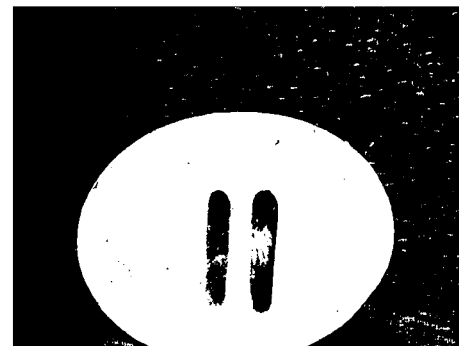




THE I

MADRAS SERIES,

CONTAINING

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

REPORTED BY

Privy Council	..	..	{ C. BOULNOIS, J. V. WOODMAN, }	<i>Middle Temple.</i>
High Court	..	..	D. CHAMIER,	<i>Inner Temple.</i>

VOL. XXIV.—1901.

JANUARY—DECEMBER.

Published under the Authority of the Governor-General in Council
BY THE BOOK DEPOT BRANCH OF THE LEGISLATIVE DEPARTMENT OF THE BENGAL SECRETARIAT, CALCUTTA;
THE SUPERINTENDENT, GOVERNMENT PRESS, MADRAS;
THE SUPERINTENDENT, GOVERNMENT CENTRAL PRESS, BOMBAY;
AND THE GOVERNMENT BOOK DEPOT, ALLAHABAD.

JUDGES OF THE HIGH COURT.

1ST JANUARY—31ST DECEMBER 1901.

CHIEF JUSTICE.

The Hon'ble Sir CHARLES ARNOLD WHITE, Kt.

PUISNE JUDGES.

The Hon'ble Mr. H. H. SHEPHARD (*retired on 13th July*).

The Hon'ble Sir S. SUBRAHMANIA AYYAR, K.C.I.E. (*on leave from 18th February to 2nd May and from 8th June*).

The Hon'ble Mr. J. A. DAVIES (*on leave from 25th November to 24th December*).

The Hon'ble Mr. R. S. BENSON.

The Hon'ble Mr. H. T. BOPPA.

The Hon'ble Sir V. BHASHYAM AYYANGAR, Kt., C.I.E. (*Offg. from 8th March to 2nd May, and assumed charge as a permanent Judge on 1st August 1901*).

The Hon'ble Mr. L. MOORE (*Offg. from 22nd July*).

ADVOCATE-GENERAL.

The Hon'ble Mr. J. E. P. WALLIS.

MADRAS:

PRINTED BY THE SUPERINTENDENT, GOVERNMENT PRESS.



A TABLE
OF THE
NAMES OF CASES REPORTED
IN THIS VOLUME.

PRIVY COUNCIL.

	PAGE
Immudipattam Thirugnana Kondama Naik <i>v.</i> Periya Dorasami	377
Kotaghiri Venkata Subbanma Rao <i>v.</i> Vellanki Venkatarama Rao ...	1
Raja Yarlagadda Mallikarjuna Prasada Nayadu <i>v.</i> Raja Yarlagadda Durga Prasada Nayadu	147
Raman Menon <i>v.</i> Raman Menon	73
Rangayya Goundan <i>v.</i> Nanjappa Rao	491
Subbarayar <i>v.</i> Subbammal	214
Vasudeva Padhi Khadanga Garu <i>v.</i> Maguni Devan Bakshi Mahapatrulu Garu	387

FULL BENCH.

Manavikraman Ettan Thamburan <i>v.</i> Aommu	471
Vasudevan Nambudripad <i>v.</i> Valia Chathu Achan	47

ORIGINAL CIVIL.

Ebrahim Currin <i>v.</i> Essa Abba Sait	163
In the matter of Rose Learmouth	120

APPELLATE CIVIL.

Ahmed <i>v.</i> Moidin	444
Alabi Koya <i>v.</i> Mussa Koya	513
Amdoo Miyan <i>v.</i> Muhammad Davud Khan Bahadur	685
Annasami Pillai <i>v.</i> Ramakrishna Mudaliar	219

	PAGE
Appa Rao v. Sobhanadri Rao	158
Appu Rao v. Ramakrishna Chettiar	672
Arumuga Mudali v. Viraraghava Mudali	255
Arumugam Pillai v. Valura Koundan	22
Avutbala v. Dayumma	233
Ayyadorai Pillai v. Solai Ammal	405
Basavayya v. Syed Abbas Saheb	20
Bhujanga Rao v. Venkanna	558
Butchanna v. Varahala	408
Chakrapani Chettiar v. Dhanji Settu	311
Chinnappa Mudaliar v. Sikka Naikan	36
Commercial Bank of India, Limited v. Sabju Saheb	252
Govinda Menon v. Karunakara Menon	43
Gururajammah v. Venkatakrishnama Chetti	350
Gurusami Chetti v. Krishnasami Naickar	419
Guruvajamma v. Venkatakrishnama Chetti	34
Hakim Muhammad Ashruff Hussain Saheb v. Syed Muhammad Ali Saheb	652
Harischandra Deo v. Narayana	508
Harischandra Devu v. President, District Board of Ganjam	114
Imbichunni Nayar v. Lalji Ram Doss Sait	560
In the matter of a First-Grade Pleader	17
In the matter of a Second-Grade Pleader	83
Kadala Reddi v. Narisi	504
Kadir Bacha Saheb v. Abdul Rahiman Saheb	639
Kamal Kutti v. Ibrayi	658
Kannan v. Pazhaniandi	438
Karunakara Kurup v. Muniperanan	356
Krishnan Nayar v. Ittina Nayar	637
Krishnasami Pannikondar v. Muthukrishna Pannikondar	364
Kuppusami Chetti v. Rathnavelu Chetti	511
Lakshmana Chetti v. Chinnathambi Chetti	326
Lakshmanan Chetti v. Kuttayan Chetti	669
Lakshmanan Chettiar v. Kannammal	185
Liladhara Vias v. Official Assignee of Madras	160
Maharajah of Jeypore v. Jannanadhora	345
Mailathi Anni v. Subbaraya Mudaliar	650
Mallikarjuna Sastri v. Narasimha Rao	412
Marudamuthu Pillai v. Rangasami Mooppan	401
Minakshi Achi v. Chinmappa Udayan	659
Mithiram Bhat v. Semanatha Naickar	397
Muhammad Jafar v. Muhammad Ibrahim	243
Muhammad Khumbarli v. Ranga Rao	654
Muhammad Usan Rowthan v. Abdulla	171
Municipal Council of Chidambaram v. Venkatanarayana Pillai	644
Municipal Council, Cocanada v. The Standard Life Assurance Company	205
Mrugesa Chetti v. Chinnathambi Goundan	421
Nagalingam Pillai v. Ramachandra Tevar	429
Nagappa v. Venkat Rao	265

	PAGE
Nalliappa Goundan v. Kailappa Goundan	59
Narasayya v. The Collector of Anantapur	95
Narasinga Bhakshi v. Govinda Bhakshi	62
Narayana Reddi v. Venkata Chariar	202
Nityananda Gantayet v. Gajapati Vasudeva Deva	681
Orr v. Mrithyunjaya Gurukkal	65
Palani Goundan v. Kuppanda Goundan	335
Pangu v. Unnikutti	275
Ramabhadrachar v. Srinivasa Ayyangar	85
Ramachandra Padayachi v. Kondayya Chetti	555
Ramamirtham v. Ranganathan	299
Raman v. Secretary of State for India in Council	427
Ramasami Pattar v. Chinnan Asari	449
Ramayya v. Sivayya	540
Ramnad case, The	613
Reference under Stamp Act, s. 57	176
Sabbapathi Gurukkal v. Lakshmu Ammal	293
Sadasiva Pillai v. Kalappa Mudaliar	39
Saldanha v. The Secretary of State for India in Council	241
Savitri Antarjanam v. Raman Nambudri	296
Secretary of State for India in Council v. Perumal Pillai	279
Sellam v. Chinnammal	441
Sesha Ayyar v. Krishna Ayyangar	96
Seshayya Chettiar v. Chengayya Chettiar	31
Srimantu Raja Yarlagadda Durga Prasada Nayadu v. Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayadu	358
Srinivasa Ayyar v. Muthusami Pillai	246
Subbarama Ayyar v. Nagammal	683
Subbarayadu v. Chenchuramayya	200
Subba Rao v. Sitaramayya	118
Subrahmania Ayyar v. Rengappa Kalakka Thola Udayar	307
Subrahmania Pattar v. Narayana Nayar	130
Surij Mull v. Hudson	259
Valambal Ammal v. Vythilinga Mudaliar	331
Vasudeva Ravi Varman v. Narayana Pattar	341
Venkatachala Reddi v. Venkatarama Reddi	665
Venkata Jogayya v. Venkatasimhadri Jagapatirazu	25
Venketapathi Naidu v. Tirumalai Chetti	447
Venkatarama Ayyar v. Venkata Subrahmanian	27
Venkataramanamma v. Purushottam	188
Venkataratnam Nayadu v. Ramaraju	361
Venkataramu v. Chinna Ramayya	695
Visvanathan Chetti v. Ramanathan Chetti	646
Udayarpalayam case, The	562
Yamuna Bai Rani Sahiba v. Solayya Kavundan	339

	PAGE
Appa Rao v. Sobhanadri Rao	158
Appu Rao v. Ramakrishna Chettiar	672
Arumuga Mudali v. Viraraghava Mudali	255
Arumugam Pillai v. Valura Koundan	22
Avuthala v. Dayamma	233
Ayyadorai Pillai v. Solai Ammal	405
Basavayya v. Syed Abbas Saheb	20
Bhujanga Rao v. Venkanna	558
Butchanna v. Varahalu	408
Chakrapani Chettiar v. Dhanji Settu	311
Chinnappa Mudaliar v. Sikka Naikan	36
Commercial Bank of India, Limited v. Sabju Saheb	252
Govinda Menon v. Karunakara Menon	43
Gururajammah v. Venkatakrishnama Chetti	350
Gurusami Chetti v. Krishnasami Naickar	419
Guruvajamma v. Venkatakrishnama Chetti	34
Hakim Muhammad Ashruff Hussain Saheb v. Syed Muhammad Ali Saheb.	652
Harischandra Deo v. Narayana	508
Harischandra Devu v. President, District Board of Ganjam	114
Imbichuuni Nayar v. Lalji Ram Doss Sait	560
In the matter of a First-Grade Pleader	17
In the matter of a Second-Grade Pleader	83
Kadala Reddi v. Narisi	504
Kadir Bacha Saheb v. Abdul Rahiman Saheb	639
Kamal Kutti v. Ibrayi	658
Kannan v. Pazhaniandi	438
Karunakara Kurup v. Muniperanan	356
Krishnan Nayar v. Itinan Nayar	637
Krishnasami Pannikondar v. Muthukrishna Pannikondar	364
Kuppusami Chetti v. Rathnavelu Chetti	511
Lakshmana Chetti v. Chinnathambi Chetti	326
Lakshmanan Chetti v. Kuttayan Chetti	669
Lakshmanan Chettiar v. Kannammal	185
Liladhara Vias v. Official Assignee of Madras	160
Maharajah of Jeypore v. Jammannadhora	345
Mailathi Anni v. Subbaraya Mudaliar	650
Mallikarjuna Sastri v. Narasimha Rao	412
Marudamuthu Pillai v. Rangasami Moeppan	401
Minakshi Achi v. Chinnappa Udayan	659
Mithiram Blat v. Semanatha Naickar	397
Muhammad Jafar v. Muhammad Ibrahim	243
Muhammad Khumarali v. Ranga Rao	654
Muhammad Usan Rowthan v. Abdulla	171
Municipal Council of Chidambaram v. Venkatarayana Pillai	644
Municipal Council, Cocanada v. The Standard Life Assurance Company	205
Murugesu Chetti v. Chinnathambi Goundan	421
Nagalingam Pillai v. Ramachandra Tevar	429
Nagappa v. Venkat Rao	265

	PAGE
Nalliappa Goundan v. Kailappa Goundan	59
Narasayya v. The Collector of Anantapur	95
Narasinga Bhakshi v. Govinda Bhakshi	62
Narayana Reddi v. Venkata Chariar	202
Nityananda Gantayet v. Gajapati Vasudeva Deva	681
Orr v. Mrithyunjaya Gurukkal	65
Palani Goundan v. Kuppanda Goundan	335
Panga v. Unnikutti	275
Ramabhadrachar v. Srinivasa Ayyangar	85
Ramachandra Padayachi v. Kondayya Chetti	555
Ramanirtham v. Ranganathan	299
Raman v. Secretary of State for India in Council	427
Ramasami Pattar v. Chinnan Asari	440
Ramayya v. Sivayya	549
Ramnad case, The	613
Reference under Stamp Act, s. 57	176
Sabbapathi Gurukkal v. Lakshmu Ammal	293
Sadasiva Pillai v. Kalappa Mudaliar	39
Saldanha v. The Secretary of State for India in Council	241
Savitri Antarjanam v. Raman Nambudri	296
Secretary of State for India in Council v. Perumal Pillai	279
Sellam v. Chinnammal	441
Sesha Ayyar v. Krishna Ayyangar	96
Seshayya Chettiar v. Chengayya Chettiar	31
Srimantu Raja Yarlagadda Durga Prasada Nayadu v. Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayadu	358
Srinivasa Ayyar v. Muthusami Pillai	246
Subbarama Ayyar v. Nagammal	683
Subbarayadu v. Chenchuramayya	200
Subba Rao v. Sitaramayya	118
Subrahmania Ayyar v. Rangappa Kalakka Thola Udayar	307
Subrahmania Pattar v. Narayana Nayar	130
Suriy Mull v. Hudson	259
Valambal Ammal v. Vythilinga Mudaliar	331
Vasudeva Ravi Varman v. Narayana Pattar	341
Venkatachala Reddi v. Venkatarama Reddi	665
Venkata Jogayya v. Venkatasimhadri Jagapatirazu	25
Venketapathi Naidu v. Tirumalai Chetti	447
Venkatarama Ayyar v. Venkata Subrahmanian	27
Venkataramanamma v. Purushottam	188
Venkataratnam Nayadu v. Ramaraju	361
Venkataram v. Chinna Ramayya	695
Visvanathan Chetti v. Ramanathan Chetti	646
Udayarpalayam case, The	562
Yamuna Bai Rani Sahiba v. Solayya Kavundan	339

APPELLATE CRIMINAL.

	PAGE
Jagannadha Rao v. Kamaraju ...	284
King-Emperor v. Antakke ...	662
King-Emperor v. Ayyan ...	675
King-Emperor v. Krishna Ayyar ...	641
King-Emperor v. Takasi Nukayya ...	660
King-Emperor v. Tirumal Reddi ...	523
Krishna Reddi v. Subbamma ...	136
Queen-Empress v. Abdulla Saheb ...	262
Queen-Empress v. Allan ...	195
Queen-Empress v. Chench Reddi ...	238
Queen-Empress v. Dorasami Ayyar ...	414
Queen-Empress v. Gangayya ...	417
Queen-Empress v. Kuniyil Raru ...	337
Queen-Empress v. Kuppamuthu Pillai ...	317
Queen-Empress v. Lakshmananna ...	318
Queen-Empress v. Munda Shetti ...	121
Queen-Empress v. Peclimuthu Tevan ...	124
Queen-Empress v. Rama ...	13
Queen-Empress v. Ramasami ...	321
Queen-Empress v. South ...	70
Queen-Empress v. Subrahmania Ayyar ...	161
Queen-Empress v. Virasami ...	919
Queen-Empress v. Yamana Rao ...	305
Ramanadhan Chetti v. Murugappa Chetti ...	45
Rattigadu v. Konda Reddi ...	271
Subba Reddi v. Munshoor Ali Saheb ...	81

TABLE OF CASES CITED

IN THIS VOLUME.

A

	PAGE
Abbakku v. Ammu Shettati. 4 M.H.C.R., 137 ...	589
Abdool Aziz, <i>In re</i> . I.L.R., 23 Calc., 577 ...	241, 242
Abdul Sadiq v. Abdul Aziz. I.L.R., 21 All., 152 ...	649
Abraham Mallory Dillet, <i>In re</i> . L.R., 12 App. Cas., 459 ...	162
Abrath v. North Eastern Railway Co. L.R., 11 Q.B.D., 440; L.R., 11 App. Cas., 247 ...	60, 61, 62, 551, 552
Achal Ram v. Udai Partab Addiya Dat Singh. L.R., 11 I.A., 51; I.L.R., 10 Calc., 511 ...	590
Achutan Nayar v. Narasimham Patter. I.L.R., 21 Mad., 411 ...	53, 57
Adimulam v. Pir Ravuthan. I.L.R., 8 Mad., 424 ...	251
Ainsworth v. Wilding. [1896] 1 Ch., 673 ...	269
Ajudhia Pershad v. Baldeo Singh. I.L.R., 21 Calc., 818 ...	700
Ajudhia Prasad v. Nand Lal Singh. I.L.R., 15 All., 318 ...	314
Alami v. Komu. (1888) I.L.R., 12 Mad., 126 ...	78
Aldrich v. Cooper. 1 W. & T.L.C., 46 ...	103
Allen v. Morrison. 8 B. & C., 565 ...	181
Ananda Chandra Bhattacharjee v. Carr Stephen. I.L.R., 19 Calc., 127 ...	46
Anandray Bapuji v. Shekh Baba. I.L.R., 2 Bom., 562 ...	310
Anderson, Wright & Co., v. Kalagarla Surjinarain. I.L.R., 12 Calc., 339 ...	104
Annasami Pillai v. Ramakrishna Mudaliar. I.L.R., 24 Mad., 219 ...	589
Antaji v. Dattaji. I.L.R., 19 Bom., 41 ...	227
Apparau v. Narasanna. I.L.R., 15 Mad., 47 ...	52
Appa Rau v. Ratnam. I.L.R., 13 Mad., 249 ...	52, 54
Appa Rau Sanayi Aswa Rau v. Krishnamarathi. I.L.R., 20 Mad., 249 ...	559
Appasami Odayar v. Subramanya Odayar. L.R., 15 I.A., 167; I.L.R., 12 Mad., 26 ...	589
Arunachellam Chetti v. Arunachellam Chetti. L.R., 15 I.A., 171; I.L.R., 12 Mad., 19 ...	314
Ashutosh Bannerjee v. Lukhimoni Dobbya. I.L.R., 19 Calc., 139 ...	684
Assan v. Pathumma. I.L.R., 22 Mad., 494 ...	363
Atchayya v. Gangayya. I.L.R., 15 Mad., 138 ...	122
Athisappa v. Ayanna. I.L.R., 8 Mad., 300 ...	666, 668
Athill, <i>In re</i> . L.R., 16 Ch.D., 211 ...	91
Attorney-General v. Brodie. 4 M.I.A., 190 ...	326
Austerberry v. Corporation of Oldham. L.R., 29 Ch.D., 750 ...	91, 94
Averam Das Mochi v. Abdul Rahim. I.L.R., 27 Calc., 131 ...	661
Ayyavu Muppanar v. Niladatchi Ammal. 1 M.H.C.R., 45 ...	592, 593

B

	PAGE
Babaji v. Narayan. I.L.R., 3 Bom., 340	588
Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee. 12 M.I.A., 1	584, 585
Baboo Gunnessh Dutt Singh v. Mugneeram Chowdhry. 11 B.L.R., 321	62
Baboo Teluckdharee Sahie v. Maharajah Rajender Protanb Sahie. (1864) W.R., (F.B.), 98	584
Babu Sheo Lochun Singh v. Babu Sahab Singh. L.R., 14 I.A., 63; I.L.R., 14 Calc., 387	589
Badul Singh v. Chutterdharee Singh. (1868) 9 W.R., (C.R.), 558	391, 392
Bahadoor Khan v. Kora Mull. 1 Agra H.C.R., 281	52
Baijanath Bandey v. Gauri Kanta Mandal. I.L.R., 20 Calc., 633	140, 142, 143, 144, 145, 146
Bai Mangal v. Bai Rukhmini. I.L.R., 23 Bom., 291	258
Baldeo Sahai v. Baij Nath. I.L.R., 13 All., 371	108
Balkaran Rai v. Gobind Nath Tiwari. I.L.R., 12 All., 129	333
Balkishan v. Kishan Lal. I.L.R., 11 All., 148	353, 355
Ballam Das v. Amar Raj. I.L.R., 12 All., 537	111, 112
Balwant Singh v. Rani Kishori. I.L.R., 20 All., 267	436, 437
Bank of England v. Vagliano Brothers. [1891] A.C., 107	481
Bapirazu v. Chiama Venkayya. 3 M.H.C.R., 238	550, 551
Basset v. Nosworthy. 2 White & Tudor's Equity Cases, 7th ed., p. 150	480
Behari Lal v. Muhammad Muttaki. I.L.R., 20 All., 482	476, 481, 482, 483
Behari Lal Pal v. Srimati Baran Mai Dasi. I.L.R., 17 All., 53	294, 295
Belgam Case. L.R., 24 I.A., 118; I.L.R., 20 Mad., 256	577, 582, 592
Beni Ram v. Kundan Lal. I.L.R., 21 A.W., 496	53
Beryl, <i>In re</i> . L.R., 9 P.D., 141	538
Bhagiram Dome v. Abar Dome. I.L.R., 15 Calc., 388	83
Bhagirathi Panda v. Padala Gopaludu. I.L.R., 3 Mad., 121	340
Bhagwan v. Gannu. I.L.R., 23 Bom., 644	699
Bhagwati Parsad Gir v. Bindeshri Gir. I.L.R., 6 All., 106	104
Bh asharat Ali Chowdhry, <i>In re</i> . I.L.R., 24 Calc., 133	649
Bheri Dorayya v. Maddipatu Ramayya. I.L.R., 3 Mad., 35	691, 693
Bhimul Doss v. Choonee Lall. I.L.R., 2 Calc., 379	590
Bholai v. The Rajah of Bansi. I.L.R., 4 All., 174	67
Bluggobutty Dossee v. Shamachurn Rose. I.L.R., 1 Calc., 337	104
Bhugwanbutti Chowdhry v. Forbes. I.L.R., 28 Calc., 78	447
Bhupathi v. Rajah Rangayya Appa Rau. I.L.R., 17 Mad., 54	52, 54
Biggs v. Hoddinott. [1898] 2 Ch., 307	453, 458, 459
Bimal Jati v. Biranja Kuar. I.L.R., 22 All., 238	453, 459
Birj Mohun Thakoor v. Rai Uma Nath Chowdhry. L.R., 19 I.A., 154; I.L.R., 20 Calc., 8	314
Birmingham Canal Company v. Cartwright. L.R., 11 Ch.D., 421	467
Boidya Nath Adya v. Makham Lal Adya. I.L.R., 17 Calc., 680	35
Boistab Churn Naun v. Woona Churn Sen. I.L.R., 16 Calc., 436	403, 404
Borland's Trustee v. Steel Brothers & Co., Limited. [1901] 1 Ch., 279	468
Brojodulabh Sinha v. Ramanath Ghose. I.L.R., 24 Calc., 808	330
Bronsdon v. Humphrey. (1884) L.R., 14 Q.B.D., 145	499

C

	PAGE
Carew, <i>ex parte</i> . [1897] A.C., 719	162, 163
Chagandas v. Gansing. I.L.R., 20 Bom., 615	108
Chairman, Madura Municipality v. Krishnayyar. Letters Patent Appeal No. 44 of 1896 (unreported)	209
Chand Hurree Maitee v. Rajah Norendro Narain Roy. (1873) 19 W.R., (C.R.), 231	391
Changaran v. Chirutha. Civil Revision Petition No. 445 of 1895 (unreported)	52, 54
Charrington v. Laing. 8 L.J., (C.P.), 50; 6 Bing., 242	269
Chengal Reddi v. Venkata Reddi. I.L.R., 12 Mad., 483	330
Chenna Kesavaraya v. Vaidelinga. I.L.R., 1 Mad., 313	224
Chennappa v. Raghunatha. I.L.R., 15 Mad., 29	333
Chester v. Willan. 2 Saund., 96	656
Chesterfield Brewery Company v. Inland Revenue Commissioners. [1899] 2 Q.B., 7	182, 184
Chinnammal v. Akkulu Ammal. Appeal No. 103 of 1888 (unreported)	585
Chinnathal v. Virudhachala Pillai. Appeal against Appellate Order No. 38 of 1897 (unreported)	666, 668
Chowdhry Chintamun Singh v. Mussamat Nowlukho Konwari. L.R., 2 I.A., 263; I.L.R., 1 Calc., 153	588
Chowdhry Paroosh Ram Das v. Kali Puddo Banerjee. I.L.R., 17 Calc., 53	187, 190, 193, 194
Chunder Monce Debia v. Meharajan Bibee. 22 W.R., (C.R.), 185	592
Chundi Churn Barua v. Rani Sidheswari Debi. L.R., 15 I.A., 149; I.L.R., 16 Calc., 71	469
Chuni Lal v. Bai Jethi. I.L.R., 22 Bom., 846	235
Chunni Lal v. Harnam Das. I.L.R., 20 All., 302	699
Chunna Lal v. Anandi Lal. I.L.R., 19 All., 196	105, 111, 112
Collector of Madura v. Moottoo Ramalinga Sathupathy. 12 M.I.A., 397	623, 634
Collins Co. v. Brown. 3 K. & J., 423	169
Collins Co. v. Cowen. 3 K. & J., 428	169
Collins Co. v. Walker. 7 W.R., 222	169
Commercial Bank of India, Limited v. Sabju Saheb. I.L.R., 24 Mad., 252	512
Corporation of Calcutta v. Standard Marine Insurance Company. I.L.R., 22 Calc., 581	208, 209, 212
Court of Wards v. Venkata Surya Mahipati Ramakrishna Rao. I.L.R., 20 Mad., 167	435
Cutenho v. Souza. 1 M.H.C.R., 15	269

D

Dashwood v. Magniac. [1891] 3 Ch., 306	51, 53
Davis v. Williams. 13 East, 232; 1 Smith, 5	182
Daya Kishan v. Nanhi Begam. I.L.R., 20 All., 304	26
Debi Parshad v. Thakur Dinal. I.L.R., 1 All., 105	590
Debi Prasad v. Rap Ram. I.L.R., 10 All., 577	403
Devarukota case. L.R., 17 I.A., 134; I.L.R., 13 Mad., 406	588, 592, 604

	PAGE
Dhurm Das Pandey v. Mussumat Shama Soondri Dibiah. (1843) 3 M.I.A., 229	391, 392
Directors, &c., of London and South Western Railway Co. v. Blackmore. L.R., 4 H.L., 610	580, 593
Doe v. Wood. 2 B. & Ald., 724; 21 R.R., 469	182
Doe d. Croft v. Tidbury. 14 C.B., 304	182, 183, 184
Doe d. Davies v. Evans. 9 M. & W., 84	252
Doe dem Graves v. Wells. 10 A. & E., 427	252
Dolphin v. Aylward. L.R., 4 H.L., 486	482
Dorasami Ayyar v. Annasami Ayyar. I.L.R., 23 Mad., 306	344
Dowlattram Harji v. Vitho Radhoji. I.L.R., 5 Bom., 188	182
Duncan Brothers & Co. v. Joetmull Greedharee Lall. I.L.R., 19 Calc., 372	104
Dunia Lal Seal v. Gopi Nath Khetry. I.L.R., 22 Calc., 820	53
Dunlop, In re. L.R., 21 Ch. D., 583	91
Dwarkadas Parshotamdas v. Isabhai Daudkhan. I.L.R., 19 Bom., 210	562

E

Edwards's Estate, In re. 11 Ir. Ch. Rep., 367	456, 459
Ellis & Co. v. Hulso. L.R., 23 Q.B.D., 24	425
Empress v. Pemantle. I.L.R., 8 Calc., 971	286
Empress of India v. Anant Ram. I.L.R., 4 All., 293	529
Endowed Schools Act, 1869, In re. L.R., 10 App. Cas., 304	229
Eravanni Revivarman v. Itapu Revivarman. (1876) I.L.R., 1 Mad., 153	75
Erusappa Madaliar v. Commercial and Land Mortgage Bank, Limited. I.L.R., 23 Mad., 377	105, 111
Eustace v. Scawan. Cro. Jac., 696	656
Ex parte Carow. [1897] A.C., 719	162, 163

F

Fanindra deb Baskat v. Rajeswar Dass. (1885) L.R., 12 I.A., 72; I.L.R., 11 Calc., 463	216, 218
Fischer v. Twigg. I.L.R., 21 Mad., 367	210
Freeman v. Commissioners of Inland Revenue. L.R., 6 Ex., 101	181,
Fuzloor Rahman v. Altaf Hossen. I.L.R., 10 Calc., 541	182, 183, 185
	186

G

G. N. D. Maharejulungaru v. V. Rajah Row Pantulu. 5 M.H.C.R., 31	592
Gajapati Rajah v. Suryanarayana. I.L.R., 22 Mad., 11	509
Gajpathi Rau v. Narsing Rau Garu. 6 M.H.C.R., 85	61
Ganes Singh v. Ramgopal Sing. 5 B.L.R., Appx., 55	225, 227
Ganeshi, In re. I.L.R., 15 All., 192	240
Gangadhar Tilak v. Queen-Empress. L.R., 25 I.A., 1; I.L.R., 22 Bom., 528	162
Gangappa v. Kapinappa. 5 M.H.C.R., 128	32
Ghellaibhai v. Nandubai. I.L.R., 21 Bom., 335	330

	PAGE
Girdhari Singh v. Hardeo Narain Singh. L.R., 3 I.A., 230	314
Girish Chunder Ghose v. The Queen-Empress. I.L.R., 20 Calc., 857	240
Glascott v. Gopal Sheikh. 9 W.R., (C.R.), 254	133
Gobind Dayal v. Inayatullah. I.L.R., 7 All., 775	516, 519
Gobindnath Roy Bahadoor v. Ramee Luchmee Koomaree. 11 W.R., (C.R.), 36	476, 478, 480, 481
Goodson v. Forbes. 6 Taunt., 171	182
Gooroochurn Doss v. Goluckmoney Dossce. (1843) Fult. Rep., 164	391
Gope Mohan Roy v. Protap Chunder Roy. 11 W.R., (C.R.), 530	208
Gossain Doss Koondoo v. Serco Koomaree Debia. 19 W.R., (C.R.), 192	588
Gossamee Sree Greedharrecjee v. Rumanlollee Gossamee. L.R., 16 I.A., 137; I.L.R., 17 Calc., 3	227
Govinda Menon v. Damodaran Nambudripad. Second Appeal No. 194 of 1889 (unreported)	52, 53
Govindan Pillai v. Chidambaram Pillai. 3 M.H.C.R., 99	582, 588, 592
Govind Purshotam Kolatkar v. The Sub-Collector and Deputy Conservator of Forests of Calaba. 6 Bom. H.C.R., (A.C.), 188	53
Grainger v. Gough. [1896] A.C., 325	269, 212
Grey v. Pearson. L.R., 5 C.P., 568	133, 135
Gudadhar Serma v. Ajodheeram Ghowdhri. (1794) 1 Sel. Rep., 6	391
Gunga Pershad v. Jawahir Singh. I.L.R., 19 Calc., 4	104, 112

H

Hall v. Venkatakrishna. I.L.R., 13 Mad., 394	60, 61, 551, 552
Hansji Chhibha v. Valabh Chhibha. I.L.R., 7 om., 297	582, 589
Hanuman Kamut v. Hanuman Mandur. L.R., 18 I.A., 581; I.L.R., 19 Calc., 123	28, 29, 30, 31
Hardai Narain v. Haruck Dhari Singh. 12 C.L.R., 104	435
Hargovandas Lakhmidas v. Bajibhai Jijibhai. I.L.R., 14 Bom., 222	454
Haris Paik v. Gahurudin Gazi. 2 Calc., W.N., 575	453, 455, 459, 468
Harivalabdas Kallindas v. Utamchand Maneckchand. I.L.R., 4 Bom., 1	328
Harkishore Dass v. Jugul Chunder Kabharathna Bhuttacharjee. I.L.R., 27 Calc., 658	145
Har Lal v. Muhamdi. I.L.R., 21 All., 454	235, 236
Harrop v. Fisher. 30 L.J., (C.P.), 283	656
Hart v. Tara Prasanna Mukherji. I.L.R., 11 Calc., 718	94, 103, 110
Haywood v. Brunswick Building Society. L.R., 8 Q.B.D., 403	91
Heera Chand Banerjee v. Bance Madhub Chatterjee. 6 W.R., (C.R.), 29	61
Hem Chunder Chowdhry v. Brojo Soondary Dabee. I.L.R., 8 Calc., 89	186, 190
Hicks v. Gore. 3 Mod., 84	287, 288
Himmatsing Becharsing v. Ganpatsing. 12 Bom., H.C.R., 94	589, 698
Hornaji Motabhai v. Pestanji Dhanjibhai. I.L.R., 12 Bom., 422	408
Hunsapore Case. 12 M.I.A., 1	575, 577, 584, 585, 586, 592, 605, 630, 631
Hureenath Koondoo v. Modhoo Soodun Saha. 19 W.R., (C.R.), 122	95, 96
Huronath Roy v. Jogendur Chunder Roy. 6 W.R., (C.R.), 218	249
Hussain v. Shaik Mira. I.L.R., 13 Mad., 46	515, 517, 521

I

	PAGE
<i>Ibrahim Saib v. Muni Mir Udin Saib.</i> 6 M.H.C.R., 26	516, 518, 520
<i>Ibu Husain v. Ramdai.</i> I.L.R., 12 All., 110	108
<i>Imdad Khatun v. Bhagirath.</i> I.L.R., 10 All., 159	52, 53
<i>In re Abraham Mallory Dillet.</i> L.R., 12 App. Cas., 459	162
<i>In re Athill.</i> L.R., 16 Ch.D., 211	91
<i>In re Beryl.</i> L.R., 9 P.D., 141	538
<i>In re Dunlop.</i> L.R., 21 Ch.D., 583	91
<i>In re Edward's Estate.</i> 11 Ir. Ch. Rep., 367	456, 459
<i>In re King's Leasehold Estates.</i> L.R., 16 Eq., 521	480
<i>In re May.</i> L.R., 28 Ch.D., 516	352
<i>In re Mower's Trusts.</i> L.R., 8 Eq., 110	103
<i>In re Riviere's Trade-mark.</i> L.R., 26 Ch.D., 484	169
<i>In re South American and Mexican Company.</i> [1895] 1 Ch., 37	447
<i>In re Turner.</i> 15 L.J., (M.C.), 140	162
<i>In re Wallace.</i> L.R., 1 P.C., 283	19
<i>In the goods of Abdool Aziz.</i> I.L.R., 23 Calc., 577	241, 242
<i>In the goods of Ram Chunder Ghose.</i> I.L.R., 24 Calc., 567	241, 242
<i>In the matter of Bhasharat Ali Chowdhry.</i> I.L.R., 24 Calc., 133	649
<i>In the matter of Roman Kissen Sett v. Hurrololl Sett.</i> I.L.R., 19 Calc., 334	328
<i>In the matter of Southekul Krishna Row.</i> L.R., 14 I.A., 151; I.L.R., 15 Calc., 152	84
<i>In the matter of the Endowed Schools Act, 1869.</i> L.R., 10 App. Cas., 304	229
<i>In the matter of the petition of Ganeshi.</i> I.L.R., 15 All., 192	240
<i>In the matter of the petition of Narain Das.</i> I.L.R., 1 All., 610	535
<i>In the matter of the petition of Prankrishna Surma.</i> I.L.R., 8 Calc., 969	289
<i>In the matter of the Petition of Thakoor Chunder Paramanick.</i> B.L.R., Sup. Vol., p. 598	53, 56
<i>Ishan Chunder Sirkar v. Beni Madhub Sirkar.</i> I.L.R., 24 Calc., 62	692
<i>Ittappan v. Manavikraman.</i> I.L.R., 21 Mad., 153	251
<i>Iyappa v. Ramalakshamma.</i> I.L.R., 13 Mad., 549	410

J

<i>Jackson & Co. v. Napper.</i> L.R., 35 Ch.D., 162	170
<i>Jadubar Singh v. Shoo Saran Singh.</i> I.L.R., 21 All., 26	61
<i>Jagat Narain v. Qutub Husain.</i> I.L.R., 2 All., 807	108
<i>Jainti Prasad v. Bachu Singh.</i> I.L.R., 15 All., 65	334
<i>Jairam Narayan Haji v. Atmaram Narayan Raju.</i> I.L.R., 4 Bom., 482	295
<i>Jatindra Mohan Tagore v. Ganendra Mohan Tagore.</i> 9 B.L.R., (P.C.), 377; 18 W.R., 359	468
<i>Jenkins v. Robertson.</i> L.R., 1 H.L., Sc., 117	447
<i>Jivi v. Ramji.</i> (1879) I.L.R., 3 Bom., 207	150, 154
<i>Jogendra Nath Roy Bahadur v. Price.</i> I.L.R., 24 Calc., 584	104
<i>John Foster & Sons v. Commissioners of Inland Revenue.</i> [1894] 1 Q.B., 516	182, 184
<i>Jones v. Bird.</i> 5 B. & A., 837	282

PAGE

<i>Joseph v. The Salt Company.</i> I.L.R., 17 Mad., 371	314
<i>Jowala Buksh v. Dharum Singh.</i> 10 M.I.A., 511	589
<i>Juggernath Sahoo v. Syud Shah Mahomed Hossein.</i> L.R., 2 I.A., 48	479, 481, 485
<i>Jugmohandas Mangaldas v. Sir Mangaldas Nathubhoy.</i> I.L.R., 10 Bom., 528	435, 436, 438
<i>Justices of the Peace for Calcutta v. The Oriental Gas Company.</i> 8 B.L.R., 433	512
<i>Juttendromohun Tagore v. Ganendromohun Tagore.</i> L.R., I.A., Sup. Vol., 47	536

K

<i>Kalandan v. Pakrichi.</i> I.L.R., 9 Mad., 378	104, 105
<i>Kalianasundram v. Egnavedeswara.</i> I.L.R., 11 Mad., 261	344
<i>Kali Prosunno Basu Roy v. Lal Mohun Gaha Roy.</i> I.L.R., 25 Calc., 258	26
<i>Kaliyani v. Narayana.</i> (1885) I.L.R., 9 Mad., 266	78
<i>Kamalakutti v. Bipathumma.</i> Appeal against Order No. 107 of 1898 (unreported)	659
<i>Kamalakutti v. Ibrayi.</i> Civil Revision Petition No. 421 of 1898 (unreported)	659
<i>Kamayya v. Leman.</i> I.L.R., 2 Mad., 37	210
<i>Kanaran v. Kuttooly.</i> I.L.R., 21 Mad., 110	452, 453, 461
<i>Kandasami v. Akkammal.</i> I.L.R., 13 Mad., 195	408
<i>Kanharankutti v. Uthotti.</i> I.L.R., 13 Mad., 490	454, 457, 464
<i>Kanna Pisharody v. Narayanan Somayajipad.</i> I.L.R., 3 Mad., 234	134
<i>Kashi Prasad v. Sheo Sahai.</i> I.L.R., 19 All., 186	701
<i>Kasim Mian v. Banda Husain.</i> I.L.R., 5 All., 616	52, 53
<i>Kasinath Das v. Sadasiv Patnaik.</i> I.L.R., 20 Calc., 805	191
<i>Katama Natchiar v. The Rajah of Shivagunga.</i> 9 M.I.A., 513	609
<i>Kausalia v. Gulab Kuar.</i> I.L.R., 21 All., 297	52, 53
<i>Kedar Nath Raut v. Kali Churn Ram.</i> I.L.R., 25 Calc., 703	699
<i>Kellie v. Fraser.</i> I.L.R., 2 Calc., 445	32, 33
<i>Keshava v. Rudran.</i> I.L.R., 5 Mad., 259	446, 447
<i>Khader Hussain Sahib v. Hussain Begum Sahiba.</i> 5 M.H.C.R., 114	522
<i>Khiroda Moyec Dossee v. Golam Somdance.</i> 21 W.R., (C.R.), 149	310
<i>King v. Reader.</i> 1 Stra., 531	162
<i>King-Emperor v. Virasami Goundan.</i> Criminal Revision Case No. 78 of 1901 (unreported)	677
<i>King's Leasehold Estates, In re.</i> L.R., 16 Eq., 521	480
<i>Kishoreo Lall v. Chummun Lall.</i> (1852) 1 S.D.A., 111	391
<i>Komal Chandra Pal v. Gour Chand Audhikari.</i> I.L.R., 24 Calc., 286	338, 393
<i>Komappan Nambiar v. Chathi Nambiar.</i> Second Appeal No. 442 of 1883 (unreported)	278
<i>Konerrav v. Gurrav.</i> I.L.R., 5 Bom., 589	30
<i>Koornayya v. Krishnamma Naidu.</i> I.L.R., 17 Mad., 165	190
<i>Kops v. The Queen.</i> [1894] A.C., 650	162
<i>Kottal Uppi v. Edavalath Thathan Nambudiri.</i> 6 M.H.C.R., 258	270

I

	PAGE
Ibrahim Saib v. Muni Mir Udin Saib. 6 M.H.C.R., 26	516, 518, 520
Ibu Husain v. Ramdai. I.L.R., 12 All., 110	108
Imdad Khatun v. Bhagirath. I.L.R., 10 All., 159	52, 53
In re Abraham Mallory Dillet. L.R., 12 App. Cas., 459	162
In re Athill. L.R., 16 Ch.D., 211	91
In re Beryl. L.R., 9 P.D., 141	588
In re Dunlop. L.R., 21 Ch.D., 583	91
In re Edward's Estate. 11 Ir. Ch. Rep., 367	456, 459
In re King's Leasehold Estates. L.R., 16 Eq., 521	480
In re May. L.R., 28 Ch.D., 516	352
In re Mower's Trusts. L.R., 8 Eq., 110	103
In re Rivière's Trade-mark. L.R., 26 Ch.D., 484	169
In re South American and Mexican Company. [1895] 1 Ch., 37	447
In re Turner. 15 L.J., (M.C.), 140	162
In re Wallace. L.R., 1 P.C., 283	19
In the goods of Abdool Aziz. I.L.R., 23 Calc., 577	241, 242
In the goods of Ram Chunder Ghose. I.L.R., 24 Calc., 567	241, 242
In the matter of Bhasharat Ali Chowdhry. I.L.R., 24 Calc., 133	649
In the matter of Roman Kissen Sett v. Hurrolohi Sett. I.L.R., 19 Calc., 334	328
In the matter of Southekul Krishna Row. L.R., 14 I.A., 154; I.L.R., 15 Calc., 152	84
In the matter of the Endowed Schools Act, 1869. L.R., 10 App. Cas., 304	229
In the matter of the petition of Ganeshi. I.L.R., 15 All., 192	240
In the matter of the petition of Narain Das. I.L.R., 1 All., 610	535
In the matter of the petition of Prankrishna Surma. I.L.R., 8 Calc., 969.	289
In the matter of the Petition of Thakoor Chunder Paramanick. B.L.R., Sup. Vol., p. 598	53, 56
Ishan Chunder Sirkar v. Beni Madhub Sirkar. I.L.R., 24 Calc., 62	692
Itappan v. Manavikraman. I.L.R., 21 Mad., 153	251
Iyappa v. Ramalakshamma. I.L.R., 13 Mad., 549	410

J

Jackson & Co. v. Napper. L.R., 35 Ch.D., 162	170
Jadubar Singh v. Shoo Saran Singh. I.L.R., 21 All., 26	61
Jagat Narain v. Qutub Husain. I.L.R., 2 All., 807	108
Jaintri Prasad v. Bachu Singh. I.L.R., 15 All., 65	334
Jairam Narayan Haji v. Atmaram Narayan Raje. I.L.R., 4 Bom., 482	295
Jatindra Mohan Tagore v. Ganendra Mohan Tagore. 9 B.L.R., (P.C.), 377; 18 W.R., 359	468
Jenkins v. Robertson. L.R., 1 H.L., Sc. 117	447
Jivi v. Ramji. (1879) J.L.R., 3 Bom., 207	150, 154
Jogendra Nath Roy Bahadur v. Price. I.L.R., 24 Calc., 584	104
John Foster & Sons v. Commissioners of Inland Revenue. [1894] 1 Q.B., 516	182, 184
Jones v. Bird. 5 B. & A., 837	232

O

PAGE

Joseph v. The Salt Company. I.L.R., 17 Mad., 371	314
Jowala Buksh v. Dharum Singh. 10 M.I.A., 511	589
Juggernath Sahoo v. Syud Shah Mahomed Hossein. L.R., 2 I.A., 48	479, 481, 485
Jugmohandas Mangaldas v. Sir Mangaldas Nathubhoy. I.L.R., 10 Bom., 528	435, 436, 438
Justices of the Peace for Calcutta v. The Oriental Gas Company. 8 B.L.R., 433	512
Juttendromohan Tagore v. Ganendromohan Tagore. L.R., I.A., Sup. Vol., 47	536

K

Kalandan v. Pakrichi. I.L.R., 9 Mad., 378	104, 105
Kalidasasundram v. Egnavedeswara. I.L.R., 11 Mad., 261	344
Kali Prosunno Basu Roy v. Lal Mohun Guha Roy. I.L.R., 25 Calc., 258	26
Kalliyani v. Narayana. (1885) I.L.R., 9 Mad., 266	78
Kamalakutti v. Bipathumma. Appeal against Order No. 107 of 1898 (unreported)	659
Kamalakutti v. Ibrayi. Civil Revision Petition No. 421 of 1898 (unreported)	659
Kamayya v. Leman. I.L.R., 2 Mad., 37	210
Kanaran v. Kuttooly. I.L.R., 21 Mad., 110	452, 453, 461
Kandasami v. Akkammal. I.L.R., 13 Mad., 195	408
Kanharankutti v. Uthotti. I.L.R., 13 Mad., 490	454, 457, 464
Kanna Pisharody v. Narayanan Somayajipad. I.L.R., 3 Mad., 234	134
Kashi Prasad v. Sheo Sahai. I.L.R., 19 All., 186	701
Kasim Mian v. Banda Husain. I.L.R., 5 All., 616	52, 53
Kasinath Das v. Sadasiv Patnaik. I.L.R., 20 Calc., 805	191
Katama Natchiar v. The Rajah of Shivagunga. 9 M.I.A., 543	609
Kansalia v. Gulab Kuar. I.L.R., 21 All., 297	52, 53
Kedar Nath Raut v. Kali Churn Rani. I.L.R., 25 Calc., 703	699
Kellie v. Fraser. I.L.R., 2 Calc., 445	32, 33
Keshava v. Rudran. I.L.R., 5 Mad., 259	446, 447
Khader Hussain Sahib v. Hussain Begum Sahiba. 5 M.H.C.R., 114	522
Khiroda Moyee Dossee v. Golam Somdane. 21 W.R., (C.R.), 149	310
King v. Reader. 1 Stra., 531	162
King-Emperor v. Virasami Goundan. Criminal Revision Case No. 78 of 1901 (unreported)	677
King's Leasehold Estates, In re. L.R., 16 Eq., 521	480
Kishoreo Lall v. Chummun Lall. (1852) 1 S.D.A., 111	391
Komal Chandra Pal v. Gour Chand Andhikari. I.L.R., 24 Calc., 286	338, 393
Komappan Nambiar v. Chathu Nambiar. Second Appeal No. 442 of 1883 (unreported)	278
Konerrav v. Gurrav. I.L.R., 5 Bom., 589	30
Koormayya v. Krishnamma Naidu. I.L.R., 17 Mad., 165	190
Kops v. The Queen. [1894] A.C., 650	162
Kottal Uppi v. Edavalath Thathan Nambudiri. 6 M.H.C.R., 258	270

	PAGE
Kotta Ramasami Chetti v. Bangari Seshama Nayanivaru. I.L.R., 3 Mad., 145	134
Koylash Chandra Shaha v. Chiristophoridi. I.L.R., 15 Calc., 171	562
Krishna Behari Rey v. Brojeswari Chowdrance. L.R., 2 I.A., 283	353
Krishnadhun Chowdhry v. Sreemutty Hur Coomary Chowdhraim. 25 W.R., (C.R.), 37	589
Krishnaji Ramchandra v. Antaji Pandurang. I.L.R., 18 Bom., 256	249
Krishnama v. Perumal. I.L.R., 8 Mad., 388	35
Krishnamachari v. Rangachari. I.L.R., 16 Mad., 73	133, 134
Krishna Menon v. Kesavan. I.L.R., 20 Mad., 305	454, 457, 464, 465
Krishnan Nambiar v. Chathu Nambiar. Appeal No. 135 of 1885 (unreported)	278, 279
Krishnan Nambiar v. Kannan. I.L.R., 21 Mad., 8	231, 235, 237
Krishnappa Holla v. Savitri. Appeal against Appellate Order No. 88 of 1897 (unreported)	666
Krishna Patter v. Srinivasa Patter. I.L.R., 20 Mad., 124	55
Krishnasami Ayyangar v. Rajagopala Ayyangar. I.L.R., 18 Mad., 73	701
Krishnasami Ayyar v. Janakiammal. I.L.R., 18 Mad., 153	105, 113
Krishnasami Konan v. Ramasami Ayyar. I.L.R., 22 Mad., 519	557
Krishnasami Pannikondar v. Muthukrishna Pannikondar. I.L.R., 24 Mad., 364	687, 688
Kristna Ayyan v. Vencatachella Mudali. 7 M.H.C.R., 60	38
Kristo Churn Dass v. Radha Churn Kur. I.L.R., 19 Calc., 750	4
Kumara Akkappa Nayanin Babudur v. Sithala Naidu. I.L.R., 20 Mad., 476	559
Kunhayen Haji v. Mayan. I.L.R., 17 Mad., 98	422, 423
Kunhi Chandu Nambiar v. Kunkan Nambiar. I.L.R., 19 Mad., 384	52
Kunjo Behary Singh v. Madhub Chundra Ghose. I.L.R., 23 Calc., 884	118, 119
Kuppusami Ayyar v. Ramasami Ayyar. Appeal against Order No. 122 of 1895 (unreported)	187

L

Lakhmidas v. Jamnadas. I.L.R., 22 Bom., 304	112, 113
Lakho Bibi v. Salamat Ali. I.L.R., 20 All., 237	649
Lakshmana v. Najimudin. I.L.R., 9 Mad., 145	314, 315
Lakshman Dada Naik v. Ramachandra Dada Naik. L.R., 7 I.A., 181; I.L.R., 5 Bom., 48	589
Lakshmi v. Krishnabhat. I.L.R., 8 Bom., 424	314
Lakshmi v. Kuttunni. I.L.R., 10 Mad., 57	314, 315
Lakshmi Bai v. Balkrishna. I.L.R., 4 Bom., 654	666, 668
Lakshmi pathi v. Kandasami. I.L.R., 16 Mad., 54	151, 570,
	578, 584, 588
Lala Beni Ram v. Kundan Lal. L.R., 26 I.A., 58; I.L.R., 21 All., 496	68
Lavergne v. Hooper. I.L.R., 8 Mad., 149	168
Leelanund Singh v. Hamidoddin. I.L.R., 8 Calc., 576	593
Leman v. Damodaraya. I.L.R., 1 Mad., 158	210
Lister v. Turner. 5 Hare, 281	482

London and South Western Railway Co., Directors, &c., (f v. Blackmore. L.R., 4 H.L., 610	580, 593
London and South Western Railway Co. v. Gomm. L.R., 20 Ch.D., 562	455, 457, 467, 468, 469, 470

M

Madhava v. Narayana. I.L.R., 9 Mad., 244	480, 589
Mahabir Pershad Singh v. Macnaghten. L.R., 16 I.A., 107; I.L.R., 16 Calc., 682	104
Mahabir Prasad v. Sital Singh. I.L.R., 19 All., 520	698
Mahalakshamma v. Venkataratnamma. (1882) I.L.R., 6 Mad., 83	151, 154
Mahalinga Rau v. Vencoba Ghosami. I.L.R., 4 Mad., 157	245
Maharajah of Jeypore v. Papayamma. I.L.R., 23 Mad., 229	346, 347, 349, 360
Maharajulungaru, G. N. D. v. V. Rajah Row Pantulu. 5 M.H.C.R., 31	592
Maharani Beni Pershad Koeri v. Duda Nath Roy. L.R., 26 I.A., 216; I.L.R., 27 Calc., 156	251
Maharani Braja Sundari Dabi v. Rani Lachmi Knuwari. 2 B.L.R., (A.C.), 155	480
Mahomed Bukah Khan v. Hosseini Bibi. L.R., 15 I.A., 81; I.L.R., 15 Calc., 684	521, 522
Mahomed Mira Ravuthar v. Savvasi Vijaya Raghunadha Gopalar. I.L.R., 23 Mad., 227	104
Mahomed Shumsool v. Shewukram. L.R., 2 I.A., 7	437
Maidin Saiba v. Nagapa. I.L.R., 7 Bom., 96	249, 251
Makum v. Imam. 10 Bom. H.C.R., 293	681
Malikarjuna Prasada Naidu v. Durga Prasada Naidu. I.L.R., 17 Mad., 362	147, 148
Maluji v. Fakirchand. I.L.R., 22 Bom., 225	476, 478, 480
Mana Varma Vilas Raja v. Kesava Potuval. Second Appeal No. 510 of 1895. See footnote I.L.R., 24 Mad., 474	474, 475, 476, 479, 480, 481, 486, 488
Manavikrama v. Vaithi Patter. Second Appeal No. 978 of 1895 (unreported)	345, 34
Manjunath Bhadrabhat v. Venkatesh Govind Shanbhog. I.L.R., 6 Bom., 54	671
Martand v. Dhondo. I.L.R., 22 Bom., 624	104, 105
Marungapuri case. L.R., 1 I.A., 287	587
Massumat Mahamaya Dibeh v. Goureekaunt Chowdhry. (1808) 1 S.D.A., Sol. Rep., 236	393
Mathura Nath Ghose v. Nobin Chandra Kunda Biswas. I.L.R., 24 Calc., 774	443
Mathura Singh v. Bhawani Singh. I.L.R., 22 All., 248	363
May, In re. L.R., 28 Ch.D., 516	352
Meenakshi Naidoo v. Subramaniya Sastri. L.R., 14 I.A., 160; I.L.R., 11 Mad., 26	95, 96, 687
Merangi case. L.R., 18 I.A., 45; I.L.R., 11 Mad., 380; I.L.R., 14 Mad., 237	591, 605
Mingale Antone Kane v. Ramachandra Baje. I.L.R., 19 Bom., 694	638

	PAGE
Mirehouse v. Rennell. 1 Cl. & Fin., 546	536
Mitchell v. Jenkins. 5 B. & Ad., 588	552
Mody v. Queen Insurance Co. I.L.R., 25 Bom., 332	552, 553
Mohabir Prasad Singh v. Adhikari Kunwar. I.L.R., 21 Cal., 473	359
Moidin v. Chanda. I.L.R., 7 Mad., 273	638
Moniram Kolita v. Kerry Kolitany. L.R., 7 I.A., 115; I.L.R., 5 Calc., 776.	442
Moro Raghunath v. Balaji Trimbak. I.L.R., 13 Bom., 45	105
Moti Lal v. Makund Singh. I.L.R., 19 All., 477	186, 187
Motilal Prannath v. Bai Kashi. (1892) I.L.R., 17 Bom., 45	151, 155
Mower's Trusts, In re. L.R., 8 Eq., 110	118
Muddun Gopal Thakoor v. Ram Buksh Tandey. 6 W.R., (C.R.), 71	435, 436, 437
Mudhoo Manjee v. Rajah Nil Monee Singh Deo. 18 W.R., (C.R.), 533	328
Muhammad Husain v. Khushalo. I.L.R., 10 All., 223	668
Muhammad Islam v. Muhammad Ahsan. I.L.R., 16 All., 237	269
Muhammad Zahur v. Cheda Lal. I.L.R., 14 All., 141	329
Mullapudi Balakrishnayya v. Venkatanarasimha Appa Rau. I.L.R., 19 Mad., 329	158, 159, 511
Munda Chetti v. Timmajai Hensu. (1863) 1 M.H.C.R., 380	78
Mangul Pershad Dichit v. Grija Kant Lahiri Chowdhry. L.R., 8 I.A., 123; I.L.R., 8 Calc., 51	670, 671, 685, 699
Muniappa Naik v. Subramania Ayyan. I.L.R., 18 Mad., 437	191
Municipal Council, Cocanada v. Royal Insurance Company, Liverpool. I.L.R., 21 Mad., 5	207, 209, 210, 212, 213
Municipal Council, Nellore v. Rangayya. I.L.R., 19 Mad., 10	209, 210, 213
Municipal Council, Tanjore v. Umamba Bai Saheb. I.L.R., 23 Mad., 523.	209
Mussumat Chando v. Hakeem Alim-ood-deen. 6 N.W.P.H.C.R., 28	516
Mussumat Rambutty Koor v. Kamessur Pershad. 22 W.R., (C.R.), 36	22
Mussumat Shumsh-ool-nissa v. Mussumat Zohra Beebee. 6 N.W.P.H.C.R., 2	516
Mussumat Lachhan Kunwar v. Anant Sing. L.R., 22 I.A., 25; I.L.R., 22 Cal., 445	227, 408
Muthu v. Chellappa. I.L.R., 12 Mad., 479	4
Muthayya Chetti v. Allan. I.L.R., 4 Mad., 209	209
Muthayyan Chetti v. Narasuvayyar. Civil Revision Petition No. 50 of 1889 (unreported);	49
Muthu v. Kambalinga. I.L.R., 12 Mad., 316	475, 478, 479, 480, 482, 485, 489
Mutta Vaduganadha Tevar v. Dorasinga Tevar. L.R., 8 I.A., 99; I.L.R., 3 Mad., 290	586, 587, 592
Muttia v. Virammal. I.L.R., 10 Mad., 283	693, 694
Muttuvaduganadha Tevar v. Teriasami. L.R., 23 I.A., 128; I.L.R., 16 Mad., 11; I.L.R., 19 Mad., 451	590

N

Nabbar Khan v. Sita. I.L.R., 20 All., 2	506, 508
Nafar Chandra Pal Chowdhuri v. Ram Lal Pal. I.L.R. 22 Calc., 742	52, 53, 54
Nanabhai Gampatray Dhairyavan v. Achratbai. I.L.R., 12 Bom., 122	436
Nanack Chand v. Telackdye Koer. I.L.R., 5 Calc., 265	173, 174

	PAGE
Nanda Rai v. Raghunandan Singh. I.L.R., 7 All., 282	648, 649, 650
Nand Kishore v. Raja Hariraj Singh. I.L.R., 20 All., 23	104, 105, 111, 112
Nanjappa v. Nanjappa. I.L.R., 12 Mad., 161	269
Naraganti Achammagaru v. Venkatachalapati Nayanivaru. I.L.R., 4 Mad., 250	590, 593, 594, 609, 610
Naraganty Lutchmeedavamah v. Vengama Naidoo. 9 M.I.A., 66	570, 584, 623
Narain Das, In re. I.L.R., 1 All., 610	535
Narayan v. Ganpat. I.L.R., 21 Bom., 619	105
Narayana v. Chengalamma. I.L.R., 10 Mad., 1	586
Narayana v. Krishna. I.L.R., 8 Mad., 214	506, 507
Narayana v. Narayana. I.L.R., 6 Mad., 327	268
Narayana v. Narayana. I.L.R., 13 Mad., 437	344
Narayana v. Ranga. I.L.R., 15 Mad., 183	237
Narayana Reddi v. Papayya. I.L.R., 22 Mad., 133	693
Narayanamsami v. Natesa. I.L.R., 16 Mad., 424	649
Narayanamsami Naidu v. Narayana Rau. I.L.R., 17 Mad., 62	173, 175
Narayan Babaji v. Nana Manohar. (1870) 7 Bom. H.C.R., (A.C.), 153	391
Narayan Jagannath Dikshit v. Vasudeo Vishnu Dikshit. I.L.R., 15 Bom., 247	589
Narayanrao Ramchandra Pant v. Ramabai. (1879) L.R., 6 I.A., 114; I.L.R., 3 Bom., 415	151, 154
Narindar Bahadur Singh v. Achal Ram. L.R., 20 I.A., 77; I.L.R., 20 Calc., 649	590
Naro Balvant v. Ramchandra Tukdev. I.L.R., 13 Bom., 326	30
Narsidas Jitram v. Joglekar. I.L.R., 4 Bom., 57	104
Narsingh Das v. Mangal Dubey. I.L.R., 5 All., 163	104
Natesan Chetti v. Soundararaja Ayyangar. I.L.R., 21 Mad., 141	235, 236, 237
Nawab Azimut Ali Khan v. Jowahir Sing. 13 M.I.A., 404	106
Neelkisto Deb Burmono v. Boerchunder Thakoor. 12 M.I.A., 523	590
Nga Hoong v. The Queen. 7 M.I.A., 72	162
Nidhoomoni Debya v. Saroda Pershad Mookerjee. (1878) L.R., 3 I.A., 253.	216, 218
Nilakant Banerji v. Suresh Chandra Mullick. I.L.R., 12 Calc., 414	105
Nilmony Singh v. Jagabandhu Roy. I.L.R., 23 Calc., 536	476, 481, 482, 483, 484
Nilratan Sen. v. Jogesh Chandra Bhattacharjee. I.L.R., 23 Calc., 983	338, 339
Nobin Chandra Soot v. Nabab Ali Sarkar. 5 Calc. W.N., 343	455, 467, 469
Nundun Lall v. Bai Joykishen. I.L.R., 16 Cal., 598	4
Nunnu Meah v. Krishnaswami. I.L.R., 14 Mad., 274	436
Nurbibi v. Maganlal Parbhudas. I.L.R., 16 Bom., 547	58
Nusserwanjee Pestonjee v. Meer Mynodeen Khan Wullud Meer Sudroodeen Khan Bahadoor. 6 M.I.A., 134	369, 373, 374
Nuzvid case. L.R., 7 I.A., 88; I.L.R., 2 Mad., 128	574, 576, 587, 591, 594, 606, 626, 629, 680, 631

O

Olpherts v. Mahabir Pershad Singh. L.R., 10 I.A., 25; I.L.R., 9 Calc., 656	314
Orby v. Trigg. 9 Mod., 3	453, 459
Orr v. Sundra Pandia. I.L.R., 17 Mad., 255	434

P

	PAGE
Padapa bin Bhujiangapa v. Swamirao Shrinivas. L.R., 27 I.A., 86; I.L.R., 24 Bom., 536	226, 231, 589
Padmavathemma v. Venkatagiri Rajah. Second Appeal No. 593 of 1899 (unreported)	511
Palaniappa Chetty v. Dorasami Ayyar. I.L.R., 18 Mad., 402	263
Panchcowrie Mull v. Chumroolall. I.L.R., 3 Calc., 563	225, 231, 232
Pandu v. Vithu. I.L.R., 19 Bom., 140	476, 478
Papamma v. The Collector of Godavari. I.L.R., 12 Mad., 341	366, 367, 373
Paramananda Das v. Mahabeer Dossji. I.L.R., 20 Mad., 378	692
Parameshraya v. Seshagiriappa. I.L.R., 22 Mad., 365	649
Parameswaran v. Shangaran. I.L.R., 14 Mad., 489	297, 298
Pareyasami v. Saluckai Tevar. 8 M.H.C.R., 157	593
Parsotam Gir v. Narbada Gir. (1899) L.R., 26 I.A., 175; I.L.R., 21 All., 505	500
Parthasaradhi Ayyangar v. Ramanuja Jeer Swami. Civil Revision Petition No. 101 of 1842, reported as a footnote in I.L.R., 10 Mad., 98	687, 688
Parvathi v. Thirumalai. I.L.R., 10 Mad., 339	580, 593
Parvathi Ammal v. Saminatha Gurukul. I.L.R., 20 Mad., 40	408
Patcha Saheb v. Sub-Collector of North Arcot. I.L.R., 15 Mad., 78	333
Pattaravy Mudali v. Audimula Mudali. 5 M.H.C.R., 422	590
Payyath Nann Menon v. Thirathipalli Raman Menon. I.L.R., 20 Mad., 51	75
Peary Mohun Chowdhry v. Rowosh Chunder Nundy. I.L.R., 15 Calc., 371	343
Pedda Amani v. Zamindar of Marungapuri. L.R., 1 I.A., 287	570, 584
Penou Kutti v. Valai Rani of Ambadi Kovilagam. Second Appeal No. 613 of 1878. See footnote I.L.R., 24 Mad., 473	473, 479, 481, 483, 486
Perayya v. Venkata. I.L.R., 11 Mad., 463	452, 453, 461
Pestaji Manoharji Wadia v. Matchott. 7 Bom., H.C.R., (A.C.J.), 10	135
Phul Chand Ram v. Nursingh Pershad Misser. I.L.R., 28 Calc., 73	698, 700, 701
Pirjada Ahmadmiya v. Sha Kalidas Kanji. I.L.R., 21 Bom., 544	106, 112
Ponnappa Pillai v. Pappuvayyangan. I.L.R., 4 Mad., 1	435
Poresh Nath Mojumdar v. Ramjodu Mojumdar. I.L.R., 16 Calc., 246	699
Prankrishna Surma, <i>in re</i> . I.L.R., 8 Calc., 969	289
Pransukhram v. Bai Ladhkor. I.L.R., 23 Bom., 653	506, 508
Premji Jivan Bhate v. Haji Cassum Juma Ahmed. I.L.R., 20 Bom., 298	53
Prince Mirza Jehan Kadr Bahadoor v. Nawab Badshoo Bahoo Sahiba. L.R., 12 I.A., 124; I.L.R., 12 Calc., 1	586
Prince Mirza Jehan Kudr Bahadur v. Nawab Afsur Bahu Begum. L.R., 6 I.A., 76; I.L.R., 4 Calc., 727	586
Proceedings of the Madras High Court, dated 22nd July 1869. Weir's Crl. Bul., 3rd. Ed., p. 927	528, 535
Proceedings of the Madras High Court, dated 18th January 1870. 5 M.H. C.R., Appx. xv	201
Prosunno Coomar Mookerjee v. Shama Churn Mookerjee. 17 W.R., (C.R.), 451	589
Puramathan Somayajipad v. Sanjara Menon. I.L.R., 23 Mad., 82	298

Q

	PAGE
Queen v. Amanulla. 12 B.L.R., Appx., 15	415
Queen v. Buldeo. 2 N.W.P.H.C.R., 286	286
Queen v. Lord. 16 L.J., (M.C.), 15	162
Queen v. Manktelow. 22 L.J., (M.C.), 115	286, 290, 291
Queen v. Matam Mal. 22 W.R., (Cr.R.), 34	528, 536
Queen v. Nabi. I.L.R., 6 Mad., 247	272, 273, 274
Queen v. Revu Pothadu. I.L.R., 5 Mad., 391n	82
Queen-Empress v. Adam Khan. I.L.R., 22 All., 106	338, 339
Queen-Empress v. Appa Subhana Mendre. I.L.R., 8 Bom., 200	528
Queen-Empress v. Babu Lal. I.L.R., 21 All., 106	528, 535
Queen-Empress v. Bhau. I.L.R., 23 Bom., 493	324
Queen-Empress v. Brij Narain Man. I.L.R., 20 All., 529	324
Queen-Empress v. Dan Sahai. I.L.R., 7 All., 862	415
Queen-Empress v. Felani Hariani. 16 W.R., (Cr.R.), 12	663
Queen-Empress v. Gundya. I.L.R., 13 Bom., 502	678
Queen-Empress v. Hanumantha Reddi. I.L.R., 23 Mad., 225	140, 142, 143, 145, 146
Queen-Empress v. Khandia bin Pandu. I.L.R., 15 Bom., 66	541
Queen-Empress v. Manick Chandra Sarkar. I.L.R., 24 Calc., 492	325
Queen-Empress v. Mirchie. I.L.R., 18 All., 864	664
Queen-Empress v. Muhammad Mahmud Khan. I.L.R., 13 All., 337	528, 535
Queen-Empress v. Munna Lal. I.L.R., 10 All., 414	528, 536
Queen-Empress v. Narain Singh. I.L.R., 22 All., 340	240
Queen-Empress v. Natu. I.L.R., 27 Calc., 137	324
Queen-Empress v. Pirya Gopal. I.L.R., 9 Bom., 100	144
Queen-Empress v. Ram Lal. I.L.R., 15 All., 136	528, 535
Queen-Empress v. Sagal Samba Sajao. I.L.R., 21 Calc., 642	415
Queen-Empress v. Sondi Donnai Sabu. Weir's Crl. Bul., 417	418
Queen-Empress v. Subrahmania Ayyar. Criminal Miscellaneous Petition No. 41 of 1900 (unreported)	546

R

R. v. R. I.L.R., 14 Mad., 88	359, 512, 513
Radanath Doss v. Gisborne. 14 M.A.I., 1	477, 479, 480, 481, 483, 484, 487, 488
Radha Charan v. Man Singh. I.L.R., 12 All., 392	186, 187
Raghavachariar v. Rangachariar. Second Appeal No. 848 of 1892 (unreported)	45
Raghoobuns Sahoy v. Kokil Singh. I.L.R., 17 Calc., 872	123
Raghubans Kunwar v. Bhagwant Kunwar. (1899) I.L.R., 21 All., 183	161
Raghunath Lalman v. Nathu Hirji Bhate. I.L.R., 19 Bom., 626	408
Rahim Bakhsh v. Muhammad Hasan. I.L.R., 11 All., 1	515
Rai Balkishen v. Rai Sita Ram. I.L.R., 7 All., 731	191
Rai Balkishen Dass v. Raja Run Bahadoor Singh. L.R., 10 I.A., 162; I.L.R., 10 Calc., 305	269, 270, 271
Rai Nursingh Dass v. Rai Narain Dass. 3 N.W.P.H.C.R., 217 at p. 235	436
Rai Ragnath Bali v. Rai Maharaj Bali. L.R., 12 I.A., 112; I.L.R., 11 Calc., 777	582, 589

	PAGE
Raja Pirthee Singh v. Rane Raj Kower. (1870) L.R., I.A., Sup. Vol., 203.	150
Rajah Kishendatt Ram v. Rajah Mumtaz Ali Khan. L.R., 6 I.A. 145; I.L.R., 5 Calc., 198 104, 105, 111	
Rajah Venkata Narasimha Appa Row Bahadur v. Rajah Narayya Appa Row Bahadur. L.R., 7 I.A., 38; I.L.R., 2 Mad., 128	586
Rajah Vurmah Valia v. Ravi Vurmah Mutha. L.R., 4 I.A., 76; I.L.R., 1 Mad., 235 225, 227, 230	
Rajajogendra Bhupati Hurri Chundun Mahapatra v. Nityanand Man- singh. L.R., 17 I.A., 128; I.L.R., 18 Calc., 151	590
Ramachandra v. Narayanasami. I.L.R., 16 Mad., 333	38
Ramachandra Rao v. Abecb Rowthan. Appeal No. 175 of 1897 (unre- ported)	657
Ramaen v. Condammal. Sudder Decisions of 1858, p. 154	257, 258, 259
Ramalingam Pillai v. Vythilingam Pillai. L.R., 20 I.A., 150; I.L.R., 16 Mad., 490	225
Ramanadan Chetti v. Kunappu Chetti. 6 M.H.C.R., 304	187
Ramanadhan v. Zamindar of Ramnad. I.L.R., 16 Mad., 407	66, 67, 68
Ramanamma v. Sambayya. I.L.R., 12 Mad., 347	593
Ramanuja Jeeyarsvami v. Ramanuja Jeeyar. I.L.R., 3 Mad., 354	263
Ramasami Ayyar v. Municipal Council of Salem. I.L.R., 18 Mad., 183	210
Ramasami Kamaya Naik v. Sundaralingasami Kamaya Naik. I.L.R., 17 Mad., 422	578, 590
Rama Varar v. Krishnen Nambudri. I.L.R., 3 Mad., 270	132
Rama Varma Tambiran v. Raman Nayar. I.L.R., 5 Mad., 89	132, 133
Ramayya v. Ranganayakamma. Appeal No. 28 of 1877 (unreported)	609
Ramayyar v. Dorasami Ayyar. Letters Patent Appeal No. 5 of 1900 (unreported)	359
Ramchandra v. Sheikh Mohidin. I.L.R., 23 Bom., 614	482
Ramchandra Narayan v. Narayan Mahadev. I.L.R., 11 Bom., 216	589
Ram Chunder Ghose, <i>In re</i> . I.L.R., 24 Calc., 567	241, 242
Ramen Chetty v. Mahomed Ghouse. I.L.R., 16 Calc., 432	261
Rameswar Koer v. Mahomed Mehdi Hossein Khan. I.L.R., 26 Calc., 39	106
Ram Kirpal Shukul v. Mussumat Rup Kuari. L.R., 11 I.A., 37; I.L.R., 6 All., 269	671, 685, 699
Ram Lal v. Chhab Nath. I.L.R., 12 All., 578	353
Ram Lal Mookerjee v. The Secretary of State for India. L.R., 8 I.A., 46; I.L.R., 7 Calc., 304	304
Ramnad case. I.L.R., 24 Mad., 613	574, 585, 592, 607
Ramunni v. Brahma Dattan. I.L.R., 15 Mad., 366	700
Rangayya Chettiar v. Parthasarathi Naickar. I.L.R., 20 Mad., 120	173, 175
Rango Vinayak Dev v. Yamunabai. (1878) I.L.R., 3 Bom., 44	151
Rani Sathaj Kuari v. Rani Deoraj Kuari. L.R., 15 I.A., 51; I.L.R., 10 All., 272	153, 587, 590, 594
Ranjeet Singh v. Koor Gujraj Singh. L.R., 1 I.A., 9	593
Rayalu Pattar v. Narayana Pattar. Appeal against Appellate Order No. 89 of 1899 (unreported)	699, 700
Reference under Stamp Act, s. 46. Referred Case No. 4 of 1892 (un- reported)	

	PAGE
Reference under Stamp Act, s. 46. I.L.R., 9 Mad., 358	182
Reference under Stamp Act, s. 46. I.L.R., 15 Mad., 386	182
Reg v. Bertrand. L.R., 1 P.C., 520	162
Reg v. George Kipps. 4 Cox. Cr. C., 167	287, 291
Reg v. Henkers. 16 Cox. Cr. C., 257	287, 291
Reg v. Miller. 13 Cox. Cr. C., 179	287
Reg v. Mycock. 12 Cox. Cr. C., 28	286, 290
Reg v. Ranchhod Dayal. 10 Bom. H.C.R., 424	263, 265
Rivière's Trade-mark, <i>In re</i> . L.R., 26 Ch.D., 48	169
Rice v. Noakes & Co. [1900] 2 Ch., 445	453, 455, 458
Robinson v. Ayya Krishnama Chariyar. 7 M.H.C.R., 37	204
Robinson v. Rattur 24 L.J., Q.B., 250	133, 135
Romon Kissen Sett, <i>In re</i> v. Hurrololl Sett. I.L.R., 19 Calc., 334	328
Royal Bank of Scotland v. Tottenham. [1894] 2 Q.B., 715	261
Roy Meghraj v. Beejoy Gobind Burral. I.L.R., 1 Calc., 197	10
Rushbrook v. Hood. 17 L.J., C.P., 58	181, 182, 184
Russickloll Mudduck v. Lokenath Kurmocar. I.L.R., 5 Calc., 688	53
Ruttonji Edulji Shet v. The Collector of Tanna. 11 M.I.A., 295	52

S

Sakvarbai v. Bhavanji Raje Deshmukh. (1864) 1 Bom. H.C.R., 194	150
Sambasiva Chari v. Ramasami Reddi. I.L.R., 22 Mad., 179	559
Samibai v. Premji Pragji. I.L.R., 20 Bom., 304	329
Sankaran v. Periasami. I.L.R., 13 Mad., 467	589
Sankaran Nambiar v. Kanara Kurup. I.L.R., 22 Mad., 182	414
Sanku v. Puttamma. I.L.R., 14 Mad., 289	506
Santley v. Wilde. [1899] 2 Ch., 474	453, 458, 460
Sariatoolia Molla v. Raj Kumar Roy. I.L.R., 27 Calc., 709	188
Seshagiri v. Pichu. I.L.R., 11 Mad., 452	108
Seshagiri Ayyar v. Marakathammal. I.L.R., 22 Mad., 196	118, 119
Seshamma v. Subbarayadu. I.L.R., 18 Mad., 403	151
Shaik Abdool Rohoman v. Dataram Bashee. (1864) W.R., (C.R.), 367	52
Shaik Husain v. Govardhandas Parmanandas. I.L.R., 20 Bom., 1	53
Shaikh Ewaz v. Mokuna Bibi. I.L.R., 1 All., 132	463
Shama Purshad Roy Chowdery v. Hurro Purshad Roy Chowdery. 10 M.I.A., 203	344
Shangunni Menon v. Veerpapan Pillai. I.L.R., 18 Mad., 407	52
Sharifa Bibi v. Gulam Mahomed Dastagir Khan. I.L.R., 16 Mad., 43	517
Shaw v. Bunny. 34 L.J., Ch., 257	104, 105, 110, 111
Sheik Budan v. Ramchandra Bhunjugaya. I.L.R., 11 Bom., 537	670
Sheikh Kudratulla v. Mahini Mohan Shaha. 4 B.L.R., 134	516, 518, 519
Sheikh Muhammad Mumtaz Ahmad v. Zubaida Jan. L.R., 16 I.A., 205; I.L.R., 11 All., 460	517
Sheo Charan Lal v. Sheo Sewak Singh. I.L.R., 18 All., 469	191
Sheonath Doss v. Janki Prosad Singh. I.L.R., 16 Calc., 132	110, 112
Sheo Nath Saran v. Sukh Lal Singh. I.L.R., 27 Calc., 229	330
Sheo Pershad Lal v. Thakoor Rai. 3 Agra H.C.R., 254	422

	PAGE
Sheosagar Singh v. Sitaram Singh. (1896) L.R., 24 I.A., 50; I.L.R., 24 Cal., 616	500
Shieu Golam Sing v. Baran Sing. (1868) 1 B.L.R., 164	391
Shirekuli Timapa Hegda v. Mahabliya. I.L.R., 10 Bom., 435	267, 268, 269, 270, 271
Shivaganga case. L.R., 8 I.A., 99; I.L.R., 3 Mad., 290	585, 586, 592, 631
Shivram v. Narayan. I.L.R., 5 Bom., 27	30
Shooshee Bhusan Rudro v. Gobind Chunder Roy. I.L.R., 18 Cal., 231	559
Singer Manufacturing Company v. Loog. L.R., 18 Ch.D., 395	168
Singer Manufacturing Company v. Wilson. L.R., 2 Ch.D., 434	168
Sinniya Pillai v. Guana Sambanda Pandara Sannadhi. Second Appeal No. 1559 of 1898 (unreported)	52
Sitayya v. Rangareddi. I.L.R., 10 Mad., 259	363
Sitha Ummal v. Rungasami Iyengar. 5 M.H.C.R., 385	480
Sivasami Naicker v. Ratnasami Naicker. I.L.R., 23 Mad., 568	668
Sivasubramania Naicker v. Krishnammal. I.L.R., 18 Mad., 287	587
Sivayya v. Rami Reddi. I.L.R., 22 Mad., 223	244, 245
Soobramania Telaver v. Sokka Telaver. 5 M.H.C.R., 437	580, 593
South v. Bloxam. 34 L.J., Ch., 369	103
South American and Mexican Company, <i>In re</i> . [1895] 1 Ch., 37	447
Southekal Krishna Row, <i>In re</i> . L.R., 14 I.A., 154; I.L.R., 15 Cal., 152	84
Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick. (1857) 6 M.I.A., 526	391, 392
Sreemutty Tripoora Soonduree v. Juggur Nath Dutt. 24 W.R., (C.R.), 321	467
Sri Gopal v. Pirthi Singh. I.L.R., 20 All., 110	105
Srimantu Raja Yarlagadda Mallikarjuna v. Srimantu Raja Yarlagadda Durga. L.R., 17 I.A., 134; I.L.R., 13 Mad., 406	148, 587
Srimati Janoki Debi v. Sri Gopal Acharjia. L.R., 10 I.A., 32; I.L.R., 9 Cal., 766	226
Srinivasa Chariar v. Raghava Chariar. I.L.R., 23 Mad., 28	232
Sri Raja Chelikani Venkataramanayamma Garu v. Appa Rau Bahadur Garu. (1897) I.L.R., 20 Mad., 207	391
Sri Raja Rao Venkata Surya Mahipati Ramakrishna Rao Bahadur v. The Court of Wards. (1898) L.R., 26 I.A., 83; I.L.R., 22 Mad., 383.	216, 225, 436, 437
Sri Raja Venkata Surya Mahipati Rama Krishna Rao Bahadur v. The Court of Wards. L.R., 26 I.A., 83; I.L.R., 22 Mad., 383	591
Sri Raja Viravara Thodhramal Rajya Lakshmi Devi Garu v. Sri Raja Viravara Thodhramal Surya Narayana Dhatrazu Bahadur Garu. L.R., 24 I.A., 118; I.L.R., 20 Mad., 256	587
Sri Rajah Viravara Thodhramal Rajyalakshmi Devi Garu v. Sri Rajah Viravara Thodhramal Suryanarayana Dhatrazu Bahadur Garu. Appeal No. 94 of 1891 (unreported)	582, 589
Srirangachariar v. Ramasami Ayyangar. I.L.R., 18 Mad., 189	447
Stree Rajah Yanumula Venkayamah v. Stree Rajah Yanumula Boochia Vankondora. 13 M.I.A., 333	590
Subbaran Nayudu v. Yagana Pantulu. I.L.R., 19 Mad., 90	362

	PAGE
Subbaraya v. Krishna. I.L.R., 6 Mad., 159	267, 268, 269
Subbaiya v. Rajesvara Sastrulu. 4 M.H.C.R., 354	588
Subbammal v. Huddleston. I.L.R., 17 Mad., 273	417
Subbaya v. Buthaya. I.L.R., 6 Mad., 380	505, 506, 508
Subbaya v. Surayya. I.L.R., 10 Mad., 251	435
Subrahmaniam Pillai v. Narayana Ayyangar. Appeal against Appellate Order No. 35 of 1898 (unreported)	700
Subramanyan v. Paramaswaran. (1887) I.L.R., 11 Mad., 116	78
Subbiem Pillay v. Arnachala Irungol Pillay. 5 M.H.C.R., 444	580, 593
Subramaniam v. Perumal Reddi. I.L.R., 18 Mad., 454	463
Subramanya Pandya Chokka Talavar v. Siva Subramanya Pillai. I.L.R., 17 Mad., 316	590, 593, 594, 609, 610
Sultan Acken Sahib v. Shaik Bava Ma'mmiyar. I.L.R., 4 Mad., 295	95, 96
Sundar Singh v. Bholu. I.L.R., 20 All., 322	105
Suntosh Ram Doss v. Gera Pattuck. 23 W.R., (C.R.), 22	258
Svami Nayudu v. Subramania Mudali. 2 M.H.C.R., 158	550
Swain v. Ayres. L.R., 21 Q.B.D., 289	466
Syud Emam Montazooddeen Mahomed v. Rajcoomar Dasa. 14 B.L.R., 408	104

T

Tara Chand v. Reeb Ram. 3 M.H.C.R., 50	435, 436, 437
Tara Lal Singh v. Sarobur Singh. L.R., 27 I.A., 33; I.L.R., 27 Cal., 407.	588
Tara Prosad Roy v. Bhobodeb Roy. I.L.R., 22 Cal., 931	699, 700
Tekait Ram Chunder Singh v. Srimati Madho Kumari. L.R., 12 I.A., 188; I.L.R., 12 Cal., 485	589
Teramath v. Lakshmi. I.L.R., 6 Mad., 270	298
Thackersey Dewraj v. Haribhum Nursey. I.L.R., 8 Bom., 432	232
Thakoor Chunder Paramanick, <i>In re</i> . B.L.R., Sup. Vol., p. 598	53, 56
Thakur Dorriao Singh v. Thakur Davi Singh. L.R., 1 I.A., 1	624
Thakur Nitpal Singh v. Thakur Jai Singh Pal. L.R., 23 I.A., 147; I.L.R., 19 All., 1	588
Tilack Singh v. Parsotein Proshad. I.L.R., 22 Cal., 924	698
Tipperah case. 12 M.I.A., 523	608, 609
Tirtha Sami v. Seshagiri Pai. I.L.R., 17 Mad., 299	362
Tofaluddi Peada v. Mahar Ali Shaba. I.L.R., 26 Cal., 78	399
Trevelyan v. Trevelyan. 53 L.T., N.S., 853	467
Trimmer v. Bayne. 9 Vesey, 209	103
Tukaram Anant Joshi v. Vithal Joshi. I.L.R., 13 Bom., 656	506
Turner v. Turner. L.R., 14 Ch.D., 829	593
Turner, <i>In re</i> . 15 L.J., (M.C.), 140	162
Tuticorin Municipality v. South Indian Railway. I.L.R., 13 Mad., 78	210, 213

U

Ukku, v. Kutti. I.L.R., 15 Mad., 401	465
Umakanta Roy v. Dino Nath Sanjal. I.L.R., 28 Cal., 4	448
Umasundari Dasi v. Ramji Haldar. I.L.R., 7 Cal., 242	506

Umbika Churn Shet v. Bhuggoputty Churn Shet.	3 W.R., (C.R.), 173	...	PAGE
Umed Dholchand v. Pir Saheb Jiwa Miya.	I.L.R., 7 Bom., 134	...	592
Ummatha v. Cheria Kunhamed.	I.L.R., 4 Mad., 308	...	100, 105
Umritnath Chowdhry v. Goureenath Chowdhry.	(1870) 13 M.I.A., 542.	...	30
Unni Kutti v. Chathu.	Second Appeal No. 1775 of 1891 (unreported)	...	391, 392
Unni Nambiar v. Nilakandan Bhatthathiripad.	I.L.R., 4 Mad., 141	...	52, 54
Uthatchadayan Haji v. Ramen Nambiar.	4 M.H.C.R., 422	...	132, 133, 134
		...	329

V

Vairavan Asari v. Ponnayya.	I.L.R., 22 Mad., 14	...	...	235
Valia Tamburatti v. Parvati.	I.L.R., 13 Mad., 454	...	...	52, 57
Varanakot Narayanan Namburi v. Varanakot Narayanan Namburi.	(1880) I.L.R., 2 Mad., 328	...	...	78
Vasudevan v. The Secretary of State for India.	(1884 & 1887) I.L.R., 11 Mad., 157	...	...	78
Vasudeva Shanbog v. Naraina Pai.	I.L.R., 2 Mad., 356	...	...	329
Vasudevan v. Sankaran.	I.L.R., 20 Mad., 129	...	...	659
Vedachala Mudali v. Ramasami Raja.	I.L.R., 22 Mad., 229	...	...	118
Veeramma v. Abbiah.	I.L.R., 18 Mad., 99	...	...	559
Venkata v. Kannam.	I.L.R., 5 Mad., 184	...	...	173, 174
Venkatagiri Rajah v. Venkat Rau.	I.L.R., 21 Mad., 243	...	...	158
Venkatanarasumma v. Ramiah.	I.L.R., 2 Mad., 108	...	...	173, 174
Venkatanarasimha Naidu v. Dandamudi Kotayya.	I.L.R., 20 Mad., 299	...	...	68
Venkatanarasimha Naidu v. Papammah.	I.L.R., 19 Mad., 54	...	...	684
Venkatappayya v. Venkatapathi.	Appeal No. 230 of 1895 (unreported)	...	...	687, 688
Venkatarama v. Senthivela.	I.L.R., 13 Mad., 265	...	...	693
Venkatarama Doss v. Maharajah of Vizianagram.	I.L.R., 19 Mad., 103n	...	...	158, 510
Venkataramana Rambhat v. Timappa Devappa.	I.L.R., 16 Bom., 132	...	...	506, 508
Venkataramayya v. Krishnayya.	I.L.R., 20 Mad., 319	...	...	334
Venkayya v. Ramasami.	I.L.R., 22 Mad., 39	...	...	68, 425
Venkiti Nayak v. Murugappa Chetti.	I.L.R., 20 Mad., 48	...	...	362, 363
Venkopadhyaya v. Kavari Hengusu.	(1864) 2 M.H.C.R., 36	...	...	150
Virammal v. Rungayyengar.	I.L.R., 4 Mad., 381	...	...	423
Viranna v. Nagayyah.	I.L.R., 3 Mad., 6	...	...	550, 551
Virchand Lalchand v. Kumaji.	I.L.R., 18 Bom., 48	...	...	235
Vishnu Chintaman v. Balaji bin Raghuji.	I.L.R., 12 Bom., 352	...	...	250
Vythelinga Mudelly v. Candasawmy Mudelly.	8 M.H.C.R., 21	...	...	294, 295

W

Wallace, <i>In re</i> .	L.R., 1 P.C., 283	...	...	19
Werle & Co. v. Colquhoun.	L.R., 29 Q.B.D., 753	...	...	209
Whistler v. Forster.	32 L.J., (C.P.), 161	...	...	656
Williams v. Millington.	1 H.B.L., 81; 2 R.R., 724	...	...	133, 134, 135
Willoughby v. Willoughby.	1 R.R., 397	...	...	480, 482
Wills v. Bridge.	18 L.J., Ex., 384	...	...	181, 182, 183
Worthington v. Warrington.	17 L.J., C.P., 117	...	...	181

Y

Yeshwadabai v. Ramachandra Tukaram.	I.L.R., 18 Bom., 66	...	PAGE
Yesu Ramji Kalnath v. Balakrishna Lakshman.	I.L.R., 15 Bom., 583.	...	53
		...	476, 478, 481, 483

Z

Zamindar of Merangi v. Sri Raja Satrucharla Ramabhadra Razu.	L.R., 18 L.A., 45; I.L.R., 11 Mad., 380; I.L.R., 14 Mad., 237	...	...	587, 609
--	---	-----	-----	----------

GENERAL INDEX

FOR

1901.

PAGE

ABKARI ACT (MADRAS)—ACT I OF 1886—*Restriction prohibiting licensed vendor of toddy from having interest in the sale of arrack—Partnership agreement between licensed vendor of toddy and licensed vendor of arrack—Illegality—Void agreement :*

A held a license for the sale of toddy, while B held a license for the sale of arrack. A entered into an agreement of partnership with B in the business of vending arrack and toddy. At the time when this agreement was entered into, a rule framed under the Abkari Act prohibited a person having a license for the sale of toddy from being interested in the sale of arrack, or a person having a license for the sale of arrack from being interested in the sale of toddy. A subsequently sued B for dissolution of partnership and for the recovery of money due to him in respect of the partnership:—*Held*, that the agreement had been entered into in contravention of the rule framed under the Abkari Act; that the rule in question was not one merely for the protection of the revenue but had also for its object the regulation of the liquor traffic in the interests of the public; and that the agreement was, in consequence, void *ab initio*, as being opposed to public policy. Inasmuch as the provisions of the Abkari Act, as a whole, show that every person carrying on abkari business as a principal must be licensed under the Act, such a business cannot be carried on by a partner who does not hold such a license.

Marudamuthu Pillai v. Rangasami Moopan ... 401

2. —————, s. 55 (g)—“Wash” fit for distillation
—“Materials” for manufacturing liquor :

A liquid mixture known as “wash,” consisting of jaggery and babool bark and proved to be fit for distillation, constitutes “materials” for the purpose of manufacturing liquor within the meaning of section 55 (g) of the Abkari Act.

Queen-Empress v. Gangayya ... 417

ACTS :

1839, XXIV :

See GANJAM AND VIZAGAPATAM AGENCY COURTS ACT.

1841, XIX :

See SUCCESSION (PROPERTY PROTECTION) ACT.

1858, XXV :

See LUNACY (DISTRICT COURTS) ACT.

1859, XIII :

See WORKMAN'S BREACH OF CONTRACT ACT.

1860, XLV :

See PENAL CODE.

1863, XX :

See RELIGIOUS ENDOWMENTS ACT.

1865, VIII (MADRAS) :

See RENT RECOVERY ACT (MADRAS).

” X :

See SUCCESSION ACT.

- 1870, VII:
See COURT FEES ACT.
- 1871, I:
See CATTLE TRESPASS ACT.
- 1872, IX:
See CONTRACT ACT.
- 1873, III (MADRAS):
See CIVIL COURTS ACT (MADRAS).
- " X:
See OATHS ACT.
- 1877, I:
See SPECIFIC RELIEF ACT.
- " III:
See REGISTRATION ACT.
- " XV:
See LIMITATION ACT.
- 1879, I:
See STAMP ACT.
- " XVIII:
See LEGAL PRACTITIONERS ACT.
- 1881, XXVI:
See NEGOTIABLE INSTRUMENTS ACT.
- 1882, IV:
See TRANSFER OF PROPERTY ACT.
- " V:
See EASEMENTS ACT.
- " XIV:
See CIVIL PROCEDURE CODE.
- " XV:
See PRESIDENCY SMALL CAUSE COURTS ACT.
- 1884, IV (MADRAS):
See DISTRICT MUNICIPALITIES ACT (MADRAS).
- " V (MADRAS):
See LOCAL BOARDS ACT (MADRAS).
- 1886, I (MADRAS):
See ABRKARI ACT (MADRAS).
- 1887, I (MADRAS):
See MALABAR COMPENSATION FOR TENANTS IMPROVEMENTS ACT (MADRAS).
- " VII:
See SUITS VALUATION ACT.
- " IX:
See PROVINCIAL SMALL CAUSE COURTS ACT.
- 1889, I (MADRAS):
See VILLAGE COURTS ACT (MADRAS).
- " VII:
See SUCCESSION CERTIFICATE ACT.
- 1891, I (MADRAS):
See GENERAL CLAUSES ACT (MADRAS).
- " XII:
See COURT FEES ACT (4).
- 1892, VII:
See MADRAS CITY CIVIL COURT ACT.
- 1893, IV:
See PARTITION ACT.
- 1897, III:
See EPIDEMIC DISEASES ACT.

- 1897, VIII:
See REFORMATORY SCHOOLS ACT.
- 1898, V:
See CRIMINAL PROCEDURE CODE.
- 1899, II:
See STAMP ACT.
- 1900, I (MADRAS):
See MALABAR COMPENSATION FOR TENANTS IMPROVEMENTS ACT (MADRAS).

BAIL—Release on bail of a person convicted by Sessions Court of Madras pending appeal to Privy Council—Jurisdiction of High Court:

A person was, at Criminal Sessions held in Madras, convicted of certain offences and sentenced to imprisonment and fine. Upon a certificate being granted by the Advocate-General under section 26 of the Letters Patent, the High Court reviewed the conviction and reduced the sentence. The accused obtained from the Judicial Committee of the Privy Council special leave to appeal, and also applied to be released on bail; but the Judicial Committee expressed the opinion that the latter application should be decided by the Madras High Court. Upon application being made accordingly to the Madras High Court:—*Held*, that the High Court had jurisdiction to make an order releasing the accused on bail pending the decision of the Privy Council; and that having regard to the rule laid down by the Judicial Committee in *Eparte Carew*, ([1897] A.C., 719), as to the circumstances under which an appeal in a Criminal matter will be admitted by the Privy Council, the accused ought to be released on bail in the present case.

Queen Empress v. Subrahmania Ayyar 161

CASES:—

- Abrath v. North Eastern Railway Co.*, (I.L.R., 11 Q.B.D., 440; L.R., 11 App. Cas., 24), referred to 59
- Balkishan v. Kishan Lal*, (I.L.R., 11 All., 148), approved and followed ... 351
- Bhagiram Dome v. Ahar Dome*, (I.L.R., 15 Calc., 388), referred to 82
- Bhugvanbutti Chowdhry v. Forbes*, (I.L.R., 28 Calc., 78), followed 445
- Ex parte Carew*, ([1897] A.C., 719), referred to 161
- Girish Chunder Ghose v. The Queen-Empress*, (I.L.R., 20 Calc., 857), referred to 238
- Hall v. Venkatakrishna*, (I.L.R., 13 Mad., 394), followed 549
- Hari Lal v. Muhamdi*, (I.L.R., 21 All., 454), discussed 233
- In re Wallace*, (I.L.R., 1 P.C., 283), referred to 17
- In the matter of the petition of Ganeshi*, (I.L.R., 15 All., 192), referred to ... 238
- Kellie v. Fraser*, (I.L.R., 2 Calc., 445), referred to 32
- Krishna Ayyan v. Venkatachalla Mudali*, (7 M.H.C.R., 60), referred to 37
- Krishna Menon v. Kesavan*, (I.L.R., 20 Mad., 305), referred to 451
- Krishnasami Konan v. Krishnasami Ayyar*, (I.L.R., 22 Mad., 519), distinguished. 555
- Kumhayen Haji v. Mayan*, (I.L.R., 17 Mad., 98), not followed 421
- Maharajah of Jeypore v. Papayamma*, (I.L.R., 23 Mad., 329), referred to ... 345
- Mahomed Buksh Khan v. Hosseini Bibi*, (L.R., 15 I.A., 81; I.L.R., 15 Calc., 684), referred to 514
- Mody v. Queen Insurance Co.*, (I.L.R., 25 Bom., 332), followed 549
- Mullapudi Balakrishnayya v. Venkatanarasimha Appa Rau*, (I.L.R., 19 Mad., 329), followed 509
- Mungul Pershad Dichit v. Gria Kant Lahiri Chowdhry*, (L.R., 8 I.A., 123; I.L.R., 8 Calc., 51), followed 670, 683

Mussamat Rambutty Koor v. Kamessur Pershad , (22 W.R., (C.R.), 36), referred to ...	20
Muttia v. Virammal , (I.L.R., 10 Mad., 283), followed ...	690
Nanda Rai v. Raghunandan Singh , (I.L.R., 7 All., 282), considered ...	647
Naraganti Achannagar v. Venkatachalapati Nayanivaru , (I.L.R., 4 Mad., 250), followed ...	563
Natesan Chetti v. Soundararaja Ayyangar , (I.L.R., 21 Mad., 141), followed ...	233
Queen v. Nabi , (I.L.R., 6 Mad., 247), discussed ...	272
Queen v. Revu Pothadu , (I.L.R., 5 Mad., 391n), referred to ...	82
Queen-Empress v. Bham , (I.L.R., 23 Bom., 483), considered ...	322
Queen-Empress v. Brij Narain Man , (I.L.R., 20 All., 529), considered ...	322
Queen-Empress v. Gundya , (I.L.R., 13 Bom., 502), referred to ...	675
Queen-Empress v. Hanumantha Reddi , (I.L.R., 23 Mad., 225), considered ...	137
Queen-Empress v. Manick Chandra Sarkar , (I.L.R., 24 Calc., 492), followed ...	322
Queen-Empress v. Narain Singh , (I.L.R., 22 All., 340), referred to ...	238
R. v. R. , (I.L.R., 14 Mad., 88), commented on ...	358
Rai Btkishen Dass v. Raja Run Bahadoor Sing , (L.R., 10 I.A., 162; I.L.R., 10 Calc., 35), referred to ...	266
Ramachandra v. Narayanasami , (I.L.R., 16 Mad., 333), referred to ...	37
Sariatoola Molla v. Raj Kumar Roy , (I.L.R., 27 Calc., 709), referred to ...	185
Shirekuli Timapa Hegda v. Mahablya , (I.L.R., 10 Bom., 435), dissented from ...	266
Srirangachariar v. Ramasami Ayyangar , (I.L.R., 18 Mad., 189), referred to ...	445
Subbammal v. Huddleston , (I.L.R., 17 Mad., 273), followed ...	445
Subramaniam v. Perumal Reddi , (I.L.R., 18 Mad., 454), referred to ...	450
Subramanya Pandya Chokka Talavar v. Sica Subramanya Pillai , (I.L.R., 17 Mad., 316), referred to ...	563
Tofaluddi Peada v. Mahar Ali Shzha , (I.L.R., 26 Calc., 78), considered ...	397
Venkatamarasimha Naidu v. Papammah , (I.L.R., 19 Mad., 54), followed ...	683
Venkatappayya v. Venkatapathi , (Appeal No. 230 of 1895 (unreported)) followed ...	686
Virammal v. Rungayyangan , (I.L.R., 4 Mad., 331), followed ...	421

CATTLE TRESPASS ACT—ACT I OF 1871, s. 24—Rescue of cattle after seizure for trespassing on public property—Conviction—Omission to record finding as to whether locality was public property—Legality of conviction:

Certain persons had been fined for rescuing cattle after seizure under section 24 of the Cattle Trespass Act, 1871. The judgment contained no finding to the effect that the land on which the cattle had been seized was public property in charge of the Public Works Department:—*Held*, that the conviction must be set aside, and the case remanded.

Queen-Empress v. Lakshman ...	318
--------------------------------------	-----

CIVIL COURTS ACT (MADRAS)—ACT III OF 1873, s. 18—Muhammadan Law—Gift of one-third of donor's interest in property—Donor not put into possession—Validity of gift—Doctrine of "musha" or confusion:

Certain property having been taken up under the Land Acquisition Act, two persons claimed a share in the compensation to be paid in respect of it, alleging that the property in question had been assigned to them by a registered deed of gift and that it had devolved upon their assignor as a sharer under the Muhammadan Law, in the estate of a deceased relative. The deed of gift recited the fact that the assignor had become entitled to 14 out of 24 shares in the said estate and authorised the claimants to collect the assignor's shares from tenants and others who were in

possession of the properties by means of suits or mediation and directed the claimants to take as a gift to their mosque one-third of the net balance so collected. The claim was disallowed by the Court of First Instance on the ground that the gift was invalid under Muhammadan Law, because the claimants, as donees, had not been put into possession of the property, and also because the gift was of an undefined share and therefore invalid according to Muhammadan Law by reason of "musha" or confusion:—*Held*, that even if the doctrine of "musha" was in force in the Presidency of Madras, the claimants were entitled to be paid the compensation claimed. Whether the doctrine of "musha" is in force in the Presidency of Madras.—*Quære*. *Per BENSON, J.*—The validity of the gift was not "a question regarding succession, inheritance, marriage or caste, or any religious usage or institution," as referred to in the Madras Civil Courts Act, 1873, and therefore the rules of Muhammadan Law with regard to gifts were not necessarily the rules by which the question should be decided. The Muhammadan Law as adopted by our Courts does not require immediate possession to be given in all cases, and it may be doubted whether even the restricted rule as to possession is any longer adapted to modern requirements and whether the mode of transfer laid down as obligatory on Europeans and Hindus by section 123 of the Transfer of Property Act and adopted by the parties in this case, (namely, by registered instrument attested by two witnesses and signed by the donor), ought not in equity and good conscience to be held to be as efficacious as delivery of possession in the case of Muhammadans. *Mahomed Buksh Khan v. Hosseini Bibi*, (L.R., 15 I.A., 81; I.L.R., 15 Calc., 684), referred to.

Alabi Koya v. Mussa Koya ...	513
-------------------------------------	-----

CIVIL PROCEDURE CODE—ACT XIV OF 1882, s. 13—Denial of plaintiff's title in a suit for rent—Decree in favour of defendants—Subsequent suit by same plaintiff against same defendants for possession—Res judicata—Oaths Act—Act X of 1873—Decree upheld in appeal on strength of oath—Final adjudication:

In 1898 A. sued B, C, D and E in a Munsif's Court to recover six years' rent alleged by A to be due in respect of certain land on a registered deed of lease. B, C and D denied A's title and pleaded that they were not liable for rent, and that the land belonged to and was in the possession of E. This defence was upheld by the Court of First Instance and on appeal. In 1899 A brought the present suit against B, C, D and E, in the same Court, on the same deed of lease; this time claiming possession of the same land, together with rent for less than two years. It was contended that this suit was not barred under section 13 of the Code of Civil Procedure inasmuch as the Court which had tried the former suit was not a Court competent to try the present suit, within the meaning of the section referred to, for the reason that the former suit was cognizable by a Small Cause Court, whereas the present suit was for the recovery of land, and a second appeal would lie from a decree passed in it:—*Held*, that the Court which had tried the former case was a Court competent to try the present suit within the meaning of section 13 of the Code of Civil Procedure. *Subbammal v. Huddleston*, (I.L.R., 17 Mad., 273), and *Bhugwanbutti Chowdhurani v. Forbes*, (I.L.R., 28 Calc., 78), followed. *Srirangachariar v. Ramasami Ayyangar*, (I.L.R., 18 Mad., 189), referred to. The suit of 1898 had been affirmed on appeal on the strength of an oath taken under the Oaths Act:—*Held*, that it was a confirmation of the original decree. As between the parties a decree arrived at after the taking of an oath on a question of fact in the case is none the less a final adjudication.

Ahmed v. Moidin ...	444
----------------------------	-----

—s. 13—Res judicata—Suit by A against B in City Civil Court—Subsequent suit in High Court by B against A raising same questions—Decision first arrived at in High Court—Subsequent trial of A's suit in City Civil Court—Effect of High Court Judgment as res judicata:

A instituted a suit against B in the Madras City Civil Court. B subsequently instituted a suit in the Madras High Court on its Original Side

against A. The parties in both Courts were the same and the matters in controversy between them were substantially the same. The latter related to the prescriptive right of B to light and air in respect of certain windows situated in a wall abutting on A's house. Issues were framed in both Courts relating to this question. By consent, A's suit in the City Civil Court was adjourned from time to time to await the final decision of the High Court. This was duly arrived at in a judgment of an Appellate Court, after which A's suit came on for hearing in the City Civil Court. The question then first raised and considered was whether the decision of the High Court barred the trial of the suit, it being contended on behalf of A that inasmuch as A's suit had been filed prior to B's, the decision in B's suit did not operate as a bar:—*Held*, that the suit was barred. The doctrine of *res judicata*, so far as it relates to prohibiting the re-trial of an issue, refers, not to the date of the commencement of the litigation but to the time when the Judge is called upon to decide the issue. *Balkishan v. Kishan Lal*, (I.L.R., 11 All., 148), approved and followed.

Gururajammah v. Venkatakrishnamma Chetti 350

2., s. 13—*Res judicata*—Suit in Subordinate Court—Previous suit in Munsif's Court—Valuation of a suit for declaration as to membership of tarwad—Specific Relief Act—Act I of 1877, s. 42:

A suit was brought in the Court of a Subordinate Judge for a declaration that the plaintiffs and defendants therein had no community of interest and were not members of a tarwad having joint property. The property of the tarwad was valued by plaintiffs at Rs. 3,000, and this was held to be a true valuation, but it appeared that the value of the plaintiffs' interest in it was Rs. 2,000 only. In a previous suit between the parties, which had been brought in the Court of a District Munsif, it had been held that the parties belonged to the same family; and this finding had been upheld on appeal. Plaintiffs did not ask, by way of further relief, for possession of a portion of the property, which was in the enjoyment of the defendants:—*Held*, that the suit was barred, both as *res judicata*, and by section 42 of the Specific Relief Act. The value of a suit for a declaration that certain persons are or are not members of a tarwad is the value of the share of the tarwad property which would be allotted to them if a partition were made by common consent.

Panga v. Unnikutti 275

4., s. 13, Expl. III—*Res judicata*—Application in execution for two reliefs—Order passed granting one relief and making no reference to the other—Subsequent application for the other relief—Power of Court to grant:

A decree awarded a plaintiff possession of land together with mesne profits. Plaintiff subsequently applied, in execution, for delivery of the land and for the mesne profits. The Court passed an order on this application directing plaintiff to be put into possession of the land, but making no reference whatever to the mesne profits. Plaintiff subsequently made another application for mesne profits, when it was contended that inasmuch as the prayer for mesne profits had not been granted when the previous application was dealt with, it must be taken that the application for mesne profits had been refused, and that the matter was consequently *res judicata*:—*Held*, that the application was not barred: and that the law of *res judicata* as laid down in explanation III to section 13 of the Code of Civil Procedure had no application to the case.

Nityananda Gantayet v. Gajapati Vasudeva Deva 681

5., s. 13, Expl. 3, and s. 43—Relinquishment of, or omission to sue for, portion of claim—Omission to claim remedy in former suit to which plaintiff was entitled—*Res judicata*—Omission to put forward ground of defence:

The appellants and respondents entered into an agreement in March 1891 for the sale by the latter to the former of a coffee estate. The

appellants were, from the date of the agreement, to provide the expenditure for, and to carry on, the cultivation; but, in order to protect certain mortgages on the estate made to a third person, the possession was, until 31st July, to remain with the respondents, whose manager however was to be subject to the directions and control of the appellants and to carry out their orders. On that date the sale was to be completed. The terms of respondents' agreement were observed for a time, but objections were taken by the completion of the proposed conveyance, and delay took place in the Disputes arose and interference by accusing the other of causing the delay. the estate took place which led to litigation between the working of against the other, but neither in their defence nor party brought a suit nor in the plaint in their own suit did the appellants claim respondents' suit, have the sale completed, although the respondents in their pleadings asserted that it had come to an end: the pleadings and issues in those suits raised only questions as to possession and compensation for disturbance, and the decisions in the suits dealt with no questions except those:—*Held*, by the Judicial Committee that a subsequent suit brought by the appellants for specific performance of the agreement was barred by section 43 of the Civil Procedure Code. The agreement was the only cause of action in both suits brought by the appellants, and in the former suit they had made it the basis of claims to possession and damages, and they could not now make it the basis of a claim for transfer of the estate, which they had in the former suit omitted to do. The High Court had held that the previous litigation operated also as a *res judicata* under section 13 of the Civil Procedure Code, on the ground that the appellants might and ought to have put forward their claim to specific performance by way of defence to the suit against them by the respondents in 1891, and that their right to that remedy was therefore barred by explanation 3 of that section. The Judicial Committee, without deciding that point, affirmed the decision of the High Court on section 43.

Rangayya Gowndan v. Nanjappa Rao 491

6., ss. 16, 18-A, 17, 373—Suit instituted by leave and withdrawn with liberty to bring fresh suit on same cause of action—Subsequent refusal of leave to bring such fresh suit—Legality of order of refusal—Letters Patent, art. 12—Exhaustion of leave by filing suit:

Leave was obtained for the institution of a suit under article 12 of the Letters Patent, and a suit was instituted in pursuance thereof, but, at the settlement of issues, was withdrawn, leave being given to plaintiffs under section 373 of the Code of Civil Procedure to institute a fresh suit upon the same cause of action if so advised. Plaintiffs again applied for leave under article 12 of the Letters Patent to institute a fresh suit, which was refused, and against that order of refusal plaintiff appealed:—*Held*, that the force of the original order granting leave to institute the suit was exhausted by its institution in pursuance thereof; and that, in consequence, when leave was again applied for, in respect of the institution of the fresh suit, there was nothing to prevent the Court from dealing with the application, and granting or refusing leave, as it deemed proper:—*Held also*, that the order which was passed by the Court in the due exercise of its discretion must be upheld.

Sabbapathi Gurukkal v. Lakshmu Ammal 293

7., ss. 43—Limitation Act—Act XV of 1877, art. 97—Suit for specific performance—Subsequent suit for money paid on a consideration that failed:

Defendant having failed to convey certain property belonging to himself and his son to plaintiff as agreed, plaintiff obtained a decree for specific performance, in pursuance of which the price was paid and a conveyance executed. Plaintiff was then obliged to sue for possession, when it was found that the sale did not bind the son's interest and on grounds of convenience plaintiff was awarded the value of defendant's share instead of a decree for partition. He now sued to recover the balance of the price paid, and it was contended that the suit was, in fact, one for damages

for breach of the contract to convey, and as such was barred under section 43 of the Code of Civil Procedure, inasmuch as the damages claimed could have been sued for in the alternative in the previous suit for specific performance:—*Held*, that the suit was not barred; it being, in fact, for the recovery of money paid on a consideration that had failed, and the cause of action being different from that in the suit for specific performance:—*Held also*, that the suit was not barred by limitation, inasmuch as the failure of consideration must be taken to have occurred when it was found, in the suit for possession, that the plaintiff was not entitled to recover the son's share; which was instituted, article 97 of the Limitation Act, 1877.

Ayyar v. Venkata Subrahmanian 27

8., s. 162—*Summons forms Nos. 125, 126—Summons to witness—Postponement of hearing of case—Necessity for issuing fresh summons—Practice:*

When a witness has been summoned to give evidence in a case which is not reached, it is not necessary to issue a fresh summons to the witness. He need only be warned that his attendance will be required on the day to which the hearing of the case may be postponed.

Subbarayadu v. Chenchuramayya 200

9., s. 206—*Limitation Act—Act XV of 1877, art. 179 (3):*

A decree was passed on 31st December 1892, and no appeal was presented by either party therefrom. Defendant No. 2, however, filed a petition for amendment of the decree in respect of the costs, which was granted on 6th October 1893. On 6th July 1896, defendant No. 2 applied for execution of the decree, and he again applied on 29th April 1898. On its being contended that the application was barred by limitation:—*Held*, that it was not barred. The order passed by the Court determining the amount of costs must be treated as a continuation or completion of the judgment, and the amendment made was therefore substantially made on review of judgment, and article 179(3) of the Limitation Act applied.

Venkata Jogayya v. Venkatasimhadri Jagapatirazu 25

10., ss. 206, 622—*Omission in judgment—Decree in conformity with judgment—Amendment of decree under section 206—Remedy by appeal—Inadmissibility of revision petition—Limitation Act—Act XV of 1877, s. 5:*

Defendants in a suit held certain land on lease from plaintiff, who alleged that they had encroached upon his land and by that means held more than the area to which they were entitled. He sued for possession of the excess and also claimed arrears of rent. Defendants denied the alleged encroachment, and pleaded that if it should be proved, they were willing to pay increased rent. They also admitted liability in respect of the arrears of rent. The encroachment was proved, and the District Munsif gave judgment declaring defendants liable for increased rent in proportion, a decree being drawn up in similar terms. Both judgment and decree omitted to award the amount admittedly due as arrears of rent. Plaintiff thereupon presented a petition to the District Munsif, who ordered the decree to be amended so as to render defendants liable for the said arrears. This order was passed more than one month from the date of the decree. Upon a petition being preferred by defendants in the High Court against the District Munsif's order of amendment:—*Held*, that the petition was not admissible, inasmuch as it was open to the petitioner, under section 5 of the Limitation Act, to appeal against the decree as amended, notwithstanding that a month had expired from the date of the decree. *Nandu Rai v. Raghunandan Singh*, (I.L.R., 7 All., 282), considered.

Visvanathan Chetti v. Ramanathan Chetti 64

11., ss. 206, 623—*Compromise after decree—No amendment of decree unless authorized by either s. 206 or s. 623, Civil Procedure Code—Proceeding in execution barred by time—Limitation Act—Act XV of 1877, sched. II, art. 179:*

The High Court has no power to alter its own decree, except under the provisions of either section 206, or section 623 of the Code of Civil Procedure. The ground of review must have been existing at the time of the decree, the section 623 not authorizing review of a decree, which was right, on the happening of a subsequent event. After a decree for land against four defendants a compromise was made between the plaintiff and the third defendant. The first and fourth had acknowledged the plaintiff's right. The second and third had defended the suit, and the decree had been made, and affirmed on appeal to the High Court, jointly and severally against the first three, and conditionally against the fourth. An application by the second and third defendants for leave to appeal to Her Majesty was withdrawn, the two parties to the compromise having obtained an order for amendment of the decree in its terms. For the execution of the decree against the three defendants, other than the third, as to the proportionate part of the property sued for, and not the subject of the compromise, the decree-holder afterwards obtained an order. This order was reversed by the High Court. Hence this appeal:—*Held*, that the order directing the amendment of the decree in the terms of the compromise was beyond the powers of the High Court, and was without operation either in favour of or against those defendants who had not been parties to the petition for that amendment:—*Held also*, on the decree-holder's petition for execution of the decree, that the period of limitation commenced from the date of the primary, and not of the amended, decree of the High Court. Execution was therefore barred by limitation. Instead of attempting the alteration in the decree, the High Court could properly have made the compromise a rule of Court, and have stayed all proceedings against the defendant who was a party to it, except for the purpose of enforcing it against him.

Kotagiri Venkata Subbamma Rao v. Vellanki Venkatarama Rao 1

12., ss. 235, 273—*Execution—Decree for money—Attachment of a right to recover mesne profits by way of restitution:*

A judgment-debtor was compelled by a decree obtained against him to deliver up possession of certain land. On appeal, the High Court reversed the decree under which he had been dispossessed and declared him to be entitled to recover possession with mesne profits. The holder of another decree against the same judgment-debtor attached, in execution of his decree the judgment-debtor's right to recover the mesne profits. The decree-holder then applied under section 273 of the Code of Civil Procedure to recover the mesne profits by way of execution:—*Held*, that he was not entitled to do so. The right of the judgment-debtor to recover the mesne profits by way of restitution was not a decree for money within the meaning of section 273 of the Code of Civil Procedure. Such a right might be enforced by suit or by summary process in execution under section 583 of the Code of Civil Procedure, but was not a decree within the meaning of section 273. Section 273 applies only to cases in which the right attached is one expressly settled by the decree. *Semle*, that if a summary order under section 583 awarding mesne profits had been made prior to the decree-holder's attachment, it might have amounted to a decree within the meaning of section 273.

Vasudeva Ravi Varman v. Narayana Pattar 341

13., ss. 235, 274 and 287—*Step-in-aid of execution—Failure by purchaser to secure possession of property purchased in execution—Execution incomplete:*

A decree was passed in favour of the plaintiff in a suit on 20th October 1893, and on 19th October 1894 the decree-holder applied for execution and purchased under a Court-sale certain land belonging to the judgment-debtor. On 13th March 1896 the decree-holder made an application for delivery to him of the lands so purchased, but delivery was not made in

respect of some of them. On 6th March 1899 an application was made for further execution of the decree:—*Held*, that the execution was not complete so long as the purchaser had not secured possession, and that the application of 13th March might fairly be called an application to take a step-in-aid of execution. *Sariatoola Molla v. Raj Kumar Roy*, (I.L.R., 27 Cal., 709), referred to.

Lakshmanan Chettiar v. Kannammal 185

14. ———, s. 244—*Addition by appellant of parties to record as representatives of deceased respondent—Dismissal of appeal—Application by some representatives in execution—Dispute among representatives as to whether some of them had been wrongly brought on—Question determinable in execution:*

A plaintiff having obtained a decree in a suit, the defendant appealed, and while that appeal was pending plaintiff died. Defendant thereupon brought several persons on the record by an application to the Court under section 368 of the Code of Civil Procedure, alleging them to be the representatives of the plaintiff. The appeal was unsuccessful, and some of the persons who had been brought on the record by defendant, as representatives of plaintiff, made an application in execution, in which the other representatives, similarly brought on, were not joined, on the ground that they were not, in fact, representatives. Those other representatives however claimed to be entitled to join in the execution proceedings. The Munsif stayed the application under the last clause of section 244 of the Code of Civil Procedure, and directed the parties to decide their rights by separate suit. This order was appealed against, when the District Judge set it aside and directed the Munsif to determine the question and then proceed with the execution:—*Held*, that the order was wrong. The Munsif had no jurisdiction in execution to re-open the question as to whether certain persons brought on the record as representatives of the deceased plaintiff, and as such made respondents in the appeal, had been properly joined as parties or not.

Venkatachala Reddi v. Venkatarama Reddi 665

15. ———, s. 244—*Hindu Law—Decree against representative of family creating charge on family property—Rights to execute against sons of defendants though not actually made parties:*

Where it is clear from the terms of a decree for maintenance that it was intended to create a charge on property, and the property to be charged can be otherwise identified, it is immaterial that the decree does not specify the property by metes and bounds. A widow sued three undivided brothers for maintenance and obtained a decree which created a charge on certain family property in respect of the maintenance sued for. The son of the first defendant was a minor at the date of the decree and was not a party to it. The widow attached the property. Upon the death of first defendant, subsequent to the decree, his son was added as legal representative and claimed the property by right of survivorship, and sought to have it released from attachment on the ground that it was not liable for the widow's maintenance:—*Held*, that as the property was charged by the decree with maintenance it could be sold in execution of the decree even though the son had not been made a party to the decree, there being no contention that the debt was either illegal or immoral and the decree being not merely a personal one against the father alone but against the representatives of the family. *Muttia v. Varammul*, (J.L.R., 10 Mad., 283), followed.

Minakeshi Achi v. Chinnappa Udayan 689

16. ———, s. 244—*Landlord and tenant—Relief against forfeiture for non-payment of rent though stipulation for payment contained in compromise decree—Decree containing general stipulation—Power of Court to relieve against penalty in execution proceedings:*

Certain lands were held on lease, and the rent fell into arrears. A suit was then brought for the arrears and for possession, but the parties arrived

at a compromise and a decree was passed in terms of that compromise. The decree contained a stipulation that if default should be made in payment of rent within the time fixed for payment each year, the leases should be forfeited. Default was made, and possession of the lands and the arrears of rent were sought for in execution of the decree, when it was objected that the stipulation for forfeiture for non-payment of rent was a penal one, and should not be given effect to, even though it was contained in a decree which was capable of execution:—*Held*, that inasmuch as the decree passed by the Court was a mere adoption of the contract which existed between the parties to it, the Court must be taken to have adopted the contract with all its incidents. It was therefore competent to the Court to relieve against the forfeiture. *Shirekuli Timapa Hegda v. Mahabliya*, (I.L.R., 10 Bom., 435), dissented from; *Rai Balkishen Dass v. Raja Run Bahadoor Singh*, (L.R., 10 I.A., 162; I.L.R., 10 Cal., 365), referred to.

Nagappa v. Venkat Rao 265

17. ———, s. 245—*Malabar Law—Suit against karnavan as manager of tarwad—Attachment of tarwad property under decree—Subsequent order of release—Suit to cancel order of release—Barred by section 244 of Civil Procedure Code:*

Plaintiff in a suit obtained a decree against the karnavan of defendants as senior member and manager of the tarwad, and attached tarwad property in execution thereof. Objection was then raised by defendants that the property was not liable under the decree, and the property was ordered to be released. Upon a suit being brought by plaintiff against defendants for the cancellation of the last-mentioned order:—*Held*, that the suit was not maintainable by reason of section 244 of the Code of Civil Procedure.

Kamal Kutti v. Ibrayi 658

18. ———, s. 258—*Agreement by purchaser of mortgaged property to pay an agreed sum to mortgagee holding decree for sale—Transfer of Property Act—Act IV of 1882, s. 57—Payment into Court by purchaser of mortgaged property in pursuance of adjustment of decree out of Court—Limitation Act—Act XV of 1877, sched. II, art. 173A—Application for adjustment of decree to be recorded:*

The mortgagee of certain property brought a suit on his mortgage and obtained a decree for sale. Petitioner then negotiated with the mortgagor for the purchase of the lands. The mortgagee consented to the proposed purchase and agreed to accept from petitioner a sum of money in full satisfaction of his mortgage decree. Petitioner completed the purchase accordingly and tendered the agreed sum to the mortgagee, who refused to accept it. Petitioner thereupon filed this petition, under section 57 of the Transfer of Property Act, asking to be allowed to pay the amount into Court and praying for a declaration that the property was freed from encumbrance. The mortgagee contended that the application fell under section 258 of the Code of Civil Procedure, in which case it would be barred under article 173A of the Limitation Act:—*Held*, that section 57 of the Transfer of Property Act did not govern the case, as it involved a question of the adjustment of decree out of Court; also that section 258 of the Code of Civil Procedure was not applicable, and that petitioner was not precluded by article 173A of the Limitation Act from proving the agreement set up by him under section 244, clause (c), of the Code of Civil Procedure, and that he was entitled, on payment of the money into Court, to the declaration sought.

Mallikarjuna Sastri v. Narasimha Rao 412

19. ———, ss. 280, 281, 283—*Property in the possession of a judgment-debtor—Attachment of right to receive a debt—Specific Relief Act—Act I of 1877, s. 42—Consequential relief:*

First defendant had obtained a decree against second defendant in execution of which he had attached and sold the second defendant's right to collect rent payable to him in respect of certain properties by tenants for a certain year. A claim had been preferred by plaintiff objecting to

the said attachment on these grounds, under section 278 of the Code of Civil Procedure, but had been rejected. Plaintiff now sued for a declaration that the attachment and sale were invalid, on the grounds that the properties belonged to a certain mutt, and not to second defendant; that second defendant had been manager of the mutt, but had been dismissed, plaintiff replacing him; and that the rents in question were not liable for the debts of second defendant. The plaintiff prayed for no relief consequential to the declaration:—*Held*, that the attachment was of a debt in respect of which prohibitory orders had been issued under section 268 of the Code of Civil Procedure; that the attachment of a right to receive a debt is not property capable of possession within the meaning of sections 280 and 281 of the Code of Civil Procedure and that the suit was therefore not one instituted under section 283 to establish a right to attached property; and that it had been properly dismissed. *Mussunut Rambutty Koer v. Kamessur Pershad*, (22 W.R., (C.R.), 36), referred to.

Basavayya v. Syed Abbas Sahel 20

20. —————, s. 311—*Setting aside sale in execution of decree—Postponement of sale from proclaimed date, and subsequent sale without fresh proclamation—Waiver of fresh proclamation by judgment-debtor—Objection to sale by other judgment-creditor for want of proclamation—Sustainability:*

A, the decree-holder in a suit, attached property of his judgment-debtor. B, the holder of another decree against the same judgment-debtor, brought the property to sale in execution of his decree. The sale was at first proclaimed for a certain date, but was twice postponed on the application of the judgment-debtor, who consented to waive the making of a fresh proclamation. A claimed to have the sale set aside on the ground of irregularity:—*Held*, that a waiver by a judgment-debtor of a fresh proclamation after a sale has been adjourned does not necessarily prevent a judgment-creditor from objecting to a sale so held, on that ground. *Semble*, that the refusal by a Court to issue a fresh proclamation, if applied for by a judgment-creditor in such a case, would constitute a ground on which the regularity of the sale might be impeached.

Chakrapani Chettiar v. Danji Settu 311

21. —————, s. 336—*Surety undertaking that judgment-debtor should apply to be declared an insolvent—Application in insolvency by judgment-debtor—Subsequent failure to appear—Release of surety:*

E became surety for a judgment-debtor, undertaking to produce the judgment-debtor in Court when called upon, and that he should apply to be declared an insolvent. The judgment-debtor, in due time, filed a petition in insolvency. Subsequently he failed to appear when called upon to do so and the petition was dismissed. On application being made for execution as against the surety:—*Held*, that the decree could not be executed against him.

Imbichunni Nayar v. Lalji Ram Doss Sait 560

22. —————, ss. 336, 349—*Release of judgment-debtor on finding a surety for his production at a specified time—Death of judgment-debtor before the expiration of that time—Release of surety—Execution of decree as against surety—Illegality:*

A judgment-debtor was released from custody on finding a surety for his production at a specified time. Before the expiration of that time the judgment-debtor died. The decree-holder thereupon obtained an order enforcing the decree as against the surety:—*Held*, that the order was illegal. The Court had no jurisdiction to enforce the obligation as a decree against the surety. Moreover the obligation of the surety was discharged by the death of the judgment-debtor. Appeal by the surety to the High Court treated as a revision petition.

Krishnan Nayar v. Itinan Nayar 637

23. —————, s. 372—*Letters Patent, art. 15—Refusal to order assignee of plaintiff to be brought on record—Appeal—Application to be brought on record in substitution for plaintiff and for postponement of decree:*

An order dismissing on its merits an application by the assignee of a plaintiff in a suit to be brought upon the record either in addition to or in substitution for the plaintiff, is a judgment within the meaning of article 15 of the Letters Patent and an appeal lies therefrom. The plaintiff in a suit, after its institution, assigned to A the subject-matter of the suit, and gave him power and authority to continue it either in addition to or in substitution for the plaintiff, and further constituted A his attorney. The suit was referred to a Judge in Chambers to take accounts, and a certificate was agreed to by the first defendant in it which left certain matters undetermined. The case was set down for hearing in order that a decree might be passed in terms of the certificate. A thereupon applied to be brought on the record in addition to or in substitution for the plaintiff in the suit and asked that the passing of a final decree therein might be postponed until the matters left undetermined by the certificate had been enquired into and determined:—*Held*, that the application was a reasonable one and should be complied with as A was directly interested in the matters to be settled by the decree.

Commercial Bank of India, Limited v. Sabju Sahel 252

24. —————, ss. 375, 462—*Agreement to refer to arbitration during pendency of suit—No order of reference made by Court—Power to give effect to agreement in the suit:*

During the pendency of a suit for partition between members of an undivided Hindu family, the division of the properties was referred by the parties to arbitrators, and an adjournment was granted by the Court to enable an award to be made. An order of reference was not, however, asked for, or made by the Court. An award was made, whereupon plaintiffs requested that it should be filed and that a decree might be passed in its terms. Defendants objected to the filing of the award. On the question whether the award could be given effect to in the suit:—*Held*, that the agreement to refer to arbitration had not been lawfully entered into, as the submission related to the rights of minors, who were parties to the suit, and leave of the Court had not been obtained under section 462 of the Code of Civil Procedure either before the submission to arbitration or after the award; and that the adjustment was in consequence not binding on the minors, nor (regard being had to the nature of the suit) on the major members of the family. The effect of the submission was to take away from the Court the power of adjudicating upon the rights of the minors and to leave such adjudication to a private tribunal. Such an agreement fell within section 462 of the Code of Civil Procedure. *Semble*, that assuming the award to be but the completion of an agreement lawfully entered into by the parties, and that such agreement plus the award affected the rights of the parties in the pending suit, it could only do so as an agreement adjusting the suit: and as such could be recorded and acted upon under section 375 of the Code of Civil Procedure. Whether an award filed under section 525 of the Code of Civil Procedure and obtained under similar circumstances, would be invalid.—*Quære*.

Lakshmana Chetti v. Chinnathambi Chetti 326

25. —————, ss. 402, 407—*Religious Endowments Act—Act XX of 1863, s. 18—Suit sanctioned for removal of trustees—Leave to sue in formâ pauperis:*

The provisions of chapter XXVI of the Code of Civil Procedure do not preclude a person, who has obtained leave to sue under section 18 of the Religious Endowments Act for the removal of the trustees of a temple, from being permitted to sue in formâ pauperis.

Gurusami Chetti v. Krishnasami Naikar 419

26. _____, s. 424—Notice previous to suing Secretary of State for India in Council or public officer—Notice by two out of three joint owners of land—"Cause of action":
- Three joint owners of land sued to recover a sum of money paid as water-rates, which they alleged had been illegally levied from them by Government in respect of faslis 1302 and 1303. Notice of suit had been given by only two of the plaintiffs, and that notice omitted to state the imposition of the rate for fasli 1303 as a cause of action, as at the date of its being given the rate for fasli 1303 had not been levied. On its being contended that the notice was invalid and that the suit founded thereon was unsustainable:—*Held*, that the notice was not invalid on the ground that it proceeded from only two out of three of the joint owners. The object of the notice required by section 424 of the Code of Civil Procedure is to give the defendant an opportunity for settling the claim, if so advised, without litigation, and that object had been fully attained by two out of three plaintiffs giving the notice:—*Held also*, that the notice was not invalid by reason of the fact that the collection of rate for fasli 1303 had not been stated as a cause of action. The collection of a further sum for a subsequent fasli, after notice of the suit had been given, was not a fresh cause of action requiring a further notice under section 424 of the Code of Civil Procedure. The term, "cause of action," in section 424, should not be construed in a narrow sense, the object of the section being merely to inform the defendant substantially of the ground of complaint.
- Secretary of State for India in Council v. Perumal Pillai ... 279
27. _____, s. 463—Suit against a lunatic not so adjudged—Lunacy (District Courts) Act—Act XXXV of 1858, ss. 2, 23—Appointment by Court of guardian ad litem to lunatic—Practice:
- The plaintiff in a suit against several defendants described the first defendant, (a widow, and not a minor), as of unsound mind, and sued her as being represented by her mother and guardian. The first defendant had not been adjudged of unsound mind under the Lunacy (District Courts) Act XXXV of 1858; nor did it appear that the Court of First Instance had satisfied itself that first defendant was, in fact, a lunatic or that it had approved of the guardian named and appointed by the plaintiff, as a fit and proper person. The suit was only contested by the second defendant. By section 463 of the Code of Civil Procedure the provisions contained in sections 440 to 462, (which relate to the conduct of suits by and against minors), are directed to apply, *mutatis mutandis*, in the case of persons of unsound mind adjudged to be so under Act XXXV of 1858 or under any other law for the time being in force. The contention having been raised that the suit was bad and must be dismissed because first defendant had not been so adjudged:—*Held*, that inasmuch as the right of suit against the lunatic was unquestionable, in the absence of any provision in the Code of Civil Procedure for the maintenance of suits against persons of unsound mind who have not been so adjudged under the Act, the Court should appoint a fit and proper person as guardian *ad litem*, upon its being established that the first defendant was, in fact, of unsound mind.
- Kadala Reddi v. Narisi ... 504
28. _____, ss. 491, 588—Attachment before judgment—Compensation—Appeal:
- There is no appeal from an order awarding compensation under section 491 of the Code of Civil Procedure.
- Narasinga Bhakshi v. Govinda Bhakshi ... 62
29. _____, ss. 493, 588—Order by Munsif dismissing petition under section 493 to commit for disobedience to injunction—Appeal to District Court under section 588—Reversal of Munsif's order and remand to Munsif for disposal—Appeal to the High Court—Maintainability of Appeal:
- A petition was filed in the Court of a District Munsif, under section 493 of the Code of Civil Procedure, praying for the committal of the

PAGE

counter-petitioner for disobedience to an injunction of the Court. The Munsif having dismissed the petition, the petitioner appealed, under section 588, to the District Judge, who set aside his order and remanded the petition to the Munsif. Against this order the counter-petitioner preferred an appeal to the High Court:—*Held*, that every order passed in an appeal under section 588 is final and that no appeal lay.

Venkatapathi Naidu v. Tirumalai Chetti ... 447

30. _____, s. 525—Application to file an award—Award relating to partition of property including immoveable property partly outside jurisdiction—Jurisdiction to file award and pass decree:

Matters in dispute between certain parties were submitted to arbitration within the jurisdiction of the High Court and an award was in due course made therein. The matter to which the award related was the partition of property, including immoveable property, part of which was situated outside the jurisdiction of the High Court. Application was then made that the award might be filed and a decree passed in its terms, when it was objected that the Court had no jurisdiction to entertain the application. Leave to sue had not been obtained under section 12 of the Letters Patent:—*Held*, that the Court had jurisdiction inasmuch as the right to have the award filed had originated within the jurisdiction. *Kellie v. Fraser*, (I.L.R., 2 Calc., 445), referred to.

Seshayya Chettiar v. Chengayya Chettiar ... 31

31. _____, s. 540—Appeal—General Clauses Act (Madras)—Act I of 1891, s. 8—Appellate jurisdiction of High Court in cases instituted under enactments in force at time of institution of suit but repealed before hearing of Appeal:

A suit was instituted in a District Court on 5th August 1897, in which a claim was made to the office of karnam. In October 1897 a notification was published under section 2 of Madras Proprietary Estates' Village Service Act (II of 1894), the effect of which was that as from the date of the notification section 11 of Regulation XXV of 1802 and Regulation XXIX of 1802, ceased to apply to the office of karnam. The Judge heard the suit, which had been filed prior to the notification, and dismissed it. Upon an appeal being preferred it was objected that the High Court had no jurisdiction to hear it:—*Held*, that the Court had jurisdiction. The appeal was from the judgment of a Court exercising original jurisdiction; and the High Court, if Madras Act II of 1894 had not been passed, would have had appellate jurisdiction, by virtue of section 540 of the Code of Civil Procedure, in suits brought under the said regulations. In cases where the Court of First Instance had jurisdiction to entertain the suit when it was instituted, and the parties had a right of appeal when the suit was instituted, the Appellate jurisdiction of the High Court is saved by section 8 of the Madras General Clauses Act, 1891, unless the right of appeal is expressly taken away:—Two persons joined in a suit, and claimed the offices of karnam and shroff as being hereditary. The offices formed portions of a permanently-settled estate of which first defendant was proprietor. The second defendant was alleged to have possession of the offices, the second plaintiff, who had the titular right to them, being thus wrongly kept out:—*Held*, that it was not necessary that the suit should have been brought for a declaration, there being no doubt as to the second plaintiff's title; and that it was properly brought for possession.

Sadasiva Pillai v. Kalappa Mudaliar ... 39

32. _____, s. 589—Suit of a small cause nature—Plaint based on muchalka but containing prayer as for the enforcement of a charge—Second Appeal:

In a suit filed in a Munsif's Court the plaintiff, a zamindar, alleged that first defendant, a tenant on his estate, had executed a muchalka, which was registered, in respect of certain lands and that second defendant was in possession of the lands and that default had been made in the payment of the kist referred to in the muchalka. The plaint contained no other

- allegations, but prayed for a decree for the arrears of kist and concluded with a prayer as for the enforcement of a charge in respect of the kist:—*Held*, that the plaint must be read as one for the enforcement of the terms of the muchalka, and that the suit was therefore of a small cause nature and no second appeal lay. *Mullapudi Balakrishnayya v. Venkatanarasimha Appa Rau*, (I.L.R., 19 Mad., 329), followed.
- Harischandra Deo v. Narayana* 508
33. —————, s. 586—*Suit of a nature cognizable in a Court of Small Causes—Suit for mesne profits—Second appeal—Provincial Small Cause Courts Act—Act IX of 1887, sched. II, art. 31:*
- A suit for mesne profits is not a suit for an account, but a suit for damages, and is not exempted from the jurisdiction of the Small Cause Courts under article 31 of schedule II to the Provincial Small Cause Courts Act. There is no second appeal from a decision in such a suit.
- Subba Rao v. Sitaramayya* 118
34. —————, s. 622—*Want of jurisdiction—Material irregularity—Succession (Property Protection) Act—Act XIX of 1841, ss. 3, 5, 8—Appointment of curator—Omission to take evidence before making order:*
- On an application under Act XIX of 1841 to recover possession of the properties of a deceased zamindar by summary suit and for the appointment of a curator pending the determination of the suit, the District Judge omitted to examine the complainant or inquire further under section 3 of the Act, but called for a report from the Collector under section 8, and on receipt thereof made an order under section 5 appointing a curator:—*Held*, (SUBRAHMANYA AYYAR, J., dissenting), that the order must be set aside under section 622 of the Code of Civil Procedure. The Judge was bound to hold an enquiry under section 3 before appointing a curator under section 5. The provisions of section 3 are mandatory and not merely directory. *Per Sir ARNOLD WHITE, C.J.*—The Judge acted without jurisdiction or with material irregularity. *Per SHEPARD J.*—The Judge acted within his jurisdiction but with material irregularity.
- Krishnasami Pannikondar v. Muthukrishna Pannikondar* 364
35. —————, ss. 622, 647—*Maintainability of civil revision petition against order granting leave passed with material irregularity—Religious Endowments Act—Act XX of 1863, s. 18—Leave to sue granted on application made by unverified letter, and not presented to Court by applicant or pleader—Validity:*
- Applications to District Courts under section 18 of the Religious Endowments Act for leave to sue should be duly verified and presented either by the applicant in person or by his pleader. A grant of such leave on an unverified application not presented in Court is a material irregularity within the meaning of section 922 of the Code of Civil Procedure, and a civil revision petition lies from the order granting it. Omission to give notice of such an application to the person whom it is intended to sue does not of itself render the leave, if granted, irregular. *Venkatappayya v. Venkatapathi*, (Appeal No. 230 of 1895 (*infra* p. 687)), approved.
- Andoo Miyan v. Muhammad Davud Khan Bahadur* 685
- CONTRACT ACT—ACT IX OF 1872, s. 230—Principal and agent—Agency coupled with an interest—Suit by agent in his own name on contract not entered into by him as agent—Maintainability of suit:**
- A document was executed in favour of plaintiff by the members of a Malabar devasom, whereby, in consideration of advances made by plaintiff, all the properties of the devasom were given over to him on lease for eighteen years. Plaintiff was given authority to sign, conduct suits and do other acts on behalf of the executants; and the document was held to be an authority coupled with an interest and irrevocable. Plaintiff now sued in his own name to recover certain property belonging to the devasom

PAGE

and which had been demised on kanom prior to the date of plaintiff's authority:—*Held*, that plaintiff was not entitled to recover. Where an agent enters into a contract as such, if he has an interest in the contract he may sue in his own name. Unless the contract for the breach of which the action is brought is one made by the agent he has no cause of action, because there is no privity.

Subrahmanya Pattar v. Narayanan Nayar 130

COURT FEES—Fee payable on appeal under Indian Insolvent Debtors' Act—11 and 12 Vict., cap. XXI:

The Court fee payable on an appeal preferred under section 73 of the Indian Insolvent Debtors' Act, is that which is provided for in article 18 of schedule A to the table of fees in the rules of the Original Side of the Madras High Court, dated 5th May 1891.

Liladhara Vias v. Official Assignee of Madras 160

COURT FEES ACT—ACT VII OF 1870, s. 7, cl. IV ()—Valuation by plaintiff of relief sought—Increase of valuation by Court and return of plaint for want of jurisdiction—Invalidity of order:

A plaint was filed in a certain Court praying for an injunction, the relief sought being valued at Rs. 50, on the basis of which valuation the Court had jurisdiction to try the suit. On objection being taken by the defendant that the plaintiff's valuation was incorrect, and that the proper valuation of the suit exceeded the pecuniary limits of the Court's jurisdiction, an issue was framed and the question was tried whether the suit was in fact within the pecuniary jurisdiction of the Court, with the result that the Judge held the proper valuation of the relief sought to be Rs. 2,700, which exceeded the pecuniary jurisdiction of the Court. He accordingly returned the plaint for presentation to the proper Court:—*Held*, that the Court had no power to increase the value of the suit. Section 7, clause IV (d) of the Court Fees Act requires that in a suit for an injunction the plaintiff shall state the amount at which he values the relief sought. The plaintiff had valued the relief at Rs. 50 and the Court therefore had jurisdiction.

Guruvajamma v. Venkatakrishnamma Chetti 34

2. —————, s. 28—*Plaint insufficiently stamped—Dismissal of suit—Appeal by plaintiff to District Court—Stamp on memorandum of appeal also insufficient—Second appeal by plaintiff properly stamped—Maintainability of second appeal—Order by High Court for payment of proper duty on plaint and on memorandum of first appeal:*

The plaint, in a suit for the cancellation of a sale-deed for Rs. 2,500, was filed with a ten-rupee stamp. The suit was dismissed, and an appeal was preferred by the plaintiff to the District Court, on which Rs. 10 was also paid as stamp duty. The appeal was dismissed, whereupon plaintiff preferred a second appeal, upon which he paid Rs. 150 as stamp duty. On its being objected that the second appeal could not be entertained on the ground that insufficient stamp duty had been paid on the plaint and in the lower Appellate Court:—*Held*, that inasmuch as the plaint had been filed and used without being properly stamped through a mistake of law as to the Court fee payable, the case was within section 28 of the Court Fees Act. An order was accordingly made by the High Court for a Court fee of Rs. 150 to be paid on the plaint and on the memorandum of first appeal within a specified time.

Balambal Ammal v. Vythilinga Mudaliar 331

3. —————, s. 31—*Criminal Procedure Code—Act V of 1898, s. 545—Order for payment of expenses of prosecution out of fine—Re-payment to complainant of fees paid in Criminal Courts:*

A person who was convicted by a Deputy Magistrate of having caused hurt, was ordered to pay a fine of Rs. 15, and also the complainant's costs of the prosecution. In the month following the conviction the Deputy

- Magistrate issued a warrant for the collection of Rs. 12-4-0 from the accused, of which Rs. 2-4-0 was levied under section 31 of the Court Fees Act as Court fees paid by the complainant, and Rs. 10 under section 545 of the Code of Criminal Procedure for two fees of Rs. 5 each paid by the complainant to the medical officer for a certificate and for giving evidence in the case. Objection having been made to the recovery of these sums, the case was referred to the High Court for orders:—*Held*, that the levy of Court fees was warranted by section 31 of the Court Fees Act, which is not modified by section 545 of the Code of Criminal Procedure. *Held also* that the Deputy Magistrate's order passed under section 545 of the Code of Criminal Procedure for the payment of expenses incurred in the prosecution was unsustainable, and such expenses could only be awarded to the complainant out of the fine levied from the accused and not in addition to it.
- Queen-Empress v. Yamana Rao* ... 305
4. **s. 34—Stamp Act—Act II of 1899, s. 69—Sale by thief of stolen stamps—Offence:** (as amended by Act XII of 1891),
A person who had been convicted of stealing two stamps was charged, under section 69 of the Stamp Act, 1899, with having sold them, he not being a licensed vendor of stamps:—*Held*, that the words "sells or offers for sale," which occur in section 69 of the Stamp Act and in section 34 of the Court Fees Act include the case of a thief who exchanges a stolen stamp for a sum of money, even though the thief cannot give a legal title by the transaction.
- Queen-Empress v. Virasami* ... 319
5. **—sched. I, cl. 11—Assessment of value of estate principally consisting of a chose-in-action:**
A petition for probate set out that the estate of the deceased consisted, at the time of her death, of property in possession worth only about Rs. 125 and the subject-matter of a suit in which she claimed some Rs. 17,000. The petitioner declared the value of the estate at under Rs. 1,000:—*Held*, that there was nothing to enable the Court to determine the value of the right which the petitioner (as executor) was seeking to enforce in the suit and that the Court could not say that the estate had been under-valued. Probate was accordingly directed to be issued without payment of stamp duty (it being declared at under Rs. 1,000) but the petitioner was ordered, on the termination of the suit, to file in Court a statement showing its result.
- Saldanha v. The Secretary of State for India in Council* ... 241
- CRIMINAL PROCEDURE CODE—ACT V OF 1898, s. 4 (o)—"Offence"—Workman's Breach of Contract Act—Act XIII of 1859, ss. 1, 2—Failure to comply with order of Court:**
The offence created by the Workman's Breach of Contract Act (XIII of 1859) is not the neglect or refusal of the workman to perform his contract, but the failure on his part to comply with an order made by the Magistrate directing the workman to repay the money advanced or perform the contract.
- Ki: J-Emperor v. Tukasi Nukayya* ... 660
2. **—ss. 144, 487—Order to "abstain from a certain act"—Trial by Magistrate who made the order of persons alleged to have disobeyed it:**
On a petition being filed in the Court of a Sub-Divisional First-class Magistrate setting out that a breach of the peace was likely to arise from the simultaneous use of a certain mosque by members of the Hanifi and Shafi sects, the Magistrate passed an order addressed to ten members, who were named, and several others of the Hanifi sect, and to three members, who were named, and several others of the Shafi sect. The order concluded as follows:—"I do order hereby that the following order

should be observed in regard to the entry of the said mosque by any of you or any other Mussalmans of the Hanifi and Shafi sects for a period of two months from this date unless in the meanwhile you establish your right in a Court of competent civil jurisdiction." It set out five periods of half an hour each during which each sect, respectively, might enter the mosque on ordinary days, and two periods of one hour each in which each sect might enter the mosque on other days:—*Held*, that the order was within the powers conferred by section 144 of the Criminal Procedure Code. Certain members of the Hanifi sect having entered the mosque in disobedience to the order hereinbefore referred to, they were charged under section 188 of the Indian Penal Code with disobedience to an order by a public servant. The case was tried by the Magistrate who had passed the order:—*Held*, that the Magistrate was not competent to try the case, inasmuch as he had made the order under section 144.

Queen-Empress v. Abdulla Saheb ... 262

—s. 144—Order to abstain from interfering with the management of a temple until the eviction of another person—Legality of order:

An order passed under section 144 of the Code of Criminal Procedure directed a person (1) not to interfere with the management of a certain temple, (2) until another person should be duly evicted from the management by due course of law:—*Held*, that the first portion of the order was a direction to "abstain from a certain act" within the meaning of those words as used in section 144 of the Code of Criminal Procedure; but that the latter portion contravened the provisions of sub-section (5) of that section and that to that extent the order was made without jurisdiction.

Ramanadhan Chetti v. Murugappa Chetti ... 45

—s. 195—Alleged forgery of documents submitted to Tahsildar holding enquiry as to transfer of names in Land Register—Revenue Court—Necessity for sanction to prosecute offender:

A Tahsildar, when holding an enquiry as to whether a transfer of names in a land register should be made or not, is a Revenue Court; and before a party to any proceeding in such a Court can be prosecuted for an offence referred to in section 195(c) of the Code of Criminal Procedure, sanction should be obtained.

Queen-Empress v. Munda Shetti ... 121

—s. 195—Penal Code—Act XLV of 1860, s. 188—Epidemic Diseases Act—Act III of 1897—Disobedience to an order promulgated by Government—Sanction for prosecution:

Certain persons were charged with having disobeyed an order promulgated by Government under the Epidemic Diseases Act (III of 1897), and were acquitted on the ground that the prosecution required, under section 195 of the Code of Criminal Procedure, the previous sanction of the public servant who had promulgated the order. Sanction had, in fact, been granted by the Chairman of the Municipality in which the order was disobeyed, but the Magistrate held that such Chairman was not the public servant who had promulgated the order, and that it was not shown that he had been specially empowered to grant the sanction:—*Held*, that the order of acquittal was wrong. Inasmuch as the order in question had been promulgated by Government and not by any public servant, no sanction was required.

Queen-Empress v. South ... 70

—s. 203—Dismissal of complaint—Refusal by Magistrate to take cognizance of case—Subsequent trial by him:

A complaint was laid in the Court of a Town Magistrate, charging certain persons with having committed offences under the Registration Act. The Town Magistrate dismissed the complaint on the ground that sanction, which he deemed to be necessary, had not been obtained. The complainant

obtained sanction and thereupon the Town Magistrate proceeded with the case and convicted the accused. On appeal, the Deputy Magistrate, while agreeing that the accused were guilty, reversed the conviction on the ground that inasmuch as the Town Magistrate had once thrown out the complaint under section 203 of the Code of Criminal Procedure, he could not subsequently entertain it. On the case being referred to the High Court for orders:—*Held*, that though, in form, the Town Magistrate's order purported to dismiss the complaint under section 203, in substance it refused to take cognizance of the offence on the ground that sanction was necessary and had not been obtained; and that the acquittal must be set aside.

Queen-Empress v. Kunyil Rani ... 337

7. —, ss. 209, 436—*Refusal by Magistrate to charge accused with offence triable exclusively by Court of Session—“Discharge”—Charge of offence triable by Magistrate—Acquittal—Order by Sessions Court for further enquiry and committal—Legality of such order:*

Certain persons were charged before a Magistrate of the first class under section 379 of the Indian Penal Code with the theft of a promissory note. The prosecution applied for a further charge to be framed under section 477 of the Indian Penal Code, but this the Magistrate declined to do, as, in his opinion, there was no direct evidence that the accused had destroyed or secreted the note. After hearing the evidence for the defence the Magistrate acquitted the accused under section 258 of the Code of Criminal Procedure. Application was then made to the Sessions Court to call for the records and direct the committal of the accused for trial for an offence under section 477 of the Indian Penal Code. The Sessions Court ordered that a further enquiry be made and that the accused be committed for trial. On its being contended, on revision, that the order of the Sessions Court was illegal on the ground that the accused had been acquitted and not discharged:—*Held*, that the order of the Magistrate was, in substance, an order discharging the accused in respect of an alleged offence under section 477, Indian Penal Code, and that the Sessions Judge had jurisdiction to make the order sought to be revised. *Queen-Empress v. Hanumantha Reddi*, (I.L.R., 23 Mad., 225), considered.

Krishna Reddi v. Subbamma ... 136

8. —, ss. 285, 537—*Commencement of trial for murder by Judge and two assessors—Absence of one assessor during portion of the trial—Resumption of his seat by assessor and his opinion expressed and recorded by the Judge—Legality of trial—Conspiracy—Abetment—Penal Code—Act XLV of 1860, s. 109:*

A trial for murder, conspiracy to murder, and abetment of murder, duly commenced before a Sessions Judge and two assessors, and continued for about seven weeks. During that period one of the assessors was permitted to absent himself during two whole days, and five half days, respectively; at first, so that he might visit his mother on her death-bed, and subsequently, to perform the daily obsequies rendered necessary by her decease. He then resumed his seat as an assessor and continued so to act until the termination of the trial, all the depositions recorded in his absence having been read by him on his return. At the conclusion of the trial the Sessions Judge invited the opinion of each assessor, and recorded it. The opinion of each was that all the accused were guilty and the Judge, concurring in that opinion, convicted the accused. The prisoners appealed to the High Court, where it was contended that the Judge had acted contrary to law in allowing the assessor who had been absent to resume his seat as an assessor, and in inviting and taking into consideration his opinion in deciding the case; and that the conviction ought to be quashed:—*Held*, (DAVIES, J., dissenting), that the finding and sentence appealed against had been passed by a Court of competent jurisdiction within the meaning of section 537 of the Code of Criminal Procedure and that the defect in the trial did not affect its validity and was cured by that section if the irregularity had “not in fact occasioned a failure of justice”; and that no such failure of justice had been shown: *Per BHASHYAM AYYANGAR, J.*—Under the Indian Penal Code conspiracy, except in cases provided for by sections

311, 400, 401, 402, and 121A of the Code, is a mere species of abetment where an act or an illegal omission takes place in pursuance of that conspiracy, and amounts to a distinct offence for each distinct offence abetted by conspiracy.

King-Emperor v. Tirumal Reddi ... 523

9. —, s. 288—*Statement of witness before committing Magistrate treated as evidence at trial before Court of Session—“Evidence duly taken”:*

Under section 288 of the Code of Criminal Procedure the Court is not restricted to admitting the evidence of a witness duly taken before the committing Magistrate merely for the purpose of contradicting that witness when he is called as a witness at the Sessions Court. The section is intended to enable the Court to read the previous evidence as substantive evidence in the case, at the trial, where, for the purposes of justice, the adoption of such a course is found necessary by the Judge.

Queen-Empress v. Dorasami Ayyar ... 414

10. —, ss. 337, 339—*Pardon—Withdrawal of pardon and commitment for trial—Procedure:*

R was charged with having committed the offence of dacoity, with others. In consequence of a confessional statement made by R, pardon was tendered to him by the Stationary Sub-Magistrate, under the District Magistrate's order. R was subsequently examined as a witness for the prosecution at a preliminary enquiry into the dacoity held by the Magistrate under chapter XVIII of the Code of Criminal Procedure, but he retracted his former statement, (which, he said, had been made in consequence of police torture), and asserted that he knew nothing about the dacoity. The dacoity case came on for trial in the Sessions Court, but R was not called as a witness, and, in the end, the persons charged were acquitted. Upon the subsequent application of the police, the District Magistrate withdrew the pardon which had been tendered to R, on the ground that the latter had withdrawn and contradicted his first statement. R was in due course charged before the same Sub-Magistrate with having been one of the dacoits, and was committed for trial:—*Held*, that the commitment was legal. The words “in the case,” which occur in section 337 (2) of the Code of Criminal Procedure, include a preliminary enquiry, and do not refer to the trial alone. If there is reason to believe that a person to whom pardon has been tendered will give false evidence, there is no duty on the prosecution to put him forward as a witness. Pardon conditionally granted may be at once withdrawn as soon as good faith has been broken, and good faith is broken if the witness does not disclose the truth to the Magistrate. The proper authority to withdraw a pardon is the authority which granted it. *Queen-Empress v. Manick Chandra Sarkar*, (I.L.R. 24 Cal., 492), followed. *Semble*, that when pardon is revoked, no steps should be taken against the person who so forfeits it until after the trial of the other accused is over; and that his trial should then proceed *de novo*. *Queen-Empress v. Brij Narain Man*, (I.L.R., 20 All., 529), and *Queen-Empress v. Bhau*, (I.L.R., 23 Bom., 493), considered.

Queen-Empress v. Ramasami ... 321

11. —, s. 403 (4)—*Previous acquittal—Acquittal by assessors on charge of abetment of dacoity with murder—Subsequent conviction by jury of receiving stolen property—“Court competent to try the offence subsequently charged”:*

Five persons were charged before a Sessions Judge, sitting with assessors, with having committed dacoity with murder, under section 396, Indian Penal Code, and a sixth, with abetting them. The abettor was acquitted. He was, however, subsequently charged before the Sessions Judge, sitting with a jury, with receiving stolen property knowing that it had been obtained by dacoity, under section 412 of the Indian Penal Code. The jury returned a verdict of guilty, and the accused was convicted and sentenced. The facts on which the accused was convicted of receiving

stolen property were the same as those upon which he had been acquitted of abetment of dacoity with murder, the dacoity by which the stolen property was alleged to have been received being the same as that which had formed the subject of the previous charge. On its being contended that the Court had power to try the accused a second time under sub-section 4 of section 403 of the Criminal Procedure Code, inasmuch as a charge of receiving stolen property must be tried by a jury; and that in consequence the Court by which the accused had first been tried was not a Court competent to try the present charge:—*Held*, that the conviction was bad.

King-Emperor v. Krishna Ayyar ... 641

12. _____, s. 528—*Transfer of case at request of Magistrate—Notice:*

An order for the transfer of a case, made at the request of the Magistrate on whose file the case stands, and not on the application of a party, is an exception to the general rule that an order for transfer should not be made under section 528 of the Code of Criminal Procedure without notice to the other side.

Queen-Empress v. Kuppumuthu Pillai ... 317

13. _____, s. 530—*Trial of an accused by Magistrate not empowered by law—Charge of giving false evidence under section 193, Indian Penal Code—Trial by First-class Magistrate though facts disclosed offence under section 194 as well—Jurisdiction:*

Certain witnesses made statements in a preliminary enquiry before a Magistrate, in a case of alleged murder, and contradicted those statements at the trial before the Court of Session. The latter then sanctioned their prosecution for giving false evidence in a judicial proceeding, an offence punishable under section 193 of the Indian Penal Code, and triable by a Magistrate of the first class. The Deputy Magistrate, by whom they were tried, convicted them, and the accused appealed, the appeals being transferred to another Sessions Court for hearing. The Sessions Judge held that, inasmuch as the false statements had been made in connection with a charge of murder, the offence for which the accused should have been tried fell under section 194, Indian Penal Code, and that, in consequence, they could be tried only by a Court of Session and not by a Magistrate of the first class. He considered their trial by a First-class Magistrate to be void under section 530 of the Code of Criminal Procedure, and set aside their conviction, committing one of them for trial by a Court of Session on a charge under section 194 of the Indian Penal Code, and making no order in respect of the other accused as he considered the imprisonment already undergone was sufficient:—*Held*, that the order was wrong as the proceedings of the First-class Magistrate were not void within the meaning of section 530 of the Code of Criminal Procedure. *Queen-Empress v. Gundaya*, (I.L.R., 13 Bom., 502), referred to.

King-Emperor v. Ayyan ... 675

14. _____, s. 545—*Order for payment of expenses of prosecution out of fine—Court Fees Act—Act VII of 1870, s. 31—Re-payment to complainant of fees paid in criminal Courts:*

A person who was convicted by a Deputy Magistrate of having caused hurt, was ordered to pay a fine of Rs. 15, and also the complainant's costs of the prosecution. In the month following the conviction the Deputy Magistrate issued a warrant for the collection of Rs. 12-4-0 from the accused, of which Rs. 2-4-0 was levied under section 31 of the Court Fees Act as Court fees paid by the complainant, and Rs. 10 under section 545 of the Code of Criminal Procedure for two fees of Rs. 5 each paid by the complainant to the medical officer for a certificate and for giving evidence in the case. Objection having been made to the recovery of these sums, the case was referred to the High Court for orders:—*Held*, that the levy of Court fees was warranted by section 31 of the Court Fees Act, which is not modified by section 545 of the Code of Criminal Procedure. *Held also*, that the Deputy Magistrate's order passed under section 545 of the Code of

Criminal Procedure for the payment of expenses incurred in the prosecution was unsustainable and such expenses could only be awarded to the complainant out of the fine levied from the accused and not in addition to it.

Queen-Empress v. Yamana Rao ... 305

15. _____, s. 556—*Disqualification of Magistrate to try case—Directing the prosecution of an accused—Subsequent trial by same Magistrate—Legality of trial:*

A Deputy Tahsildar made a report concerning A to the Tahsildar, who, in turn, reported the matter to the Deputy Magistrate. The latter authorized the Tahsildar to prosecute A, on such charges as might be capable of being proved in a criminal Court, and a prosecution was accordingly instituted. The case was tried by the same Deputy Magistrate, and on the objection being raised that under section 556 of the Code of Criminal Procedure that Magistrate was disqualified from trying the accused:—*Held*, that he was not disqualified. The act of the Deputy Magistrate was an authorization and not a direction that the accused should be prosecuted. *Girish Chunder Ghose v. The Queen-Empress*, (I.L.R., 20 Cal., 857), *In the matter of the petition of Ganeshi*, (I.L.R., 15 All., 192), and *Queen Empress v. Narain Singh*, (I.L.R., 22 All., 340), referred to.

Queen-Empress v. Chenchi Reddi ... 238

DISTRICT MUNICIPALITIES ACT (MADRAS)—ACT IV OF 1884, s. 53, sched. A, proviso 4—*Person carrying on business as a money-lender—Liability to pay profession tax:*

A person, who carries on the business of a money-lender and whose income is less than Rs. 30 per mensem, is not chargeable with a tax under section 53 of the District Municipalities Act, (Madras), 1884.

Municipal Council of Chidambaram v. Venkatanarayana Pillai ... 644

2. _____, ss. 53, 262—*Carrying on business within the limits of a municipality—Business conducted by a local agent without power to make contracts on behalf of company—Levy of profession tax—Suit to recover amount paid—Substantial compliance with the provisions of the Act—Maintainability of suit:*

A person who resided within the limits of a municipality procured business and collected premiums for an Insurance Company and forwarded the moneys so collected to the company at a place outside the municipality. For these services a commission was received, but no office or establishment of the company was kept or managed by the person so acting within the municipality, nor was he empowered to represent the company in matters relating to contracts entered into by them. The municipality levied a sum of money on the company as profession tax, under section 47 of the Madras District Municipalities Act, 1884; and it was paid under protest. The company then filed a suit to recover the amount so levied, when it was contended in defence that the company carried on a business that was liable to the tax and that such business was carried on through the company's agent within the limits of the municipality and that the tax had in consequence been properly levied. It was further contended that by reason of section 262 of the Act no suit would lie as against the municipality:—*Held*, that the company was not doing business within the limits of the municipality. *Held also*, that the suit was maintainable. A company not liable to the tax had been taxed, and the provisions of the Act had not been in substance and effect complied with. The municipality were therefore not protected from action by section 262. Whether a company carrying on the business of insurance is liable to be taxed under the Madras District Municipalities Act: *Quære*.

Municipal Council, Cocanada v. The Standard Life Assurance Company ... 205
p *

8. *Levy of tax—Legality :* ... s. 63(2), (3)—
 By section 63 (2) of the District Municipalities Act, (Madras), 1884, it is enacted that, except as provided in sub-section (3) of that section and in section 63-A, a tax may be levied at such rate, not exceeding eight and a half per centum, on the annual value of the buildings or lands or both upon which it is imposed, as the Municipal Council may have notified under section 50; and by section 63 (3), in the case of (a) lands not occupied by buildings and not appurtenant to any building or attached thereto for use therewith as a garden or pleasure-ground or for the pasturage of animals kept for private use, and (b) lands occupied by native huts, the Chairman may, subject to the approval of the Municipal Council and the sanction of the Governor in Council, impose a tax on such lands at an annual rate, not exceeding four annas for every 80 square yards thereof, in lieu of the tax referred to in sub-section (2). Provided that no tax shall be levied under this sub-section upon lands used solely for agricultural purposes :—*Held*, that, subject to the conditions mentioned, a tax levied under sub-section (3) on all lands within a municipality is a legal tax.
- Queen-Empress v. Allan* ... 195
- EASEMENTS ACT—ACT V OF 1882, ss. 7, 17—Right to raise crest level of calingula of tank—Submersion of lands thereby—Right of owner of such lands to protect them from submergence :**
 The defendants, being the holders of land situated below a tank, had, for a period of over 20 years, by means of a dam, raised the calingula of the tank higher than its crest level. The effect had been to collect an increased quantity of water in the tank and, from time to time, to throw it back on to the plaintiffs' lands, which were situated above the tank. The plaintiffs' lands were thus submerged. On a suit being brought by plaintiffs against the defendants for an order that the dam placed by defendants on the calingula should be removed so that water should be stored in the tank only to the height of the crest level of the calingula :—*Held*, that the defendants had not exceeded the right which they had been proved to have acquired. *Semle*, that notwithstanding that right plaintiffs were entitled to take measures to save their lands from being submerged.
- Narayana Reddi v. Venkata Chariar* ... 202
- EPIDEMIC DISEASES ACT—ACT III OF 1897—Disobedience to an order promulgated by Government—Sanction for prosecution—Criminal Procedure Code—Act V of 1898, s. 195—Penal Code—Act XLV of 1860, s. 188 :**
 Certain persons were charged with having disobeyed an order promulgated by Government under the Epidemic Diseases Act (III of 1897), and were acquitted on the ground that the prosecution required, under section 195 of the Code of Criminal Procedure, the previous sanction of the public servant who had promulgated the order. Sanction had, in fact, been granted by the Chairman of the Municipality in which the order was disobeyed, but the Magistrate held that such Chairman was not the public servant who had promulgated the order, and that it was not shown that he had been specially empowered to grant the sanction :—*Held*, that the order of acquittal was wrong. Inasmuch as the order in question had been promulgated by Government and not by any public servant, no sanction was required.
- Queen-Empress v. South* ... 70
- GANJAM AND VIZAGAPATAM AGENCY COURTS ACT—ACT XXIV OF 1839—Validity of Agency Rules Nos. XX and XXXI passed under the Act—Application to High Court to direct Agent to review his decision—Maintainability :**
 In a suit in the Court of the Senior Assistant Agent to the Governor, in Vizagapatam, a decree was passed in favour of the plaintiff for possession of certain villages. On appeal to the Court of the Agent, this decree was reversed. Plaintiff thereupon filed a petition in the High Court praying that the Agent might be directed to review his judgment. The petition

was filed under Rule No. XX of the Agency Rules, which is as follows :—
 "All decrees passed by the Agent on appeals from decrees of his subordinates shall be final, the Sudder Court having the power, on special grounds, to require him to review his judgment, as directed by them." A preliminary objection was taken to the hearing of the petition on the grounds (1) that the latter part of Rule No. XX is *ultra vires*, and (2) that even if it be not *ultra vires*, the application should have been presented to the Governor in Council, under Rule No. XXXI, and not to the High Court :—*Held*, that Rule No. XX is not *ultra vires*; and that Rule No. XXXI has no application to a case of this nature. *Maharajah of Jeypore v. Papayamma*, (I.L.R., 23 Mad., 329), referred to.

Maharajah of Jeypore v. Jammanadhora ... 345

ERAL CLAUSES ACT (MADRAS)—ACT I OF 1891, s. 8—Appellate jurisdiction of High Court in cases instituted under enactments in force at time of institution of suit but repealed before hearing of appeal—Civil Procedure Code—Act XI of 1882, s. 540—Appeal :

A suit was instituted in a District Court on 5th August 1897, in which a claim was made to the office of karnam. In October 1897 a notification was published under section 2 of Madras Proprietary Estates' Village Service Act (II of 1894), the effect of which was that as from the date of the notification section 11 of Regulation XXV of 1802 and Regulation XXIX of 1802, ceased to apply to the office of karnam. The Judge heard the suit, which had been filed prior to the notification, and dismissed it. Upon an appeal being preferred it was objected that the High Court had no jurisdiction to hear it :—*Held*, that the Court had jurisdiction. The appeal was from the judgment of a Court exercising original jurisdiction; and the High Court, if Madras Act II of 1894 had not been passed, would have had appellate jurisdiction, by virtue of section 540 of the Code of Civil Procedure, in suits brought under the said regulations. In cases where the Court of First Instance had jurisdiction to entertain the suit when it was instituted, and the parties had a right of appeal when the suit was instituted, the Appellate jurisdiction of the High Court is saved by section 8 of the Madras General Clauses Act, 1891, unless the right of appeal is expressly taken away. Two persons joined in a suit, and claimed the offices of karnam and shroff as being hereditary. The offices formed portions of a permanently-settled estate of which first defendant was proprietor. The second defendant was alleged to have possession of the offices, the second plaintiff, who had the titular right to them, being thus wrongly kept out :—*Held*, that it was not necessary that the suit should have been brought for a declaration, there being no doubt as to the second plaintiff's title; and that it was properly brought for possession.

Sadasiva Pillai v. Kalappa Mudaliar ... 39

DU LAW—Bequest of self-acquired property by a testator to his sons—Intention expressed by will that property should be taken in severalty, but its terms otherwise consistent with ordinary rules of inheritance—Birth of grandson and subsequent alienations by gift—Validity of alienations—Property having quality of ancestral property though taken under the will—Intention—Presumption in favour of ancestral nature of estate :

A Hindu father possessed of self-acquired property may deal with that property as he pleases, either by gift or by testamentary disposition, and his sons cannot dispute the disposition, even though it be in favour of a stranger. Any of the observations made in *Tara Chand v. Reeb Ram*, (3 M.H.C.R., 50), which conflict with this proposition cannot now be regarded as good law. A father may leave his self-acquired property to descend to his sons as ancestral property, or, if he makes any disposition of it in favour of a son, he is at liberty to preserve for it the quality of ancestral property. Whether in any given case the property was intended to pass to the son as ancestral or as self-acquired property is a question of intention turning on the construction of the instrument of gift. If there are no words indicating the contrary intention, the natural inference should be that the father intended the sons to take his property as their ancestral estate. If partition is made by the father on the footing that

the property is partible property, although there is in point of law a disposition made by the father, the intention of the father will be taken to be that the quality of the ancestral property shall remain. Plaintiff's father made voluntary gifts of certain property to the defendant after the date of plaintiff's birth. Plaintiff now sued to set these alienations aside, and to recover the property, one ground being that the property alienated was ancestral property in the hands of his father, in which plaintiff had acquired an interest by birth, and that his father had, in consequence, no power to make the alienations. The whole of the property in question had been self-acquired, originally, by plaintiff's paternal grandfather, who had disposed of it by will to his three sons, of whom plaintiff's father was one. Plaintiff, however, contended that notwithstanding this fact the property had the quality of, ancestral property in his father's hands. From the terms of the will it appeared that the testator intended his sons to take the property in severalty, but in other respects the dispositions contained in the will were consistent with the ordinary rules of inheritance under the Hindu Law. There were no words in the will indicating any intention that the sons should hold their shares free from the incidents of ancestral property:—*Held*, that plaintiff was entitled to recover.

Nagalingam Pillai v. Ramachandra Tevar ... 429

2. ————*Bequest to daughter and her sons from generation to generation—Testator predeceased by legatee who left daughters—Lapse of legacy—Succession Act—Act X of 1865, ss. 92, 96:*

A Hindu testator, who had no male issue, bequeathed certain real property to his eldest daughter and her sons from generation to generation. The legatee, who had daughters, predeceased the testator, who then also died, leaving a widow and other daughters him surviving. The daughters of the deceased legatee claimed the property as the lineal descendants of the testator, contending that although section 96 of the Indian Succession Act did not apply to the case it should be held to govern it by analogy, as affording a guide to justice, equity and good conscience:—*Held*, that the words used in the will must be constructed as meaning "heirs," and that the provision contained in section 96 of the Indian Succession Act could not be extended to such a case.

Ramamirtham v. Ranganathan ... 299

3. ————*Contract by managing member of joint family, consisting of a father and two sons—Subsequent partition by which one son became divided—Liability of divided son (to extent of family property taken at the division), for loss arising under the contract:*

Whilst a father and two sons were carrying on business as an undivided trading Hindu family, the father, as managing member, entered into a contract by which he undertook to pay to plaintiff any shortfalls that might take place in respect of consignments of indigo. Subsequently to this contract, one of the sons became divided from the family. Shortfalls having occurred the plaintiff sued to enforce the contract against the divided son as well as the two other members of the family:—*Held*, that the son was liable only to the extent of the family property which had come to him under the partition. *Krishnasami Konan v. Ramasami Ayyar*, (I.L.R., 22 Mad., 519), distinguished.

Ramachandra Padayachi v. Kondayya Chetti ... 555

4. ————*Decree against representative of family creating charge on family property—Right to execute against sons of defendants though not actually made parties—Civil Procedure Code—Act XIV of 1882, s. 244:*

Where it is clear from the terms of a decree for maintenance that it was intended to create a charge on property, and the property to be charged can be otherwise identified, it is immaterial that the decree does not specify the property by metes and bounds. A widow sued three undivided brothers for maintenance and obtained a decree which created a charge on certain family property in respect of the maintenance sued for. The

son of the first defendant was a minor at the date of the decree and was not a party to it. The widow attached the property. Upon the death of first defendant, subsequent to the decree, his son was added as legal representative and claimed the property by right of survivorship, and sought to have it released from attachment on the ground that it was not liable for the widow's maintenance:—*Held*, that as the property was charged by the decree with maintenance it could be sold in execution of the decree even though the son had not been made a party to the decree, there being no contention that the debt was either illegal or immoral and the decree being not merely a personal one against the father alone but against the representatives of the family. *Muttia v. Virammal*, (I.L.R., 10 Mad., 283), followed.

Minakshi Achi v. Chinnappa Udayan ... 689

———*Devolution of impartible property—Right of nearest coparcener of senior line—Impartible estate—Original incidents of impartibility—Expulsion of occupants—Restoration under British rule after lapse of time during which enjoyment suspended—Continuance of incidents of impartibility:*

Under the Law of Mitakshara, when impartible property passes by survivorship from one line to another, it devolves not necessarily on the coparcener nearest in blood but on the nearest coparcener of the senior line. The holder of an impartible zamindari had three wives. By the first he left no issue; by the second he had issue M, R and P; by the third he had issue V. Upon the death of the zamindar he was succeeded, first by M, then by M's son, and then by R, who held the estate for many years. When R died, possession of the estate was taken by the grandson of his whole brother P, whereupon V's son claimed it, contending that he stood in a nearer class of heirs:—*Held*, that the grandson of P was the nearest coparcener of the senior line, and was entitled in preference to V's son who belonged to the junior line. *Naraganti Achammagaru v. Venkata-challapati Nayanivaru*, (I.L.R., 4 Mad., 250), followed. *Subramanya Pandya Chokka Talavar v. Siva Subramanya Pillai*, (I.L.R., 17 Mad., 316), referred to. The question as to onus of proof of partibility considered. An estate had been held, up till the year 1765, as an impartible palayam, by one member only, of a family, and not as subject to the ordinary rule of Hindu Law. In 1765, the palayagar, (being the ancestor of the present holder), was expelled from possession by the Nawab of the Karnatic and fled to Mysore, returning in 1780 and holding a precarious possession of the palayam until 1783, when he supported the East India Company. In 1785, he was replaced in possession as a "renter," but upon failure to pay kist the palayam was placed under the control of a manager, until the country was restored to the Nawab. In 1790, the East India Company again assumed control of the country, and the palayagar again held possession of the estate as a "renter" under the Company. In 1792, the palayagar died, he being the same palayagar who had been expelled in 1765. He was succeeded by his son, who died in 1801, the year in which the Company took possession of the country, leaving a younger brother of the half blood him surviving. The Government, in 1802, declared its intention of appointing the half-brother to succeed to the palayam on a zamindari tenure, and subsequently directed that the half-brother should be instated in the palayam as soon as a sanad of investiture could be prepared. The question of restoration was however kept under consideration, and, as a temporary measure, the palayagar was granted an allowance of ten per cent. on the net revenue of the palayam. This was paid until 1814, when the Board of Revenue, reiterating its intention to restore the palayagar to the management of his palayam under a new arrangement, proposed to grant him a jaghire bringing in an average of thirty-three per cent. of the gross collections, and subject to a nominal rental assessment. This proposal was consented to by the palayagar, but the arrangement was again varied, the palayagar receiving ten per cent. of the gross collections. In 1817, instructions were issued to the effect that villages should be given over to the palayagar of a value equal to the average gross amount of his then income, from whatever source derived. It was also declared that the villages were to be given on zamindari tenure. The approval of Government having been obtained, a conditional sanad was

granted in December 1817, and the half-brother of the last palayagar was put in possession. The first defendant, in whose possession the zamindari was at the date of suit, was a descendant from the palayagar last referred to, tracing his descent from the family of the grantee of the sanad, by his second wife. Plaintiff and second defendant were descendants from the family of the grantee by his third wife. Plaintiff now sued for partition, when the plea was raised that the zamindari had been from its origin an impartible estate, and that the sanad granted in 1817 had not altered the incident of impartibility which had always attached to it:—*Held*, that the estate was impartible.

The Udayarpalayam Case 562

6. ———— *Husband and wife—Rights of husband as legal guardian of wife—Custom for wife to remain in custody of parents until maturity:*

Though a husband is the legal guardian of his wife from the moment of his marriage with her, he is, by the general custom prevailing among the Hindu community in this Presidency, not entitled to the actual custody of his wife until she attains maturity, unless such custody should be necessary in the interests of the girl.

Arumuga Mudali v. Viraraghava Mudali 255

7. ———— *Impartible zamindari—Alleged transfer—Not in manner prescribed by the Transfer of Property Act, 1882 Recital of acts done, and arrangement made, in a deed executed by the zamindar, and his family, inoperative to transfer—Effect of petitions and applications to Revenue officers the same:*

On the claim made by a person who was the heir to an impartible zamindari for a declaration of his right, and that he was entitled to redeem a usufructuary mortgage upon the property, the defence was that the estate had been transferred to the defendant by the plaintiff's father, who was the predecessor in estate, by executing, before the birth of the plaintiff, a deed, to which were parties all the members of the joint family including the defendant, who was then the presumptive heir; a proceeding which was followed by other acts indicating transfer to the latter. The deed was unilateral, and was addressed to the mortgagee. Reciting the fact of the mortgage it required the mortgagee to surrender the estate, on payment of the mortgage debt, by either the family or the defendant, to the latter. It also required that petitions should be sent notifying the transfer to the Collector and to the Deputy Collector of the district; these were sent and a statement to the same effect was made by the zamindar to the Tahsildar. Mutation of names followed in the defendant's favour:—*Held*, (1) that at the date of the deed a transfer such as that alleged could not be effected except by a registered deed, as required by the Transfer of Property Act, 1882; (2) that neither the mortgage nor the petitions effected the transfer; (3) that the deed was both in form and substance a transaction between the family and the mortgagee, and not one between the several members of the family; (4) that it did not show that a contract founded on good consideration had been, in fact, made for a transfer, though if such a well-founded contract had existed it would have been an answer to the claim; (5) the family being joint, and the estate, though impartible, being held jointly, the object was to strengthen the mortgagee's title, not to effect changes in the family as to the right of property.

Immudipattam Thirugnana Kondama Naik v. Periya Dorasami 31

8. ———— *Migration by widow of a subject of French India to British India—Acquisition of domicile in British India—Character of her widow's estate:*

Migration by the widow of a Hindu subject of French India to British India, and acquisition of a British Indian domicile, does not change the character of the estate held by the widow, and, if she does not adopt the system of law prevalent among Hindus in British India, the property inherited by her from her husband will be held by her according to the customary law of French India.

Mailathi Anni v. Subbaraya Mudaliar 6

9. ———— *Partition of part of the estate of a Hindu joint family—Continuance of undivided state Impartible estate in the possession of the senior member—Wrongful withholding of junior members' maintenance—Their right to recover arrears:*

In a former suit brought by a junior member of a Hindu joint family for partition of the whole of their joint family estate, the final decree declared that a zamindari in the possession of the senior member was impartible, and awarded among the parties only the divisible part of the family property. In the present suits brought by two younger brothers against the eldest who was in possession of the impartible zamindari, for maintenance, with arrears of the latter unpaid, it was decided that the family was undivided by the effect of those proceedings so far as the impartible estate was concerned, which remained chargeable with their rights of maintenance. As to those rights the Courts below differed, the High Court being of opinion that the arrears were not recoverable. The Judicial Committee held that although the withholding maintenance did not necessarily give a right to sue for the arrears there was therein *prima facie* evidence of wrongful withholding, and that such evidence, supported as it was in this case by evidence of the zamindar's unwillingness to pay for their maintenance and his denial of their rights, led to the conclusion that the withholding was proved to be wrongful. The arrears, for the period within limitation, were accordingly claimable, and were decreed.

Raja Yarlagaadda Mallikarjuna Prasada Nayadu v. Raja Yarlagaadda Durga Prasada Nayadu 147

10. ———— *Rights to villages granted to one member of a Hindu joint family—Bar of limitation after three years from cessation of disability—Application of ss. 7, 18 and 28, and of arts. 142 and 144 of sched. II, Act XV of 1877 (Limitation Act):*

Subject to a proviso, the effect of section 7 of the Limitation Act, 1877, is that a person under disability may, after the disability has ceased, institute a suit within the same period that would have been allowed to him under the schedule, as if he had not been under disability. The proviso governing this is that the time allowed after the period during disability shall not, in any case, extend over more than three years from the date when the disability ceased. Direct evidence was absent as to the circumstances under which a grant was made to one of two brothers, since deceased, who were joint in estate. The question was raised between the parties to this suit, (who were the sons of those brothers respectively), whether the grant had operated in favour of the donee exclusively, for his benefit, or was for that of the two members of the joint family and formed part of the joint estate as between these first cousins. It was clear, however, that the exclusive possession of the defendant, who was the son of the donee, had been discontinued, in favour of the joint estate, from the year 1858 when the then surviving brother had died. This defendant was, at the death of his father, a minor; and afterwards came of age about the year 1871. Within the period of limitation, as determined by the above section and by either article 142, or 144 of the schedule, the defendant had not sued to establish the right of exclusive ownership. The possession of the joint estate was adverse to his separate title. It followed upon this that the defendant's title, if any, to the two villages, in the character of separate estate, was by the operation of section 28, extinguished. This extinction was established by the evidence and needed not to have been pleaded. The result was that the decree of the High Court, (whose judgment was in the plaintiff's favour on the merits), was maintained upon the law of limitation, and upon title by non-claim.

Yasudeva Padhi Khadanga Garu v. Maguni Devan Bakshi Mahapatrulu Garu 387

11. ———— *Suit by one of three widows against her two co-widows for partition of widow's estate in their late husband's property—Proof of unchastity on part of plaintiff during widowhood no ground for refusal—Tenant-in-common—Partition a matter of right—Limitation Act—Act XV of 1877, sched. II, art. 127—Proof of exclusion from joint family property—Mere non-participation in or refusal to live on joint property insufficient:*

One Panguni died in or about the year 1881, leaving three widows him surviving. The three widows, as tenants-in-common, participated for some

time in the profits of their late husband's property. After his decease one of the widows began to lead an immoral life and refused to live with the other two. In 1895 she sued her co-widows for partition and for an allotment of her one-third share of the property. She claimed to have participated in the profits of the family property until 1890, but the defendants contended that she had ceased to participate therein for more than twelve years before the institution of the suit and raised the plea of limitation. They also pleaded that plaintiff was not entitled to claim partition, by reason of her unchastity. It was proved that plaintiff had been living with her paramour subsequent to her husband's decease, and had supported herself without recourse to the family property and had refused to live with defendants:—*Held*, that the burden lay on the defendants of proving that plaintiff, who was admittedly a tenant-in-common with them till 1882, was excluded from enjoyment of the property. Mere proof of refusal on the part of the plaintiff to live with her co-widows, or of non-participation by her in the family property, did not establish ouster or exclusion by defendants and there was no other evidence to show that she had abandoned her interest to their knowledge. *Held also*, that proof of plaintiff's unchastity after her husband's death did not disentitle her to claim partition of the property by metes and bounds. A widow, being a tenant-in-common, is entitled to partition as a matter of right and the Court has no discretion in the matter.

Sellam v. Chinnammal 44

12. ———— *Will—Construction—Bequest to testator's adopted son—Not conditional by this will on adoption having taken place:*

A testator stated in his will that he had been keeping a minor as his adopted son, and recited,—in a bequest of property to him,—“whereas my adopted son is a minor.” On this appeal the question was whether the meaning and effect of the will was to entitle the minor to inherit under the bequest, assuming that he had not been validly adopted by the testator:—*Held*, that the expression that the testator had been keeping the minor as his adopted son meant keeping him with a view to his adoption, and that the bequest to the minor was not conditional on his having been adopted, but was effectual, whether he had been adopted or not.

Subbarayar v. Subbammal 214

IRRIGATION CHANNEL—Negligence—Negligent Act by Government official—Absence of malicious intention—Premature closing of water-supply by mistake of revenue officer—Right of action—Parties:

Plaintiff, a Government raiyat, occupied lands the cultivation of which depended upon a supply of water from a Government channel which was ordinarily kept open until a specified date, when it was closed. Defendant, a revenue officer employed by Government, negligently, but without malice and without any intention of harming plaintiff, caused the channel to be closed at an earlier date than was customary, thereby causing damage to plaintiff's crops. It was part of defendant's duty to see that the channel was closed at a certain date, but he had, on this occasion, closed it too soon by mistake. Plaintiff sued defendant for the damage which he had thereby suffered:—*Held*, that inasmuch as plaintiff's right to a supply of water was founded on contract, a right of action, in case of the water being improperly withheld, might exist as against Government, but that there was none as against the defendant, by whom no legal injury had been committed. *Seemle*, that if malicious intention on the defendant's part had been proved plaintiff might have had a cause of action. *Krishna Ayyan v. Venkatachella Mudali*, (7 M.H.C.R., 60), and *Ramachandra v. Narayanasami*, (I.L.R., 16 Mad., 333), referred to.

Chinnappa Mudaliar v. Sikka Naikan 36

JURISDICTION—Allegation in plaint believed to have been falsely made in order to avoid jurisdiction of Small Cause Court—Procedure by Court:

Where an allegation is made in a plaint which appears to a Court of First Instance to be false and to have been made for the purpose of avoiding the jurisdiction of the Small Cause Court, the plaintiff may be required to satisfy the Court that the allegation is *bona fide* and not merely colourable in order to change the venue.

Appa Rao v. Sobhanadri Rao 158

LANDLORD AND TENANT—Agricultural holdings—Alteration of the character of the holdings by persons entitled to permanent rights of occupancy—Remedy:

The occupants of certain tope lands, forming portions of a zamindari, built a number of tiled dwelling houses, admittedly not for agricultural purposes, thereon. By the terms of the pattas under which the lands were held, the rent payable was liable to vary according to the use made of the land. On a suit being brought by the lessees of the zamindari for possession of the said lands, after demolition of the buildings which had been so erected:—*Held*, that the buildings referred to altered the character of the holdings; and it was no answer that there still remained as many trees as originally had stood upon the land. *Held also*, that the act complained of did not amount to a breach of the condition on which the land was held so as to work a forfeiture of the tenure, which was admittedly a permanent right of occupancy. The appropriate remedy was for the houses to be removed and the land restored to the condition in which it was before its character had been altered.

Orr v. Mrithyunjaya Gurukkal 65

2. ———— *Denial by tenant of landlord's title—Option on part of landlord to determine tenancy—Limitation Act—Act XV of 1877, sched. II, art. 139—Period of limitation as from determination of tenancy by landlord:*

The defendants in a suit for ejectment occupied land of which their predecessor in title had acquired possession under a deed which had been executed in 1836, and which created a tenancy from year to year in favour of that predecessor in title. That lease had been executed by the leading mirasidars of the village. In 1871, defendants had, to the knowledge of plaintiff, set up a right of permanent occupancy in the lands in question, thereby repudiating their landlords' title. In 1894, plaintiff gave defendants notice to give up possession of the lands, but until that time had not evinced any intention to determine the lease. In 1895, plaintiff, on behalf of himself and the other villagers, brought this suit for ejectment. On its being contended that the suit was barred by limitation inasmuch as it was brought more than twelve years after the repudiation of the tenancy by defendants:—*Held*, that the suit was not barred by limitation. A tenant repudiating the title under which he entered becomes liable to immediate eviction at the option of the landlord; but until the landlord indicates that he intends to exercise his option, the tenancy subsists. This principle applies to tenancies from year to year.

Srinivasa Ayyar v. Muthusami Pillai 246

3. ———— *Relief against forfeiture for non-payment of rent though stipulation for payment contained in compromise decree—Civil Procedure Code—Act XIV of 1892, s. 244—Decree containing general stipulation—Power of Court to relieve against penalty in execution proceedings:*

Certain lands were held on lease, and the rent fell into arrears. A suit was then brought for the arrears and for possession, but the parties arrived at a compromise and a decree was passed in terms of that compromise. The decree contained a stipulation that if default should be made in payment of rent within the time fixed for payment each year, the lease should be forfeited. Default was made, and possession of the lands and the arrears of rent were sought for in execution of the decree, when it was objected that the stipulation for forfeiture for non-payment of rent was a penal one, and should not be given effect to, even though it was contained in a decree which was capable of execution:—*Held*, that

inasmuch as the decree passed by the Court was a mere adoption of the contract which existed between the parties to it, the Court must be taken to have adopted the contract with all its incidents. It was therefore competent to the Court to relieve against the forfeiture. *Shirekul Timapa Hegda v. Mahabha*, (I.L.R., 10 Bom., 435), dissented from; *Rai Balkishen Dass v. Raja Rm Bahadoor Singh*, (L.R., 10 I.A., 162; I.L.R., 10 Calc., 305), referred to.

Nagappa v. Venkata Rao ... 265

LEGAL PRACTITIONERS ACT—ACT XVIII OF 1879, ss. 13, 14—*Petition containing disrespectful language presented by co-plaintiff who was also a pleader in the Court—Act committed by a suitor :*

Two persons filed a suit as co-plaintiffs, in a district Court of which one of them was a first-grade pleader. The District Judge, doubting the *bona fides* of the claim, took evidence from the plaintiffs and others, and passed proceedings, giving in detail the reasons for his doubts and ordering that the Official Assignee should be added as a defendant in the suit. The pleader and his co-plaintiff thereupon filed a petition objecting to their having been *prima facie* condemned, and traversing the statements of fact and inferences made against them in the proceedings. Certain passages in the petition were disrespectful, and after some delay and other proceedings a charge was brought against the pleader under the Legal Practitioners Act, 1879. The pleader, while disclaiming any intention to be disrespectful, contended that no offence had been committed under the Legal Practitioners Act inasmuch as he had, in writing the petition, acted as a party and not as a pleader. On the case being referred to the High Court :—*Held*, that steps should not have been taken against the pleader under the Legal Practitioners Act so long as it was possible to take notice of his behaviour in any other way as one committed by a suitor. *In re Wallace*, (L.R., 1 P.C., 283), referred to.

In the matter of a First-grade Pleader ... 17

2. ———, ss. 13, 14, 40—*Suspension from practice without opportunity to defend :*

Two charges were, on 30th December 1899, framed by a District Judge against a pleader under section 14 of the Legal Practitioners Act, and it was directed that they should be heard on 24th January 1900. On the day on which the charges were framed, namely, 30th December 1899, the District Judge passed an order suspending the pleader from practice as from 1st January 1900, pending the disposal of the charges. With regard to one of the charges, no opportunity was given to the pleader to defend himself before the order of suspension was made. With regard to the second charge, the Judge had, prior to the date upon which the charges were framed, made an observation, in the course of a judgment, reflecting in general terms upon the conduct of the pleader, in consequence of which the pleader had written a letter and filed an affidavit by way of explanation :—*Held*, that the order suspending the pleader was irregular and must be set aside.

In the matter of a Second-grade Pleader ... 83

LETTERS PATENT, art. 12—Civil Procedure Code—Act XIV of 1882, ss. 16, 16-A, 17, 373—*Suit instituted by leave and withdrawn with liberty to bring fresh suit on same cause of action—Subsequent refusal of leave to bring such fresh suit—Legality of order of refusal—Exhaustion of leave by filing suit :*

Leave was obtained for the institution of a suit under article 12 of the Letters Patent, and a suit was instituted in pursuance thereof, but, at the settlement of issues, was withdrawn, leave being given to plaintiffs under section 373 of the Code of Civil Procedure to institute a fresh suit upon the same cause of action if so advised. Plaintiffs again applied for leave under article 12 of the Letters Patent to institute the fresh suit, which was refused, and against that order of refusal plaintiff appealed :—*Held*, that the force of the original order granting leave to institute the suit was

exhausted by its institution in pursuance thereof; and that, in consequence, when leave was again applied for, in respect of the institution of the fresh suit, there was nothing to prevent the Court from dealing with the application, and granting or refusing leave, as it deemed proper. *Held also*, that the order which was passed by the Court in the due exercise of its discretion must be upheld.

Sabhapathi Gurukkal v. Lakshmu Ammal ... 293

2. ———, art. 12—Stamp Act—Act I of 1879, s. 16—*“Stamped at the time of execution”—Stamp Act—Act II of 1899—Affixing and cancelling stamp immediately after signature—Part of the cause of action—Promissory note payable in Madras or Secunderabad—Payments of interest in Madras—Jurisdiction :*

A promissory note was executed in plaintiff's favour at Vizianagram payable in Secunderabad or Madras. Payments of interest due on the note were made in Madras. The note was signed first, the stamp having been affixed and cancelled after signature, the acts being practically simultaneous. Leave to sue in the High Court had been obtained under article 12 of the Letters Patent :—*Held*, that part of the cause of action had arisen in Madras. Also, that the note was stamped at the time of execution, within the meaning of section 16 of the Stamp Act (I of 1879).

Suriy Mull v. Hudson ... 259

3. ———, art. 15—Judgment—Order directing receiver in suit to advance money for defence by guardian ad litem—Appeal :

An order directing a receiver in a suit to advance money to a guardian *ad litem* to enable him to conduct the defence on behalf of a defendant is not a judgment within the meaning of article 15 of the Letters Patent and no appeal lies therefrom.

Kuppasami Chetti v. Rathnavelu Chetti ... 511

4. ———, art. 15—Order of a single Judge refusing a stay of execution—“Judgment”—Appeal :

An order, made by a single Judge, refusing a stay of execution, is not a judgment within the meaning of article 15 of the Letters Patent, and no appeal lies therefrom. *R. v. R.*, (I.L.R., 14 Mad., 88), commented on.

Srimantu Raja Yarlagadda Durga Prasada Nayudu v. Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayadu ... 358

5. ———, art. 15—Refusal to order assignee of plaintiff to be brought on record—Appeal—Civil Procedure Code—Act XIV of 1882, s. 372—Application to be brought on record in substitution for plaintiff and for postponement of decree :

An order dismissing on its merits an application by the assignee of a plaintiff in a suit to be brought upon the record either in addition to or in substitution for the plaintiff, is a judgment within the meaning of article 15 of the Letters Patent and an appeal lies therefrom. The plaintiff in a suit, after its institution, assigned to A the subject-matter of the suit, and gave him power and authority to continue it either in addition to or in substitution for the plaintiff, and further constituted A his attorney. The suit was referred to a Judge in Chambers to take accounts, and a certificate was agreed to by the first defendant in it which left certain matters undetermined. The case was set down for hearing in order that a decree might be passed in terms of the certificate. A thereupon applied to be brought on the record in addition to or in substitution for the plaintiff in the suit and asked that the passing of a final decree therein might be postponed until the matters left undetermined by the certificate had been enquired into and determined :—*Held*, that the application was a reasonable one and should be complied with as A was directly interested in the matters to be settled by the decree.

Commercial Bank of India, Limited v. Sabju Saheb ... 252

6. ———, 'cl. 34—Probate or Letters of Administration—Jurisdiction of High Court to grant—Estate of a deceased who had not dwelt or left goods within limits of presidency—Succession Act—Act X of 1865, s. 240:

The High Court of Madras has no jurisdiction to grant probate of the will of a testator, or letters of administration of the estate of an intestate who did not dwell and who did not leave assets within the limits of the presidency.

In the matter of Rose Learmouth 120

- LIMITATION—Rent Recovery Act (Madras)—Act VIII of 1865, s. 69—Delay in presenting appeal—Power of Court to excuse:**

Under section 69 of the Rent Recovery Act, a Court has no power to excuse delay in presenting an appeal from a judgment from the Court of First Instance in a suit by a tenant to set aside a distraint made by a land-holder under the provisions of the Rent Recovery Act (Madras).

Bhujanga Rao v. Venkanna 558

2. ———, *Rent Recovery Act (Madras)—Act VIII of 1865, s. 78—Six months from date of cause of action—Illegal attachment by landholder of tenant's property—Retention for more than six months—Continuing wrong:*

By section 78 of the Rent Recovery Act (Madras), 1865, a suit may be brought to recover damages in respect of anything professedly done under the authority of that Act, provided that it be instituted within six months from the time at which the cause of action arose. A landholder illegally attached goods of his tenant and detained them for longer than six months. The tenant then sued to recover the goods and damages for the illegal detention:—*Held*, that the claim was not barred: the detention being a continuing wrong.

Yamuna Bai Rani Sahiba v. Solayya Kavundan 339

3. ———: See SPECIFIC RELIEF ACT, s. 27, and TRANSFER OF PROPERTY ACT, ss. 54, 60.

- LIMITATION ACT—ACT XV OF 1877, s. 3, sched. II, art. 118—"Plaintiff"—Suit to set aside an adoption—Effect of bar on immediate reversioner:**

S died leaving a widow and two daughters him surviving. He also left immoveable property of which the widow took possession. About eight years after, namely in March 1886, the widow took A in adoption, in pursuance of authority alleged to have been given by her late husband. From that date A claimed as adopted son to be entitled to the estate of S; and both the daughters of S were aware of that claim from 1886. In 1893 a son was born to one of the daughters; and within six years of his birth, namely in 1898, the present suit was instituted on his behalf to set aside A's adoption. A in defence contended that the suit was barred by article 118 of schedule II of the Limitation Act. For the plaintiff it was claimed that limitation could only run as against him from the date of his birth:—*Held*, that the suit was barred. The daughters, as immediate reversioners, represented the inheritance, and plaintiff, as a remote reversioner, was a person claiming through or from the daughters within the meaning of section 3 of the Limitation Act.

Ayyadorai Pillai v. Solai Ammal 405

2. ———, s. 5—Civil Procedure Code—Act XIV of 1882, ss. 206, 622—Omission in judgment—Decree in conformity with judgment—Amendment of decree under section 206—Remedy by appeal—Inadmissibility of revision petition:

Defendants in a suit held certain land on lease from plaintiff, who alleged that they had encroached upon his land and by that means held more than the area to which they were entitled. He sued for possession of the excess and also claimed arrears of rent. Defendants denied the alleged encroachment, and pleaded that if it should be proved they were

willing to pay increased rent. They also admitted liability in respect of the arrears of rent. The encroachment was proved, and the District Munsif gave judgment declaring defendants liable for increased rent in proportion, a decree being drawn up in similar terms. Both judgment and decree omitted to award the amount admittedly due as arrears of rent. Plaintiff thereupon presented a petition to the District Munsif, who ordered the decree to be amended so as to render defendants liable for the said arrears. This order was passed more than one month from the date of the decree. Upon a petition being preferred by defendants in the High Court against the District Munsif's order of amendment:—*Held*, that the petition was not admissible, inasmuch as it was open to the petitioner, under section 5 of the Limitation Act, to appeal against the decree as amended, notwithstanding that a month had expired from the date of the decree. *Nanda Rai v. Raghunandan Singh*, (I.L.R., 7 All., 282), considered.

Visvanathan Chetti v. Ramanathan Chetti 646

1. ———, ss. 7, 18, 28, sched. II, arts. 142, 144—Application of—Hindu Law—Rights to villages granted to one member of a Hindu joint family—Bar of limitation after three years from cessation of disability:

Subject to a proviso, the effect of section 7 of the Limitation Act, 1877, is that a person under disability may, after the disability has ceased, institute a suit within the same period that would have been allowed to him under the schedule, as if he had not been under disability. The proviso governing this is that the time allowed after the period during disability shall not, in any case, extend over more than three years from the date when the disability ceased. Direct evidence was absent as to the circumstances under which a grant was made to one of two brothers, since deceased, who were joint in estate. The question was raised between the parties to this suit, (who were the sons of those brothers respectively), whether the grant had operated in favour of the donee exclusively, for his benefit, or was for that of the two members of the joint family and formed part of the joint estate as between these first cousins. It was clear, however, that the exclusive possession of the defendant, who was the son of the donee, had been discontinued, in favour of the joint estate, from the year 1858 when the then surviving brother had died. This defendant was, at the death of his father, a minor; and afterward came of age about the year 1871. Within the period of limitation, as determined by the above section and by either article 142, or 144 of the schedule, the defendant had not sued to establish the right of exclusive ownership. The possession of the joint estate was adverse to his separate title. It followed upon this that the defendant's title, if any, to the two villages, in the character of separate estate, was by the operation of section 28, extinguished. This extinction was established by the evidence and needed not to have been pleaded. The result was that the decree of the High Court, (whose judgment was in the plaintiff's favour on the merits), was maintained upon the law of limitation, and upon title by non-claim.

Vasudeva Padhi Khadanga Garu v. Maguni Devan Bakshi Mahapatralu Garu 387

4. ———, ss. 14, 19—Deduction of period during which plaintiff had been prosecuting another proceeding—Former proceeding dismissed for misjoinder of causes of action—Written statement of defendant treated as an acknowledgment:

Plaintiff had previously filed against the same defendants a suit which had been dismissed on the ground of misjoinder of causes of action. He now filed this suit, which would be barred by limitation unless the period during which the first suit had been pending should be deducted, under section 14 of the Indian Limitation Act:—*Held*, that plaintiff was entitled to have that period deducted, inasmuch as he had prosecuted the first suit with due diligence. The written statement of the defendant in the first suit was treated as an acknowledgment, under section 19 of the Limitation Act, from the date of which the period of limitation should be calculated.

Venkataramayya Nayudu v. Ramaraju 1

5. —————, sched. II, art. 97—*Civil Procedure Code*
—*Act XIV of 1882, s. 43—Suit for specific performance—Subsequent suit for money paid on a consideration that failed:*

Defendant having failed to convey certain property belonging to himself and his son to plaintiff as agreed, plaintiff obtained a decree for specific performance, in pursuance of which the price was paid and a conveyance executed. Plaintiff was then obliged to sue for possession, when it was found that the sale did not bind the son's interest, and on grounds of convenience plaintiff was awarded the value of defendant's share instead of a decree for partition. He now sued to recover the balance of the price paid, and it was contended that the suit was, in fact, one for damages for breach of the contract to convey, and as such was barred under section 43 of the Code of Civil Procedure, inasmuch as the damages claimed could have been sued for in the alternative in the previous suit for specific performance:—*Held*, that the suit was not barred; it being in fact, for the recovery of money paid on a consideration that had failed, and the cause of action being different from that in the suit for specific performance. *Held also*, that the suit was not barred by limitation, inasmuch as the failure of consideration must be taken to have occurred when it was found, in the suit for possession, that the plaintiff was not entitled to recover the son's share; which date was less than three years from that upon which the present suit had been instituted, article 97 of the Limitation Act, 1877, being applicable.

Venkatarama Ayyar v. Venkata Subrahmanian 27

6. —————, sched. II, arts. 111, 116—*Suit to recover unpaid purchase money and to enforce vendor's lien:*

A suit to recover unpaid purchase money due in respect of a sale of land, and to enforce the vendor's lien, is governed by article 111 of schedule II to the Limitation Act. *Natesan Chetti v. Soundararaja Ayyangar*, (I.L.R., 21 Mad., 141), followed. *Har Lal v. Muhamdi*, (I.L.R., 21 All., 454), discussed. Where, on a sale of land, there was no contract in writing between the vendor and purchaser as to the payment of the purchase money, but only a registered sale-deed, which recited that the price had been paid:—*Held*, that article 116 did not apply.

Avuthala v. Dayamma 233

7. —————, sched. II, art. 127—*Proof of exclusion from joint family property—Mere non-participation in or refusal to live on joint property insufficient—Hindu law—Suit by one of three widows against her two co-widows for partition of widow's estate in their late husband's property—Proof of unchastity on part of plaintiff during widowhood no ground for refusal—Tenancy-in-common—Partition a matter of right:*

One Pangani died in or about the year 1881, leaving three widows him surviving. The three widows, as tenants-in-common, participated for some time in the profits of their late husband's property. After his decease, one of the widows began to lead an immoral life and refused to live with the other two. In 1895 she sued her co-widows for partition and for an allotment of her one-third share of the property. She claimed to have participated in the profits of the family property until 1890, but the defendants contended that she had ceased to participate therein for more than twelve years before the institution of the suit and raised the plea of limitation. They also pleaded that plaintiff was not entitled to claim partition, by reason of her unchastity. It was proved that plaintiff had been living with her paramour subsequent to her husband's decease, and had supported herself without recourse to the family property and had refused to live with defendants:—*Held*, that the burden lay on the defendants of proving that plaintiff, who was admittedly a tenant-in-common with them till 1892, was excluded from enjoyment of the property. Mere proof of refusal on the part of the plaintiff to live with her co-widows, or of non-participation by her in the family property, did not establish ouster or exclusion by defendants and there was no other evidence to show that she had abandoned her interest to their knowledge. *Held also*, that proof of plaintiff's unchastity after her husband's death did not disentitle her

to claim partition of the property by metes and bounds. A widow, being a tenant-in-common, is entitled to partition as a matter of right and the Court has no discretion in the matter.

Sellam v. Chinnammal 44

8. —————, sched. II, art. 134—*"Purchased"—Sub-mortgage by a mortgagee as if complete owner—Possession by sub-mortgagee for over twelve years—Suit for redemption by original mortgagor—Right of sub-mortgagee to be redeemed:*

In 1864, A mortgaged certain lands to B for Rs. 750. In 1881, B mortgaged the same lands to C for Rs. 5,000. In so doing, B represented himself as the absolute owner of the property, and did not profess to transfer merely the interest which he possessed, and which was, in fact, only that of a mortgagee. C enjoyed possession of the lands for a period exceeding twelve years from the date of his mortgage. A then instituted a suit for redemption; when, it was contended on behalf of C that A was bound to redeem C's mortgage before he could recover possession of the property on the ground that C's mortgage, which, but for the law of limitation would have been invalid as against A, had become good by C's possession for twelve years, the property having been "purchased" from a mortgagee, within the meaning of article 134 of schedule II to the Limitation Act:—*Held*, (DAVIES, J., dissenting) that C had "purchased" within the meaning of article 134.

Manavikraman Ettan Thanburan v. Ammu 471

9. —————, sched. II, art. 139—*Landlord and tenant—Denial by tenant of landlord's title—Option on part of landlord to determine tenancy—Period of limitation as from determination of tenancy by landlord:*

The defendants in a suit for ejectment occupied land of which their predecessor in title had acquired possession under a deed which had been executed in 1836, and which created a tenancy from year to year in favour of that predecessor in title. That lease had been executed by the leading mirasidars of the village. In 1871, defendants had, to the knowledge of plaintiff, set up a right of permanent occupancy in the lands in question, thereby repudiating their landlords' title. In 1894, plaintiff gave defendants notice to give up possession of the lands, but until that time had not evinced any intention to determine the lease. In 1895, plaintiff, on behalf of himself and the other villagers, brought this suit for ejectment. On its being contended that the suit was barred by limitation inasmuch as it was brought more than twelve years after the repudiation of the tenancy by defendants:—*Held*, that the suit was not barred by limitation. A tenant repudiating the title under which he entered becomes liable to immediate eviction at the option of the landlord; but until the landlord indicates that he intends to exercise his option, the tenancy subsists. This principle applies to tenancies from year to year.

Srinivasa Ayyar v. Muthusami Pillai 246

10. —————, sched. II, art. 173-A—*Civil Procedure Code—Act XIV of 1882, s. 258—Agreement by purchaser of mortgaged property to pay an agreed sum to mortgagee holding decree for sale—Transfer of Property Act—Act IV of 1882, s. 57—Payment into Court by purchaser of mortgaged property in pursuance of adjustment of decree out of Court—Application for adjustment of decree to be recorded:*

The mortgagee of certain property brought a suit on his mortgage and obtained a decree for sale. Petitioner then negotiated with the mortgagor for the purchase of the lands. The mortgagee consented to the proposed purchase and agreed to accept from petitioner a sum of money in full satisfaction of his mortgage decree. Petitioner completed the purchase accordingly and tendered the agreed sum to the mortgagee, who refused to accept it. Petitioner thereupon filed this petition, under section 57 of the Transfer of Property Act, asking to be allowed to pay the amount into Court and praying for a declaration that the property was freed from encumbrance. The mortgagee contended that the application fell under section 258 of the Code of Civil Procedure, in which case it would be barred

under article 173A of the Limitation Act:—*Held*, that section 57 of the Transfer of Property Act did not govern the case, as it involved a question of the adjustment of a decree out of Court; also that section 258 of the Code of Civil Procedure was not applicable, and that petitioner was not precluded by article 173A of the Limitation Act from proving the agreement set up by him under section 244, clause (c), of the Code of Civil Procedure, and that he was entitled, on payment of the money into Court, to the declaration sought.

Mallikarjuna Sastri v. Narasimha Rao 412

11. —————, sched. II, art. 179—*Application for execution—Application to take a step-in-aid of execution—Distinction:*

On 4th November 1895, a decree-holder applied to the Court for the attachment of a sum of money belonging to the judgment-debtor, but which was in the hands of a Government department. There was no prayer in the petition that the money should be paid to the petitioner. An order purporting to be made under section 272 of the Code of Civil Procedure was made on 19th November 1895, requesting the department to remit the amount to the Court. On 29th April 1898, the Treasury Deputy Collector informed the Court that there was a balance due to the judgment-debtor. On 12th December 1898, the decree-holder petitioned the Court under sections 268 and 272 of the Code, that the said balance might be sent for and paid to him:—*Held*, that the application was not barred and that article 179 of schedule II to the Limitation Act was not applicable to the case.

Venkataramanamma v. Purushottam 188

12. —————, sched. II, art. 179—*Application in execution more than three years after previous application—Omission on part of judgment-debtor to set up bar by limitation—Adjudication on application—Subsequent application in execution—Objection on ground that previous application was barred—Res judicata:*

A decree was obtained on 16th March 1893, and a petition in execution was presented on 8th February 1894. The next petition in execution was presented on 2nd July 1897, when the judgment-debtor, though he had notice of it, did not raise the defence of limitation. An order was passed on the petition for the issue of a warrant for the arrest of the defendant, and the warrant was duly issued. Within three years of that petition the present application in execution was made, when it was objected that as the application in 1897 had been presented more than three years from the previous application in 1894 it was barred, and that in consequence the present application must also be barred:—*Held*, that it was not open to the judgment-debtor now to raise the objection that the application of 1897 was barred. He had had notice of that application and had raised no objection to it. Execution had been ordered in pursuance of it, which was an adjudication on the application; that order was acted on and no appeal was preferred against it. The question whether the application of 1897 was barred was therefore *res judicata*. As the Court which had ordered the execution had jurisdiction to determine whether the decree was barred and had made an order in execution of the decree, it must be considered to have determined that it was not barred. *Mungul Pershad Dicit v. Grija Kant Lahiri Chowdhry*, (L.R., 8 I.A., 123; I.L.R., 8 Cal., 51), followed.

Lakshmanan Chetti v. Kuttayan Chetti 669

13. —————, art. 179—*Compromise after decree—No amendment of decree unless authorized by either s. 206 or s. 623, Civil Procedure Code—Proceeding in execution barred by time:*

The High Court has no power to alter its own decree, except under the provisions of either section 206, or section 623 of the Code of Civil Procedure. The ground of review must have been existing at the time of the decree, the section 623 not authorizing review of a decree, which was right, on the happening of a subsequent event. After a decree for land

against four defendants a compromise was made between the plaintiff and the third defendant. The first and fourth had acknowledged the plaintiff's right. The second and third had defended the suit, and the decree had been made, and affirmed on appeal to the High Court, jointly and severally against the first three, and conditionally against the fourth. An application by the second and third defendants for leave to appeal to Her Majesty was withdrawn, the two parties to the compromise having obtained an order for amendment of the decree in its terms. For the execution of the decree against the three defendants, other than the third, as to the proportionate part of the property sued for, and not the subject of the compromise, the decree-holder afterwards obtained an order. This order was reversed by the High Court. Hence this appeal:—*Held*, that the order directing the amendment of the decree in the terms of the compromise was beyond the powers of the High Court, and was without operation either in favour of or against those defendants who had not been parties to the petition for that amendment. *Held also*, on the decree-holder's petition for execution of the decree, that the period of limitation commenced from the date of the primary, and not of the amended, decree of the High Court. Execution was therefore barred by limitation. Instead of attempting the alteration in the decree, the High Court could properly have made the compromise a rule of Court, and have stayed all proceedings against the defendant who was a party to it, except for the purpose of enforcing it against him.

Kotagiri Venkata Subbamma Rao v. Vellanki Venkatarama Rao 1

14. —————, sched. II, art. 179—*Step in aid of execution—Decree directing execution of muchalka and costs—Recovery of costs in execution—Application to enforce execution of muchalka more than three years previously—Subsequent applications for costs incidental to execution proceedings—Limitation:*

A decree was passed in 1882 directing a defendant to execute a muchalka, no order being made as to costs. The Appellate Court affirmed the decree and also awarded costs. These costs were recovered by plaintiff in execution proceedings in 1883. Plaintiff now, (namely, in September 1899), sought, in an application in execution, to enforce the decree for the execution of the muchalka, claiming that the application was not barred by limitation because previous applications in execution had been made in 1885, 1886, 1887, 1889, 1894, 1895 and 1897. The last two applications had been for the recovery of costs incidental to previous execution proceedings, and not to enforce the execution of the muchalka, the last application for that relief having been made in 1894:—*Held*, that the application was barred by limitation. The applications in 1895 and 1897 for costs incidental to the execution proceedings were not applications for the execution of the original decree or any part of it.

Appu Rao v. Ramakrishna Chettiar 672

15. —————, sched. II, art. 179—*Transfer of Property Act—Act IV of 1882, ss. 88, 89—Decree for sale under section 88—No order absolute under section 89—Application by decree-holder for sale under Civil Procedure Code—Order as asked—No further applications in execution for more than three years—Then, application for order absolute, under section 89—Bar by previous order:*

A decree for sale of mortgaged property was passed on 30th August 1895 under section 88 of the Transfer of Property Act. No order absolute for sale was asked for or made under section 89 of the Transfer of Property Act. On 30th September 1896, the decree-holder applied to the Court under sections 286 and 287 of the Code of Civil Procedure for an order directing the sale of the mortgaged property and an order was passed accordingly. This application was subsequently dismissed for failure to pay the expenses. On 10th October 1896, another application for execution was made but no further step in execution was taken for more than three years, namely, till 20th November 1899, when the decree-holder applied for an order absolute under section 89 of the Transfer of Property Act. He contended that as such an order had never been made he was

entitled to ask for it, and that inasmuch as his application was not one for execution it was not barred by limitation under article 179 of schedule II to the Limitation Act:—*Held*, that the order passed on the application of 30th September 1896 must be taken to be an order absolute for sale, as well as an order directing certain further steps in execution, and it was in consequence not open to the decree-holder to apply now for an order under section 89 of the Transfer of Property Act. His present application must accordingly be regarded as an application for execution, and as such it was barred under article 179 of schedule II of the Limitation Act.

Venkataram v. Chinna Ramayya 695

16. —————, art. 179 (3)—*Civil Procedure Code—Act XIV of 1882, s. 206:*

A decree was passed on 31st December 1892, and no appeal was presented by either party therefrom. Defendant No. 2, however, filed a petition for amendment of the decree in respect of the costs, which was granted on 6th October 1893. On 6th July 1896, defendant No. 2 applied for execution of the decree, and he again applied on 29th April 1898. On its being contended that the application was barred by limitation:—*Held*, that it was not barred. The order passed by the Court determining the amount of costs must be treated as a continuation or completion of the judgment, and the amendment made was therefore substantially made on review of judgment, and article 179 (3) of the Limitation Act applied.

Venkata Jogayya v. Venkatasimhadri Jagapatirazu 25

LOCAL BOARDS ACT (MADRAS)—ACT V OF 1884, ss. 57, 64, 149—*Wrongful collection of land cess from inamdar—Suit for its recovery against President, District Board—Maintainability of suit:*

A sum of money was collected from an inamdar as land cess under section 57 of the Madras Local Boards Act, 1884. The amount had been assessed by the Collector of the district under section 64, collected by him and subsequently paid to the credit of the District Fund, under section 149 of the said Act. The inamdar filed a suit against the President of the District Board to recover the amount on the ground that it had been illegally collected from him. There was no claim for damages. On its being objected that the suit was wrongly brought against the President of the District Board:—*Held*, that the suit was not maintainable. The assessment and the collection of which plaintiff complained were not the acts of the defendant, who could not be called upon to make good the amount said to have been wrongly collected merely because it had eventually been paid over to the credit of the District Board.

Harischandra Devu v. President, District Board of Ganjam 114

LUNACY (DISTRICT COURTS) ACT—ACT XXXV OF 1858, ss. 2, 23—*Appointment by Court of guardian ad litem to lunatic—Practice—Civil Procedure Code—Act XIV of 1882, s. 463—Suit against a lunatic not so adjudged:*

The plaintiff in a suit against several defendants described the first defendant, (a widow, and not a minor), as of unsound mind, and sued her as being represented by her mother and guardian. The first defendant had not been adjudged of unsound mind under the Lunacy (District Courts) Act XXXV of 1858; nor did it appear that the Court of First Instance had satisfied itself that first defendant was, in fact, a lunatic or that it had approved of the guardian named and appointed by the plaintiff, as a fit and proper person. The suit was only contested by the second defendant. By section 463 of the Code of Civil Procedure the provisions contained in sections 440 to 462, (which relate to the conduct of suits by and against minors), are directed to apply, *mutatis mutandis*, in the case of persons of unsound mind adjudged to be so under Act XXXV of 1858 or under any other law for the time being in force. The contention having been raised that the suit was bad and must be dismissed because first defendant had not been so adjudged:—*Held*, that inasmuch as the right of suit against the lunatic was unquestionable, in the absence of any provision in the Code of Civil Procedure for the maintenance of suits against

persons of unsound mind who have not been so adjudged under the Act, the Court should appoint a fit and proper person as guardian *ad litem*, upon its being established that the first defendant was, in fact, of unsound mind.

Kadala Reddi v. Narisi 504

MADRAS CITY CIVIL COURT ACT—ACT VII OF 1892, s. 3—*Jurisdiction—Suit for "breach of promise of marriage"—Contract of marriage between intended bridegroom and parent of intended bride—Cognizable by Small Cause Court—Presidency Small Cause Courts Act—Act XV of 1882, s. 19 (q):*

The phrase "breach of promise of marriage" which occurs in article (q) of section 19 of the Presidency Small Cause Courts Act has reference to the action as understood in English law, that is, between the parties who contemplate contracting the marriage, and not between an intended bridegroom and the parent of the intended bride. By section 3 of the Madras City Civil Court Act, 1892, jurisdiction is conferred upon the City Civil Court to try all suits of a civil nature except *inter alia*, suits cognizable by the Small Cause Court. By section 19 (article (g)) of the Presidency Small Cause Courts Act, the Small Cause Court has no jurisdiction to entertain suits for compensation for breach of promise of marriage. A suit was filed in the City Civil Court for compensation for breach of promise of marriage; but the contract alleged to have been broken had been entered into between the parent of the intended bride and the intended bridegroom:—*Held*, that the Court had no jurisdiction inasmuch as such a suit was not exempted from the jurisdiction of the Small Cause Court.

Hakim Muhammad Ashruff Hussain Sahab v. Syed Muhammad Ali Sahab ... 652

MALABAR COMPENSATION FOR TENANTS IMPROVEMENTS ACT (MADRAS)—ACT I OF 1887, ss. 2, 3, 4, 6—*Malabar Compensation for Tenants Improvements Act (Madras)—Act I of 1900, ss. 3, 4, 7, 10—Transfer of Property Act—Act IV of 1882, ss. 108 (h), (o), 117—Right of kanomdar to remove and appropriate trees planted by himself:*

A kanomdar is entitled, during the period of his occupation, to remove and appropriate to himself any trees that he has planted, provided that he leaves the property substantially in the state in which he received it.

Isasudevan Nambudripad v. Valia Chathu Achan 47

MALABAR LAW—*Appointment of trustee to tarwad charities by karnavan—Validity:*

Though the karnavan of a Malabar tarwad has the power, unless specially limited by family usage or agreement, of himself managing the trust property of the tarwad, he has no inherent right, as karnavan, to appoint another to take his place as such trustee.

Kannan v. Pashaniandi 436

2. ————— *Customary Law—Adoption among the Nayars of South Malabar—Power to adopt of a karnavan of a tarwad—Consent of the anandran required:*

This litigation between Nayars in South Malabar was decided according to their laws and usages, some of which relating to the descent of property through females, are so established as to be judicially noticed without proof, while others require proof. The large powers of the karnavan of a tarwad are essentially for the management of its property. His power to alienate is limited. He is empowered to adopt so as to make persons and their heirs members of the tarwad only with the consent of the other members thereof. Where the members had been reduced in number to the karnavan himself and one anandran:—*Held*, that the karnavan could not adopt at his own discretion without the consent of the latter, in the absence of a proved custom authorizing adoption by the karnavan alone. In the time of the last possible karnavan such a power to him alone might be essential to preserve the tarwad. But in the

present case the last karnavan had not been reached; and the adoption by the actual one acting alone without the consent of the surviving anandran was therefore invalid.

Raman Menon v. Raman Menon 73

3. ———— *Denial of uralan's title by his co-uralan—Suit by one of two uralans without consulting co-uralan—Maintainability of suit, co-uralan being impleaded as defendant:*

One of two co-uralans had for a considerable time denied the title of the other uralan. The latter brought a suit to redeem a kanom without first consulting his co-uralan or asking him to join in it. He impleaded the co-uralan as a defendant giving as his reason that inasmuch as his co-uralan had denied his title it was unnecessary to consult him as to the institution of the suit:—*Held*, that the suit was not maintainable. It is only when one perversely declines to co-operate with the other, after being invited to do so, and when it is for the benefit of the institution that proceedings should be taken, that one uralan can sue, impleading the other as defendant.

Savitri Antarjanam v. Raman Nambudri 296

4. ———— *Suit against karnavan as manager of tarwad—Attachment of tarwad property under decree—Subsequent order of release—Suit to cancel order of release—Barred by section 244 of Civil Procedure Code—Civil Procedure Code—Act XIV of 1882, s. 244:*

Plaintiff in a suit obtained a decree against the karnavan of defendants, as senior member and manager of the tarwad, and attached tarwad property in execution thereof. Objection was then raised by defendants that the property was not liable under the decree, and the property was ordered to be released. Upon a suit being brought by plaintiff against defendants for the cancellation of the last-mentioned order:—*Held*, that the suit was not maintainable by reason of section 244 of the Code of Civil Procedure

Kamal Kutti v. Ibrayi 658

MALICIOUS PROSECUTION—Finding on reasonable and probable cause:

Plaintiff had been charged by defendant with the destruction of defendant's crop, and convicted, the conviction being upheld on appeal. A revision petition was then filed in the High Court when the case was remanded to the lower Appellate Court, which again upheld the conviction. The High Court, however, quashed the conviction, and plaintiff now sued for damages for malicious prosecution. The District Munsif dismissed the suit, holding that defendant had reasonable and probable cause for preferring the complaint. The Subordinate Judge reversed this decree and gave judgment for plaintiff. He said that the Munsif had considered that the existence of reasonable and probable cause should be presumed from the fact that plaintiff had been convicted and that his conviction had been upheld on appeal. The judgment of the High Court should, however, have been taken into consideration, and was in favour of plaintiff. He added:—"In the state of things the complaint and prosecution by defendant must be presumed to have been made maliciously; I accordingly find the issue for the plaintiff and against the defendant, and hold that the latter prosecuted the former falsely and maliciously and without reasonable and probable cause."—*Held*, that on this finding the plaintiff had failed to show affirmatively an absence of reasonable and probable cause. The Subordinate Judge had presumed malice from the fact that the conviction of the plaintiff had been ultimately quashed by the High Court; and, having presumed malice, he found the issue for the plaintiff. The absence of probable cause does not imply malice in law. *Mody v. Queen Insurance Co.*, (I.L.R., 25 Bom., 332), and *Hall v. Venkatakrishna*, (I.L.R., 13 Mad., 394), followed.

Ramayya v. Sivayya 549

2. ———— *Proof of plaintiff's innocence—Insufficiency of proof that the charge against plaintiff has been dismissed:*

In a suit for damages for malicious prosecution, plaintiff, with the object of proving the falsity of the charge which defendant had preferred against him, filed the order of the Magistrate dismissing the charge under section 209 of the Code of Criminal Procedure, and adduced oral evidence. The latter was not accepted as reliable, the falsity of the charge being taken as established solely by the said order of dismissal:—*Held*, that this was insufficient, the onus being on the plaintiff to prove that he was innocent and that his innocence had been pronounced by the tribunal before which the accusation had been made. *Abrath v. North Eastern Railway Co.*, (L.R., 11 Q.B.D., 440; L.R., 11 App. Cas., 24), referred to.

Nalliappa Goundan v. Kaliappa Goundan 59

MORTGAGE—Right of possession of mortgaged lands as between first and second mortgagee—Suit on mortgage by first mortgagee, second mortgagee not being joined—Decree for sale and subsequent purchase of the lands by first mortgagee—Possession by first mortgagee—Suit by second mortgagee against first mortgagee, decree for sale, and purchase by second mortgagee—Delivery of possession to second mortgagee—Right of first mortgagee to recover possession:

A mortgagee sued and obtained a decree on his mortgage, and brought the mortgaged land to sale in execution of that decree. In that sale he purchased the land, which he subsequently sold to R, who obtained possession of it. At the date of the suit, a second mortgage existed over the land, but the second mortgagee was not made a party to the suit. The second mortgagee then brought a suit against R and others, and obtained a decree authorizing the sale of the land subject to R's rights. The land was again sold, and was purchased by the second mortgagee, whose successors in title were in due course put into possession of it. R now petitioned the Court for an order setting aside the delivery of possession to the successors of the second mortgagee:—*Held*, that R was entitled to possession.

Muhammad Usan Rowthan v. Abdulla 171

MUHAMMADAN LAW—Gift of one-third of donor's interest in property—Donees not put into possession—Validity of gift—Doctrine of "musha" or confusion—Civil Courts Act (Madras)—Act III of 1873, s. 16:

Certain property having been taken up under the Land Acquisition Act, two persons claimed a share in the compensation to be paid in respect of it, alleging that the property in question had been assigned to them by a registered deed of gift and that it had devolved upon their assignor as a sharer under the Muhammadan Law, in the estate of a deceased relative. The deed of gift recited the fact that the assignor had become entitled to 14 out of 24 shares in the said estate and authorised the claimants to collect the assignor's shares from tenants and others who were in possession of the properties by means of suits or mediation and directed the claimants to take as a gift to their mosque one-third of the net balance so collected. The claim was disallowed by the Court of First Instance on the ground that the gift was invalid under Muhammadan Law, because the claimants, as donees, had not been put into possession of the property, and also because the gift was of an undefined share and therefore invalid according to Muhammadan Law by reason of "musha" or confusion:—*Held*, that even if the doctrine of "musha" was in force in the Presidency of Madras, the claimants were entitled to be paid the compensation claimed. Whether the doctrine of "musha" is in force in the Presidency of Madras.—*Quære*. *Per BENSON, J.*—The validity of the gift was not "a question regarding succession, inheritance, marriage or caste, or any religious usage or institution," as referred to in the Madras Civil Courts Act, 1873, and therefore the rules of Muhammadan Law with regard to gifts were not necessarily the rules by which the question should be decided. The Muhammadan Law as adopted by our Courts does not require immediate possession to be given in all cases, and it may be doubted whether even the restricted rule as to possession is any longer adapted to modern requirements and whether the mode of transfer laid down as

obligatory on Europeans and Hindus by section 123 of the Transfer of Property Act and adopted by the parties in this case, (namely, by registered instrument attested by two witnesses and signed by the donor), ought not in equity and good conscience to be held to be as efficacious as delivery of possession in the case of Muhammadans. *Mahomed Buksh Khan v. Hosseini Bibi*, (L.R., 15 I.A., 81; I.L.R., 15 Calc., 684), referred to.

Alabi Koya v. Mussa Koya

NEGLIGENCE—Negligent act by Government official—Absence of malicious intention—Premature closing of water-supply by mistake of revenue officer—Right of action—Parties:

Plaintiff, a Government raiyat, occupied lands the cultivation of which depended upon a supply of water from a Government channel which was ordinarily kept open until a specified date, when it was closed. Defendant, a revenue officer employed by Government, negligently, but without malice and without any intention of harming plaintiff, caused the channel to be closed at an earlier date than was customary, thereby causing damage to plaintiff's crops. It was part of defendant's duty to see that the channel was closed at a certain date, but he had, on this occasion, closed it too soon by mistake. Plaintiff sued defendant for the damage which he had thereby suffered:—*Held*, that inasmuch as plaintiff's right to a supply of water was founded on contract, a right of action, in case of the water being improperly withheld, might exist as against Government, but that there was none as against the defendant, by whom no legal injury had been committed. *Seemle*, that if malicious intention on the defendant's part had been proved plaintiff might have had a cause of action. *Krishna Ayyan v. Venkatuchella Mudali*, (7 M.H.C.R., 60), and *Ramachandra v. Narayana-sami*, (I.L.R., 16 Mad., 333), referred to.

Chinnappa Mudaliar v. Sikka Naikan

NEGOTIABLE INSTRUMENTS ACT—ACT XXVI OF 1881, s. 51—Promissory note in favour of two payees—Endorsement by one in favour of the other—Suit by endorsee as such—Maintainability—Suit by endorsee as assignee of chose in action—Endorsement evidence of assignment:

Where a promissory note has been made in favour of two payees, one of whom endorses it to the other, the endorsee cannot sue on the note as endorsee or as one of two joint payees. He may, however, maintain a suit in respect of the amount due under the note as assignee of the chose in action. Though such an endorsement cannot operate as an endorsement under the law merchant, it may be relied on as evidence of an assignment by way of release in favour of the endorsee. Rule 428 of the Rules of Procedure of the Presidency Small Cause Court is not *ultra vires*.

Muhammad Khumarali v. Ranga Rao

OATHS ACT—ACT X OF 1873—Decree upheld in appeal on strength of oath—Final adjudication—Civil Procedure Code—Act XIV of 1882, s. 13—Denial of plaintiff's title in a suit for rent—Decree in favour of defendants—Subsequent suit by same plaintiff against same defendants for possession—Res judicata:

In 1898 A sued B, C, D and E in a Munsif's Court to recover six years' rent alleged by A to be due in respect of certain land on a registered deed of lease. B, C and D denied A's title and pleaded that they were not liable for rent, and that the land belonged to and was in the possession of E. This defence was upheld by the Court of First Instance and on appeal. In 1899 A brought the present suit against B, C, D and E, in the same Court, on the same deed of lease; this time claiming possession of the same land, together with rent for less than two years. It was contended that this suit was not barred under section 13 of the Code of Civil Procedure inasmuch as the Court which had tried the former suit was not a Court competent to try the present suit, within the meaning of the section referred to, for the reason that the former suit was cognizable by a Small Cause Court, whereas the present suit was for the recovery of land, and a second appeal would lie from a decree passed in it:—*Held*, that the Court which had tried the former case was a Court competent to try the present

suit within the meaning of section 13 of the Code of Civil Procedure. *Subbammal v. Huddleston*, (I.L.R., 17 Mad., 273), and *Bhugwanbutti Chowdhurani v. Forbes*, (I.L.R., 28 Calc., 78), followed. *Srirangachariar v. Ramasami Ayyangar*, (I.L.R., 18 Mad., 185), referred to. The suit of 1898 had been affirmed on appeal on the strength of an oath taken under the Oaths Act:—*Held*, that it was a confirmation of the original decree. As between the parties a decree arrived at after the taking of an oath on a question of fact in the case is none the less a final adjudication.

Ahmed v. Moidin 444

TITION ACT—ACT IV OF 1893, s. 2—Order for delivery of share in house to decree holder—Application in execution—Order for sale under Partition Act:

Section 2 of the Partition Act of 1893, which empowers a Court to order a sale of property instead of a division, in partition suits, may be applied, though a preliminary order defining the share of a plaintiff and directing partition has been passed.

Kadir Bacha Saheb v. Abdul Rahiman Saheb 630

AL CODE—ACT XLV OF 1860, s. 109—Conspiracy—Abetment—Criminal Procedure Code—Act V of 1898, ss. 285, 537—Commencement of trial for murder by Judge and two assessors—Absence of one assessor during portion of the trial—Resumption by assessor of his seat and his opinion expressed and recorded by the Judge—Legality of trial:

A trial for murder, conspiracy to murder, and abetment of murder, duly commenced before a Sessions Judge and two assessors, and continued for about seven weeks. During that period one of the assessors was permitted to absent himself during two whole days, and five half days respectively; at first, so that he might visit his mother on her death-bed, and subsequently, to perform the daily obsequies rendered necessary by her decease. He then resumed his seat as an assessor and continued so to act until the termination of the trial, all the depositions recorded in his absence having been read by him on his return. At the conclusion of the trial the Sessions Judge invited the opinion of each assessor, and recorded it. The opinion of each was that all the accused were guilty and the Judge, concurring in that opinion, convicted the accused. The prisoners appealed to the High Court, where it was contended that the Judge had acted contrary to law in allowing the assessor who had been absent to resume his seat as an assessor, and in inviting and taking into consideration his opinion in deciding the case; and that the conviction ought to be quashed:—*Held*, (DAVIES, J., dissenting), that the finding and sentence appealed against had been passed by a Court of competent jurisdiction within the meaning of section 537 of the Code of Criminal Procedure and that the defect in the trial did not affect its validity and was cured by that section if the irregularity had "not in fact occasioned a failure of justice"; and that no such failure of justice had been shown: *Per* BHASHYAM AYYANGAR, J.—Under the Indian Penal Code conspiracy, except in cases provided for by sections 311, 400, 401, 402, and 121A of the Code, is a mere species of abetment where an act or an illegal omission takes place in pursuance of that conspiracy and amounts to a distinct offence for each distinct offence abetted by conspiracy.

King-Emperor v. Tirumal Reddi 529

, s. 144—Unlawful assembly—Evidence of common object:

Two persons were charged with being members of an unlawful assembly armed with deadly weapons for the purpose of committing dacoity. The facts proved were that a crowd of about 100 persons, including the accused, had assembled together, armed with bill-hooks and sticks; and that the crowd had dispersed at once on seeing the police. On these facts the Magistrate assumed that the intention of the members of the crowd was to use criminal force, and, having regard to the weapons with which they were armed, he convicted the accused under section 144 of the Indian

Penal Code:—*Held*, that the prosecution had failed to show that the common object of the crowd was such as would constitute it an unlawful assembly as defined by section 141 of the Indian Penal Code, and that the accused were entitled to be acquitted.

Queen-Empress v. Peelimuthu Tevan ... 124

3. —, s. 188—*Criminal Procedure Code—Act V of 1898, s. 195—Epidemic Diseases Act—Act III of 1897—Disobedience to an order promulgated by Government—Sanction for prosecution:*

Certain persons were charged with having disobeyed an order promulgated by Government under the Epidemic Diseases Act (III of 1897), and were acquitted on the ground that the prosecution required, under section 195 of the Code of Criminal Procedure, the previous sanction of the public servant who had promulgated the order. Sanction had, in fact, been granted by the Chairman of the Municipality in which the order was disobeyed, but the Magistrate held that such Chairman was not the public servant who had promulgated the order, and that it was not shown that he had been specially empowered to grant the sanction:—*Held*, that the order of acquittal was wrong. Inasmuch as the order in question had been promulgated by Government and not by any public servant, no sanction was required.

Queen-Empress v. South ... 70

4. —, s. 193—*Charge of giving false evidence under section 193—Trial by First-class Magistrate though facts disclosed offence under section 194 as well—Jurisdiction—Criminal Procedure Code—Act V of 1898, s. 530—Trial of an accused by Magistrate not empowered by law:*

Certain witnesses made statements in a preliminary enquiry before a Magistrate, in a case of alleged murder, and contradicted those statements at the trial before the Court of Session. The latter then sanctioned their prosecution for giving false evidence in a judicial proceeding, an offence punishable under section 193 of the Indian Penal Code, and triable by a Magistrate of the first class. The Deputy Magistrate, by whom they were tried, convicted them, and the accused appealed, the appeals being transferred to another Sessions Court for hearing. The Sessions Judge held that inasmuch as the false statements had been made in connection with a charge of murder, the offence for which the accused should have been tried fell under section 194, Indian Penal Code, and that, in consequence, they could be tried only by a Court of Session and not by a Magistrate of the first class. He considered their trial by a First-class Magistrate to be void under section 530 of the Code of Criminal Procedure, and set aside their conviction, committing one of them for trial by a Court of Session on a charge under section 194 of the Indian Penal Code, and making no order in respect of the other accused as he considered the imprisonment already undergone was sufficient:—*Held*, that the order was wrong as the proceedings of the First-class Magistrate were not void within the meaning of section 530 of the Code of Criminal Procedure. *Queen-Empress v. Gundya*, (I.L.R., 13 Bom., 502), referred to.

King-Emperor v. Ayyan ... 675

5. —, s. 317—*Exposure of child with intention to abandon—Ingredients of offence:*

Upon a charge being preferred against a mother of exposure and abandonment of her child, under section 317, Indian Penal Code, the Sessions Judge believed that the accused had left the child at a particular spot with the intention that it should be found and cared for by the owner of a neighbouring house. He acquitted her, holding that the offence charged had not been committed, inasmuch as the child had been deliberately placed where it would be (as in fact it was) found and looked after:—*Held*, that the acquittal was wrong. The gist of the offence under section 317 is the exposure or leaving with intention to wholly abandon, and the manner of exposing or leaving, and the consequences likely to ensue are not essential ingredients, though they may be taken into consideration in passing sentence.

King-Emperor v. Antakke ... 662

6. —, ss. 361, 363, 366,—*Kidnapping from lawful guardianship—"Lawful guardian"—Continuance of parent's possession though physical possession temporarily with another:*

S, a girl of the age of eight years, lived ordinarily under the guardianship of her father. A sister of S was married to a nephew of one K, and, with her husband, lived in the house of K. S, with her father's knowledge and consent, visited her sister in K's house, and had remained there for about a month when four brothers (being cousins of S) came to K's house one night and took S to their own house, which was close by, and S was at once married to one of them. The father of S was not asked for his consent, and it was known by the nephews and by K that the father objected to such a marriage. K was present at the marriage and consented to it, hoping to reconcile the girl's father to it subsequently. The father, however, sought the aid of the police, to whom S was given up by her cousins after having been detained by them in their house for thirty-six hours. The four cousins were then charged, under section 366 of the Indian Penal Code, with kidnapping S from lawful guardianship with intent that she might be compelled to marry one of them. The charge was framed in general terms and did not state from whose guardianship the kidnapping was alleged to have taken place. The trial was, however, conducted on the footing that the kidnapping was from the guardianship of K. The accused were acquitted, on the ground that K was at the time the lawful guardian of the girl and it had not been shown that she had been taken without K's consent. Upon an appeal being preferred by Government against that acquittal:—*Held*, that the accused had been rightly acquitted of the charge of kidnapping S from the guardianship of K; but that the question whether they were guilty of kidnapping S from the guardianship of her father had not been and ought to be tried. The word "include" in the explanation to section 361 of the Indian Penal Code is not intended to limit the protection which the section gives to parents and minors, but rather to extend that protection by including in the term "lawful guardian" any person lawfully entrusted with the care or custody of the minor. The fact that a father allows his child to be in the custody of a servant or friend for a limited purpose and for a limited time does not determine the father's rights as guardian or his legal possession for the purposes of the Criminal Law. If the facts are not inconsistent with a continuance of the father's legal possession of the minor, the latter must be held to be in the father's possession or keeping even though the actual possession should be temporarily with a friend or other person.

Jaganmadha Rao v. Kamaraju ... 284

7. —, s. 379—*Removal of fish from an ordinary irrigation tank—Charge of theft—Maintainability of charge:*

Fish in an ordinary irrigation tank are not in the possession of any person so as to be capable of being the subject of theft. Nor does the removal of such fish constitute any other offence. *Queen v. Revu Pothadu*, (I.L.R., 5 Mad., 391n); and *Bhagiram Dome v. Abar Dome*, (I.L.R., 15 Cal., 388), referred to.

Subba Reddi v. Munshoor Ali Saheb ... 81

- PRACTICE—*Execution of decree—Declaratory decree erroneously construed as a decree capable of execution—Orders in execution after notice to judgment-debtor and without contest by him—Subsequent objection that the decree was not capable of execution—Judgment-debtor bound by previous orders:*

A decree, which was in form declaratory, was construed as being capable of execution and on several occasions execution of it was ordered, (after notice to the judgment-debtor, and without contest by him), attachments of the judgment-debtor's property were made and amounts alleged to be due were paid. Upon a subsequent application for execution being made, it was objected that the previous orders had been erroneously passed under the decree and that no further order could be made:—*Held*, that the judgment-debtor was bound by the previous orders, as the Court which had passed them must be held, rightly or wrongly, to have determined that the decree was capable of execution. *Venkatanarasimha Naidu v. Papammah*, (I.L.R., 19 Mad., 54) and *Mungul Pershad Dohit v. Gria Kant Lahiri Chowdhry*, (L.R., 8 I.A., 123; I.L.R., 6 Cal., 51), followed.

Subbarama Ayyar v. Nagammal ... 683

PRESIDENCY SMALL CAUSE COURTS ACT—ACT XV OF 1892, s. 19 (q)—Madras City Civil Court Act—Act VII of 1892, s. 3—Jurisdiction—Suit for “breach of promise of marriage”—Contract of marriage between intended bridegroom and parent of intended bride—Cognizable by Small Cause Court:

The phrase “breach of promise of marriage” which occurs in article (q) of section 19 of the Presidency Small Cause Courts Act has reference to the action as understood in English law, that is, between the parties who contemplate contracting the marriage, and not between an intended bridegroom and the parent of the intended bride. By section 3 of the Madras City Civil Court Act, 1892, jurisdiction is conferred upon the City Civil Court to try all suits of a civil nature except, *inter alia*, suits cognizable by the Small Cause Court. By section 19 (article (q)) of the Presidency Small Cause Courts Act, the Small Cause Court has no jurisdiction to entertain suits for compensation for breach of promise of marriage. A suit was filed in the City Civil Court for compensation for breach of promise of marriage; but the contract alleged to have been broken had been entered into between the parent of the intended bride and the intended bridegroom:—*Held*, that the Court had no jurisdiction inasmuch as such a suit was not exempted from the jurisdiction of the Small Cause Court.

Hakim Muhammad Ashruff Hussain Saheb v. Syed Muhammad Ali Saheb ... 652

PROBATE OR LETTERS OF ADMINISTRATION—Jurisdiction of High Court to grant—Estate of a deceased who had not dwelt or left goods within limits of presidency—Succession Act—Act X of 1865, s. 240—Letters Patent, 1862, cl. 34:

The High Court of Madras has no jurisdiction to grant probate of the will of a testator, or letters of administration of the estate of an intestate who did not dwell and who did not leave assets within the limits of the presidency.

In the matter of Rose Learmouth ... 120

PROVINCIAL SMALL CAUSE COURTS ACT—Act IX of 1887, s. 15, sched. II, art. 8—Suit for rent with cross-demand for value of improvements—Jurisdiction of Small Cause Court:

Plaintiff sued to recover arrears of rent due by defendants and also prayed that the value of improvements due to the defendants might be made liable for the claim:—*Held*, that the suit was one for rent and triable by a Court of Small Causes.

Karunakara Kurup v. Muniperanan ... 356

2. **31—Civil Procedure Code—Act XIV of 1882, s. 586—Suit of a nature cognizable in a Court of Small Causes—Suit for mesne profits—Second appeal:**

A suit for mesne profits is not a suit for an account, but a suit for damages, and is not exempted from the jurisdiction of the Small Cause Courts under article 31 of schedule II to the Provincial Small Cause Courts Act. There is no second appeal from a decision in such a suit.

Subba Rao v. Sitaramayya ... 118

REFORMATORY SCHOOLS ACT—ACT VIII OF 1897, ss. 8, 9, 11, 13, 16—Youthful offenders—Periods of detention allowable under the Act—Finding by Magistrate as to age—Form of order—Exact period of detention:

A District Magistrate before whom the case of a youthful offender came, under the provisions of section 9 of the Reformatory Schools Act, 1897, found the accused to be thirteen years of age, sentenced him to six months' rigorous imprisonment, and directed that in lieu of undergoing that sentence he should be detained in a Reformatory school for a period of five years, unless he should attain the age of eighteen years at an earlier date:—*Held*, that the order was wrong, inasmuch as it failed to fix the exact period of detention. *Semble*, that in some cases it may not be necessary to ascertain the

exact age of the offender. If he be not over fifteen, a period of three years may be rightly fixed; if not over eleven, a period of seven years may be fixed without further enquiry. But in cases in which enquiry is necessary in order to fix the period, as when the offender is over eleven, and the Magistrate wishes to make the period as long as possible, he must find, as well as he can, the exact age of the offender, and is not at liberty to leave the decision of the question to the Reformatory officials. The effect of the notification published by Government regulating the periods for which youthful offenders may be sent to Reformatory schools in the Madras Presidency, is to fix a minimum period of five years for all cases in which such a period is legally possible; namely, in all cases where the offender is not over thirteen at the date of conviction. It was not intended to prevent the Magistrate from fixing a period short of five years, but not short of three years, in the case of a boy over thirteen.

Queen-Empress v. Rama ... 13

REGISTRATION ACT—ACT II OF 1877, s. 17, cl. (d)—Transfer of Property Act—Act IV of 1882, ss. 107, 117—Lease for agricultural purposes—Lease reserving annual rent—Term exceeding five years:

Defendants executed an instrument by which they leased a betel garden from plaintiff for an indefinite period at an annual rent of Rs. 35. The instrument was not registered. Rent having fallen into arrears, plaintiff sued to recover the same, when it was pleaded in defence that the instrument of lease was inadmissible in evidence for want of registration. The Munsif dismissed the suit on the grounds (1) that the lease was not for agricultural purposes and that therefore its registration was compulsory under section 107 of the Transfer of Property Act, and (2) that assuming it to be an agricultural lease its registration was compulsory under section 17, clause (d), of the Indian Registration Act, inasmuch as it was not a lease for a term not exceeding five years. On a petition being filed to revise the Munsif's decree:—*Held* (1) that a lease of land for the cultivation of betel is an agricultural lease, *Kunhayen Haji v. Mayan*, (I.L.R., 17 Mad., 98), not followed; (2) that although the lease might continue beyond five years in the event of neither party determining it in the meanwhile, it was not a lease for a term exceeding five years, as either party might determine it before the expiration of that period. *Virammal v. Runjayyengar*, (I.L.R., 4 Mad., 381), followed. Inasmuch as the annual rent was under Rs. 50, registration was optional and plaintiff was not precluded from proving the letting by oral evidence or by proof of the unregistered instrument.

Murugesu Chetti v. Chinnathambi Goundan ... 421

REGULATION III OF 1802 (MADRAS), s. 16, cl. 7—Claim for property of an intestate—Order dismissing petition—Appeal:

No appeal lies against an order of a District Judge passed under section 16, clause 7, of Madras Regulation III of 1802.

Narasayya v. The Collector of Anantapur ... 95

2. **XI OF 1816, s. 10—Confinement of Native Christian in stocks—Legality of order:**

By section 10 of Regulation XI of 1816, heads of villages are given summary powers of punishment in cases of a trivial nature, such as using abusive language, and if the offenders “shall be of any of the lower castes of the people on whom it may not be improper to inflict so degrading a punishment,” they may be put in the stocks. A person who was a Mala, or Hindu pariah, by birth, and who had become a convert to Christianity, was convicted of having used abusive language and sentenced to two hours' confinement in the stocks under the said regulation. His profession was that of a weaver, but he, in fact, worked as a cooly. On the question of the legality of the sentence being referred to the High Court:—*Held*, that to render a person liable to confinement in the stocks under the regulation there must be a concurrence of two circumstances, viz., (1) he must be a person belonging to one of the lower castes of the

people, and (2) he must be a person on whom from his social standing or otherwise it may not be improper to inflict so degrading a punishment. That the test is not what is the offender's creed, but what is his caste. *Semle*, that a person who has changed his creed but continues to belong to his caste may be within the purview of the regulation if the caste is of the nature therein referred to; but if he abandons his caste he cannot longer be said to "belong to one of the lower castes of the people" and punishment by confinement in the stocks would no longer be legal. *The Queen v. Nabi*, (I.L.R., 6 Mad., 247), discussed.

Rattigadu v. Konda Reddi 271

RELIGIOUS ENDOWMENTS ACT—ACT XX OF 1863, s. 14—Suit for declaration—Maintainability when ancillary to claim for dismissal of manager—Ground of dismissal—Bonâ fide claim by manager to property of the institution:

In a suit brought under the Religious Endowments Act, a declaration that property belongs to an institution and that a mortgage over it is not binding on the institution, may be asked for and made, when it is ancillary to a claim for the removal of the manager. The plaintiffs in a suit under the Religious Endowments Act based their claim for the removal of a defendant from his office of manager of a mosque, on the ground that he had set up a right of private property in the mosque. They sued for a declaration that certain property was the property of the mosque, and that a mortgage created over it was invalid. They also asked that defendant might be removed:—*Held*, that they were entitled to the declarations prayed for. With regard to the claim for the removal of the defendant, as it seemed probable, on the evidence, that he, in setting up a right of private property in the mosque was acting under the *bonâ fide* belief that it was the private property of his family, and as, apart from that, there was practically no evidence of misconduct, it was not necessary to dismiss him from his office, but he was ordered to pay the costs of the suit.

Muhammad Jafar v. Muhammad Ibrahim 243

2. **s. 18—Leave to sue granted on application made by unverified letter and not presented to Court by applicant or pleader—Validity—Civil Procedure Code—Act XIV of 1882, ss. 622, 647—Maintainability of civil revision petition against order granting leave passed with material irregularity:**

Applications to District Courts under section 18 of the Religious Endowments Act for leave to sue should be duly verified and presented either by the applicant in person or by his pleader. A grant of such leave on an unverified application not presented in Court is a material irregularity within the meaning of section 622 of the Code of Civil Procedure, and a civil revision petition lies from the order granting it. Omission to give notice of such an application to the person whom it is intended to sue does not of itself render the leave, if granted, irregular. *Venkatappayya v. Venkatapathi*, (Appeal No. 230 of 1895 (*infra* p. 687)), approved.

Amdoo Miyan v. Muhammad Davud Khan Bahadur 685

3. **s. 18—Leave to sue in High Court in case of neglect by trustee—Trustee of public charity—Acquisition by prescription of trusteeship with power to appoint successors:**

The trusteeship of certain public temples was handed down from M to his son and then to his grand-son, after which the younger brother of the grand-son succeeded to the office. He, by will, appointed his sister and her husband as trustees to succeed him and authorised them to appoint their own successors, thus diverting the devolution of the office from the family of the original trustee. The sister and her husband assumed office, but the husband died soon after. The sister continued to hold the office of trustee for over twenty-four years. She, by will, appointed as her successor her sister's son, who held office for twenty years, and, by will, appointed his son-in-law, the defendant, as his successor. Defendant was a great grand-son of M. and assumed the office of trustee. A suit having

been filed by plaintiffs on behalf of themselves and other worshippers for a declaration that the appointment of defendant as trustee was illegal and void:—*Held*, that defendant was the rightful trustee, having been appointed by one who had acquired a valid title to the trusteeship with power to appoint a successor. The sister had acquired a valid title to the trusteeship by prescription and had entered upon it under a will which contained a provision for the appointment of a successor; and she had, acting under that provision, appointed a successor, giving him a similar power to appoint his own successor. *Semle*, that the title so acquired by the sister and her successor was not a hereditary trusteeship passing necessarily to their heirs, but one with power to appoint a successor. A trusteeship with power to appoint a successor is an estate well known to and recognised by law and may be prescribed for. The Religious Endowments Act, 1863, was not intended to apply to a suit, brought under the ordinary original jurisdiction of the High Court inherited from the Supreme Court, charging neglect of duty on the part of a temple trustee. Such a suit is therefore maintainable without leave being obtained under section 18 of that Act. *Semle*, that where a person who had no right to the office of a trustee, according to the rule of devolution established by the founder of a trust, acquires a title to the office by prescription but restores it to one who, except for the transferor's prescriptive title, could have taken the office according to the rules laid down by the founder, such transfer should be treated as an exception to the general doctrine that a trusteeship is not assignable.

Annasami Pillai v. Ramakrishna Mudaliar 219

s. 18—Suit sanctioned for removal of trustees—Leave to sue in formâ pauperis—Civil Procedure Code—Act XIV of 1882, ss. 402, 407:

The provisions of chapter XXVI of the Code of Civil Procedure do not preclude a person, who has obtained leave to sue under section 18 of the Religious Endowments Act for the removal of the trustees of a temple, from being permitted to sue in *formâ pauperis*.

Gurusami Chetti v. Krishnasami Naikar 419

RECOVERY ACT (MADRAS)—ACT VIII OF 1865, s. 33—Sale of distrained property—Bid for one item sufficient to meet arrears of rent—Failure by bidder to complete purchase—Re-sale of item with others—Legality of sale—Satisfaction of arrears:

A landholder distrained the property of a tenant and brought it to sale under section 33 of the Rent Recovery Act (Madras), 1865, when a bid was made for the first item which was sufficient to satisfy the arrear. The bidder, however, paid only a small portion on account of his bid, and failed to pay the balance, and the item was subsequently put up for sale again, with others, and purchased by the landholder. A suit was then brought to set aside the sale, when it was contended that inasmuch as a bid equal to the amount of the arrear had been made for a portion of the property the claim of the landholder had been satisfied, under section 33 of the Rent Recovery Act, though the whole amount bid had not in fact been paid: also that a subsequent sale of the rest of the tenant's property was illegal and that the landholder's proper remedy lay in taking proceedings against the defaulting purchaser:—*Held*, that the contention could not be upheld. An arrear of rent is only satisfied by a sale when the amount bid is paid, till when the debt subsists. *Held further*, that notice of the second sale was not necessary under section 39 of the Rent Recovery Act (Madras), 1865.

Subrahmania Ayyar v. Rangappa Kalakka Thola Udayar 307

s. 69—Delay in presenting appeal—Power of Court to excuse—Limitation:

Under section 69 of the Rent Recovery Act, a Court has no power to excuse delay in presenting an appeal from a judgment from the Court of First Instance in a suit by a tenant to set aside a distraint made by a landholder under the provisions of the Rent Recovery Act (Madras).

Bhujanga Rao v. Venkanna 558

date of cause of action—Illegal attachment by landholder of tenant's property—Retention for more than six months—Continuing wrong—Limitation:

By section 78 of the Rent Recovery Act (Madras), 1865, a suit may be brought to recover damages in respect of anything professedly done under the authority of that Act, provided that it be instituted within six months from the time at which the cause of action arose. A landholder illegally attached goods of his tenant and detained them for longer than six months. The tenant then sued to recover the goods and damages for the illegal detention:—*Held*, that the claim was not barred: the detention being a continuing wrong.

Yamuna Bai Rani Sahiba v. Solayya Kavundan ... 339

SPECIFIC RELIEF ACT—ACT I OF 1877, s. 27—Limitation—Transfer of Property Act—Act IV of 1882, ss. 54, 60—Mortgage with right of pre-emption in favour of mortgagee—Assignment of equity of redemption—Non-exercise of pre-emptive right for over twenty years—Suit for redemption—Validity of defence based on pre-emptive right:

In 1872, A mortgaged certain land with possession to S to secure an advance of Rs. 100. The instrument of mortgage contained a covenant conferring upon the mortgagee a right of pre-emption in the following terms:—"If we assign our right over these properties to any one, the land delivered possession of to you for appropriating the interest shall be assigned to you alone and it shall not be assigned to any body else. When we assign the land, we shall receive 50 fanams more from you, and then we shall assign the land for these two amounts together." In 1873, A sold his equity of redemption to V, and before 1893 V's interest was sold in execution of a decree against him and bought by plaintiff. In 1897, plaintiff instituted this suit for redemption against the representative of S, the mortgagee, who pleaded in defence the right of pre-emption created in his favour by the mortgage deed, and contended that in consequence thereof the assignment to V and the subsequent purchase of V's interest by plaintiff were invalid. The defendant did not, however, bring the price fixed into Court:—*Held*, that plaintiff was entitled to redeem. *Per* SHEPARD, J.—Under the covenant and by reason of section 54 of the Transfer of Property Act, defendant had no interest in the property. His right could be no other than a right to specific performance available under section 27 of the Specific Relief Act, against a transferee who had taken with notice of the covenant. But notice of a contract such as is required to satisfy the section must be notice of an existing obligation. Plaintiff was not a transferee who took with notice of the contract now sought to be enforced, the time for the performance of which had long passed without anything being done and the natural inference being that the right arising under it had been waived or otherwise discharged. Assuming that there was notice of the contract, and that it was otherwise a valid contract, defendant could not be allowed to use it as an answer to plaintiff's suit, inasmuch as no suit could now be brought to enforce the contract. *Per* BHASHYAM AYYANGAR, J.—The rule that a mortgagee may stipulate for the collateral advantage of pre-emption, if such advantage does not directly or indirectly "clog the equity of redemption," is based upon the principle that the option of sale is still left with the mortgagor, who may redeem or sell as he likes; the only stipulation being that, in the event of his choosing to sell, he shall give the mortgagee the refusal. But by the terms of the stipulation under consideration the mortgagee was entitled to exercise his option by paying, not the market price of the day or the price offered by a stranger, but the price fixed in the instrument of mortgage. In considering whether a mortgagee could effectually secure a right of pre-emption where the mortgagor was so tied down as to price, the question is whether the collateral advantage stipulated for by the mortgagee is or is not unconscionable or oppressive, though it does not clog the redemption. In the present case the collateral advantage, namely, the right of pre-emption, was one that could be enforced only by the equitable remedy of specific performance, and, *prima facie*, a bargain by which the mortgagor is tied down to a price by the instrument of mortgage, whenever the occasion for exercising the right of pre-emption may arise, is oppressive and unconscionable. Where a right of pre-emption

springs from contract, it rests only upon a covenant which does not run with the land, and stands no higher than a contract of sale of immoveable property, and does not of itself create any interest in, or charge on, the immoveable property which is subject to the right of pre-emption. Until the contract is carried out by specific performance, either by act of parties or decree of Court, the pre-emptor acquires no title to or interest in such property, which alone can extinguish the mortgagor's right of redemption, though he may have a right to call for a conveyance of the property. The equity of redemption in an usufructuary mortgage is an "intangible thing," within the meaning of section 54 of the Transfer of Property Act, and its transfer by sale can be made only by registered instrument, even though its value may be less than Rs. 100. The equity of redemption in a simple mortgage may be tangible immoveable property and its sale can be effected, if its value be less than Rs. 100, without a registered instrument, by mere delivery of the property. The right of a simple mortgagee in the property mortgaged is an intangible thing, within the meaning of section 54 of the Transfer of Property Act, and a transfer by sale of a hypothecation executed to secure a debt under Rs. 100 can be made only by a registered instrument. *Subramaniam v. Perumal Reddi*, (I.L.R., 18 Mad., 454), referred to. Inasmuch as the cause of action for specific performance had accrued in 1873, when the right of pre-emption had been infringed by the assignment of the equity of redemption, the right to enforce the right of pre-emption was barred. The fact that S had been in possession of the property as mortgagee could not save him from the operation of the law of limitation on his right to sue for specific performance of the contract of pre-emption. *Krishna Menon v. Kesavan*, (I.L.R., 20 Mad., 305), referred to. Whether such a covenant for pre-emption transgresses the rule against perpetuities.—*Quære*.

Ramasami Pattar v. Chinnan Asari ...

2. **s. 42—Civil Procedure Code—Act XIV of 1882, s. 13—Res judicata—Suit in Subordinate Court—Previous suit in Munsif's Court—Valuation of a suit for declaration as to membership of tarwad:**

A suit was brought in the Court of a Subordinate Judge for a declaration that the plaintiffs and defendants therein had no community of interest, and were not members of a tarwad having joint property. The property of the tarwad was valued by plaintiffs at Rs. 3,000, and this was held to be a true valuation, but it appeared that the value of the plaintiff's interest in it was Rs. 2,000 only. In a previous suit between the parties, which had been brought in the Court of a District Munsif, it had been held that the parties belonged to the same family; and this finding had been upheld on appeal. Plaintiffs did not ask, by way of further relief, for possession of a portion of the property, which was in the enjoyment of the defendants:—*Held*, that the suit was barred, both as *res judicata*, and by section 42 of the Specific Relief Act. The value of a suit for a declaration that certain persons are or are not members of a tarwad is the value of the share of the tarwad property which would be allotted to them if a partition were made by common consent.

Panga v. Unnikutti ...

3. **s. 42—Consequential relief—Civil Procedure Code—Act XIV of 1882, ss. 280, 281, 283—Property in the possession of a judgment-debtor—Attachment of right to receive a debt:**

First defendant had obtained a decree against second defendant in execution of which he had attached and sold the second defendant's right to collect rent payable to him in respect of certain properties by tenants for a certain year. A claim had been preferred by plaintiff objecting to the said attachment on these grounds, under section 278 of the Code of Civil Procedure, but had been rejected. Plaintiff now sued for a declaration that the attachment and sale were invalid, on the grounds that the properties belonged to a certain mutt, and not to second defendant; that second defendant had been manager of the mutt, but had been dismissed, plaintiff replacing him; and that the rents in question were not liable for the debts of second defendant. The plaintiff prayed for no relief

consequential to the declaration :—*Held*, that the attachment was of a debt in respect of which prohibitory orders had been issued under section 268 of the Code of Civil Procedure : that the attachment of a right to receive a debt is not property capable of possession within the meaning of sections 280 and 281 of the Code of Civil Procedure ; and that the suit was therefore not one instituted under section 288 to establish a right to attached property ; and that it had been properly dismissed. *Mussamut Rambutty Koor v. Kumessur Pershad*, (22 W.R., C.R., 36), referred to.

Basavayya v. Syed Abbas Sahab 20

STAMP ACT—ACT I OF 1879, s. 16—“*Stamped at the time of execution*”—*Stamp Act—Act II of 1899—Affixing and cancelling stamp immediately after signature—Letters Patent, art. 12—Part of the cause of action—Promissory note payable in Madras or Secunderabad—Payments of interest in Madras—Jurisdiction* :

A promissory note was executed in plaintiff's favour at Vizianagram payable in Secunderabad or Madras. Payments of interest due on the note were made in Madras. The note was signed first, the stamp having been affixed and cancelled after signature, the acts being practically simultaneous. Leave to sue in the High Court had been obtained under article 12 of the Letters Patent :—*Held*, that part of the cause of action had arisen in Madras. *Also*, that the note was stamped at the time of execution, within the meaning of section 16 of the Stamp Act (I of 1879).

Surij Mull v. Hudson 259

STAMP ACT—ACT II OF 1899, s. 5—*Agreement with numerous landholders for mining rights—Community of interest—Stamp* :

A company, having obtained from the Secretary of State for India the right to search for and work minerals in a certain district, prepared an indenture with the object that it should be executed by numerous persons who were landholders and owners of surface and mining rights over the lands comprised in that district. By the indenture, each intended executant, for a consideration of one rupee and a royalty, granted to the company a license to prospect and work upon a piece of land belonging to him and covenanted to sell or lease the mining rights over it if required. The executant further covenanted to indemnify the company from claims that might be made by other persons, and undertook not to sell the mining rights to any other person for fifty years :—*Held*, that the instrument was chargeable with the aggregate amount of the duties with which separate instruments relating to the same matter would be chargeable. Upon the face of it, the instrument dealt with several distinct matters, namely, with agreements with several persons with regard to their separate property ; and the proper stamp to be affixed was an eight-anna stamp, or as many such stamps as there were separate landholders who were made parties to the agreement. *Held also*, that the instrument did not contain distinct agreements with any one raiyat.

Reference under Stamp Act, s. 57 176

2. s. 69—Court Fees Act—Act VII of 1870 (as amended by Act XII of 1891), s. 34—*Sale by thief of stolen stamps—Offence* :

A person who had been convicted of stealing two stamps was charged, under section 69 of the Stamp Act, 1899, with having sold them, he not being a licensed vendor of stamps :—*Held*, that the words “*sells or offers for sale*,” which occur in section 69 of the Stamp Act and in section 34 of the Court Fees Act include the case of a thief who exchanges a stolen stamp for a sum of money, even though the thief cannot give a legal title by the transaction.

Queen-Empress v. Virasami 810

SUCCESSION ACT—ACT X OF 1865, ss. 92, 96—Hindu Law—Bequest to daughter and her sons from generation to generation—Testator predeceased by legatees who left daughters—Lapse of legacy :

A Hindu testator, who had no male issue, bequeathed certain real property to his eldest daughter and her sons from generation to generation. The legatee, who had daughters, predeceased the testator, who then also died, leaving a widow and other daughters him surviving. The daughters of the deceased legatee claimed the property as the lineal descendants of the testator, contending that although section 96 of the Indian Succession Act did not apply to the case it should be held to govern it by analogy, as affording a guide to justice, equity and good conscience :—*Held*, that the words used in the will must be construed as meaning “*heirs*,” and that the provision contained in section 96 of the Indian Succession Act could not be extended to such a case.

Ramamirtham v. Ranganathan 299

2. s. 240—Letters Patent, 1862, cl. 34—Probate or Letters of Administration—Jurisdiction of High Court to grant—Estate of a deceased who had not dwelt or left goods within limits of presidency :

The High Court of Madras has no jurisdiction to grant probate of the will of a testator, or letters of administration of the estate of an intestate who did not dwell and who did not leave assets within the limits of the presidency.

In the matter of Rose Learmouth 120

SUCCESSION CERTIFICATE ACT—ACT VII OF 1889, s. 4—“Debt”—Suit by son of deceased mortgagee for amount due on usufructuary mortgage—Failure to produce certificate of heirship—Right to recover :

A Hindu, being the usufructuary mortgagee of certain lands, died, leaving an adopted son and two widows. The widows assigned the mortgage without consideration. The mortgagor sold the equity of redemption to a purchaser who paid off the mortgage to the assignee of the widows. The adopted son then sued the mortgagor, the widows, their assignee and the purchaser of the equity of redemption to recover the amount due under the mortgage, or for possession of the lands until the mortgage amount should be paid, but he did not produce a certificate of heirship :—*Held*, that he was entitled to recover as against the mortgaged property. The money sued for was not due under a contract, but was in reality the value of the plaintiff's mortgage interest. In strictness, plaintiff was entitled to a decree for the land itself, and it was only by his consent that money was awarded in lieu of the land. The amount could not, therefore, rightly be treated as a debt within the meaning of the Succession Certificate Act, and the failure of the plaintiff to produce a certificate was no bar to a decree being passed in his favour.

Arumugam Pillai v. Valura Koundan 22

SUCCESSION (PROPERTY PROTECTION) ACT—ACT XIX OF 1841, ss. 3, 5, 8—Appointment of curator—Omission to take evidence before making order—Civil Procedure Code—Act XIV of 1882, s. 622—Want of jurisdiction—Material irregularity :

On an application under Act XIX of 1841 to recover possession of the properties of a deceased zamindar by summary suit and for the appointment of a curator pending the determination of the suit, the District Judge omitted to examine the complainant or inquire further under section 3 of the Act, but called for a report from the Collector under section 8, and on receipt thereof made an order under section 5 appointing a curator :—*Held*, (SUBBAHMANIA AYYAR, J., dissenting), that the order must be set aside under section 622 of the Code of Civil Procedure. The Judge was bound to hold an enquiry under section 3 before appointing a curator under section 5. The provisions of section 3 are mandatory and not merely directory. *Per* Sir ARNOLD WHITE, C.J.—The Judge acted without jurisdiction or with material irregularity. *Per* SHEPARD, J.—The Judge acted within his jurisdiction but with material irregularity.

Krishnasami Pannikondar v. Muthukrishna Pannikondar 364

SUITS VALUATION ACT—ACT VII OF 1887, s. 11—Improper valuation for jurisdictional purposes—Case not finally disposed of by lower Appellate Court but only remanded for findings—Validity of order of remand:

Section 11 of the Suits Valuation Act (VII of 1887) has the effect of curing a want of jurisdiction caused by improper valuation not only in cases where there has been a final disposal by the lower Appellate Court, but also where a case has been remanded by the lower Appellate Court to the Court of First Instance for a finding.

Raman v. Secretary of State for India in Council ... 427

2. Disposal of suit not prejudicially affected—Admissibility of objection on second appeal:

The defendant in a suit raised the objection that its valuation was incorrect, and that if correctly valued it would exceed the jurisdiction of the Munsif's Court. The objection was overruled both in the Munsif's Court and in that of the District Judge, but was raised again on second appeal:—*Held*, that the objection was one that could be raised on second appeal. *Held also*, that even though the suit were under-valued, as contended, the objection to it on that ground was not one that the Court would entertain having regard to section 11 of the Suits Valuation Act (VII of 1887), inasmuch as it had not been shown that the disposal of the suit had been thereby prejudicially affected.

Govindu Menon v. Karunakara Menon ... 43

TRADE-MARK—Prior user by owner in Scotland—Effect on right to exclusive user in British India by a person other than the owner—Infringement:

Plaintiff claimed to have been for many years the sole importer into Bombay and Madras of umbrellas bearing a certain trade-mark. Defendant had recently commenced importing and selling in Madras umbrellas which, plaintiff contended, bore a trade-mark so similar as to be calculated to deceive purchasers so as to induce them to buy defendant's umbrellas under the belief that they were buying plaintiff's. He asked for an injunction and damages. Defendant denied that plaintiff had been the sole importer of umbrellas bearing the trade-mark in question; or that he was the owner or entitled to the exclusive use of that trade-mark; or that umbrellas bearing that trade-mark had come to be known as umbrellas imported and sold by plaintiff alone. It was contended that the trade-mark belonged to and had, since 1884, been used by a Glasgow firm, who manufactured the umbrellas, and supplied them to defendant, through another. Defendant denied the alleged similarity of the trade-marks or that purchasers were calculated to be deceived as alleged, and contended that plaintiff could not lawfully use or claim it. For the purposes of the case it was assumed that the trade-mark in question had been used by the Glasgow firm before it was used by plaintiff in India; and that it had never been used by the Glasgow firm in India before plaintiff so used it. On its being contended that inasmuch as the trade-mark had originally belonged to the Glasgow firm it could not be lawfully used or claimed by plaintiff, notwithstanding that the Glasgow firm had never used it in or imported umbrellas bearing it into India:—*Held*, that the contention could not be supported and that the prior use in Scotland did not justify the Scotch firm and the defendant in claiming that plaintiff's user of the trade-mark was illegal or otherwise than an exclusive user.

Ebrahim Currim v. Essa Abda Sait ... 163

TRANSFER OF PROPERTY ACT—ACT IV OF 1882, ss. 54, 60—Mortgage with right of pre-emption in favour of mortgagee—Assignment of equity of redemption—Non-exercise of pre-emptive right for over twenty years—Suit for redemption—Validity of defence based on pre-emptive right—Specific Relief Act—Act I of 1877, s. 27—Limitation:

In 1872, A mortgaged certain land with possession to S to secure an advance of Rs. 100. The instrument of mortgage contained a covenant conferring upon the mortgagee a right of pre-emption in the following

terms:—"If we assign our right over these properties to any one the land delivered possession of to you for appropriating the interest shall be assigned to you alone and it shall not be assigned to anybody else. When we assign the land, we shall receive 50 fanams more from you, and then we shall assign the land for these two amounts together." In 1873, A sold his equity of redemption to V, and before 1893 V's interest was sold in execution of a decree against him and bought by plaintiff. In 1897, plaintiff instituted this suit for redemption against the representative of S, the mortgagee, who pleaded in defence the right of pre-emption created in his favour by the mortgage deed, and contended that in consequence thereof the assignment to V and the subsequent purchase of V's interest by plaintiff were invalid. The defendant did not, however, bring the price fixed into Court:—*Held*, that plaintiff was entitled to redeem. *Per SHEPHARD, J.*—Under the covenant and by reason of section 54 of the Transfer of Property Act, defendant had no interest in the property. His right could be no other than a right to specific performance available under section 27 of the Specific Relief Act, against a transferee who had taken with notice of the covenant. But notice of a contract such as is required to satisfy the section must be notice of an existing obligation. Plaintiff was not a transferee who took with notice of the contract now sought to be enforced, the time for the performance of which had long passed without anything being done and the natural inference being that the right arising under it had been waived or otherwise discharged. Assuming that there was notice of the contract, and that it was otherwise a valid contract, defendant could not be allowed to use it as an answer to plaintiff's suit, inasmuch as no suit could now be brought to enforce the contract. *Per BHASHYAM AYYANGAR, J.*—The rule that a mortgagee may stipulate for the collateral advantage of pre-emption, if such advantage does not directly or indirectly "clog the equity of redemption," is based upon the principle that the option of sale is still left with the mortgagor, who may redeem or sell as he likes; the only stipulation being that, in the event of his choosing to sell, he shall give the mortgagee the refusal. But by the terms of the stipulation under consideration the mortgagee was entitled to exercise his option by paying, not the market price of the day or the price offered by a stranger, but the price fixed in the instrument of mortgage. In considering whether a mortgagee could effectually secure a right of pre-emption where the mortgagor was so tied down as to price, the question is whether the collateral advantage stipulated for by the mortgage is or is not unconscionable or oppressive, though it does not clog the redemption. In the present case, the collateral advantage, namely, the right of pre-emption, was one that could be enforced only by the equitable remedy of specific performance, and, *prima facie*, a bargain by which the mortgagor is tied down to a price by the instrument of mortgage, whenever the occasion for exercising the right of pre-emption may arise, is oppressive and unconscionable. Where a right of pre-emption springs from contract, it rests only upon a covenant which does not run with the land, and stands no higher than a contract of sale of immoveable property, and does not of itself create any interest in, or charge on, the immoveable property which is subject to the right of pre-emption. Until the contract is carried out by specific performance, either by act of parties or decree of Court, the pre-emptor acquires no title or interest in such property, which alone can extinguish the mortgagor's right of redemption, though he may have a right to call for a conveyance of the property. The equity of redemption in an usufructuary mortgage is an "intangible thing," within the meaning of section 54 of the Transfer of Property Act, and its transfer by sale can be made only by registered instrument, even though its value may be less than Rs. 100. The equity of redemption in a simple mortgage may be tangible immoveable property and its sale can be effected, if its value be less than Rs. 100, without a registered instrument, by mere delivery of the property. The right of a simple mortgagee in the property mortgaged is an intangible thing, within the meaning of section 54 of the Transfer of Property Act, and a transfer by sale of a hypothecation executed to secure a debt under Rs. 100 can be made only by a registered instrument. *Subramaniam v. Perumal Reddi*, (I.L.R., 18 Mad., 454), referred to. Inasmuch as the cause of action for specific performance had accrued in 1873, when the right of pre-emption had been infringed by the assignment of the equity of redemption, the

right to enforce the right of pre-emption was barred. The fact that S had been in possession of the property as mortgagee could not save him from the operation of the law of limitation on his right to sue for specific performance of the contract of pre-emption. *Krishna Menon v. Kesavan*, (I.L.R., 20 Mad., 805), referred to. Whether such a covenant for pre-emption transgresses the rule against perpetuities.—*Quære*.

Ramasami Pattar v. Chinnan Asari ... 449

2. *s. 57—Payment into Court by purchaser of mortgaged property in pursuance of adjustment of decree out of Court—Limitation Act—Act XV of 1877, sched. II, art. 173A—Application for adjustment of decree to be recorded—Civil Procedure Code—Act XIV of 1882, s. 258—Agreement by purchaser of mortgaged property to pay an agreed sum to mortgagee holding decree for sale:*

The mortgagee of certain property brought a suit on his mortgage and obtained a decree for sale. Petitioner then negotiated with the mortgagor for the purchase of the lands. The mortgagee consented to the proposed purchase and agreed to accept from petitioner a sum of money in full satisfaction of his mortgage decree. Petitioner completed the purchase accordingly and tendered the agreed sum to the mortgagee, who refused to accept it. Petitioner thereupon filed this petition, under section 57 of the Transfer of Property Act, asking to be allowed to pay the amount into Court and praying for a declaration that the property was freed from encumbrance. The mortgagee contended that the application fell under section 258 of the Code of Civil Procedure, in which case it would be barred under article 173A of the Limitation Act:—*Held*, that section 57 of the Transfer of Property Act did not govern the case, as it involved a question of the adjustment of a decree out of Court; also that section 258 of the Code of Civil Procedure was not applicable, and that petitioner was not precluded by article 173A of the Limitation Act from proving the agreement set up by him under section 244, clause (c), of the Code of Civil Procedure, and that he was entitled, on payment of the money into Court, to the declaration sought.

Mallikarjuna Sastri v. Narasimha Rao ... 412

3. *s. 60—Redemption suit—Claim in the alternative—Effect on suit where there has been no previous tender or payment of mortgage amount:*

A mortgagor who institutes a suit for the redemption of his mortgaged property is entitled to put an alternative claim before the Court. He may aver that the mortgage money has been re-paid, and, in the alternative, in the event of the Court finding any sum to be still due under the mortgage, that he is prepared to pay such further sum. Section 60 of the Transfer of Property Act raises no bar to a suit for redemption where the mortgage money has not been paid or tendered.

Butchanna v. Varahala ... 408

4. *s. 82—Contribution to mortgage debt—Liability of land in possession of third person:*

Certain land was mortgaged to R. Subsequently a portion of the land comprised in R's mortgage was mortgaged to plaintiffs together with other land. R then obtained a decree on his mortgage, in pursuance whereof the said portion of R's security which was also mortgaged to plaintiffs was sold. R's decree was thus satisfied, without the necessity for the sale of the remaining land which comprised R's security. This remaining land was purchased by some of the defendants. Plaintiffs now sued on their mortgage, and claimed not only as against their mortgagors, and the property comprised in their security, but also, on the principle of contribution, sought to charge any balance which might still remain due as against the remaining land already referred to as having been purchased by some of the defendants:—*Held*, that plaintiffs were not entitled to enforce contribution against the defendants. *Semble*, that if the claim for contribution were maintainable it ought not to have been

joined with the ordinary claim on a mortgage.—Plaintiffs had purchased a portion of the property comprised in their own mortgage when it was sold in execution of R's decree, already referred to. By that purchase they had made a profit. It was contended that plaintiffs in their character of second mortgagees stood in a fiduciary position towards their mortgagors, and that they were not entitled to be treated as independent strangers buying at an auction sale. There was nothing to show that plaintiffs had taken any advantage of their position:—*Held*, that plaintiffs took an absolute title such as strangers might have taken. *Held* also, that their claim on their mortgage was not affected by their purchase of part of the property, since under the circumstances they must be taken to have paid the full value of the unencumbered property.—The owners of certain property, wishing to raise a sum of Rs. 10,500 on mortgage, executed two mortgages in favour of the same mortgagees, over the same lands, on the same day;—one for Rs. 10,000 and another for Rs. 500. The latter instrument recited the bond for Rs. 10,000 as a prior mortgage. The mortgagees then sued on the mortgage for Rs. 500 and obtained a decree, under which portions of the security were sold, subject to liability under the mortgage for Rs. 10,000. The mortgagees now sued on the mortgage for Rs. 10,000, when it was objected that the suit was not maintainable by reason of section 43 of the Code of Civil Procedure. *Held*, that this objection was not sustainable, and that, regarding the case as one of a mere personal claim on the instrument of mortgage, section 43 did not apply.

Sesha Ayyar v. Krishna Ayyangar ... 96

5. *s. 82—Liability of several properties to rateable contribution "in the absence of a contract to the contrary":*

The owner of certain lands mortgaged them, and subsequently effected a partition of the family property between himself and his three sons. By the terms of that partition the father and his sons each took a fourth share in the family property and each became liable for a fourth of the mortgage debt. One of the sons then sold the greater portion of his share in the mortgaged property to plaintiff, giving plaintiff a security bond for a sum of money and hypothecating other lands to indemnify plaintiff from any loss which might arise if the original mortgagee should bring the mortgaged lands to sale. The mortgagee obtained a decree on his mortgage in execution of which a portion of the mortgaged land was sold, including that which plaintiff had bought. The proceeds of sale of the said portion were sufficient to satisfy the mortgagee's decree. Plaintiff then sued on his security bond, and the land hypothecated to him was sold, plaintiff receiving the amount secured by the bond. He now sued under section 82 of the Transfer of Property Act and claimed rateable contribution from the other portions of the mortgaged property which had not been sold to satisfy the mortgagee's decree:—*Held*, that he was entitled to recover, and that his right to rateable contribution was in no way affected by the indemnity bond or the payment made to him thereunder. *Held* further, that the words "in the absence of a contract to the contrary," in section 82 of the Transfer of Property Act apply to contracts between a mortgagor and mortgagee, and that an agreement which is binding only as between the mortgagors is not "a contract to the contrary," within the meaning of the section.

Ramabhadrachar v. Srinivasa Ayyangar ... 85

6. *ss. 88, 89—Decree for sale under section 88—No order absolute under section 89—Application by decree-holder for sale under Civil Procedure Code—Order as asked—No further applications in execution for more than three years—Then, application for order absolute, under section 89—Bar by previous order—Limitation Act—Act XV of 1877, sched. II, art. 179:*

A decree for sale of mortgaged property was passed on 30th August 1895 under section 88 of the Transfer of Property Act. No order absolute for sale was asked for or made under section 89 of the Transfer of Property Act. On 30th September 1896, the decree-holder applied to

the Court under sections 286 and 287 of the Code of Civil Procedure for an order directing the sale of the mortgaged property and an order was passed accordingly. This application was subsequently dismissed for failure to pay the expenses. On 10th October 1896, another application for execution was made but no further step in execution was taken for more than three years, namely, till 20th November 1899, when the decree-holder applied for an order absolute under section 89 of the Transfer of Property Act. He contended that as such an order had never been made he was entitled to ask for it, and that inasmuch as his application was not one for execution it was not barred by limitation under article 179 of schedule II to the Limitation Act:—*Held*, that the order passed on the application of 30th September 1896 must be taken to be an order absolute for sale, as well as an order directing certain further steps in execution, and it was in consequence not open to the decree-holder to apply now for an order under section 89 of the Transfer of Property Act. His present application must accordingly be regarded as an application for execution, and as such it was barred under article 179 of schedule II of the Limitation Act.

Venkatarazu v. Chinna Ramayya ... 695

7. *by sons against father for partition—Subsequent mortgage of suit property by father—Consent decree in partition suit—Subsequent decree in a suit on the mortgage against the father alone—Liability of property in execution—Effect of instrument intended to be a mortgage but defective in form—Charge:*

Plaintiffs, who were the sons of first defendant, had, on March 18th, 1893, instituted a suit against their father for partition. On 24th July 1893, their father executed a deed purporting to mortgage the house to defendants Nos. 2 and 3. That deed was, however, attested by only one witness. On 24th December 1894, a razinamah was filed and a decree based on it was passed in the partition suit between plaintiffs and their father, by which the father conveyed to plaintiffs the whole of his interest in the immoveable family property, retaining only sufficient money to satisfy certain encumbrances which existed on the property. These were in fact paid off and the plaintiff took possession. Defendants Nos. 2 and 3 obtained, against the father alone, a decree for the amount of their mortgage and for sale in default of payment; and purchased it at a sale in execution thereof; and obtained possession through the Court. Plaintiffs then applied under section 332 of the Code of Civil Procedure for an order restoring them to possession, and, as that application was dismissed, filed the present suit:—*Held*, that plaintiffs were entitled to recover possession. As against the plaintiffs, the decree obtained by defendants Nos. 2 and 3 must be regarded as merely a personal decree against the father on his covenant to pay; and the house was not available in execution of it, inasmuch as it was the separate property of the plaintiffs, under the decree in the partition suit, at the time when the decree was obtained. Whether an instrument which was intended to be a mortgage but is invalid by reason of its not fulfilling the requirements of law, should be held as between the parties to it to operate so as to create a charge under section 100 of the Transfer of Property Act.—*Quere*. *Tofaluddi Peada v. Mahar Ali Shaha*, (I.L.R., 26 Cal., 78), considered.

Mithirath Bhat v. Somanatha Naickar ... 397

8. *agricultural purposes—Registration Act—Act III of 1877, s. 17, cl. (d)—Lease for reserving annual rent—Term exceeding five years:*

Defendants executed an instrument by which they leased a betel garden from plaintiff for an indefinite period at an annual rent of Rs. 35. The instrument was not registered. Rent having fallen into arrears, plaintiff sued to recover the same, when it was pleaded in defence that the instrument of lease was inadmissible in evidence for want of registration. The Munsif dismissed the suit on the grounds (1) that the lease was not for agricultural purposes and that therefore its registration was compulsory under section 107 of the Transfer of Property Act, and (2) that assuming

it to be an agricultural lease its registration was compulsory under section 17, clause (d), of the Indian Registration Act, inasmuch as it was not a lease for a term not exceeding five years. On a petition being filed to revise the Munsif's decree:—*Held*, (1) that a lease of land for the cultivation of betel is an agricultural lease. *Kunhayen Haji v. Mayan*. (I.L.R., 17 Mad., 98), not followed; (2) that although the lease might continue beyond five years in the event of neither party determining it in the meanwhile, it was not a lease for a term exceeding five years, as either party might determine it before the expiration of that period. *Virammal v. Runjayyengar*, (I.L.R., 4 Mad., 381), followed. Inasmuch as the annual rent was under Rs. 50, registration was optional and plaintiff was not precluded from proving the letting by oral evidence or by proof of the unregistered instrument.

Murugesu Chetti v. Chinnathambi Goundan ... 421

9. *ss. 108 (h), (o), 117—Right of kanomdar to remove and appropriate trees planted by himself—Malabar Compensation for Tenants Improvements Act (Madras)—Act I of 1887, ss. 2, 3, 4, 6—Malabar compensation for Tenants Improvements Act (Madras)—Act I of 1900, ss. 3, 4, 7:*

A kanomdar is entitled, during the period of his occupation, to remove and appropriate to himself any trees that he has planted, provided that he leaves the property substantially in the state in which he received it.

Vasudevan Nambudripad v. Valia Chathan Achan ... 47

- VILLAGE COURTS ACT (MADRAS)—ACT I OF 1889, s. 73—*Revision by District Munsif of Village Court's proceedings—Payment under protest by a defendant to a Village Munsif to avoid attachment and sale under a decree—Order by District Munsif setting aside all proceedings and for refund by Village Munsif—Legality of order:*

By section 73 of the Madras Village Courts Act, 1889, the District Munsif may set aside the decree or order of a Village Munsif on certain grounds. A Village Munsif, having passed a decree against a defendant in a suit before him, attached, in pursuance thereof, property belonging to the defendant, who thereupon paid the amount to the Village Munsif under protest. Defendant then applied under section 73 to the District Munsif, who set aside the decree and attachment and declared them to be void and ordered the Village Munsif to refund the money he had recovered from the defendants:—*Held*, that the order, in so far as it related to a refund of the money by the Village Munsif, was made without jurisdiction and must be set aside without prejudice to the rights (if any) of the defendant to proceed against the Village Munsif for damages suffered by reason of his misconduct. Under section 73 a District Munsif has power only to set aside the decree or order complained of, and cannot make an order for payment against the Village Munsif, the section applying to proceedings between litigants.

Palani Goundan v. Kuppana Goundan ... 335

- WORKMAN'S BREACH OF CONTRACT ACT—ACT XIII OF 1859, ss. 1, 2—*Failure to comply with order of Court—Criminal Procedure Code—Act V of 1898, s. 4 (o)—“Offence”:*

The offence created by the Workman's Breach of Contract Act (XIII of 1859) is not the neglect or refusal of the workman to perform his contract, but the failure on his part to comply with an order made by the Magistrate directing the workman to repay the money advanced or perform the contract.

King-Emperor v. Takasi Nukayya ... 660

THE
INDIAN LAW REPORTS,
Madras Series.

PRIVY COUNCIL.

KOTAGHIRI VENKATA SUBBAMMA RAO (PETITIONER),
APPELLANT,

v.

VELLANKI VENKATARAMA RAO (COUNTER-PETITIONER),
RESPONDENT.*

P.C.*
1899.
November 11.
1900.
June 28.

[On Appeal from the High Court at Madras.]

Compromise after decree—No amendment of decree unless authorised by either s. 206 or s. 623, Civil Procedure Code—Proceeding in execution barred by time—Limitation Act—Act XV of 1877, sched. II, art. 179.

The High Court has no power to alter its own decrees, except under the provisions of either section 206, or section 623 of the Code of Civil Procedure. The ground of review must have been existing at the time of the decree, the section 623 not authorizing review of a decree, which was right, on the happening of a subsequent event.

After a decree for land against four defendants a compromise was made between the plaintiff and the third defendant. The first and fourth had acknowledged the plaintiff's right. The second and third had defended the suit, and the decree had been made, and affirmed on appeal to the High Court, jointly and severally against the first three, and conditionally against the fourth.

An application by the second and third defendants for leave to appeal to Her Majesty was withdrawn, the two parties to the compromise having obtained an order for amendment of the decree in its terms.

For the execution of the decree against the three defendants, other than the third, as to the proportionate part of the property sued for, and not the subject of the compromise, the decree-holder afterwards obtained an order. This order was reversed by the High Court. Hence this appeal.

Held, that the order directing the amendment of the decree in the terms of the compromise was beyond the powers of the High Court, and was without

* Present: The Lord CHANCELLOR, Lords ROSEHOUSE, MORRIS, DAVEY and ROBERTSON, and Sir RICHARD COUGH.

KOTAGHIRI
VENKATA
SUBBAMMA
RAO
v.
VELLANKI
VENKATA-
RAMA RAO.

operation either in favour of or against those defendants who had not been parties to the petition for that amendment.

Held also, on the decree-holder's petition for execution of the decree, that the period of limitation commenced from the date of the primary, and not of the amended, decree of the High Court. Execution was therefore barred by limitation.

Instead of attempting the alteration in the decree, the High Court could properly have made the compromise a rule of Court, and have stayed all proceedings against the defendant who was a party to it, except for the purpose of enforcing it against him.

APPEAL from an order (1st December 1896) of the Appellate High Court, reversing an order (20th August 1895) of a single Judge of the High Court who had affirmed an order (21st March 1894) of the Subordinate Judge of Ellore, thus also reversing the latter order. The judgment and order of the High Court against which this appeal was preferred, reversed, under section 15 of the Letters Patent, the order of a single Judge maintaining an order for the execution of a decree passed in the first instance by the District Judge of Kistna, in Original Suit No. 17 of 1883 on the 17th October 1884, and affirmed by the High Court in Regular Appeal No. 40 of 1885 on the 12th July 1886. The suit was between members of the Vellanki family disputing an inheritance in the Kistna district, and the plaintiff was declared entitled and possession was decreed. His representative was the petitioner for execution and was now the appellant. The respondent, counter-petitioner, was representative of the first defendant. The appeal decree was amended by the High Court in terms of a compromise between the widow, who represented the plaintiff on his death in August 1886, and the third defendant. That proceeding gave rise to the questions, for decision and decided, on the present appeal, first, whether the representative of the plaintiff who petitioned for execution could have execution of the decree, after the amendment, against the first defendant; and, secondly, whether the period of limitation commenced from the date of the unaltered decree or from what other date.

The estate had last been held by Sudarsana Rao who, dying childless, was succeeded by his mother Chellayamma who died in 1872. On her death the succession was open to the heir nearest, through the common ancestor Gopal Rao, who left three sons, the progenitors of three lines of descendants. The line of the eldest of the three ended with Sudarsana Rao. The line of the second

son, Pedda Rao, was represented by the defendants. The line of the third son, Venkata Rao, was represented by the plaintiff in this suit. The first defendant, who was sued with three other co-defendants, was his father. Of the four defendants the first and fourth admitted the plaintiff's title; the second and third denied his right, claiming themselves. The fourth defendant, an infant, appearing by his guardian, defended as claiming to be adopted son of a deceased heir, whose widow was the second defendant. If the adoption, which was the subject of another suit, should be valid, he was within the line of heirs. But if it should be found invalid then the widow represented the deceased. The decree in the suit, made by the District Judge of Kistna at Masulipatam, was that on his establishing his adoption he should be liable as a co-defendant, to the decree which was against his three co-defendants jointly and severally, and as against this fourth one, conditionally. From this decree the second and third defendants appealed to the High Court. The appeal was dismissed on the 12th July 1886.

The plaintiff, Vellanki Venkata Krishna Rao, died on the 18th August 1886, and was succeeded on the record by his widow Buchamma. The second and third defendants applied in September of the same year, under section 598, Civil Procedure Code, for leave to appeal to Her Majesty. After this, Buchamma and the third defendant effected a compromise, and on the 23rd November 1887 these two parties presented the razinama petition which appears in their Lordships' judgment, asking for the amendment of the decree of the 12th July 1886. This was followed by the order of the High Court of 1st February 1888, granting the petition and ordering the amendment to be made in terms of the compromise. The decree was not formally amended till the 8th March 1891, continuing to have the same date, 12th July 1886. The order for the amendment, and the amended decree are set forth in the judgment on the present appeal.

On the 28th January 1891 Buchamma filed a petition for execution of the decree as amended on the 1st February 1888 by putting her in possession of two-thirds of the estate and the mesne profits, the proportionate part of the three defendants. All the four original defendants were made parties to this petition; and they all, except the second defendant, opposed the grant of execution. The first and fourth objected that no execution could be had against them, as they had been exonerated by the original

KOTAGHIRI
VENKATA
SUBBAMMA
RAO
v.
VELLANKI
VENKATA-
RAMA RAO.

KOTAGHIRI
VENKATA
SUBBAMMA
RAO
v.
VELLANKI
VENKATA-
RAMA RAO.

decree of the 12th July 1886; and that execution was barred by time. The third defendant insisted on the terms of the razinama petition and on the amendment.

On the 3rd October 1891 the petition for execution was rejected by the Subordinate Judge on the ground of limitation. This decision was reversed by the High Court on the 4th September 1893, and the Subordinate Judge was informed that the appeal decree of 1886 had been amended on the 3rd March 1891. This was followed by the grant of execution by him on the 31st March 1894. As to limitation he then said "the time from which the period of three years begins to run under clause 2 of article 179 in this case is the date of the final decree, or order of the Appellate Court, and such date is here the 1st February 1888."

Against this order the representative of the deceased first defendant, with the fourth defendant, appealed. While the appeal was pending Buchamma died, and her infant daughter Subbamma, the present appellant, was brought on the record.

On the 20th August 1895 the order appealed against was confirmed by PARKER, J., whose opinion as to limitation was thus expressed,—“The test in such a case is whether the whole decree is imperilled by the appeal of one, and if it is, the limitation will run against all, under article 179 of the Limitation Act, from the date of the appeal judgment (*Muthu v. Chellappa*(1); *Nundun Lall v. Rai Joykishen*(2); and *Kristo Churn Dass v. Radha Churn Kur*(3)). In the present case the decree was in peril until the motion for liberty to appeal to the Privy Council was withdrawn on February 1st, 1888. The present application was presented within three years from that date and is in time.”

On an appeal by the first defendant the High Court (COLLINS, C.J., and BENSON, J.), as a Court under section 15 of the Letters Patent, reversed the order of the single Judge by their order of the 1st December 1896. They said:—“The order of Mr. Justice Parker against which this appeal is made confirmed the order of the Subordinate Judge of Ellore directing execution of the decree of the High Court originally, dated 12th July 1886, but amended in accordance with orders passed on the 1st February 1888 and 3rd March 1891. The order of the Subordinate Judge

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

(2) I.L.R., 16 Calc., 598.

(3) I.L.R., 19 Calc., 760.

“was to divide the Inagadapa estate into three equal shares and to put the decree-holder into possession of such shares and for recovery of mesne profits. On referring to the decree under execution we do not find that it contains any such direction as might be supposed from the execution order, or, in fact, any direction at all regarding the first defendant, the present appellant. He is no party to the decree. No relief is given against him and there is, in fact, nothing in the decree that can be executed against him. It is suggested that the decree, as it now stands, is not in accordance with the judgment of the Court, and ought to be amended so as to bring it into conformity with that judgment. We are, however, unable to accede to this contention. The decree as it now stands was expressly approved by the Judges who amended it. The defence, which it is now alleged to contain, was brought to notice by the plaintiff in Civil Miscellaneous Petition No. 671 of 1891, dated the 14th August 1891, but this Court, in its order of the 31st August 1891, refused to further amend the decree expressly on the ground that the amendment, dated the 1st February 1888 and 3rd March 1891, was made in accordance with a compromise made between plaintiff and the third defendant and in the terms of the compromise. We are unable to say that the petition asking for the amendment does not bear out that contention, and we do not think that we ought now to go behind it and consider whether the parties did not really intend to retain the decree of the 12th July 1886 unaltered as against the first defendant as is now contended by plaintiff. On the ground, then, that the decree grants no relief against the first defendant we must set aside the orders of Mr. Justice Parker and of the Subordinate Judge, and dismiss the execution petition as against first defendant with costs throughout.”

On the 2nd February 1897 Subbamma, the present appellant, petitioned the High Court for an order that the decree might be amended, so that it might be brought into conformity with the intention of the parties which was that the proportionate part of the property decreed in 1886 and not dealt with by the compromise should be delivered to the plaintiff's representative. This was rejected by the High Court on the 9th August 1897.

On this appeal Mr. J. D. Mayne, for the appellant, argued that the orders of the High Court of the 1st December 1896, and 9th August 1897, should be reversed. The order of Mr. Justice Parker

KOTAGHIRI
VENKATA
SUBBAMMA
RAO
v.
VELLANKI
VENKATA-
RAMA RAO.

KOTAGHIRI
VENKATA
SUBBAMMA
RAO
v.
VELLANKI
VENKATA-
RAMA RAO.

of the 29th August 1895 should be restored, and execution should issue against the respondent. The decree of the High Court of the 12th July 1886 had secured to the plaintiff, and to his representatives in succession on the record, all his rights under the original decree of the 17th October 1884. The amendment, ordered on the 1st February 1888, and entered in the decree on the 8th March 1891, altered those rights, in pursuance of the compromise, only for the benefit of the third defendant, and in regard to his interest in the estate. It was not intended to affect the plaintiff's rights against any of the defendants except the third defendant, who alone had agreed to the compromise, and alone of the defendants was a party to the petition for amendment. Nor had the High Court power to alter the rights conferred by the decree except so far as the parties had agreed, and no alteration was valid to affect those who were not even parties to the petition of *razinama*. As to the latter the amended decree must be taken to have re-affirmed the primary one, which continued in force as to three defendants, and as to two-thirds of the property decreed. He referred to the powers given in the Civil Procedure Code to amend decrees. Sections 206 and 623. Neither of these were the authority here. Whatever the effect of the alteration, the fourth defendant, who had in effect consented to the original decree in the Court of First Instance having, by his written statement, acknowledged the title of the plaintiff, could derive no exoneration from the alteration of the decree, that alteration having been confined to the rights of the plaintiff and the third defendant. Application had been made to the High Court that upon the two decrees the right construction might be placed, with regard to the intention of the parties, but had not been granted. But even now the appellant's right position could be recovered upon the construction, now contended for, that the decree of 1886 remained unchanged against all the defendants, but the third, the interest of the latter being no longer liable in execution. As to limitation, the execution was not barred by article 178, schedule II. The three years' period ran from the date of the amendment of the prior decree. The latter decree was the final one among the parties. Until the amendment an appeal to Her Majesty was open. The finality was in abeyance. The starting point, the date of the amendment ordered, was the 2nd February 1888, and execution was petitioned for on the 28th January 1891.

KOTAGHIRI
VENKATA
SUBBAMMA
RAO
v.
VELLANKI
VENKATA-
RAMA RAO.

Mr. J. H. A. Branson, for the respondent, contended that the application for execution was barred by time. No stay of execution had been granted, or had been caused, either of the original decree of 17th October 1884, or of the decree of the High Court of the 12th July 1886. Notwithstanding that the second and third defendants had applied under section 598 for leave to appeal to Her Majesty the decree-holder could have at any time obtained execution. The enforcement of the decree of the 12th July 1886 could not have been interfered with by that application having been made, nor had its dismissal given a new starting point. The first defendant had not been a party to the amended decree, and the amendment, even if operative at all, had not affected his rights, directly or indirectly. The only decree with which he was concerned was that of July 12th, 1886; and of that decree execution against him was barred by limitation. There had been nothing done on the part of the defendants, or of any of them, to give a fresh starting point for limitation. Neither the application for leave to appeal, nor the petition for the amendment of the decree on the interests of one defendant, none of the others having been made parties to the proceeding, nor the amendment itself, could have had any such effect.

Mr. J. D. Mayne replied.

Afterwards, on the 28th June, their Lordships' judgment was delivered by LORD DAVEY:

JUDGMENT.—The delivery of the judgment on this appeal has been delayed at the request of the respondent's solicitors. In the first instance the respondent's counsel desired to draw their Lordships' attention to certain articles of the Code of Civil Procedure, which had not been mentioned at the hearing of the appeal, and subsequently a petition was lodged for leave to produce fresh evidence which was disposed of yesterday morning.

The facts which have given rise to the present appeal are shortly as follows: A suit was brought to recover the estate of one Sudarsana Rao the succession to which opened on the death of his mother in 1872. There were four defendants. The second and fourth defendants were the widow and (alleged) adopted son of one Suryaprakasa Rao deceased and between them represented one interest. The first and fourth defendants by their written statements admitted the plaintiff's case. The third defendant and second defendant contested it. But the interest of

KOTAGHIRI
VENKATA
SUBBAMMA
RAO
v.
VELLANKI
VENKATA-
RAMA RAO.

the second defendant depended on the alleged adoption of the fourth defendant by Suryaprakasa Rao turning out to be invalid. The respondent is the representative of the first defendant now deceased. That defendant was the natural father of the original plaintiff which, to a certain extent, may serve to explain the delay in executing the decree against him.

The District Judge decided in favour of the plaintiff and by his decree, dated the 17th October 1884, it was ordered that the plaintiff's claim be allowed with mesne profits, and that the costs of plaintiff and defendants Nos. 1 and 4 be paid by defendants Nos. 2 and 3; that the fourth defendant be personally exonerated but should he succeed in establishing his adoption and get possession of the property of the second defendant, then such property be liable to this decree and that subject to this limitation first, second and third defendants be severally and jointly liable to this decree.

The second and third defendants appealed to the High Court with the result that on the 12th July 1886 that Court confirmed the decree of the original Court and dismissed the appeal with costs.

The plaintiff died on the 18th August 1886 and his widow Buchamma was substituted on the record as his legal representative. Buchamma subsequently died and her infant daughter Subbamma (the present appellant) was brought on the record in her place.

In September 1886 the second and third defendants applied to the High Court for leave to appeal to Her Majesty in Council against the decree of the High Court. Pending the proceedings on this application Buchamma and the third defendant compromised the suit as between themselves. And on the 23rd November 1887 they presented to the High Court a razinama petition in the following terms:—

“The respondent's widow, Rajah Vellanki Buchamma Rao Zamindar Garu, begs to submit as follows:—

“As the appellant has presented a petition praying for permission to appeal to the Privy Council, and as I am a female and not sufficiently wealthy to defend the suit, I have agreed to the effect that I should receive from the appellant Rs. 9,000 (nine thousand) now paid, exclusive of Rs. 1,000 (one thousand) already paid on account of costs, &c., as proper consideration, that the appellant should be in enjoyment of one-third share in the zamin of the northern portion

‘of Vinigadapa estate in suit, one-third share in the houses and the devastanam dharmakartaship as usual, and that I should give up my claim against the appellant.

“The appellant submits as follows:—

“As I have agreed to the terms stated above by the respondent widow, I most respectfully pray that the petition put in by me praying for permission to appeal to the Privy Council may be dismissed, that this razinama petition may be filed with the records of your Court and that the decree may be amended on the terms hereof.”

On the 1st February 1888 the High Court made the following order on this petition:—

“We make the razi set out in Civil Miscellaneous Petition No. 71 of 1888 a rule of Court and accordingly direct that the decree in appeal No. 40 of 1885, dated the 12th day of July 1886, be amended by omitting the words ‘This Court doth order and decree that the decree of the lower Court be, and the same hereby is, confirmed, and this appeal dismissed; and this Court doth further order and decree that the appellants do pay to the respondent Rs. 270-8-5 for his costs in opposing this appeal,’ and by substituting therefor the words ‘It appearing that Rs. 9,000, exclusive of Rs. 1,000 already paid on account of costs, has been paid to the respondent as proper consideration, this Court doth order and decree that the appellant do enjoy one-third share in the zamin of Magadapa estate in suit, one-third share in the houses and the devastanam dharmakartaship as usual, and that the respondent's representative do give up her claim against the second appellant.’”

The application for leave to appeal to Her Majesty in Council was thereupon dismissed.

The actual amendment of the decree in pursuance of this order was not made until the 3rd March 1891. As amended the decree bore date the 12th July 1886 (the day on which the order was made dismissing the appeal to the High Court) and was in the following terms:—

“Decree.—This appeal coming on for hearing on Monday, the 22nd day of March 1886, and having stood over for consideration till this day; upon perusing the grounds of appeal, the judgment and decree of the lower Court, and the material papers in the suit, and upon hearing the arguments of Mr. R. Shadagopachariar vakil for the appellants, and of Mr. J. H. S. Branson, counsel for the respondent; it appearing that Rs. 9,000, exclusive of Rs. 1,000 already paid on account of costs, has been paid by the respondent

KOTAGHIRI
VENKATA
SUBBAMMA
RAO
v.
VELLANKI
VENKATA-
RAMA RAO.

KOTAGIRI
VENKATA
SUBBAMMA
RAO
v.
VELLANKI
VENKATA-
RAMA RAO.

“as proper consideration, this Court doth order and decree that the second appellant do enjoy one-third share in the zamin of the northern portion of Inagadapa estate in suit, one-third share in the houses and the devasthanam dharmakartaship as usual, and that the respondent's representative do give up her claim against the second appellant.”

It is not easy to understand what jurisdiction the High Court supposed themselves to have to amend their decree in this manner. So far as their Lordships are aware the High Court has no power to alter its own decrees except under the provisions of either section 206 or section 623 of the Civil Procedure Code, and neither of these sections authorise such an amendment as was made by the Court. Section 206 enables the Court to amend the decree if it is found to be at variance with the judgment, or if any clerical or arithmetical error be found in it. Section 623 enables any of the parties to apply for a review of any decree on the discovery of new and important matter and evidence, which was not within his knowledge, or could not be produced by him at the time the decree was passed, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. It is not necessary to decide in this case whether the latter words should be confined to reasons strictly *ejusdem generis* with those enumerated as was held in *Roy Meghraj v. Beejoy Gobind Burral*(1). In the opinion of their Lordships, the ground of amendment must at any rate be something which existed at the date of the decree, and the section does not authorise the review of a decree which was right when it was made, on the ground of the happening of some subsequent event. It is, however, easy to point out the inaccuracies of the decree as amended. It does not dispose of the appeal of the second defendant who was also appellant and it states circumstances as appearing to the Court on the 12th July 1886 which were not at that date existent. A plausible explanation of the extraordinary order made by the High Court is that it was really based on an agreement between all the parties to the litigation including the first, second and fourth defendants as well as the third defendant who made the compromise to which effect was given by the order. But no such agreement was proved or even suggested at any stage of the proceedings which followed the

amendment of the decree, and neither the order of the 1st February 1888 nor the amended decree is expressed to be made by the consent of any party other than the third defendant. Nothing of the kind is to be found in the record or proceedings before their Lordships, nor was any suggestion of the kind made at the hearing of the appeal. It is too late now for their Lordships to listen to any suggestion of such an agreement even if it could regularly be put in evidence in the execution proceedings, and the case must be dealt with on the footing that no such agreement existed.

Buchamma on 4th August 1891 petitioned the High Court to further amend the decree so as to establish the compromise without disturbing the rest of it. This application was refused, on the ground that the amendment was made in accordance with the compromise and in terms of that compromise. Their Lordships are unable to agree with the view so expressed. The petition asked only that the razinama might be placed on the files of the Court, and the decree amended accordingly, *i.e.*, so as to give effect to the compromise between the appellant and the third defendant only. It was no doubt erroneous in asking for any amendment of the decree, and the only order which should have been made on it was to make the razinama a rule of Court, and stay all further proceedings on the decree against the third defendant except for the purpose of enforcing the compromise.

In the meantime and on the 28th January 1891 Buchamma filed an application for execution of the original decree of 17th October 1884. In the column headed “whether any appeal was preferred against the decree,” it is mentioned that an appeal was preferred and the decree of the lower Court was confirmed, “thereupon application for review having been made review order was passed on 1st February 1888.” The petition sought possession of two-thirds of the estate with mesne profits. All four original defendants or their representatives were made parties to the application. The present respondent claimed that the application was barred by limitation. The third defendant relied on the compromise. And the fourth defendant in addition to the defence of limitation averred that he was not a party to the “review order” mentioned by plaintiffs, and it did not affect him. The second defendant offered no opposition.

This application has come before the Courts no less than five times and various judicial opinions have been expressed. When

KOTAGIRI
VENKATA
SUBBAMMA
RAO
v.
VELLANKI
VENKATA-
RAMA RA

KOTAGHIRI
VENKATA
SUBBAMMA
RAO
v.
VELLANKI
VENKATA-
RAMA RAO.

the case first came before the District Judge, he had not before him the amended decree and he held that the application was barred by limitation, three years having elapsed since the date of the appeal decree in 1886. On appeal the amended decree was produced and the case was remanded. On coming again before the District Judge he held that the time for limitation ran from the date of the order of 1st February 1888, and decreed execution for two-thirds of the estates and mesne profits. On appeal to a single Judge, Mr. Justice Parker concurred and dismissed the appeal. The learned Judge seems, however, to have thought that the application for leave to appeal to Her Majesty in Council stayed proceedings on the decree which is clearly erroneous. On a second appeal by the present respondent to the High Court on the ground that the amended decree grants no relief against the first defendant, the Court set aside the order of Mr. Justice Parker and dismissed the execution petition. There was in fact (they held) nothing in the decree that can be executed against that defendant.

There is now an appeal to this Board. Their Lordships have had great difficulty in unravelling the tangled skein of these proceedings. The whole difficulty has been occasioned by the terms in which the order of 1st February 1888 and the amended decree were drawn up. Mr. Mayne argued that there was no final decree or order until that order was made and consequently limitation only then began to run against his client. He is at once met with the difficulty that the amended decree which he seeks to have executed gives no relief against the respondent. It is difficult looking to the terms of the amended decree to accept his suggestion that the two together form the final decree. The amended decree clearly is intended by its terms to be a substitution for the whole of the appeal decree. But in truth the appeal decree of 1886 required nothing to complete it, and when closely examined Mr. Mayne's argument rests on the erroneous assumption that the application for leave to appeal to Her Majesty in Council by the second and third defendants operated as a stay of execution against the other defendants, and required to be got rid of to make the appeal decree complete or operative. In fact he treats the application for leave as equivalent to an appeal.

Their Lordships have come to the conclusion that the order of the 1st February 1888, so far as it directed an amendment of the

KOTAGHIRI
VENKATA
SUBBAMMA
RAO
v.
VELLANKI
VENKATA-
RAMA RAO

decree, was *ultra vires* and had no operation either in favour of, or against the defendants who were not parties to that application. Or (in other words) they must regard it as an order made only for the purpose of giving effect to the compromise and not as adding to the decree but as *pro tanto* satisfaction of it. The original decree (as confirmed on appeal) therefore remained in force against the other defendants and might have been executed against them, and, on the other hand, they are entitled to the benefit of limitation as from the date of the appeal decree.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal be dismissed. They would gladly relieve the appellant from the costs, as the whole difficulty has been occasioned by the form in which the order of 1st February 1888 was drawn up by the officers of the High Court. But on the most favourable view to the appellant, she and her predecessors have remained idle and not enforced their decree, while the period of limitation has been running, and their Lordships cannot deprive the respondent who, they hold, is right, of his costs. The appellant will pay the costs of the appeal, but may set off the costs of the respondent's petition for the admission of fresh evidence.

Appeal dismissed.

Solicitor for the appellant—Mr. R. T. Tasker.

Solicitors for the respondent—Messrs. Burton, Yeates & Hart.

APPELLATE CRIMINAL.

Before Mr. Justice Shephard and Mr. Justice Davies.

QUEEN-EMPRESS

v.

RAMA.*

1900.
February 8,
13.

*Reformatory Schools Act—Act VIII of 1897, ss. 8, 9, 11, 13, 16—Youthful offenders
—Periods of detention allowable under the Act—Finding by Magistrate as to
age—Form of order—Exact period of detention.*

A District Magistrate before whom the case of a youthful offender came, under the provisions of section 9 of the Reformatory Schools Act, 1897, found the

* Criminal Revision Case No. 15 of 1900, taken up by the High Court, in Calendar Case No. 5 of 1899, on the file of the District Magistrate of Bellary.

QUEEN-
EMPRESS
v.
RAMA.

accused to be thirteen years of age, sentenced him to six months' rigorous imprisonment, and directed that in lieu of undergoing that sentence he should be detained in a Reformatory school for a period of five years, unless he should attain the age of eighteen years at an earlier date:

Held, that the order was wrong, inasmuch as it failed to fix the exact period of detention.

Semble, that in some cases it may not be necessary to ascertain the exact age of the offender. If he be not over fifteen, a period of three years may be rightly fixed; if not over eleven, a period of seven years may be fixed without further enquiry. But in cases in which enquiry is necessary in order to fix the period, as when the offender is over eleven, and the Magistrate wishes to make the period as long as possible, he must find, as well as he can, the exact age of the offender, and is not at liberty to leave the decision of the question to the Reformatory officials.

The effect of the notification published by Government regulating the periods for which youthful offenders may be sent to Reformatory schools in the Madras Presidency, is to fix a minimum period of five years for all cases in which such a period is legally possible; namely, in all cases where the offender is not over thirteen at the date of conviction. It was not intended to prevent the Magistrate from fixing a period short of five years, but not short of three years, in the case of a boy over thirteen.

THE District Magistrate of Bellary passed the following sentence:—"Rama *alias* Honnura *alias* Kala has been tried by the Town Sub-Magistrate for an offence under section 379 of the Indian Penal Code and is now sent before this Court under section 9 of Act VIII of 1897 as the Sub-Magistrate considers the accused to be a proper person to be an inmate of a Reformatory school. The accused is a boy of thirteen years of age. The facts proved before the Sub-Magistrate show that in broad day light and in the open bazaar the accused with some other boys picked the pocket of an individual who was purchasing vegetables in the market. The boys were caught at once and the money (Rs. 3) stolen was recovered. The accused had been twice convicted of stealing already. In Calendar Case No. 50 of 1898 on the file of the Town Sub-Magistrate he was convicted under section 379 of the Indian Penal Code and sentenced to receive twenty stripes. In Calendar Case No. 6 of 1899 on the same file he was convicted of an offence under section 380 of the Indian Penal Code and sentenced to receive thirty stripes. The first offence was committed on 28th February 1898; the second on 30th December 1898. The present case of theft committed on the 15th instant shows that the previous punishments have not had a deterrent effect on this youthful offender. I agree with the Sub-Magistrate in

QUEEN-
EMPRESS
v.
RAMA.

thinking that he is a proper person to be sent to a Reformatory. The accused was sent under my orders to the District Medical and Sanitary officer who certifies that he is about thirteen years of age. I have ascertained from the Superintendent, Chingleput Reformatory, that there is room in that institution for this boy. I now find the accused guilty of an offence under section 379 of the Indian Penal Code, and sentence him to six months' rigorous imprisonment. In lieu of undergoing this sentence, I direct under sections 8 and 9 of Act VIII of 1897 that the accused be detained at the Chingleput Reformatory school for a period of five years, unless he shall attain the age of eighteen years at an earlier date."

The records were called for by the High Court.

The Acting Public Prosecutor (*C. Sankaran Nayar*) for the Crown.

SHEPARD, J.—The question is whether a direction that a youthful offender shall be "detained in a Reformatory school for a period of five years, unless he shall attain the age of eighteen years at an earlier date" is a direction which should properly be made under the provisions of Act VIII of 1897. In respect to time the Act lays down three rules;—First, the youthful offender must be a boy under the age of fifteen years at the date of his conviction. In the present case the Magistrate finds that the boy is thirteen years old. Then the Act says the period of detention in the school must not be less than three years and, lastly, that the period must not exceed seven years. In order to give effect to these rules the Magistrate is directed by section 11 of the Act to enquire into the question of age and, after taking such evidence as may be deemed necessary, to record a finding thereon stating the boy's age as nearly as may be, and, as it appears from section 13, the Magistrate is to state the age in his order of detention. The finding is final in the sense that it cannot be altered on appeal or revision (section 16). But in case the Magistrate should have made a mistake and understated the age in the order for detention, it is competent to the local Government on the motion and report of the commission of visitors or Board of management to order the removal of the boy if and when he is found to have attained the age of eighteen years. As a general proposition it is clearly the duty of a Magistrate when pronouncing a sentence to define precisely the nature of the sentence intended. Generally, the sentence, like the decree in a civil case ought, I apprehend, to be

QUEEN-
EMPRESS
V.
RAMA.

self-contained, so that the functionary who has to execute it should have nothing to do but obey the directions given without making any inquiry on his own account. There are no words in the Act that I can find to indicate that the Magistrate acting under section 8 of the said Act is not to proceed in accordance with this principle. In some cases it is not necessary to ascertain the exact age of the boy. So long as he is not over fifteen, the Magistrate may rightly fix a period of three years, or if the boy is not over eleven, he may safely fix a period of seven years without further enquiry. But if enquiry is necessary in order to fix the period as it would be when the boy is over eleven and the Magistrate wishes to make the period as long as possible, then I think the Magistrate must find, as well as he can, the exact age of the boy, and he is not at liberty to leave the decision of the question to the Reformatory officials. If this is the Magistrate's duty under the Act, I do not think the notification of Government can or does make any difference. As I read the notification the intention was to fix a minimum of five years for all cases in which such a period was legally possible, that is, in all cases where the boy was not over thirteen at the date of conviction, and I do not think it was intended to prevent the Magistrate from fixing a period short of five years, but not short of three years in the case of a boy over thirteen. If the notification is intended to fix an absolute minimum of five years the direction of the Magistrate contravenes it, because he does not find that the boy is under thirteen. I think he was right in directing the detention of the boy in a Reformatory school, but wrong in not fixing the exact period. The Magistrate is directed to amend his order of detention in accordance with this judgment.

DAVIES, J.—I concur.

Government of India Notification, No. 1076, dated 30th June 1887:—In exercise of the power conferred by section 22 of the Reformatory Schools Act V of 1876, the Governor-General in Council made the following rule for regulating the periods for which Courts and Magistrates in the Madras Presidency may send youthful offenders to a Reformatory school:—"No boy shall be sent to a Reformatory school, if under ten years of age, for a less period than seven years; if over ten years of age, for a less period than five years, unless he shall sooner attain the age of eighteen years."

APPELLATE CIVIL.

Before Mr. Justice Subrahmanya Ayyar and Mr. Justice Davies.

IN THE MATTER OF A FIRST-GRADE PLEADER.*

1900.
February 16.

Legal Practitioners Act—Act XVIII of 1879, ss. 13, 14—Petition containing disrespectful language presented by co-plaintiff who was also a pleader in the Court—Act committed by a suitor.

Two persons filed a suit as co-plaintiffs, in a District Court of which one of them was a first-grade pleader. The District Judge, doubting the *bona fides* of the claim, took evidence from the plaintiffs and others, and passed proceedings, giving in detail the reasons for his doubts and ordering that the Official Assignee should be added as a defendant in the suit. The pleader and his co-plaintiff thereupon filed a petition objecting to their having been *primâ facie* condemned, and traversing the statements of fact and inferences made against them in the proceedings. Certain passages in the petition were disrespectful, and after some delay and other proceedings a charge was brought against the pleader under the Legal Practitioners Act, 1879. The pleader, while disclaiming any intention to be disrespectful, contended that no offence had been committed under the Legal Practitioners Act inasmuch as he had, in writing the petition, acted as a party and not as a pleader. On the case being referred to the High Court:

Held, that steps should not have been taken against the pleader under the Legal Practitioners Act so long as it was possible to take notice of his behaviour in any other way as one committed by a suitor.

In re Wallace (L.R., 1 P.C., 283), referred to.

CHARGE under section 14 of the Legal Practitioners Act of 1879 against a first-grade pleader, for using disrespectful language to a District Judge. The acts complained of were committed in the following manner and circumstances:—The pleader took a joint mortgage, with another person, of certain property, the mortgagor of which, some seven months later, became an insolvent with large liabilities. A debt due to the insolvent passed to the mortgagees as part of the mortgaged security, and a suit was filed by them for its recovery. The District Judge, believing that the mortgage on which the suit was based was a sham transaction and a fraud on the *bonâ fide* creditors of the insolvent, took and collected evidence in regard to it from the plaintiffs and others. The plaintiffs then petitioned the Court to join the Official Assignee as a defendant since their *bona fides* and that of

* Referred Case No. 16 of 1899 stated under section 14 of the Legal Practitioners Act, 1879.

IN THE
MATTER OF A
FIRST-GRADE
PLEADER.

the mortgagor was suspected, and this was afterwards done by a proceedings in which the District Judge stated in detail his reasons for thinking that the insolvency of the mortgagor and the mortgage deed were a fraud. On the same day issues in the suit were framed. About a fortnight later plaintiffs presented a counter-petition to the Judge's proceedings, in which they objected to having been *prima facie* condemned, and traversing *in toto* all the statements of fact and inferences made against them. This petition contained the expressions which formed the subject-matter of the present charge. On the following day the District Judge returned the petition with the following endorsement:— "This petition is returned for amendment, being disrespectful in tone throughout and containing much irrelevant matter. "It must be drawn up in accordance with section 541." The Official Assignee petitioned the Court stating that he could not dispute the claim of the plaintiffs and asking that those issues in the suit which concerned the validity of the mortgage might be struck out, which was accordingly done. The District Judge who passed the proceedings hereinbefore referred to had, meanwhile, moved to another district, and the suit was decided, by his successor, in favour of the plaintiffs, on the sole issue as to the debt sued upon. The Judge who had passed the proceedings subsequently resumed his duties, and, some four months having lapsed from the date of the return of the petition, called upon the pleader to show cause why he should not be reported for impertinent expressions contained therein. Another change then took place, the Court being taken charge of by the Judge who made the present reference to the High Court. This Judge considered the case with reference to the Legal Practitioners Act.

In defence, the pleader disclaimed any intention of insulting the District Judge and said the petition was written solely to refute the serious imputations which had been made against him and the insolvent by the Judge: he further contended that if strong language had been used it was justified by the peculiar way in which the Judge had tried the suit and the gravity of the charges which had been made, and which he considered to be "strange and unwarranted." He laid stress on the fact that his petition had been simply returned to him at first for amendment, as being disrespectful and irrelevant, and had never been re-presented, the Judge having left the district, and that the matter

IN THE
MATTER OF A
FIRST-GRADE
PLEADER.

had been taken up again three months later when the Judge returned and when other charges were accumulating against him. He disclaimed having intended to be disrespectful, and said that he only desired to make a strong refutation of unwarranted charges; and contended that in any view no offence had been committed under the Legal Practitioners Act, because in writing the petition he was merely acting as a party, and not as a pleader.

The District Judge dealt very fully with, and arrived at the conclusion that, the defence contained no real apology, and recommended that the pleader should be suspended for one day, or in the alternative that he should be severely reprimanded and ordered to submit a full apology to his predecessor. He added that as the pleader enjoyed great reputation and prestige locally, the punishment would be markedly felt and would amply meet the merits of the case.

Sivasami Ayyar on behalf of Pleaders Examination Board.

Mr. *K. Brown*, Mr. *R. F. Grant*, and *Ayya Ayyar* for defendant.

JUDGMENT.—There is no doubt the language used in the petition was highly improper, and in returning the petition for amendment, the Judge adopted the proper course. As no further immediate action was taken and the petition was not re-presented the matter should have been allowed to drop and not resuscitated after the lapse of several months.

Further, we are of opinion that steps should not have been taken against the petitioner under the Legal Practitioners Act so long as it was possible to take notice of the act in any other way, as one committed by a suitor. (See the case of *In re Wallace*(1)). It may be added that the act of the petitioner was not *per se* sufficient to disqualify him from continuing to be a pleader.

We therefore dismiss the charge.

(1) L.R., 1 P.O., 283.

APPELLATE CIVIL.

Before Mr. Justice Subrahmanya Ayyar and Mr. Justice Davies.

BASAVAYYA (PLAINTIFF), APPELLANT,

v.

SYED ABBAS SAHIB AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, ss. 280, 281, 283—Property in the possession of a judgment-debtor—Attachment of right to receive a debt—Specific Relief Act—Act I of 1877, s. 42—Consequential relief.

First defendant had obtained a decree against second defendant in execution of which he had attached and sold the second defendant's right to collect rent payable to him in respect of certain properties by tenants for a certain year. A claim had been preferred by plaintiff objecting to the said attachment on these grounds, under section 278 of the Code of Civil Procedure, but had been rejected. Plaintiff now sued for a declaration that the attachment and sale were invalid, on the grounds that the properties belonged to a certain mutt, and not to second defendant; that second defendant had been manager of the mutt, but had been dismissed, plaintiff replacing him; and that the rents in question were not liable for the debts of second defendant. The plaintiff prayed for no relief consequential to the declaration:

Held, that the attachment was of a debt in respect of which prohibitory orders had been issued under section 208 of the Code of Civil Procedure; that the attachment of a right to receive a debt is not property capable of possession within the meaning of sections 280 and 281 of the Code of Civil Procedure; and that the suit was therefore not one instituted under section 283 to establish a right to attached property; and that it had been properly dismissed.

Mussamut Rambutty Koer v. Kamessur Pershad, (22 W.R., C.R., 36), referred to.

Suit for a declaration. First defendant had obtained a decree against second defendant, in execution of which he had attached and sold the right of collecting rent payable to second defendant in respect of certain properties by their tenants for the year 1896-97. Plaintiff, alleging that he was the manager of the Virakata mutt at Karakal, now sued for a declaration to the effect that the said attachment and sale were invalid as against him, and that he was entitled to collect the said rent. He alleged that second defendant

had been manager of the mutt, but, owing to his misconduct, had been dismissed, plaintiff being appointed in his place; and that the rent in question was applicable to the charitable purposes of the mutt and was not liable for the debts of second defendant. A claim had been preferred by plaintiff objecting to the said attachment on these grounds, under section 278 of the Code of Civil Procedure, but had been rejected. First defendant denied that plaintiff was manager of the mutt, or that the mutt had any right to collect the rent in dispute, or that it had any right to the property in respect of which the rent was payable. He contended that the suit was not sustainable under sections 13 and 276 of the Code of Civil Procedure. The attachment referred to (filed as exhibit XXXIX) was as follows:—"To the said defendant and his tenants mentioned below:—It is ordered that the defendant be and is hereby prohibited, until the further order of this Court, from receiving from the said tenants, certain money or debt due to the defendant and which is now in the possession of the said tenants, namely, the undermentioned rent and that the said tenants of the said defendant be and are hereby prohibited from making payment of the said rent or any part thereof, to any person whomsoever." The District Munsif found that the right to collect the rent did not belong to the mutt; that plaintiff was not the duly appointed manager of the mutt; and that plaintiff was not entitled to the declaration prayed for. He dismissed the suit. On plaintiff's appeal, the District Judge said:—"Without going into the issues of fact, I hold that the plaintiff's suit was not sustainable as a declaratory suit under section 42 of the Specific Relief Act because he did not seek further consequential relief which he might have sought. The evidence clearly shows that the plaintiff and the mutt itself were alienated between the years 1872 and 1874 by the then trustees of the mutt to persons who were not trustees. The second defendant eventually got possession and title, not as a trustee, but as a stranger. He then alienated the land to the first defendant and gave him constructive possession though he obtained a mulgeni lease. The property was thus no longer in possession of a trustee of the mutt at the time of plaintiff's appointment, and it did not therefore pass to plaintiff's possession, on his appointment as trustee, assuming his appointment to be valid. He sues for a declaration that the sale of the right to collect rents on the land

BASAVAYYA
v.
SYED ABBAS
SAHIB.

1900.
February 6,
16.

* Second Appeal No. 118 of 1899 against the decree of F. H. Hamnett, District Judge of South Canara, in Appeal Suit No. 168 of 1898, affirming the decree of V. C. Mascarenhas, District Munsif of Karakal, in Original Suit No. 26 of 1897.

BASAVAYYA
v.
SYED ABBAS
SAHEB.

for a certain year is not binding on him, as he has a title to the land as trustee. This is clearly a suit for declaration of plaintiff's title to land not in his possession and he is bound to sue for possession as well under the proviso to section 42, Specific Relief Act." He dismissed the appeal.

Plaintiff preferred this second appeal.

Ramachandra Rao Sahab and *Madhava Rao* for appellant.

Narayana Rao for respondent No. 1.

JUDGMENT.—It is clear from exhibit XXXIX (the attachment order) that what was attached was a debt in respect to which prohibitory orders were issued under section 268, Code of Civil Procedure. The attachment of a right to receive a debt is not, in our opinion, property capable of possession within the meaning of sections 280 and 281 of the Code. A similar view was taken under the Code of 1859 by the Calcutta High Court (*Mussamut Rambutty Koore v. Kamessur Pershad* (1)). The observation of Phear, J., that section 246 of that Code clearly contemplates property of which the judgment-debtor is entitled to the possession in specie, is applicable to the corresponding provision of the present Code. This suit was, therefore, not one instituted under section 283 of the Code. The appeal accordingly fails and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Subrahmaniam Ayyar and Mr. Justice Davies.

ARUMUGAM PILLAI (PLAINTIFF), APPELLANT,

v.

VALURA KOUNDAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

Succession Certificate Act—Act VII of 1889, s. 4—"Debt"—Suit by son of deceased mortgagee for amount due on usufructuary mortgage—Failure to produce certificate of heirship—Right to recover.

A Hindu, being the usufructuary mortgagee of certain lands, died, leaving an adopted son and two widows. The widows assigned the mortgage without

(1) 22 W.R., (C.R.), 36.

* Second Appeal No. 1770 of 1897 against the decree of K. Ramachandra Ayyar, Acting Subordinate Judge of Bellary and Salem, in Appeal Suit No. 89 of 1896, reversing the decree of Syed Tajuddin Sahib, District Munsif of Namakkal, in Original Suit No. 706 of 1894.

consideration. The mortgagor sold the equity of redemption to a purchaser who paid off the mortgage to the assignee of the widows. The adopted son then sued the mortgagor, the widows, their assignee and the purchaser of the equity of redemption to recover the amount due under the mortgage, or for possession of the lands until the mortgage amount should be paid, but he did not produce a certificate of heirship:

Held, that he was entitled to recover as against the mortgaged property. The money sued for was not due under a contract, but was in reality the value of the plaintiff's mortgage interest. In strictness, plaintiff was entitled to a decree for the land itself, and it was only by his consent that money was awarded in lieu of the land. The amount could not, therefore, rightly be treated as a debt within the meaning of the Succession Certificate Act, and the failure of the plaintiff to produce a certificate was no bar to a decree being passed in his favour.

SUIT to recover the amount due under two usufructuary mortgage deeds executed by first defendant in favour of plaintiff's adoptive father or for possession of the lands until the mortgage amounts should be paid. The mortgaged properties had reached the possession of defendant No. 5, through defendant No. 4, who had obtained a transfer of the mortgages from defendants Nos. 2 and 3, the widows of plaintiff's adoptive father, the mortgagee. Plaintiff produced no certificate of heirship. Defendant No. 5, by whom the suit was principally contested, denied plaintiff's adoption and alleged that on the death of plaintiff's father without male issue the second and third defendants became his heirs, and that they had obtained a certificate of heirship from the District Court for the collection of their late husband's debts. The Subordinate Judge, on appeal, treated such certificate as having been obtained by the widows. Defendant No. 5 contended that while the certificate was in force plaintiff was not entitled to sue. He also claimed to have purchased the equity of redemption of the mortgaged lands from the mortgagor, and to have paid off the mortgage amounts to the fourth defendant. The facts, as ultimately found, (an order for further findings having been made by the High Court), were:—That plaintiff was the legally adopted son of the late mortgagee; that plaintiff had failed to prove that the mortgage debt sued for was due as joint family property; that the assignment of the mortgages to fourth defendant was made without consideration; that such assignment was not binding on plaintiff; that the sale of the mortgaged premises to the fifth defendant was true and valid; that fifth defendant had discharged the mortgages by payment to fourth defendant, but that such discharge was not binding on the plaintiff. The

ARUMUGAM
PILLAI
v.
VALURA
KOUNDAN.

1898.
October 20.
1900.
February 22.

ARUMUGAM
PILLAI
v.
VALURA
KOUNDAN.

District Munsif decreed, as against fifth defendant, for the amount sued for, the same to be recovered by sale of the mortgaged land on default in payment. The Subordinate Judge reversed that decree and dismissed the suit. On the case coming on for final hearing, after the return of the findings above referred to :—

Sundara Ayyar and Rayhava Ayyangar for appellant.

Sivasami Ayyar for respondents.

JUDGMENT.—We agree with the District Judge that the payment relied on by the fifth defendant to the fourth defendant is not binding on the plaintiff, inasmuch as the assignment to the fourth defendant by defendants Nos. 2 and 3 was also not binding on plaintiff. The contention now for the first time made that the defendants Nos. 2 and 3 acted as guardians on behalf of the minor plaintiff is opposed to the whole facts of the case.

The only other question is whether the plaintiff is not entitled to the decree he obtained in the Court of First Instance by reason of his not having produced a certificate of heirship. That decree is not for money due under a contract, but is in reality the assessment in money by the District Munsif of the value of the plaintiff's mortgage interest. In strictness the plaintiff was entitled to a decree for the land itself, and it was only by his consent that money was awarded in lieu of the land. The amount cannot, therefore, rightly be treated as a debt within the meaning of the Succession Certificate Act. The failure of the plaintiff to produce a certificate was, therefore, no bar to the decree he got. We accordingly reverse the decree of the Subordinate Judge, and we restore that of the District Munsif with the modification that the fifth defendant is not personally liable, nor any of his property except the mortgaged property, to the decree. The fifth defendant will pay the costs of the plaintiff in this and in the lower Appellate Court.

The memorandum of objections is dismissed.

APPELLATE CIVIL.

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

VENKATA JOGAYYA (PLAINTIFF), APPELLANT,

v.

VENKATASIMHADRI JAGAPATIRAZU (DEFENDANT No. 2),
RESPONDENT.*

1900
March

*Civil Procedure Code—Act XIV of 1882, s. 206—Limitation Act—Act XV of 1877,
Sched. II, art. 179 (3).*

A decree was passed on 31st December 1892, and no appeal was presented by either party therefrom. Defendant No. 2, however, filed a petition for amendment of the decree in respect of the costs, which was granted on 6th October 1893. On 6th July 1896, defendant No. 2 applied for execution of the decree, and he again applied on 29th April 1898. On its being contended that the application was barred by limitation :

Held, that it was not barred. The order passed by the Court determining the amount of costs must be treated as a continuation or completion of the judgment, and the amendment made was therefore substantially made on review of judgment, and article 179 (3) of the Limitation Act applied.

EXECUTION PETITION filed, under section 235 of the Code of Civil Procedure, by defendant No. 2 against the plaintiff in a suit. Plaintiff filed a counter-petition alleging that the application was barred by limitation. The facts appear from the following order which was passed by the District Munsif on the petition :—
“ In this case the original decree was passed on 31st December 1892, and no appeal was preferred against it by either party. But the second defendant put in a petition for amendment of that decree in respect of costs and that petition was dismissed. Against that order, he preferred an appeal to the Subordinate Court and the appeal was dismissed. Dissatisfied with that order, he appealed to the High Court and that appeal also was dismissed. The second defendant put in this petition clearly three years after the date of the original decree and contends that it is not barred inasmuch as he had preferred appeals and that these appeals would save him from limitation. But I cannot agree with him. Apparently the appeals lodged by him were not against the original decree but against an order on a petition, and these appeals

* Civil Miscellaneous Second Appeal No. 48 of 1899 against the decree of C. G. Kappusami Ayyar, Acting Subordinate Judge of Cocanada, in Appeal Suit No. 26 of 1899, reversing the order of G. Subbayya, District Munsif of Peddapur, in Execution Petition No. 615 of 1898 (Original Suit No. 388 of 1891).

VENKATA
JOGAYYA
v.
VENKATA-
SINHADRI
JAGAPATI-
RAJU.

would not, in my opinion, save him from limitation. For these reasons, I hold that this petition is barred by time and I accordingly dismiss it. Each party to bear his own costs." From that order, petitioner appealed to the Subordinate Judge who delivered the following judgment:—"The principal point to be decided in this appeal is whether the application for the execution of the decree is barred by the law of limitation. The decree was passed on the 31st December 1892. The appellant applied for an amendment of the decree, which was granted on the 6th October 1893. On the 6th July 1896 a petition was put in for execution of the decree. It is contended for the appellant that the application for amendment partook of the nature of a petition for a review under clause 3 of article 179 of the Limitation Act, and that the starting period for the limitation should date from the 6th October 1896; (vide *Kali Prosunno Basu Roy v. Lal Mohun Guha Roy*(1)). The view suggested by the appellant is correct. The amendment of the decree was tantamount to a review. I hold that the decision (*Daya Kishan v. Nanhi Begam*(2)) is not applicable to this case."

Plaintiff preferred this appeal.

Sundara Nana Rau for appellant.

Appadorai Ayyar for respondent.

JUDGMENT.—The amendment of the decree related to the actual amount of costs, which was not settled in the judgment, but which, under the second paragraph of section 206 of the Code of Civil Procedure, had as usual to be determined subsequent to judgment for entry in the decree. An order passed by the Court determining such amount must be treated as a continuation or completion of the judgment, and the amendment made was, therefore, substantially an amendment made on review of judgment, and article 179, clause (3), of the second schedule of the Limitation Act strictly applies. The cases of *Kali Prosunno Basu Roy v. Lal Mohun Guha Roy*(1) and *Daya Kishan v. Nanhi Begam*(2) were cases where the decree differed from what appeared on the face of the judgment. As this is not a similar case, it is unnecessary for us to express any opinion on the contrary decisions arrived at in those cases. We dismiss the second appeal with costs.

(1) I.L.R., 25 Calo., 258.

(2) I.L.R., 20 All., 304.

APPELLATE CIVIL.

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

VENKATARAMA AYYAR AND OTHERS (DEFENDANTS AND HIS REPRESENTATIVES), APPELLANTS,

v.

VENKATA SUBRAHMANIAN (PLAINTIFF), RESPONDENT.*

1899.
December 1.
1900.
March 12.

Civil Procedure Code—Act XIV of 1882, s. 43—Limitation Act—Act XV of 1877 art. 97—Suit for specific performance—Subsequent suit for money paid on a consideration that failed.

Defendant having failed to convey certain property belonging to himself and his son to plaintiff as agreed, plaintiff obtained a decree for specific performance, in pursuance of which the price was paid and a conveyance executed. Plaintiff was then obliged to sue for possession, when it was found that the sale did not bind the son's interest and on grounds of convenience plaintiff was awarded the value of defendant's share instead of a decree for partition. He now sued to recover the balance of the price paid, and it was contended that the suit was, in fact, one for damages for breach of the contract to convey, and as such was barred under section 43 of the Code of Civil Procedure, inasmuch as the damages claimed could have been sued for in the alternative in the previous suit for specific performance:

Held, that the suit was not barred; it being in fact, for the recovery of money paid on a consideration that had failed, and the cause of action being different from that in the suit for specific performance.

Held also, that the suit was not barred by limitation, inasmuch as the failure of consideration must be taken to have occurred when it was found, in the suit for possession, that the plaintiff was not entitled to recover the son's share; which date was less than three years from that upon which the present suit had been instituted, article 97 of the Limitation Act, 1877, being applicable.

SUIT to recover a sum of money paid by plaintiff to defendant as consideration for the purchase of a house, which house defendant had failed to put into the possession of plaintiff. Plaintiff alleged that defendant and his son agreed to sell the house for Rs. 450, taking Rs. 50 in advance, and executing a letter to that effect and undertaking that on default in executing a sale-deed within one month defendant and his son would return the Rs. 50 advanced and pay Rs. 50 more as damages; that defendant had failed to

* Second Appeal No. 1729 of 1898 against the decree of P. Narayanasami Ayyar, Subordinate Judge of Negapatam, in Appeal Suit No. 219 of 1898, reversing the decree of B. Annasami Ayyar, Acting District Munsif of Tiruvadi, in Original Suit No. 269 of 1897.

VENKATA-
RAMA
Ayyar
v.
VENKATA
SUBRAH-
MANIAN.

execute the sale-deed, whereupon plaintiff had deposited Rs. 400 in Court and sued defendant in Original Suit No. 68 of 1894, in which a decree was passed, by defendant's consent, ordering the latter to execute a sale-deed, which he accordingly did. Defendant had, however, not put plaintiff in possession of the house, so Original Suit No. 220 of 1894 had been brought against defendant and his said son, wherein it was decreed that plaintiff could not recover the house, but that the defendants therein should pay Rs. 275. Plaintiff having lost both the house and the money now sued to recover the Rs. 50 advanced at first, as well as the Rs. 400, less the Rs. 275 decreed in the last-mentioned suit; and he laid the cause of action as having arisen on 1st February 1895 when it was decreed that he could not recover the house. The plaint in the present suit was presented on 19th July 1897. Defendant contended that the suit was barred by sections 13, 43 and 44 of the Code of Civil Procedure by reason of the decision in the former suit, Original Suit No. 220 of 1894; and also by limitation. The District Munsif found that the suit was *res judicata*, and with reference to sections 43 and 44 of the Code of Civil Procedure, he said:—"I fail to see how it is barred especially when the plaintiff has withdrawn his prayer for relief against the money that was in deposit in Original Suit No. 68 of 1894. The plaintiff did not and was not bound to ask for compensation in the alternative when he brought Original Suit No. 220 of 1894 for possession of the house. The case of *Hanuman Kamut v. Hanuman Mandur*(1) referred to by the plaintiff's pleader is a distinct authority against the contention of the defendant. In conclusion I find that the suit is barred by section 13 of the Civil Procedure Code and is not barred by section 43 or section 44." On the question of limitation he held that plaintiff had no lien on the properties, and that the suit was time barred under article 62 of schedule II to the Limitation Act. On this point he said:—"The suit is clearly time barred under article 62 of the second schedule of the Limitation Act. (He referred to *Hanuman Kamut v. Hanuman Mandur*(1)). The purchase money was declared to be the defendant's on the 1st March 1894 by the decree in Original Suit No. 68 of 1894 and the sale-deed (exhibit A) was executed on the 7th July 1894. Time began to run at least from the 7th July 1894, if not earlier. The

present suit was instituted on the 19th July 1897, *i.e.*, more than three years. Even assuming that the plaintiff has a lien, I doubt very much whether article 132 would apply so far as the claim for sale of the defendant's interest in the plaint house is concerned. In the converse case of a vendor of immoveable property bringing a suit for enforcing his lien for unpaid purchase money the time prescribed is only three years from the time fixed for completing the sale, or, when the title is accepted, after the time fixed for completion from the date of acceptance. I cannot see how a longer time could have been prescribed for the converse case of a vendee of immoveable property bringing a suit to enforce his lien for return of the purchase money paid. As ruled by their Lordships of the Calcutta High Court in *Hanuman Kamut v. Hanuman Mandur*(1) above mentioned, article 62 must be the article applicable to suits like the present where it is sought to enforce a lien for purchase money deposited. I therefore find that even assuming that the plaintiff has a lien on the defendant's interest in the plaint house, the suit is time barred."

Plaintiff appealed to the Subordinate Judge who said:—"The contention of the defendant is that this suit is *res judicata* by reason of the decrees in Original Suit No. 220 of 1894 and in Appeal Suit No. 206 of 1895 and copy of judgment in the latter is now filed as exhibit E. In that suit the relief asked for was recovery of possession of the house sold. Plaintiff did not ask for damages or other relief in the alternative. The Court decreed in that suit the money equivalent for one moiety of the house, because it considered that a physical division was inconvenient. The relief sought for in this suit is recovery of purchase money, which can be got only in case the sale fell through. To determine the question of *res judicata* we must see whether the matter directly and substantially in issue in this suit was directly and substantially in issue in the previous suit, and whether it was heard and finally decided by the Court in the previous suit. The relief now asked for was not asked in the previous suit, there was no issue raising this question in the previous suit and it was not heard and decided. The appeal judgment (exhibit E) allows plaintiff another suit and all the circumstances of the case have been duly considered in it. The authorities bearing on the point are *Unimatha v. Cheria*

VENKATA-
RAMA
Ayyar
v.
VENKATA
SUBRAH-
MANIAN.

(1) L.R., 18 I.A., 581; I.L.R., 19 Cal., 123.

(1) L.R., 18 I.A., 581; I.L.R., 19 Cal., 123.

VENKATA-
RAMA
Ayyar
v.
VENKATA
SUBRAH-
MANIAN.

Kunhamed(1), *Shivram v. Narayan*(2), and *Konerrav v. Gurrav*(3). Further, section 43 does not apply to this case as the cause of action is different. It is said that under that section, this claim might have been and ought to have been inserted as an alternative claim in the former suit. The present claim is in respect of a totally different cause of action from that raised in the former suit. That was for recovery of the house based on the sale-deed; the present suit is based on the fact that the sale fell through and that plaintiff is entitled to his purchase money. Therefore section 43 is no bar to this suit, (*Hanuman Kamut v. Hanuman Mandur*(4) and *Naro Balvant v. Ramchandra Tukdeo*(5)). The District Munsif has found that this suit is not barred by sections 43 and 44, but that it is barred by section 13, being *res judicata*. I differ from the opinion of the District Munsif and find that this is not *res judicata* and that it is not barred by any of those sections." He held that the suit was not barred by limitation, inasmuch as article 97 of the Limitation Act applied; and decreed in plaintiff's favour for the amount claimed.

Defendant preferred this second appeal.

V. Krishnasami Ayyar for appellants Nos. 2 and 3.

Ramachandra Rao Saheb for respondent.

JUDGMENT.—The decree of the Subordinate Judge is right. The questions argued before us for the appellant are—(1) that the suit is barred by section 43 of the Code of Civil Procedure, and (2) that it is barred by limitation.

The defendant agreed to convey certain property belonging to him and his son to the plaintiff. Disputes having arisen before the conveyance was executed, plaintiff sued for specific performance and got a decree, in pursuance of which the price was fully paid, and a conveyance was executed. Plaintiff not having been given possession, sued for possession. It was then found that the sale did not bind the son's interest in the property, and that though the plaintiff was entitled to possession of the father's share, a division ought not to be effected on the ground of the inconvenience attending the division of the house. Plaintiff was awarded the value of the defendant's share, and the present suit is to

(1) I.L.R., 4 Mad., 308.
(3) I.L.R., 5 Bom., 589.
(5) I.L.R., 13 Bom., 326.

(2) I.L.R., 5 Bom., 27.
(4) L.R., 18 I.A., 153; I.L.R., 19 Cal., 123.

VENKATA-
RAMA
Ayyar
v.
VENKATA
SUBRAH-
MANIAN.

recover the balance of the price paid, on the ground of failure of consideration to the extent of the son's share.

It is contended by the appellant that the suit should be regarded as one for damages for breach of the contract to convey, and that, if so, plaintiff should have sued for the damages as an alternative relief in the suit for specific performance and that section 43 of the Code of Civil Procedure is therefore a bar to the present suit. The contract to sell having been specifically enforced no question as to its breach arises, and the suit is really one for recovery of money, consideration for which has failed, as stated above. The cause of action, therefore, in this suit is entirely different from that in the suit for specific performance and section 43 of the Code of Civil Procedure has no application.

As to the question of limitation the Privy Council case of *Hanuman Kamut v. Hanuman Mandur*(1) is a clear authority against the appellant. The failure of consideration must be taken to have occurred when it was found in the suit for possession that the plaintiff was not entitled to recover the son's share. The present suit is within three years from that date and is therefore within time under article 97, schedule II, of the Limitation Act.

We dismiss the second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Davies.

SESHAYYA CHETTIAR (DEFENDANT No. 1), APPELLANT,

v.

CHENGAYYA CHETTIAR AND ANOTHER, (PLAINTIFF
AND DEFENDANT No. 2), RESPONDENTS.*

1900.
March
19.

Civil Procedure Code—Act XIV of 1882, s. 525—Application to file an award—Award relating to partition of property including immoveable property partly outside jurisdiction—Jurisdiction to file award and pass decree.

Matters in dispute between certain parties were submitted to arbitration within the jurisdiction of the High Court and an award was in due course made

(1) L.R., 18 I.A., 153; I.L.R., 19 Cal., 123.

* Original Side Appeal No. 23 of 1899 against the decree of Mr. Justice Subrahmanya Ayyar, in Civil Suit No. 50 of 1899.

SESHAYYA
CHETTIAR
v.
CHENGAYYA
CHETTIAR.

therein. The matter to which the award related was the partition of property, including immoveable property, part of which was situated outside the jurisdiction of the High Court. Application was then made that the award might be filed and a decree passed in its terms, when it was objected that the Court had no jurisdiction to entertain the application. Leave to sue had not been obtained under section 12 of the Letters Patent :

Held, that the Court had jurisdiction inasmuch as the right to have the award filed had originated within the jurisdiction.

Kellie v. Fraser, (I.L.R., 2 Calc., 445), referred to.

APPLICATION under section 525 of the Code of Civil Procedure that an award might be filed in Court, and a decree passed in terms thereof. The matter to which the award related was the partition of property, including immoveable property, part of which was outside the jurisdiction of the Court on its original side. The submission to arbitration as well as the making of the award had taken place within the jurisdiction of the Madras High Court on its original side. Leave to sue had not been obtained under section 12 of the Letters Patent. The third issue framed, after the filing of the written statements of the defendants raised the question whether the Court had jurisdiction to file the award and pass a decree thereon as prayed. On this issue the judgment of the Court was as follows :—" With reference to the third issue it is clear that this Court has jurisdiction, whether the present proceeding is received as one relating to immoveable property or not. If the former view is taken, then part of the immoveable property being situated within, and part without, the ordinary jurisdiction of this Court, the proceeding must be held to be entertainable by this Court, inasmuch as an ordinary suit, in like circumstances, can be instituted here with leave. It is scarcely necessary to say that the leave to be obtained in such cases is but a condition to the exercise of the jurisdiction vested in the Court. If, on the other hand, the present proceeding is treated as one that does not relate to the immoveable property, then the submission to the arbitration as well as the making of the award having taken place in Madras, the cause of action arose therein, and, of course, the Court has jurisdiction. *Kellie v. Fraser*(1), cited on behalf of the plaintiff, is a clear authority in favour of the above conclusion, and the general observations in *Gangappa v. Kapinappa*(2), relied on by first defendant's counsel are not in point."

(1) I.L.R., 2 Calc., 445.

(2) 5 M.H.C.R., 128.

The award was directed to be filed and its terms enforced, subject to certain modifications.

Defendant No. 1 preferred this appeal.

The Acting Advocate-General (Sir V. Bhashyam Ayyangar) and *Narayana Rao* for appellant.

Sivasami Ayyar and *Masilamani Pillai* for respondents.

JUDGMENT.—The only question seriously argued is whether there was jurisdiction to try the suit, or in other words whether the matter to which the award relates was matter over which this Court had jurisdiction.

There is no doubt that the matter to which the award relates was the partition of property including immoveable property, part of which is outside the jurisdiction of this Court on its original side. Without leave first obtained a suit for the partition of such property could not have been entertained. And it is consequently contended that, there being no leave granted in the present case, there was no jurisdiction having regard to section 12 of the Letters Patent. A similar contention was raised and overruled in *Kellie v. Fraser*(1), and we see no reason for not following that case.

It cannot be said that because the Court was not bound to grant leave it had no jurisdiction over the matter in respect of which it had liberty to grant leave.

In the case cited leave to sue would have been necessary if the suit had been an ordinary suit, because part of the cause of action admittedly did not arise within the jurisdiction. If it was right to hold in that case that leave was not necessary, it must be equally so in the present case where part of the land is not within the jurisdiction. Leave cannot be required on the ground that the property is in part outside the jurisdiction because this is plainly not a suit for land. Nor can leave be required on the ground that the cause of action has in part arisen out of the jurisdiction for that is not the case. The right to have the award filed is a right which originated within the jurisdiction.

It is objected that this view of the law may lead to great inconveniences and that applications may be made here which ought to be made in other Courts. In our opinion there is a wide distinction between an application to file an award which, *ex hypothesi*, decides the question in dispute between the parties, and an ordinary

SESHAYYA
CHETTIAR
v.
CHENGAYYA
CHETTIAR.

(1) I.L.R., 2 Calc., 445.

SESHAYYA
CHETTIAR
v.
CHENGAYYA
CHETTIAR.

suit, and moreover under section 20 of the Code of Civil Procedure it is always competent to the defendant to move for a stay of proceedings with a view to return of the plaint.

For these reasons we dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Davies.

GURUVAJAMMA (PLAINTIFF), APPELLANT,

v.

VENKATAKRISHNAMA CHETTI AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Court Fees Act—Act VII of 1870, s. 7, cl. IV (d)—Valuation by plaintiff of relief sought—Increase of valuation by Court and return of plaint for want of jurisdiction—Invalidity of order.

A plaint was filed in a certain Court praying for an injunction, the relief sought being valued at Rs. 50, on the basis of which valuation the Court had jurisdiction to try the suit. On objection being taken by the defendant that the plaintiff's valuation was incorrect, and that the proper valuation of the suit exceeded the pecuniary limits of the Court's jurisdiction, an issue was framed and the question was tried whether the suit was in fact within the pecuniary jurisdiction of the Court, with the result that the Judge held the proper valuation of the relief sought to be Rs. 2,700, which exceeded the pecuniary jurisdiction of the Court. He accordingly returned the plaint for presentation to the proper Court :

Held, that the Court had no power to increase the value of the suit. Section 7, clause IV (d) of the Court Fees Act requires that in a suit for an injunction the plaintiff shall state the amount at which he values the relief sought. The plaintiff had valued the relief at Rs. 50 and the Court therefore had jurisdiction.

Suit for a perpetual injunction restraining defendants from opening certain windows in their premises, which adjoined plaintiff's house, and from preventing the construction of a wall by plaintiff against the said windows, for the purpose of erecting an upper storey to plaintiff's house. Plaintiff contended that the easement enjoyed by the defendants in respect of the said windows was only permissive. She estimated the value of the relief sought

* Civil Miscellaneous Appeal No. 136 of 1899 against the order of C. R. Pattabhirama Ayyar, City Civil Judge, Madras, in Original Suit, No. 53 of 1898, for presentation to the proper Court.

GURUVA-
JAMMA
v.
VENKATA-
KRISHNAMA
CHETTI.

at Rs. 50, paid stamp duty thereon and filed the suit in the City Civil Court. Defendants contended, *inter alia*, that the value of the easement was not Rs. 50, as stated in the plaint, and that in determining whether the City Civil Court had jurisdiction to entertain the suit the value of the upper storey which plaintiff proposed to erect should be considered, and not the value of the easement. An issue was accordingly framed as to whether the suit fell within the pecuniary jurisdiction of the City Civil Court. On this the City Civil Judge said:—"When the suit came on before me, counsel for the defendants took the objection that the value of the suit exceeded the pecuniary limits of the jurisdiction of this Court. He contended that the real value is Rs. 5,000, which was the value given by first defendant and his sons in the suit they instituted in the Original Side of the High Court. The attorneys for the plaintiff maintained that the value is only Rs. 50, and as the matter is one affecting the jurisdiction of this Court, I framed a preliminary issue whether the suit falls within the pecuniary jurisdiction of this Court, and I directed both sides to furnish particulars of valuation and gave them time to adduce evidence on the issue. Both sides furnished particulars of valuation and examined witnesses in support of their respective contentions." He then dealt with the evidence as to value and found the amount of the loss which plaintiff would suffer, if the relief prayed for by her were not granted, to be Rs. 2,700. He continued as follows:—"As the valuation of the suit has been found by me to exceed Rs. 2,500 I have no jurisdiction to try and dispose of it. I also consider that the value given by the plaintiff in this case is not *bonâ fide*, and that she ought not to be permitted to choose the Court in which she should bring her suit by assigning an arbitrary value to it—vide the observations of the Chief Justice and Mr. Justice Banerjee in *Boidya Nath Adya v. Makhan Lal Adya*(1). In the same way as it is not open to the plaintiff to represent the subject matter of the suit as more than it really is with a view to having it filed in a superior Court—vide *Krishnama v. Perumal*(2) it is not open to him to put a nominal value on his claim and oust the superior Court of its jurisdiction." He returned the plaint for presentation to the proper Court.

Plaintiff preferred this appeal.

(1) I.L.R., 17 Cal., 680 at p. 683.

(2) I.L.R., 8 Mad., 388.

GURUVA-
JAMMA
v.
VENKATA-
KRISHNAMA
CHETTI.

JUDGMENT.—We are clearly of opinion that the learned Judge is wrong in holding that the valuation given in the plaint for an injunction can be questioned.

Section 7, clause IV (d), of the Court Fees Act VII of 1870 requires that in a suit for an injunction the plaintiff shall state the amount at which he values the relief sought. The plaintiff in this case values the relief at Rs. 50, and therefore the City Civil Court had jurisdiction.

There is no authority for holding that the Court has power to increase the value.

The appeal is allowed. The defendant must pay the costs of the appeal.

Messrs. *Branson & Branson*—Attorneys for appellant.

Messrs. *Short & Roll*—Attorneys for respondents.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Davies.

CHINNAPPA MUDALIAR (DEFENDANT), APPELLANT,

v.

SIKKA NAIKAN (PLAINTIFF), RESPONDENT.*

Negligence—Negligent act by Government official—Absence of malicious intention—Premature closing of water-supply by mistake of revenue officer—Right of action—Parties.

Plaintiff, a Government raiyat, occupied lands the cultivation of which depended upon a supply of water from a Government channel which was ordinarily kept open until a specified date, when it was closed. Defendant, a revenue officer employed by Government, negligently, but without malice and without any intention of harming plaintiff, caused the channel to be closed at an earlier date than was customary, thereby causing damage to plaintiff's crops. It was part of defendant's duty to see that the channel was closed at a certain date, but he had, on this occasion, closed it too soon by mistake. Plaintiff sued defendant for the damages which he had thereby suffered:

Held, that inasmuch as plaintiff's right to a supply of water was founded on contract, a right of action, in case of the water being improperly withheld,

* Second Appeal No. 442 of 1899 against the decree of G. T. Mackenzie, District Judge of Coimbatore, in Appeal Suit No. 75 of 1898, affirming the decree of T. A. Ramakrishna Ayyar, District Munsif of Udumalpet, in Original Suit No. 6 of 1897.

might exist as against Government, but that there was none as against the defendant, by whom no legal injury had been committed.

Semble, that if malicious intention on the defendant's part had been proved plaintiff might have had a cause of action.

Krishna Ayyan v. Venkatachella Mudali, (7 M.H.C.R., 60), and *Ramachandra v. Narayanasami*, (I.L.R., 16 Mad., 333), referred to.

Suit for damages sustained by reason of the negligence of defendant, a revenue officer of Government, in causing an irrigation channel to be closed before the usual time. Plaintiff was a Government raiyat occupying certain lands which were irrigated by a Government channel. The practice was to close this channel annually, for the removal of silt, on 1st May. On the occasion complained of the channel was closed on 15th April or fifteen days earlier. Plaintiff contended that this early closing was unauthorised, that it had been done without notice to the public, and that as a result of it his crops suffered for want of water. Plaintiff thereupon requested defendant, the Tahsildar, to re-open the channel, but he refused. Permission was then obtained from the Public Works authorities, but defendant again interfered, disputed the authority of the Public Works Department, and ordered the channel to be closed. Plaintiff charged that the action of the defendant was unauthorised and unjustifiable, and was actuated by an utter disregard of his duties as Tahsildar towards the raiyats, that the failure of the crop was the consequence, and that defendant was liable to recoup the loss suffered thereby. The defence was that the suit was not sustainable against the defendant as representing the interest of Government in his official capacity of Tahsildar, inasmuch as the notice required by section 424 of the Code of Civil Procedure had not been issued. Defendant also denied having obstructed the distribution of water by closing the channel in his official capacity of Tahsildar, and contended that he had ordered it to be closed at about the usual time, for the purpose of effecting the usual repairs, and with no other object. He said that the suit had been brought against him maliciously, but admitted that the channel was closed on 15th April owing to a mistake. The District Munsif found that plaintiff had need of the supply of water for irrigation; that defendant had no intention to cause injury to any one when he closed the channel on 15th April; but that defendant had been guilty of negligence in not first referring to the rules. He also found that plaintiff had suffered loss, and that the loss was the direct result of defendant's

CHINNAPPA
MUDALIAR
v.
SIKKA
NAIKAN.

CHINNAPPA
MUDALIAR
v.
SIKKA
NAIKAN.

action in closing the channel at an unreasonable time. He held that it was unnecessary for plaintiff to sue the Secretary of State, and that defendant was individually liable, and passed a decree against him for the amount of damages proved. Defendant appealed to the District Judge who confirmed the decree.

Defendant preferred this second appeal.

Sir *V. Bhashyam Ayyangar* and *Sivasami Ayyar* for appellant.
V. C. Desikachariar and *Seshachariar* for respondent.

JUDGMENT. — It is found that the plaintiff, a Government raiyat, has suffered damage by reason of the negligence of the defendant, a revenue officer of Government, in causing the Government channel from which the plaintiff's land derives its supply of water to be closed before the date on which it ought to be closed.

These are the facts found by the District Munsif and the District Judge does not express any dissent. It must be taken that there was no malice on the defendant's part and no intention to harm the plaintiff. It was part of the [defendant's duty as Tahsildar to see that the channel was closed at a certain date, but he made the mistake of closing it fifteen days too soon.

On these facts the question is whether the plaintiff can maintain an action for damages against the defendant. In support of the judgment Mr. Desikachariar contends that the plaintiff's right to the water is in the nature of an easement, and that the plaintiff has a right of action against any person who disturbs it. He cites the case of *Kristna Ayyan v. Vencatachella Mudali*(1). That case appears to us to affirm the very proposition which was denied on behalf of the plaintiff and affirmed on behalf of the defendant. Innes, J., in the course of his judgment, shows how, having regard to the relation between Government and its raiyats, there can be no question of easement and places on the footing of contract the right to a supply of water, which a raiyat occupying wet lands enjoys. In *Ramachandra v. Narayanasami*(2), where this case was followed, damages were given against the raiyats on whose petition the diversion complained of was made, but the ground of the defendant's liability is not explained. The plaintiff's right being founded in contract it follows that in case of improper withholding of water he may have his action against Government, but he has none against the defendant by whom no legal injury has been

(1) 7 M.H.C.R., 60.

(2) I.L.R., 16 Mad., 333.

committed. He is in exactly the same position as a householder whose supply of gas or water has been cut off by the negligence of a servant of the company which contracted to supply him with gas or water. He has his remedy against the company and not against the servant. The plaintiff has failed to show that any right of property has been infringed by the defendant, nor has he proved the malicious intention on the defendant's part which, if it had existed, might possibly have given him a right of action.

The appeal must be allowed and the suit dismissed with all costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Davies.

SADASIVA PILLAI AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

KALAPPA MUDALIAR AND ANOTHER, (DEFENDANTS),
RESPONDENTS.*

1900.
March 28, 29.

General Clauses Act (Madras)—Act I of 1891, s. 8 Appellate jurisdiction of High Court in cases instituted under enactments in force at time of institution of suit but repealed before hearing of appeal—Civil Procedure Code—Act XIV of 1882, s. 540—Appeal.

A suit was instituted in a District Court on 5th August 1897, in which a claim was made to the office of karnam. In October 1897 a notification was published under section 2 of Madras Proprietary Estates' Village Service Act (II of 1894), the effect of which was that as from the date of the notification section 11 of Regulation XXV of 1802 and Regulation XXIX of 1802, ceased to apply to the office of karnam. The Judge heard the suit, which had been filed prior to the notification, and dismissed it. Upon an appeal being preferred it was objected that the High Court had no jurisdiction to hear it:

Held, that the Court had jurisdiction. The appeal was from the judgment of a Court exercising original jurisdiction; and the High Court, if Madras Act II of 1894 had not been passed, would have had appellate jurisdiction, by virtue of section 540 of the Code of Civil Procedure, in suits brought under the said regulations. In cases where the Court of First Instance had jurisdiction to entertain the suit when it was instituted, and the parties had a right of appeal when the suit was instituted, the Appellate jurisdiction of the High Court is saved

* Appeal No. 96 of 1899 against the decree of H. H. O'Farrell, District Judge of Chingleput, in Original Suit No. 14 of 1897.

SADASIVA
PILLAI
v.
KALAPPA
MUDALIAR.

by section 8 of the Madras General Clauses Act, 1891, unless the right of appeal is expressly taken away.

Two persons joined in a suit, and claimed the offices of karnam and shroff as being hereditary. The offices formed portions of a permanently-settled estate of which first defendant was proprietor. The second defendant was alleged to have possession of the offices, the second plaintiff, who had the titular right to them, being thus wrongly kept out:

Held, that it was not necessary that the suit should have been brought for a declaration, there being no doubt as to the second plaintiff's title; and that it was properly brought for possession.

Suit claiming the offices of karnam and shroff and the emoluments attached to such offices, and the plaintiffs were an uncle and his nephew, and they claimed that the offices were hereditary in their family. The offices sued for formed portions of a permanently-settled estate of which first defendant was proprietor. The second defendant was alleged to have possession of them, the plaintiffs being thus wrongly kept out. The plaint was originally presented at the Court of the District Munsif, who held that he had no jurisdiction and returned it for presentation to the District Court, where it was filed on 5th August 1897. First defendant, while denying the claim generally, contended that the suit was barred by limitation, and that the Court's jurisdiction had ceased after 1st October 1897, when Madras Act II of 1894 had been brought into force on that estate by notification. The District Judge found that the plaintiff's family possessed the hereditary right to the offices; and that first plaintiff had no claim to the office of karnam, to which second plaintiff had been appointed in 1887. He held also that plaintiffs should have sued for a declaration and not for possession; that if treated as a suit for a declaration it was barred; that the suit was not sustainable; and that the plaintiffs had no joint cause of action against the defendants as claimed in the plaint. On the latter point he said:—"There is a further difficulty which has not been raised by the defendant in his written statement but which appears to me necessary to be considered. The suit is not brought by the second plaintiff alone, but by the first and second plaintiffs jointly. They do not ask for a decree in the alternative, for whichever of them is found entitled, but for joint possession of the office and the emoluments. It is clear that the first plaintiff has no right to the office either solely or jointly with the second plaintiff. Although this was pointed out to the plaintiffs' vakil the first plaintiff did not offer to withdraw from the suit. . . . I think, therefore, that his

subsequently filing this suit alleging his joint right with the second plaintiff was an act done *malu fide*, and that the suit must be held to fail because the joint right so claimed is not made out."

He also held that the Court had jurisdiction, inasmuch as the plaint had been filed prior to the date of the notification of 1st October 1897; and dismissed the suit.

Plaintiffs preferred this appeal.

Desikachariar, for respondent No. 1, raised the preliminary objection that no appeal lay. He contended that Regulation XXIX of 1802, under which the suit had been brought, does not provide for appeals, and that in the absence of such specific provision, an appeal could not be brought. Moreover, at the date of the present appeal, Madras Act II of 1894 was in force, and an appeal could not be entertained in a Civil Court, an appeal not being a continuation of the suit.

The objection was overruled.

Eliraja Mudaliar, for appellants, contended that the suit was maintainable; that it was not barred; and that even if the first plaintiff had been wrongly joined as a plaintiff, that was no ground for the dismissal as against second plaintiff, who had the right.

V. C. Desikachariar, for respondent No. 1, contended that Madras Act III of 1895 applies to the office of karnam in a permanently-settled zamindari or estate to which Madras Act II of 1894 (Madras Proprietary Estates Village Service Act) has been extended, and that in consequence suits for the office of a karnam are not cognizable by a Civil Court.

JUDGMENT.—A preliminary objection has been taken that no appeal lies.

The suit was instituted in the District Court of Chingleput on 5th August 1897. In October 1897 a notification was published under section 2 of Madras Act II of 1894. The effect of this notification was that as from the date of the notification section 11 of Regulation XXV of 1802 and Regulation XXIX of 1802 ceased to apply to the office of karnam. The District Judge held, quite rightly, that notwithstanding the notification he had jurisdiction to hear the suit on the ground that it had been instituted before the notification came into force. The question before this Court is, have we jurisdiction to hear an appeal from the District Judge's decree dismissing the suit? We are of opinion that we have. The appeal is from a Court exercising original jurisdiction and this

SADASIVA
PILLAI
v.
KALAPPA
MUDALIAR.

SADASIYA
PILLAI
v.
KALAPPA
MUDALIAR.

Court, if Act II of 1894 had not been passed, would have appellate jurisdiction by virtue of section 540 of the Civil Procedure Code in suits brought under the regulations above referred to. In our judgment the appellate jurisdiction of this Court in cases where the Court of First Instance had jurisdiction to entertain the suit when the suit was instituted and the parties had a right of appeal when the suit was instituted, is saved by section 8 of the Madras General Clauses Act, 1891, unless the right of appeal has been taken away in express terms. This right of appeal has been expressly taken away by Act II of 1897 in the case of suits under Regulation VI of 1831. There is no enactment which, in express terms, takes away the right of appeal in suits brought under Regulations XXV and XXIX of 1802.

The preliminary objection is overruled.

Coming now to the merits, the second plaintiff is undoubtedly the title-holder of the office of karnam, and the suit is for possession of that office and the removal of the second defendant and for the recovery of the fees due to second plaintiff as forming part of the emoluments of that office. The Judge has thrown out the suit on the grounds (i) that it ought to have been a suit for a declaration and as such was time-barred, and (ii) that there was a misjoinder of the first plaintiff, the uncle of the second plaintiff, inasmuch as only the second plaintiff had the titular right to the office, and the first plaintiff had no joint right as he claimed. As to the latter ground it is sufficient to say that the Judge ought not to have dismissed the suit altogether but only the suit of the first plaintiff, and as to the first ground we are clearly of opinion that the Judge was wrong in his view that the suit should have been for a declaration for there was no doubt as to the second plaintiff's title. All he wanted was to get possession of the office which was his by right, and his suit was therefore properly brought to obtain possession. As such suit it fell under article 124 of the second schedule to the Limitation Act and was within time. The facts proved are that second defendant is in possession of the office, and that he has no right thereto; also that the merah fees which were payable to the second plaintiff amounted to Rs. 84 per annum. There will, therefore, be a decree in reversal of the lower Court's decree, directing the removal by the first defendant of the second defendant from the office of karnam, and of karnam only, the office of nottam, if distinct from that of karnam, not being subject to

SADASIYA
PILLAI
v.
KALAPPA
MUDALIAR.

our jurisdiction, and the installation of the second plaintiff therein, and for the recovery by second plaintiff from first and second defendants, on account of merah, of the sum of Rs. 84 due before suit and of Rs. 353-0-6 due from date of suit till this date, being at the rate of Rs. 84 per annum. The second plaintiff will have his costs from first and second defendants throughout.

The suit as by first plaintiff is dismissed but without costs as though he was in error in joining in the plaint he had always been recognised as one of the Ismdars that is as one of the family in which the hereditary right to the office of karnam was vested.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

GOVINDA MENON (DEFENDANT No. 1), APPELLANT,

v.

KARUNAKARA MENON AND OTHERS (PLAINTIFFS Nos. 2 AND 3,
AND DEFENDANTS Nos. 2 TO 4), RESPONDENTS.*

1900.
April 6.

Suits Valuation Act—Act VII of 1887, s. 11—Under-valuation of suit—Disposal of suit not prejudicially affected—Admissibility of objection on second appeal.

The defendant in a suit raised the objection that its valuation was incorrect, and that if correctly valued it would exceed the jurisdiction of the Munsif's Court. The objection was overruled both in the Munsif's Court and in that of the District Judge, but was raised again on second appeal:

Held, that the objection was one that could be raised on second appeal.

Held also, that even though the suit were under-valued, as contended, the objection to it on that ground was not one that the Court would entertain having regard to section 11 of the Suits Valuation Act (VII of 1887), inasmuch as it had not been shown that the disposal of the suit had been thereby prejudicially affected.

Suit for the removal of a karnavan and for the appointment of another in his stead. An objection was taken in the written statement of first defendant that the valuation of the suit was incorrect, and that, if correctly valued, the suit would be beyond

* Second Appeal No. 441 of 1899, against the decree of W. H. Welsh, District Judge of South Malabar, in Appeal Suit No. 425 of 1898, affirming the decree of T. V. Anantan Nayar, District Munsif of Kutnad, in Original Suit No. 148 of 1897.

GOVINDA
MENON
v.
KARUNAKARA
MENON.

the pecuniary jurisdiction of a Munsif's Court. The District Munsif held that he had jurisdiction to entertain the suit and, after hearing the evidence, ordered the removal of first defendant from the office of karnavan, and appointed second plaintiff in his stead. First defendant appealed to the District Judge who, on this part of the case, said :—"The first issue is, whether the suit was cognizable by a Munsif. Plaintiffs valued the relief sought at Rs. 2,000. First defendant contends that the value of the leased estate of the tarwad is Rs. 10,000, but the right of management is not of the same value as the estate nor as the annual income, and there was no proof adduced to satisfy the Munsif that the valuation fixed by plaintiff was not fixed *bona fide*. First defendant has never stated any other value than that stated by plaintiff, nor suggested any method of valuation by which a Court can determine what the relief ought to be valued at, nor shown reason for doubting the good faith of plaintiff's valuation. I am of opinion that the Munsif's decision on this issue is correct."

He dealt with the appeal on its merits and dismissed it.

Defendant No. 1 preferred this second appeal.

Sir V. Bhaskyam Ayyangar and Govinda Menon for appellant :—The District Munsif had no jurisdiction to entertain the suit. The finding of the District Munsif is that the suit is cognizable by his Court, but he finds at the same time that the annual net income of the tarwad is really Rs. 4,000 after defraying all legitimate expenses. The valuation of the suit should therefore be over Rs. 4,000. A suit to remove a karnavan has no doubt been held to be incapable of valuation, but the plaintiff's valuation must at least be *bona fide*. It is submitted that the plaintiff's valuation in this case is not *bona fide*. Section 11 of the Suits Valuation Act VII of 1887 has no application to the case. The High Court in second appeal is not entitled under clause (2) of section 11 "to determine the other grounds of appeal." It can only reverse the decrees of the lower Courts and return the plaint to be presented to the proper Court. That section deals with objections taken to the jurisdiction of Court of First Instance in entertaining a suit, and of a lower Appellate Court in entertaining an appeal. In either case the Appellate Court in certain contingencies may determine the appeal by itself. In the present case the District Munsif assumed jurisdiction by reason of the under-valuation of the suit by the plaintiffs. The District Judge in appeal could have

interfered under section 11, clause (2); but the High Court cannot do so in second appeal.

Sankaran Nayar and *Ryru Nambiar*, for respondents Nos. 1 and 2, referred to *Raghavachariar v. Rangachariar*(1), where the High Court interfered in a similar case.

JUDGMENT.—The only question raised before us is as to the jurisdiction of the District Munsif's Court to entertain the suit as it is urged that the proper valuation of the suit exceeds the jurisdiction of that Court.

We are of opinion that even though the suit were under-valued as suggested on behalf of the first defendant (of which however we are by no means satisfied) the objection is not one which we should entertain having regard to section 11 of the Suits Valuation Act (Act VII of 1887), as it is not shown that the disposal of the suit has been thereby prejudicially affected.

It was argued that this objection could only be taken in the Court of first appeal, and not on second appeal. We think, however, that it is an objection that can be raised in second appeal (*Raghavachariar v. Rangachariar*(1)). As no other grounds of appeal are urged before us, we dismiss this second appeal with costs.

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Moore.

RAMANADHAN CHETTI (PETITIONER)

v.

MURUGAPPA CHETTI (COUNTER-PETITIONER).*

1900.
April 10.

Criminal Procedure Code—Act V of 1898, s. 144—Order to abstain from interfering with the management of a temple until the eviction of another person—Legality of order.

An order passed under section 144 of the Code of Criminal Procedure directed a person (1) not to interfere with the management of a certain temple, (2) until another person should be duly evicted from the management by due course of law :

(1) Second Appeal No. 848 of 1892 (unreported).

* Criminal Revision Case No. 543 of 1899, under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of A. Banerji, Acting Head Assistant Magistrate of Madura.

GOVINDA
MENON
v.
KARUNAKARA
MENON.

RAMANADHAN
CHETTI
v.
MURUGAPPA
CHETTI.

Held, that the first portion of the order was a direction to "abstain from a certain act" within the meaning of those words as used in section 144 of the Code of Criminal Procedure; but that the latter portion contravened the provisions of sub-section (5) of that section and that to that extent the order was made without jurisdiction.

PETITION for the revision of an order of a Head Assistant Magistrate passed under section 144 of the Code of Criminal Procedure. The order was as follows:—"Notice under section 144, Code of Criminal Procedure.—Whereas it has been made to appear to me that you, N. K. A. Ramanadhan Chetti of Devikottah, are interfering with the management of a kovil at Kottoor village by one Murugappa Chetti of Devikottah by trying to forcibly evict him from the kovil under the aid of a riotous mob and thus causing or about to cause serious disturbance to public tranquillity, likely to result in riot or affray, I do hereby direct you not to interfere with the management of the kovil at Kottoor by the said Murugappa Chetti who is reported to be now managing it and cause disturbance and strictly warn and enjoin you not to take any part in any manner whatever until the said Murugappa Chetti is duly evicted from the kovil management by due course of law. Given under my hand and the seal of the Court, this 22nd day of September 1899."

Petitioner contended that the Magistrate had no power to pass such an order under section 144.

Venkatarama Sastri for *Sivasami Ayyar* for petitioner.

Counter-petitioner was not represented.

JUDGMENT.—In this case the petitioner was directed "not to interfere with the management" of a certain "kovil." In our judgment this is a direction to "abstain from a certain act" within the meaning of these words as used in section 144 of the Code of Criminal Procedure. The order, therefore, so far as this point is concerned, was not made without jurisdiction. The case is distinguishable on the facts from the case of *Ananda Chandra Bhuttacharjee v. Carr Stephen*(1).

The order directed the petitioner to abstain from taking any part in the management until the counter-petitioner was duly evicted from the management by due course of law. This contravenes the provisions of sub-section (5) of section 144, and

(1) I.L.R., 19 Calc., 127.

to this extent the order was made without jurisdiction. We accordingly set aside so much of the order as directs that the order shall remain in force until the counter-petitioner is evicted from management

RAMANADHAN
CHETTI
v.
MURUGAPPA
CHETTI.

APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice Davies, Mr. Justice Benson, and
Mr. Justice Boddam.*

VASUDEVAN NAMBUDBIPAD (PLAINTIFF AND HIS
REPRESENTATIVE), APPELLANTS,

v.

VALIA CHATHU ACHAN AND OTHERS (DEFENDANTS),
RESPONDENTS.*

1898,
July 13.
November 21
1900.
January 9,
10, 30.
May 1.

Malabar Compensation for Tenants Improvements Act (Madras)—Act I of 1887, ss. 2, 3, 4, 6—Malabar Compensation for Tenants Improvements Act (Madras)—Act I of 1900, ss. 3, 4, 7, 10—Transfer of Property Act—Act IV of 1882, ss. 108 (h), (e), 117—Right of kanomdar to remove and appropriate trees planted by himself.

A kanomdar is entitled, during the period of his occupation, to remove and appropriate to himself any trees that he has planted, provided that he leaves the property substantially in the state in which he received it.

SUIT for a perpetual injunction restraining the defendants from felling timber and to recover the value of certain timber cut and removed. Plaintiff was the jenmi of lands held by the defendants on a kanom granted in 1874: and he complained that they had, in 1894, cut and removed trees from the forest on the property. He claimed damages and an injunction to restrain defendants from felling more trees in the forest. Defendants Nos. 1 to 3 contested plaintiff's claim and pleaded that the forest had been planted and cultivated by them; that the jenmi-plaintiff had no right to the timber trees and other improvements made by them, and that they had the right to cut and remove the trees

* Second Appeal No. 387 of 1897, against the decree of A. Venkataramana Pai, Subordinate Judge of South Malabar at Palghat, in Appeal Suit No. 819 of 1895, reversing the decree of A. Annasami Ayyar, District Munsif of Temelprom, in Original Suit No. 303 of 1894.

VASUDEVAN
NAMBUDRI-
PAD
v.
VALIA
CHATHU
ACHAN.

in the forest at their option. The District Munsif granted the injunction and awarded damages in respect of the trees which had been cut. Defendants Nos. 1 to 3 appealed to the Subordinate Judge who said:—"Defendants have been in occupation of the land on kanom for a long period. The old kanom was renewed in 1861 and again in 1874. In these renewal deeds it is expressly stated that the lessee had been paid compensation for certain improvements, and that certain other improvements would be paid for at the time of eviction. One of the latter items of improvements is the "valathu kadu", on item No. 8 which is the jungle in dispute. This completely disproves the plaintiffs' bold assertion in the plaint that it is a jungle of spontaneous growth. The Valathu Kadu is jungle planted and reared and the parties have agreed that lessor should pay the lessee compensation for the same. It is next argued that a mortgagee is not entitled to cut and carry away the trees in the forest even though it may have been grown by himself. I am of opinion that the contention is not sound. The tenant is entitled to dispose of his own improvements on the demised property and it is only when he preserves his improvements on the land up to the time of eviction and chooses to claim compensation from his landlord that the latter can have the improvements on payment of their value. I am not shown any authority for the contention that the tenant is bound to preserve any improvements until the termination of the lease. A tenant is bound to restore the land in the state in which it was at the beginning of the lease. The defendants' case is further strengthened by the terms of the contract between the parties. In the renewal kanom documents of 1861 and 1874, the land on which the jungle is grown is shown to be a paramba, i.e., practically waste land on which some temporary crops may be raised and a small quantity of oil is mentioned as rent payable for the same, although it is also stated that a forest had been grown on the land. This clearly indicates that the parties were not conscious that plaintiff had any interest in the forests or its income until the termination of the lease. The defendants are perfectly at liberty to grow timber and use it. By felling seasonable timber the tenant makes the only use possible of timber forests. It would be unjust to compel the tenant to keep the forest grown by himself unused until such time as the landlord may be pleased to redeem the kanom."

VASUDEVAN
NAMBUDRI-
PAD
v.
VALIA
CHATHU
ACHAN.

He found that the forest in question belonged to the defendants and that plaintiff was not entitled to recover any damages for the timber trees cut and removed by defendants. He further held that plaintiff was not entitled to an injunction, and reversed the Munsif's decree and dismissed the suit.

Plaintiff preferred this second appeal.

The case first came on for hearing before a Court consisting of SUBRAHMANIA AYYAR and MOORE, JJ., who, after hearing the arguments, passed the following

ORDER.—This appeal has been argued here mainly with reference to Act I of 1887 (Madras) and section 108, clauses (h) and (o), of the Transfer of Property Act. The question as to whether a landlord can claim compensation for trees cut down by a tenant cannot be decided with reference to the Malabar Tenants Improvement Act exclusively, and the Transfer of Property Act was not in force when the kanom, under which the present tenant holds, was granted. We, therefore, consider it necessary for the decision of the present appeal to call on the Subordinate Judge to try the following issues:—

1. "Is a kanomdar in the locality whence this suit comes entitled by custom to cut trees such as those removed in the present case?"

2. "What are the purposes to which trees such as those removed in the present case are usually applied in the locality from which this suit comes?"

In compliance with the above order the Subordinate Judge submitted findings which, after dealing with the evidence supporting them, he summarised as follows:—

"(1) On the whole I find that, although there have been several instances of trees of the kind in question having been cut by the kanom tenants without the jenmi's consent, the instances are not sufficiently numerous or ancient to warrant the Court to record a finding in favour of the custom attempted to be proved by the defendants. Nor is there on plaintiff's side sufficient evidence to prove the custom alleged by him. The fact is that it is only in comparatively recent years after the introduction of the railway in this district that the practice of cutting trees wholesale in Valathu Kadu has come into vogue, and that both the jenmi and

VASUDEVAN
NAMBUDRI-
PAD
v.
VALIA
CHATHU
ACHAN.

the tenant are equally uncertain as to the alleged right to cut the trees. In my opinion, then, the evidence on record does not warrant a finding as to the existence of any 'custom' one way or the other. (2) The trees in question are of the following fifteen kinds:—1. Teak, 2. Irul, 3. Karumarudu, 4. Pullamarudu, 5. Vemba, 6. Aval, 7. Annakara, 8. Nelli, 9. Oduga, 10. Kanakyda, 11. Pottakalam, 12. Parukku, 13. Ponkanni, 14. Atambu, and 15. Nava. The following are the purposes for which the several trees are used:—The first four kinds and item 15 (Nava) are used for building purposes; Vemba (item 5) and Aval (item 6) are employed for making doors; Annakara (item No. 7), if good, is used for building purposes; Annakara of inferior quality, Nelli (No. 8), Pottakalam (No. 11), Parukku (No. 12), Ponkanni (No. 13) and Atambu (No. 14), are fit for fuel. Oduga (item No. 9) is generally used as fuel and rarely for building purposes. Item No. 10 is used for fuel and also as handles for axes and spades."

The case came on again for hearing before a Court consisting of SUBRAHMANIA AYYAR and DAVIES, JJ., when their Lordships made the following

ORDER OF REFERENCE TO FULL BENCH.—It is found, and that finding we accept, that the trees cut and appropriated by the kanomdars (defendants) were trees planted and reared by themselves. We also accept the finding that neither the jenmi (plaintiff) nor the kanomdars have proved the existence of any usage for or against such cutting.

The question is whether a kanomdar is entitled to take away trees grown by himself, or whether he must leave them on the ground, being entitled only to compensation for them at the time of the surrender of the kanom. If, under the Malabar Compensation Act of 1887, the tenant is entitled to the market value of the trees, it would seem to follow that he would be entitled to cut and carry away the trees instead of waiting for compensation for them. If, on the other hand, his right to compensation does not extend to the full value of the trees, it would appear that he could not remove the trees which are not exclusively his own. Under the general law as laid down in the Transfer of Property Act, section 108, clause (h), read with the Interpretation clause, any lessee can remove trees planted by himself, unless that clause is taken to be qualified by clause (o) with reference to timber trees planted by the lessee. The question is of considerable importance

and we therefore refer to the decision of a Full Bench the following points:—

(1) Is a kanomdar, during the period of his occupation, entitled to remove and appropriate to himself any trees that he has planted, or if not all trees what trees, and

(2) Whether in awarding damages to the jenmi in case of trees that have been wrongfully removed, allowance should be made to the kanomdar as compensation for his growing the trees?

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

The Acting Advocate-General (Sir V. Bhashyam Ayyangar), Sundara Ayyar and P. K. Subrahmania Ayyar for appellants.

Sankaran Nayar, J. L. Rosario and Ryru Nambiar for respondent No. 3.

Sundara Ayyar for appellant.—The suit is by the jenmi, who claims damages for the cutting and removal of trees by defendants, the kanomdars. The questions are (1) what is the general law, and (2) does that general law apply in Malabar, under the Compensation Act of 1887. It is submitted that the Transfer of Property Act, section 108, clause (h), does not govern the case. The term "attached to the earth," used in that clause, is defined in section 3 (a), (b) and (c). Under that section, a lessee would be entitled to remove all trees planted by him, subject to certain reservations. By clause (o) of section 108, a lessee may not fell timber. The result is that while clause (h) is stated in general terms which may include timber, clause (o) specifically precludes the felling of timber, and, by the ordinary rule of construction, the specific provision should govern the case, and the plaintiff should be held to be entitled to the relief which he seeks against defendants. Moreover the word "timber" has a well-understood legal meaning, see *Dashwood v Magniac* (1). [BENSON, J.:—Clause (o) places buildings in the same category as timber. If clause (o) and clause (h) be read together, the effect appears to be that a lessee may remove trees or buildings he has erected or planted, subject to the proviso in clause (h).] There is no definition of "timber" in any Indian Act. [DAVIES, J.:—The word must be taken in its general sense, and not in

VASUDEVAN
NAMBUDRI-
PAD
v.
VALIA
CHATHU
A.

(1) [1891] 3 Ch., 306 at p. 321.

VASUDEVAN
NAMBUDRI-
PAD
v.
VALIA
CHATHU
ACHAN.

accordance with legal decisions in English cases.] If "timber" was intended to mean "trees," the Legislature could have used the latter word. Then by section 117 of the Transfer of Property Act, the chapter in which section 108 occurs is not to apply to leases for agricultural purposes. From the terms of the lease in this case it appears to be for agricultural purposes, since it relates to cultivation, though the rearing of trees is provided for. [BENSON, J.:—A tenant would be at liberty to rear trees, under the customary law of Malabar, even though no provision were made in the lease.] No doubt there is a difference between the custom on the east coast, where a tenant may not plant, and on the west coast, where he not only may plant, but is entitled to compensation for what he has planted because of the benefit conferred on the landlord by the improvement of the holding. But the tenant is entitled only to the value of his labour, and not to the whole value of the trees. The definition of "improvement" in section 3 of the Malabar Compensation for Tenants Improvements Act, 1887, has been altered in the new Act of 1900. (He referred to the following cases:—*Shangunni Menon v. Veerappan Pillai*(1); *Kunhi Chandu Nambiar v. Kunkan Nambiar*(2); *Changaran v. Chirutha*(3) in which *Nafar Chandra Pal Chowdhuri v. Ram Lal Pal*(4) and *Ruttonji Edulji Shet v. The Collector of Tanna*(5) were followed; *Unni Kutti v. Chathu*(6); *Govinda Menon v. Damodaran Nambudripad*(7); *Valia Tamburatti v. Parvati*(8); *Apparau v. Narasanna*(9); *Appa Rau v. Ratnam*(10); *Bhupathi v. Rajah Rangayya Appa Rau*(11); *Sinniya Pillai v. Gnana Sambanda Pandara Sannadhi*(12); *Kausalia v. Gulab Kuar*(13); *Kasim Mian v. Banda Husain*(14); *Imdad Khatun v. Bhagirath*(15); *Bahadoor Khan v. Kora Mull*(16); *Shaik Abdool Rohoman v. Dataram Bashee*(17); *Govind Purshotam Kolatkar v. The Sub-Collector and*

- (1) I.L.R., 18 Mad., 407. (2) I.L.R., 19 Mad., 384.
(3) Civil Revision Petition No. 445 of 1895 (unreported).
(4) I.L.R., 22 Cal., 742 at p. 750. (5) 11 M.I.A., 295 at p. 313.
(6) Second Appeal No. 1775 of 1891 (unreported).
(7) Second Appeal No. 194 of 1889 (unreported).
(8) I.L.R., 13 Mad., 454. (9) I.L.R., 15 Mad., 47 at p. 49.
(10) I.L.R., 13 Mad., 249. (11) I.L.R., 17 Mad., 54.
(12) Second Appeal No. 1559 of 1898 (unreported).
(13) I.L.R., 21 All., 297. (14) I.L.R., 5 All., 616.
(15) I.L.R., 10 All., 159. (16) 1 Agra. H.C.R., 281.
(17) (1864) W.R., (C.R.), 367.

Deputy Conservator of Forests of Colaba(1); *Nurbibi v. Maganlal Parbhudas*(2).) The cases cited show that all the High Courts have held that a tenant has no right to cut and remove trees, even if planted by himself. The English rule regarding timber is that it belongs to the landlord, *Dashwood v. Magniac*(3). Greame's 'Glossary' shows that cutting down trees by a tenant was a cause of forfeiture. The same rule prevailed under the Roman Law. (He also referred to Wigram's 'Malabar Law'.)

J. L. Rosario, for respondent, relied on section 108 of the Transfer of Property Act, not as governing the case, but as an enactment of the law as it stood before that Act was passed. The lease was not an agricultural one and section 117 of the Transfer of Property Act did not apply. He referred to *In the matter of the petition of Thakoor Chunder Paramanick*(4); *Russick-loll Mudduck v. Lokenath Kurmohar*(5); *Dunia Lal Seal v. Gopi Nath Khetry*(6); *Beni Ram v. Kundan Lal*(7); *Yeshwadbai v. Ramchandra Tukaram*(8); *Shaik Husain v. Govardhandas Parmanandas*(9); *Premji Jivan Bhate v. Haji Cassum Juma Ahmed*(10). He argued that *Kasim Mian v. Banda Husain*(11), *Imdad Khatun v. Bhagirath*(12), *Kausalia v. Gulab Kuar*(13), and *Nafar Chandra Pal Chowdhuri v. Ram Lal Pal*(14) were decided with reference to peculiar tenures. In *Achutan Nayar v. Narasimham Patter*(15) the decision in *Govinda Menon v. Damodaran Nambudripad*(16) was disagreed with. He submitted that trees came under the same category as buildings, and that a tenant was entitled to remove his trees during the continuance of the tenancy.

JUDGMENT.—The question for our decision is whether a kanomdar during the period of his occupation is entitled to remove and appropriate to himself all, or any, of the trees that he has himself planted on the land demised to him on kanom. It is found that the (plaintiff) jenmi has not proved any custom forbidding the (defendants) kanomdars to cut and appropriate such trees, nor

- (1) 6 Bom. H.C.R., (A.C.J.), 188 at p. 191. (2) I.L.R., 16 Bom., 547.
(3) [1891] 3 Ch., 306 at p. 351. (4) B.L.R., Sup. Vol., p. 598.
(5) I.L.R., 5 Cal., 688. (6) I.L.R., 22 Cal., 820 at p. 822.
(7) I.L.R., 21 All., 496. (8) I.L.R., 18 Bom., 66.
(9) I.L.R., 20 Bom., 1. (10) I.L.R., 20 Bom., 298.
(11) I.L.R., 5 All., 616. (12) I.L.R., 10 All., 159.
(13) I.L.R., 21 All., 297. (14) I.L.R., 22 Cal., 742 at p. 750.
(15) I.L.R., 21 Mad., 411.
(16) Second Appeal No. 194 of 1889 (unreported).

VASUDEVAN
NAMBUDRI-
PAD
v.
VALIA
CHATHU
ACHAN.

VASUDEVAN
NAMBUDRI-
PAD
v.
VALIA
CHATHU
ACHAN.

have the kanomdars proved any custom allowing them to do so. On behalf of the plaintiff it is argued that, in the absence of custom or contract to the contrary, the general law forbids a tenant to cut trees on land held by him under a landlord, and a number of cases decided by the High Courts in other parts of India have been cited in support of this proposition. We do not, however, think it necessary to refer in detail to these cases. Many of them relate to trees not planted by the tenant, which of course stand on a footing totally different from that of those planted by the tenant himself. Others depend on the incidents of special tenures in Bengal and the North-Western Provinces and on the terms of the Tenancy Acts in those Provinces. The plaintiff also relies on the decisions of this Court (*Appa Rau v. Ratnam*(1) and *Bhupathi v. Rajah Rangayya Appa Rau*(2)), but those cases dealt with the rights of tenants in zamindari tracts and had no reference to kanom tenures in Malabar. So far as we are aware the question of a kanomdar's right to cut down trees planted by himself has not been decided by this Court in any reported case. It was, however, dealt with in two unreported cases which are relied on by the plaintiff's vakil.

In *Changaran v. Chirutha*(3) a single Judge, following the decision in *Nafar Chandra Pal Chowdhuri v. Ram Lal Pal*(4), held that, though a kanomdar might apparently cut down trees planted by himself, he might not appropriate them to his own use. The Calcutta case turned on the terms of the Bengal Tenancy Act, and it cannot, in our opinion, be regarded as an authority applicable to kanomdars in Malabar. In the second case (*Unni Kutti v. Chathu*(5)) a Bench of this Court held that, "*Prima facie*, the trees, "&c., form part of the holding and the tenant would not ordinarily be entitled to remove them as they are not inimical to the purpose for which the holding was granted."

This decision seems to proceed on the assumption that the trees are the property of the landlord and that the tenant's only right is to receive compensation for them when he is turned out of the holding. That assumption was, however, held to be without foundation in the more recent case of *Krishna Patter v. Srinivasa*

(1) I.L.R., 13 Mad., 249.

(2) I.L.R., 17 Mad., 54.

(3) Civil Revision Petition No. 445 of 1895 (unreported).

(4) I.L.R., 22 Calc., 742 at p. 750.

(5) Second Appeal No. 1775 of 1891 (unreported).

VASUDEVAN
NAMBUDRI-
PAD
v.
VALIA
CHATHU
ACHAN.

(1). It was there observed that "this assumption about the property being in the mortgagor even before compensation is paid by him, is not only not supported by any authority but is directly contradicted by the fifth report," to which reference is then made. If the property in the tree is in the kanomdar who planted it, it seems to us to follow that he must be at liberty to cut it down and appropriate it, in the absence of any custom or contract to the contrary. It seems to us that the principle applicable to the case before us is that laid down in section 108 of the Transfer of Property Act, clauses (h) and (o). These clauses are as follows:—

"(h) the lessee may remove, at any time during the continuance of the lease, all things which he has attached to the earth: provided he leaves the property in the state in which he received it: (o) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell timber, pull down or damage buildings, work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto."

These two clauses must be read together and in conjunction with the definition of the words "attached to the earth" in section 3 of the Act. These words are there declared to mean—"(a) rooted in the earth, as in the case of trees and shrubs; (b) imbedded in the earth, as in the case of walls or buildings; or (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached."

Under the Transfer of Property Act, then, a lessee may, during the continuance of the lease, remove trees which he has himself planted, and buildings which he has himself erected, provided he leaves the property in the state in which he received it. The prohibition in regard to the felling of timber and the pulling down of buildings in clause (o) does not limit the right declared in clause (h). It is subject to that right; that is, the lessee must not fell timber or pull down buildings unless the timber has been planted or the buildings erected by the lessee, and he must leave the property in the state in which he received it. It is argued

(1) I.L.R., 20 Mad., 124.

VASUDEVAN
NAMBUDRI-
PAD
V.
VALIA
CHATHU
ACHAN.

that, as the kanom in the present case was granted in 1874, the Transfer of Property Act, which came into force in 1882, cannot apply to it, and also that section 117 excludes agricultural leases from the operation of section 108.

Both these statements are, no doubt, true, but they are beside the mark. It may be doubted whether a kanom demise can be regarded as a purely agricultural lease. It always, we believe, in the absence of a contract to the contrary, carries with it the right to erect a dwelling-house and appurtenances on the land, and to plant cocoanut and other trees on any land not already devoted to grain cultivation. We do not, however, wish to suggest that the Transfer of Property Act, of its own force, applies directly to the present case, but the rules in the Act to which we have referred are, we think, founded on reason and equity and may properly be adopted as a statement of the law which we ought to apply to the case before us. It must be remembered that the rights of a kanom-tenant in Malabar have always been much higher than the rights of an ordinary lessee. He is, *inter alia*, absolutely entitled to make improvements, and to receive compensation for them when turned out of the holding, and he is not at liberty to contract himself out of the right.

It has not, so far as we are aware, ever been doubted but that he could, during the continuance of his demise, pull down or remove any building, erected by himself. Indeed, the rule "*quicquid plantatur solo, solo cedit*" had been declared inapplicable to buildings even in other parts of India before the Transfer of Property Act was passed. In *In the matter of the Petition of Thakoor Chunder Paramanick*(1) the Full Bench of the High Court of Calcutta said:—"We think it clear according to the usage and customs of the country buildings and other such improvements do not by the mere accident of their attachment to the soil become the property of the owner of the soil, and we think it should be laid down as a general rule that the tenant who makes an improvement is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil." We do not think that any valid distinction in principle can be drawn between

(1) B.L.R., Sup. Vol., p. 598.

buildings erected by a tenant and trees planted by him, and it will be observed that the Transfer of Property Act places both in the same category as regards the tenant's right of removal. It is suggested that trees exhaust the ground, but we are not aware that there is any proof of this. Many soils would probably benefit by being opened up and aerated by the planting of trees. There might be more difficulty in restoring ground planted with trees to its original state than in restoring ground covered with buildings, but that is a matter for the tenant to deal with when he removes the trees. If he does it, as the law requires him to do, the landlord will not be injured, and it is difficult to see on what principle the tenant's right to remove the trees could be forbidden.

If we consider the matter in connection with the right of the tenant to compensation for improvements, we arrive at the same conclusion. The right has always been recognised both as regards trees and buildings in Malabar. The amount of compensation, and the principles on which it should be granted, have, no doubt, been the subject of much discussion and of not a few conflicting decisions. In 1887, the local Legislature passed "The Malabar Compensation for Tenants Improvements Act" (Act I of 1887). As observed by this Court in *Valia Tamburatti v. Parvati*(1), "the object which the Legislature had in view was to secure to the tenant the full value of his improvements." Much difficulty was felt in deciding what was the value of an improvement effected by planting cocoanut and other fruit trees, since the value of the tree apart from the soil would be trifling, whereas if it was valued as a growing tree with reference to its capacity for producing fruit allowance would have to be made for the fact that its continued productiveness depended on the use of the soil on which it was planted—a use to which the tenant would not be entitled after the term of his lease had expired. This difficulty, however, does not exist in the case of trees which the tenant desires to remove during the term of his tenancy. In the case of *Achutan Nayar v. Narasimham Patter*(2), two of the present Bench held that under Act I of 1887 a tenant was entitled to the whole of the value of timber trees planted by himself. It seems to follow from this decision that he must be entitled to remove the trees if he prefers to do so. In the Act which has just been passed by the local Legislature

(1) I.L.R., 13 Mad., 454.

(2) I.L.R., 21 Mad., 411.

VASUDEVAN
NAMBUDRI-
PAD
V.
VALIA
CHATHU
ACHAN.

VASUDEVAN
NAMBUDRI-
PAD
v.
VALIA
CHATHU
ACHAN.

(Act I of 1900) in lieu of Act I of 1887 (Madras), section 10 enacts that "when the improvement consists of timber trees or other useful trees or plants sown or planted by the tenant himself, the compensation to be awarded shall be three-fourths of the sum which the trees might reasonably be expected to realize, if sold by public auction to be cut and carried away." It is argued from this that the Legislature recognises the landlord's interests in such trees to the extent of one-fourth of their value, but we think the deduction is made rather on account of the compulsory nature of the law which obliges the landlord to pay for the improvement whether he wants it or not. This seems clear from the fact that section 7 of the same Act provides that when a tenant is ejected who has erected any building or planted any tree which the Court finds is not an improvement for which he can claim compensation (owing, for instance, to its being unsuitable to the holding), but which can be removed without substantial injury to the holding, he may remove the tree or building within a time to be fixed by the Court. If, then, a tenant is allowed, even after the expiry of his tenancy, to remove a tree or building which is not an improvement, it would seem to be unreasonable to forbid him to remove it during his tenancy. The law treats such tree or building as the property of the tenant, and it is not the less his property, because it is of such a kind that he can require the landlord to pay him compensation for it if it be left for the landlord's benefit. It may well happen that a tree planted by a tenant may arrive at maturity and be fit for the market before the expiry of the kanom tenancy. In such a case it would surely be unreasonable to hold that the tenant should be forbidden to utilise his tree, but should be obliged to allow it to deteriorate until the end of his tenancy and then claim compensation for it from the landlord. Whether, then, we have regard to the views of the local Legislature with respect to tenants' improvements in Malabar, or whether we consider the matter on the broad ground of principle, we are of opinion that the first question referred to us should be answered in the affirmative and that a kanomdar during the period of his occupation is entitled to remove and appropriate to himself any trees that he has himself planted, provided that he leaves the property substantially in the state in which he received it. In this view the second question referred to us requires no answer.

On the appeal again coming on for hearing after the decision of the Full Bench, the Court (Sir ARNOLD WHITE, C.J., and DAVIES, J.) delivered the following

JUDGMENT.—The ruling of the Full Bench is against the appellant. The second appeal must accordingly be dismissed with costs.

VASUDEVAN
NAMBUDRI-
PAD
v.
VALIA
CHATHU
ACHAN.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Davies.

NALLIAPPA GOUNDAN (PLAINTIFF), APPELLANT,

v.

KAILAPPA GOUNDAN (DEFENDANT), RESPONDENT.*

1900.
May 2.

Malicious prosecution—Proof of plaintiff's innocence—Insufficiency of proof that the charge against plaintiff has been dismissed.

In a suit for damages for malicious prosecution, plaintiff, with the object of proving the falsity of the charge which defendant had preferred against him, filed the order of the Magistrate dismissing the charge under section 209 of the Code of Criminal Procedure, and adduced oral evidence. The latter was not accepted as reliable, the falsity of the charge being taken as established solely by the said order of dismissal:

Held, that this was insufficient, the onus being on the plaintiff to prove that he was innocent and that his innocence had been pronounced by the tribunal before which the accusation had been made.

Abrath v. North Eastern Railway Co., (L.R., 11 Q.B.D., 440; L.R., 11 App. Cas., 24), referred to.

SUIT for damages for malicious prosecution. Plaintiff alleged that defendant had maliciously and without reasonable and probable cause and not honestly believing the case to be true, complained to the Police that plaintiff and others had committed certain offences, whereupon he and the others were tried by a Magistrate, but were discharged. He claimed damages and the costs of his defence. The defence was that the criminal case was a true one, and was *bonâ fide* believed to be true by defendant, acting on the information he had received. Evidence was called in support of

* Second Appeal No. 613 of 1899 against the decree of W. J. Tate, District Judge of Salem, in Appeal Suit No. 175 of 1898, reversing the decree of V. K. Desikachariar, District Munsif of Namakkal, in Original Suit No. 598 of 1897

NALLIAPPA
GOUNDAN
v.
KAILAPPA
GOUNDAN.

plaintiff's case, and the order of discharge passed by the Magistrate under section 209 of the Code of Criminal Procedure was filed as exhibit A. The Munsif said:—"Exhibit A shows that the innocence of the plaintiff was pronounced by the tribunal before which the accusation was made, with the observation that the case was a purely concocted one. Thus the main element in support of the claim, viz., that the case brought against him ended in his discharge or acquittal stands made out by the plaintiff. The next question is, whether, as a matter of fact, plaintiff was innocent of the crimes with which he was respectively charged?" He dealt with the plaintiff's evidence and considered it to be interested and unreliable. The moral testimony of defendant's witnesses he described as being as bad as that of plaintiff's, if not worse. He therefore considered the probabilities of the case, and in the end, held that plaintiff had established his innocence, which, he considered, had been rightly declared by the Magistrate in his judgment, exhibit A. He found further that defendant had made no honest enquiry whatever and had acted with a total want of reasonable and probable cause and had known the case to be groundless; also that he had been influenced by malicious motives towards plaintiff. He decreed for plaintiff, awarding the damages claimed. Defendant appealed to the District Judge, who, after holding that defendant was responsible for the charge being laid, since it was the result of his complaint to the Police, said:—"The next question is whether the plaintiff has succeeded in proving, and the burden is on him throughout, the three requisites (a) falsity of the charge, (b) want of reasonable and probable cause, and (c) want of an honest belief in the truth of the complaint and of an honest belief in the case laid before the Police. See *Hall v. Venkatakrishna*(1) and the case of *Abrath v. North Eastern Railway Co.*(2). As the District Munsif points out his evidence is very poor and meagre. There is no proof that the plaintiff was elsewhere at the time, and in fact, no proof whatever of any circumstance which would render the offence impossible. And the burden is on him of course; the arguments used in the Magistrate's judgment (exhibit A) cannot become evidence here. The District Munsif has, therefore, gone into probabilities. I am not sure that

(1) I.L.R., 13 Mad., 394.

(2) L.R., 11 Q.B.D., 440; L.R., 11 App. Cas., 247.

NALLIAPPA
GOUNDAN
v.
KAILAPPA
GOUNDAN.

decrees in these suits can be based on probabilities alone, irrespective of evidence. They would be, of course, valuable in deciding the criminal case. But their only value in these suits is as a test of the plaintiff's evidence, i.e., in order that the Court may see whether it can believe the plaintiff's absolute and otherwise uncorroborated denials. . . . There are, no doubt, other pros. and cons. in the case. But it is not a matter now of convicting the plaintiff, but of seeing whether he has proved the case laid against him by the defendant to be absolutely false. And I cannot say, upon the evidence before me, that he has done so. . . . And I find, considering the state of feeling between the parties, that the defendant may well have believed the case he laid before the Police and been actuated by an honest desire to bring the offender to justice." He reversed the decree and dismissed the suit.

Plaintiff preferred this second appeal.

Seshagiri Ayyar for appellant:—The District Judge's ruling as to the onus of proof goes farther than is warranted by the decided cases. He holds that plaintiff should prove that the case laid against him by the defendant is absolutely false. I submit that all that the plaintiff has to prove is that he was acquitted of the charges laid against him, and that there was no reasonable or probable ground for the action taken by the defendant. Even *Abrath v. North Eastern Railway Co.*(1), which is the strongest case, does not go the length contended for. The observations of the learned Judges in *Hall v. Venkatakrishna*(2) do not show that a plaintiff should prove that there was absolutely no justification for the action taken by a defendant. It is submitted that the judgment of the Magistrate is *prima facie* evidence of plaintiff's innocence. See the cases of *Heera Chand Banerjee v. Banee Madhub Chatterjee*(3), *Gajpathi Rau v. Narsing Rau Garu*(4), and *Jadubar Singh v. Sheo Saran Singh*(5).

Rama Rau for respondent.

JUDGMENT.—We think the District Judge was right in holding that the plaintiff had failed to prove the falsity of the charge brought against him. The evidence adduced by the plaintiff for the purpose of proving the falsity of the charge consisted of (a) the order of the Magistrate dismissing the charge under section

(1) L.R., 11 Q.B.D., 440; L.R., 11 App. Cas., 247.

(2) I.L.R., 13 Mad., 394.

(4) 6 M.H.C.R., 85.

(3) 6 W.R., (C.R.), 29.

(5) I.L.R., 21 All., 26.

NALLIAPPA
GOUNDAN
v.
KAILAPPA
GOUNDAN.

209 of the Code of Criminal Procedure, (b) the oral testimony of the plaintiff and his witnesses. The District Munsif, however, appears to have placed no reliance on the evidence of the plaintiff's witnesses and to have relied entirely on the order of dismissal as establishing the falsity of the charge. In this he was wrong,—see the judgment of the Judicial Committee in *Baboo Gunnesh Dutt Singh v. Mugneeram Chowdhry* (1). With regard to proving the falsity of the charge the law is thus laid down by Lord Bowen in *Abrath v. North Eastern Railway Co.* (2):—"In an action for malicious prosecution the plaintiff has to prove, first, that he was innocent, and that his innocence was pronounced by the tribunal before which the accusation was made."

On the evidence, we do not think the plaintiff proved that he was innocent. We also think there was no evidence to warrant a finding that the defendant had acted without reasonable or probable cause or that his proceedings against the plaintiff were instituted from an indirect and improper motive and not in furtherance of justice.

The second appeal must be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Benson.

1900.
July 17 18

NARASINGA BHAKSHI AND ANOTHER (DEFENDANTS NOS.
1 AND 3), APPELLANTS,

v.

GOVINDA BHAKSHI AND ANOTHER (PLAINTIFFS),
RESPONDENTS.*

*Civil Procedure Code—Act XIV of 1882, ss. 491, 588—Attachment before judgment.
—Compensation—Appeal.*

There is no appeal from an order awarding compensation under section 491 of the Code of Civil Procedure.

(1) 11 B.L.R., 321.

(2) L.R., 11 Q.B.D., 440; L.R., 11 App. Cas., 247.

* Second Appeal No. 624 of 1899 against the decree of F. Murray, District Judge of Berhampur, in Appeal Suit No. 191 of 1898, affirming the decree of V. Krishnamurti Pantulu, District Munsif of Sompeta, in Original Suit No. 506 of 1897.

NARASINGA
BHAKSHI
v.
GOVINDA
BHAKSHI.

A PETITION filed under section 483 of the Code of Civil Procedure for attachment of defendants' property before judgment, stated that a suit had been instituted for the amount due by defendants to plaintiffs in respect of the mesne profits for the crop of fasli 1306; that defendants caused constant trouble without effecting a settlement; that plaintiffs had attached some paddy in possession of defendants for the said debt but that a portion of the paddy so attached was to be released. Plaintiffs asked that it might be attached. An order of attachment was made as prayed. Defendants Nos. 1 to 3 then filed a petition in which they traversed plaintiffs' allegations and asked that the attachment might be withdrawn and that plaintiffs might be directed to pay defendants Rs. 1,000 or any less sum as compensation, under section 491 of the Code of Civil Procedure, as plaintiffs had attached defendants' property maliciously. The District Munsif held that the attachment before judgment had been applied for and obtained on insufficient grounds. The defendants' evidence assessed the loss suffered by them, owing to the attachment, at over Rs. 1,000, and the District Munsif awarded Rs. 300 to defendants as compensation. Against this order the defendants appealed to the District Judge who held that the order was not appealable. He dismissed the appeal.

Defendants Nos. 1 to 3 preferred this second appeal.

K. Srinivasa Ayyangar (for *Sundara Ayyar*) for appellants.—I submit that there is an appeal against the Munsif's order. An award of compensation under section 491 of the Code of Civil Procedure is made in the decree itself and forms a portion of the decree and there is an appeal and a second appeal in the usual course. Under section 491 there is no separate order, but the order awarding compensation is incorporated in the decree. The last clause prohibits a suit when an award is made. That award may be for a very small sum or the order may give no compensation at all, and yet it is contended that the aggrieved party has no remedy. That, I submit, is unreasonable. If the Court declined to go into the question or to pass any award, there would be no appeal, but in such a case a regular suit could be brought. Section 540 allows an appeal from all decrees and there is no prohibition against an appeal from an order passed under section 491.

Rangachariar for respondents.—The decree in this case awards a certain sum as compensation against the plaintiffs. An appeal

NARASINGA
BHAKSHI
v.
GOVINDA
BHAKSHI.

lies against such an order by the plaintiffs and has been preferred. But the appeal by the defendants is in respect of the amount which they complain was not awarded. That is not a portion of the decree. If there is an appeal against such an order, it must be brought under section 588; but no such appeal is provided for by that section. Under section 497, where the wording is similar, an appeal is allowed under section 588, clause 24, which shows that orders under sections 491 and 497 are not decrees, but merely orders. If the contention of the appellants is correct there would be no necessity to provide for an appeal against orders under section 497.

K. Srinivasa Ayyangar in reply.—Where a decree awards a particular sum, the effect is that it disallows the remainder that was claimed. An appeal lies therefore in respect of the portion disallowed. The analogy of section 497 is in favour of an appeal being possible. Clause 24, section 588, which gives a right of appeal from orders under section 497, is introduced for the purpose of curtailing the right of appeal. By section 2 of the Code of Civil Procedure, orders included in section 588 are taken out of the category of decrees. The effect of section 588, clause 24, is that there is only one appeal from orders passed under section 497 and no second appeal. If clause 24 were absent, there would be an appeal and second appeal, as the award of compensation under section 497 is incorporated in the decree itself. As in cases of awards of compensation under section 491, there would be an appeal and second appeal, while in cases under section 497 there would be only one appeal by virtue of clause 24, section 588, and no second appeal. There is a reason for this distinction. Section 497 contemplates cases of injunction with respect to property the subject matter in dispute, where both parties claim the property and it is only the judgment which decides whose property it is. But in cases under section 491, the property which is attached is not the suit property, but property admittedly belonging to the defendant and the defendant is prevented from dealing with his own property. It also includes cases of personal arrest.

JUDGMENT.—The question is whether an appeal lies against an order passed in regard to compensation under section 491, Civil Procedure Code. At first sight it would appear that the order would be appealable as a decree, inasmuch as the award forms part of the decree under the express direction of the section and

NARASINGA
BHAKSHI
v.
GOVINDA
BHAKSHI.

the order is not one of those enumerated in section 588, Civil Procedure Code. We observe, however, that the terms of the parallel section 497, Civil Procedure Code, are precisely similar to those of section 491, and section 588 (clause 24) provides for an appeal against an order under that section (497). The inference is that there would be no appeal but for this provision and as there is no similar provision for section 491, we must conclude that the Legislature did not intend to allow an appeal against an order passed under this section. The second appeal must therefore be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Moore.

ORE AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

MRITHYUNJAYA GURUKKAL AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

1900.
July 24.

Landlord and tenant—Agricultural holdings—Alteration of the character of the holdings by persons entitled to permanent rights of occupancy—Remedy.

The occupants of certain topo lands, forming portions of a zamindari, built a number of tiled dwelling houses, admittedly not for agricultural purposes, thereon. By the terms of the pattas under which the lands were held, the rent payable was liable to vary according to the use made of the land. On a suit being brought by the lessees of the zamindari for possession of the said lands, after demolition of the buildings which had been so erected:

Held, that the buildings referred to altered the character of the holdings; and it was no answer that there still remained as many trees as originally had stood upon the land.

Held also, that the act complained of did not amount to a breach of the condition on which the land was held so as to work a forfeiture of the tenure, which was admittedly a permanent right of occupancy. The appropriate remedy was for the houses to be removed and the land restored to the condition in which it was before its character had been altered.

Suits for possession of land, after the demolition of buildings erected thereon; or, in the alternative, for the recovery of the

* Second Appeals Nos. 271 and 272 of 1899 against the decrees of S. Russell, District Judge of Madura, in Appeal Suits Nos. 400 and 401 of 1898, affirming the decrees of C. V. Visvanatha Sastri, Acting District Munsif of Sivaganga, in Original Suits Nos. 336 and 358 of 1897.

ORR
v.
MRITHYUN-
JAYA
GURUKKAL.

value of the said lands. Plaintiffs, as lessees of the Sivaganga zamindari, claimed in both cases, that the second defendant had unlawfully built a house or houses on tope land situated in the zamindari. The defence was that the lands belonged to the defendants, the plaintiffs having only the right to collect taxes in respect thereof. A compromise was also set up. By the terms of the pattas in both cases the rent payable by defendants to plaintiffs was liable to vary according to the use made of the land. The District Munsif dismissed the suits. Plaintiffs appealed to the District Judge, who said :—" In both of these cases the second defendant has built a house or houses on tope lands. The Appeal Suit No. 401 of 1898 differs slightly from that in No. 400 of 1898. In Appeal Suit No. 401 of 1898 it is admitted that the tope is situated within the four walls of the fort and is surrounded by houses. It is admitted that the land is not classified as either dry or wet and only tree-tax is collected. Second defendant also contends that the site on which the buildings are erected is intended for house-site, if required for that purpose. In Appeal Suit No. 400 of 1898 it is admitted that the site is tope and always has been tope and nothing else but tree-tax has ever been paid, but it is contended for plaintiff that the land is entered in the muchalkas as dry, and therefore under possible circumstances it might be used for dry cultivation. There are entries in the patta that, if 'Ellu, &c.' be cultivated, the landlord is entitled to corresponding rent. These are the usual entries in pattas. As a fact it is not suggested that any dry cultivation has ever been made on this tope land or will be made. It is admitted in each case that buildings have been erected. It is admitted that no trees have been cut down and that, as topes, no injury has been committed. The plaintiffs get the same tax now as they always have been accustomed to get. The houses have been built on vacant spaces between the trees. The law on the subject is that laid down in *Ramanadhan v. Zamindar of Ramnad*(1). The defendant here like the defendant in that case has an occupancy right. I cannot find any evidence on the record to show that plaintiffs have suffered by the erection of the buildings in their topes or that they are ever likely to suffer, nor can I see in what respect the character of the holdings have been altered. They are still

(1) I.L.R., 16 Mad., 407.

ORR
v.
MRITHYUN-
JAYA
GURUKKAL.

topes exactly as before. It has been suggested in argument that a tope is not an agricultural holding. I am not inclined to admit the contention, but I think it may be confidently asserted that these topes are not altered as topes. It is not asserted that these buildings have been erected for tope purposes. I cannot find that the erection of these houses is inconsistent with the purpose for which the tope exists. It has been suggested that the plaintiffs might lose inasmuch as the vacant spaces between the trees could be cultivated. The reply is that no cultivation has ever taken place in the tope, and I can find no authority for the proposition that the landlord can compel the tenant to cultivate. In order that the plaintiffs should succeed, I think they must prove at least possible injury, and this they have not done." He held that the suits had been properly dismissed.

Plaintiffs preferred these second appeals.

Sir V. Bhashyam Ayyangar for appellant.—Appellant sued to demolish buildings erected by defendants on their holdings and to eject them. Both the lower Courts are in error. The present case is that of an occupancy tenant erecting on his holding (which is agricultural) buildings for residential purposes. The leading case on the point is *Ramanadhan v. Zamindar of Ramnad*(1). See also the cases cited therein. No special damage need be alleged or proved. That is decided by the case of *Ramanadhan v. Zamindar of Ramnad*(1). The tenant cannot erect buildings other than those compatible with the character of his holding. The buildings here are not for agricultural purposes. There will be considerable injury to the landlord if it is permitted. No doubt the tenant is not bound to cultivate in a particular way. But the landlord loses the prospect of all extension of cultivation or improvements. According to the terms of the patta the rates vary as different crops are raised. Such conduct altogether prevents the land from being hereafter more fully utilized. It is a conversion of the character of the holding. As to the relief, plaintiff is at least entitled to an injunction to remove the buildings. I submit that he can even eject, though there is no authority for that contention. In *Bholai v. The Rajah of Bansi*(2), the planting of trees or building was held to be an act detrimental to the holding and rendered the tenant liable to ejectment. But that case seems to have been

(1) I.L.R., 16 Mad., 407.

(2) I.L.R., 4 All., 174.

ORR
V.
MRITHYUN-
JAYA
GURUKKAL.

decided on a special Act. Apart from that, on principle, the tenant can be ejected. It is an implied condition of the tenure that the tenant should not convert the character of the holding or commit waste; if he does so, he forfeits the tenancy. No right of re-entry need be reserved, because it is an implied condition of the tenure itself. (See Woodfall's 'Landlord and Tenant,' pages 325 and 326.) A condition in the lease or of the tenure has been broken. It is not on the footing of a mere covenant, for which there ought to be a clause for re-entry or a condition attached thereto.

V. Krishnasami Ayyar and K. Srinivasa Ayyangar for respondents.—The plaint only asks for ejectment after removal of buildings, but not for removal of the buildings as a substantive relief; so the tenant cannot be ejected. As to the injunction claimed, it is submitted that unless the landlord proves damage he is not entitled to such relief. Admittedly, there is no damage. The topes, as topes, are not injured. That is the finding. The landlord cannot compel the tenant to cultivate or to extend his cultivation. He is only entitled to a rent, and so long as he gets the rent he is not injured. The tenant may use the land as he likes; he has rights equal, if not superior, to those of the zamindar. He is the owner of the soil. (See *Venkatanarasimha Naidu v. Dandamudi Kotayya*(1).) A tenant can convert nanja land into a cocoanut tope without committing waste (see *Venkayya v. Ramasami*(2)). The land in one of the suits is a house-site: that is the finding of the Munsif. The tenant is entitled to fair compensation. Moreover there was acquiescence.

Sir *V. Bhashyam Ayyangar*, in reply, referred to *Lala Beni Ram v. Kundan Lal*(3) as showing that a tenant is not entitled to compensation.

JUDGMENT.—The learned District Judge has rightly referred to *Ramanathan v. Zamindar of Ramnad*(4) as containing the law which governs this case, but we are unable to agree with him that the building of a number of tiled dwelling houses, admittedly not for agricultural purposes, on tope land, does not alter the character of the holding. It is clear from a reference to the pattas that, in both the cases before us, the rent or varam payable by the defendants to the plaintiffs is liable to vary according to the use made of

(1) I.L.R., 20 Mad., 299.

(3) I.L.R., 26 I.A., 58; I.L.R., 21 All., 496.

(2) I.L.R., 22 Mad., 39.

(4) I.L.R., 16 Mad., 407.

the land whether for growing fruit trees or crops of grain. If the land or part of it is covered with permanent houses it is clear that it so far ceases to be land fit for planting trees or growing other crops, and the plaintiffs' prospect of receiving enhanced rent or varam is destroyed. It is no answer to say that there are still as many trees as there ever were on the land. That is because the land has not hitherto been fully utilized as a tope, but the defendants are not at liberty to render it impossible in the future to so utilize it. To do so is, in our opinion, manifestly to change the character of the holding.

The next question is as to the plaintiffs' proper remedy. They claim that the defendants' act is a breach of the condition on which the land is held, and that this works a forfeiture of the defendants' tenure. The defendants have admittedly a permanent right of occupancy. The plaintiffs' vakil has not been able to cite any case to support his contention as to the alleged forfeiture, and we should certainly be slow to hold that, in the circumstances of this case, the defendants' act does work a forfeiture. In our opinion, the plaintiffs' proper remedy is to have the houses removed and the land restored to the condition in which it was before the defendants altered its character.

We would give a decree on this footing but that the defendants bring to notice that neither Court has decided the fourth issue raised by the defendants to the effect that the matter has really been settled by a compromise prior to the suit.

We must, therefore, ask the District Judge to return a finding on that issue on the evidence already on record within six weeks from the date of receipt of this order. Seven days will be allowed for filing objections after the finding has been posted up in this Court.

ORR
V.
MRITHYUN-
JAYA
GURUKKAL.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Moore.

QUEEN-EMPRESS

v.

SOUTH AND OTHERS.*

1900.
July 25.

Criminal Procedure Code—Act V of 1898, s. 195—Penal Code—Act XLV of 1860, s. 188—Epidemic Diseases Act—Act III of 1897—Disobedience to an order promulgated by Government—Sanction for prosecution.

Certain persons were charged with having disobeyed an order promulgated by Government under the Epidemic Diseases Act (III of 1897), and were acquitted on the ground that the prosecution required, under section 195 of the Code of Criminal Procedure, the previous sanction of the public servant who had promulgated the order. Sanction had, in fact, been granted by the Chairman of the Municipality in which the order was disobeyed, but the Magistrate held that such Chairman was not the public servant who had promulgated the order, and that it was not shown that he had been specially empowered to grant the sanction :

Held, that the order of acquittal was wrong. Inasmuch as the order in question had been promulgated by Government and not by any public servant, no sanction was required.

APPEAL by the Public Prosecutor against an acquittal. The facts of the case appear from the judgment of the Acting Joint Magistrate of Kistna, which was as follows :—The accused Mr. J. South, District Traffic Superintendent, Southern Mahratta Railway, Guntur, is charged with an offence punishable under section 188, Indian Penal Code, in that he disobeyed an order lawfully promulgated to present himself for examination under the Plague Rules. Mr. South's case has been transferred to my file, as he has claimed to be tried as a European British subject. His servants have also been charged, but I have been satisfied that they have already been tried and acquitted by the Sub-Magistrate on an identical charge, and are not liable to further trial. They are at once acquitted under section 245, Criminal Procedure Code. They were charged here, as from the record sent up by the Sub-Magistrate it did not appear that their cases had been disposed of in his Court. The

* Criminal Appeal No. 551 of 1899, under section 417 of the Code of Criminal Procedure, against the judgment of acquittal passed on the accused in Calendar Case No. 23 of 1899 by F. D. P. Oldfield, Acting Joint Magistrate of Kistna.

accused has raised a preliminary objection, that the sanction of the public servant who promulgated the order which he is charged with disobeying, is necessary before he can be prosecuted, and that the sanction given by the Chairman of the Municipal Council, which is produced, is useless, since the Chairman did not promulgate the rules. The rule, which accused is charged with infringing, is rule No. 17 (i), Original Mufussal Regulations under the Epidemic Diseases Act. It is headed G.O., No. $\frac{2830}{M}$, 17th December 1897, and Notification No. 897, Fort St. George Gazette, 18th December 1897. *Prima facie*, it appears to have been promulgated by Government, not the Chairman. The person sent to conduct the case for the Chairman has, admitting this, produced a printed circular signed by the Collector and argued that paragraph 4 empowered the Chairman to accord sanction in cases of this nature. Paragraph 4 simply states that "the regulations that have been published under the Epidemic Diseases Act give all local bodies and all public officers ample power to deal with all acts or omissions calculated to sow the seeds of disease." This amounts neither to a general nor specific authorisation of the Chairman. Argument is further based on—a letter from the Collector to the Chairman—containing the words: "If you consider that the circumstances require it, you may sanction the prosecution of persons still in Guntur, and lodge a complaint against them for disobeying the lawful orders of a public servant." This is not in itself such a sanction as the law requires, since it mentions no names and does not specify any particulars of the offence charged. Nor can I consider it as an authority to the Chairman to sanction, without evidence (i) that the Collector has power of sanction himself, (ii) that they can be delegated. No such evidence is forthcoming. Under the circumstances, the accused is acquitted under section 245, Criminal Procedure Code.

Against the above order this appeal was preferred.

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

The accused were not represented.

JUDGMENT.—The Public Prosecutor withdraws the appeal as against J. South and Solomon. The other two persons Mamilla Reddi and Rajendram were acquitted by the Stationary Sub-Magistrate of the offence alleged against them, viz., that they had disobeyed an order promulgated by Government under the

QUEEN-
EMPRESS
v.
SOUTH.

QUEEN-
EMPRESS
v.
SOUTH.

Epidemic Diseases Act (III of 1897). The reason given by the Sub-Magistrate was that the prosecution required the previous sanction of the public servant concerned under section 195, Criminal Procedure Code, which public servant he held to be the public servant who promulgated the order.

The only sanction given for the prosecution was that of the Chairman of the Municipality, in which the order was broken and the Sub-Magistrate held that the Chairman was not the public servant who promulgated the order and had not shown that he was specially empowered to give the sanction. The Joint Magistrate subsequently acquitted these persons on the ground that they had been already acquitted by the Sub-Magistrate.

Government appeals against these acquittals.

We are of opinion that the order of the Sub-Magistrate cannot be upheld. Section 195, Criminal Procedure Code, read with section 188, Indian Penal Code, does, no doubt, require that no Court shall take cognizance of an offence committed by disobeying an order promulgated by a public servant, except with the previous sanction of the public servant concerned or of some public servant to whom he is subordinate.

In the case before us, the order, for disobeying which the charge is brought, was not promulgated by any public servant but by Government. The Chairman cannot be said to have "promulgated" the order. He merely republished in his municipality the order promulgated, *i.e.*, formally made and issued by Government under the Epidemic Diseases Act. The order not having been promulgated by any public servant, no sanction is required as a condition precedent to prosecution for disobeying the order. We must therefore set aside the acquittals, and direct the Stationary Sub-Magistrate to restore the case to his file as against Mamilla Reddi and Rajendram and dispose of it according to law.

PRIVY COUNCIL.

THIRUTHIPALLI RAMAN MENON AND OTHERS
(DEFENDANTS), APPELLANTS,

v.

VARIANGATTIL PALISSERI RAMAN MENON
(REPRESENTING THE PLAINTIFF), RESPONDENT.

P.C.*
1900.
June 22.
July 7.

[On appeal from the High Court at Madras.]

*Malabar law—Customary law—Adoption among the Nayers of South Malabar—
Power to adopt of a karnavan of a tarwad—Consent of the anandravan required.*

This litigation between Nayers in South Malabar was decided according to their laws and usages, some of which relating to the descent of property through females, are so established as to be judicially noticed without proof, while others require proof.

The large powers of the karnavan of a tarwad are essentially for the management of its property. His power to alienate is limited. He is empowered to adopt so as to make persons and their heirs members of the tarwad only with the consent of the other members thereof.

Where the members had been reduced in number to the karnavan himself and one anandravan:

Held, that the karnavan could not adopt at his own discretion without the consent of the latter, in the absence of a proved custom authorizing adoption by the karnavan alone.

In the time of the last possible karnavan such a power to him alone might be essential to preserve the tarwad. But in the present case the last karnavan had not been reached; and the adoption by the actual one acting alone without the consent of the surviving anandravan was therefore invalid.

APPEAL from a decree (15th September 1896) of the High Court(1), reversing a decree (31st March 1894) of the Subordinate Judge of Malabar at Calicut.

The parties to this suit were Nayers in South Malabar, among whom inheritance is regulated by the Marumakkatayam law, whereby the family estate devolves in the female line, so that children are not the heirs of the wife's husband, but inherit from and through their mother.

The question raised by this appeal was, whether the elder of two brothers, the only surviving members of a tarwad, was entitled

* Present: Lords HOBHOUSE, MACNAGHTEN, and LINDLEY, Sir RICHARD COUCH, and Sir HENRY DEVILLIERS.

(1) I.L.R., 20 Mad., 51.

RAMAN
MENON
v.
RAMAN
MENON.

to adopt so as to make the persons adopted by him alone to be joint members thereof without the consent of his younger brother the only remaining anandravan of the tarwad.

The appellants were defendants in this suit, filed on the 21st December 1892 by the plaintiff Nanu Menon, younger brother of Govindan Nayar, the karnavan or managing member of a tarwad. The elder brother had died in the preceding June. Nanu died pending this appeal, and the respondent, who was administrator of his estate, was then placed on the record. The karnavan Govindan had, on the 21st April 1891, purported to adopt the four defendants, of whom the first and second were his own son and daughter; the other two were the daughter and son of the second defendant.

It was found below that the brothers were not on good terms, and it was admitted that the consent of Nanu was neither asked nor given. As the last member of the tarwad he sued to have the adoption declared inoperative on the ground of his never having consented to its being made and claimed that the defendants might be ordered to give up possession of all property held by Govindan at his death either as tarwad property or as his own acquisition.

The defendants relied on the adoption as valid. None of the facts bearing on the adoption were in dispute and there were no prior decisions of the High Court as to the precise point in question. The material effect of the evidence taken as to the custom, in regard to the karnavan's powers in the matter, is stated in their Lordships' judgment.

The Subordinate Judge found that the tarwad had diminished in numbers to a degree that rendered an adoption by the karnavan a necessary step. In his judgment, although the junior surviving member might have prevented the effecting an improper adoption by withholding his consent, the absence of consent on his part did not invalidate an adoption which had been in all respects proper in itself. At the same time it was decided that the plaintiff, as the senior member of the family, re-constituted by the adoption, was the karnavan of the tarwad, and as such entitled to the possession and management of its property. On the plaintiff's appeal the High Court's judgment, given by SUBRAHMANIA AYYAR, J., was concurred in by DAVIES, J., in *Payyath Nanu Menon*

RAMON
MENON
v.
RAMAN
MENON.

v. *Thiruthipalli Raman Menon*(1). Their opinion was that the adoption attempted to be made to the tarwad was beyond the powers of a karnavan acting at his sole discretion. The adoption having purported to be made as it had been, was invalid. They declined to recognize that a karnavan, the head of a family, could adopt without the consent of the only one surviving anandravan. No custom had been proved to authorize this adoption. They gave little weight to the evidence. Resorting to the general principle that an adoption not made with the requisite consent of the surviving anandravan of the tarwad was outside of the scope of the karnavan's authority, and explaining the reasons of that principle, they decided that the adoptions made by Govindan were void and ineffectual.

On this appeal, Mr. J. D. Mayne and Mr. C. W. Arathoon, for the appellant, argued that there was error in the judgment of the High Court. The adoption by the karnavan of the tarwad of the four defendants, his son and daughter, and the son and daughter of that daughter, should have been held valid. The extent of a karnavan's authority to act independently of the other members of the tarwad in adopting for the purpose of adding members to it, had, for the first time, come before the High Court for decision. The judgment had not given due weight to the evidence in support of the custom alleged for the defence, to the effect that the karnavan could, in such a case as this, have exercised a power to adopt without obtaining the consent of the sole remaining anandravan. The evidence for the defendants had overbalanced that given for the plaintiff in this respect. The High Court had, moreover, not been right in maintaining a difference between the powers of the karnavan of a Nayar tarwad and those of the father of a joint Hindu family in acting upon an independent authority of his own. The powers exercised by these two kinds of heads of families were analogous. Reference was made to *Eravanni Revivarmen v. Ittupu Revivarmen*(2), where it was said in the judgment that the person to whom the karnavan bore the closest resemblance was the father of a Hindu family. The High Court, not having found satisfactory evidence in favour of the karnavan's sole authority, or indeed, as they said, to support the plaintiff's contention against that authority, in such a case as the present, had resolved that

(1) I.L.R., 20 Mad., 51.

(2) (1876) I.L.R., 1 Mad., 153.

RAMAN
MENON
v.
RAMAN
MENON.

principle alone could govern the matter, and had arrived at their view of what that principle was, concluding that the consent was essential. The best materials for ascertaining the Marumakkatayam law, or heirship of sister's sons, which the term implied, was to be found in the report to the Madras Government of the Malabar Marriage Commission of 1891. The late Sir Muttusami Ayyar was President of the Commission, and had added a memorandum giving a clear and concise account of the above law, of which, as prevailing in Malabar, judicial notice was taken. It had passed the stage where customary law required proof by evidence, except as regarded its application to certain outlying races. It was distinct from the Makkatayam custom, on the western coast, which meant descent in the line of sons. There were no sacred books of the old Malabar law. The summary referred to was as follows:—"In its simplest form a tarwad, or Marumakkatayam family, consists of a mother and her children living together with the maternal uncle as their karnavan. In its complex form it consists of several mothers and their children or their descendants in the female line, all tracing their descent from a common female ancestor, and living together as a joint family, in subjection to the power, and under the guidance and control of the senior male for the time being, as its head or representative. The link of relationship is descent from a common female ancestor, and the bond of family union is subjection to a common karnavan. The notion of tarwad property is that the entire family is its owner, that it is impartible except by common consent, and that each individual member is entitled to be maintained in his, or her, tarwad home and to the fruits of joint beneficial enjoyment. The joint family is called a tarwad, and each of the mothers and her children, and descendants in the female line constituting the tarwad is called a taivali, or the line of a single mother. In its secondary sense the term refers to a branch of the family having separate possession of a portion of the family property for convenience of enjoyment without prejudice to the unity of tarwad interest, or to the general control of the tarwad karnavan. The term includes also a branch holding self-acquired property, and at the same time retaining its joint interest in tarwad property. If the tarwad is broken up by partition made by common consent each branch is called a new, or branch tarwad, and the divided kinsmen are called attaladakkan or reversionary heirs. It is noteworthy that the relation of

"husband and wife or of father and child is not inherent in the conception of a Marumakkatayam family. In cases in which a Nayar woman resides with her husband, it is still considered to be in accordance with immemorial usage to send her back to her own tarwad immediately after, or very shortly before, his death, and not to remove his corpse for cremation until she is first sent away. The person that begot a child on a Marumakkatayam female was originally regarded as a casual visitor, and the sexual relation depended for its continuance on mutual consent." The Malabar law regulating descent through females, whereby the son inherited from and through the mother and not through a father, required that adoption into a tarwad should be the adoption of a female. According to some family systems a male was to be appointed to manage the tarwad property: according to others the adopted female was to manage; Wigram's 'Malabar Law and Custom' at pages 11, 12, was cited, and T. L. Strange's 'Manual of Hindu Law,' Madras, 1856, chapter XIII, relating specially to Malabar law, was referred to, as showing that the adoption of a male was legal and that the power to adopt was vested in the karnavan alone. Strange's statement of the law was:—"On failure of the sister's progeny male and female, the head of the family may make adoption. The descent being to the female line the adoption must be of a female." Strange adds that a male, her brother, may be taken in adoption at the same time with herself to provide for the administration of the affairs of the family and for conduct of the religious rites to be observed therein. This showed that the adoption of the persons selected to be adopted in this case was in conformity with the Malabar law as stated on good authority. Next was cited the work of Mr. William Logan, 'Malabar,' Madras, 1887, at pages 130-135 and 152. The Nayars had religious ceremonies in this connection. The cogent reason apparently for adoption was to avert impending extinction of the tarwad by the failure of descendants, in which case there would be in all probability an escheat to the Government. That was the position of this family, reduced, when the adoption took place in 1891, to two members, aged men. This danger of extinction was the main ground of the written answer of the defendants in this case. They alleged that the plaintiff had for years ceased to conduct himself as a member of the tarwad. The karnavan thus left alone in advanced old age in regard to the imminent failure

RAMAN
MENON
v.
RAMAN
MENON.

RAMAN
MENON
v.
RAMAN
MENON.

of heirs, and decline of the tarwad had acted under a necessity to adopt, and had made suitable adoptions, having (as it was submitted that he had) a right to resist unreasonable or capricious opposition. The following cases were cited : As to the Nayar law of inheritance and the tarwad with the karnavan, *Munda Chetti v. Timmaji Hensu*(1), *Subramanyan v. Paramaswaran*(2); as to failure of heirs and its results, *Vasudevan v. The Secretary of State for India*(3), *Alami v. Komu*(4); as to tarwad and its functions and as to the powers of the karnavan, *Varanakot Narayanan Namburi v. Varanakot Narayanan Namburi*(5); as to the absence of necessity for the assent of every member of the tarwad to render valid the sale of tarwad property, *Kalliyani v. Narayana*(6).

Mr. J. H. A. Branson, for the respondent, argued that the High Court had rightly decided that the defendants, on whom was the burden, had failed to prove that custom gave to the karnavan of the tarwad the power to adopt, without the consent of the other members of the tarwad, at his own option so as to bring in a new member of it. There was no law or custom among the Nayars in Malabar investing the karnavan with such a right to adopt by his own, sole, authority, except, and unless, it might be allowed to him so to do, where he had been left the last and only surviving member of the tarwad after all possibility of issue from the females of the family had become extinct. In such a case the necessity of the occasion, in order to prevent the extinction of the tarwad, might render the exercise of the karnavan's sole authority lawful and valid in effect. Here no such occasion had arisen when Govindan Nayar had attempted to adopt the four defendants. His younger brother Nanu Menon was an anandravan living at the time, who, on the death of the elder, had succeeded as karnavan, becoming, as both the Courts below had rightly held, entitled to the possession and management of the properties of the tarwad. No analogy existed between the authority to adopt in the case of a karnavan under the Marumakkatayam law and that belonging to the father of a joint Hindu family. The origin of their respective relations, to the tarwad in the one case, and in other, to the joint family, was by no means identical. Even if the resemblance

(1) (1863) 1 M.H.C.R., 380.

(3) (1884 & 1887) I.L.R., 11 Mad., 157.

(5) (1880) I.L.R., 2 Mad., 328 at p. 330.

(2) (1887) I.L.R., 11 Mad., 116 at p. 119.

(4) (1888) I.L.R., 12 Mad., 126.

(6) (1885) I.L.R., 9 Mad., 266.

RAMAN
MENON
v.
RAMAN
MENON.

of the managements had been more complete than it actually was, and if the analogy did exist, the karnavan's right to adopt was only absolute and exercisable at his sole will when he happened to be the only surviving member of the tarwad. The decision of the High Court was right both on the principle referred to by them, and as derived from the inference to be drawn from the failure of the defence to prove that custom allowed such an adoption as the one in question.

Mr. J. D. Mayne replied.

Afterwards their Lordships' judgment was delivered by Lord Lindley on the 7th July.

JUDGMENT.—The question raised by this appeal is whether the elder of two brothers who were the two surviving members of their tarwad and the elder of whom was its karnavan was entitled to adopt four persons so as to make them members of the tarwad without the consent of the younger brother. The younger brother, after the death of the elder, sued to set aside the adoption. The adoption was declared valid by the Court of First Instance, but this decision was reversed by the High Court of Madras. The persons adopted have appealed from this decision to Her Majesty in Council.

The younger brother has died since the action was commenced, and has left a will and the real controversy between the parties is to whom the property of the tarwad belongs. This controversy, however, is not now before their Lordships for adjudication. The only question before them is whether the High Court of Madras was right in deciding the adoption to be invalid.

The litigation is between Nayars in South Malabar and has to be decided according to the laws and usages of those persons. Those laws and usages are very peculiar; some of them are so well established as to be judicially noticed without proof. But others of them are still in that stage in which proof of them is required before they can be judicially recognised and enforced. The Nayars are persons amongst whom polyandry is legally recognised; and descent of property through females is acknowledged law. A right (and perhaps duty) to adopt females into the family or tarwad when necessary to preserve it appears also to be in accordance with their law. Speaking generally it may be safe to say that this right is vested in the karnavan or head of the family. This is so stated in Strange's 'Manual of Hindu Law,' section 403. So far

RAMAN
MENON
v.
RAMAN
MENON.

their Lordships are prepared to assume the law peculiar to the Nayers to be established and not to require proof in any particular case. But beyond this they are not prepared to go. The passage in Strange's 'Manual' does not really mean more than above stated. There is no sacred book or other writing having legal authority, and there is no series of decisions which can be appealed to in order to determine the circumstances under which and the consents if any subject to which the karnavan for the time being can adopt strangers into the family and thereby make them and their descendants heirs to its property. Their Lordships are clearly of opinion that, under these circumstances, the burden of proving the validity of the adoption made in this case is upon those who assert its validity; and that the only question which their Lordships have to consider is whether the appellants have shown that the adoption in dispute in these proceedings is in accordance with the law or custom of the Nayers.

Mr. Mayne, in his very able argument, drew attention to all the authorities bearing on the point and to some previous adoption deeds and to the verbal evidence adduced by the parties in this particular case. The authorities and adoption deeds do not really come nearly up to what is wanted; not one of them shows that a karnavan ever adopted a stranger into the family without consulting the other members of it.

The witnesses called at the trial certainly do not prove any custom warranting such an adoption. The witnesses called by the plaintiffs distinctly negative it. Those called by the defendant say, in chief, that the custom goes this length: but not one of them can give an instance in which he knew it was done. The witnesses are the ninth, tenth, and eleventh. The ninth, the Raja of Calicut, however, stated distinctly in re-examination that the karnavan in such a case as that before the Court could not adopt without the consent of his brother unless he was an outcaste or insane. Upon such evidence it appears to their Lordships that the balance is against and not in favour of the validity of the adoption which they have to consider. Certainly its validity is far from being established.

Large as the powers of a karnavan appear to be, those powers are essentially powers of management. He cannot apparently alienate the family property without the consent of the other members of the family (anandravans), although an unreasonable,

RAMAN
MENON
v.
RAMAN
MENON.

wrong-headed opposition may probably be overruled. His limited power of alienation renders it improbable that he should have the wide power of adoption contended for by the appellants, the power, *i.e.*, without consulting other members of the family of introducing strangers into the tarwad and making them heirs to its property. Such a power may be essential to the preservation of the tarwad when the last possible karnavan has been reached, but the possession of such a power by any karnavan, who is not the last surviving head of his tarwad, seems to their Lordships to be unnecessary and to be unjust to those members of the family who may survive him and become karnavans in their turn. In the absence of proof it would be contrary to sound legal principles to hold that any such power was conferred by any alleged custom.

Their Lordships are of opinion that the decision of the High Court is correct, and they will humbly advise Her Majesty that this appeal should be dismissed. The appellants will pay the costs.

Appeal dismissed.

Solicitors for the appellants—Messrs. *T. L. Wilson & Co.*

Solicitor for the respondent—Mr. *R. T. Tasker.*

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Moore.

SUBBA REDDI (ACCUSED No. 1), PETITIONER,

v.

MUNSHOOR ALI SAHEB (COMPLAINANT), RESPONDENT.*

Penal Code—Act XLV of 1860, s. 379—Removal of fish from an ordinary irrigation tank—Charge of theft—Maintainability of charge.

Fish in an ordinary irrigation tank are not in the possession of any person so as to be capable of being the subject of theft. Nor does the removal of such fish constitute any other offence.

* Criminal Revision Case No. 38 of 1900, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the proceedings of H. O. D. Harding, Acting District Magistrate of Cuddapah, on Miscellaneous Petition No. 150 of 1899, directing that Calendar Case No. 353 of 1899 on the file of the Stationary Second-class Magistrate be restored to the file and the accused therein (the petitioner) be re-tried.

1900.
March 16.

SUBBA
REDDI
v.
MUNSHOOR
ALI SAHEB.

Queen v. Revu Pothadu, (I.L.R., 5 Mad., 391n); and *Bhagiram Dome v. Abar Dome*, (I.L.R., 15 Cal., 388), referred to.

PETITION that an order of the District Magistrate of Cuddapah might be revised whereby the case of the petitioner was directed to be restored to the file of the Stationary Second-class Magistrate of Cuddapah and the petitioner re-tried. The charge was for an offence of theft, under section 379 of the Indian Penal Code. The complainant alleged that he had taken the Patha Cuddapah tank fishery on lease, and was entitled to the sole right of fishing in the tank from the Bugga channel in Bellam Mundi. He had, however, found the accused and others catching fish by letting the water through the sluice and spreading nets. The Stationary Second-class Magistrate passed the following order:—"The complainant says that he has obtained the right of fishing in the Patha Cuddapah tank and a portion of the Bugga river, and that the accused have without his permission carried away the fish and have thus committed theft. It has been held by the Madras and Calcutta High Courts that such an act constitutes no offence which a Criminal Court can take cognizance of. The petition is, therefore, dismissed under section 203 of the Code of Criminal Procedure." Upon this the District Magistrate of Cuddapah passed the following order:—"Fish in tanks are the property of the tank-owners and may be and are usually leased by the State to private persons. If a person other than the lessee remove such fish the offence is clearly theft. The case must be restored to file and disposed of according to law."

Against this order the petitioner preferred this criminal revision petition.

Mr. C. Krishnan, (for Mr. N. Subrahmaniam), for the petitioner.

K. C. Desikachariar, (for Venkatasubbaramayya), for the respondent.

JUDGMENT.—The District Magistrate has overlooked the rulings of this Court, dated 23rd October 1878, No. 1759, reported at page 232, Weir's 'Law of Offences,' 3rd edition, and in the note to *Queen v. Revu Pothadu*(1).

It was there held that fish in an ordinary open irrigation tank are not in possession of any person, so as to be capable of being

(1) I.L.R., 5 Mad., 390.

the subject of theft. The question whether the removal of such fish constitutes any other offence is fully discussed in *Bhagiram Dome v. Abar Dome*(1) and is answered in the negative. These rulings are evidently referred to by the Sub-Magistrate, though he has failed to note them with exactness.

The District Magistrate should have referred to them before setting aside the order of the Sub-Magistrate. Following those rulings we must set aside the order of the District Magistrate and restore that of the Sub-Magistrate dismissing the case.

SUBBA
REDDI
v.
MUNSHOOR
ALI SAHEB.

APPELLATE CIVIL.

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

IN THE MATTER OF A SECOND-GRADE PLEADER.*

1900.
March 19.

Legal Practitioners Act—Act XVIII of 1879, ss. 13, 14, 40—Suspension from practice without opportunity to defend.

Two charges were, on 30th December 1899, framed by a District Judge against a pleader under section 14 of the Legal Practitioners Act, and it was directed that they should be heard on 24th January 1900. On the day on which the charges were framed, namely, 30th December 1899, the District Judge passed an order suspending the pleader from practice as from 1st January 1900, pending the disposal of the charges. With regard to one of the charges, no opportunity was given to the pleader to defend himself before the order of suspension was made. With regard to the second charge, the Judge had, prior to the date upon which the charges were framed, made an observation, in the course of a judgment, reflecting in general terms upon the conduct of the pleader in consequence of which the pleader had written a letter and filed an affidavit by way of explanation.

Held, that the order suspending the pleader was irregular and must be set aside.

PETITION against the order of a District Judge suspending petitioner from practice pending the disposal of charges framed against him under the Legal Practitioners Act. The petition stated that petitioner had practised as a second-grade pleader in a District Munsif's Court of the district, during which time he had

(1) I.L.R., 15 Cal., 388.

* Civil Miscellaneous Petition No. 41 of 1900 against the order of the District Judge of Kurnool, suspending the petitioner from practice, pending disposal of charges framed against the petitioner under the Legal Practitioners Act.

IN THE
MATTER OF A
SECOND-
GRADE
PLEADER.

given satisfaction to three Munsifs, all of whom certified to his good conduct and behaviour; that the District Judge had, on 30th December 1899, framed two charges against petitioner under the Legal Practitioners Act, and that the District Judge had simultaneously with the framing of the said charges, suspended petitioner from practice, under section 14 of the same Act, with effect from 1st January 1900, pending the disposal of the charges. The petition then dealt with the merits of the case, and prayed that the order of suspension might be cancelled, it having been passed before petitioner had had an opportunity for being heard in his defence.

Narayana Rao for the petitioner.

JUDGMENT.—In this case the District Judge, under proceedings, dated 30th December 1899, framed two charges against the petitioner under section 14 of the Legal Practitioners Act. The charges related to two distinct matters. The proceedings directed that the charges would be heard on 24th January 1900. On the day on which the charges were framed, (30th December 1899), the Judge passed an order suspending the petitioner from practice as from 1st January 1900, pending the disposal of the charges framed against him.

In passing this order the District Judge overlooked the provisions of section 40 of the Act. That section provides as follows:—"Notwithstanding anything hereinbefore contained, "no pleader, mukhtar or revenue agent shall be suspended or "dismissed under this Act unless he has been allowed an opportunity of defending himself before the authority suspending or "dismissing him." This section governs the provisions of section 14 which gives to a Judge a power of suspension pending the investigation and the orders of the High Court. In *In the matter of Southekul Krishna Row*(1), the Privy Council considered the effect of section 40 of the Act, and they pointed out (see page 158) that any proceedings instituted under the Act are subject to the provisions of section 40.

As regards the first charge framed against the petitioner, it is not suggested that he was given any opportunity of defending himself before the order of suspension pending investigation was made. As regards the second charge it would seem that on 7th September

(1) L.R., 14 I.A., 154; J.L.R., 15 Calo., 152.

IN THE
MATTER OF A
SECOND-
GRADE
PLEADER.

1899, in Appeal Suit No. 42 of 1899 the District Judge, whilst remanding the suit to the District Munsif for further evidence, made the following observation:—"The conduct of their vakil " (the petitioner) ought to be carefully watched by the Court."

On 5th October 1899, the petitioner wrote a letter of explanation to the District Munsif with reference to the observation above referred to, and supported his explanation by an affidavit.

The explanation and the affidavit were forwarded to the District Judge.

We do not think that an observation made by a Judge in the course of a judgment reflecting in general terms upon the conduct of a pleader can be said to be "an opportunity of defending himself" within the meaning of section 40. But, however this may be, it is quite clear that no "opportunity of defending himself" was given with reference to the first charge.

The order of 30th December 1899, suspending the petitioner from practice was irregular and must be set aside.

APPELLATE CIVIL.

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

RAMABHADRACHAR (PLAINTIFF), APPELLANT,

v.

SRINIVASA AYYANGAR AND OTHERS (DEFENDANTS Nos. 1 to 3
AND 7 TO 19 AND 14TH DEFENDANT'S REPRESENTATIVES),

RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, s. 82—Liability of several properties to rateable contribution "in the absence of a contract to the contrary."

The owner of certain lands mortgaged them, and subsequently effected a partition of the family property between himself and his three sons. By the terms of that partition the father and his sons each took a fourth share in the family property and each became liable for a fourth of the mortgage debt. One of the sons then sold the greater portion of his share in the mortgaged property to plaintiff, giving plaintiff a security bond for a sum of money and hypothecating other lands to indemnify plaintiff from any loss which might arise if the

* Appeal No. 56 of 1899 against the decree of G. T. Mackenzie, District Judge of Coimbatore, in Original Suit No. 13 of 1897.

1900.
February 16,
19.
March 6.
May 3.

RAMA-
BHADRACHAR
v.
SRINIVASA
AYYANGAR.

original mortgagee should bring the mortgaged lands to sale. The mortgagee obtained a decree on his mortgage in execution of which a portion of the mortgaged land was sold, including that which plaintiff had bought. The proceeds of sale of the said portion were sufficient to satisfy the mortgagee's decree. Plaintiff then sued on his security bond, and the land hypothecated to him was sold, plaintiff receiving the amount secured by the bond. He now sued under section 82 of the Transfer of Property Act and claimed rateable contribution from the other portions of the mortgaged property which had not been sold to satisfy the mortgagee's decree:

Held, that he was entitled to recover, and that his right to rateable contribution was in no way affected by the indemnity bond or the payment made to him thereunder.

Held further, that the words "in the absence of a contract to the contrary," in section 82 of the Transfer of Property Act, apply to contracts between a mortgagor and mortgagee, and that an agreement which is binding only as between the mortgagors is not "a contract to the contrary," within the meaning of the section.

SUIT for contribution under section 82 of the Transfer of Property Act. One Srinivasa Ayyangar mortgaged certain lands to Rangayya Goundan for Rs. 20,000. A partition was subsequently effected between Srinivasa Ayyangar and his three sons. Each took one-fourth of the property, and it was agreed that each should bear Rs. 5,000, being one-fourth of the debt due to Rangayya Goundan. One of the sons, Krishna Ayyangar, then sold to plaintiff a portion of the lands that had fallen to Krishna Ayyangar at partition, and plaintiff paid him Rs. 10,500 as the purchase money therefor. To provide against the contingency of the land being sold under the mortgage of Rangayya Goundan, plaintiff took from Krishna Ayyangar a security bond for Rs. 5,000, and in this bond some other lands of Krishna Ayyangar were hypothecated to plaintiff for that amount. Rangayya Goundan obtained a decree on his mortgage against the whole family, declining to recognize the arrangement among themselves by which each was to pay one-fourth. In execution of that decree certain land was sold, including the land which plaintiff had bought from Krishna Ayyangar. Plaintiff then sued on his security bond. The land hypothecated to him was sold for Rs. 14,000, and out of that sum plaintiff recovered Rs. 6,000, in satisfaction of his security bond. Plaintiff now filed this suit for contribution. In execution of Rangayya Goundan's decree only a portion of the property mortgaged to him had been sold and the sale-proceeds thereof were sufficient to satisfy his decree. The land which plaintiff had purchased from Krishna Ayyangar constituted about one-third of

RAMA-
BHADRACHAR
v.
SRINIVASA
AYYANGAR.

the land that had been so sold. Plaintiff claimed contribution from the portions that were not sold. The particulars were given in the plaint, which was as follows:—"1. In Original Suit No. 19 of 1894, on the file of this Court one Rangayya Goundan sued the parties in this suit and some others to recover a certain sum of money by the sale of the properties mentioned in the schedule hereto annexed. These properties were hypothecated to the said Rangayya Goundan by the first defendant to whom they originally belonged. Subsequent to the said hypothecation, the parties in this suit acquired interest in the portions of the said properties either as purchasers or mortgagees. 2. The plaintiff in the said Original Suit No. 19 of 1894 described the said properties as four distinct items as mentioned in the schedule hereto annexed. He obtained a decree directing the sale of all the four items for his decree debt which amounted to Rs. 26,002-7-6. All the defendants in the said suit admitted the debt and some of them prayed that the Court would be pleased to order contribution and direct each of them to pay only such fraction of the mortgage debt as his portion of the property bore to the entire estate mortgaged. But this contention was disallowed and decree was passed for the whole debt on the whole estate without rateable distribution. 3. The said Rangayya Goundan executed the said decree and brought all the properties to sale on the 28th September 1896. By the sale of item No. 1 alone the decree was satisfied and the remaining three items remain unsold. 4. Survey Nos. 501 (5-91 acres), 503 and 504 of the said item No. 1 belong to the plaintiff in this suit exclusively. He offered to pay his portion of the decree debt to have his property sold last in case of necessity. He even prayed that a short time might be allowed him to pay up the whole decree debt. His prayer was not granted. His properties were sold away in auction for a low price. Thus he had to suffer loss on account of the owners of other three items of the said mortgaged properties not paying their share of the mortgage debt. 5. Item No. 1 was sold for Rs. 30,610. Of this, a sum of Rs. 26,507-5-6 was paid for the decree-debt, including poundage. All the items mentioned in the schedule hereto annexed are liable to pay this latter sum rateably. The value of the first item as per auction sale is Rs. 30,610. The value of the other three items of the land is at least Rs. 29,390. The first item is liable to pay only Rs. 13,523. The remaining sum of Rs. 12,984-5-6 should

RAMA-
BHADRACHAR
v.
SRINIVASA
AYYANGAR.

be distributed rateably among the three items. 6. Item No. 2 of the plaint belongs to defendants Nos. 1 to 3. It forms one entire tope. It is worth at least Rs. 20,880. Defendants Nos. 4 to 6 are interested in this item as mortgagees and mortgage decree-holders. Items Nos. 3 and 4 are nanja lands. They are worth at least Rs. 265 per acre. Defendants Nos. 7 to 10 are owners of 12.34 acres in item No. 3 of the plaint, and defendant No. 11 is the owner of 2 acres in the same. Defendant No. 12 is the owner of 7.49 acres in item No. 4. Defendants Nos. 13 to 16 claim 5.14 acres of item No. 4 as purchasers. Defendant No. 17 is the owner of 5.14 acres in item No. 4. Hence they are made parties to the suit. Defendant No. 18 is made a party as he purchased item No. 2 in Court auction subsequent to the institution of this suit. This suit is withdrawn against defendants Nos. 4 to 6. 7. The value of the plaintiff's portion of items is $\frac{1050}{3061}$ of the value of the whole of that item. He is, therefore, entitled to recover from the owners of items Nos. 2 to 4, and from those properties Rs. 4,452 which is $\frac{1050}{3061}$ of the sum to be recovered from those items for the mortgage debt. Plaintiff is also entitled to interest on the said sum at 6 per cent. per annum from the 26th September 1896, the date of sale of item No. 1.

	RS.	A.	P.
"8. From defendants Nos. 1 to 3 and 18 and item No. 2 plaintiff claims	3,218	5	8
From defendants Nos. 7 to 10 and their portion of item No. 3 plaintiff claims	503	10	7
From defendant No. 11 and of his portion of item No. 3 plaintiff claims	81	6	5
From defendant No. 12 and of his portion of item No. 4 plaintiff claims	306	4	3
From defendants Nos. 13 to 16 and their portion of item No. 4 plaintiff claims	210	1	10
And lastly from defendant No. 17 and his portion of item No. 4 plaintiff claims	210	1	10
Total	4,529	14	7

"This figure is explained in a separate sheet attached to this plaint. 9. Plaintiff has valued the properties approximately. If, on examination, the Court should find that these items are worth more, he prays that any extra sum that may be found due to him

RAMA-
BHADRACHAR
v.
SRINIVASA
AYYANGAR.

may also be decreed to him. He further submits that he had to suffer a great loss by his property being sold away in Court auction, and the contribution amount claimed by him will not be sufficient to compensate him for his loss. 10. The cause of action arose at Coimbatore on the 28th September 1896, the date of sale of item No. 1. Plaintiff, therefore, prays that the Court will be pleased to pass a decree both personally as well as against the properties belonging to the defendants for the various sum of money claimed against them and their share of the plaint properties with subsequent interest and costs of the suit and also to grant to plaintiff such further or other relief as to the Court may seem meet and the nature of the case may require."

The District Judge said:—"As an owner of a portion of the mortgaged property the plaintiff would have a claim to contribution from the portions which were not sold if there were no disturbing complications. The first complication is that plaintiff took an indemnity from the former owner and has received that indemnity in full. For plaintiff, it is contended that this does not bar his right to contribution, that the measure of contribution is not the loss which plaintiff suffers but is a claim based upon a valuation of all the properties that were liable to the mortgage. The reply to this contention, in my opinion, is that plaintiff would thus be paid twice and that by accepting an indemnity from Krishna Ayyangar he placed Krishna Ayyangar in the position of the person who is to sue for contribution. It appears to me that Krishna Ayyangar, who has had to pay this indemnity to plaintiff, is the man who is damnified by the sale of this land, and that Krishna Ayyangar can sue the holders of the unsold portions for contribution. On this ground I am of opinion that plaintiff's suit must fail." He dismissed the suit. He, however, calculated what the amount of contribution should be, in case his ruling should be reversed, as follows:—"The whole property mortgaged to Rangayya Goundan was worth Rs. 69,219. The decree amount was Rs. 26,507-5-6. The portion sold was worth Rs. 43,134. It paid the full decree amount. It should receive from the unsold portion a contribution of Rs. 10,026-6-6. Plaintiff's land was valued at Rs. 12,696. He ought to receive from the unsold portion a contribution of Rs. 2,951-12-0. This contribution must be distributed as follows:—The eighteenth defendant who owns item No. 2 will pay Rs. 2,311-8-0. The seventh, eighth, ninth and

RAMA-
BHADRACHAR
v.
SRINIVASA
AYYANGAR.

tenth defendants who own portion of item No. 3 would pay Rs. 241-8-0. The eleventh defendant who owns the rest of item No. 3 would pay Rs. 38-13-0. The twelfth defendant who owns part of item No. 4 would pay Rs. 126-2-0. The thirteenth, fourteenth, fifteenth and sixteenth defendants who own part of item No. 4 would pay Rs. 86-14-6. The seventeenth defendant who owns part of item No. 4 would pay Rs. 86-14-6."

Plaintiff preferred this appeal.

Sir *V. Bhashyam Ayyangar*, *Kasturiranga Ayyangar* and *S. Srinivasa Ayyangar*, for appellant, submitted that plaintiff was entitled to contribution under section 82 of the Transfer of Property Act, and that the indemnity which he had taken from his vendor did not bar this claim for contribution. Under the sales the lands were conveyed free of incumbrances. Plaintiff paid for the lands on the basis of their value free of all incumbrances, and his vendor was bound to discharge the incumbrances as against plaintiff (see sections 55 (1), (8), and 56 of the Transfer of Property Act). The indemnity which plaintiff took represented this claim only. The present claim was based on the ground that plaintiff's property had borne a greater proportion of the mortgage-debt than it was liable for.

Sivasami Ayyar for respondents.—Plaintiff had notice of the mortgage and he did not therefore buy it free of incumbrances. The indemnity was taken for this very purpose and he has recovered it. He will recover twice over if his present claim is allowed. He suffers little loss, since he has been paid the greater portion of the purchase money as well as the surplus sale-proceeds. In any event he cannot recover more than the price he paid. In any case plaintiff is liable to one-fourth of the original mortgage-debt. It is mentioned in the indemnity bond. Plaintiff can recover only the balance that his property has paid, over and above the one-fourth of the mortgage debt which his vendor undertook to pay and of which plaintiff had notice. Under the partition, there was an agreement that the plaintiff's vendor was to pay one-fourth. Plaintiff must therefore pay that proportion. Section 82 of the Transfer of Property Act only prescribes the liability to rateable contribution "in the absence of a contract to the contrary." Here there was a contract to the contrary. That contract binds the plaintiff.

RAMA-
BHADRACHAR
v.
SRINIVASA
AYYANGAR.

Sir *V. Bhashyam Ayyangar* in reply.—The last point was not taken in the lower Court, and no evidence has been adduced as to the terms of the partition, and the partition deed has not been filed. The provision in the partition that each son should bear one-fourth of the family debt is not an agreement contemplated by section 82. In a partition amongst members of a Hindu family, liabilities as well as assets are divided, and an express provision in the partition is nothing more than what the Hindu law directs. Moreover, such a contract does not bind an assignee, even with notice, for it is not a contract running with the land. A purchaser of the land is not bound unless it is a contract running with the land; and the burden of affirmative covenants never runs with the land, either in equity or at law. (He referred to Dart's 'Vendors and Purchasers,' volume II, page 865: also *Haywood v. Brunswick Building Society*(1) and *Austerberry v. Corporation of Oldham*(2)). In the present case the covenant is an affirmative one only, even if it has to do with the land. The "contract to the contrary" mentioned in section 82 must be within the mortgage deed, and not a contract between the owners of the equity of redemption. The words relate only to contracts between mortgagor and mortgagee that certain properties are to be primarily liable, others secondarily liable, and so forth. This is clear, the section being taken from the passage in Fisher on 'Mortgages,' page 659, section 1101, and there the corresponding phrase "and not one as surety or the collateral security for the other" means only such contracts as will, as a matter of course, necessarily bind all assignees. Contracts between the owners of the equity of redemption, though binding on the parties to them, will not bind their assignees, even with notice, unless they are restrictive covenants running with the land. This interpretation of the words "contract to the contrary" is supported by *In re Athill*(3), and *In re Dunlop*(4).

JUDGMENT.—The material facts and dates are as follows:—In 1883 one Srinivasa Ayyangar mortgaged certain lands which belonged to him and his three sons to one Rangayya Goundan for Rs. 20,000. The mortgaged property may be conveniently described as items Nos. 1-4. Subsequently to the mortgage there

(1) L.R., 8 Q.B.D., 403.

(3) L.R., 16 Ch.D., 211.

(2) L.R., 29 Ch.D., 750.

(4) L.R., 21 Ch.D., 533.

RAMA-
BHADRACHAR
v.
SRINIVASA
AYYANGAR.

was a partition between Srinivasa Ayyangar and his three sons. Under the partition the father and the three sons each took a one-fourth share, and each became liable for one-fourth of the mortgage-debt. On August 9th, 1886, one of the sons, Krishna Ayyangar, sold the greater portion of his share in the mortgaged property to the plaintiff. The sale-deeds are exhibits A, B and C. These deeds state that the lands are sold free from incumbrances. The total purchase price was Rs. 10,500. Nine days after the sale on August 18th, 1886, Krishna Ayyangar gave an indemnity bond (exhibit I) to the plaintiff. This bond, after reciting the mortgage to Rangayya Goundan and stating that Rs. 5,000 is due in respect of Krishna Ayyangar's share thereof, authorises the plaintiff, in the event of Krishna Ayyangar's failing to discharge the share of the mortgage-debt for which the lands sold to the plaintiff were liable, to recover this Rs. 5,000 from certain other specified lands belonging to Krishna Ayyangar. The amount for which Krishna Ayyangar became liable under this bond was paid to the plaintiff.

In 1894, Rangayya Goundan brought a suit on his mortgage against Srinivasa Ayyangar and twenty-five others. Srinivasa Ayyangar and his three sons were defendants Nos. 1-4. The plaintiff in the present suit was the seventh defendant. Rangayya Goundan obtained a decree for Rs. 26,000. In execution of the decree, item No. 1 was sold and realized Rs. 30,000, and the decree was satisfied.

In January 1897 the plaintiff brought the present suit under section 82 of the Transfer of Property Act claiming rateable contribution from the other properties mortgaged to secure the debt. The District Judge held that the suit must fail on the ground that, the plaintiff by receiving the amount secured by the bond (exhibit I) from Krishna Ayyangar, the latter became the person entitled to sue for contribution and the plaintiff lost his right to sue. In our opinion this is not the legal effect of the transactions between Krishna Ayyangar and the plaintiff. Krishna Ayyangar purported to convey the lands free from incumbrances. He had, in fact, nothing more to convey than an equity of redemption. The moneys received by the plaintiff under the bond (exhibit I) represent the difference between the value of the lands if they had been conveyed free from incumbrance and their value subject to the existing incumbrance. The

RAMA-
BHADRACHAR
v.
SRINIVASA
AYYANGAR.

result of the transactions was that Krishna Ayyangar merely conveyed an equity of redemption at an agreed price. The plaintiff's right to rateable contribution was in no way affected by the indemnity bond or the payment to him thereunder.

A further question was raised before us, though not raised in the Court below—a question as to the basis of the contribution by the other properties which have benefited by the satisfaction of the whole mortgage-debt by the sale of the plaintiff's land. It was argued on behalf of the eighteenth defendant, a purchaser who derives title through Srinivasa Ayyangar, the father, that, inasmuch as there was an admitted agreement between the father and the three sons, that each was to be liable for one-quarter of the mortgage-debt, the plaintiff was only entitled to contribution in respect of moneys paid by him in excess of his own liability for one-quarter of the mortgage-debt. In other words, the amount of the decree-debt being Rs. 26,507, the plaintiff must debit himself with Rs. 6,626, a quarter of this amount, before he can claim contribution from the other properties.

This question depends upon the construction of the words “in the absence of a contract to the contrary” in section 82 of the Transfer of Property Act. Having regard to the principle upon which the equitable doctrine of contribution is based, as illustrated in the English authorities to which our attention has been called, it seems clear that an agreement binding only as between the mortgagors is not a “contract to the contrary” within the meaning of the section, and that these words were intended to apply to contracts between mortgagor and mortgagee—contracts, for example, under which some of the mortgaged properties were to be liable in the first instance and others were only to be liable in the event of the security of the properties liable in the first instance being insufficient.

In the present case the contract which, it is contended, is a “contract to the contrary” which prevents the application of the doctrine of rateable distribution, was nothing more than a partition amongst the co-parceners of an undivided Hindu family. The proportionate liability of the members of the family *inter se* for the amount of the mortgage-debt existed apart from any express contract which they may have chosen to make. The contract as between the parties, the owners of the equity of redemption, is of course binding, but it is not a contract which binds their assigns.

RAMA-
BHADRACHAR
v.
SRINIVASA
ATTANGAR.

Assuming that the plaintiff took with notice of this contract, inasmuch as such a contract does not run with the land at law he is not bound by it in equity by reason of the fact that he took with notice. (See *Austerberry v. Corporation of Oldham*(1).) In our opinion there was no contract to the contrary within the meaning of section 82, and the plaintiff is entitled to rateable contribution.

As regards the calculation of the contribution, the figures appear to be correctly worked out in paragraph 10 of the District Judge's judgment and neither party takes any exception to them. The rights of the parties, other than the plaintiff, in respect of item No. 1 will be adjusted in another suit which is now pending.

As regards the finding of the District Judge upon the issue as to whether the plaintiff's brother-in-law was a *benami* purchaser for the plaintiff of the land sold in suit No. 19 of 1894, we think the District Judge took an erroneous view of the legal effect of this transaction. The plaintiff was within his rights in providing his brother-in-law with the funds necessary for the purchase of the undivided half of the land which was sold in execution of the decree of Rangayya Goundan. The case of *Hart v. Tara Prasanna Mukherji*(2) has no application to the facts of the present case and there is no reason why any deduction should be made from the plaintiff's claim in this suit in respect of any profit which he may have made by re-sale of the land in question.

The issue as to whether the balance now in Court of the sale-proceeds after satisfying the decree-holders in suits Nos. 19 of 1894 and 8 of 1893 is now liable for the plaintiff's claim has been disposed of by our decision in Appeal No. 131 of 1899.

In the result, we reverse the decree of the District Judge, and we find that the plaintiff is entitled to rateable contribution from the defendants mentioned in paragraph 10 of the District Judge's judgment of the amounts specified in that paragraph, together with interest at 6 per cent. per annum from October 28th, 1896, up till realization or till three years after date of decree. The eighteenth defendant must pay the plaintiff's costs in the lower Court and his costs of appeal. The plaintiff must pay the costs of appeal of the original fourth, now the nineteenth, defendant.

(1) L.R., 29 Ch.D., 750.

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

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Moore.

NARASAYYA (PETITIONER), APPELLANT,

v.

THE COLLECTOR OF ANANTAPUR (COUNTER-PETITIONER),
RESPONDENT.*

*Regulation III of 1802 (Madras), s. 16, cl. 7—Claim for property of an intestate—
Order dismissing petition—Appeal.*

No appeal lies against an order of a District Judge passed under section 16, clause 7, of Madras Regulation III of 1802.

PETITION to the District Court under Madras Regulation III of 1802, section 16, clause 7. Petitioner claimed to be entitled to the property of a person who had died intestate within the jurisdiction of the Court. The District Judge, after investigating the claim, dismissed it. Against that order petitioner preferred this appeal.

The Government Pleader (Mr. E. B. Powell), for respondent, took the preliminary objection that there is no appeal provided by the Madras Regulation III of 1802; that the order was not a decree within the definition in section 2 of the Code of Civil Procedure; and that section 540 does not confer a right of appeal.

V. Krishnasami Ayyar for appellant.—Section 647 of the Code of Civil Procedure makes the procedure in suits applicable to miscellaneous proceedings. The appeal from decrees in suits is part of the procedure. Therefore, section 647 gives a right of appeal from an order in miscellaneous proceedings. In a case under the Religious Endowments Act XX of 1863, an appeal was held to lie from an order passed upon an application, though the Act itself gave no appeal; *Sultan Acken Sahib v. Shaik Rava Maliniyar*(1). The decision of the Privy Council in *Meenakshi Naidoo v. Subramaniya Sastri*(2) does not touch the case last cited.

The Government Pleader, in reply, referred to *Hureenath Koondoo v. Modhoo Soodan Saha*(3), and contended that the

* Civil Miscellaneous Appeal No. 6 of 1900 against the order of T. M. Horsfall, Acting District Judge of Bellary, in Civil Miscellaneous Petition No. 507 of 1897.

(1) I.L.R., 4 Mad., 295.

(2) L.R., 14 I.A., 160; I.L.R., 11 Mad., 26.

(3) 19 W.R., (C.R.), 122.

1900.
August 16.

NARASAYYA
v.
THE
COLLECTOR
OF
ANANTAPUR.

decision in *Meenakshi Naidoo v. Subramaniya Sastri*(1) did, in effect, overrule the decision in *Sultan Acken Sahib v. Shaik Bava Malimiyar*(2).

JUDGMENT.—We think that the preliminary objection taken by the Government Pleader is well founded, and that no appeal lies against the order of the District Judge passed under section 16, clause 7, of Madras Regulation III of 1802.

The vakil for the appellant argues that an appeal is given by section 647, Civil Procedure Code, and relies on the decision of this Court in *Sultan Acken Sahib v. Shaik Bava Malimiyar*(2).

That decision must, however, be held to be overruled by the decision of the Privy Council in *Meenakshi Naidoo v. Subramaniya Sastri*(1). In the case of *Hureenath Koondoo v. Modhoo Soodun Saha*(3) it was held that no appeal was given by section 38 of Act XXIII of 1861 against an order passed under Regulation I of 1798. We do not think that, so far as the present matter is concerned, section 647 of the present Civil Procedure Code differs in any material degree from section 38 of Act XXIII of 1861, and in our opinion, the grounds of that decision are applicable to the present case. We dismiss this appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Davies.

SESHA AYYAR AND ANOTHER (PLAINTIFFS NOS. 2 AND 3),
APPELLANTS,

v.

KRISHNA AYYANGAR AND OTHERS (DEFENDANTS NOS. 1 TO 26
AND LEGAL REPRESENTATIVE OF PLAINTIFF No. 1),
RESPONDENTS.*

*Transfer of Property Act—Act IV of 1882, s. 82—Contribution to mortgage
debt—Liability of land in possession of third person.*

Certain land was mortgaged to R. Subsequently a portion of the land comprised in R's mortgage was mortgaged to plaintiffs together with other land. R then obtained a decree on his mortgage, in pursuance whereof the said

(1) L.R., 14 I.A., 160; I.L.R., 11 Mad., 26.

(2) I.L.R., 4 Mad., 295.

(3) 19 W.R., (C.R.), 122.

* Appeal No. 64 of 1899 against the decree of G. T. Mackenzie, District Judge of Coimbatore, in Original Suit No 15 of 1897.

portion of R's security which was also mortgaged to plaintiffs was sold. R's decree was thus satisfied, without the necessity for the sale of the remaining land which comprised R's security. This remaining land was purchased by some of the defendants. Plaintiffs now sued on their mortgage, and claimed not only as against their mortgagors, and the property comprised in their security, but also, on the principle of contribution, sought to charge any balance which might still remain due as against the remaining land already referred to as having been purchased by some of the defendants:

Held, that plaintiffs were not entitled to enforce contribution against the defendants.

Seemle, that if the claim for contribution were maintainable it ought not to have been joined with the ordinary claim on a mortgage.

Plaintiffs had purchased a portion of the property comprised in their own mortgage when it was sold in execution of R's decree, already referred to. By that purchase they had made a profit. It was contended that plaintiffs in their character of second mortgagees stood in a fiduciary position towards their mortgagors, and that they were not entitled to be treated as independent strangers buying at an auction sale. There was nothing to show that plaintiffs had taken any advantage of their position:

Held, that plaintiffs took an absolute title such as strangers might have taken.

Held also, that their claim on their mortgage was not affected by their purchase of part of the property, since under the circumstances they must be taken to have paid the full value of the unencumbered property.

The owners of certain property, wishing to raise a sum of Rs. 10,500 on mortgage, executed two mortgages in favour of the same mortgagees, over the same lands, on the same day;—one for Rs. 10,000 and another for Rs. 500. The latter instrument recited the bond for Rs. 10,000 as a prior mortgage. The mortgagees then sued on the mortgage for Rs. 500 and obtained a decree, under which portions of the security were sold, subject to liability under the mortgage for Rs. 10,000. The mortgagees now sued on the mortgage for Rs. 10,000, when it was objected that the suit was not maintainable by reason of section 43 of the Code of Civil Procedure:

Held, that this objection was not sustainable, and that, regarding the case as one of a mere personal claim on the instrument of mortgage, section 43 did not apply.

Suit for money due under a mortgage deed. The plaint alleged that defendants Nos. 1 and 2 had, under a mortgage deed, dated 24th April 1889, mortgaged certain properties mentioned in schedule A to the plaintiffs for Rs. 10,000 bearing interest at 10 per cent. per annum, the latter to be enhanced to 15 per cent. per annum in default of payment at due date. Defendants Nos. 3 and 4 were the undivided sons of defendants Nos. 1 and 2. The fifth defendant had purchased some of the mortgaged properties subject to the plaintiff's mortgage; and, it was claimed, had agreed to pay plaintiffs the debt and interest due to them thereunder. Defendants Nos. 6 to 8 were the undivided sons of fifth

SESHA
AYYAR
v.
KRISHNA
AYYANGAR.

SESHA
 AYYAR
 v.
 KRISHNA
 AYYANGAR.

defendant, and defendants Nos. 9, 10 and 11 had purchased and were in possession of the mortgaged properties from fifth defendant. Defendant No. 12, one Srinivasa Ayyangar, was the father of defendants Nos. 1 and 2, and had mortgaged item No. 7 in the said schedule A, together with the properties comprised in schedule B to the plaintiff, to one Rangayya Goundan. This mortgage was prior in date to plaintiffs'; and Rangayya Goundan had obtained a decree against twelfth defendant, and defendants Nos. 1, 2, 5 and 10 to 25 in pursuance of which the said item No. 7 in schedule A had been sold and his claim satisfied. Certain other properties which were also included in Rangayya Goundan's mortgage had not been sold. These were now numbered as items Nos. 1 to 3 in schedule B to the present plaintiff. It was claimed that these items should have been made answerable to Rangayya Goundan's claim and that the liability should not have fallen solely on item No. 7 of schedule A, which had alone been sold, and which was part of the mortgage security held by plaintiffs. Against these items Nos. 1 to 3 of schedule B, contribution was now claimed, and defendants Nos. 9 to 26, who set up claims to them, were accordingly made parties to the suit. Further facts are set out in the judgment of the District Judge. The decree referred to by him as having been obtained by plaintiff in Original Suit No. 541 of 1891 was in the following terms:—"The plaintiffs have brought this suit stating—that defendants Nos. 1 and 2 borrowed Rs. 500 from plaintiffs and executed a bond on 24th April 1889 in favour of plaintiffs, hypothecating the under-mentioned immovable properties for the said sum of Rs. 500 and for the interest accruing thereon at the rate of Rs. 10 per cent. per annum, agreeing to pay the said sum before 24th April 1897 and the interest of each year on 24th April of that year and in default of paying the interest each year to pay on demand by the holder the principal and interest with interest at 1½ per cent. irrespective of the period fixed for the payment of the principal sum—that though the time for the payment of interest on the principal of the said bond at the said rate for the first year is past, it has not yet been paid, that as the defendants Nos. 1 and 3 are undivided, the first defendant's son, namely, third defendant, is made party herein, that as defendants Nos. 2, 4 and 5 are members of an undivided family, and as their family properties are liable for the plaintiff debt, the second defendant's sons, namely, defendants Nos. 4 and 5, are

SESHA
 AYYAR
 v.
 KRISHNA
 AYYANGAR.

made parties hereto and hence the plaintiff prays for a decree for Rs. 693-4-0 inclusive of principal and interest
 DECREE:—This suit coming on for final disposal . . . the defendants having allowed the suit to proceed *ex parte*, the Court doth order and decree that plaintiffs do recover from defendants Nos. 1 and 2 the suit amount, Rs. 693-4-0, and Court costs on a day subsequent to the expiry of two months from this date and that, in default of payment by defendants, the plaintiffs do recover the same by causing the hypothecated properties to be sold." The judgment of the District Judge was as follows:—"One Srinivasa Ayyangar mortgaged to Rangayya Goundan for Rs. 20,000 the seventh item of schedule A and the whole of schedule B attached to this plaintiff. Afterwards he came to a partition with his sons. Two of these sons are the first and second defendants in this suit. After the partition the first and second defendants borrowed, on 24th April 1889, Rs. 10,500 from the plaintiffs, mortgaging to plaintiffs the whole of schedule A. They gave two mortgage bonds, one for Rs. 10,000 and the other for Rs. 500. These bonds are of the same date and both bonds hypothecate the lands in schedule A, but the bond for Rs. 500 recites the bond for Rs. 10,000 as a previous mortgage. Plaintiffs filed suit No. 541 of 1891 upon their mortgage for Rs. 500 and obtained a decree. In the execution sale under that decree items Nos. 1 to 6 of schedule A were brought to sale and were purchased by the fifth defendant with a recited liability to the previous mortgage of Rs. 10,000. Rangayya Goundan filed suit No. 19 of 1894 upon his mortgage for Rs. 20,000. In execution of his decree item No. 7 in schedule A and item No. 4 of schedule B were brought to sale and were purchased by one of the plaintiffs in this suit and by another man. It is said that the fifth defendant, after he purchased at the auction sale of suit No. 541 of 1891, gave an undertaking to pay the previous mortgage of Rs. 10,000 held by plaintiffs. Plaintiffs now sue upon their mortgage for Rs. 10,000. They claim the money not only from first and second defendants who executed the bond, but also from fifth defendant who agreed to pay the sum and they pray not only that the mortgaged property be sold, but also for contribution from those whose property was not brought to sale in execution of suit No. 19 of 1894. In the written statements and in the oral discussion at the settlement of issues, many objections were taken to this suit. The following

SESHA
AYYAR
v.
KRISHNA
AYYANGAR.

issues (among others) were Nos. 9, 10 and 11 had purchased and from bringing this suit as they did not include the plaint document in a previous suit No. 541 of 1891 on the file of the District Munsif of Coimbatore? (ii) Is this suit bad, defective or premature for misjoinder of causes of action and parties, that is to say, in suing for a contribution and on a mortgage? (vii) Which of the defendants and what property in their hands is liable to contribute? (ix) Whether plaintiffs have purchased lands sold in suit No. 19 of 1894 for an inadequate price or in the name of their gumastah, and if so whether plaintiffs' right to sue is extinguished thereby. (x) Is the interest claimed correct? Upon the first issue the contention of the first and second defendants is that they borrowed Rs. 10,500 as one transaction, that plaintiffs for their own convenience split it into two mortgages, because they had an old stamped paper which would suffice for the bond for Rs. 10,000, that the two bonds constitute one cause of action and that this bond for Rs. 10,000 ought to have been comprised in the suit that was filed on the bond for Rs. 500. To this, plaintiffs reply that the transactions were separate, because the recitals in the two bonds show that the plaintiffs were to devote the Rs. 10,000 to clearing off some debts due by defendants and were to advance the Rs. 500 in cash. I think that the reply does not establish a good distinction. Notwithstanding that part was to be paid in cash and part was to be paid by clearing off debts, the whole Rs. 10,500 could form the consideration for one mortgage. But I see no reason why plaintiffs should not split up their claim by two registered bonds and I think that section 99 of the Transfer of Property Act does not prevent it. Also, I think that as the first and second defendants consented to execute two bonds, this attempt to evade one of the bonds is not honest. On the first issue, I find that the suit will lie (*Umed Dholchand v. Pir Saheb Jiva Miya*(1)). It will be convenient next to clear the fifth defendant out of the way. When a decree had been given in suit No. 541 of 1891, the suit on the bond for Rs. 500, this fifth defendant in execution purchased, for the very low sum of Rs. 800, items Nos. 1 to 6 in schedule A, and there is a delivery warrant which shows that he got possession. He afterwards staved off proceedings under the

SESHA
AYYAR
v.
KRISHNA
AYYANGAR.

other bond for Rs. 10,000, hence the plaintiffs some of the interest due on that bond and in order to raise funds to pay this interest, the fifth defendant sold to the ninth, tenth and eleventh defendants for Rs. 1,500 fields Nos. 253 and 254, which are part of item No. 6 of schedule A. Also, it is said that fifth defendant executed an agreement to plaintiffs undertaking to pay off the bond for Rs. 10,000. This episode in the case gives rise to various contentions. The first and second defendants say that when fifth defendant purchased the land, which was subject to this mortgage of Rs. 10,000, he became the person most concerned in paying off that mortgage, that he therefore gave this undertaking to pay off that mortgage and that this is a *novatio* under which the liability of the first and second defendants ceases. They, however, admit that they were not parties to that document. They further contend that the payment of interest by the fifth defendant was at the lower rate and that the acceptance of interest at that rate was a waiver of the higher rate now claimed. It appears that fifth defendant paid the interest partly in cash and partly by a promissory note upon which plaintiffs have sued and recovered. The first and second defendants point to a recital in this promissory note that the interest was settled up to date. Fifth defendant does not admit that he executed any agreement and puts plaintiffs to the proof of it. He denies his liability personally for this debt, although he cannot dispute that the property which he purchased may be liable. The ninth, tenth and eleventh defendants say that they purchased the fields Nos. 253 and 254 with the knowledge of plaintiffs, on the understanding that these fields would be exonerated from the mortgage bond of Rs. 10,000 and that plaintiffs, having accepted the purchase money, Rs. 1,500, from fifth defendant towards interest, are bound by that understanding. They produce no document which sets forth this exoneration. Lastly they ask that, at least, these fields be sold last. Second plaintiff, who was called as the first defence witness said that he lost the agreement which fifth defendant executed. It was not a registered document and no copy is produced. In these circumstances I must find that no such agreement is proved, that there is no personal liability against fifth defendant and that the liability of the first and second defendants remains. Second plaintiff, in the witness box, went on to explain that, at that time, the interest was in default and the principal had therefore become due, that

SESHA
 AYYAR
 v.
 KRISHNA
 AYYANGAR.

second plaintiff threatened to file a suit immediately, that fifth defendant, to stave off that suit, paid part of the interest due and promised to pay the whole sum shortly and that the consideration for plaintiffs' relinquishment of the enhanced rate of interest was the promise that fifth defendant should pay off the principal in two months. As fifth defendant has failed to do this, plaintiffs contend that their right to the enhanced rate of interest has revived. I must find that the promise to pay the whole sum in two months is not proved and I must hold plaintiffs to the recital in the promissory note on which they have sued and must find that there was a waiver of the enhanced rate of interest We now come to the difficult question of contribution. The case stands thus. Rangayya Goundan held a prior mortgage on certain lands. Plaintiffs hold a later mortgage on certain lands, including portion of the hypotheca of Rangayya Goundan. In other words the two mortgages overlap. Rangayya Goundan brings to sale a portion of his hypotheca and that portion includes some of the lands mortgaged to plaintiffs. The plaintiffs now sue to bring to sale the other lands which were mortgaged to them, and for that portion of their hypotheca which was brought to sale by Rangayya Goundan, the plaintiffs claim a contribution from that portion of Rangayya Goundan's hypotheca which was not sold. Plaintiffs contend that they are bound to include in this suit their whole cause of action. I am of opinion that the suit for contribution must fail. Under section 82 of the Transfer of Property Act contribution is a liability which rests upon the various items of mortgaged property and I think that the claim for contribution can be made only by the owner of the item that has been sold. I think that a claim for contribution cannot be made by a mortgagee whose right over the land has not yet ripened into ownership. The ninth issue raises the question whether plaintiffs by purchasing at the auction sale in execution of Rangayya Goundan's decree have made a profit which practically satisfies their mortgages. It is admitted that plaintiffs at that auction sale purchased one-half of the property then sold. Their share of the purchase money would be Rs. 15,305. In a deposition given in the suit on fifth defendant's promissory note the second plaintiff said that the annual rental of the property then bought would be Rs. 4,000 or Rs. 5,000 and he now admits that he leased out a portion of it for Rs. 2,000. Plaintiffs have agreed to sell to Rangayya Goundan for Rs. 20,000 the half

SESHA
 AYYAR
 v.
 KRISHNA
 AYYANGAR.

which they purchased. Thus they have made a profit on the transaction of at least Rs. 4,695. Under the ruling in *Hart v. Tara Prasanna Mukherji*(1), this sum will be deducted from the plaintiff's claim. As I hold that the suit for contribution fails, I have not worked out the calculation of contribution, but the report of the Commissioner is on record and so there are materials for such a calculation. Plaintiffs will have a decree for Rs. 10,000 with interest at ten per cent. per annum from 6th January 1894 to this date, deducting Rs. 4,695 received in profits. Costs on the total after this deduction is made. Interest from this date six per cent. on the whole sum. If not paid, with interest and costs in six months, sell the hypotheca. Personal liability against the first and second defendants. The family property of the third and fourth defendants is liable. Defendants Nos. 5 to 11 will bear their own costs. The costs of the remaining defendants will be borne by plaintiffs. Fields Nos. 253 and 254 will be sold last."

Plaintiffs Nos. 2 and 3 preferred this appeal.

Defendants Nos. 1 and 2 filed a memorandum of objections

Sundara Ayyar and *Anantakrishna Ayyar* for the appellants. — The plaintiffs are entitled to contribution from those properties included in Rangayya Goundan's mortgage which were not sold. All those properties were bound to contribute rateably towards Rangayya's mortgage; but inasmuch as the sale of item No. 7 of schedule A fetched enough to pay Rangayya's debt, the others were not sold. They were thus benefited by the sale of item No. 7, and are bound to contribute rateably towards plaintiffs' mortgage. Plaintiffs' original right as against item No. 7 is now, by the sale of that item by Rangayya, converted into a right against the other items included in Rangayya's mortgage. [They referred to the following cases:—*Trimmer v. Bayne*(2); *Aldrich v. Cooper*(3); *In re Mower's Trusts*(4); *South v. Bloxam*(5); also to Robbins on 'Mortgages,' volume I, pages 778, 779; Fisher on 'Mortgages,' paragraphs 1347, 1357 and 1502.] The lower Court erred in deducting the profit made by the plaintiffs in purchasing the item No. 7 in the Court sale. No undue advantage was taken by them in that sale. As they were not decree-holders in that

(1) I.L.R., 11 Calc., 718, at page 730.
 (3) 1 W. & T.L.C., p. 46.
 (5) 34 L.J., Ch., 369 at p. 372.

(2) 9 Vesey, 209.
 (4) L.R., 8 Eq., 110.

SESHA,
 AYYAR
 v.
 KRISHNA
 AYYANGAR.

suit, they were not bound to obtain leave to bid in the auction; and there is no provision compelling persons other than decree-holders to obtain leave to bid. The case of *Shaw v. Bunny*(1) which has been followed by Privy Council in *Rajah Kishendatt Ram v. Rajah Mumtaz Ali Khan*(2) is conclusive on this point. A second mortgagee purchasing the mortgaged property at a sale held by the first mortgagee acquires an absolute title. [They referred also to *Mahabir Pershad Singh v. Macnaghten*(3); *Gunga Pershad v. Jawahir Singh*(4); *Mahomed Mira Ravuthar v. Savvasi Vijaya Raghunatha Gopalar*(5); *Nand Kishore v. Raja Hariraj Singh*(6).]

Sir V. Bhashyam Ayyangar and S. Srinivasa Ayyangar for respondents Nos. 1 and 2:—The suit is barred by section 43 of the Civil Procedure Code. The present claim should have been included in the previous suit on the Rs. 500 mortgage. [They referred to *Kalandan v. Pakrichi*(7); *Anderson, Wright and Co., v. Kalagarla Surjinaraian*(8); *Duncan Brothers & Co. v. Jeetmull Greedharee Lall*(9); *Syud Enam Momtazooddeen Mahomed v. Rajcoomar Dass*(10).] Again, the suit is bad for misjoinder of causes of action. The cause of action for contribution does not arise till loss has been actually sustained. The plaintiffs should first sell items Nos. 1 to 6, and it is only when their mortgage is still unsatisfied that their cause of action for contribution will arise. The suit being bad for misjoinder of causes of action it should be dismissed (*Narsingh Das v. Mangal Dubey*(11); *Bhagwati Prasad Gir v. Bindeshri Gir*(12); *Jogendra Nath Roy Bahadur v. Price*(13)). As regards the question raised by the ninth issue, the plaintiffs' mortgage is extinguished, and they cannot sue upon it. See *Syud Enam Momtazooddeen Mahomed v. Rajcoomar Dass*(10); *Bhuggobutty Dossee v. Shamachurn Bose*(14); *Narsidas Jitram v. Joglekar*(15); *Martand v. Dhando*(16). Even if the mortgage is not extinguished, the plaintiffs should give credit for the profit they made in the purchase of item No. 7. The mortgagee is always under a disability. He cannot purchase the mortgaged properties,

(1) 34 L.J., Ch., 257; 33 Beav., 494.

(2) L.R., 6 I.A., 145; I.L.R., 5 Cal., 198 at p. 211.

(3) L.R., 16 I.A., 107; I.L.R., 16 Cal., 682. (4) I.L.R., 19 Cal., 4. p. defend-

(5) I.L.R., 23 Mad., 227.

(6) I.L.R., 20 All., 23.

(7) I.L.R., 9 Mad., 378.

(8) I.L.R., 12 Cal., 33. that as

(9) I.L.R., 19 Cal., 372.

(10) 14 B.L.R., 408 at p. and Emily,

(11) I.L.R., 5 All., 163.

(12) I.L.R., 6 All., 106. Pl. the

(13) I.L.R., 24 Cal., 584.

(14) I.L.R., 1 Cal., 337. Pl. the

(15) I.L.R., 4 Bom., 57.

(16) I.L.R., 22 Bom., 624. Pl. the

SESHA
 AYYAR
 v.
 KRISHNA
 AYYANGAR.

except with leave of Court. This is clearly pointed out by the Bombay High Court in *Martand v. Dhondo*(1), and that case has been recently followed by a bench of this Court,—*Erusappa Mudaliar v. Commercial and Land Mortgage Bank, Limited*(2). The property purchased by the plaintiffs should also contribute rateably with the other properties comprised in plaintiffs' mortgage. [They referred to section 67 of the Transfer of Property Act, and to the following cases also:—*Narayan v. Ganpat*(3); *Nawab Azimut Ali Khan v. Jowahir Sing*(4); *Nilakant Banerji v. Suresh Chandra Mullick*(5); *Krishnasami Ayyar v. Janakiammal*(6); *Moro Raghunath v. Balaji Trimbak*(7); *Chunna Lal v. Anandi Lal*(8); *Nand Kishore v. Raja Hariraj Singh*(9).]

Sivasami Ayyar and Kasturiranga Ayyangar, for respondents Nos. 5, 13, 16 and 26, argued that plaintiffs' suit for contribution should fail and that they should bear their costs.

The other respondents were not represented.

Sundara Ayyar in reply.—Section 43 is no bar. The mortgage bonds sued on are two separate documents. The one recites the other as a previous mortgage. See *Umed Dholchand v. Pir Saheb Jiva Miya*(10); *Kalandan v. Pakrichi*(11); *Sundar Singh v. Bholu*(12); *Sri Gopal v. Pirthi Singh*(13); *Moro Raghunath v. Balaji Trimbak*(7). On the question of the disability of the mortgagee to purchase the mortgage properties when sold by a prior mortgagee, the case of *Shaw v. Bunny*(14) is conclusive. It has been approved by the Privy Council in *Rajah Kishendatt Ram v. Rajah Mumtaz Ali Khan*(15). The properties having been sold by the first mortgagee, whoever purchases them acquires an absolute title. In all the cases cited by the respondents on this point, the properties were sold subject to the prior mortgage by the subsequent mortgagee. Here they were sold by the first mortgagee free, and the purchaser acquires an absolute title. See *Nand Kishore v. Raja Hariraj Singh*(9) and *Pirjada Ahmadmiya*

(1) I.L.R., 22 Bom., 624.

(2) I.L.R., 23 Mad., 377..

(3) I.L.R., 21 Bom., 619.

(4) 13 M.I.A., 404.

(5) I.L.R., 12 Cal., 414.

(6) I.L.R., 18 Mad., 153.

(7) I.L.R., 13 Bom., 45.

(8) I.L.R., 19 All., 196.

(9) I.L.R., 20 All., 23.

(10) I.L.R., 7 Bom., 134.

(11) I.L.R., 9 Mad., 378.

(12) I.L.R., 20 All., 322.

(13) I.L.R., 20 All., 110 at p. 112.

(14) 34 L.J., Ch., 257; 33 Beav., 494.

(15) L.R., 6 I.A., 145; I.L.R., 5 Cal., 198 at p. 211.

SESHA
 AYYAR
 v.
 KRISHNA
 AYYANGAR.

v. *Sha Kalidas Kanji*(1). The lower Court ought to have awarded interest at the enhanced contract rate from the date of default in 1894 till date of realization (*Rameswar Koer v. Mahomed Mehdi Hossein Khan*(2)).

JUDGMENT.—The plaintiffs are the holders of a mortgage for Rs. 10,000 executed on the 24th April 1889. Besides seeking to enforce the ordinary remedies of mortgagees against their mortgagors and against the property comprised in the mortgage, they claim on the principle of contribution to charge any balance which may still remain due to them against certain other property which, with the property comprised in their own mortgage, was included in a prior mortgage executed in favour of Rangayya Goundan. It will be convenient to deal first with this latter claim, as to which it is argued, firstly, that in point of law it cannot be maintained and, secondly, that it cannot properly be joined in a suit by the mortgagee on his own mortgage. The claim arises in this way—

In execution of the decree on Rangayya Goundan's mortgage, some of the property which is included in the later mortgage of the plaintiffs was sold and to that extent the plaintiffs' security has been diminished. It was not competent to the plaintiffs, though they were parties to Rangayya Goundan's suit, to insist that he should prosecute his claim in the first instance against the property other than that comprised in the plaintiffs' mortgage, because the plaintiffs had notice of Rangayya Goundan's mortgage and therefore could not call in aid the provision of section 81 of the Transfer of Property Act. Their case is that they, being interested in property X, comprised in both mortgages, are entitled, as against the defendants who have become possessed of property Y, comprised in Rangayya Goundan's mortgage only, to make them contribute to Rangayya Goundan's claim, inasmuch as that claim has been paid off out of property X. It is not necessary to consider the effect of section 56. The question is whether, under section 82 of the Act, the plaintiffs have any legal claim against a third person in possession of property Y. The second paragraph of the section clearly has no bearing on the present case; for that paragraph merely deals with a case in which, the first mortgage having been paid off out of the only property comprised in it, it remains to be determined how the second

(1) I.L.R., 21 Bom., 544.

(2) I.L.R., 26 Cal., 39.

SESHA
 AYYAR
 v.
 KRISHNA
 AYYANGAR.

mortgage debt is to be borne as between the remainder of that property and another property which is also made security for the second debt. In such a case contribution works, not in favour of the second mortgagee, but in favour of other persons interested in one or other of the two properties comprised in his mortgage. Nor do we think that the first paragraph of the section is applicable in the circumstances of the case. If the plaintiffs, instead of taking a mortgage on the 24th April 1889, had bought the property then mortgaged to them and had, as purchasers, been included in Rangayya Goundan's suit and had allowed that property to be sold under his decree, what possible right could they have had to claim compensation at the expense of persons interested in other property included in Rangayya Goundan's mortgage? *Ex hypothesi*, Rangayya Goundan's claim has been satisfied and nothing has been done to keep his lien alive for the benefit of the plaintiffs. The first paragraph does not provide for the keeping alive of the lien after the mortgage debt has been paid, for it merely declares the manner in which the debt shall be borne by the several properties. It would come into effect when the administration of the estate of the mortgagor was under consideration and may be taken to recognise a lien possessed by the person who, being interested in one of the mortgaged properties, pays off the debt and so acquires a right of contribution; but we do not think that the section gives any further right. In the present case the plaintiffs, who certainly cannot be in a better position than they would be if they had simply bought part of the mortgaged property subsequently sold under Rangayya Goundan's decree, had their opportunity, and they might, by paying off the debt and saving the property from sale, have acquired a right of contribution secured by a lien on the other property. They would then have stood in a position analogous to that of one of several mortgagors who has redeemed the whole property and claims to take advantage of section 95 of the Act. But the plaintiffs did nothing and, therefore, no right of contribution arose and the other property stood free from any lien.

The principle of contribution is not peculiar to the law of mortgage. Whenever estates are subject to a common demand and that demand is satisfied by the person interested in one of them, he has the right to call upon the other owners to contribute, and, if the demand was on account of land revenue payable to Government,

SESHA
Ayyar
v.
KRISHNA
Ayyangar.

it has been held in this Court that he has in addition a lien on the land of others forming part of the entire estate in respect of which revenue was payable (*Seshagiri v. Pichu*(1)). It has never been suggested that, in such cases, any lien could come into existence unless there had been an antecedent payment and a consequent right of contribution. We are aware that in the Allahabad High Court there are cases which seem to justify the notion that section 82 of the Transfer of Property Act has a wider operation (*Ibu Husain v. Ramdai*(2); *Baldeo Sahai v. Baij Nath*(3)); but the point does not seem to have been argued. The cases of *Chagandas v. Gansing*(4) and *Jagat Narain v. Qutub Husain*(5) are illustrations of the ordinary claim for contribution. In the passage cited in argument from Robbins on 'Mortgages,' volume 1, page 779, it is stated that one of the owners has paid off the debt; and there is a close resemblance between the language of that paragraph and the language of the section. In our opinion section 82 does not justify the notion that a man who has bought a property which at one time was, with other property, subject to a mortgage may, after the mortgage debt has passed into a decree and after the decree has been satisfied by the sale of that other property, be held responsible for part of the mortgage debt and, therefore, the suit as against the defendants interested in property Y was rightly dismissed. If the claim were maintainable, we should also be prepared to hold that it ought not to have been joined with the ordinary claim on the mortgage. Accordingly we dismiss the appeal as regards respondents Nos. 9, 10, 11 and 13 to 26, with costs payable to defendants Nos. 13 and 26.

It remains to consider the question raised by the ninth ground of appeal and also the objections taken on behalf of the first and second respondents. The objections actually argued resolve themselves into the question whether, in view of the fact that the plaintiffs had another mortgage of even date comprising the same property and had obtained a decree on that mortgage, they could maintain this suit. It appears that, on the 24th April 1889, besides the mortgage already mentioned for Rs. 10,000, another mortgage for Rs. 500 was executed in the plaintiffs' favour. It cannot be

(1) I.L.R., 11 Mad., 452 at p. 457.

(3) I.L.R., 13 All., 371.

(5) I.L.R., 2 All., 807.

(2) I.L.R., 12 All., 110 at p. 114.

(4) I.L.R., 20 Bom., 615.

SESHA
Ayyar
v.
KRISHNA
Ayyangar.

doubted that it was owing to the accident that the plaintiffs already had a stamped paper which sufficed for a Rs. 500 mortgage that the transaction was split up into two. In 1891 a suit was brought on the Rs. 500 mortgage, decree was passed, and under the decree some property was sold to the present fifth defendant. In the plaint it is stated that this sale was made subject to the plaintiffs' mortgage for Rs. 10,000 and the averment, so far from being denied by the defendants, is admitted by the second and fifth defendants. It is argued, however, on their behalf that section 43 of the Code of Civil Procedure prohibits the institution of the second suit which is now brought. Regarding the case as one of a mere personal claim on the instrument of mortgage, we think it is clear that section 43 does not apply. It may be true that the term "cause of action" is used in that section in a peculiar way, but we do not think that when parties, for whatever reason, choose to agree that there should be two instruments and two obligations, the Courts are justified in saying that there is only one obligation. The case put by Sir V. Bhashyam Ayyangar, of a man advancing Rs. 10,000 on a deposit of title-deeds and then on another day advancing another such sum on the same security is, we think, distinguishable; for, in that case, there would not be the declared intention of the parties that the two loans should be treated as giving rise to distinct obligations. The case would be in no way different from that in which successive loans were made without any written instrument or security. It is then contended that the fact that the same security is given by both instruments made it obligatory on the plaintiffs to join in one suit the two claims and that it was not competent to them to ask in a suit on the Rs. 500 mortgage for a sale of the property subject to the other mortgage. Whether the suit of 1891 on the Rs. 500 mortgage was a suit which, having regard to sections 85 and 99 of the Transfer of Property Act, ought to have been maintained and whether in that suit the relief given was lawfully given, are questions which we need not consider. We have to deal with the admitted fact that under the decree, rightly or wrongly made in that suit, property was sold subject to the mortgage now sued on; and, unless it can be said that the suit is barred by section 43 of the Code of Civil Procedure, we think we are bound to hold that the suit is maintainable. In our opinion that section does not apply and this objection must be overruled.

SESHA
ATTAR
v.
KRISHNA
ATTANGAR.

There are two questions raised by the appellants. The District Judge has found that the plaintiffs waived their right to interest at the enhanced rate. We cannot agree with this finding. In our opinion the intention was to do no more than waive interest at the higher rate up to the date of the promissory note which was given.

The other question relates to the point raised by the ninth issue. The District Judge has deducted Rs. 4,695 from the amount of the plaintiffs' claim, and in doing so he professes to follow the ruling in *Hart v. Tara Prasanna Mukherji*(1). The sum deducted represents, according to the Judge, the profit which the plaintiffs have made by their purchase at the sale in execution of Rangayya Goundan's decree of a part of the property comprised in their own mortgage. The case of *Hart v. Tara Prasanna Mukherji*(1) so far resembles the present that in both cases there is found a mortgagee buying at one execution sale part of the mortgaged property. In other respects the cases are totally different. Here it is not the decree-holder who has bought, and the question does not arise between rival creditors of the mortgagor but between the mortgagee and his mortgagor (see *Sheonath Doss v. Janki Prosad Singh*(2)). Moreover, the judgment in the case, in so far as it favours the notion that a mortgagee decree-holder, who buys, having first obtained leave to bid, is in the position of a trustee cannot be supported; for it has been distinctly decided by the Judicial Committee that leave obtained removes the disability under which, in the absence of leave, a decree-holder labours. In the present case the plaintiffs not being decree-holders at the time of the purchase, it is argued that in their character of second mortgagees they stood in a fiduciary position towards their mortgagors and therefore cannot be treated as independent strangers buying at an auction sale. *Shaw v. Bunny*(3) gives a complete answer on this point. There, Lord Justice Knight Bruce, affirming a decision of the Master of the Rolls, held that the defendant who had bought a house sold by a first mortgagee in exercise of his power of sale had, though himself a second mortgagee of the same house, acquired an irredeemable and absolute title such as a stranger buying under the circumstances would have taken. It might have made a difference, he added, if the

(1) I.L.R., 11 Calc., 718 at p. 730. (2) I.L.R. 16 Calc., 132 at p. 136.
(3) 34 L.J., Ch., 257.

SESHA
ATTAR
v.
KRISHNA
ATTANGAR.

defendant "had availed himself of his position as a mortgagee to procure some facility or advantage relating to the purchase or connected with it." This statement of the law being clearly approved by the Judicial Committee in *Rajah Kishendatt Ram v. Rajah Muntaz Ali Khan*(1), we are bound to follow it, and therefore to disregard the case of *Erusappa Mudaliar v. Commercial and Land Mortgage Bank, Limited*(2), which was cited, if that case conflicts with *Shaw v. Bunny*(3). No difference can be suggested between the position of a second mortgagee buying as the defendant bought in *Shaw v. Bunny*(3) and the plaintiffs buying, as they did, at the sale in execution of the decree in which they were parties and which was obtained at the suit of the first mortgagee. In either case the title conveyed is that which the mortgagor and mortgagee could have legally conveyed at the date of the mortgage and the purchaser takes the property free from any claim by the second mortgagee. We must, therefore, hold that the plaintiffs took an absolute title such as strangers might have taken. They were under no sort of disability and there is nothing to show that they took any advantage of their position (see section 90, Indian Trusts Act)

This then being the state of things, it has to be asked how the plaintiffs' claim on their mortgage is affected by their purchase of part of the property. When the facts are once understood it seems clear that the purchase has no effect at all, since presumably the whole value of the unincumbered property was paid by the plaintiffs. There are, however, cases which seem to support the general proposition that a mortgagee who purchases part of the mortgaged property must submit to some reduction of his claim. In several Allahabad cases language has been used which may be held to justify that proposition (*Ballam Das v. Amar Raj*(4); *Chunna Lal v. Anandi Lal*(5); *Nand Kishore v. Raja Hariraj Singh*(6)); and a case decided in this Court was also cited. In *Nand Kishore v. Raja Hariraj Singh*(6), there had been two mortgages to the same person and there were two decrees; a part of the mortgaged property included in the first mortgage was sold in execution of another decree, a decree for money, and bought by

(1) L.R., 6 I.A., 145; I.L.R., 5 Calc., 198 at p. 211. (2) I.L.R., 23 Mad., 377.
(3) 34 L.J., Ch., 257. (4) I.L.R., 12 All., 537.
(5) I.L.R., 19 All., 196. (6) I.L.R., 20 All., 23.

SESHA
 AYYAR
 v.
 KRISHNA
 AYYANGAR.

the mortgagee, and another part of the property included in both mortgages was sold under the decree on the second mortgage and bought by the mortgagee. The question was whether the decree on the first mortgage was absolutely discharged by these purchases, and the question was answered in the negative. It was assumed that to some extent the decree must have been satisfied by the purchases and, regard being had to the special facts, the rightness of that assumption cannot be questioned; for it is clear that a person bidding at the sale under the decree on the second mortgage could only have expected to buy the property subject to the first mortgage and that in calculating the amount of his bid he would take into account the proportionate part of the mortgage money on the property. The mortgagee who cannot be supposed to have paid any higher price could not be allowed to gain the difference between the value of the property unincumbered and the value of it subject to the proportionate part of the debt, and therefore would rightly be made to submit to a proportionate reduction of his claim. *Chunna Lal v. Anandi Lal*(1) is another case in which the sale was made subject to an existing incumbrance (see also *Lakhmidas v. Jamnadas*(2); *Pirjada Ahmadiya v. Shah Kalidas Kanji*(3)). It was otherwise in *Ballam Das v. Amar Raj*(4), but that case is questioned by Banerji, J., in *Nand Kishore v. Raja Hariraj Singh*(5) and is not easy to understand. The cases in which the property has been sold and bought subject to the mortgage which it is sought to enforce are clearly distinguishable from the present case in which the purchasers, though they happened to be mortgagees, must be taken to have paid the full value of the unincumbered property.

No less distinguishable are those cases in which the mortgagee, having under his decree for sale bought part of the mortgaged property, proceeds to execute his decree against other property or against the mortgagor personally. It is plain that in such a case the mortgagee must give credit for the amount of his bid, it being assumed that he had leave to bid and to set off the amount of his decree against the purchase money. We refer by way of illustration to *Sheonath Doss v. Junki Prosad Singh*(6) and *Gunga Pershad*

SESHA
 AYYAR
 v.
 KRISHNA
 AYYANGAR.

v. Jawahir Singh(1). See *Lakhmidas v. Jamnadas*(2). There are, again, the cases in which, in consequence of a purchase made by the mortgagee from one of the mortgagors, the question arises as between the mortgagee and the other mortgagors. Those cases also are radically different from the present, because it cannot be supposed that a mortgagee buying under such circumstances has dealt with the mortgagor as if he were the holder of unencumbered property. On the contrary, it must be taken that, in calculating the price paid by the mortgagee, allowance has been made to him for a proportionate part of the mortgage debt. The case in *Krishnasami Ayyar v. Janakiammal*(3) belongs to the class of cases in which a decree-holder, having bought at the sale in execution of his own decree, proceeds to further execution of the decree against the judgment-debtor. It is thus distinguishable from the present because, here, it will be remembered, it was at the sale in execution of Rangayya Goundan's decree that the plaintiffs bought. For some reason which is not clear the Court held that the decree-holder ought to give credit, not for the mere amount of his bid but for that sum *plus* "the amount undertaken to be paid to the mortgagee."

On the facts of the present case, it being granted that the plaintiffs, with regard to their purchase at the sale in execution of Rangayya Goundan's decree, must be treated as strangers and that the whole property free from incumbrance and free from the plaintiffs' right of redemption was put up for sale and bought, we can see no ground for holding that their claim under their mortgage is in any way impaired. The sale to the plaintiffs was not effected at their instance and brought no gain to them. It had the effect of diminishing the security, but it leaves the plaintiffs' claim as against the other property included in their own mortgage as it was before, wholly unsatisfied.

The decree must be amended by substituting for the amount decreed the full amount of the claim *minus* the sum of Rs. 1,500-13-4 admitted to have been received by the plaintiffs and, with regard to interest, by giving interest at the enhanced rate from the rate of the promissory note up to the date fixed for payment. The decree must also be amended by fixing the

(1) I.L.R., 19 All., 196.

(3) I.L.R., 21 Bom., 544.

(5) I.L.R., 20 All., 23.

(2) I.L.R., 22 Bom., 304 at p. 313.

(4) I.L.R., 12 All., 537.

(6) I.L.R., 16 Cal., 132.

(1) I.L.R., 19 Cal., 4. (2) I.L.R., 22 Bom., 304 at p. 313.

(3) I.L.R., 18 Mad., 153.

SESHA
 AYYAR
 v.
 KRISHNA
 AYYANGAR.

28th February 1901 as the day for payment. In the result, there will be a decree for Rs. 18,156-9-10 with interest at 15 per cent. on the principal Rs. 8,500 up to 28th February 1901, or till payment, if sooner. The first, second, ninth, tenth and eleventh defendants must pay the costs of plaintiffs calculated on the amount allowed by the decree.

The appeal is dismissed as against the sixteenth respondent with costs and also against fifth respondent with costs.

The memorandum of objections is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Moore.

HARISCHANDRA DEVU (PLAINTIFF), APPELLANT,

v.

PRESIDENT, DISTRICT BOARD OF GANJAM (DEFENDANT),
 RESPONDENT.*

Local Boards Act (Madras)—Act V of 1884, ss. 57, 64, 149—Wrongful collection of land cess from inamdar—Suit for its recovery against President, District Board—Maintainability of suit.

A sum of money was collected from an inamdar as land cess under section 57 of the Madras Local Boards Act, 1884. The amount had been assessed by the Collector of the district under section 64, collected by him and subsequently paid to the credit of the District Fund, under section 149 of the said Act. The inamdar filed a suit against the President of the District Board to recover the amount on the ground that it had been illegally collected from him. There was no claim for damages. On its being objected that the suit was wrongly brought against the President of the District Board:

Held, that the suit was not maintainable. The assessment and the collection of which plaintiff complained were not the acts of the defendant, who could not be called upon to make good the amount said to have been wrongly collected merely because it had eventually been paid over to the credit of the District Board.

* Second Appeal No. 513 of 1899 against the decree of F. Murray, District Judge of Berhampur, in Appeal Suit No. 110 of 1898, reversing the decree of V. Krishnamurti Pantulu, District Munsif of Sompeta, in Original Suit No. 483 of 1897.

HARIS-
 CHANDRA
 DEVU
 v.
 PRESIDENT,
 DISTRICT
 BOARD OF
 GANJAM.

Suit to recover money collected from plaintiff under the Madras Local Boards Act, 1884. Plaintiff alleged that the defendant had fixed road cess on certain lands which were not in his possession or enjoyment and had wrongly collected the tax from plaintiff. The defence was that inasmuch as the tax had been imposed and collected by the Collector of the district, as such, the suit should have been filed against that official and not against the present defendant, and that the suit was in consequence bad in law as having been brought against a wrong defendant. This question was raised in an issue, and the District Munsif held that the suit was rightly brought, and decreed that the amount of land cess in question be refunded to plaintiff. The defendant appealed to the District Judge who said:—"The first question is whether the suit is maintainable against the President of the District Board, since it is claimed the Collector ought to have been sued. Now there is no doubt that the same person is both Collector and President, District Board, but it depends in what capacity he acts as to how he should be sued, for the proper defendant in the case of a suit against the Collector is the Secretary of State, and notice of two months is necessary to that functionary, so that the suit fails if it is ruled that the President, District Board, is the wrong man. The plaint cess, I find, was most clearly imposed and collected by the Collector and not by the President, District Board. Although the plaintiff has not filed the notice of demand he admits by his *vakil* it was a notice by the Collector. Now a Collector has to collect money in many capacities and for many purposes and if he collects a wrong amount, no matter for what purpose, he is presumably liable to a civil action and not the man, men, corporation, board or other body to whom he may hand over the money wrongly so collected. That he himself may also be the head, voluntarily or involuntarily, of such board or corporation is a mere accident. What he collects he collects as Collector only, or in other words, as the head and chief of the public administration of that district *per se* and for all his actions in that position he is liable as Collector or Agent of the Secretary of State. The Munsif holds him to be the Agent of the District Board—a view I hold to be utterly wrong. Plaintiff relies on sections 57, 58, 59 and 60 of the Local Boards Act V of 1884. These give the Board power to issue a notification that a tax will be levied with the sanction of the Governor in Council, who is the Collector's superior, be it noticed,

HARIS-
CHANDRA
DEVU
v.
PRESIDENT,
DISTRICT
BOARD OF
GANJAM.

for without that sanction the Collector could not act. Section 64 prescribes the manner of fixing land cess and sections 65 *et seq* show how the Collector can require the information necessary to be filed and can even himself fix under section 68 the land cess. Obviously he does not do this as agent or head of the District Board, but as Collector and as chief officer administering the public revenues in the district and as having at his hand all the requisite land accounts containing the information necessary to enable him to proceed under section 64. That he does all this by force of his position as chief revenue officer is evidenced by section 71, by which all appeals against his decisions lie, not to his supposed principals, according to plaintiff's view the District Board, but to the Board of Revenue, who have no connection whatever with the District Board. This completely settles the matter. The suit is bad and cannot be maintained. The Munsif's decree is reversed."

Plaintiff preferred this second appeal.

Sundara Ayyar, for appellant, submitted that the suit was rightly brought. The amount had been paid over to the defendant, and he could be sued for a refund if the tax had been, as alleged, wrongly levied.

Mr. D. Chamier, for the Government Pleader, for respondent, contended that the suit should not have been brought against the present defendant. Sections 57 to 76 of Madras Act V of 1884 showed that the assessment was made by the Collector and not by the District Board. The question raised in the suit could only be properly defended by Government, whose interests were directly concerned, and the fact that the money collected had been paid over to the defendant did not remove the liability from the Collector, who had assessed the land and collected the tax from plaintiff.

JUDGMENT.—A sum of money was collected from an inamdar in Ganjam district as land cess under section 57, Act V of 1884, (Madras Local Boards Act).

The amount was assessed by the Collector (section 64, clause II), collected by him and paid in by him to the credit of the District Fund (section 149). The inamdar filed a suit against the President, District Board, to recover the sum on the ground that it had been illegally collected from him. He did not claim damages. The District Munsif decreed as prayed for. The District Judge reversed the decision of the District Munsif on the ground that the Collector, as the person who had collected the

HARIS-
CHANDRA
DEVU
v.
PRESIDENT,
DISTRICT
BOARD OF
GANJAM.

money, was liable, and not the President, District Board. For the appellant (inamdar) it is urged that the money was illegally collected from him, that it has been paid over to the President, District Board, by the Collector who collected it, and that he is entitled to recover it from the former in whose possession it now is. For the President, District Board, the main argument put forward is that the suit should have been brought against the Secretary of State, and that the question of the liability or otherwise of the inamdar is an important one in which the interests of Government are involved. It is urged that the assessment, collection and in fact everything that the inamdar complains of was done by the Collector, and that the mere fact that the money has found its way into the hands of the President, District Board, does not make him liable. We are of opinion that the decision of the District Judge is right. All the wrong that the appellant alleges was caused to him was caused by the acts of the Collector. It is the Collector who, he contends, has wrongly assessed him and illegally collected the tax from him. The President of the Local Board was powerless in the matter and could not have relieved the appellant from the liability imposed on him by the Collector. As the President is not responsible for any part of the wrong alleged to have been done, he cannot be called on to make good the amount said to have been wrongfully collected merely because that sum has eventually been paid over by the Collector to the credit of the District Board.

We dismiss the second appeal with costs.

APPELLATE CIVIL.

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

1900.
August 31.

SUBBA RAO AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

SITARAMAYYA (DEFENDANT), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, s. 586—Suit of a nature cognizable in a Court of Small Causes—Suit for mesne profits—Second appeal—Provincial Small Cause Courts Act—Act IX of 1887, sched. II, art. 31.

A suit for mesne profits is not a suit for an account, but a suit for damages, and is not exempted from the jurisdiction of the Small Cause Courts under article 31 of schedule II to the Provincial Small Cause Courts Act. There is no second appeal from a decision in such a suit.

Suit to recover Rs. 342 as mesne profits. Plaintiffs had in a previous suit sued defendant for possession of certain lands with mesne profits. A decree was granted for possession, but not for the mesne profits claimed. Plaintiffs had appealed in respect of the mesne profits, but without success. The present suit was brought for the same mesne profits. The District Munsif held that the claim was barred under section 13 of the Code of Civil Procedure. The District Judge upheld that finding.

Plaintiffs preferred this second appeal.

Nagabhushanam, (with him *Subba Rao*), for the respondent, took the preliminary objection that no second appeal lay. The claim was for mesne profits, and as the amount was less than Rs. 500, section 586 prohibited a second appeal. He relied on *Seshagiri Ayyar v. Marakathammal*(1) and *Kunjo Behary Singh v. Madhub Chundra Ghose*(2).

Seshagiri Ayyar urged, on behalf of the appellants, that part of the claim in this case was for rent, and so far as the suit was for rent a second appeal lay on the authority of *Vedachala Mudali v. Ramasami Raja*(3) and even so far as the suit was one for mesne

* Second Appeal No. 772 of 1899 against the decree of J. H. Munro, Acting District Judge of Godavari, in Appeal Suit No. 7 of 1899, affirming the decree of A. Raghunadha Rao, District Munsif of Rajahmundry, in Original Suit No. 273 of 1898.

(1) I.L.R., 22 Mad., 196.

(2) I.L.R., 23 Calc., 884.

(3) I.L.R., 22 Mad., 229.

profits, he contended that a second appeal lay, inasmuch as such a suit was exempted from the jurisdiction of Small Cause Courts by article 31 of the second schedule to Act IX of 1887. He contended that a suit for mesne profits was "a suit for the profits of immoveable property belonging to the plaintiffs which have been wrongfully received by the defendant," and pointed out that, as mesne profits could not be determined without an account being taken, every suit for mesne profits was, from its very nature, a suit for an account.

Nagabhushanam, in reply, relied on the record as showing that the tenancy between the parties terminated in 1891, and as the present claim was for the years 1894 and 1895, what was claimed was only mesne profits and not rent. If the suit was for mesne profits, under the Full Bench decision of *Kunjo Behary Singh v. Madhub Chundra Ghose*(1), which was followed in *Seshagiri Ayyar v. Marakathammal*(2), no second appeal lay.

JUDGMENT.—The defendant's tenancy terminated in 1891. When this suit was brought there was no relation of landlord and tenant subsisting between the plaintiffs and the defendant. The defendant was a trespasser and the claim was one for mesne profits. It has been urged on behalf of the appellants that it appears from the claim itself that the mesne profits cannot be ascertained without the taking of an account, and it is sought to distinguish this case from *Seshagiri Ayyar v. Marakathammal*(2) where it was held, following a Full Bench decision of the Calcutta High Court, that a suit for mesne profits is cognizable by a Court of Small Causes. In a sense, no doubt, every claim for mesne profits involves the taking of an account, but a suit for mesne profits is not a suit for an account, but a suit for damages, and is not exempted from the jurisdiction of the Small Cause Courts under article 31 of the second schedule to the Provincial Small Cause Courts Act. We think that the suit was a suit of a nature cognizable in a Court of Small Causes and that the preliminary objection should be upheld.

The second appeal is dismissed with costs.

(1) I.L.R., 23 Calc., 884.

(2) I.L.R., 22 Mad., 196.

SUBBA RAO
v.
SITARA-
MAYYA.

ORIGINAL CIVIL.

*Before Mr. Justice Shephard.*1900.
September
11.IN THE MATTER OF THE LAST WILL AND TESTAMENT OF ROSE
LEARMOUTH (DECEASED).**Probate or Letters of Administration—Jurisdiction of High Court to grant—Estate of a deceased who had not dwelt or left goods within limits of presidency—Succession Act—Act X of 1865, s. 240—Letters Patent, 1862, cl. 34.*

The High Court of Madras has no jurisdiction to grant probate of the will of a testator, or letters of administration of the estate of an intestate, who did not dwell and who did not leave assets within the limits of the presidency.

PETITION for probate. The petitioner, who was described in the petition as residing in Madras, stated that the testator, who had resided in Calcutta, was at the time of her death possessed of property in British India; and that the amount of assets likely to come to the petitioner's hands would not exceed Rs. 7,796. He asked to be at liberty to prove the will in common form, and that probate thereof might be granted to him as the sole executor thereby appointed. The testator had not resided in the Presidency of Madras, nor did she leave any goods or effects within the limits of the presidency.

JUDGMENT.—Under the Letters Patent of 1862 it was ordained that the High Court should "have like power and authority as that which may now be exercised by the said Supreme Court whether within or without the Presidency of Madras in relation to the granting of probate of last wills and testaments and letters of administration of the goods, chattels, credits and all other effects whatsoever of persons dying intestate whether within or without the said presidency" (clause 34). The Letters Patent of 1800 do not seem to define the testamentary jurisdiction of the Supreme Court, but I do not think it can be doubted that its jurisdiction was limited, like that of the Ecclesiastical Courts in England, to the cases in which the deceased testator or intestate had dwelt or his goods and effects were found within the local limits of the jurisdiction of the Court. (See Williams on 'Executor,' pages 293, 407.)

* Testamentary Petition No. 104 (a) of 1900.

The Succession Act, section 240, prescribes the same limits for the jurisdiction of the District Judge, and section 264 declares that the High Court "shall have concurrent jurisdiction with the District Judge in the exercise of all the powers hereby conferred upon the District Judge."

In the present case the testator did not live in the Presidency of Madras nor did she leave any goods or effects within the limits of the presidency.

In my judgment, therefore, the Court has no jurisdiction and the petition must be dismissed.

Messrs. *Barclay, Orr & David*—Attorneys for petitioner.

IN THE MAT-
TER OF ROSE
LEARMOUTH.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Moore.

QUEEN-EMPRESS

v.

MUNDA SHETTI AND OTHERS.*

1900.
September
13.

Criminal Procedure Code—Act V of 1898, s. 195—Alleged forgery of documents submitted to Tahsildar holding enquiry as to transfer of names in Land Register—Revenue Court—Necessity for sanction to prosecute offender.

A Tahsildar, when holding an enquiry as to whether a transfer of names in a land register should be made or not, is a Revenue Court; and before a party to any proceeding in such a Court can be prosecuted for an offence referred to in section 195(c) of the Code of Criminal Procedure, sanction should be obtained.

CASE referred to the High Court for orders. It appeared that a petition had been received by the Tahsildar of Kasaragod by post, which purported to be marked by one Koi Shetti, requesting that certain property standing in the Land Register should be transferred to the name of one of his heirs. The Tahsildar ordered enquiry to be made, with the result that a report and statement

* Criminal Revision Case No. 200 of 1900, referred for the orders of the High Court, under section 438 of the Code of Criminal Procedure, by J. W. F. Dumergue, Sessions Judge of South Canara, in letter No. 1229, dated 2nd June 1900.

QUEEN-
EMPRESS
v.
MUNDA
SHETTI.

was forwarded to him in which Koi Shetti purported to consent to the transfer. The Tahsildar then returned the report with the mark that consent of all Koi Shetti's heirs was necessary before the transfer could be made; and a statement purporting to be signed by Koi Shetti's heirs was submitted, giving the required consent. The Tahsildar thereupon directed the transfer to be made. Some five months later, Koi Shetti presented a petition to the Tahsildar, alleging that the documents referred to were forgeries, and asking that the transfer might be cancelled. This petition was dismissed. Meanwhile one of Koi Shetti's heirs presented a committal complaint to the Stationary Second-class Magistrate accusing seven persons of forgery, of whom four were committed for trial on charges under sections 465 and 471 of the Indian Penal Code. No sanction for the prosecution had been obtained from the Tahsildar, and it was contended, on behalf of the accused, that the Magistrate had, in consequence, no jurisdiction to entertain the complaint. The District Judge considered that the commitment was illegal and should be quashed. He said:—"The documents in respect of which the accused have been charged were given in evidence in a proceeding before the Tahsildar, who was legally authorised to take evidence, whose duty it was to hold an investigation in the matter and who could, under Act III of 1869, have issued summonses for the attendance of witnesses and the production of documents. In *Atchayya v. Gangayya*(1) the Full Bench of the Madras High Court ruled that the word 'Court' used in section 195 of the Code of Criminal Procedure has the same meaning as the word 'Court' in section 3 of the Indian Evidence Act and includes all persons except arbitrators legally authorised to take evidence. That ruling was passed when the Criminal Procedure Code of 1882 was in force; but by sub-section (2) of section 195 of the present Criminal Procedure Code, it is declared that, although the term 'Court' does not include a Registrar or Sub-Registrar under the Indian Registration Act, 1877, it means a Civil, Revenue, or Criminal Court. In my opinion the Tahsildar holding an investigation and taking evidence in this case was undoubtedly a Court, and his sanction was undoubtedly necessary under section 195 of the Code of Criminal Procedure, before the accused could be prosecuted.

(1) I.L.R., 15 Mad., 138.

QUEEN-
EMPRESS
v.
MUNDA
SHETTI.

It is clear from the Tahsildar's order that he would not have granted sanction if it had been applied for. Hence it appears to me that the accused have been greatly prejudiced, and that there has been a failure of justice within the meaning of this term in section 537, Code of Criminal Procedure. Under these circumstances, I submit that the commitment was illegal and ought to be quashed."

Rangachariar, for the Public Prosecutor, for the Crown.

Ayya Ayyar for the complainant.

JUDGMENT.—We agree with the Sessions Judge that the Tahsildar, when holding an enquiry as to whether transfer of the names in a land register should be made or not, was a Revenue Court. He was authorised under Act III of 1869, (Madras), to receive evidence and to decide whether transfer should be made or not. He was therefore, in our opinion, a tribunal empowered to deal with a particular matter and authorised to receive evidence bearing on that matter in order to enable him to arrive at a determination; (*Raghoobuns Sahoy v. Kokil Singh*(1)). It appears, however, that the second accused person alone was a party to the proceeding in the Tahsildar's Court in which the documents alleged to be forgeries were produced. The accused persons Nos. 1, 4 and 5 were not parties, and such being the case sanction in their case was not required under section 195, clause (c), of the Code of Criminal Procedure. We accordingly set aside the committal to the Court of Sessions in the case of the second accused and direct that she be discharged, but decline to interfere in so far as accused Nos. 1, 4 and 5 are concerned.

(1) I.L.R., 17 Calo., 872.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Moore.

QUEEN-EMPRESS

v.

PEELIMUTHU TEVAN AND ANOTHER.*

Penal Code—Act XLV of 1860, s. 144—Unlawful assembly—Evidence of common object.

Two persons were charged with being members of an unlawful assembly armed with deadly weapons for the purpose of committing dacoity. The facts proved were that a crowd of about 100 persons, including the accused, had assembled together, armed with bill-hooks and sticks; and that the crowd had dispersed at once on seeing the police. On these facts the Magistrate assumed that the intention of the members of the crowd was to use criminal force, and, having regard to the weapons with which they were armed, he convicted the accused under section 144 of the Indian Penal Code:

Held, that the prosecution had failed to show that the common object of the crowd was such as would constitute it an unlawful assembly as defined by section 141 of the Indian Penal Code, and that the accused were entitled to be acquitted.

APPEAL against an acquittal. The facts of the case are set out by the Special First-class Magistrate in his judgment, the material portions of which are as follows:—"The accused in this case are 32 in number, all Maravars, belonging to Nilidanallur, Krishnapuram, and surrounding villages. The charge against them is that they assembled unlawfully for the purposes of dacoity on 16th June 1899 at Ommayanpottal. The prosecution case is as follows:—In the early morning of the 16th, first prosecution witness set out from Kurukkalpatti to Vililingapuram where he heard his brother-in-law's house had been looted. On the way, near Chinnakovilingulam, he saw two men in front of him, and another pair in front of those. The former pair addressed the latter 'in what place is the crowd going to meet?' and the latter replied 'in Ommayanpottal, to loot places adjoining Shentbamaram.' On going a little further, first prosecution witness saw a crowd of about 100 persons, and being alarmed, returned to Kurukkalpatti and informed the Station House officer, fourth prose-

* Criminal Appeal No. 179 of 1900, under section 417 of the Code of Criminal Procedure, against the judgment of acquittal passed in Criminal Appeal No. 66 of 1899 by J. Hewetson, Sessions Judge of Tinnevely.

cution witness. The latter sent a constable to summon volunteers and, along with prosecution witnesses Nos. 1-3 and two constables, fifth prosecution witness, and another, set out for Ommayanpottal. They came upon the crowd after crossing and getting on the bund of Shorangudi tank. The crowd made off as soon as they saw the police. The prosecution witnesses chased and caught two of the crowd, accused Nos. 1 and 2, who had sticks and a bill-hook, and brought them back to the police station. All the prosecution witnesses identified before the Court accused Nos. 3-32, who were subsequently arrested and deposed that they were members of the crowd. This account is given by prosecution witnesses Nos. 1-5. Prosecution witnesses Nos. 6 and 7 spoke only to the subsequent identification of accused Nos. 3-32. The defence, as far as could be gathered, did not dispute the presence of the crowd, armed with sticks and bill-hooks at Ommayanpottal, and I see no reason to doubt the evidence on this point. I shall consider (1) the evidence as to the common object of the assembly, (2) the nature of the identification of the accused by the prosecution witnesses. The prosecution witnesses agreed in believing that the intention of the crowd was to commit dacoity. Their reasons are that there was a rumour that their village was going to be looted and that other places had been looted. Second prosecution witness said he heard the crowd say they were going to loot places round Shorattanur. This uncorroborated statement I am not inclined to credit, as second prosecution witness is, in other particulars of his evidence as will be seen, somewhat reckless, and as all the prosecution witnesses agreed in saying that the crowd ran immediately they caught sight of the prosecution witnesses when they were some 25 yards off, and it is not likely the crowd would proclaim its intention then. First prosecution witness based his opinion as to the crowd's intention on the conversation of the four men whom he said he saw on the road and afterwards in the crowd. This account I am not inclined to give much credit to, because (1) the second pair was 25 yards behind the first pair, and the conversation was carried on by shouts, and it is unlikely that they would proclaim their intention so unguardedly; (2) first prosecution witness said he never went nearer either pair than 100 yards, and so the accuracy of what he heard is doubtful; (3) he said he saw all four in the crowd again, but deposed that he could not identify the latter pair; (4) I doubt,

QUEEN-
EMPRESS
v.
PEELIMUTHU
TEVAN.

QUEEN-
EMPRESS,
v.
PEELIMUTHU
TEVAN.

for reasons to be subsequently given, if first prosecution witness could be certain that he saw the four persons in the crowd. I did not, therefore, consider it as satisfactorily proved that the intention of the assembly was to commit dacoity. I saw no reason, *primâ facie*, to doubt the fact that a crowd of 100 persons armed with sticks and bill-hooks did assemble in Ommayanpottal and that accused Nos. 1 and 2, members of the crowd, were pursued and caught by the prosecution witnesses. The prosecution account on these general facts was not shaken in cross-examination. The intention of this assembly must be presumed from its conduct. The fact that the crowd consisted of 100 or 150 persons, armed with sticks and bill-hooks and that it fled immediately on seeing the police, is *primâ facie* evidence that the assembly was unlawful, and that its intention was to use criminal force in prosecution of any ulterior object it might have, its common object therefore was to use criminal force, in itself an offence, and that therefore the assembly was *primâ facie* an unlawful one. It would rest with any members of it to prove the contrary. Next, as to the identification of the accused by the prosecution witnesses, I did not consider the identification of accused Nos. 3-32 satisfactory. [He dealt with the evidence as against these accused and discharged them.] The case of first and second accused is different. The evidence was that they were arrested on the spot, and that they were armed with sticks and a bill-hook, produced in Court. Having found, for reasons stated above, that the assembly was an unlawful one armed with bill-hooks and sticks, I, considering a bill-hook a deadly weapon, framed a charge against accused Nos. 1 and 2 under section 144, Criminal Procedure Code. They pleaded not guilty and examined three witnesses. [He dealt with the defence evidence, and concluded as follows :—] The evidence for the defence is very dubious, and, considering that these witnesses were not cited at first, that their story differs from the statement of the accused, and that no reason has been shown why the prosecution witnesses should falsely depose against them, I cannot give any credit to the defence evidence. The prosecution account of the arrest of these two persons is consistent, and I see no reason to doubt it. They were arrested on the spot and the prosecution witnesses had ample opportunity of identifying them. The accused have not chosen to admit their presence in the crowd and explain their purpose there. I, therefore, find accused Nos. 1 and 2 guilty of

QUEEN-
EMPRESS
v.
PEELIMUTHU
TEVAN.

being members of an unlawful assembly under section 144, Criminal Procedure Code, and sentence each of them to rigorous imprisonment for eighteen months."

Against this conviction and sentence the accused appealed. The judgment of the Sessions Court was as follows :—"Thirty-two accused were put up for trial by the police, but the Magistrate discharged 30 and convicted the two appellants; the 30 were not arrested at the time of the offence, but subsequently, while the two appellants are alleged to have been arrested on the spot. The Magistrate also disbelieved the evidence given by the prosecution to show that the common intention of the crowd was to commit dacoity, but he inferred from the facts that the crowd consisted of 100 or 150 persons armed with sticks and bill-hooks and that it fled immediately on seeing the police, that the assembly was unlawful, and that its intention was to use criminal force in prosecution of any ulterior object it might have. I have said in previous appeals that I cannot draw any such inference. When nothing more than this is proved it seems to me that there are several lawful purposes which such a crowd might have, even supposing that they had any common intention at all. The Public Prosecutor did not trouble to argue the appeal, as he took it for granted that I should follow my previous decisions in appeals Nos. 54 and 59. The finding and sentence of the lower Court are reversed and the accused ordered to be set at liberty."

Against this acquittal the Public Prosecutor preferred this appeal under section 417 of the Code of Criminal Procedure.

Mr. D. Chamier, for the Public Prosecutor, for the Crown, contended that a *primâ facie* case had been made out against the accused. No crowd would assemble in such numbers and armed in such a manner unless their intention was to use criminal force. Moreover, the fact that the persons so assembled ran away immediately they saw the police showed that their object was not an innocent one. At any rate, enough had been shown to establish a *primâ facie* case, which the accused had not rebutted, as they might have done by showing that they had in fact assembled to carry out an object which was lawful. Moreover, the whole of this particular district was in a state of disturbance at the time.

Gopalasami Ayyangar for the accused.

MOORE, J.—This is an appeal preferred by Government against the judgment of the Sessions Judge of Tinnevely in Criminal

QUEEN-
EMPRESS
v.
PEELIMUTHU
TEVAN.

Appeal No. 66 of 1899, setting aside the conviction of two men, who had been sentenced by the Special Magistrate to rigorous imprisonment for eighteen months each for an offence under section 144 of the Indian Penal Code. The reasons for the decision arrived at by the Sessions Judge are given by him briefly in the judgment above mentioned and at greater length in his judgments in Criminal Appeals Nos. 54 and 59 of 1899 which have been printed with the record in this case and referred to by the Government Pleader.

What the Magistrate has found as to the facts of this case is that the two persons convicted by him together with others, to the number in all of 100 or 150, assembled together armed with bill-hooks and sticks, and that they dispersed at once on seeing the police. From these facts he assumes that the intention of the members of the crowd was to use criminal force—an offence punishable under section 352 of the Indian Penal Code—and, as they were armed with what he appears to have held were deadly weapons, he has convicted them under section 144 of the Indian Penal Code. In order to show the common intention of the members of the crowd some evidence was put forward before the Magistrate to prove that certain members of the crowd were heard saying that they were going to loot, but he has, as I consider rightly, discredited this evidence. There is therefore nothing to show what the intention of the men was except that they were in a large crowd and were armed. These facts, no doubt, raise a strong suspicion that the men had not assembled with any harmless or innocent intention, but it cannot, in my opinion, be held that they afford proof that the intention of the members of the crowd was to use criminal force or to commit any other offence. One argument put forward here by Mr. Chamier in support of the appeal appears to be that, as the men had assembled in a crowd and were armed, a *prima facie* case against them had been made out which was sufficient, in the absence of rebutting evidence to show that the men had come together for self-defence or for any other lawful object, to warrant a conviction. I cannot admit this argument. The prosecution was bound to show that the common object of the crowd was such as would constitute it an unlawful assembly as defined by section 141 of the Indian Penal Code, and, as I am of opinion that this was not done, I would decline to interfere with the judgment of the Sessions Judge and would dismiss this appeal.

QUEEN-
EMPRESS
v.
PEELIMUTHU
TEVAN.

BENSON, J.—I am not prepared to dissent from the conclusion arrived at by my learned brother in this case.

The fact that so large a crowd of Maravars had assembled and that they were armed with sticks and bill-hooks and ran away when the police appeared is, in my opinion, sufficient to raise a strong suspicion that they had come together for an unlawful purpose, intending to use criminal force or to commit some offence, but I am not prepared to say that the Sessions Judge was wrong in holding that these facts alone were insufficient as legal proof of the unlawful character of the assembly. It is observed that no evidence was given as to the disturbed condition of the district which is now alleged before us and especially as to the relations existing between the Shanars and the Maravars in the neighbourhood and the action taken by similar crowd of Maravars about the same time. Had such evidence been given, it might, in my opinion, have been sufficient to lead to an inference as to the unlawful character of the assembly though it would not necessarily do so, for it might be that the crowd had come together for a lawful purpose, such as to discuss the situation or to petition the authorities, and had armed themselves with sticks and bill-hooks for protection against anticipated violence from the Shanars. The “common object” of an assembly is to be ascertained from the acts and language of the members composing it and from a consideration of all the surrounding circumstances. In the absence of evidence such as I have referred to and when the specific acts adduced by the prosecution to prove the unlawful character of the assembly have been disbelieved by both Courts, I do not think that the case is one in which we should interfere with the acquittal. I therefore agree that we should dismiss this appeal.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Boddam.

1900.
September 4,
17.

SUBRAHMANIA PATTAR (PLAINTIFF), APPELLANT,

v.

NARAYANAN NAYAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Principal and agent—Contract Act—Act IX of 1872, s. 230—Agency coupled with an interest—Suit by agent in his own name on contract not entered into by him as agent—Maintainability of suit.

A document was executed in favour of plaintiff by the members of a Malabar devasom, whereby, in consideration of advances made by plaintiff, all the properties of the devasom were given over to him on lease for eighteen years. Plaintiff was given authority to sign, conduct suits and do other acts on behalf of the executants; and the document was held to be an authority coupled with an interest and irrevocable. Plaintiff now sued in his own name to recover certain property belonging to the devasom and which had been demised on kanom prior to the date of plaintiff's authority:

Held, that plaintiff was not entitled to recover. Where an agent enters into a contract as such, if he has an interest in the contract he may sue in his own name. Unless the contract for the breach of which the action is brought is one made by the agent he has no cause of action, because there is no privity.

Suit for redemption and possession of certain real property, with rent. Plaintiff claimed in his own name to recover property belonging to the devasom of fourteenth defendant, which had been demised on kanom to first defendant in 1863. In June 1892, fourteenth defendant and forty-four others, being in the line of succession to the stanom, executed a document to plaintiff which was filed in the suit as exhibit Y. This contained the following, among other, provisions:— “Whereas the immoveable properties belonging to the stanom of Kongattil Muppil Nayar, which executant No. 1 at present bears and which the remaining executants will hereafter attain in the order of seniority, are in the possession of various tenants on kanom and other rights and whereas in respect of such properties the deceased stanom-holders created some simple debts, and fresh kanoms without stanom necessity and without consideration and had decrees passed in respect of some simple debts and the jenmam right over some immoveable properties sold, and whereas sufficient

* Second Appeal No. 749 of 1899 against the decree of A. Venkataramana Pai, Subordinate Judge of South Malabar, in Appeal Suit No. 524 of 1898, affirming the decree of K. Imbichunni Nayar, District Munsif of Nedunganad, in Original Suit No. 163 of 1897.

funds are not available in order to have such debts, fresh kanoms and sales declared invalid by suits and to pay off such debts as you may consider as having been contracted for stanom purposes and for full consideration, and to defray daily household and other expenses on the scale now arranged, we requested you to advance the requisite money and to conduct suits, pay off the debts which, as aforesaid, you may be satisfied were contracted for stanom purposes and to defray the expenses, and you have consented to the request. And, in consideration of your doing so, we have given over to you all the immoveable properties belonging to the stanom on contract lease (Kuthaka Pattom) together with first executant's right of signature for a period of 18 years from this date. (2) It is agreed that you are to exercise for 18 years all such authorities as may be exercised by the first executant, such as entertaining servants on monthly salaries and out of the approximate annual collection of 1,720 paras of paddy and Rs. 80, collecting such as may be lawfully leviable, with interest on arrears as rent, purapad and other incomes belonging to the stanom, executing, registering and delivering documents in respect of old kanoms and also new kanoms raised for proper purposes on receipt of renewal fees, provided that such kanoms shall not be increased in amounts, digging elephant pits and catching elephants, collecting rents on thorns and bamboos, &c., which may be removed by people from forests. . . . (4) As regards immoveable properties belonging to the devasoms of which the stanom possesses the sole uraima right or uraima right conjointly with others, it is agreed that the power to execute documents, to conduct suits, to collect arrears of rent with interest and future income and all other rights and powers which are vested in executant No. 1 shall for 18 years vest in you. (5) It is further agreed that you shall keep accounts of the charges as perschedule B and of all other expenditure out of the collections relating to the stanom and devasom, and furnish a copy thereof to executant No. 1 or to his successor on 30th of Chingam in each year and that you shall defray the expenses of litigation according to your discretion and that we shall accept the said charges. (6) This Kuthaka karar shall be equally binding on the remaining executants when they succeed to the stanom of executant No. 1.”

This document was brought before the High Court, in Appeal, No. 191 of 1898, when it was construed as being an authority.

SUBRAHMANIA
PATTAR
v.
NARAYANAN
NAYAR.

SUBRAHMANIA
PATTAR
v.
NARAYANAN
NAYAR.

coupled with an interest and irrevocable. The District Munsif, while conceding that plaintiff could manage the devasom of fourteenth defendant till the expiration of eighteen years from the date of the document, held that plaintiff was not entitled, by virtue of exhibit Y, to maintain a suit in his own name. The District Court upheld this ruling in the following judgment:—"The question is whether the plaintiff is entitled to sue in his own name on behalf of the plaintiff devasom. As lessee under the fourteenth defendant the uralan of the plaintiff devasom, the plaintiff sues to redeem the kanom granted by the late samudayi to the first defendant and his late karnavan in April-May 1863 for Rs. 171-6-11. The third to twelfth and fourteenth defendants pleaded, *inter alia*, that the plaintiff is not entitled to sue. The District Munsif dismissed the suit. Plaintiff appeals. The fourteenth defendant is the present holder of the stanam of Kongat Valia Nayar. The stanam owns landed property. The stanam is also the uralan or co-uralan of certain devasoms. In June 1892, the fourteenth-defendant and 44 others being in the line of succession to the stanam, executed to plaintiff a karar (exhibit Y in Appeal Suit No. 523 of 1898) whereby the stanam estate was committed to his management, including the power to grant demises and renewals and to conduct suits relating thereto. The land in suit belongs to the Mancheri devasom, of which the fourteenth defendant is uralan. The karar does not authorise the plaintiff to charge any money that might be found due to him on the devasom property, such liability being confined to the stanam properties (see paragraph 12 of the document). I agree with the District Munsif in holding that in regard to devasom properties the said karar, exhibit Y, is simply a delegation of the management. In other words, the plaintiff is no other than a manager or samudayi. It is settled law that a samudayi has no authority to sue in his own name in behalf of the devasom (*Rama Varar v. Krishnen Nambudri*(1) and *Unni Nambiar v. Nilakandan Bhattathiripad*(2)). Nor would plaintiff's case be improved if exhibit Y be construed as a transfer of a higher right, namely, of the right of management by way of lease or otherwise, for it has been held that such transfers are invalid (*Rama Varma Tambaran v. Raman Nayar*(3)). I confirm the District Munsif's finding that the plaintiff is not entitled to sue in his

(1) I.L.R., 3 Mad., 270. (2) I.L.R., 4 Mad., 141 at p. 142. (3) I.L.R., 5 Mad., 89.

own name on behalf of the plaintiff devasom and accordingly confirm his decree and dismiss the appeal with costs."

Plaintiff preferred this second appeal.

Sundara Ayyar for appellant.—It must be assumed, after the construction placed upon it by this Court, that exhibit Y is a deed of agency coupled with an interest. Even then, plaintiff is entitled to maintain this suit. In British India a person cannot sue in the name of another; the latter must be made a defendant. But an agent with an interest may sue. (He referred to *Krishnamacharlu v. Rangacharlu*(1) and *Robinson v. Ruttes*(2); *Grey v. Pearson*(3); *Williams v. Millington*(4); *Glascott v. Gopal Sheikh*(5); 'Chitty on Pleadings,' 6th edition, page 7; 'Dicey on Parties,' page 141; and 'Pearson on Agency,' page 340.) The case of *Rama Varma Tambaran v. Raman Nayar*(6) relied on by the lower Appellate Court, relates to the transfer of a trusteeship and not to a mere delegation by a trustee of certain of his duties.

Govinda Menon for respondent.—The question whether an agent can sue in his own name or not is one of procedure. (See the remarks of Innes, J., in *Unni Nambiar v. Nilakandan Bhattathiripad*(7)); and the cases cited from the English reports are not applicable to the practice in India. The ordinary rule is that an agent cannot sue in his own name on behalf of a principal. If he may do so in any particular case it is an exception to that rule. It is submitted that the case of an agency coupled with an interest is not an exception. Section 230 of the Indian Contract Act provides for three exceptions to the general rule, namely, (i) where the contract is made for a foreign principal; (ii) where the agent does not disclose the name of the principal; (iii) where the principal, though disclosed, cannot be sued. Except in the above cases the agent cannot personally enforce contracts made by him on behalf of his principal. Section 435 of the Civil Procedure Code refers to certain cases in which a corporation or company is authorized to sue in the name of an officer or of a trustee. An agent coupled with an interest is nowhere mentioned as an exception. Again, some of the English cases quoted are cases of auctioneers, who stand upon an exceptional footing. They are allowed to sue in England on account of the law merchant. Whether they would be regarded

SUBRAHMANIA
PATTAR
v.
NARAYANAN
NAYAR.

(1) I.L.R., 16 Mad., 73.

(3) L.R., 5 C.P., 568.

(5) 9 W.R., (C.R.), 254.

(7) I.L.B., 4 Mad., 141 at p. 142.

(2) 21 L.J., Q.B., 250.

(4) 1 H.B.L., 81; 2 R.R., 724.

(6) I.L.R., 5 Mad., 89.

SUBRAHMANIA
PATTAR
v.
NARAYANAN
NAYAR.

as exceptions by the Indian Law is doubtful. But assuming that it would be so, it does not follow that every agent coupled with an interest can sue. At any rate there is no case which goes to the extent of saying that he can sue to redeem. This property belongs to the devasom and the only person who can represent it in suits is the uralan, fourteenth defendant. Even a karaima samudayi cannot sue (*Unni Nambiar v. Nilakandan Bhattathiripad*(1)). Neither can it be said that the plaintiff can sue because the fourteenth defendant has transferred to him the right of management. A trustee cannot delegate to another his trust. *Krishnamachari v. Rungachari*(2) did not decide that the right of management can be transferred as was done in this case for a payment of money made or promised. (He referred to *Kotta Ramasami Chetti v. Bangari Seshama Nayanivaru*(3); and *Kanna Pisharody v. Narayanan Somayajipad*(4)).

Sundara Ayyar, in reply, contended that the English cases quoted proceed on the principle that an agent who has an interest can sue and that it is only on that ground that an auctioneer has been held entitled to sue.

JUDGMENT.—The only question argued before us in this second appeal is whether the plaintiff can sue in his own name to recover certain property belonging to the devasom of the fourteenth defendant and demised on kanom to the first defendant.

In June 1892 the fourteenth defendant and the other adult members of the devasom executed to the plaintiff the document put in as exhibit Y which is called a 'lease *alias* Kuthaka Karar.' This document has already been the subject of judicial interpretation by the High Court in Appeal No. 191 of 1898, and it was then held to be an authority coupled with an interest and was irrevocable.

The plaintiff's suit was dismissed both by the District Munsif and by the Subordinate Judge on the ground that the document did not enable the plaintiff to recover devasom properties in a suit brought in his own name.

It was argued before us that by the document in question the plaintiff became an agent with interest, and that he, therefore, had a right to sue in his own name and *Williams v. Millington*(5),

(1) I.L.R., 4 Mad., 141 at p. 142.

(3) I.L.R., 3 Mad., 145 at p. 167.

(5) 1 H.Bl., 81; 2 R.R., 724.

(2) I.L.R., 16 Mad., 73.

(4) I.L.R., 3 Mad., 234.

Robinson v. Rutter (1), Gray v. Pearson (2), and other cases and text-books were cited in support of this proposition, and *Pestangi Mancharji Wadia v. Matchett*(3) was also cited as a further authority for the same proposition. The proposition as stated is in our judgment too wide. In *Williams v. Millington*(4) and *Robinson v. Rutter*(1) the agents who were held entitled to sue were agents who had made the contract with the defendant as auctioneers, and it was held that, though they had contracted as agents having an interest, they were entitled to sue in their own names. In *Gray v. Pearson*(2) the plaintiff's suit was dismissed. There, there was no contract entered into between the plaintiff and the defendant. The plaintiff was merely the manager for others and the words used by Willes, J., in his judgment, to which our attention was called, do not assist the plaintiff's contention. He says the proper person to bring the action is the person whose right has been violated. Though there are certain exceptions to the general rule, for instance, in the case of agents, auctioneers or factors, these exceptions are in truth more apparent than real, &c. The real proposition of law, which these and other cases establish, is that where an agent enters into a contract as such, if he has interest in the contract, he may sue in his own name. Unless the contract for the breach of which the action is brought is one made by the agent he has no cause of action because there is no privity between himself and the defendant, and Montague Smith, J., in his judgment in *Gray v. Pearson*(2) puts this point says, "There is no privity between the plaintiffs and the defendant. The contract is between the defendant and the other members of the association." The mere fact that after a contract has been made between A and B, A gives C authority to act for him for a consideration, does not create any privity between C and B, so as to enable C to sue B for breach of his contract with A. If there is a breach and C wishes to sue B, he must do so in the name of A, that is in the name of the person whose right has been violated.

The case of *Pestangi Mancharji Wadia v. Matchett*(3) does not in any way touch the question. There, Matchett had given Pestangi a power of attorney to sue one Nowell for a debt due to Matchett out of which Pestangi was to pay himself a debt due

(1) 24 L.J., Q.B., 250.

(3) 7 Bom. H.C.R., (A.C.J.), 10.

(2) L.R., 5 C.P., 568.

(4) 1 H.Bl., 81; 2 R.R., 724.

SUBRAHMANIA
PATTAR
v.
NARAYANAN
NAYAR.

to him from Matchett, but in spite of this power Matchett had himself sued Nowell for the debt to the exclusion of Pestanji. There the Court held that the power was irrevocable, because Pestanji had a pecuniary interest which was consideration for the power, and in the result, Pestanji having been joined as a co-plaintiff, the Court entered judgment for the amount due to Pestanji first, the balance, if any, to be paid to Matchett. Here the action was brought in Matchett's name, and all that the case decided was that Matchett, having given an irrevocable power of attorney to Pestanji, could not sue to the exclusion of Pestanji.

In the case before us there is no privity between the plaintiff and the defendant. The authority to bring suits in the document does not purport to give the plaintiff the right to sue in his own name, and so far as we are aware, nothing else has happened which could authorise the plaintiff to sue the defendant in his own name.

We are of opinion, therefore, that the plaintiff's suit was rightly dismissed in the Courts below, and we dismiss this second appeal with costs.

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice, Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.

KRISHNA REDDI AND OTHERS (ACCUSED NOS. 1 TO 3),
PETITIONERS,

v.

SUBBAMMA (COMPLAINANT), RESPONDENT.*

Criminal Procedure Code—Act V of 1898, ss. 209, 436—Refusal by Magistrate to charge accused with offence triable exclusively by Court of Session—"Discharge"—Charge of offence triable by Magistrate—Acquittal—Order by Sessions Court for further enquiry and committal—Legality of such order.

Certain persons were charged before a Magistrate of the first class under section 379 of the Indian Penal Code with the theft of a promissory note. The

* Criminal Revision Case No. 26 of 1900, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the order of T. M. Saminadha Ayyar, Acting Sessions Judge of Nellore, in Criminal Revision Petition No. 7 of 1899, directing further enquiry and the committal of the petitioners to the Court of Sessions for offence under section 477, Indian Penal Code.

prosecution applied for a further charge to be framed under section 477 of the Indian Penal Code, but this the Magistrate declined to do, as, in his opinion, there was no direct evidence that the accused had destroyed or secreted the note. After hearing the evidence for the defence the Magistrate acquitted the accused under section 258 of the Code of Criminal Procedure. Application was then made to the Sessions Court to call for the records and direct the committal of the accused for trial for an offence under section 477 of the Indian Penal Code. The Sessions Court ordered that a further enquiry be made and that the accused be committed for trial. On its being contended, on revision, that the order of the Sessions Court was illegal on the ground that the accused had been acquitted and not discharged:

Held, that the order of the Magistrate was, in substance, an order discharging the accused in respect of an alleged offence under section 477, Indian Penal Code, and that the Sessions Judge had jurisdiction to make the order sought to be revised.

Queen-Empress v. Hanumantha Reddi, (I.L.R., 23 Mad., 225) considered.

PETITION to revise an order made by the Sessions Court of Nellore directing the committal of the petitioners for an offence under section 477, Indian Penal Code. The petitioners, three in number, had originally been charged before the Head Assistant Magistrate of Gudur with theft, under section 379, Indian Penal Code. The prosecution alleged that the complainant held a promissory note for Rs. 2,000. Both the promisor and the promisee were dead; but it was arranged that the third accused, who was the legal representative of the deceased promisor, should execute bonds in favour of complainant in place of the note. While third accused, in company with first accused, was writing the bond, second accused snatched the note, and subsequently all the three accused combined in retaining the note so obtained. The Magistrate framed a charge of theft as against second accused, and of abetment of theft as against accused Nos. 1 and 2. The prosecution also asked that a charge might be framed under section 477 of the Indian Penal Code, but this the Magistrate declined to do, there being no direct evidence that second accused had destroyed or secreted the document. In the end, after hearing evidence for the defence, the Magistrate made the following order:—"I think on the whole that the weight of evidence is on the side of the defence and so the accused are acquitted under section 258 of the Code of Criminal Procedure."

The Sessions Court was thereupon petitioned to direct a committal of the accused to the Court of Sessions for an offence under section 477 of the Indian Penal Code. The Sessions Judge, after stating the facts, said:—"At the trial it was pointed out that an

KRISHNA
REDDI
v.
SUBBAMMA.

KRISHNA
REDDI
v.
SUBBAMMA.

offence under section 477 of the Indian Penal Code had been committed. The Magistrate, however, thought that the offence fell under section 379. He accordingly charged the accused under that section and after hearing the defence witnesses, acquitted them, as in his opinion the defence evidence was entitled to a greater credence than the prosecution evidence. It is conceded that this Court cannot interfere and set aside the order of acquittal, if the offence really came within the Magistrate's jurisdiction. But it is urged that, when it was not so, his duty did not extend beyond committing the accused for trial to this Court, if he found that a *prima facie* case had been made out by the prosecution in respect of the offence with which they stood charged." He dealt with the evidence and concluded:—"I am unable, for the above reasons, to hold that the Magistrate was right in charging the accused under section 379, Indian Penal Code, and accordingly direct that a further enquiry be made in reference to the documents filed from first witness' custody and the accused be committed to the Sessions Court under section 477, Indian Penal Code."

Against this order of committal the petitioners preferred this criminal revision petition.

The case first came on for hearing before a Court composed of BENSON and MOORE, JJ.

Mr. R. F. Grant for petitioners.

Mr. K. Brown and S. Subrahmania Ayyar for complainant.

Their Lordships delivered the following judgments:—

BENSON, J.—I do not think that the order of the Sessions Judge was one which he had no jurisdiction to make. In my view the decision of the Magistrate must be taken to be not only one of acquittal of an offence punishable under section 379, Indian Penal Code, but one of discharge so far as the alleged offence under section 477, Indian Penal Code, is concerned. The complaint against the accused was that he committed an offence punishable under section 477, Indian Penal Code. Such offence is triable exclusively by the Court of Session. The Magistrate could neither acquit nor convict him of such offence. He was bound either to commit him to the Sessions Court or to discharge him. He did not commit him. The only alternative was to discharge him, and that, I take it, is what the Magistrate really did do. It is not suggested that the charge under section 477 is still pending before the Magistrate. It has been disposed of, and the only

KRISHNA
REDDI
v.
SUBBAMMA

question is as to what the disposal has been. It seems to me that the accused has been discharged so far as the charge under section 477 is concerned. The Magistrate's order, if stated fully, should have been "I discharge him as regards the offence punishable under section 477, and I acquit him as regards the offence punishable under section 379."

If the order had run in that form I do not see how it could be said that the Sessions Judge would not have had jurisdiction under section 436, Criminal Procedure Code, to order him to be committed for trial upon the matter of which he had been, in the opinion of the Sessions Judge, improperly discharged, *i.e.*, as regards the offence under section 477, Indian Penal Code. But the mere omission of the Magistrate to say "I discharge the accused so far as the offence under section 477, Indian Penal Code, is concerned" cannot alter the essential character of the Magistrate's proceedings.

The fact that the accused was acquitted of the minor offence of theft could not, in my opinion, affect the power of the Sessions Judge, any more than that power would have been affected by a conviction on the minor charge of theft.

Section 403, clause (4), Criminal Procedure Code, distinctly enacts that "a person acquitted or convicted of any offence constituted by any acts, may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed, if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged."

In the present case, therefore, the acquittal of theft by the Magistrate would be no bar to the trial and conviction of the accused by the Sessions Court on the same facts for an offence punishable under section 477, Indian Penal Code, since the latter offence is one which the Magistrate was not competent to try—and it is difficult to see how it can be a bar to the exercise by the Sessions Judge of the revisional jurisdiction conferred on him by section 436, Criminal Procedure Code.

One of the objects of sections 403 and 436, Criminal Procedure Code, is to prevent Magistrates with limited powers from clutching jurisdiction in important cases, but this object would, it seems to me, with all respect, be, to a great extent, frustrated if the view of the Calcutta High Court on which the decision in *Baijanath*

KRISHNA
REDDI
v.
SUBBAMMA.

Pandey v. Gauri Kanta Mandal(1) followed in *Queen Empress v. Hanumantha Reddi*(2) is based, be accepted as correct. Under section 403, clause 4, if A is charged with, and acquitted of, theft by a Second-class Magistrate, he may, on the same facts, be tried and convicted by a First-class Magistrate on a charge of robbery. The First-class Magistrate has this power notwithstanding the fact that an appeal against an acquittal can be made only by Government, and lies only to the High Court, and the reason, I take it, is because the Second-class Magistrate acted improperly in clutching jurisdiction and in dealing with a case which he ought not to have dealt with but left for the decision of a Court of competent jurisdiction. The Second-class Magistrate's proceedings in such a case are held to be no bar to further proceedings before the Court which is really competent to deal with the matter. On the same principle I do not think that the improper action of the Magistrate in clutching jurisdiction can be held to be a bar to the exercise of the revisional jurisdiction vested in the Sessions Judge under section 436. Nor can it be said that the Sessions Judge in the Calcutta case or in the present case, was exercising the powers of a Court of Appeal (section 423, Criminal Procedure Code) in a case of acquittal any more than a First-class Magistrate exercises such powers when he proceeds under section 403, clause 4, to convict of robbery a man who has been acquitted of theft, on the same facts, by a Second-class Magistrate. If this view is correct the ground on which the Calcutta case rests is not sustainable and no other ground in reason can, I think, be suggested why the Sessions Judge's general jurisdiction to revise improper discharges should be taken away in this particular class of cases.

As to the language of section 209, it may, I think, be conceded that it contemplates trial by the Magistrate as an alternative to discharge, but that is because the section is framed on the assumption that the Magistrate will act within his jurisdiction. There are many cases in which a Magistrate has a discretion as to whether he will try a case himself or will commit it for trial to the Court of Session. It is to meet such cases that the alternative given by the last clause of the section "unless it appears, &c. . . ." is provided. Suppose a man is charged by the Police with having committed murder and theft at the same time and place and a

KRISHNA
REDDI
v.
SUBBAMMA.

Magistrate after enquiry says "I do not think there is sufficient evidence to justify me in committing the accused for murder, but the theft is proved and I convict him of that offence" can it be held that the Sessions Judge could not on revision, order the Magistrate to commit the accused on a charge of murder? I think there is no doubt but that he could do so, yet section 209 does not in terms provide for such a case nor does any other section of the Code do so. In my judgment, however, trial on a minor charge is not inconsistent with a discharge as regards a grave offence, nor does the provision for such trial by the last clause of the section negative the propriety of an order of discharge for a grave offence under the first part of the section. If such order of discharge had, in fact, been made in the present case, there can be no doubt the Sessions Judge would have been able to interfere under section 436 and, in my judgment, the mere omission to make a formal order makes no difference, when the proceeding in reality amounts to a discharge.

I would, therefore, dismiss the petition on the ground that the Judge had jurisdiction to make the order.

MOORE, J.—Three persons were put on their trial before the Head Assistant Magistrate of Nellore, the case for the prosecution being that they had committed offences under sections 379 and 477 of the Indian Penal Code. The Magistrate acquitted them of the charge under section 379. He was asked to frame a charge against them of having committed an offence under section 477, Indian Penal Code, but refused to do so as the evidence did not appear to be sufficient to warrant him in drawing up a charge under that section. On application having been made to the Sessions Judge he directed that further enquiry should be made and that the accused persons should be committed to the Court of Session on a charge of having committed an offence under section 477, Indian Penal Code.

It is now urged that, as the accused persons had not been discharged by the Head Assistant Magistrate with respect to a charge of having committed an offence under section 477, Indian Penal Code, it was not open to the Sessions Judge under section 436 of the Criminal Procedure Code to direct that they should be committed to the Court of Session for trial on that charge and attention is called to the case of *Baijanath Pandey v. Gauri Kanta*

(1) I.L.R., 20 Cal., 633.

(2) I.L.R., 23 Mad., 225.

KRISHNA
REDDI
v.
SUBBAMMA.

Mandal(1) and to *Queen-Empress v. Hanumantha Reddi*(2) on the file of this Court.

In answer to this argument it is urged that the present case can be distinguished from those just mentioned on the ground that, although a formal order discharging the accused persons with respect to a charge of having committed an offence under section 477, Indian Penal Code, was not drawn up under section 209, Criminal Procedure Code, yet that the men were accused before the Magistrate of having committed that offence and that the Magistrate having refused to frame a regular charge against them under that section, it must be held that they were discharged by him in so far as that offence was concerned and that, such being the case, it was not necessary, in order to give the Sessions Judge the right to act under section 436, Criminal Procedure Code, that a formal order of discharge under section 209, Criminal Procedure Code, should have been drawn up.

With reference to these contentions it will be seen, on referring to the cases above mentioned, that no distinction can be drawn between them and the present case. In *Baijanath Pandey v. Gauri Kanta Mandal*(1) it will be found that the complaint against the accused persons was that they had committed dacoity; the Magistrate, however, found "that no sessions offence was *prima facie* established" (vide page 639) and accordingly framed charges of offences under sections 379 and 448 of the Indian Penal Code, which he proceeded to try himself. Here, as in the present case, although there was no formal discharge under section 209 of the Criminal Procedure Code, there was a refusal by the Magistrate to proceed against the accused persons on a charge of dacoity. I have referred to the magisterial records connected with *Queen-Empress v. Hanumantha Reddi*(2) on the file of this Court and find that the facts are similar to the present case. There a Deputy Magistrate took up a charge laid before him as being one under section 304, Indian Penal Code. He examined witnesses but took leave before completing the enquiry. His successor, "after careful consideration of the evidence on record and of the circumstances of the case and after hearing the pleaders on both sides," held that a charge under section 304, Indian Penal Code, could not stand. He accordingly proceeded to try the accused persons under sections

(1) I.L.R., 20 Cal., 633.

(2) I.L.R., 23 Mad., 225.

KRISHNA
REDDI
v.
SUBBAMMA.

147 and 325 of the Indian Penal Code, and acquitted them of offences under those sections. He, however, did not either formally or otherwise discharge them under section 209, Criminal Procedure Code, with reference to the complaint made against them of having committed an offence under section 304 of the Indian Penal Code. It thus appears to me to be clear that no distinction can be drawn between the present case and those already alluded to. Having a second time heard the question fully argued, I am of opinion that the decision in *Queen-Empress v. Hanumantha Reddi*(1), in which I took part, is correct. What the Sessions Judge should have done in this case was, as pointed out in *Baijanath Pandey v. Gauri Kanta Mandal*(2), to make a reference to the High Court under section 438, Criminal Procedure Code. I may further point out that not only did the Head Assistant Magistrate not discharge the accused persons with respect to the charge under section 477, Indian Penal Code, before he proceeded to try them for theft, but that under the provisions of section 209, Criminal Procedure Code, it would not have been open to him to do so. That section provides that when a Magistrate has taken the evidence for the prosecution he shall, if he finds that there are not sufficient grounds for committing the accused for trial, record his reasons and discharge him, unless it appears to him that he should be tried before himself or some other Magistrate, in which case he shall proceed to have him tried. The section does not appear to warrant a Magistrate to formally discharge the accused with respect to certain offences under section 209, Criminal Procedure Code, and then proceed to try him for other offences. This point does not, however, appear to me to be of much importance.

On the ground that, as there was no discharge by the Magistrate under section 209, Criminal Procedure Code, the order of the Sessions Judge, under section 436, Criminal Procedure Code, directing committal to the Sessions Court was illegal, I am of opinion that that order should be set aside.

[The case again came on for hearing before a Court constituted as above, under sections 429 and 439 of the Code of Criminal Procedure.]

(1) I.L.R., 23 Mad., 225.

(2) I.L.R., 20 Cal., 633.

KRISHNA
REDDI
v.
SUBBAMMA.

Ramachandra Rao Saheb for accused No. 2.—There was no charge in the complaint in respect of an offence under section 477. The Magistrate charged the accused for theft and they were acquitted. There was no allegation that the accused had destroyed the document. Then the Sessions Judge was applied to and his power of revision invoked. Even if there had been evidence as to an offence under section 477, which is not admitted, I submit that the Sessions Judge had no jurisdiction to pass an order of committal, there having been an acquittal by the Magistrate. The Sessions Judge's order was passed under section 436. If there is no order of discharge the Sessions Court had no power to make the order. To see if the order was one of discharge, it is necessary to examine section 209. Here the Magistrate has not discharged the accused. [DAVIES, J., referred to the Magistrate's order—"I am asked to charge the accused under section 477. This I decline to do." That was a refusal to charge and was in effect a discharge; and must have been passed under section 209, as there is no other section under which it could be passed.] [SUBRAHMANYA AYYAR, J., referred to *Queen-Empress v. Piry Gopal*(1).] There are three modes of discharge,—under sections 209, 213 and 253. Under section 437 a Sessions Judge may direct the District Magistrate by himself or by any of the Magistrates subordinate to him to make, and the District Magistrate may himself make, or direct any Subordinate Magistrate to make, further enquiry into any complaint which has been dismissed under section 203 or sub-section (3) of section 204, or into the case of any accused person who has been discharged. On the charge of theft the accused were acquitted under section 258. I submit that the Magistrate either discharges, or charges and tries or acquits—he must do one or the other. In *Baijanath Pandey v. Gauri Kanta Mandal*(2), the facts disclosed dacoity exclusively triable by sessions. There the Magistrate acquitted the accused and gave sanction to prosecute the complainant. The District Magistrate directed that there should be an enquiry; and the High Court held that the Sessions Judge had exercised a jurisdiction not vested in him by law; acting as a revision Court he could send for the record for any purpose mentioned in section 436, but he was not competent under section 436 to direct a fresh

(1) I.L.R., 9 Bcm., 100.

(2) I.L.R., 20 Cal., 633.

KRISHNA
REDDI
v.
SUBBAMMA.

enquiry, inasmuch as the accused had not been improperly discharged of an offence triable exclusively by a Court of Session, but had been acquitted of an offence within the Magistrate's jurisdiction; the Sessions Judge had, in fact, exercised the jurisdiction vested in him as an Appellate Court under section 423, as if an appeal had been presented to him from an order of acquittal; such powers in revision cases are only conferred on the High Court. By section 403:—"A person once convicted or acquitted may not be tried again on the same facts." The meaning of section 209 is made clear by referring to the corresponding section of Act X of 1872, i.e., section 195. I submit that the remark of the Magistrate as to section 477 does not deal with the case, i.e., does not decide it. *Queen-Empress v. Hanumantha Reddi*(1). There was nothing to prevent the Magistrate from making an order of discharge. There may be a single transaction which discloses either a major or a minor offence, and the Magistrate decides there is nothing to justify his proceeding with the higher offence and he decides to proceed with the minor one, and passes an order on the minor offence,—that action precludes the possibility of its being a discharge. *Har Kishore Dass v. Jugul Chunder Kabyarathna Bhuttacharjee*(2) was an order of conviction, but that does not affect my argument. That was a charge of mischief. The Sessions Judge directed further enquiry. It was held by the High Court that he could only direct it in two events, i.e., where the complaint had been dismissed under section 203 or sub-section (3) of section 204 of the Code of Criminal Procedure, or where there was an order of discharge. The Magistrate here thought it was a case he could take cognizance of and under the latter part of section 209 (1) he proceeded to try it, and acquitted. That precludes its being treated as an order of discharge. I am supported by *Baijunath Pandey v. Gauri Kanta Mandal*(3) and *Queen-Empress v. Hanumantha Reddi*(1).

Mr. K. Brown and S. Subrahmanya Ayyar for the complainant were not called upon.

JUDGMENT.—The order of the Magistrate was in substance an order discharging the accused in respect of an alleged offence under section 477, Indian Penal Code.

(1) I.L.R., 23 Mad., 225.

(2) I.L.R., 27 Cal., 658.

(3) I.L.R., 20 Cal., 633.

KRISHNA
REDDI
v.
SUBBAMMA.

If section 209 of the Criminal Procedure Code is to be construed as meaning that there can be no "discharge" under that section in respect of an offence exclusively triable by a Court of Session in cases where it appears to the Magistrate that the accused should be tried before himself or some other Magistrate in respect of offences not so exclusively triable, there would be a deadlock, since there is no provision in the Code, other than that contained in section 209, for dealing with a case where the Magistrate is of opinion that there is no evidence of an alleged offence which is triable exclusively by a Court of Session, but considers that the accused should be tried before himself, or some other Magistrate, in respect of alleged offences which are not so exclusively triable. From the terms of the Magistrate's order it is clear that he adjudicated upon the question whether there was any evidence against the accused in respect of the major offence. The Magistrate came to the conclusion that there was not, and he declined to charge him with the major offence. It seems to us that this is a "discharge" within the meaning of section 209.

Chapter XVIII relates to enquiries into cases triable by the Court of Session or High Court. The primary object of section 209 is to make provision for the procedure in such cases. If, in the opinion of the Magistrate, there is no evidence to warrant a charge for an offence exclusively triable by a Court of Session, he may "discharge" the accused in respect of the alleged offence and, having done so, may proceed as regards the minor offence or offences under chapter XXI or other appropriate chapter. In fact, a Magistrate cannot proceed to act under the latter part of sub-section (1) of section 209 until he has "discharged" the accused under the former part of the sub-section. This is the course which the Magistrate adopted in the present case.

We think that the Sessions Judge had jurisdiction to make the order under section 436. We agree with the judgment of Benson, J., and the general grounds of that judgment and we are unable to agree with the view taken by the Calcutta High Court in *Baijanath Pandey v. Gauri Kanta Mandal*(1) and with the decision of a Division Bench of this Court, *Queen Empress v. Hanumantha Reddi*(2), which followed the Calcutta High Court.

The petition is dismissed.

(1) I.L.R., 20 Cal., 633.

(2) I.L.R., 23 Mad., 225.

PRIVY COUNCIL.

RAJA YARLAGADDA MALLIKARJUNA PRASADA
NAYADU (DEFENDANT), APPELLANT,

v.

RAJA YARLAGADDA DURGA PRASADA NAYADU
(PLAINTIFF), RESPONDENT.

RAJA YARLAGADDA MALLIKARJUNA PRASADA
NAYADU (DEFENDANT), APPELLANT,

v.

RAJA YARLAGADDA VENKATA RAMALINGAMMA
(PLAINTIFF), RESPONDENT.

[On appeal from the High Court at Madras.]

Hindu Law—Partition of part of the estate of a Hindu joint family—Continuance of undivided state—Impartible estate in the possession of the senior member—Wrongful withholding of junior members' maintenance—Their right to recover arrears.

In a former suit brought by a junior member of a Hindu joint family for partition of the whole of their joint family estate, the final decree declared that a zamindari in the possession of the senior member was impartible, and awarded among the parties only the divisible part of the family property.

In the present suits brought by two younger brothers against the eldest who was in possession of the impartible zamindari, for maintenance, with arrears of the latter unpaid, it was decided that the family was undivided by the effect of those proceedings so far as the impartible estate was concerned, which remained chargeable with their rights of maintenance. As to those rights the Courts below differed, the High Court being of opinion that the arrears were not recoverable.

The Judicial Committee held that although the withholding maintenance did not necessarily give a right to sue for the arrears there was therein *prima facie* evidence of wrongful withholding, and that such evidence, supported as it was in this case by evidence of the zamindar's unwillingness to pay for their maintenance and his denial of their rights, led to the conclusion that the withholding was proved to be wrongful. The arrears, for the period within limitation, were accordingly claimable, and were decreed.

CONSOLIDATED APPEALS, and cross appeals respectively, from two decrees (9th March 1894) of the High Court(1), in part affirming,

* Present: Lords HOBHOUSE, MACNAGHTEN, and LINDLEY, Sir RICHARD COUCH and Sir HENRY DEVILLIERS.

(1) *Mallikarjuna Prasada Naidu v. Durga Prasada Naidu*, (I.L.R., 17 Mad. 362).

P.C.*
1900.
June 27.
July 11.

and in part reversing, two decrees (4th December 1891) of the District Court of Kistna at Masulipatam.

Two suits giving rise to the above appeals and cross appeals were brought on the 21st April 1891 against Raja Yarlagadda Mallikarjuna Prasada, the eldest of the three sons of Raja Anakinidi, a former zamindar of Challapalli, who died in August 1875, leaving with other family property that impartible estate comprising sixty-five villages giving an income of more than two and-a-half lakhs by the year. The two younger sons, Durga and Ramalingamma, each sought to have his right declared to maintenance, and to have future maintenance, as well as arrears, declared a charge upon the impartible zamindari in the possession of the eldest brother, the defendant.

On this appeal the two plaintiffs were respondents and cross-appellants. The defendant was appellant in both appeals and cross-respondent. The proceedings in the two suits were identical, and this report of the one suit brought by Durga is the report of both. The Courts below each gave but one judgment, and the decrees were of even date.

In a prior suit of the year 1880 Durga sued for a partition of the entire family estate including the zamindari of Devarakota, also named Challapalli, claiming that it should be divided into shares to be held by all the brothers according to the Hindu law of inheritance. By the judgment of the Judicial Committee, of the 1st May 1891 in that suit(1), only a small part of the family estate was declared to be divisible among them all, and Devarakota was decided to be an impartible zamindari in the hands of the eldest brother alone.

All the connection, between this suit for maintenance and arrears, and the above suit for partition, appears in the judgment of their Lordships on the present appeal, and all the facts are there stated. The main questions now argued were, (i) whether the two younger brothers, the respondents and cross-appellants in the two suits, had a right to sue for arrears for the period within limitation, and (ii) whether the arrears as well as the maintenance had been rightly charged upon certain villages, part of the Devarakota zamindari.

(1) (1891) Srimantu Raja Yarlagadda Mallikarjuna v. Srimantu Raja Yarlagadda Durga, (L.R., 17 I.A., 134; I.L.R., 13 Mad., 406).

The claims in the plaint are set forth in the report of the appeal to the High Court (see *Mallikarjuna Prasada Naidu v. Durga Prasada Naidu*(1)), and in the judgment of their Lordships upon this appeal. Briefly, it claimed sums for maintenance, for arrears with interest, money for the marriages of children, residence, furniture and utensils;—and all expenses to be charged on the impartible zamindari of Devarakota or on some part thereof. It alleged a demand of these by letter dated 30th March 1891. The answer of the defendant which also is given in the same report denied that the plaintiff was ever joint with him after the decree of the first Court given on the 30th September 1882 in the partition suit. It denied refusal as well as liability to maintain, adding that the amount claimed was extravagant, with other objections.

It was admitted by both sides that each plaintiff received Rs. 19,500 as maintenance for the period of the pendency of the appeal in the partition suit. That was under an order of the High Court in that suit.

The issues raised questions of the title to maintenance, to arrears, interest, and the rate, and the other claims to allowances.

The District Judge awarded both maintenance in the future and arrears of it for twelve years, with deduction made of the payments made under the order of the High Court while the appeal to England was pending in the partition suit: no interest was allowed. Maintenance in the past at Rs. 500, future at Rs. 750, to cover all claims. Arrears Rs. 56,000: the whole to be a charge on the impartible estate.

The High Court, on appeal, concurred in the judgment of the District Judge on all points except as to the arrears, and the extension of the charge for maintenance over the whole zamindari. They directed a reference to the District Judge as to what villages within the impartible estate would be suitable to be charged instead of the whole (see *Mallikarjuna Prasada Naidu v. Durga Prasada Naidu*(1)). They found no wrongful withholding on the defendant's part of the maintenance due in the past. On the contrary, they found that it was the plaintiff's own fault, that he had not received maintenance during the period in question. They concluded that the judgment as to the arrears should be reversed.

(1) (1894) I.L.R., 17 Mad., 362, at p. 365.

RAJA
YARLAGADDA
MALLI-
KARJUNA
PRASADA
v.
RAJA
YARLAGADDA
DURGA
PRASADA
NAYADU.

RAJA
YARLAGADDA
MALLI-
KARJUNA
PRASADA
NAYADU
v.
RAJA
YARLAGADDA
DURGA
PRASADA
NAYADU.

In regard to the question of the family rights, as a joint family, after the former litigation, the High Court was of opinion that, by the effect of the proceedings in the partition suit derived in 1890, there had been no general and complete severance of the family coparcenary and the members of it retained such rights of maintenance and such possible rights of succession as belonged to the younger sons of a family entitled to an impartible estate descending to a single heir.

On this appeal, as the case for the cross-appellants raised the question of the right to the arrears, their counsel was called upon to argue first on their behalf, on that point.

Mr. J. H. A. Branson, for the cross-appellant (plaintiff), on the question of the arrears claimed as due on account of the non-payment of maintenance, argued that the High Court had erred in disallowing the arrears that had been decreed payable in the first Court. The right to maintenance involved the right to recover the accumulated arrears where they had been withheld, the non-payment not having been caused by the wrongful act or neglect or relinquishment, of the member entitled to be maintained. It was true, as the High Court had said, that the primary right to receive maintenance money was to receive it as it fell due for the purposes intended. But this did not afford a ground for excluding as unsupported by law a claim for unpaid maintenance money, withheld for no assigned cause or for no lawful reason given. In this case not only had this taken place, but the liability to pay maintenance had been denied. It was true that it was open to a proprietor whose estate was alleged to be chargeable with payments for maintenance to show that the payments had been waived in respect of a past period. But here there had been no such waiver nor any kind of relinquishment. The payment had been wilfully and wrongfully withheld by the zamindar. Therefore upon evidence given the arrears were claimable. No rule of Hindu law precluded the recovery of maintenance for a past period. Reference was made to *Sakvarbai v. Bhavanji Raje Deshmukh*(1); *Jivi v. Ramji*(2); *Raja Pirthee Singh v. Rane Raj Korer*(3); *Venkopadhyaya v. Kavari Hengusu*(4);

(1) (1864) 1 Bom. H.C.R., 194.
(3) (1870) L.R., I.A., Sup. Vol., 203.

(2) (1879) I.L.R., 3 Bom., 207.
(4) (1864) 2 M.H.C.R., 36.

Lakshmipathi v. Kandasami(1); *Mahalakshamma v. Venkataratnamma*(2); *Narayanrao Ramchandra Pant v. Ramabai*(3); *Rango Vinayak Dev v. Yamunabai*(4); *Raghubans Kunwar v. Bhagwant Kunwar*(5).

Mr. J. D. Mayne for the cross-respondent, (defendant), argued that the High Court had rightly dismissed the claim for arrears for the reasons assigned in their judgment. They had found that it was the plaintiff's own fault that he had not received maintenance money for the period for which it was now claimed. His suit of 1880 was brought to obtain a share of the whole family estate and was decided against him in 1890. That a junior member of the family had not, during a preceding time, been maintained by the possessor of the impartible estate, as to which that junior member had been contending that it was partible, did not necessarily give occasion for a right of suit, to arise for the recovery of arrears. As the High Court had held, it was incumbent on the claimant to prove that there had been a wrongful withholding, and this proof had not been given. It was admitted that the claimant and the defendant had since 1875 been living apart, and that there had been no demand made, nor any receipt of maintenance, except the sum paid under the order of the High Court pending the appeal to England, between December 1887 and July 1890. Thus the facts indicated that the claimant had looked less to the maintenance in question than to a share in the family estate of Devarakota, and the suit ended in the latter year was inconsistent with the present one. Whilst the remedy pursued in the former proceedings was being sought there could be no state of things between the parties that could be construed into a refusal of maintenance. There could not be any wrongful refusal of what would have been, if offered, contrary to the actual demand made. Thus the wrongful character of any withholding had not been established by evidence. Reference was made to *Narayanrao Ramchandra Pant v. Ramabai*(3); *Motilal Prannath v. Bai Kashi*(6); *Seshamma v. Subbarayadu*(7).

Afterwards, on July 11th, 1900, their Lordships' judgment was delivered by Sir HENRY DEVILLIERS.

(1) (1892) I.L.R., 16 Mad., 54.
(3) (1879) L.R., 6 I.A., 114; I.L.R., 3 Bom., 415.
(5) (1899) I.L.R., 21 All., 183.
(7) (1893) I.L.R., 18 Mad., 403.

(2) (1882) I.L.R., 6 Mad., 83.
(4) (1878) I.L.R., 3 Bom., 44.
(6) (1892) I.L.R., 17 Bom., 45.

RAJA
YARLAGADDA
MALLI-
KARJUNA
PRASADA
NAYADU
v.
RAJA
YARLAGADDA
DURGA
PRASADA
NAYADU.

RAJA
YARLAGADDA
MALLI-
KARJUNA
PRASADA
NAYADU
v.
RAJA
YARLAGADDA
DURGA
PRASADA
NAYADU.

JUDGMENT.—These are appeals and cross-appeals against a decision of the High Court of Madras which modified a decision of the District Court of Kistna. Two separate suits for maintenance had been brought in the lower Court against the zamindar of Challapalli by his two younger brothers, respectively; but all the proceedings in the two cases were identical and the observations of their Lordships upon the one case will be equally applicable to the other.

The appellant, the defendant in the lower Court, is the eldest son of Anakinidi, late zamindar of Challapalli, who died on the 6th of April 1875, leaving three sons, viz., the defendant and the two plaintiffs. Not long after their father's death quarrels arose between the brothers, and in April 1880 one of the younger brothers brought an action for partition against the present appellant in the District Court of Kistna. That Court decided that the zamindari estate was impartible, but awarded to the then plaintiff one-third of certain property not forming part of the zamindari estate. That judgment was reversed by the High Court of Madras, but, on appeal to Her Majesty in Council, the judgment of the High Court was reversed on the 1st May 1890 and that of the District Court was restored. In April 1891 the two younger brothers instituted the present suits for maintenance. The plaintiffs claimed (i) maintenance at the rate of Rs. 2,000 per month; (ii) Rs. 5,31,938 for arrears of maintenance; (iii) Rs. 12,000 towards the marriage expenses of the plaintiffs' children; (iv) the provision of suitable houses, lands, utensils and furniture for the plaintiffs; and (v) an order declaring that the arrears and future maintenance constitute a charge upon the Challapalli estate or such portion thereof as may seem proper to the Court. The District Court by its judgment decreed future maintenance at the rate of Rs. 750 per month and arrears of maintenance for twelve years at the rate of Rs. 500 per month, the whole to be a charge upon the zamindari estate. The District Judge found that the claim for maintenance was not affected by the decree in the partition suit and was not barred by limitation. In regard to the claim for arrears of maintenance, he held that although no demand had been made, maintenance had been practically withheld and could be recovered for a period of twelve years immediately preceding the institution of the suit. Against this judgment the zamindar appealed while the plaintiffs filed objections. The Judges of the

High Court agreed with the lower Court upon all points except as to arrears of maintenance, and as to the maintenance being a charge upon the whole of the zamindari estate. They held that the arrears were not claimable except a certain sum actually received by the plaintiffs under a previous order of the High Court and they reduced the amount of arrears from Rs. 56,000 to Rs. 23,000. As to the question whether the maintenance decreed should be a charge upon the whole of the zamindari they say:—"We think that the zamindar is justified in objecting to the decree as framed by the District Judge inasmuch as it fetters him unnecessarily in the disposition of his property. It is sufficient that the decree should make the maintenance chargeable on certain villages." The defendant now appeals against the judgment of the High Court in so far as it allows any maintenance at all, while, on the other hand, the plaintiffs respectively cross-appeal against that part of the judgment which refuses further specific relief and reduces the amount of the arrears of maintenance.

Their Lordships fully agree with the High Court that the family of the parties to the present action has not become a divided one in consequence of the proceedings in the previous suit to which reference has already been made. It is true that, in that suit, a decree was made for the partition of a portion of the family property, but it was a very inconsiderable portion and had no relation whatever to the zamindari estate. As to the zamindari estate this Board held that it was impartible and the consequence is that the plaintiffs, as the younger brothers of the zamindar, retain such right and interest in respect of maintenance as belong to the junior members of a raj or other impartible estate descendible to a single heir (*Rani Sartaj Kuari v. Rani Deoraj Kuari*(1)). In regard to the amount of maintenance the Judges of the High Court very properly refused to disturb the finding of the District Judge whose experience in the district they fully recognise.

The only question upon which there has been any serious argument before their Lordships is whether the arrears of maintenance awarded by the lower Court ought to have been reduced by the High Court. The plaintiffs no longer object to the arrears being limited to the period of twelve years, but they claim that for that period at all events they should receive the amount awarded

RAJA
YARLAGADDA
MALLI-
KARJUNA
PRASADA
NAYADU
v.
RAJA
YARLAGADDA
DURGA
PRASADA
NAYADU.

(1) (1887) L.R., 15 I.A., 51; I.L.R., 10 All., 272 at p. 285.

RAJA
YARLAGADDA
MALLI-
KARJUNA
PRASADA
NAYADU
v.
RAJA
YARLAGADDA
DURGA
PRASADA
NAYADU.

to them. Among their reasons for the view that arrears of maintenance are not claimable the learned Judges of the High Court state the following:—"The District Judge has granted arrears "at the rate of Rs. 500 per mensem for twelve years prior to the "institution of the suit. In this we think he was wrong. The "right to maintenance is primarily a right to be maintained out "of the current income of the property in the enjoyment of the "party chargeable. The circumstance, however, that a person "entitled to maintenance has not, in fact, been maintained by the "person chargeable does not necessarily give him a right of action "for arrears. On proof of failure to maintain, without more, he "cannot be said to become a creditor of the person in default. It "is incumbent on him to prove that there has been a wrongful "withholding of the maintenance to which he is entitled." In support of these views the learned Judges refer to two cases (*Jivi v. Ramji*(1) and *Mahalakshamma v. Venkataratnamma*(2)), but these cases by no means support the conclusions at which the High Court has arrived. The first of them, decided by the High Court of Bombay in 1879, was a case in which a Hindu widow sued her late husband's undivided brother for four years' arrears of maintenance. The High Court, reversing the judgment of the District Court, held that the widow had a legal right, irrespective of demand and refusal, to maintenance and may recover arrears for any period not excluded by the law of limitation. The question raised in the second case, which was decided by the High Court of Madras in 1882, was whether a Hindu widow entitled to maintenance can have the payment thereof secured by a charge on part of the inheritance in the hands of the heir. The question was decided in the affirmative and the learned Judges in the course of their judgment made the following remarks, page 84:—"It is argued that the claim "to pass maintenance ought to have been disallowed, but we "are unable to assent to this view Although no "previous express demand is necessary to sustain a claim to "past maintenance, and it is only evidence of a wrongful withholding of maintenance, which, as observed by the Privy Council in *Narayanrao Ramchandra Pant v. Ramabai*(3) is the

ground of liability—the Subordinate Judge has also found in this case that demands were made but not complied with since 1876." The case before this Board to which reference was made in the case last cited was decided in 1879. Three questions were raised before their Lordships, namely, whether the suit of the plaintiff, a Hindu widow, for maintenance and arrears under a will is barred by limitation on the expiration of twelve years from the testator's death, whether she had disentitled herself to maintenance by living apart from the son, and whether the suit could be maintained notwithstanding that there had been no demand and refusal of the maintenance. Their Lordships answered the two first questions in the negative and as to the third question they made the following observations:—"It was said that no action could be maintained because a demand and refusal had not been proved. There is no evidence that a specific demand was made for the maintenance, but the Subordinate Judge has found, and the High Court have not disagreed with him, that the maintenance was refused; and taking all the circumstances of this family into consideration, their Lordships do not doubt that there was a withholding of this maintenance by the son under circumstances which would amount to a refusal of it." Among the circumstances thus taken into consideration was the antecedent litigation which showed the state of hostility between the members of the family and accounted for the withholding of the maintenance. The case is of authority for the proposition that in order to recover arrears of maintenance it is necessary to prove a demand for each year's maintenance as it became payable. On the contrary the fair deduction from this and other cases cited is that, while the learned Judges of the High Court were right in holding that non-payment of maintenance to a person entitled thereto does not necessarily give him a right of action for arrears, it constitutes *prima facie* proof of wrongful withholding. It is only upon a full consideration of all the circumstances of each particular case that it is possible to decide whether such *prima facie* proof has been rebutted. The only case which might appear to conflict with this view is that of *Motilal Prannath v. Bai Kashi*(1). In that case the learned Judges of the High Court of Bombay admitted that a withholding

RAJA
YARLAGADDA
MALLI-
KARJUNA
PRASADA
NAYADU
v.
RAJA
YARLAGADDA
DURGA
PRASADA
NAYADU.

(1) (1879) I.L.R., 3 Bom., 207.

(2) (1882) I.L.R., 6 Mad., 83.

(3) L.R., 6 I.A., 114; I.L.R., 3 Bom., 415 at p. 421.

(1) (1892) I.L.R., 17 Bom., 45.

RAJA
YARLAGADDA
MALLI-
KARJUNA
PRASADA
NAYADU
v.
RAJA
YARLAGADDA
DURGA
PRASADA
NAYADU.

of maintenance might be proved otherwise than by a demand or refusal, and if they intended moreover to decide that non-payment of maintenance when due does not constitute *prima facie* proof of such withholding, their Lordships are unable to agree with the decision. In the present case it is said that the claim for maintenance is inconsistent with the claim for partition in the previous action, and in one sense this may be true, but it by no means follows that the right to arrears of maintenance was forfeited in consequence. It is not alleged that the plaintiff did not act in perfectly good faith in instituting his suit for partition and the fact that there was considerable diversity of opinion in the different Courts which had successively to decide the case shows that the plaintiff's claim for partition was not wholly baseless. So long as that action was pending the plaintiff could not well claim maintenance except as a provisional means of support pending the appeal to Her Majesty in Council. The defendant, on the other hand, if he had been willing to allow full maintenance in lieu of a partition, might have made an unconditional offer of a reasonable amount of maintenance or he might have set aside a certain sum for the purpose. It is true that, in an affidavit, he made a vague admission of his liability but he never went any further. It is reasonably clear from the proceedings in the present suit that he would not have been willing to provide maintenance at the rate of Rs. 750 per month, if that sum had been demanded in the previous suit instead of a decree for partition. One of the express grounds stated by him for his appeal in the present suit to the High Court was that "even granting that the plaintiff is entitled to maintenance the rate of maintenance awarded to him is excessive." And among his grounds of appeal to Her Majesty in Council are the following:—(4) The High Court failed to notice that it is for the plaintiff to set up and prove any custom entitling him to maintenance and that he has not done so. (5) The High Court erred "in thinking that there was any admission by the defendant of his liability for maintenance. (10) The amount of maintenance awarded is excessive." After these objections, and in view of the strained relations between the brothers ever since their father's death, it is impossible to believe that the defendant would have paid maintenance at the rate of Rs. 750 per month or at any other rate if it had been demanded from him in the first instance. He does not allege, in his defence, nor is there any evidence, that he

was in any way prejudiced by the form of the previous action. It may well be that, if he had been misled into the belief that the claim for maintenance was abandoned and had in consequence not set aside any portion of his annual income to meet such a claim, he would have had a good defence to the present action. But, without some such ground of defence, it is impossible to hold that the younger brothers of the defendant have forfeited an undoubted right merely because they were, in the first instance, advised to institute a wrong suit and did not claim their maintenance as it fell due. The District Court, therefore, properly held that the younger brothers were entitled to recover arrears for any period not excluded by the law of limitation.

The result is that, in the opinion of their Lordships, the defendant's appeals should be dismissed and the plaintiff's cross-appeals allowed to this extent that the judgment of the District Court for arrears be restored and the defendant ordered to pay the plaintiffs' costs of appeal to the High Court and their Lordships will humbly advise Her Majesty accordingly. The costs of these appeals will also be paid by the defendant, but the Registrar will be directed not to include in such costs any expenses occasioned by the printing of irrelevant or unnecessary matter in the bulky record presented to their Lordships.

Appeals dismissed.

Solicitor for the appellants—Mr. R. T. Tasker.

Solicitors for the respondents—Frank Richardson & Sadler.

RAJA
YARLAGADDA
MALLI-
KARJUNA
PRASADA
NAYADU
v.
RAJA
YARLAGADDA
DURGA
PRASADA
NAYADU.

APPELLATE CIVIL.

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

APPA RAO (PLAINTIFF)

v.

SOBHANADRI RAO (DEFENDANT).*

*Jurisdiction—Allegation in plaint believed to have been falsely made in order
to avoid jurisdiction of Small Cause Court—Procedure by Court.*

Where an allegation is made in a plaint which appears to a Court of First Instance to be false and to have been made for the purpose of avoiding the jurisdiction of the Small Cause Court, the plaintiff may be required to satisfy the Court that the allegation is *bonâ fide* and not merely colourable in order to change the venue.

CASE stated under section 646A of the Code of Civil Procedure by the District Munsif of Gudivâda, for the opinion of the High Court. The facts were as follows:—"The plaintiff in Original Suit No. 180 of 1898 is the zamindar of Nuzvid. The suit is brought to recover Rs. 21-3-11, being the kattubadi due from the defendant for faslis 1304, 1305 and 1306. There is an allegation in paragraph 4 of the plaint that, from the custom obtaining in the zamindari of Nuzvid and the understanding between the inamdars and zamindar, the kattubadi payable is a charge upon the defendant's inam. The plaint winds up with a prayer that the kattubadi should be chargeable on land. In *Mullapudi Balakrishnayya v. Venkatanarasimha Appa Rau*(1), it was held that the 'suit for kattubadi was a suit of a small cause nature.' It was further held that 'The mere fact that the plaintiff asserted that kattubadi was chargeable on land cannot be taken to alter the nature of the suit when, in fact, it was not so chargeable. Notwithstanding the decision in *Venkatarama Doss v. Maharajah of Vizianagram*(2), we must say that in our opinion kattubadi is not, in the absence of any custom or contract to the contrary, chargeable on land.' Again in *Venkatagiri Rajah v. Venkat Rau*(3), their Lordships held that a suit for arrears of jodi

* Referred Case No. 24 of 1898, stated under section 646A of the Code of Civil Procedure by S. A. Saminatha Sastri, Acting District Munsif of Gudivâda, in Original Suit No. 180 of 1898 on his file.

(1) I.L.R., 19 Mad., 329. (2) I.L.R., 19 Mad., 103n. (3) I.L.R., 21 Mad., 243.

is maintainable as a small cause suit under Provincial Small Cause Court's Act, 1887. Jodi and kattubadi are almost synonymous terms. I am inclined to hold that the plaintiff's allegation in the plaint that the kattubadi was chargeable on the inam according to custom obtaining in the zamindari and the understanding between the parties must have been purposely inserted by the plaintiff for the purpose of creating jurisdiction. I am fortified in the view by the fact that the plaintiff in this case was the plaintiff in the case of *Mullapudi Balakrishnayya v. Venkatanarasimha Appa Rau*(1) above quoted. About twenty suits of a similar nature are filed by this plaintiff in my Court as original suits and ninety-nine similar suits by another zamindar of Nuzvid. I entertain a doubt if suits of this description are not cognizable by the Small Cause Court. The process fee of four rupees required for service of notice on plaintiff and defendant is herewith submitted."

Venkatarama Sarma for the plaintiff.

The defendant was not represented.

JUDGMENT.—As the District Munsif thinks that the allegation in the plaint that the kattubadi is a charge on the land is a false allegation made for the purpose of avoiding the jurisdiction of the Small Cause Court, we think that the proper course is to require the plaintiff to satisfy that Court that the allegation is *bonâ fide* and not merely colourable in order to change the venue. The plaintiff may be required to adduce some decision of the Courts, or some orders or reports of Government or public authorities in which such a charge has been recognized, or, if the charge is a matter of contract, he may be required to produce any written or other evidence in support of the contract. If the Court then thinks the allegation is made *bonâ fide* even though the Court may not hold it to be actually proved, it should register the plaint on the Original Side and proceed to dispose of it according to law. Otherwise the plaint should be registered by the District Munsif and disposed of on the Small Cause side or returned to the party to be filed in the proper Court as may be appropriate.

(1) I.L.R., 19 Mad., 329.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice.

LILADHARA VIAS (APPELLANT)

v.

OFFICIAL ASSIGNEE OF MADRAS (RESPONDENT).*

*Court Fees—Fee payable on appeal under Indian Insolvent Debtors' Act—
11 and 12 Vict., cap. XXI.*

The Court fee payable on an appeal preferred under section 73 of the Indian Insolvent Debtors' Act is that which is provided for in article 18 of schedule A to the table of fees in the rules of the Original Side of the Madras High Court, dated 5th May 1891.

REFERENCE under section 5 of the Court Fees Act (VII of 1870). The subject-matter of this reference was an appeal under section 73 of the Indian Insolvent Debtors' Act (11 and 12 Vict., cap. XXI). The appellant paid a Court fee of Rs. 5, but it appeared that the practice of the Court had hitherto been for appeals of this nature to be filed as Original Side appeals (and in fact the present appeal was so described), and for fees of Rs. 50 to be paid in respect of them under article 18 of schedule A to the table of fees, (of the Original Side rules of the Madras High Court), which is as follows:—

" 18. On presentation of Memorandum of Appeal—

In suits for debt, damages or moveable property where the amount to which the appeal relates does not—

	rs.
Exceed Rs. 1,500	16
„ „ 2,500	24
„ „ 5,000	32
Beyond „ 5,000	50
In all other cases	50 "

It was contended on behalf of the appellant that this table of fees had no application to the case under reference and that the fee leviable could not exceed that payable, under the Court Fees Act, on the value of the subject-matter of the appeal, which was only Rs. 150.

Referred Case No. 8 of 1900 stated under section 5 of the Court Fees Act, 1870, by the Taxing Officer of the High Court in his letter, dated 4th April 1900.

The parties were not represented.

JUDGMENT.—In my opinion the words "in all other cases" in article 18 in schedule A of the table of fees prescribed under the authority conferred by 24 and 25 Vict., cap. 104, section 15, cover a Memorandum of Appeal presented under section 73 of 11 and 12 Vict., cap. XXI, and the fee payable is Rs. 50 irrespective of the value of the subject-matter of the appeal.

LILADHARA
VIAS
v.
OFFICIAL
ASSIGNEE
OF MADRAS.

APPELLATE CRIMINAL.

*Before Sir Arnold White, Chief Justice, Mr. Justice Shephard
and Mr. Justice Davies.*

QUEEN-EMPRESS

v.

SUBRAHMANIA AYYAR.*

1900.
August 23.

*Bail—Release on bail of a person convicted by Sessions Court of Madras pending
appeal to Privy Council—Jurisdiction of High Court*

A person was, at Criminal Sessions held in Madras, convicted of certain offences and sentenced to imprisonment and fine. Upon a certificate being granted by the Advocate-General under section 26 of the Letters Patent, the High Court reviewed the conviction and reduced the sentence. The accused obtained from the Judicial Committee of the Privy Council special leave to appeal, and also applied to be released on bail; but the Judicial Committee expressed the opinion that the latter application should be decided by the Madras High Court. Upon application being made accordingly to the Madras High Court:

Held, that the High Court had jurisdiction to make an order releasing the accused on bail pending the decision of the Privy Council; and that having regard to the rule laid down by the Judicial Committee in *Ex parte Carew*, ([1897] A.C., 719), as to the circumstances under which an appeal in a criminal matter will be admitted by the Privy Council, the accused ought to be released on bail in the present case.

PETITION for the release of petitioner on bail. Petitioner had been tried at the Criminal Sessions of the Madras High Court for having committed offences under sections 161, 384 and 109 of the Indian Penal Code, and was found guilty on the first, second

* Criminal Miscellaneous Petition No. 95 of 1900, under section 493, Criminal Procedure Code, praying the High Court to release the accused on bail pending disposal of his case before the Privy Council.

QUEEN-
EMPRESS
v.
SUBRAHMANIA
AYYAR.

and sixth counts in the indictment and was convicted and sentenced to three years' rigorous imprisonment and a fine of Rs. 8,000. The petition set forth that, upon a certificate granted by the Advocate-General under section 26 of the Letters Patent, the High Court had reviewed the case and determined that the conviction in respect of the first and second counts ought not to be upheld; but that the majority of the Judges of the High Court had upheld the conviction on the sixth count and had altered the sentence to one of two years' rigorous imprisonment and a fine of Rs. 5,000. The petition stated that petitioner had obtained special leave to appeal to Her Majesty in Council against the said sentence and fine; but that he was now confined in jail and undergoing the sentence of imprisonment. It further stated that petitioner had applied for bail to the Judicial Committee, who had expressed the opinion that the matter should be decided by the Madras High Court. He prayed that having regard to the difference of opinion which had existed as to the propriety of his conviction on the sixth count and to the fact that special leave to appeal had been granted by the Privy Council, the Madras High Court would be pleased to enlarge him on bail or suspend the sentence or pass such order as to the Court should seem fit.

Mr. J. H. M. Ryan, for petitioner, referred to the charter of the Madras High Court, and submitted that precedents must be sought in the practice of the English Courts. He cited Bishop's 'Criminal Procedure,' paragraph 880, and Blackstone's 'Commentaries,' Book IV, as showing that a Court has power to respite a sentence and argued that if a Court can respite it may admit to bail. By section 498 of the Criminal Procedure Code the Court which has convicted has power to liberate on bail pending an appeal, and that power is conferred without restriction. He cited the following cases and books:—*The Queen v. Lord*(1); *The King v. Reader*(2); *In re Turner*(3); *Nga Hoong v. The Queen*(4); *Ex parte Carew*(5); *In re Abraham Mallory Dillet*(6); *Reg v. Bertrand*(7); *Kops v. The Queen*(8); *Gangadhar Tilak v. Queen-Empress*(9); and Mayne's 'Criminal Law,' page 971.

(1) 16 L.J., (M.C.), 15.

(3) 15 L.J., (M.C.), 140.

(5) [1897] A.C., 719.

(7) L.R., 1 P.C., 520 at p. 530.

(9) L.R., 25 I.A., 1; I.L.R., 22 Bom., 528.

(2) 1 Stra., 531.

(4) 7 M.L.A., 72.

(6) L.R., 12 App. Cas., 459 at p. 465.

(8) [1894] A.C., 650.

QUEEN-
EMPRESS
v.
SUBRAHMANIA
AYYAR.

The Crown Prosecutor (Mr. John Adam) opposed the application. The remark in Blackstone, he contended, was based on the fact that offenders in certain small felonies were at that time liable to capital punishment. The cases in the Law Journal were instances of bail being granted by an Appellate Court—not by the Court which had convicted. He argued that section 498 of the Criminal Procedure Code could not be construed without regard to the other sections of the Code, the principle underlying which was that only the Court to which an appeal is preferred can admit to bail.

JUDGMENT.—In our judgment this Court has jurisdiction to make an order, in this case, releasing the accused on bail, pending the decision of the Privy Council.

Having regard to the rule laid down by the Judicial Committee in *Ex parte Carew*(1) as to the circumstances in which an appeal in a criminal matter will be admitted by the Privy Council, we think we ought to allow the accused to be released on bail in the present case.

The accused will be released on bail on entering into his own recognizances for Rs. 10,000 and on the recognizances of two sureties for Rs. 5,000 each.

P. Subrahmania Ayyar.—Attorney for petitioner.

ORIGINAL CIVIL.

Before Mr. Justice Shephard.

EBRAHIM CURRIM (PLAINTIFF),

v.

ESSA ABBA SAIT (DEFENDANT).*

1900.
September
18.

Trade-mark—Prior user by owner in Scotland—Effect on right to exclusive user in British India by a person other than the owner—Infringement.

Plaintiff claimed to have been for many years the sole importer into Bombay and Madras of umbrellas bearing a certain trade-mark. Defendant had recently commenced importing and selling in Madras umbrellas which, plaintiff contended, bore a trade-mark so similar as to be calculated to deceive purchasers so as to induce them to buy defendant's umbrellas under the belief that they were buying plaintiff's. He asked for an injunction and damages. Defendant denied

(1) [1897] A.C., 719, at p. 721.

* Civil Suit No. 75 of 1900.

EBRAHIM
CURRIM
v.
ESSA ABBA
SAIT.

that plaintiff had been the sole importer of umbrellas bearing the trade-mark in question; or that he was the owner or entitled to the exclusive use of that trade-mark; or that umbrellas bearing that trade-mark had come to be known as umbrellas imported and sold by plaintiff alone. It was contended that the trade-mark belonged to and had, since 1884, been used by a Glasgow firm, who manufactured the umbrellas, and supplied them to defendant, through another. Defendant denied the alleged similarity of the trade-marks or that purchasers were calculated to be deceived as alleged, and contended that plaintiff could not lawfully use or claim it. For the purposes of the case it was assumed that the trade mark in question had been used by the Glasgow firm before it was used by plaintiff in India; and that it had never been used by the Glasgow firm in India before plaintiff so used it. On its being contended that inasmuch as the trade-mark had originally belonged to the Glasgow firm it could not be lawfully used or claimed by plaintiff, notwithstanding that the Glasgow firm had never used it in or imported umbrellas bearing it into India:

Held, that the contention could not be supported and that the prior use in Scotland did not justify the Scotch firm and the defendant in claiming that plaintiff's user of the trade-mark was illegal or otherwise than an exclusive user.

Suit for an injunction restraining defendant from importing or selling umbrellas bearing a certain trade-mark. The plaint was as follows:—"That the plaintiff's firm have been for many years past the only importers of water-proof umbrellas bearing 'the stag' trade-mark into Bombay and Madras, which mark has the largest sale of any brand of umbrellas in India. That the said trade-mark consists of the device of a stag in gold on the inside of the umbrellas and the words 'Ebrahim Currim No. I' indicating the quality above the said stag and the word 'water-proof' underneath and a circular device on the opposite side of the umbrella representing the sun in gold with the Prince of Wales' feathers at the top and the words 'Best rain-proof, superior quality, Ebrahim Currim,' around and within the said stamp and at the bottom of it the words 'Wilson Latham & Co.,' the plaintiff's agents in Manchester. That by reason of the trade-mark the plaintiff's said umbrellas have come to be known throughout India as the 'stag mark' and are frequently ordered and invoiced under that name and such mark indicates that umbrellas bearing the said stamp are imported and sold by the plaintiff alone. That the plaintiff is informed that the defendant ten days ago commenced importing and selling in Madras umbrellas of an inferior quality of water-proof bearing a facsimile of plaintiff's stag mark with the device of a stag and the words 'Aldridge Salmon & Co., Ltd.,' above the said stag and the word 'water-proof' below and on the

EBRAHIM
CURRIM
v.
ESSA ABBA
SAIT.

opposite side a device similar to that of the plaintiff and the plaintiff charges that such use by the defendant of the trade-mark aforesaid is calculated to deceive intending purchasers to buy the defendant's goods in the belief that they are buying those of the plaintiff. The plaintiff through his solicitors has called upon the defendant to desist from selling the umbrellas bearing the said mark and for an account of all umbrellas sold bearing the said mark, but the defendant has failed and neglected to do so. The plaintiff prays for judgment as follows:—"That the defendant his servants and agents may be restrained by an injunction issued out of and under the seal of this Honourable Court from importing or selling or passing off or attempting to pass off the defendant's goods as and for the plaintiff's goods and in particular from offering for sale or selling umbrellas bearing the said 'stag' mark. That the defendant may be decreed to pay a sum of Rs. 3,000 as and by way of damages for such fraudulent and wrongful user of plaintiff's stag mark, or if this Honourable Court should deem it desirable that an account should be taken of the profits earned by the defendant and that the amount thereof be decreed to the plaintiffs. That the defendant be decreed to pay the costs of this suit. That the plaintiff may have such further or other relief as the nature of the case may require."

The defendant filed the following written statement:—"Save and except as hereinafter expressly admitted the defendant does not admit the several allegations contained in the plaint and puts plaintiff to proof thereof. The defendant states that the 'stag' trade-mark consists only of the device of a stag in gold and denies that the words 'Ebrahim Currim No. I' above and the word 'water-proof' underneath such device or the device on the opposite side of the umbrellas representing a sun in gold with the Prince of Wales' feathers at the top and the words mentioned in paragraph 2 of the plaint form part of the said stag trade-mark as therein alleged. The defendant is informed that the plaintiff has been in the habit of selling in Madras umbrellas bearing among other marks the stag mark which are supplied to him by Messrs. Wilson Latham & Co. through Messrs. Latham Abercrombie & Co. of Bombay. The defendant denies the allegation that the plaintiff's firm has been for many years the only importers of water-proof umbrellas bearing the stag trade-mark into Bombay and Madras, and he denies that the plaintiff is the owner or is by assignment

EBRAHIM
CURRIM
v.
ESSA ABBA
SAIT.

from the owner or otherwise in any way entitled to the exclusive use of the stag mark or of the sun mark which latter mark is claimed to be the registered trade-mark of Messrs. Wilson Latham & Co. The defendant denies that the plaintiff's umbrellas have come to be known as the stag mark and that such mark indicates that umbrellas bearing it are imported and sold by the plaintiff alone as alleged in paragraph 2 of the plaint. The stag mark was originated by and it belongs to and is the trade-mark of the firm of Messrs. McIntosh and Ferguson of Glasgow who have used it since 1884 on umbrellas manufactured by them and the said firm has supplied the defendant with umbrellas which are imported direct to Madras through Messrs. Aldridge Salmon & Co., and the defendant has sold such umbrellas. The said umbrellas supplied to and sold by the defendant bear the said stag trade-mark with the words 'Aldridge Salmon & Co., Ltd.,' and also the word 'water-proof' which is not a trade-mark. Some of them bear also another device which is the defendant's own trade-mark, and which does not resemble the sun trade-mark or the circular device mentioned in paragraph 2 of the plaint, but is entirely different therefrom. The defendant denies that the sale of umbrellas bearing the marks and his use of the marks mentioned in the last preceding paragraph hereof is calculated to deceive as alleged in paragraph 4 of the plaint. In 1897 Messrs. McIntosh and Ferguson agreed that they would not sell umbrellas with a single stag mark for Bombay excepting through Messrs. Wilson Latham & Co., but the right to the former firm to ship in respect of all other Indian markets was reserved and in July 1899 the said agreement was modified in other respects, but the full right of Messrs. McIntosh and Ferguson to the free use of their stag mark in all other markets except Bombay was again expressly reserved. The defendant submits that the use by the plaintiff of the stag mark in Madras is fraudulent, and that the plaintiff has no right to use the stag mark other than the right of his vendors Messrs. Wilson Latham & Co. under the license of the owners and that the plaintiff is bound by the arrangement made between them and cannot go behind the same and is thereby estopped and precluded from maintaining his present suit. The defendant submits that the plaintiff has no title to maintain this suit and has no cause of action against him for either damages or an injunction, and that in any case the damages claimed are excessive."

EBRAHIM
CURRIM
v.
ESSA ABBA
SAIT.

The following issues were framed:—"1. Whether the plaintiff's firm have been for a period of ten years the sole importers into the markets of Bombay and Madras of umbrellas bearing the stag mark? 2. Whether the stag trade-mark was before the date of the plaintiff's user and still is the trade-mark of McIntosh and Ferguson as alleged in the sixth paragraph of the written statement? 3. Whether if the last issue be found in the affirmative the said trade-mark was used by the said McIntosh and Ferguson in regard to umbrellas imported into Madras and Bombay and if so for what period? 4. Whether the trade-mark used by the defendant is calculated to deceive the public as alleged in the fourth paragraph of the plaint? 5. To what damages (if any) or other relief the plaintiff is entitled? 6. Whether the matters of fact referred to in the second and third issues raise a valid defence?"

It was ordered by the Court on 31st July 1900 that the sixth issue be tried as a preliminary issue on the 10th August 1900; and the case came on for hearing in due-course.

Mr. J. H. M. Ryan and Mr. P. Grant for the plaintiff.

Mr. K. Brown for the defendant.

JUDGMENT.—The question I have to determine is whether the allegation made by the defendant that the stag trade-mark used on umbrellas is the trade-mark of McIntosh Ferguson & Co., who carry on business in Glasgow is relevant by way of defence to this suit. For the purpose of the argument it must be taken that the stag mark was used by the Glasgow firm before it was used by the plaintiff in India and that it was never used by that firm in this country before the plaintiff had begun to use it in his trade, and on this assumption it is contended that since the trade-mark originally belonged to McIntosh and Ferguson it cannot be lawfully used or claimed by the plaintiff notwithstanding that the Scotch firm have never used the mark in India or imported umbrellas bearing it into this country. In my opinion this contention is not sound and the prior use in Scotland would not justify the Scotch firm and the defendant in saying that the plaintiff's user of the trade-mark is illegal or otherwise than an exclusive user. The principle which underlies the law relating to trade-marks is that no man has a right to put off his goods for sale as the goods of a rival trader. "No man," says James, L.J., "is entitled to represent his goods as being the goods of another man; and no man is permitted

EBRAHIM
CURRIM
v.
ESSA ABBA
SAIT.

to use any mark, sign or symbol, device or other means, whereby, without making a direct false representation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie or to make a false representation to somebody else who is the ultimate customer." (*Singer Manufacturing Company v. Loog*(1).) A man whose goods, associated with a certain trade-mark, have a reputation in the market is not for that reason entitled to prevent other traders from imitating his goods and selling them, but he is entitled to prevent other persons from attaching to such goods his trade-mark in such a way as to deceive customers. Fraud on the defendant's part need not be proved, but no wrongful act has been committed by the defendant unless it is shown that his conduct has been calculated to deceive the public into buying his goods as the goods of the plaintiff. These considerations show in how qualified a sense a man can be said to have property in a trade-mark, (see particularly Mellish, L.J., in *Singer Manufacturing Company v. Wilson*(2). It is only in a peculiar sense that a man's right of property can be said to be infringed when in order to establish the infraction he must prove the possibility of other persons being deceived. Yet it was mainly on the strength of the theory that trade-mark is property that it was contended before me that prior ownership of a trade-mark in Scotland excluded the possibility of ownership of the same symbol in India. The proposition seems to me to go a great deal beyond what is required for the protection of traders. It assumes that two or more persons in England cannot lawfully use the same trade-mark, and that the Scotch firm could, if they come to Madras, maintain an action against the plaintiff. The books show that the co-existence of identical marks in different parts of the country has not been uncommon in England, and under the Statute there may be as many as three registered owners. No case was cited in support of the proposition that the Scotch firm could maintain an action here against the plaintiff.

The case chiefly relied on was *Laverne v. Hooper*(3). The point actually decided in that case was that the plaintiffs, whatever right they may otherwise have had, had led the defendant to believe that his firm was to adopt the trade-mark in dispute; and that was the ground on which the suit had been dismissed in the Court

(1) L.R., 18 Ch.D., 395 at p. 412.

(2) L.R., 2 Ch.D., 434 at p. 454 *et seq.*

(3) I.L.R., 8 Mad., 149 at p. 153.

EBRAHIM
CURRIM
v.
ESSA ABBA
SAIT.

of First Instance. The question whether exclusive use of a trade-mark in one market gives an exclusive right to use it in another market, though the person using it may not have employed it in such other market, was propounded and the conclusion arrived at was that "the remedies which are conceded for the protection of trade-marks adopted in the home market are also extended to trade-marks which have been originally adopted in foreign markets, and it is immaterial that goods bearing such marks are not sold in the home market." The *Collins Company* cases (*The Collins Co. v. Walker*(1), *The Collins Co. v. Brown*(2), and *The Collins Co. v. Cowen*(3)) are cited by way of authority. I do not think this statement can be treated as more than a dictum. Not only was the case decided on the distinct ground already mentioned, but as a matter of fact the plaintiff had been trading in the Madras market in so far as he had been supplying the defendant with the brandies bearing the Maltese Cross mark. In point of law the authorities cited do not support the proposition which I am asked to affirm. In *The Collins Co. v. Brown*(2), the point taken on demurrer was that the plaintiffs were a foreign company and therefore not entitled in England to any rights in respect of their trade-mark, and the demurrer was overruled. Nothing was or could be decided as to the circumstance that the trade-mark was not used in England, because the bill alleged that articles bearing it had been sold to persons in England. I can hardly believe that the learned Judges of this Court intended to hold on the authority of these cases that a man can maintain an action for infringement of his trade-mark without proof that his goods have ever been brought into the market. *In re Rivière's Trade-mark*(4) relates to the same trade-mark. There the Madras firm, alleging that they had formerly been supplied by Rivière & Co. with brandy bearing the Maltese Cross and had requested them to get it registered in England and in France, objected to the registration of Rivière & Co. as owners of the Maltese Cross in connection with brandy, and because the former had never used the mark in England it was held on demurrer by Pearson, J. that they were not persons "aggrieved" within the meaning of the Act. On appeal, it was held that the Madras firm might possibly be "aggrieved," although

(1) 7 W.R., 222.

(2) 3 K. & J., 423.

(3) 3 K. & J., 428.

(4) L.R., 26 Ch.D., 48.

EBRAHIM
CURRIM
v.
ESSA ABBA
SAIT.

they were not themselves entitled to register in respect of the mark. This case, so far from supporting the defendant's position is like several others which were cited as authority for the proposition that "user," as understood by the Act, means user in England. This is put most clearly by Stirling, J., in *Jackson & Co. v. Napper*(1), where registration was refused in the case of particular articles in respect of which user in England had not been proved and allowed as to others in respect of which there was proof, although there was a similar mark already on the register. As regards articles of the former class, as the *jus tertii* set up by the defendants failed the plaintiffs obtained an injunction, and it does not appear to have been suggested that the use of the trade-mark in connection with those articles in Germany was any answer to the claim for an injunction. The circumstance that the industry of counsel was unable to find any English case directly supporting this contention is in my opinion a strong argument against it, for it is inconceivable that cases similar to the present should not have occurred in England or cases in which the foreign owner of a trade-mark used abroad complained of another person using the same mark in England. The protection which the law affords to traders using a trade-mark in this country would be seriously diminished if immunity from action were secured to rival traders who, having brought goods into the market with the same mark, were able to prove that in some other quarter of the globe some other trader had been in the habit of using the mark for a period longer than that alleged by the plaintiff.

For these reasons I think the second issue must be struck out.

The third issue is for other reasons unnecessary since the question is sufficiently raised by the first issue.

The third issue is also struck out.

The defendants must pay the costs of the issue.

Messrs. *Short & Roll*—Attorneys for the plaintiff.

Mr. A. E. *Rencontre*—Attorney for the defendant

(1) L.R., 35 Ch. D., No. 2 at p. 170.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Boddam.

MUHAMMAD USAN ROWTHAN (DEFENDANT No. 5 AND PETITIONER), APPELLANT,

v.

ABDULLA AND OTHERS (REPRESENTATIVES OF PLAINTIFF AND COUNTER-PETITIONERS), RESPONDENTS.*

1900.
September
7, 24.

Mortgage—Right of possession of mortgaged lands as between first and second mortgagee—Suit on mortgage by first mortgagee, second mortgagee not being joined—Decree for sale and subsequent purchase of the lands by first mortgagee—Possession by first mortgagee—Suit by second mortgagee against first mortgagee, decree for sale, and purchase by second mortgagee—Delivery of possession to second mortgagee—Right of first mortgagee to recover possession.

A mortgagee sued and obtained a decree on his mortgage, and brought the mortgaged land to sale in execution of that decree. In that sale he purchased the land, which he subsequently sold to R, who obtained possession of it. At the date of the suit, a second mortgage existed over the land, but the second mortgagee was not made a party to the suit. The second mortgagee then brought a suit against R and others, and obtained a decree authorizing the sale of the land subject to R's rights. The land was again sold, and was purchased by the second mortgagee, whose successors in title were in due course put into possession of it. R now petitioned the Court for an order setting aside the delivery of possession to the successors of the second mortgagee.

Held, that R was entitled to possession.

PETITION presented under section 244 of the Code of Civil Procedure in Original Suit No. 81 of 1895 on the file of the District Munsif of Mannargudi. Petitioner (appellant) had purchased certain property from one Kadir Mohidin Rowthan. The said Rowthan had purchased it at an auction sale held in execution of the decree in Original Suit No. 402 of 1887 on the file of the same Court. In that suit, Kadir Mohidin Rowthan was the transferee-plaintiff, the suit being on a mortgage, and he bought the land in question in execution of the said decree. At the date of Original Suit No. 402 of 1887, there was a second mortgage on the land, but the second mortgagee was not

* Civil Miscellaneous Second Appeal No. 63 of 1899 against the order of G. F. T. Power, District Judge of Tanjore, in Civil Miscellaneous Appeal No. 408 of 1899, affirming the order of B. Virasamayya, District Munsif of Mannargudi, in Miscellaneous Petition No. 52 of 1899, in the matter of Original Suit No. 81 of 1895.

MUHAMMAD
USAN
ROWTHAN
v.
ABDULLA.

made a party to the suit. Petitioner was put into possession of the land. The second mortgagee then brought Original Suit No. 81 of 1895 (in which petitioner was impleaded as defendant No. 5) and obtained a decree authorizing the sale of the land, subject to the right of the petitioner. The extent of petitioner's interest and other matters arising between him and the second mortgagee were not decided: and neither party appealed. The land was thereupon sold in execution of that decree, subject to petitioner's rights as mortgagee. It was purchased by the plaintiff (namely the second mortgagee), who subsequently died, but his heirs (the present counter-petitioners) were put into possession of the land by the Court. Petitioner now claimed that counter-petitioners had no right either to bring the land to sale or to obtain possession of it without first obtaining a declaration as to the extent of petitioner's claim over it, and paying the amount. He asked for an order, setting aside the delivery of possession to counter-petitioners. The District Munsif passed the following order under sections 244 and 335 of the Code of Civil Procedure:— "This is a petition by a person who has been dispossessed of certain lands purchased by him in execution of his own decree in Original Suit No. 402 of 1887 as the first mortgagee thereof; and he seeks to have the property restored to him by taking it from a subsequent mortgagee and auction-purchaser of the same in Original Suit No. 81 of 1895. Properly speaking the petition is one that has a direct reference to section 334 of the Code as the ouster was occasioned by the counter-petitioner, not in his capacity of decree-holder, but as auction-purchaser. If so, the possessor cannot be disturbed now since the second sale was held, as directed by the Appellate Court in appeal, in supersession of the petitioner's right as prior purchaser and only subject to his right as prior mortgagee. In view of the relative position of the petitioner and the counter-petitioner, all that the petitioner can contend for is that the property is still answerable for his debt, and this nobody denies. What his vakil presses on the Court is that the subsequent mortgagee and purchaser should be made to pay the debt due to the petitioner before he could enter on the land, and, in the event of his failure to do so, he should be compelled to give up the property. I am unable to see the force of this argument when there is absolutely nothing in the appeal decree to give the slightest countenance to it. The dispossession cannot be set aside and the

petitioner should seek his remedy, if any, otherwise. The petition is dismissed without costs."

Petitioner appealed to the District Judge who passed the following order:—"In my opinion the District Munsif's order is right. When the Appellate Court said 'the plaintiff may bring the mortgaged property to sale subject to the rights of the fifth defendant,' it could only mean that the land was to be sold subject to fifth defendant's rights as mortgagee. It could not mean that it was to be sold subject to his rights as owner of the land by purchase at the former sale, for that would be nonsense. The fifth defendant's rights as mortgagee do not include the right to possession, and therefore, when the land was sold a second time in execution of the Appellate Court's decree, subject to his rights as mortgagee, he was not entitled to possession as against the purchaser at the second sale. The appeal is dismissed with costs."

Against this order the petitioner preferred this appeal.

V. Krishnasami Ayyar, for appellant, contended that the lower Courts were wrong in turning petitioner out of possession and delivering possession to the counter-petitioners. Petitioner was entitled to possession and his right to the land was held subject only to the right of the counter-petitioners to redeem. He referred to *Venkatanarasammah v. Ramiah*(1); *Nanack Chand v. Teluckdye Koer*(2); and *Venkata v. Kannam*(3).

Sivasami Ayyar, for respondents, argued that the predecessor in title to the counter-petitioners had acquired all rights over the land, and that petitioner was only entitled to redeem. He cited *Rangayya Chettiar v. Parthasarathi Naickar*(4) and *Narayanasami Naidu v. Narayana Rau*(5).

SHEPHARD, J.—The appellant has become possessed by purchase of certain land comprised in the certificate granted to his vendor who, himself being plaintiff in a suit on a mortgage of 1884, bought that and other pieces of land at the sale in execution of the decree. At the date of that suit there was a second mortgage, but the holder of that mortgage was not made a party.

He accordingly brought a suit in 1895 making the appellant a party and he obtained a decree authorizing, among other things,

MUHAMMAD
USAN
ROWTHAN
v.
ABDULLA.

(1) I.L.R., 2 Mad., 108 at p. 112.

(2) I.L.R., 5 Calc., 265 at p. 268.

(3) I.L.R., 5 Mad., 184 at p. 188.

(4) I.L.R., 20 Mad., 120.

(5) I.L.R., 17 Mad., 62.

MUHAMMAD
USAN
ROWTHAN
v.
ABDULLA.

the sale of this land subject to the right of the appellant. In making the decree, the District Judge practically refused to decide the questions arising between the appellant and the plaintiff in the suit. It was to the interest of both parties to have those questions decided, yet there was no appeal. Now, the property having been put up for sale and bought by the plaintiff, the question arises as between his heirs and the appellant whether they are entitled to take possession, and I think the question must be decided in the present proceeding. According to the appellant's contention his rights, subject to which the sale was made, include the right of possession, and are in no way limited except by the respondent's right of redemption and consequent right on his mortgage. According to the respondents' contention all rights in the property have passed to them in virtue of the plaintiff's purchase, subject only to the right of the appellant to redeem the property.

In my opinion the appellant's contention must prevail. Not only has he the prior title, inasmuch as his mortgage and his sale were prior in point of time to the plaintiff's mortgage and decree, but he has the advantage of having been put in possession. The case is similar to *Venkatanarasammah v. Ramiah*(1) and stronger than *Nanak Chand v. Teluckdye Koer*(2), for in these latter cases it was held that, as between two purchasers under different decrees, the right of possession remains with him who has first taken possession without regard to the priority of the claim on which the decree was obtained. These cases are plainly distinguishable from the case in which the second mortgagee has taken possession under his mortgage. It stands to reason that the right to possession so obtained cannot be affected by the result of a suit on the first mortgage, in which the mortgagee in possession was not made a party (*Venkata v. Kannam*(3)). In the present case the plaintiff was not put in possession, and therefore the only right which, had he been joined in the suit on the first mortgage, he could have claimed to exercise, was the right to redeem that mortgage with the view of enforcing his own mortgage. That right and no other, it appears to me, remains to him now. It is only on the supposition that the property exceeds in value the

(1) I.L.R., 2 Mad., 108 at p. 112.

(2) I.L.R., 5 Cal., 265 at p. 268.

(3) I.L.R., 5 Mad., 184 at p. 188.

MUHAMMAD
USAN
ROWTHAN
v.
ABDULLA.

amount secured by the first mortgage that they have any actual interest in the property. The respondent's vakil relies on *Rangayya Chettiar v. Parthasarathi Naickar*(1) and argues that his client, as second mortgagee, is entitled to have the property sold in satisfaction of his claim. I think it must be allowed that the language used in the judgment in that case is open to exception. But the point actually decided had regard solely to the sufficiency of the decree made in favour of the second mortgagee. There was no question in that case as to the first purchaser's right of possession and the decree did in fact completely protect the rights of the first mortgagee who had bought. The case of *Narayanasami Naidu v. Narayana Rau*(2) turns upon the special facts of the case. Different reasons are given by the two learned Judges for the conclusion at which they arrive.

It is a necessary consequence of framing a decree in the manner in which the decree now being executed has been framed that further litigation should ensue. Practically the question we have to decide is, who shall take the first step in that litigation? In my view it is the respondents who must make the first move, since the appellant is in lawful possession under a title prior to that acquired by the respondents.

I would allow the appeal and direct that the appellant be restored to possession. I would allow no costs, as the difficulty would not have arisen but for the omission to join the plaintiff in the first suit.

BODDAM, J.—I agree.

(1) I.L.R., 20 Mad., 120.

(2) I.L.R., 17 Mad., 62.

APPELLATE CIVIL.

*Before Sir Arnold White, Chief Justice, Mr. Justice Shephard,
Mr. Justice Subrahmanya Ayyar, Mr. Justice Davies, and
Mr. Justice Benson.*

1900.
September
21, 27.

REFERENCE UNDER STAMP ACT, s. 57.*

Stamp Act—Act II of 1899, s. 5—Agreement with numerous landholders for mining rights—Community of interest—Stamp.

A company, having obtained from the Secretary of State for India the right to search for and work minerals in a certain district, prepared an indenture with the object that it should be executed by numerous persons who were landholders and owners of surface and mining rights over the lands comprised in that district. By the indenture, each intended executant, for a consideration of one rupee and a royalty, granted to the company a license to prospect and work upon a piece of land belonging to him and covenanted to sell or lease the mining rights over it if required. The executant further covenanted to indemnify the company from claims that might be made by other persons, and undertook not to sell the mining rights to any other person for fifty years:

Held, that the instrument was chargeable with the aggregate amount of the duties with which separate instruments relating to the same matter would be chargeable. Upon the face of it, the instrument dealt with several distinct matters, namely, with agreements with several persons with regard to their separate property; and the proper stamp to be affixed was an eight-anna stamp, or as many such stamps as there were separate landholders who were made parties to the agreement:

Held also, that the instrument did not contain distinct agreements with any one raiyat.

CASE stated under section 57 of the Stamp Act, 1899, for the decision of the High Court. The agreement in connection with which the reference was made was as follows:—"AGREEMENT between . . . hereinafter called the landholder (landholders) . . . of the one part and Messrs. Best & Co., Merchants, Agents, and Bankers of Madras hereinafter called "The Company" which term shall be deemed to include . . . their and his assigns and other the persons or person who from time to time shall be either jointly or solely entitled either as licensees or lessees to the benefit of the mining prospecting license

* Referred Case No. 13 of 1900 stated, under section 57, Stamp Act, 1899, by the Secretary to the Commissioner of Salt, Abkari and Separate Revenue, Madras, in letter, dated 12th June 1900, Miscellaneous No. 2610.

from the Secretary of State for India in Council hereinafter recited or to the benefit of any mining lease which may be obtained from the said Secretary of State pursuant to the terms of the said license of the other part. WHEREAS by an indenture . . .

. . . the Secretary of State for India in Council granted and demised to Messrs. Best & Co., their executors, administrators and assigns ('therein called the licensees') the sole right and license during a period of two years from the date thereof (*inter alia*) to search for and work coal mineral ores and mineral oils within, under, or throughout certain lands . . . and by the same indenture the said Secretary of State covenanted that on or before the determination of the now reciting indenture the licensees should have a preferential right subject as therein mentioned to a mining lease for thirty years in accordance with the terms and upon the conditions in the now reciting indenture mentioned over an area not exceeding six square miles in . . .

AND WHEREAS the landholder is (landholders are) the sole owner (owners) of the piece or parcel of land in the said District . . .

. . . and to the surface and mining rights thereof but subject as to such mining rights to the right of the State zamindar or shrotriendmar to share in the produce of the minerals worked. AND WHEREAS the landholder has (landholders have) agreed to grant to the Company a license to prospect upon all or any portion of the piece or parcel of land described in the schedule hereto and to mine for coal and other minerals and mineral oil for the period and upon and subject to the terms and conditions hereinafter contained and has (have) further agreed if so required by the Company at any time during the said term to sell to the Company the mining rights of or at the Company's option to sell or grant to the Company a lease of the surface rights of, in, and over the whole or such portions of the said piece or parcel of land described in the schedule hereto as the Company may require upon such terms and conditions as are hereinafter mentioned for the purpose of mining for coal and other minerals and mineral oil such lease to be for a period corresponding with the remainder which may be then unexpired of the term for which the Company may hold a lease from the Secretary of State for India granted pursuant to the said recited indenture. Now THIS INDENTURE WITNESSETH that in pursuance of the said agreement and in consideration of the sum of Re. 1 paid by the Company to the landholder (landholders) the receipt whereof

REFEREN
UNDER
STAMP AC
S. 57.

REFERENCE
UNDER
STAMP ACT,
s. 57.

the landholder (landholders) hereby acknowledges (acknowledge), the landholder doth (landholders do) hereby irrevocably grant to the Company the sole right and license to enter upon and to explore and search the surface of the piece or parcel of land described in the schedule hereto and to dig bore and sink shafts and pits and make other excavations therein and to deposit thereon the earth and other substances excavated and to erect and maintain thereon such buildings and other erections, engines, machinery and plant as shall be requisite or necessary for digging, boring, and sinking such shafts, pits, and other excavations and for pumping water thereout with liberty for the purposes aforesaid to use any existing roads, paths, ways, ditches, waters, and watercourses and others to construct and maintain upon the said piece or parcel of land and to cut down and convert to the use of the Company all trees, brushwood, and undergrowth which may be found growing upon the said piece or parcel of land and which for the purposes aforesaid it shall be found necessary or expedient to remove or which may be required by the Company for fuel building or otherwise subject to the payment to the landholder (landholders) of a sum or sums equivalent to the royalty or royalties, dead rent or dead rents, payable to Government zamindar or shrotriendmar by the landholder (landholders) in respect of the following specimens or samples. [The specimens or samples are here set out.] (3) The Company shall make and pay reasonable satisfaction and compensation to the landholder (landholders) for all injury which may be done in the exercise of the powers conferred by this license by reason of injury to crops the prevention of cultivation and the cutting down of trees, brushwood, and undergrowth. (4) This agreement shall be in force and continue for a period of years from the date hereof. (5) The landholder (landholders) hereby covenants (covenant) with the Company that the landholder (landholders) will pay all assessments and other charges due to Government zamindar or shrotriendmar in respect of the piece or parcel of land described in the schedule hereto during the said period of years. (6) That the landholder is (landholders are) the sole owner (owners) of the piece or parcel of land described in the schedule hereto. (7) That the landholder (landholders) will indemnify the Company against all actions, suits, claims, and demands by any other person or persons claiming to be entitled to or to a

share in or otherwise interested in the said piece or parcel of land. (8) That the landholder (landholders) will not during the said term of years to the prejudice of this agreement sell, transfer, assign, lease or otherwise part with all or any of his (their) mining or surface rights in, to, or over the whole or any part of the said piece or parcel of land or grant any license to any other Company, person, or persons to prospect or mine over the same or any part thereof. (9) That the Company shall be at liberty at any time during the said period of years to remove but shall not be bound to remove all or any of the buildings and other erections, engines, machinery and plant which at any time during the said period of years may have been erected or brought upon the said piece or parcel of land. (10) That the landholder (landholders) will if so required by the Company at any time during the said period of years sell to the said Company all the rights of the landholder (landholders) to mine in, or under, or throughout the said piece or parcel of land for coal or other minerals and mineral oil at the price of Rs. . . . per acre or part thereof of the surface area of the said piece or parcel of land. (11) That the landholder (landholders) will if so required by the Company at any time during the said period of years at the option of the Company either sell and transfer to the Company for the sum of Rs. . . . the surface rights over the said piece or parcel of land or grant to the Company a lease thereof whichever the Company shall think fit at an annual rent of Rs. . . . per acre or part thereof of the surface area for a period corresponding with the remainder which may be then unexpired of the term for which the Company may hold a lease from the Secretary of State for India granted pursuant to the said recited indenture. . . . (12) Such lease shall be determinable at the option of the Company in the event of the coal or other minerals or mineral oil becoming worked out, or exhausted, or by reason of the Company being unable to work for same at a profit. (13) The landholder (landholders) shall at his (their) own cost during the said term of years or before or after selling or assigning or leasing his (their) mining or surface rights as hereinbefore provided make all such applications to the Government of Madras zamindar or shrotriendmar or other body or bodies, authority or authorities, representing the Secretary of State for India or possessing a share in the minerals as the Company

REFERENCE
UNDER STAMP
ACT, s. 57.

REFERENCE
UNDER STAMP
ACT, s. 57.

shall from time to time require for the purpose of obtaining the consent of the said Secretary of State for India or the said owners or possessors of a share in the minerals to the Company carrying on any prospecting or mining operations upon the said piece or parcel of land. (14) And it is hereby agreed by and between the landholder (landholders) and the Company that if any doubt, difference, or dispute shall arise as to the amount of any payment made or which ought to be made pursuant to the terms of this agreement the matter in difference shall be referred for determination to the Revenue Officer for the time being in charge of the District within which the piece or parcel of land the subject of these presents is situate or in the event of such Revenue Officer being unable or unwilling to act as arbitrator then to such other person or persons as the landholder (landholders) and the Company may mutually agree upon and the decision and award of such Revenue Officer or other person or persons as aforesaid shall be final and conclusive upon the landholder (landholders) and the Company. [Here follows the schedule.] IN WITNESS whereof the said parties hereto have hereunto set their respective hands the day and year first above written. SIGNED by the said in the presence of SIGNED by the said Messieurs Best and Company in the presence of"

In the opinion of the Board of Revenue this document conferred a right to occupy and explore the land and carry away coal on payment of a premium of one rupee, in addition to royalty of an uncertain amount, and was liable to a minimum fee, of eight annas under article 35 (c) of schedule I to the Stamp Act (II of 1899). It was also thought that the document was chargeable with additional stamp duty as an agreement under article 5 (b) and an agreement to lease under article 35 and in respect of the covenants for sale and for grant of further lease contained therein.

Messrs. Best & Co. had applied for a ruling as to whether agreements of the nature of the document now under consideration might be executed on a single stamp by the pattadars collectively, village by village, instead of individually. They contended that the pattadars, while not having a joint interest in the lands, were jointly interested in the success of their mining operations, and requested that permission might be accorded to execute the agreements village by village. In the opinion of the Board section 5

REFERENCE
UNDER STAMP
ACT, s. 57.

of Act II of 1899 lays down that instruments relating to several distinct matters shall be chargeable with the aggregate of the duties with which separate instruments relating to each of such matters shall be chargeable. The Board referred to the rule in Phillips on 'Evidence,' namely;— "If the interest of the parties relates to one thing which is the subject-matter of the instrument, or, in other words, if the instrument affects the separate interests of several and there is a community of the same subject-matter as to all the parties, there a single stamp will be sufficient," and the Board doubted if there was any community of the same subject-matter as to all the residents in each of the several villages and if Messrs. Best & Co.'s request was admissible. It accordingly referred the case for the opinion of the High Court under section 57 of the Stamp Act, 1899.

The case first came on for hearing before Sir ARNOLD WHITE, C.J., and BENSON and MOORE, JJ. It was subsequently posted for re-argument before the Court constituted as above.

Mr. K. Brown for Messrs. Best & Co.—It is submitted that section 5 applies and that the stamp duty payable is only eight annas on the single original copy of this document. *Wills v. Bridge*(1) which was affirmed and followed in *Freeman v. Commissioners of Inland Revenue*(2) shows that one stamp is sufficient where several deeds have one purpose and are executed to one person. In the agreement under reference there is the single purpose of developing the mineral wealth of a particular district. In *Worthington v. Warrington*(3), the document contained both a lease and a covenant for sale of lands, yet it was held that there were not two distinct objects so as to require separate stamps, that there was but one purpose. The wording of the Statute under which that decision was passed appears in *Rushbrook v. Hood*(4). The reasoning of the cases is that although an agreement may contain more than one term, and so conceivably be separable, it is not to be split up into many agreements and made liable to numerous stamps. In *Rushbrook v. Hood*(4) where two stamps were held to be necessary, the document comprised an agreement for sale and also a mortgage. In *Allen v. Morrison*(5), a power-of-attorney had been executed by all the members of a mutual insurance

(1) 18 L.J., Ex., 384.

(3) 17 L.J., O.P., 117.

(5) 8 B. & C., 565.

(2) L.R., 6 Ex., 101.

(4) 17 L.J., O.P., 58.

REFERENCE
UNDER STAMP
ACT, s. 57.

club. That case refers to Phillips on 'Evidence,' 3rd edition, page 445. In the case under reference there is community of purpose, an entire village being about to engage in a common search for minerals. In *Reference under Stamp Act*, s. 46(1), ten mirasidars of a village executed an instrument authorising the person therein mentioned to recover for them from their former agent the perquisites and other communal income appertaining to their mirasi rights, to cultivate their maniams, to distribute to them proportionately to their shares the profits of certain common land, &c., and it was held that the instrument was a power-of-attorney and should bear a stamp of five rupees. Even assuming that the individual transferors here have different interests in the property, at least that is only what was the case in *Wills v. Bridge*(2), and in *Freeman v. Commissioners of Inland Revenue*(3), already referred to. If it be held that each document here is liable to stamp duty the proposed prospecting will be impracticable, as each will have also to be registered. See also *Davis v. Williams*(4). In the document under reference it is submitted that there is one purpose, one consideration, community of interest. In *Reference under Stamp Act*, s. 46(5), eighty-one persons at Salem, unconnected with each other, executed a power-of-attorney in favour of an individual; and the ground of the decision was that there was no community of interest and no connection between the executants. In the course of the argument the following cases were referred to:—*Rushbrook v. Hood*(6); *Doe d. Croft v. Tidbury*(7); *Wills v. Bridge*(2); *Goodson v. Forbes*(8); *Dowlatram Harji v. Vitho Radhoji*(9); *John Foster & Sons v. Commissioners of Inland Revenue*(10); *Chesterfield Brewery Company v. Inland Revenue Commissioners*(11); *Reference under Stamp Act*, s. 46(12); *Reference under Stamp Act*, s. 46(1); and *Doe v. Wood*(13).

JUDGMENT.—The principal question referred to us for decision is whether the instrument presented to the Collector comprises or

(1) I.L.R., 15 Mad., 386.

(3) L.R., 6 Ex., 101.

(5) Referred Case No. 4 of 1892 (unreported).

(6) 17 L.J., C.P., 58.

(8) 6 Taunt., 171.

(10) [1894] 1 Q.B., 516.

(12) I.L.R., 9 Mad., 358.

(2) 18 L.J., Ex., 384.

(4) 13 East, 232; 1 Smith, 5.

(7) 14 C.B., 304 at p. 322.

(9) I.L.R., 5 Bom., 188.

(11) [1899] 2 Q.B., 7.

(13) 2 B. & Ald., 724; 21 R.R., 469.

relates to several distinct matters so as to be chargeable accordingly under section 5 of the Indian Stamp Act. The instrument is not complete, inasmuch as only one landholder is named, whereas the case shows, and it is admitted by counsel on behalf of Messrs. Best & Co., that the intention is to have it executed by several landholders, each severally interested in the piece of land mentioned against his name in the schedule.

This mere statement of the facts is almost sufficient to show that the instrument is chargeable with the aggregate amount of the duties with which separate instruments relating to the same matters would be chargeable, for it is plain that agreements with two or more raiyats not jointly interested in the same land for the purchase or lease of their lands are distinct agreements which may give rise to different rights of action by or against the several raiyats. It was argued, however, on the strength of some English cases, that there is a community of interest between the several landholders of a village who, as it is proposed, are to be made parties and that therefore only one stamp is required. The strongest case cited was *Doe d. Croft v. Tidbury*(1), where it was held that a deed executed by several encroachers in respect of their several encroachments did not need to be impressed with several stamps. In effect it was considered that because the parties conveying joined in conveying all the encroachments a community of interest was established between them as to the same subject-matter. In *Wills v. Bridge*(2), there was a deed of transfer executed by three persons jointly in respect of sixty shares in a company, of which thirty shares belonged to one person, twenty to another, and ten to the third. It was held that although the deed conveyed the separate interests of three persons, three stamps were not required. *Wills v. Bridge*(2) is cited by Kelly, C. B., with apparent approval in *Freeman v. Commissioners of Inland Revenue*(3).

The latter case has no direct bearing on the question now before us. It is probably the last reported case decided under the Stamp Law as it stood before the consolidated Act, 33 & 34 Vict., cap. 97, was passed. In considering such cases it has to be borne in mind that the law was then expressed with much less distinctness than it has been since 1870. In the Statute of Anne the

REFERENCE
UNDER STAMP
ACT, s. 57.

(1) (1854) 14 C.B., 304 at p. 320.

(2) (1849) 18 L.J., Ex., 384.

(3) L.R., 6 Ex., 101 at p. 106.

REFERENCE
UNDER STAMP
ACT, s. 57.

provision on which the case above cited turns was as follows:—
“Where more than one of the matters or things (i.e., indentures, leases, bonds or deeds) thereby charged with any stamp duty should be engrossed on one piece of vellum, the duties should be charged on every one of such matters.” This provision as was observed by Coltman, J. (*Rushbrook v. Hood*(1)) referred to different deeds having different objects inserted in the same parchment.

A provision of that sort is obviously very different from the provision which was first introduced in the Statute, 33 & 34 Vict. There section 7, sub-section 2, provides as follows:—“If more than one instrument be written upon the same piece of material, every one of such instruments is to be separately and distinctly stamped with the duty with which it is chargeable”—that is practically a re-production of section 24 of the Statute of Anne (12 Anne, section 2, chapter 9). Then comes the section which is in effect identical with section 5 of the Act now in force in India. This section introduces an entirely new provision and therefore renders the cases on the Statute of Anne of comparatively small importance. The fact that in 1854 the Court held that a conveyance such as had been executed by the incroachers spoken of in *Doe d. Croft v. Tidbury*(2) required only one stamp affords really no ground for arguing that the same conclusion would be arrived at on a similar instrument at the present day.

The learned counsel for Messrs. Best & Co. did not cite any case decided with reference to the modern Stamp Acts which he could claim as having any direct bearing on the question now before us. In both the recent cases cited by him as giving some indirect support to his argument, *John Foster & Sons v. Commissioners of Inland Revenue*(3), *Chesterfield Brewery Company v. Inland Revenue Commissioners*(4), the instrument under consideration was a transfer and not a contract such as we have before us and the transferors as partners or members of a company were persons jointly interested in the property with which they were dealing. It could not possibly have been said in either case that the deed related to several distinct matters.

In order to decide what stamp should be impressed on a

(1) 17 L.J., C.P., 58 at p. 60.

(3) [1894] 1 Q.B., 516 at p. 529.

(2) [1854] 14 C.B., 804 at p. 820.

(4) [1899] 2 Q.B., 7.

document we have to see what, upon the face of it, it is according to its true and proper effect (*Martin, B., in Freeman v. Commissioners of Inland Revenue*(1)). Looking at the instrument before us in this way we have no hesitation in saying that it deals with several distinct matters, that is to say, with agreements with several persons with regard to their separate property, and that to that extent the opinion expressed by the Board of Revenue is right.

In our judgment the proper stamp to be affixed is an eight-anna stamp or as many such stamps as there are separate raiyats who are made parties to the agreement. We do not consider that the instrument contains distinct agreements with any one raiyat.

Messrs. Barclay, Orr & David—Attorneys for Messrs. Best & Co.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Benson.

LAKSHMANAN CHETTIAR (PETITIONER—PLAINTIFF),
APPELLANT,

v.

KANNAMMAL AND ANOTHER (COUNTER-PETITIONERS—
DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, ss. 235, 274 and 287—Step-in-aid of execution—Failure by purchaser to secure possession of property purchased in execution—Execution incomplete.

A decree was passed in favour of the plaintiff in a suit on 20th October 1893, and on 19th October 1894 the decree-holder applied for execution and purchased under a Court-sale certain land belonging to the judgment-debtor. On 13th March 1896 the decree-holder made an application for delivery to him of the lands so purchased, but delivery was not made in respect of some of them. On 6th March 1899 an application was made for further execution of the decree:

Held, that the execution was not complete so long as the purchaser had not secured possession, and that the application of 13th March might fairly be called an application to take a step-in-aid of execution.

Sariatoolla Molla v. Raj Kumar Roy, (I.L.R., 27 Cal., 709), referred to.

PETITION, dated 6th March 1899, presented to the Subordinate Judge's Court at Tinnevely, under sections 235, 274 and 287 of

(1) L.R., 8 Ex., 101 at p. 108.

* Civil Miscellaneous Appeal No. 114 of 1899, against the order of K. Krishna Rao, Acting Subordinate Judge of Tinnevely, in execution Petition No. 47 of 1899, in the matter of Original Suit No. 57 of 1892.

REFERENCE
UNDER STAMP
ACT, s. 57.

1900.
September
28.

LAKSHMANAN
CHETTIAR
v.
KANNAMMAL.

the Code of Civil Procedure by first plaintiff in a suit on the file of that Court, praying that an order might be passed directing that the amount due to plaintiff on a decree, dated 20th October 1893, should be realised by the attachment and sale of certain properties belonging to the defendants. Particulars of a previous petition were stated as follows:—"An execution petition was presented on 19th October 1894 and properties were sold in auction. In that (auction) purchase was made on behalf of the plaintiff on 28th January 1895 for Rs. 5,921. A petition was presented on 13th March 1896 for delivery of possession of the properties purchased at the said auction. Some properties were delivered and some properties were not delivered, and in respect thereof Original Suit No. 60 of 1897 on the file of the Subordinate Judge's Court of Tinnevely has been instituted."

The Subordinate Judge passed an order which is set out below and from which further facts appear:—"A question of limitation bar has arisen in this case. The decree was passed on the 20th October 1893. On the 19th October 1894 the decree-holder (plaintiff) applied for execution, and himself bought a certain land of the judgment-debtors under Court-sale. On the 13th March 1896 he made an application for delivery to him, of the property so bought by him and duly got possession. His present application for further execution of the decree is dated 6th March 1899. It is clear the present application is barred by time unless the application of 13th March 1896 saves it, as being a step-in-aid of execution. To show that it does save the limitation bar, plaintiff quotes the decision in *Moti Lal v. Makund Singh*(1), in which it has been held that an application for possession of land purchased in execution of the decree by the plaintiff himself is a step-in-aid of execution. The learned Judges of the Allahabad High Court rely upon a previous decision of the same Court (*Radha Charan v. Man Singh*(2)) to the effect that an application to get a sum of money from the Court's deposit in satisfaction of the decree is a step-in-aid of execution. Now this latter decision may be perfectly right, though even as to it the Calcutta High Court seems to entertain a contrary view (*Hem Chunder Chowdhry v. Brojo Soondury Dabee*(3) and *Fuzloor Rahman v. Altaf Hossen*(4)). My own opinion is that

(1) I.L.R., 19 All., 477.

(3) I.L.R., 8 Cal., 89.

(2) I.L.R., 12 All., 392.

(4) I.L.R., 10 Cal., 541.

the decision in *Moti Lal v. Makund Singh*(1) in regard to an application for possession of purchased property may not be good. The application of an auction purchaser (he be the decree-holder or another person) can hardly be said to be a step-in-aid of execution; for so far as the account of the purchase money is concerned, the decree was satisfied at least on the date of the confirmation of the sale which in this case took place on 9th April 1895. The subsequent proceedings for taking possession of the property bought have nothing to do with the execution of the purchase, were he a third party, and consequently even where he is the decree-holder himself. This is inferrible from the decision in *Ramanadan Chetti v. Kunnappu Chetti*(2) and *Kuppusami Ayyar v. Ramasami Ayyar*(3). The decision in *Chowdhry Parvosh Ram Das v. Kali Puddo Banerjee*(4), also is to the effect that there can be a step-in-aid of execution only when an application for execution is actually pending. In the present case no such application was pending on the 13th March 1896 when the decree-holder's application for possession was filed. Consequently, the application for possession could not be a step-in-aid of execution. As shown above the Allahabad High Court rest their decision in *Moti Lal v. Makund Singh*(1), on the decision in *Radha Charan v. Man Singh*(5), and as this latter decision is dissented from by the Calcutta Court, I doubt if the former ought to be followed. Moreover the effect of the decision of our own High Court in *Ramanadan Chetti v. Kunnappu Chetti*(2) and *Kuppusami Ayyar v. Ramasami Ayyar*(3) is to show that the decision in *Moti Lal v. Makund Singh*(1) cannot be sound. I therefore hold that the present application is not saved by the application of 13th March 1896, and therefore I dismiss it, but without costs.

Against this order the petitioner (plaintiff) preferred this appeal, on the ground, among others, that the decree-holder's petition to obtain delivery of the properties he had purchased at the execution sale was a step-in-aid of execution within the meaning of article 179 of schedule II of the Limitation Act, and that the right to execute the decree was in consequence not barred.

Sundara Ayyar and *Balasubramania Ayyar* for appellants.

The respondents were not represented.

(1) I.L.R., 19 All., 477.

(3) Appeal against Order No. 122 of 1895 (unreported).

(4) I.L.R., 17 Cal., 53.

(2) 6 M.H.C.R., 304.

(5) I.L.R., 12 All., 392.

AKSHMANAN
CHETTIAR
v.
KANNAMMAL.

JUDGMENT.—The execution was not complete as long as the purchaser had not secured possession. His application therefore may fairly be called an application to take a step-in-aid of execution (*Sariatoola Molla v. Raj Kumar Roy*(1)). We must reverse the order and remand the case for disposal. The costs of this appeal will abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Benson.

1900,
October 2.

VENKATARAMANAMMA (LEGAL REPRESENTATIVE OF
DEFENDANT AND JUDGMENT-DEBTOR), APPELLANT,

v.

PURUSHOTTAM (PLAINTIFF AND DECREE-HOLDER), RESPONDENT.*

*Limitation Act—Act XV of 1877, sched. II, art. 179—Application for execution—
Application to take a step-in-aid of execution—Distinction.*

On 4th November 1895 a decree-holder applied to the Court for the attachment of a sum of money belonging to the judgment-debtor, but which was in the hands of a Government department. There was no prayer in the petition that the money should be paid to the petitioner. An order purporting to be made under section 272 of the Code of Civil Procedure was made on 19th November 1895, requesting the department to remit the amount to the Court. On 29th April 1898, the Treasury Deputy Collector informed the Court that there was a balance due to the judgment-debtor. On 12th December 1898, the decree-holder petitioned the Court under sections 268 and 272 of the Code, that the said balance might be sent for and paid to him.

Held, that the application was not barred and that article 179 of schedule II to the Limitation Act was not applicable to the case.

PETITION by a decree-holder filed, under sections 268 and 272 of the Code of Civil Procedure, as follows:—"On the application of the plaintiff in execution of the decree in the said suit, the amount in the hands of the Treasury Deputy Collector, Kistna District, standing to the credit of the defendant, was attached by means of a prohibitory order. Thereupon, the Treasury Deputy Collector,

(1) I.L.R., 27 Cal., 709.

* Civil Miscellaneous Appeal No. 16 of 1900, against the order of W. C. Holmes, District Judge of Kistna, in Miscellaneous Petition No. 1146 of 1898 (in Original Suit No. 36 of 1894).

Kistna District, addressed a letter to your Court on 29th April 1898 intimating that only Rs. 62-14-11 belonging to the defendant remains in his hands and that that amount is available for payment to the plaintiff. The said amount is still at deposit with the said Treasury Deputy Collector. Plaintiff therefore prays that the said Rs. 62-14-11 may be sent for by issue of an order to the Treasury Deputy Collector and the amount paid to the plaintiff."

The judgment-debtor filed a counter-petition under sections 244 and 248 of the Code of Civil Procedure and article 179 of schedule II of the Limitation Act and said:—"The execution of the decree in this case is barred by limitation as the last application made by the decree-holder was dated 4th November 1895 and as no steps in aid of execution were taken by plaintiff since then. It is said that the plaintiff has now made an application for the realisation of a certain amount of money under the decree and for paying the same to the plaintiff. Petitioner submits that nothing further can be done in execution as the decree is clearly barred. Petitioner prays that it may be decreed under section 244 of the Code of Civil Procedure that the further execution of the decree is barred and that the costs of the petitioner may be paid by plaintiff."

The District Judge stated the material facts as follows:—"The decree-holder in Original Suit No. 36 of 1894 applied, on 4th November 1895, for the attachment of two sums of money, one with the Treasury Deputy Collector and the other with the Salt Assistant Commissioner, and to order the monies to be remitted to the Court. There was no prayer that the money should be paid to the petitioner. An order purporting to be under section 272, Code of Civil Procedure, dated 19th November 1895, was issued and served on the Treasury Deputy Collector and on the Assistant Commissioner and called on them to remit to the Court the amount due to judgment-debtor. . . . By a letter dated 29th April 1898, the Treasury Deputy Collector informed the Court that there was a balance of Rs. 62-14-11 to credit of judgment-debtor. . . . On 12th December 1898, the present application was filed, by which the Court was asked to send for and pay the money to the petitioner.

It is further contended that the Court is under section 277, Code of Civil Procedure, authorised to pay over the money to the petitioner notwithstanding the absence of a prayer for payment

VENKATA-
RAMANAMMA
v.
PURU-
SHOTTAM.

VENKATA-
RAMANAMMA
v.
PURU-
SHOTTAM.

in the application, dated 4th November 1895. *Hem Chunder Chowdhry v. Brojo Soondury Dabee*(1) cited in *Koormayya v. Krishnamma Naidu*(2) is relied on. Section 277 only applies when the property attached is coin or Government notes, money in fact. In the present case, the facts are these:—Government promissory notes were deposited as security by the judgment-debtor with the Salt Department having been endorsed to that department. They were sold and after deducting what was due by the judgment-debtor to the Salt Department, the balance was Rs. 62-14-11. It is not very clear whether it should be held that a debt due by the Salt Department to the judgment-debtor was attached or whether it should be held that money belonging to the judgment-debtor in the hands of the Salt Department was attached. The Government promissory note was not attached. What was attached was the balance due to the judgment-debtor after the claims of the Salt Department were satisfied. I am inclined to the opinion that that balance should be regarded as cash belonging to the judgment-debtor in the hands of the Salt Department. It is contended that by section 272 the property is 'held subject to the further orders of the Court' and that these orders can be passed at any time. The argument is that as it has been considered that coin or currency notes can be paid at any time, so by analogy of reasoning, it should be held that the Court can pass further orders at any time under section 272, Code of Civil Procedure. In the present case the matter is complicated by there being no prayer in the petition of 4th November 1895 to pay the money to the petitioner. A case in support of the contention of the petitioner is *Chowdhry Paroosh Ram Das v. Kali Puddo Banerjee*(3), the facts of which are analogous to the facts of the case before me. Section 235, Code of Civil Procedure, requires the mode in which the assistance of the Court is required to be stated in the application. In this case attachment was prayed for. The question is when such a prayer is made and attachment is effected, can the Court take further action if the judgment-creditor fails for three years to take any action? As the property in question is under attachment, I think the Court is bound to order its payment to the judgment-debtor notwithstanding the absence of a prayer to that effect in the application of 4th November 1895. . . . I regard the

(1) I.L.R., 8 Cal., 89.

(2) I.L.R., 17 Mad., 165.

(3) I.L.R., 17 Cal., 53.

VENKAT
RAMANAN
v.
PURU-
SHOTTA.

present application as a petition reminding the Court of what action it has to take. Only two courses are open; either to pay the money to the judgment-debtor or to release the money from attachment. I do not think there is any authority for adopting the latter course. It was contended that there was no proper attachment by the order of the 19th November 1895. The order was as follows:— 'The plaintiff having applied under section 272 of the Code of Civil Procedure for an attachment of Rs. $\frac{692-14-1}{723-3-5}$, being balance of sale-proceeds of the Government bond deposited by Tayi Venkata Subba Rao Naidu Garu in your Treasury office under the credit of salt, I have the honour to request that you will be so good as to remit to this Court the said amounts if due to the judgment-debtor.' It is argued that there was property deposited with a public officer within the meaning of section 272, Code of Civil Procedure, and that was the proper section for the Court to have acted under. This view is, I think, correct. Even if there were any irregularity in the attachment by not giving notice to the creditor under section 268, Code of Civil Procedure, it is contended the irregularity does not nullify the attachment. *Rai Balkishen v. Rai Sita Ram*(1); *Muniappa Naik v. Subramania Ayyan*(2); *Sheo Charan Lal v. Sheo Sewak Singh*(3); and *Kasinath Das v. Sadasiv Patnaik*(4) are quoted. The result is that the sum of Rs. 62-14-11 will be paid to the petitioner. Whether further execution applications are barred or not is left an open question." The balance was ordered to be paid to petitioner.

The judgment-debtor preferred this appeal.

V. Krishnasami Ayyar and *Nagabhushanam* for appellant.— The present application is dated 12th December 1898. The last preceding application was dated 4th November 1895. The interval being more than three years, the present application is barred under article 179. The prayer in the previous application was that the money belonging to the judgment-debtor in the hands of the Salt Department should be "attached and got." As soon as orders were passed on this application as required, there was a disposal of the application and there was nothing more left to be done under it. The present application is for the payment to the decree-holder

(1) J.L.R., 7 All., 731.

(2) I.L.R., 18 Mad., 437.

(3) I.L.R., 18 All., 469.

(4) I.L.R., 20 Cal., 805.

VENKATA-
RAMANAMMA
v.
PURU-
SHOTTAM.

of the money realised by the attachment. It does not call upon the Court to do anything which might have been done in pursuance of the former application but which was not done. Obviously, the present application is in no sense a continuation of the former. The question of continuation can arise only when the previous application was partially complied with and when an application is presented again for doing something asked for in the previous application but not done. Here the two applications are independent of each other and the second application put in more than three years after the first is clearly barred. The previous application having been fully complied with, any other application for execution can only be made under section 235 of the Code of Civil Procedure and the present application (dated 12th December 1898) which must be regarded as such is barred under column 3 of article 179, for within three years prior to it there has been no application for execution. The execution of a decree is always applied for under the Civil Procedure Code and as the civil procedure makes no distinction between applications for execution of the decree and applications for taking a step-in-aid of execution, all applications for execution, whatever their nature, must be deemed to be covered by the language of the first column of article 179, so from any point of view the application dated 12th December 1898 is barred.

Sundara Ayyar and K. Subrahmanya Sastri for respondent:—The present application is not barred. It asks the Court to pay to the decree-holder the amount realised by attachment in pursuance of the previous application. The previous application was an application under section 235 of the Code of Civil Procedure, where property has to be attached in execution of a decree. All that can be asked for under that section is that the property be attached. (See clause (j) which only speaks of relief by attachment of property and not of relief by the sale of the attached property and payment of proceeds to the decree-holder.) From this omission in clause (j) of section 235, it follows that once the application for attachment has been made and granted, no application for sale and payment of proceeds to the decree-holder is really necessary. After attachment, the Court may take the further steps as a matter of course. And if the party chooses to make an application, there is no limitation for it. The present application only asks the Court to complete what was begun to be done in pursuance of the previous application. There is no limitation at all for such an application

VENKATA-
RAMANAMMA
v.
PURU-
SHOTTAM.

(see *Chowdhry Paroosh Ram Das v. Kali Puddo Banerjee*(1)). Article 178 of the Limitation Act may possibly apply to such an application. But that article is no bar to the present application inasmuch as the right to apply for the money did not accrue until April 1898, when the amount available for payment to the decree-holder was first ascertained.

JUDGMENT.—The facts of this case are briefly as follows:—On the 4th November 1895, the decree-holder applied to the Court “to attach and get” a sum of money belonging to the judgment-debtor, but which was in the hands of the Salt Department. The application did not ask that the money should be paid to the decree-holder. An order purporting to be under section 272, Civil Procedure Code, was made on the 19th November 1895.

On the 29th April 1898, the Treasury Deputy Collector informed the Court that there was a balance of Rs. 62-14-11 due to the judgment-debtor.

On the 12th December 1898 the present application was put in by the decree-holder asking the Court to send for the Rs. 62-14-11 and pay it to him.

The question is whether this application is barred by article 179, schedule II, of the Limitation Act, having been made more than three years after the application of the 4th November 1895.

The District Judge decided that it was not barred, and we think his decision is right.

We do not think that article 179 applies to this case. That article says that an application for the execution of a decree must be made within three years from the date of the last application for execution or from the date of the last application to take a step-in-aid of execution. A distinction is made between an application to execute a decree and an application to take a step-in-aid of execution. An application to execute a decree means an application within the terms of section 235, Civil Procedure Code, that is to say, an application setting the Court in motion to execute a decree in any manner set out in clause (j) of the section, e.g., in this case by attaching the property; but having so set the Court in motion any further application during the continuance of the same proceeding is an application to take a step-in-aid of execution within the terms of clause 4 in the last column of

(1) I.L.R., 17 Cal., 53.

VENKATA-
RAMANAMMA
v.
PURU-
SHOTTAM.

article 179; *Chowdhry Paroosh Ram Das v. Kali Pyddo Banerjee*(1). The application to take a step-in-aid of execution may be made at any time so far as article 179 is concerned for that article imposes no limitation on such applications. That article only imposes a limitation on an application for execution. In the present case the application for execution is the application of the 4th November 1895. The attachment then ordered continued in force on the 12th December 1898 on which date the decree-holder made a further application, viz., to pay the money to him. We think that this application must be regarded not as an application for execution, which means such an application as would be made under section 235, Civil Procedure Code, but rather as an application to take a step-in-aid of execution, i.e., an application to the Court to take the further steps contemplated by the Code in order to satisfy the decree-holder's claim out of the property held under attachment by the Court in pursuance of the application for execution made on the 4th November 1895.

We look upon the application of December 1898 merely as subsidiary to the application for execution made on the 4th November 1895. This application did not in terms ask for the delivery of the money attached to the decree-holder, but such a prayer is not required by section 235, Civil Procedure Code, as in all cases of attachment such a prayer is implied and the Court is empowered by subsequent sections of the Code to deal with the property attached by sale or otherwise. It may be that article 178 of the second schedule of the Limitation Act imposes a limitation in regard to an application to take a step-in-aid of execution, but that article is no bar in the present case, because the right to apply for the payment of the money did not accrue until April 1898, when the amount available for payment was first ascertained.

We dismiss this appeal with costs.

(1) I.L.R., 17 Calc., 53.

APPELLATE CRIMINAL.

Before Mr. Justice Shephard and Mr. Justice Benson.

QUEEN-EMPRESS

v.

ALLAN.*

1900.
September
27.
October 2.

District Municipalities Act (Madras)—Act IV of 1884, s. 63 (2), (3)—Levy of tax—Legality.

By section 63 (2) of the District Municipalities Act, (Madras), 1884, it is enacted that, except as provided in sub-section (3) of that section and in section 63-A, a tax may be levied at such rate, not exceeding eight and a half per centum, on the annual value of the buildings or lands or both upon which it is imposed, as the Municipal Council may have notified under section 50; and by section 63 (3), in the case of (a) lands not occupied by buildings and not appurtenant to any building or attached thereto for use therewith as a garden or pleasure-ground or for the pasturage of animals kept for private use, and (b) lands occupied by native huts, the Chairman may, subject to the approval of the Municipal Council and the sanction of the Governor in Council, impose a tax on such lands at an annual rate, not exceeding four annas for every 80 square yards thereof, in lieu of the tax referred to in sub-section (2). Provided that no tax shall be levied under this sub-section upon lands used solely for agricultural purposes:

Held, that, subject to the conditions mentioned, a tax levied under sub-section (3) on all lands within a municipality is a legal tax.

APPEAL by Government against an order of acquittal. Defendant was charged under clause (2) of section 103 of Madras Act IV of 1884, (as amended by Madras Act III of 1897). The facts of the case appear from the judgment of the Bench of Magistrates, Ootacamund, which was as follows:—

“This is a prosecution under clause 2, section 103, Act IV of 1884, as amended by Act III of 1897, instituted by the Ootacamund Municipal Council against Mr. Alexander Allan, the proprietor of certain lands within the municipality under their charge, taxation on which is imposed it is stated, under section 63, clause 3 (a) and section 75 of the District Municipalities Act, 1884. Mr. Allan has omitted to pay. The claim amounts to Rs. 354-14-4 in all and refers to taxation for the years 1897-98 and 1898-99. Bills for the claim were presented, but the defendant would not pay,

* Criminal Appeal No. 512 of 1900, under section 417 of the Code of Criminal Procedure against the judgment of acquittal in Summary Case No. 845 of 1899 by the Court of the Bench Magistrates, Ootacamund.

warrants of distraint were then issued but were returned unexecuted as no moveable property of the defendant could be found.

"The Solicitor for the prosecution has informed the Court that criminal proceedings against the defendant have been instituted in view to obtaining a test case. The lands against which the claim was originally made are as follows:—Survey Nos. 157, 172, 175 to 180, 184, 186, and 1117 to 1120.

"The first named of these has now, at the request of both parties, been struck out, it having been sold some time since to his Highness the Gaicowar of Baroda. The fields which remain are, it is admitted, not appurtenant to any building or attached thereto for any purpose.

"The condition of these lands as found on inspection by the municipal overseer very shortly after the present complaint was lodged is given in the statement attached to exhibit D, the correctness of which is not traversed by the defendant.

"The defence is that the whole of the lands shown in the list above referred to including Nos. 1117 to 1120 which are said by the defendant to be grass lands, a statement which the prosecution does not deny, are lands used solely for agricultural purposes and are therefore under the proviso to clause 3, section 63 of the Act exempt from taxation. Another ground raised is that the defendant did not wilfully or negligently omit to pay the amount said to be due by him, inasmuch as the claim made was under the circumstances alleged for the defence an illegal one.

"We at first went into the evidence bearing upon the cases put forward by the prosecution and defence, and it was not until we came to discuss the draft of a judgment which it was proposed that we should pass and which was based on an examination of the objections raised for the defence and which dealt with the case on its merits, that a point which had hitherto escaped notice attracted our attention. A consideration of this has caused us to arrive at the conclusion that this prosecution must fail.

"There are under the District Municipalities Act, 1884, two methods of taxing lands.

"The one is on the annual rent value at a rate not exceeding 8½ per cent. on such value (section 63, clauses 1 and 2). The other is on the area at a rate not exceeding four annas for every 80 square yards (section 63, clause 3). It is under the latter of these that the claim before us has been made.

"Referring to exhibits F and G,* it will be seen that, in both of them, the municipality claims the tax under section 63, clause 3, of the Act not at the rate of so many pies or annas not exceeding four annas per 80 square yards which is the unit laid down by the law where the section and clause above referred to are applied, but at the rate of Rs. 1-8-0 per acre. We have re-examined the manager of the municipal office, and he produces the sanction of Government to the levy of land-tax as notified in exhibits F and G.

"He states that the whole of the lands within the Ootacamund Municipality which have been taxed have been assessed under clause 3, section 63 of the Act. He cannot account for this having been done to the exclusion of taxation on the annual rent value, but thinks that the reason must have been that the municipality did not know the rent values of the land within their jurisdiction or in other words did not care to go to the trouble of ascertaining or fixing them and hearing appeals against the assessments. It may be, however, that the municipality adopted the course which it did as being the more remunerative for the annual rent value per acre which would produce at 7½ per cent. Rs. 1-8-0 per annum is Rs. 20, a manifestly absurd figure for land bearing, as a very large proportion of the waste to be found within the limits of the Ootacamund Municipality does, either worthless scrub, or almost equally worthless indigenous grass.

"Reading section 63 of the District Municipalities Act as a whole, we are of opinion that clause 3 of it is intended to apply to exceptional cases only, for in clause (1) the word 'shall' is used with reference to the action of the Chairman, whilst in clause (3) the word 'may' occurs, and in that clause there are specific instances given in which its provisions cannot, in any case, be applied. Further the use in clause (3) of a small unit of area of which an acre is no multiple and the mention in it of a rate of taxation calculated upon this unit, which if applied to the acre would work out to a permissible tax of something over Rs. 15 on that area, support the view that it was not the intention of the Legislature that taxation under its provisions should ever be

* Notifications of taxes to be levied during the financial year. These contained announcements in the following terms:—"Tax on (a) lands not occupied by buildings and not appurtenant to any building or attached thereto, and (b) lands occupied by native huts at an annual rate of rupee one and annas eight per acre, under section 63 (3) (a) and (b)."

QUEEN-
EMPRESS
v.
ALLAN.

rendered applicable, as has been the case in the Municipality of Ootacamund, to all lands within a municipality; but only to special cases—of which that of the defendants is certainly not one—in which what may be called punitive taxation is found, or considered necessary. Apart from this aspect of the case, we consider that to allow of taxation under clause (3), section 63 of the District Municipalities Act, 1884, at all, the sanction of Government should be obtained in the terms of the clause itself, viz., so many pies or annas not exceeding four annas per 80 square yards and in no other; that taxation under this clause calculated upon the acre and at a rate arbitrarily fixed is contrary to the law as it stands, and that the fact that that Government sanctioned it does not render it legal as such sanction was *ultra vires*. We acquit Mr. Alexander Allan under section 245, Criminal Procedure Code."

The defendant was accordingly acquitted.

Against that order of acquittal this appeal was preferred.

Mr. N. Subrahmaniam (for the Public Prosecutor) for the Crown.

Respondent was not represented.

JUDGMENT.—The Bench of Magistrates have in effect held that the tax imposed upon Mr. Allan's lands by the Municipal Council is an illegal one and have accordingly acquitted him on the charge laid under section 103 (2) of Madras Act IV of 1884.

According to section 63 of the Act read with section 50, to which it refers, it is lawful for the Municipal Council with the approval of the Governor in Council to notify that a tax shall be levied on buildings or lands.

Sub-section (2) declares the maximum rate at which such tax shall be levied in cases other than those to which sub-section (3) or section 63-A may be made applicable, the maximum rate being, according to the sub-section, $8\frac{1}{2}$ per centum on the annual value of the lands.

In the third sub-section power is given to the Chairman subject to the approval of the Municipal Council and the sanction of the Governor in Council "to impose a tax on lands" at an annual rate not exceeding four annas every 80 square yards thereof in lieu of the tax referred to in sub-section (2). This latter provision can be applied only to lands occupied by native huts (which, notwithstanding the definition of buildings, are not regarded as buildings) and to lands not occupied by other buildings nor attached thereto for use therewith for the pasturage of animals kept for

private use. Not unnaturally, having regard to the small area with reference to which the calculation is to be made and the other terms of the sub-section, the Bench have considered that it was intended to apply in exceptional cases only and have been led to the conclusion that an indiscriminate application of the section to all lands within the municipality other than those excepted in the provision itself is illegal. It certainly does seem strange that the Legislature should have authorized the Municipal Council to impose a tax upon all lands and buildings in the manner mentioned in sub-section (2) and by way of alternative should have allowed, in the case of lands including lands occupied by native huts the imposition of a tax on a much higher scale, nor is it easy to understand why, with regard to this alternative method, the power is in the first instance given to the Chairman, and there is practically a repetition of the provision that the consent of the Municipal Council and of the Governor in Council shall be obtained. The smallness of the area, only 80 square yards, and the rate chargeable, which is nearly double what can be charged under sub-section (2), certainly suggest that the Legislature has not said precisely what it meant to say. But the words of the two sub-sections being unambiguous we are bound to give effect to them and to hold that, subject to the conditions mentioned, a tax levied under sub-section (3) on all lands within the municipality indiscriminately is a legal tax.

We do not think the objection taken to the terms of the sanction is a valid one. As there are questions left undecided by the Bench, we must, while setting aside the order of acquittal, remand the case for trial.

QUEEN-
EMPRESS
v.
ALLAN.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Boddam.

1900.
October 11.

SUBBARAYADU (PLAINTIFF), PETITIONER,

v.

CHENCHURAMAYYA (DEFENDANT), RESPONDENT.*

*Civil Procedure Code—Act XIV of 1882, s. 162—Summons forms Nos. 125, 126—
Summons to witness—Postponement of hearing of case—Necessity for issuing
fresh summons—Practice.*

When a witness has been summoned to give evidence in a case which is not reached, it is not necessary to issue a fresh summons to the witness. He need only be warned that his attendance will be required on the day to which the hearing of the case may be postponed.

PETITION to revise the judgment of the District Court of Nellore in a Small Cause suit, dismissing the suit because of plaintiff's (petitioner's) default in not securing the attendance of his witnesses. The suit was posted for hearing on 10th January 1900, and was adjourned till 17th January. On the latter day, plaintiff's witnesses failed to appear and in consequence the suit was dismissed. The judgment of the District Court was as follows:—"The plaintiff sues to recover Rs. 219-8-0 from the defendant, being the damages sustained by him in consequence of the defendant's refusal to deliver fifteen putties of paddy as agreed to by him, together with a sum of Rs. 47 paid by the plaintiff as earnest-money to the defendant. The defendant denies the agreement and alleges that the suit is the result of enmity. The plaintiff's pleader did not put in the witness list till the evening of the 15th instant, and even then he did not deposit the necessary batta. The defendant's pleader filed the witness list on the morning of the 15th with the result that he has secured the attendance of his witnesses. Both pleaders knew full well, when the suit was adjourned on the evening of the 10th instant for want of time, that there was not a long interval. They could have asked for a longer adjournment if they had wanted it. Instead of doing any such thing, the plaintiff's pleader put in the list on the evening of the 15th instant without

* Civil Revision Petition No. 99 of 1900, under section 25 of the Provincial Small Cause Courts Act, praying the High Court to revise the decree and judgment of T. M. Saminadha Ayyar, Acting District Judge of Nellore, in Small Cause Suit No. 154 of 1899.

depositing any batta, and consequently the summonses could not be sent. The pleader probably thought that Sessions Case No. 2 of 1900 posted for the 15th might occupy some days and consequently was indifferent in taking steps to secure his witnesses for this date. But when he found that afternoon that that case was withdrawn by the Public Prosecutor, he thought it well that he filed the list of witnesses and did so accordingly. Since the attendance of witnesses has not been secured through plaintiff's fault and as the burden of proving the claim and the turn for opening the enquiry is on him, I dismiss for default the suit with costs and pleader's fee of Rs. 3."

Plaintiff preferred this civil revision petition.

Seshagiri Ayyar, for petitioner, contended that the application for an adjournment on account of the absence of plaintiff's witnesses was a reasonable one and should have been granted. The witnesses had been summoned to attend on the 10th January and did attend, and the case was then adjourned till 17th. He stated that it is the practice in the mufassal to issue summonses to witnesses for a particular day, and to renew the summonses from day to day if the case is not reached. He referred to form No. 125 in schedule IV to the Code of Civil Procedure and the notes thereto and to form No. 126. That practice varied from the practice in the High Court on the Original Side, where witnesses only required warning. The Judge did not warn the witnesses to attend and consequently there was no default on the part of the plaintiff.

Raghava Ayyangar, for *Raghunatha Sastriar*, for respondent.

JUDGMENT.—We are told that the practice is, if a case is not reached on a given day, for fresh summons to witnesses to be required. This is altogether a mistake. Section 162 of the Code of Civil Procedure as well as the form of the summons itself shows that the possibility of witnesses being detained beyond one day has not been overlooked. The proper course was to warn the witnesses on the 10th that they would be required to appear on the 17th (see *Proceedings of the Madras High Court*, dated 18th January 1870(1), and other cases cited in *Mayne's 'Criminal Law'*, page 85).

We must reverse the decree and remand the case. Costs will abide the result.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Davies.

NARAYANA REDDI AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

VENKATA CHARIAR (DEFENDANT No. 1), RESPONDENT.*

Easements Act—Act V of 1882, ss. 7, 17—Right to raise crest level of calingula of tank—Submersion of lands thereby—Right of owner of such lands to protect them from submergence.

The defendants, being the holders of land situated below a tank, had, for a period of over twenty years, by means of a dam, raised the calingula of the tank higher than its crest level. The effect had been to collect an increased quantity of water in the tank and, from time to time, to throw it back on to the plaintiffs' lands, which were situated above the tank. The plaintiffs' lands were thus submerged. On a suit being brought by plaintiffs against the defendants for an order that the dam placed by defendants on the calingula should be removed so that water should be stored in the tank only to the height of the crest level of the calingula:

Held, that the defendants had not exceeded the right which they had been proved to have acquired.

Semle, that notwithstanding that right plaintiffs were entitled to take measures to save their lands from being submerged.

SUIT for the removal of a bund and for damages. Plaintiffs were the holders of land in the village of Pennalore, which is situated above the Periya tank. Defendants were holders of land in the village of Venkodu, situated below that tank. Defendants had erected a dam above the calingula of the tank, the effect of which was that an increased amount of water was collected and stored in the tank, and water was thereby thrown back upon plaintiffs' lands, the latter were submerged at certain seasons, and the crops upon them were destroyed. Plaintiffs alleged that the calingula had been raised for the first time in 1893 and prayed for a decree fixing a limit to the height to which the dam on the calingula might be raised; and ordering the removal of the present dam. They also claimed damages. The District Munsif

* Second Appeal No. 939 of 1899 against the decree of S. Gopalachariar Acting District Judge of Chingleput, in Appeal Suit No. 235 of 1898, reversing the decree of S. Adinarayana Ayyar, District Munsif of Conjeveram, in Original Suit No. 249 of 1897.

found that the dam complained of was injurious to plaintiffs, and ordered its removal. On appeal the District Judge said:—" *Primâ facie* the submergence of plaintiffs' lands by the overflow of water stored by defendants in their tank is a nuisance (see page 649, 'Coulson and Forbes on Waters'). The general principle regulating the liabilities of land-owners with regard to the escape and overflow of water, is stated at page 128 of the said treatise as follows:—'Where the owner of the land without wilfulness or negligence uses his land in the ordinary manner of its use, though mischief thereby accrues to his neighbour, he will not be liable for damages, but where for his own convenience, he diverts or interferes with the course of a stream, or where he brings upon his land water which would not naturally have come upon it, even though in so doing he acts without wilfulness or negligence, he will be liable for all direct and proximate damages, unless he can show that the escape of the water was caused by an agent beyond his control, or by a storm which amounts to *vis major* or the act of God, in the sense that it is practically if not physically impossible to resist it.' See also page 483. Bullen and Leake's 'Pleadings,' 5th edition, page 547, Vol. XII, 'Encyclopædia of the Laws of England.' Here it is not the case of an escape, so much as overflow and periodical and transitory submergence solely due to storage. As to this, Mr. Collet observes in paragraph 199 of his 'Treatise on Torts,' 6th edition. 'Where this collection of water is, or arises from a natural or necessary use of the land, and much more where it is done in accordance with a duty as in the case of tanks for irrigation in India, the owner is not liable if, without negligence on his part, the water escapes and damages the property of another.' At all events, this right to flood the land of another is an easement—see pages 87, 88, 'Goddard on Easements,' 5th edition. See the converse case in illustration (g) to section 24, Easements Act. Where the easement is established, the question is whether there was negligence or excess of user. Clause (e) of section 28 of the Easements Act says that in the case of such a prescriptive right its extent and mode of enjoyment must be determined by the accustomed user of the right. Now plaintiffs say that defendants had no right to put up the embankment, but defendants reply that without the embankment sufficient water would not be stored in the tank, that if the embankment were put up plaintiffs' lands would necessarily be submerged for a time and that in 1893, defendants

NARAYANA
REDDI.
VENKATA
CHARIAR.

NARAYANA
REDDI
v.
VENKATA
CHARIAR.

put up the embankment only to the customary extent. The onus of proof lies on defendants. Have they proved that they have the right to put up the embankment, and store water, and that in 1893 they did not exceed the customary limits or were not negligent?" He found both points in defendants' favour and held that the calingula had been maintained by them for over twenty years at its present height. He allowed the appeal and dismissed the suit.

Plaintiffs preferred this second appeal.

Mr. D. Chamier, for appellants, contended that the easement which had been held to exist was not one that could be recognized in law. He referred to the definition of an easement in section 7 of the Indian Easements Act, and to illustration (h) to that section, and to section 17 (a). Such a right as that now claimed by the defendants would tend to the total destruction of the plaintiffs' lands. The water flowing from the plaintiffs' lands to defendants' tank was surface water and not flowing in a stream, and no rights could be acquired over such surface water, under section 17 (e). He relied on *Robinson v. Ayya Krishnama Chariyar*(1).

K. Srinivasa Ayyangar, for Sundara Ayyar, for respondents, argued that inasmuch as the lands used by plaintiffs were adjacent to the bed of the tank, they were liable to submersion when the tank was full.

JUDGMENT.—We must take it as found that the respondent has for a period of twenty years kept the calingula at the height at which it now is, and has not raised it. The effect has been to submerge at times the appellants' land. On the authority of *Robinson v. Ayya Krishnama Chariyar*(1), it is contended that the right claimed by the respondent is not one which can be recognized in law. In that case Mr. Justice Holloway was dealing with the question whether the defendants could be prohibited from draining their own land of the water falling upon it and naturally accumulating there, and he held that such a right could not be recognized. That is not the right directly claimed in the present case. Here the respondent merely claims to be allowed to maintain his bund at its usual height so as to give him the full advantage of his tank. There is no question as to what the appellants may be entitled to do in order to get rid of water

(1) 7 M.H.C.R., 37.

which is thrown back on to their land, and while deciding that the respondent has not exceeded the right which he has proved, we do not decide that it is beyond the power of the appellants to take measures to save their land from being submerged. We dismiss the second appeal with costs.

NARAYANA
REDDI
v.
VENKATA
CHARIAR.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Boddam.

THE MUNICIPAL COUNCIL, COCANADA (DEFENDANT),
PETITIONERS,

v.

THE STANDARD LIFE ASSURANCE COMPANY
(PLAINTIFF), RESPONDENT.*

1900.
October 11,
12, 16.

District Municipalities Act (Madras)—Act IV of 1884, ss. 53, 262—Carrying on business within the limits of a municipality—Business conducted by a local agent without power to make contracts on behalf of company—Levy of profession tax—Suit to recover amount paid—Substantial compliance with the provisions of the Act—Maintainability of suit.

A person who resided within the limits of a municipality procured business and collected premiums for an Insurance Company and forwarded the moneys so collected to the company at a place outside the municipality. For these services a commission was received, but no office or establishment of the company was kept or managed by the person so acting within the municipality, nor was he empowered to represent the company in matters relating to contracts entered into by them. The municipality levied a sum of money on the company as profession tax, under section 47 of the Madras District Municipalities Act, 1884; and it was paid under protest. The company then filed a suit to recover the amount so levied, when it was contended in defence that the company carried on a business that was liable to the tax and that such business was carried on through the company's agent within the limits of the municipality and that the tax had in consequence been properly levied. It was further contended that by reason of section 262 of the Act no suit would lie as against the municipality:

Held, that the company was not doing business within the limits of the municipality.

Held also, that the suit was maintainable. A company not liable to the tax had been taxed, and the provisions of the Act had not been in substance and

* Civil Revision Petition No. 91 of 1900, under section 25 of the Provincial Small Cause Court's Act, 1887, praying the High Court to revise the decree of B. Virasami Ayya, District Munsif of Cocanada, in Small Cause Suit No. 1191 of 1899.

MUNICIPAL
COUNCIL,
COCANADA
v.
THE
STANDARD
LIFE
ASSURANCE
COMPANY.

effect complied with. The municipality were therefore not protected from action by section 262.

Whether a company carrying on the business of insurance is liable to be taxed under the Madras District Municipalities Act : *Quære*.

SUIT to recover a sum of four rupees, which sum plaintiffs alleged that the municipality had illegally and wrongfully collected from them as profession tax due by the plaintiff's company for the half-year ending with 30th September 1899, as a company carrying on business at Cocanada. The issues were :—(1) Is the suit sustainable ? (2) Does plaintiff's company carry on business at Cocanada ? (3) Is the money to be refunded or not ? The evidence of the plaintiff's first witness was as follows :—“ The plaintiff's company has no office of its own in this town ; nor any establishment. I am only a commission agent of it. I have no power to accept or reject proposals or to issue policies or to carry on any general business for the company. I do not sign any receipts for the company. I collect moneys and premiums. I paid Rs. 4 to the municipality under protest on defendant's demand. *Cross-examination*.—I merely collect money under receipts sent by the company previously. I forward applications. I engage the doctor. I never paid any policy. I have not had the opportunity. I hand over the policies to the holders. I am paid commission. I keep my accounts under the orders of the Bombay officer. I do this in the Bank of Madras. I transact business there. I have taken the permission of the Bank of Madras to transact this business. I am not allowed a clerk by the company. I send up copies. I have no one with me to get persons. I took the business from the old agent. There are other agents of other companies. I don't go about canvassing for business. I don't go about giving advice. I am the agent of the Bank of Madras. I live in the Bank.” Further facts are set forth in the District Munsif's judgment :—“ This is a suit by the Standard Insurance Company of Bombay against the Municipal Council of the Town, Cocanada, to recover back Rs. 4 levied from them as profession tax due for the first half of the current year. The objection is based on the ground that the company, which is a Joint Stock Company incorporated under an Act of Parliament, does not carry on the business here as was wrongly assumed, and so are not liable to pay any profession tax to the municipality ; the defence, among other pleas, presses the contention that the company should be taken to carry

their business here. This is the material point involved in the second issue ; the first relating to the preliminary objection that the plaint is informally drawn up not being properly signed and verified. This objection, however, has been given up at the trial by the concession of defendant's vakil that, as a registered company, its secretary was competent to sign and verify the plaint on its behalf. Another objection comprehended in the issue touching the sustainability of the suit is that a tax once paid cannot form the subject of a suit for its refund. This can be easily answered by stating that the company's commission agent, who made the payment, affirms as a witness that the money was paid under protest. This statement stands unchallenged by anything to the contrary on the part of the Municipal Council, who have adduced no evidence on their side. I hold, under the first issue, that the suit is sustainable. Then, about the substantial issue No. 2, concerning the legality of taxation, I should think that the imposition is one which is not countenanced by the Municipal Act. Notwithstanding the strenuous efforts of the plaintiff's vakil for exemption, I am prepared to hold that the Insurance Company in question is one coming under the general description contained in the first clause of Schedule A of Act III of 1897 now in force ; the denomination referred to there being carrying on business as a company. This name is wide enough to include in it all corporations which conduct their business as a body and not as individual persons for which provision is made in the subsequent clauses. The clause has been interpreted in this light by the High Court of Madras in another case in which the same municipality was involved (*Municipal Council, Cocanada v. Royal Insurance Company, Liverpool*(1)) to apply to all companies, no matter what may be the business carried on by them. Besides this, the term company is defined in section 3 of the Act to take in all those incorporated by an Act of Parliament like plaintiff's company. The difficult point for solution is whether the Insurance Company in question can be said to carry on their business here through its commission agent, who is also the agent of the Bank of Madras located in this town. According to his evidence he collects the premiums here for the company and forwards the moneys from time to time, receiving commission. He attends to the

MUNICIPAL
COUNCIL,
COCANADA
v.
THE
STANDARD
LIFE
ASSURANCE
COMPANY.

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

MUNICIPAL
COUNCIL,
COCANADA
v.
THE
STANDARD
LIFE
ASSURANCE
COMPANY.

correspondence himself without any clerk or peon allowed him the company for the transaction of the business. He cannot therefore be said to manage any office of the company put under his charge, nor is he empowered to represent the company in matters affecting the legitimate discharge of their duties in relation to the contracts and obligations entered into with them. In other words the agent may be said to procure business for the commission paid to him, but not to transact any business on behalf of the company as an officer on their establishment assigned to him out of what they have already taken into their hands as part and parcel of their prescribed functions. To make the idea more vivid I should say that the agent stands to the company in no better position than a Vakil to the Court in procuring work, and yet neither of them can be reckoned as part of the regular establishment. In *Gope Mohan Roy v. Protap Chunder Roy*(1) the expression "carry on business" is taken to exclude business done by a commission agent, though the question arose in connection with civil jurisdiction. So also the Standard Marine Insurance Company was treated in *Corporation of Calcutta v. Standard Marine Insurance Company*(2) as not liable to be taxed by the Calcutta Municipal Corporation because its business was carried on in Calcutta by its agents at their own offices, and the company had no place of business of its own at all in Calcutta. This is precisely the state of things in the case on hand. There is no attempt made by the Municipal Council to show that the plaintiff's company has any office of its own at this station with clerks, furniture and other provisions to transact its legitimate business on the same lines as it does at Bombay where it has a regular office. The agent, as commission agent, works on his own account in that capacity and not as a salaried officer of the company executing any work delegated to him. I hold, under the second issue, that plaintiff's company do not carry on business here. The issue is found against the defendant. Under the third issue the tax is ordered to be returned to the company. Suit is decreed against the defendants and they are ordered to pay plaintiff's company Rs. 4 with costs and fee Rs. 5 and bear their own costs."

The defendant preferred this civil revision petition under section 25 of Act IX of 1887.

V. Krishnasami Ayyar for petitioners.—It is submitted that a suit of this nature does not lie under section 262, clause (2), of Madras Act IV of 1884. The tax was levied under section 52 of that Act; the section under which appeals may be brought is section 97; and section 101 provides that assessments shall be final. By section 262, clause 2, no action lies. This section has been amended by the later Act—section 172 (2) of Madras Act III of 1897, but there is no material difference and I submit that if a person is assessed in respect of a business which he does not, in fact, carry on, he cannot bring a suit to recover money paid under such an assessment. See *Chairman, Madura Municipality v. Krishnayyar*(1) in which *Municipal Council, Nellore v. Rongayya*(2) is expressly approved. See also *Municipal Council, Cocanada v. Royal Insurance Company, Liverpool*(3); and *Municipal Council, Tanjore v. Umamba Bai Saheb*(4). The evidence given by the plaintiff company's agent establishes that a business is being carried on. See *Muthayya Chetti v. Allan*(5) as to "carrying on business." *HEPARD, J.*—Did the agent carry on the business of the company, or was he a mere channel of communication? *Werle & Co. Colquhoun*(6) shows that an agent represents his principal even though his authority be limited, as in the present case. The principal, in fact, carries on the business through the agent. The case last referred to is not overruled, but only distinguished in *rainger v. Gough*(7). The contracts in the present case were made in Cocanada, because the communication of the acceptance was made at Cocanada by the agent. See section 4 of the Indian Contract Act. Moreover premiums are paid at Cocanada, so the company would be liable to be sued there. The case of *Corporation of Calcutta v. Standard Marine Insurance Company*(8), referred to by the Munsif, does not apply, as the Madras Act is worded differently to that on which the case referred to was decided. The language in the Bengal Act is "keeper of a place of business." I submit that the policy of the Legislature is to make the decision of the Council final on the question whether a business is or is not carried on within the limits of a municipality.

MUNICIPAL
COUNCIL,
COCANADA
v.
THE
STANDARD
LIFE
ASSURANCE
COMPANY.

- | | |
|--|--------------------------|
| (1) Letters Patent Appeal No. 44 of 1896 (unreported). | |
| (2) I.L.R., 19 Mad., 10. | (3) I.L.R., 21 Mad., 5. |
| (4) I.L.R., 23 Mad., 523. | (5) I.L.R., 4 Mad., 209. |
| (6) I.L.R., 20 Q.B.D., 753. | (7) [1896] A.C., 325. |
| (8) I.L.R., 22 Cal., 581. | |

(1) 11 W.R., (C.R.), 532.

(2) I.L.R., 22 Cal., 581.

MUNICIPAL
COUNCIL,
COCANADA
v.
THE
STANDARD
LIFE
ASSURANCE
COMPANY.

The Advocate-General (Hon. Mr. J. P. Wallis) for respondent.—The case of *Municipal Council, Nellore v. Rangayya*(1) was decided under the old section. The provisions of the amended section have not in substance been complied with when a Council imposes a tax on a person who does not, in fact, carry on business within the municipality. In such a case the tax cannot be said to have been levied under the Act. In *Leman v. Damodaraya*(2) it was laid down that a tax illegally levied under Act III of 1871, section 85, could be recovered by suit, though the wording of that Act was much stronger. The decision in *Kamayya v. Leman*(3) turns on the particular facts of the case. *Tuticorin Municipality v. South Indian Railway*(4) decides that if an express provision of law is violated a suit will lie to recover a tax illegally levied. Here the law has been violated by a tax being imposed on a person not carrying on business within the municipality; there is no legal sanction for such a tax. In *Ramasami Ayyar v. Municipal Council of Salem*(5) a similar suit was maintained, though the point was not expressly decided. In *Municipal Council, Nellore v. Rangayya* no provisions of the Act had been contravened in the imposition of the tax. *Municipal Council, Cocanada v. Royal Insurance Company, Liverpool*(6) assumes that, even under the unamended Act, an action like this would lie, whilst *Fischer v. Twigg*(7) is a direct authority that an action lies if a person who is not liable is taxed. [He was only heard on this point.]

V. Krishnasami Ayyar in reply.—The words “carrying on business” are wide enough to cover any business. See the heading to schedule A. Section 53 covers every trade mentioned in schedule A. Regarding the maintainability of the suit—in *Tuticorin Municipality v. South Indian Railway*(4) the municipality had purported to act in a manner that contravened the Act. In *Fischer v. Twigg*(7) the building which had been taxed was admitted to be one for a charitable purpose. There, an express provision of the Act had been contravened. Clause (1) of section 262 deals with formal errors; and it is submitted that section 262, clause (2), governs cases like the present, in which a Municipal Council may have arrived at a mistaken conclusion on a question of fact.

(1) I.L.R., 19 Mad., 10.

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

(5) I.L.R., 18 Mad., 183.

(7) I.L.R., 21 Mad., 367.

(2) I.L.R., 1 Mad., 158.

(4) I.L.R., 13 Mad., 78.

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

MUNICIPAL
COUNCIL,
COCANADA
v.
THE
STANDARD
LIFE
ASSURANCE
COMPANY.

JUDGMENT.—The decree in favour of the plaintiff is impugned on the ground that the substantial question in the case has been wrongly decided and on the ground that the action to recover the money paid was barred by the provisions of section 262 of the Act IV of 1884 (Madras).

In regard to the substantial question there are two points to be considered—it has to be ascertained whether the Company was exercising any art, profession, trade, or calling specified in the schedule to the Act, and whether the Company exercised such art, profession, trade, or calling within the Municipality within the meaning of the 53rd section. The business of Life Insurance does not appear in the schedule as one of the businesses or trades in respect of which a tax may be levied and therefore it would seem that the plaintiff's Company, whose business is that of Life Insurance, could not by any possibility be liable. But it is said that, as the schedule includes in its list of denominations “carrying on business as a Company,” any Company that does carry on business becomes chargeable whether or not its business is otherwise one of the trades mentioned in the schedule. Now there are several difficulties in the way of this construction. Considering the terms of the section one would expect to find in the schedule a catalogue of arts, professions, trades and callings, but the schedule does not strictly correspond with the section, since it gives a list of persons, and not of trades or professions. In order to apply the schedule to the present case we should have to say that the transaction of the business of a Company is designated by the Legislature as a trade or calling. Ordinary people in making a list of trades or callings would make their classification with reference to the nature of the employment and without regard to the question whether the business was transacted by individual persons or by an incorporated Company, and they would not denote the business of Companies in general as one of the known trades or callings. That is one difficulty in the way of the Council. Another difficulty is that whereas the schedule denotes a banker or barrister as a person who may be taxed, it does not in similar language declare that any Company may be taxed. It is apparently a person “carrying on business as a Company” who is to be taxed. What that is intended to mean we do not pretend to know, but it can hardly mean “a Company carrying on business as a Company.” If that was intended it was so easy to say so in plain language.

MUNICIPAL
COUNCIL,
COCANADA
v.
THE
STANDARD
LIFE
ASSURANCE
COMPANY.

Whether it was one individual person or the Company that was in contemplation of the Legislature, it is also difficult to believe that all Companies, without reference to the nature of their business, were intended to be included. No limitation is placed on the meaning of the word Company and therefore it must denote Companies incorporated not for purposes of gain, as well as ordinary trading Companies. It is said that the Act was amended in consequence of the decision in *Corporation of Calcutta v. Standard Marine Insurance Company*(1) which apparently turned on the language of an Act similar to the original Madras Act of 1884. That may be so, and it is true that this Court in *Municipal Council, Cocanada v. Royal Insurance Company, Liverpool*(2) considered that an effective amendment of the Act had been made. But we cannot suppose that the learned Judges intended to decide authoritatively a point which was in no way before them. The meaning of the Legislature is in our opinion so doubtful that we are unable to say with the certainty requisite in cases where taxation is involved that Companies carrying on the business of insurance are liable to be taxed under the Act.

If there is any doubt as to that question, there is certainly none as to the question whether this particular Company is doing business within the Municipality. On the facts, the case is undistinguishable from *Grainger v. Gough*(3). In that case, at this, there was an agent employed to canvass and take orders from another person, with no power to make contracts. An attempt was made to distinguish the cases on the ground that according to section 4 of the Indian Contract Act the acceptance of a proposal is not binding on the acceptor until he becomes aware of it. That rule of law has, in our opinion, no bearing whatever on the question where a man's trade or business is carried on. That is a question of fact and we can see no reason why it should not receive in this country the same answer as that which was given in the House of Lords. On the ground that the Company was not doing business in Cocanada the Municipal Council went beyond their powers in exacting the tax.

It is then argued on behalf of the Council that they are protected from action by section 262, and reliance is particularly

placed on the case of *Municipal Council, Nellore v. Rangayya*(1) where that section as it stood before the recent amendment was considered. Whatever was the intended effect of the amendment it certainly cannot prejudicially affect the plaintiff. The question really is whether when a Company, which in respect of its particular business is not taxable under the Act or does not transact business within the municipality, is nevertheless taxed, it can be said that "the provisions of the Act have been in substance and effect complied with." The question whether there has been a substantial compliance with the Act is one of fact, which has to be determined with reference to the particular circumstances of the case. The case of *Municipal Council, Nellore v. Rangayya*(1) was one of an unfinished house and we were not satisfied that any provision of the Act had been contravened. The cases, *Tuticorin Municipality v. South Indian Railway*(2) and *Municipal Council, Cocanada v. Royal Insurance Company, Liverpool*(3), are on the other side of the line. The last of these cases closely resembles the present, the same municipality was petitioner, and yet the objection now under consideration was either not taken or was overruled.

We can see no difference in principle between the exaction of a tax which has not been legally imposed and the exaction of a tax from a person who is not taxable under the Act. In the latter case no less than in the former there has been a substantial disregard of the provisions of the Act.

For these reasons we think the petition fails and must therefore be dismissed with costs.

(1) I.L.R., 19 Mad., 10. (2) I.L.R., 13 Mad., 78. (3) I.L.R., 21 Mad., 5.

(1) I.L.R., 22 Cal., 581. (2) I.L.R., 21 Mad., 5. (3) [1896] A.C., 325.

MUNICIPAL
COUNCIL,
COCANADA
v.
THE
STANDARD
LIFE
ASSURANCE
COMPANY.

PRIVY COUNCIL.

P.C.*
1900.
July 3, 21.

SUBBARAYAR AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

SUBBAMMAL AND OTHERS (DEFENDANTS), RESPONDENTS.

[On appeal from the High Court at Madras.]

Hindu Law—Will—Construction—Bequest to testator's adopted son—Not conditional by this will on adoption having taken place.

A testator stated in his will that he had been keeping a minor as his adopted son, and recited,—in a bequest of property to him,—“whereas my adopted son is a minor.”

On this appeal the question was whether the meaning and effect of the will was to entitle the minor to inherit under the bequest, assuming that he had not been validly adopted by the testator :

Held, that the expression that the testator had been keeping the minor as his adopted son meant keeping him with a view to his adoption, and that the bequest to the minor was not conditional on his having been adopted, but was effectual, whether he had been adopted or not.

APPEAL from a decree (18th March 1898) of the High Court affirming a decree (31st March 1897) of the District Court of Coimbatore.

This suit was brought on the 7th May 1896 by the appellants, the four sons of Venkata Kuppayyar, the fourth defendant respondent, the first cousin of the testator, also named Kuppayyar, whose will, the subject of the present litigation, had been attested by the said Venkata. The testator died without issue on the 27th February 1896 having on the 26th made the will which is set forth in their Lordships' judgment.

The testator left a widow and his father's widow in his household, as well as a minor the second defendant respondent on this appeal, under guardianship. The widow was the first and the mother the third. The fourth respondent, above-named, did not appear on this appeal.

The four plaintiffs sued as reversioners to have the will which they alleged to have been falsely put forward after the death of Kuppayyar, set aside as defeating their rights, and to have declared invalid the adoption of the boy, to whom the estate had been

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

bequeathed, to be taken after the death of the testator's widow and after his attaining full age, with the provisions as to management, and protection of the widows, appearing in the will. SUBBARAYAR v. SUBBAMMAL.

The question for decision on this appeal was whether, according to the true construction of the will, there was a valid bequest to the minor independently of there having been, or not having been a valid adoption of him by the testator; or whether the bequest was conditional thereupon.

Both the Courts below held that the will was validly executed.

As to the adoption having taken place in fact the District Judge found that a giving and taking did take place on the 27th February 1896, and he concluded as follows :—

“I find that the deceased did authorize his wife to perform dattahomam, and that such authorization is valid. I regard the will as an authority to adopt, and that would necessarily include authority to supply the necessary ceremonies to an inchoate adoption. Also, I find that, when the second defendant was given and taken on the 27th, there was verbal authority to the wife to complete the ceremony by the necessary dattahomam.”

The District Judge had in his judgment already expressed the opinion that the will in favour of the minor had complete operation, whether a valid adoption had, or had not, been effected. On the ground that the bequest was not conditional thereon the suit was dismissed.

On an appeal by the plaintiffs to the High Court, a division Bench (SUBRAHMANIA AYYAR and DAVIES, JJ.) were of opinion that the adoption had been proved, but did not find, as the first Court had found, that the giving and taking had been effected on the date on which also the testator's death had occurred.

They found that at the time when the minor left his natural father to live in the household of the testator there had been a gift and acceptance of him. That took place three years before the death of the testator; and that giving and taking was not accompanied by the performance of dattahomam, which was afterwards performed.

Having arrived at a conclusion in favour of the adoption, the High Court considered it unnecessary to express any opinion on the question whether the bequest would be good, assuming that there had been no adoption. They dismissed the appeal.

SUBBARAYAR
*
SUBBAMMAL.

On this appeal, Mr. J. D. Mayne, for the appellants, contended that the bequest to the minor must be construed as governed by the condition of the adoption having been effective and valid. The gift of the property was to the minor as adopted son, and the will in its directions assumed that the adopted son would be qualified to perform the funeral rites of the deceased. True adoption having been necessary to qualify the minor, it now could hardly be said that there was a real concurrence in the Courts below as to how and when it had taken place. The first Court had given the designation of the minor in the will as the sufficient reason for the decree in his favour;—the Appellate Court had found the adoption in fact to be a sufficient ground for the gift to take effect. But it was now argued that the will should have been construed to mean that the minor should take as adopted son, and only upon the condition of his having been validly adopted. In *Nidhoomoni Debya v. Saroda Pershad Mookerjee*(1) the testator evidently intended that the donee of the property should take it whether the adoption should in all respects be carried out or not. But in the present case the difference from that case was that here, if the minor should not have been adopted, he would be unable to perform the sacred rites required to be performed by him. That adoption would have been his qualification, and this showed that the gift to him of the property was conditional on his having the character of adopted son. Reference was made to *Fanindra deb Raikat v. Rajeswar Dass*(2) and to *Sri Raja Rao Venkata Surya Mahipati Ramakrishna Rao Bahadur v. The Court of Wards*(3).

Mr. C. W. Arathoon, (for the first three respondents), argued that the minor's title to the property given to him by the will was entirely independent of the question whether he had been validly adopted by the testator or not. The will stated the position of the minor, who was entitled according to the intention of the testator and whether the ceremonies performed subsequently to the giving and taking, had been sufficient to render the adoption valid or not, was not material to his claim. The gift was to the minor, validly made to a person designated.

(1) (1876) L.R., 3 I.A., 253.

(2) (1885) L.R., 12 I.A., 72; I.L.R., 11 Cal., 463.

(3) (1898) L.R., 26 I.A., 83; I.L.R., 22 Mad., 383.

Mr. J. D. Mayne replied.

Afterwards on the 21st July their Lordships' judgment was delivered by Lord MACNAGHTEN.

JUDGMENT.—In this case their Lordships have only to consider the meaning and effect of the will of one Kuppayyar which is found by both Courts below to have been executed when the testator was of sound disposing mind. Mr. Mayne, who appeared for the appellants, admitted that, if the decision of the Court was against him on the construction of the will, success on other points would be of no avail. The question is whether the minor respondent Venkataramanayyar is entitled to inherit under the will assuming that he was not validly adopted by the testator.

The will is in the following terms:—"Will left on the 26th February 1896, corresponding to 16th Masi of Manmatha year, "by me Kuppayyar, son of Venkatarayar, Brahman by caste, cultivator, residing at Chinna Dharapuram, Karur Taluk. Whereas "I possess the undermentioned immoveable and moveable properties, money, outstandings and debts, whereas I, having no "issue, have been keeping Venkataramanayyar, a minor, aged about "10, son of Venkatasappayya of Andan Kovil, Brahman, cultivator, who is my brother-in-law, as adopted son and protecting "him for the last three years, whereas I am now seriously ill, "whereas my mother Venkalakshmi Ammal is in her dotage, and "whereas my adopted son, the said Venkataramanayyar is a minor "and consequently incapable of managing the said properties and of "protecting us, my wife Subbammal shall, until the said minor "becomes a major, administer the said properties as guardian of "the said minor, discharge the debts, maintain the undermentioned "charities which I have been conducting, bring up the said minor, "have his thread ceremony, marriage, &c., celebrated, maintain "me and my mother Venkalakshmi Ammal till our lifetime, "and after our demise have our funerals, &c., performed for us by "the said minor. Afterwards the said minor on his attaining "majority shall take charge of the said properties, debts, &c., and "until the lifetime of the said Subbammal he shall as per her "orders look after the said properties and discharge the debts, also "maintain the undermentioned charities and after the said Subbammal's lifetime he shall perform her funerals, &c., and possess "and enjoy with all rights the said properties, &c., from generation "to generation so long as the sun and moon last, and maintain

SUBBARAYAN
*
SUBBAMMAL.

SUBBARAYAR “and conduct the said charities. Thus have I of my own
v.
SUBBAMMAL. “accord and with my free will and consent executed this will.
“(Signed) Kuppayyar.”

It appears to their Lordships that the gift to the minor is not conditional on adoption. The testator no doubt refers to the minor as his adopted son, but he explains what is meant by that expression by stating that he had been keeping the minor “as adopted son” that is with a view to his adoption.

The case on which Mr. Mayne principally relied was the case of *Fanindra deb Raikat v. Rajeswar Dass*(1). There this Board had to construe an angikar-patra which contained an allegation of the adoption of the person who claimed to inherit and then proceeded to make a statement which might be construed either as a disposition of property or as a declaration of the consequences flowing from adoption. Their Lordships held that the author of the angikar-patra had no power to adopt a son who would succeed to the estate; and on the language of the particular instrument before them they held it was not a disposition of property, but only a statement of what would have happened if there had been an adoption in fact and no angikar-patra had been executed.

The language of one instrument does not afford much assistance in the construction of another. Their Lordships, however, may observe that the language of the will in the present case is more like that of the will in the case of *Nidhoomoni Debya v. Saroda Pershad Mookerjee*(2) to which Mr. Mayne also referred. There it was held that the gift of the testator's property to a person whom the testator declared he had adopted took effect although in consequence of the proper ceremonies not having been performed by the testator's widows the adoption might not be in all respects complete.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal ought to be dismissed. The appellants will pay the costs of the respondents appearing on that appeal.

Appeal dismissed.

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

Solicitors for the respondents: Messrs. *T. L. Wilson & Co.*

(1) L.R., 12 I.A., 72; I.L.R., 11 Cal., 463.

(2) L.R., 3 I.A., 253.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Boddam.

ANNASAMI PILLAI AND OTHERS (PLAINTIFFS NOS. 1 TO 7, 9 AND 10),
APPELLANTS,

1900.
October 15,
17, 18.

v.

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

Religious Endowments Act—Act XX of 1863, s. 18—Leave to sue in High Court in case of neglect by trustee—Trustee of public charity—Acquisition by prescription of trusteeship with power to appoint successors.

The trusteeship of certain public temples was handed down from M to his son and then to his grand-son, after which the younger brother of the grand-son succeeded to the office. He, by will, appointed his sister and her husband as trustees to succeed him and authorised them to appoint their own successors, thus diverting the devolution of the office from the family of the original trustee. The sister and her husband assumed office, but the husband died soon after. The sister continued to hold the office of trustee for over twenty-four years. She, by will, appointed as her successor her sister's son, who held office for twenty years, and, by will, appointed his son-in-law, the defendant, as his successor. Defendant was a great grand-son of M, and assumed the office of trustee. A suit having been filed by plaintiffs on behalf of themselves and other worshippers for a declaration that the appointment of defendant as trustee was illegal and void:

Held, that defendant was the rightful trustee, having been appointed by one who had acquired a valid title to the trusteeship with power to appoint a successor. The sister had acquired a valid title to the trusteeship by prescription and had entered upon it under a will which contained a provision for the appointment of a successor; and she had, acting under that provision, appointed a successor, giving him a similar power to appoint his own successor.

Semble, that the title so acquired by the sister and her successor was not a hereditary trusteeship passing necessarily to their heirs, but one with power to appoint a successor.

A trusteeship with power to appoint a successor is an estate well known to and recognised by law and may be prescribed for.

The Religious Endowments Act, 1863, was not intended to apply to a suit, brought under the ordinary original jurisdiction of the High Court inherited from the Supreme Court, charging neglect of duty on the part of a temple trustee. Such a suit is therefore maintainable without leave being obtained under section 18 of that Act.

Semble, that where a person who had no right to the office of a trustee, according to the rule of devolution established by the founder of a trust, acquires

* Original Side Appeal No. 8 of 1899 against the decree of Mr. Justice Shephard, in Civil Suit No. 54 of 1898.

ANNASAMI
PILLAI
v.
RAMAKRISHNA
MUDALIAR.

a title to the office by prescription but restores it to one who, except for the transferor's prescriptive title, could have taken the office according to the rules laid down by the founder, such transfer should be treated as an exception to the general doctrine that a trusteeship is not assignable.

SUIT for a declaration and for the appointment of trustees to certain temples. The temples, which were dedicated to Malleeswara and Kesavaperumal, had originally stood upon a site which was acquired by Government for public purposes on payment of compensation. One Mudukrishna Mudali (senior), who was at the time of such acquisition the manager of the temple, received the compensation money from Government, collected further funds by inviting subscriptions, and, with the money so acquired, constructed the temples which formed the subject-matter of this suit. He held the office of trustee to the temples until his death in 1795, when he was succeeded by his son Chinnaya Mudali. The latter was succeeded by his son Mudukrishna Mudali (junior), who held office till 1840, when he also died. Mudukrishna Mudali (junior) was succeeded by his younger brother Lakshmana Mudali, who executed a will, dated 8th March 1847, by which he appointed his sister Ammani Ammal and her husband Ramasami Mudali his executors. The testator, after reciting that the temples had been erected by the exertions of his grandfather, and that the charities had since been performed by his father and elder brother respectively, directed that his sister Ammani Ammal and her husband Ramasami Mudali should perform the charities after his death, and directed that on failure of issue to his said sister, she and her husband should "adopt measures in order that fit and proper persons might be appointed after their death as their successors for the purpose of the charities, which I have enumerated above, that such may be uninterruptedly continued, and performed so long as the moon and the sun shall endure." He died in 1847: and Ramasami Mudali and Ammani Ammal assumed the duties of trustees. Ramasami Mudali died on 12th June 1848, but Ammani Ammal continued to hold office. On 14th May 1872, Ammani Ammal executed a will, by which she appointed her sister's son, M. Vythilinga Mudali, her executor, appointing him to the trusteeship of the temples after her death, and enjoining him to appoint others, in due course, as follows:—"Steps should be taken to appoint proper persons in order to conduct all the charities written and left (by) my elder brother as long as the sun and moon last after the death

ANNASAMI
PILLAI
v.
RAMAKRISHNA
MUDALIAR.

of the aforesaid Maungadu Vythilinga Mudaliar." She died in the same year, whereupon the said Vythilinga Mudali became trustee and performed the charities. By his will, dated 18th April 1890, Vythilinga Mudali appointed his son-in-law, M. Ramakrishna Mudali, the present defendant and first respondent, as his executor, and elected him trustee to conduct the charities as the testator had conducted them. The said M. Ramakrishna Mudali was a great grand-son of the first-mentioned Mudukrishna Mudali (senior). Vythilinga Mudali died on 28th December 1892, whereupon Ramakrishna Mudali took out probate of his will and assumed the office of trustee. Plaintiffs brought this suit on behalf of themselves and other worshippers, and prayed that the appointment of defendant as trustee and his possession of the temples might be declared illegal and void; that, on various grounds of alleged misfeasance, he should be removed from his office and new trustees should be appointed; and that defendant might be compelled to make good certain losses which the temples were alleged to have sustained by his default and neglect, misconduct and mismanagement. The charges of misconduct and mismanagement were denied. Leave to institute the suit had not been obtained under section 18 of the Religious Endowments Act; nor under section 30 or section 539 of the Code of Civil Procedure. The following issues were framed:—
 "(1) Whether the plaint temples are public or private charities? (2) Was the temple founded by the defendant's ancestors? (3) Have the plaintiffs a right to sue? (4) Is the defendant entitled to fill the office of dharmakarta or trustee of the said temples either by virtue of his appointment as set forth in the plaint or on the grounds alleged in the written statement? (5) Has the defendant been guilty of the acts of misconduct alleged in the plaint or any of them and is he thereby disqualified from continuing to hold the office of dharmakarta or trustee? (6) Should a new dharmakarta or trustee be appointed to act with the defendant or should new trustees be appointed? (7) Should new or additional trustees be found necessary should they be appointed solely from descendants of the founder's family? (8) To what relief, if any, are the plaintiffs entitled? (9) Is the suit maintainable?" The defendant was not called on for his defence.

The issues and the evidence adduced are dealt with in the judgment passed on the original side of the High Court, the material portions of which were as follows:—

ANNASAMI
PILLAI
v.
RAMAKRISHNA
MUDALIAR.

"This is a suit by two persons who profess to be interested in two important temples in Black Town. They charge the defendant, the dharmakarta, as being-guilty of a number of acts of misfeasance and nonfeasance, and allege that by reason thereof the temples have suffered loss to the extent of Rs. 35,000. The written statement denies the charges which are made against the defendant and alleges that the office of dharmakarta is vested in the family of the defendant, his ancestor having been the founder of these two temples. Several issues were settled, the first of which is whether the temples are public or private charities. It is not distinctly alleged in the written statement that the temples are of a private character, but I must take it that at the settlement of issues that contention was raised on behalf of the defendant. It is quite clear to my mind from the evidence of the plaintiff that that contention cannot be sustained. The second issue is whether the temples were founded by the defendant's ancestor. With regard to that question another issue was raised in the course of the hearing, namely, as to whether that question had been settled by a suit in the Supreme Court in 1835. In my view the decree in that suit did not settle the question. It was a suit in which two members of the defendant's family were parties. The Advocate-General was also a party to the suit. In the view I take on the materials which are before me, the question as to who founded the temples was not a question necessary to decide the case. It was common ground as between the plaintiff and the defendant in that case that the temples had been founded by the ancestor of the parties, Mudukrishna. The Advocate-General, as far as I can see, took no active part in the case, and there is nothing to show that the second issue which is now raised was raised or ought to have been raised in that case. Therefore, I rule that the matter is not *res judicata*. The fifth issue relates to the charges against the defendant. Unless those charges are established, it is not necessary to go into any other question. The plaintiffs have produced a quantity of evidence in support of the very numerous charges which they make in their plaint. Practically the charges come to three. There is the charge that the defendant during the five or six years of his office has been negligent in collecting the monies due to the temples. There is the charge of omitting to repair the temples and its buildings, and thirdly there is the charge of negligence in the matter of ceremonies. With regard to these two

ANNASAMI
PILLAI
v.
RAMAKRISHNA
MUDALIAR.

last charges there is really no evidence at all. Some of the plaintiffs' witnesses say that the ceremonies or utsavams are carried on just as before. There is nothing whatever to show that there was any material departure from custom in the matter of these ceremonies. With regard to the condition of the temples, there is evidence that repairs have been done, and there is no substantial evidence to show that the defendant has been guilty of any neglect. It is true that the car has been allowed to get into a shaky condition and that it is no longer safe to use it. Nevertheless the car festival has gone on, and I do not believe that the worshippers regard that as a serious ground of complaint. The only charge which can be said to have been brought home in any manner of way is the charge relating to the omission to collect the rents and monies due to the temples. With regard to this charge there has been a great deal of evidence adduced." [His Lordship dealt with the evidence at length, and concluded:—] "The plaintiffs' witnesses entirely failed to prove that any substantial amount is irrecoverable. The evidence of the other witnesses, particularly the tenant, rather goes to show that efforts had been made to collect what was due. The tenants say that constant applications were made to them. They say that suits were brought and that in a number of cases bonds were taken. There has been, no doubt, a certain amount of laxity; still efforts have been made to get in the money. The case in the plaint is not put on the ground of dishonesty charged against the defendant. It is not pretended that there was anything more than a careless omission to collect the rents. It is absurd to impute to the defendant a deliberate intention to refrain from collecting the rents. At the most it comes to this—that he has been negligent in getting in the monies which he ought to have got in. I know of no case in which the Court has, on such evidence as that, gone the length of dismissing a trustee of a religious institution from office. I therefore find that the plaintiffs have failed to prove the charges made against the defendant and the fifth issue must be found in the negative. I have already said that the plaintiffs have succeeded in proving that the temples are public temples. I think they are entitled to have a declaration to that effect and thus set that question at the rest in future. As to the second issue, namely, whether the temples were founded by the defendant's ancestor, I do not think it necessary to pronounce any decided opinion. There

ANNASAMI
PILLAI
v.
RAMAKRISHNA
MUDALIAR.

is some excuse for the defendant raising the question, as it was conceded in the suit of 1835 that the temples were founded by his predecessor. On the other hand, there is a good deal of evidence to show that however important a part he may have taken as a benefactor of the temples, it can hardly be said that he actually founded them. I think therefore that the defendant must pay plaintiffs the costs of the first two issues. For the better protection of the funds of the temples in future, it is desirable that the dharmakarta should once every year, that is, the 15th July of every year commencing with the next 15th July, publish a full and complete balance sheet in the Fort Saint George Gazette and have his account books kept open for inspection in the temples in the month of August every year on due notice being given by any of the worshippers of the temples. Besides the declaration above mentioned a direction to that effect will be embodied in the decree. In other respects the suit is dismissed, the plaintiffs paying the costs other than those of the first two issues."

V. Krishnasami Ayyar, (*Sundara Ayyar* and *Gopalasami Ayyangar* with him), for appellants:—The learned Judge below has held that the temple is a public endowment and not a private charity created by Mudukrishna Mudali (senior), and that Mudukrishna Mudali was not the founder, but can be regarded only as a trustee. Granting, therefore, that his successors were all acting as trustees, as Ammani Ammal and Vythilinga (who never belonged to the founder's family) were trustees for longer than the statutory period, Mudukrishna's family lost its right to the trusteeship. The High Court has so decided in favour of Vythilinga in a previous litigation about this very institution (*Chenna Kesavaraya v. Vaidealinga*(1)). For the purposes of this suit then, Vythilinga was the rightful trustee, though his original appointment was illegal, for he held the trusteeship for more than twelve years. Granting that trusteeship is heritable, the defendant is not the heir of Vythilinga, being only his son-in-law, and is only a trespasser. He has been in possession only for six years, and the Court below ought to have decided the issue in favour of plaintiffs. Even granting that no misconduct on the part of the defendant has been proved, he must be removed, as being a mere trespasser. The defendant claims under a will left by the deceased trustee.

(1) I.L.R., 1 Mad., 348.

ANNASAMI
PILLAI
v.
RAMAKRISHNA
MUDALIAR.

A trustee has no power of appointment. It has long been held that a trusteeship being *extra commercium*, no alienation of a trusteeship is valid. See also *Rajah Vurmah Valia v. Ravi Vurmah Mutha*(1), which has been followed in numerous other cases. A will is an alienation, (see *Sri Raja Venkata Surya Mahipati Rama Krishna Rao Bahadur v. The Court of Wards*(2)). A trustee has no power to appoint his successor, unless the instrument of trust provides for such appointment, or it has been allowed by the usage of the institution. *Ramalingam Pillai v. Vythilingam Pillai*(3) was a case of usage. [He also dealt with the evidence and submitted that neglect of duty had been established.] He contended that the Court ought to have framed a scheme or have appointed co-trustees, or a controlling body and have provided for the proper preparation, keeping and auditing of accounts.

Sir *V. Bhashyam Ayyangar*, (*Seshagiri Ayyar* and *Seshachariar* with him), for respondent No. 1:—It is true that the appointment may be invalid. But a trustee who claims under an invalid appointment and acts for more than twelve years as trustee becomes a trustee with powers conferred on him in the deed of appointment. By prescription the defendant's predecessor, Vythilinga, became trustee with the power to appoint and defendant was duly appointed by him. Defendant is therefore the lawful trustee. Such a qualified estate is well known to law. A person can prescribe for a mortgagee's estate; also for a widow's estate. The defendant's appointment is therefore legal and valid. The Privy Council decision in *Rajah Vurmah Valia v. Ravi Vurmah Mutha*(1) ought not to be applied to the circumstances of this case. The principle is that an alienation of trusteeship for consideration is opposed to public policy. But in the present case, the alienation was in favour of the descendant of the original founder. It should therefore be treated as an exception to the general rule. [He referred to *Ganes Sing v. Ramgopal Sing*(4) and *Panchcowrie Mull v. Chumroolall*(5).] It is also submitted that a suit under Act XX of 1863 must be brought against a trustee and will not lie as against a mere interloper. A suit for a declaration that a person holds *qua* trustee is not maintainable under it. It must confine

(1) L.R., 4 I.A., 76; I.L.R., 1 Mad., 235.

(2) L.R., 26 I.A., 83; I.L.R., 22 Mad., 383.

(3) I.L.R., 20 I.A., 150; I.L.R., 16 Mad., 490.

(4) 5 B.L.R., Appx., 55.

(5) I.L.R., 3 Calc., 563.

ANNASAMI
PILLAI
v.
RAMAKRISHNA
MUDALIAR.

the remedy asked for to making him accountable as a trustee. Inasmuch as this Act of 1863 was passed after the Indian Councils Act, it is applicable to the mufassal as well as to the Supreme Court. So section 14 is wide enough to apply to all temples and mosques of a public nature, wherever situated. *Sheoratan Kunwari v. Ram Pargash*(1); *Attorney-General v. Brodie*(2); *Padapa bin Bhujangapa v. Swamirao Shrinivas*(3).

V. Krishnasami Ayyar in reply :—The contention now raised is that the defendant is validly in possession and that he has acquired a right to the property by prescription; and that he has acquired an absolute estate in the temple and its endowments. [Sir *V. Bhashyam Ayyangar* :—I contended that he had acquired a right to appoint a successor.] I submit that no such right can be acquired in law. An absolute estate can be acquired by prescription. A trustee might acquire an absolute trusteeship by prescription, though a trespasser when he entered, but in that case the devolution would be in accordance with the prior usage of the institution. If there is no usage proved, and an estate is acquired, the succession must go to the heir at law, *Srimati Janoki Debi v. Sri Gopal Acharjia*(4). [SUBRAHMANIA AYYAR, J.—It is contended that the power to arrange a course of succession by nomination is as well known to Hindu Law as the system under which trustees are hereditary or are ascertained according to a usage.] I contend that prescription can only be for an estate; and that a person cannot prescribe for a course of devolution. In law a power of appointment is not an estate. [SUBRAHMANIA AYYAR, J.—If the founder appoints a trustee conferring on him a power to appoint his successor, does the trustee's estate include the power of appointing his successor?] If it did, it would be because of the accident that the trusteeship and the power were vested in the same person. But the trusteeship might well be vested in one person and the power of appointment in some totally different person. It is not conceded that a person may prescribe merely for the mere power to appoint, separate and distinct. This latter is not an interest in property. A prescriptive title is acquired because of continuous occupation or of repeated acts, so long or so often that

(1) I.L.R., 18 All., 227.

(2) 4 M.I.A., 190.

(3) L.R., 27 I.A., 86; I.L.R., 24 Bom., 556.

(4) L.R., 10 I.A., 32; I.L.R., 9 Calc., 766.

ANNASAMI
PILLAI
v.
RAMAKRISHNA
MUDALIAR.

title is acquired. But if the position of trustee is acquired by a sufficiently long adverse possession the power to appoint would not be acquired because it could not be repeated, and so there could be no acquisition. In *Mussummat Lachhan Kunwar v. Anant Sing*(1) the Privy Council lay down that if, e.g., a widow prescribes for an estate, it would be presumed that she prescribed for an absolute estate. See also *Antaji v. Dattaji*(2). As an instance of an estate, that, I submit, could not be prescribed for,—take an appointment of two trustees with power to appoint successors in conjunction with the Collector of a district; then acquisition by a trespasser of an interest by adverse possession. It is submitted that the person so acquiring possession could not exercise the power of appointment. In the absence of a usage, the estate will go to the heir at law; that is said in the Privy Council case of *Gossamee Sree Greedharreejee v. Rumanolljee Gossamee*(3). Moreover, there must be repeated acts for prescription. If a series of trustees have occupied in succession to a trespasser and if each has appointed his successor then the Courts might take that into consideration and assume a lawful authority. [He cited the preamble to the Limitation Act and also section 28 referring to possession of property.] The right to appoint is not a thing capable of possession. The fallacy lies in assuming that an estate may be acquired by prescription in anything. Stephen's 'Commentaries,' 13th edition, page 151, dealing with freehold estates of inheritance, lays down that "some kind of actual interest or ownership is implied in the term estate; for a bare possibility, (such, for example, as the expectation of the eldest son of succeeding upon his father's decease, to the inheritance of his lands), will not satisfy the legal idea of an estate, nor will a mere power amount to an estate,—as if a man by will orders his land to be sold by his executors. The executors will take no estate in the land but only a bare authority over it." No new rule is laid down in *Rajah Vurmah Valia v. Ravi Vurma Mutha*(4), where it is said that a transfer of a trust is invalid. That applies to all trusts. *Narayana v. Ranga*(5). [He also referred to *Ganes Sing v. Ramgopal Sing*(6)]. [SUBRAHMANIA AYYAR, J.—The contention is

(1) L.R., 22 I.A., 25; I.L.R., 22 Calc., 445.

(2) I.L.R., 19 Bom., 41.

(3) L.R., 16 I.A., 137; I.L.R., 17 Calc., 3.

(4) L.R., 4 I.A., 76; I.L.R., 1 Mad., 235.

(5) I.L.R., 15 Mad., 183 at p. 184.

(6) 5 B.L.R., Appx., 55.

ANNASAMI
PILLAI
v.
RAMAKRISHNA
MUDALIAR.

that the power to appoint a successor is annexed to the estate of the trustee.) I submit that the power to appoint is not an estate known to law, and a trespasser who becomes trustee only prescribes for the position of a trustee and not for the incidental right to appoint his successor. It is submitted, in conclusion, that prescription is known to cut down an ordinary estate, but never to enlarge or widen it.

JUDGMENT.—The main questions to be determined in this appeal are—(1) whether the first respondent (defendant) hereinafter referred to as the respondent is the rightful trustee of the temples of Malleeswara and Kesavaperumal situated in Black Town; (2) if so, whether the suit, in so far as it relates to the charge of neglect of duty alleged against him, is unsustainable because no leave was obtained under section 18 of the Religious Endowments Act, XX of 1863; and (3) whether the respondent has been guilty of neglect of duty calling for notice at the hands of the Court.

Now, as regards the first question the facts bearing thereon are beyond dispute. Prior to the year 1777 a temple, dedicated to Malleeswara and Kesavaperumal, existed at the site on which the old light-house stands. But that site having been taken up by Government on payment of compensation, the temple was pulled down. Mudukrishna Mudali (senior), who was at that time the manager of the temple, caused the present temple to be constructed with money received by him from Government as compensation and with funds which he collected by way of subscriptions. He held the office of trustee of the present temple till his death in 1795. He was succeeded by his son Chinnaya Mudali who held the office till his death in 1816. His son Mudukrishna Mudali (junior) succeeded him, held the management up to the year 1840 and was succeeded by his younger brother Lakshmana Mudali who died in 1847. He left a will whereby he appointed his own sister Ammani Ammal and her husband Ramasami Mudali as his succeeding trustees, and authorized them to appoint their own successors, and thus diverted the devolution of the office from the family of Mudukrishna Mudali (senior) into the hands of persons who had no right thereto. Ramasami Mudali died shortly afterwards and Ammani Ammal continued to hold the office of trustee till 1872. By her will she appointed her sister's son Vythilinga Mudali to the trusteeship. He held the office for twenty

years and by his will appointed the respondent, one of Mudukrishna's (senior) great-grandsons, as his successor.

The first contention on behalf of the respondent was that, granting for argument there was a vacancy on Vythilinga's death, as urged for the appellants (plaintiffs Nos. 1 to 4 and Nos. 6 to 10) the right of management reverted to the heirs of Mudukrishna Mudali (senior) as he was the founder. We are, however, unable to agree with the suggestion that Mudukrishna was the founder. If a temple gets into ruins and a person, as a matter of mere benefaction, erects fresh buildings and dedicates them to the same sort of worship as had been carried on in the old temple, such person may properly be treated as the founder of the new temple, even though, in constructing it, he used materials of the former temple or other property belonging thereto. The circumstances of the present case are, however, very different. When Mudukrishna received the money paid as compensation by Government he received it as trustee, and in applying that money towards the construction of the present temple he did nothing more than what he was called upon to do as trustee. The circumstance that he had taken the trouble to raise subscriptions to supplement the trust funds in his hands and that such subscriptions amounted to much more than the original trust funds would not make either him or the subscribers founders. The reasonable view would be to treat the amount subscribed as accretions to the existing trust funds and as something contributed for the better carrying out of the purposes of the original foundation (compare the observations of the Earl of Selborne, L.C., in the Privy Council case, *In the matter of the Endowed Schools Act, 1869*(1). As the very first step in the argument addressed to us with reference to the contention under consideration fails, it is not necessary to discuss the contention further.

It was next urged on behalf of the respondent that his appointment by Vythilinga should be upheld on the ground that it was a transfer of the office to a person who, being a member of the family of Mudukrishna (senior) and also in the line of heirs, would have been entitled to succeed to the office of trustee had the right of the family not been extinguished by lapse of time. No doubt in the absence of custom entitling a trustee to transfer

ANNASAMI
PILLAI
v.
RAMAKRISHNA
MUDALIAR.

(1) L.R., 10 App. Cas., 304 at p. 308.

ANNASAMI
PILLAI
v.
RAMAKRISHNA
MUDALIAR.

his office, he is not at liberty to do so. Having regard, however, to the ground of the decision of the judicial committee in *Rajah Vurmah Valia v. Ravi Vurmah Mutha*(1) it would seem, as urged by Sir V. Bhashyam Ayyangar, not unreasonable to hold that where a person, who had no right to the office of a trustee according to the rule of devolution established by the founder, acquires a title to the office by prescription, but restores it to one, who, except for the transferor's prescriptive title, could have taken the office according to the rules laid down by the founder, such transfer should be treated as an exception to the general doctrine that a trusteeship is not assignable, subject, of course, to the condition that no corrupt inducement has entered into the transaction and the interests of the trusts are not likely to be prejudicially affected. For such a transfer would put an end to the continuance of a management inconsistent with the founder's intention and once more let in the class of persons by whom the founder contemplated the management should be carried on. We consider it, however, preferable to rest our decision in favour of the respondent with reference to this part of the case on the other ground which was suggested on his behalf. That ground is that the respondent is a rightful trustee having been appointed by one who had acquired a valid title to the trusteeship with power to appoint a successor. Now the appellants do not dispute that Ammani Ammal acquired a valid title to the trusteeship by prescription. But what sort of trusteeship did she acquire? It was not, as contended for the appellants, a hereditary trusteeship without power to appoint a successor. On the contrary she took possession of the office under a will which contained a provision for the appointment of a successor to herself and acting under that provision, she appointed Vythilinga giving him at the same time power to appoint his own successor. Vythilinga accordingly appointed a successor in the person of the respondent. The effect of such acts of Ammani Ammal and Vythilinga on their possession must be held to be that they were claiming not a trusteeship descendible to their heirs, but one with power to appoint a successor. When they exercised their powers of appointment they exercised them as an incident to their office of trustee. And such an estate being well known to and recognized by law, there is no reason for holding that such a

(1) L.R., 4 I.A., 76; I.L.R., 1 Mad., 235.

ANNASAMI
PILLAI
v.
RAMAKRISHNA
MUDALIAR.

trusteeship should not be prescribed for, or that Ammani Ammal and Vythilinga did not prescribe for it. *Padapa bin Bhujangapa v. Swamirao Shrinivas*(1) cited for the respondent is a decision somewhat in point. There the judicial committee held that a person who acquired a right to a watan by adverse possession, took the property attached thereto subject to the restriction incident to the tenure that an alienation of such property by the watandar had no effect beyond his life. No doubt power to alienate one's property is not exactly of the same nature as the power to appoint a successor to the office, for the former is a component part or incident of ownership. But where in such an estate as that of a trustee the devolution is by appointment, the power to appoint a successor is as much an incident of the trusteeship as the right to alienate is an incident of ownership. An instance more closely analogous to the present case may be easily suggested. Suppose a person holds for the statutory period possession of property under a mortgage, purporting to confer on the mortgagee a power to sell, granted by a person who had no title to the property but who, under the law, was competent to make a mortgage with such power. It must be held that such possession confers on the possessor the right of a mortgagee with power to sell and not minus such power. We hold, therefore, that the respondent succeeded to the office rightfully by virtue of the appointment under Vythilinga's will.

We now pass to the consideration of the question whether the absence of leave under section 18 of the Religious Endowments Act, XX of 1863, precludes the appellants from maintaining so much of the suit as relates to the alleged charges of neglect of duty on the part of the respondent. This Court, as the successor to the late Supreme Court, possesses a jurisdiction similar to, and corresponding to, that exercised by the Court of Chancery in England over charities. Within the original jurisdiction of this Court persons interested in charities have all along been allowed, as relators, to take legal proceedings in reference to the due administration of charities. According to the analogy of the procedure applicable to similar cases in England the Advocate-General should be a party to proceedings like the present. But a different practice has long prevailed—see *Panchcowrie Mull v. Chumroolall*(2),

(1) L.R., 27 I.A., 86; I.L.R., 24 Bom., 556.

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

ANNASAMI
PILLAI
v.
RAMAKRISHNA
MUDALIAR.

Thackersey Dewraj v. Haribhram Nursey(1), and *Srinivasa Chariar v. Raghava Chariar*(2).

Following the view taken by Garth, C.J., and Markby, J., in *Panchcourie Mull v. Chumroolall*(3) already cited, we hold that Act XX of 1863 was not intended to apply to a suit such as this brought under the ordinary original jurisdiction of this Court inherited from the Supreme Court. The absence of leave, relied on, is therefore immaterial, and the portion of the suit which relates to the charges of neglect of duty is sustainable notwithstanding that no leave was obtained under section 18 of the Religious Endowments Act.

The third and last question calls for but a few words. We agree with the learned Judge that the appellants have failed to make out any serious neglect of duty on the part of the respondent. In our opinion the evidence very clearly shows that shortly after the respondent's succession in 1892 certain unfounded objections to his right to act as trustee were started by persons unfriendly to him, and that his principal subordinates who had to attend to the work of collecting the rents due to the temple were induced to act hostilely to him, and to thwart his management by inciting tenants to withhold their rents. The delay and the paucity in the collection of rents spoken to by the appellant's witnesses were manifestly due to this improper opposition on the part of the respondent's subordinates, some of whom are appellants in this very case. Nor is there any evidence worth the name to show that any loss has resulted to the temple by the failure of the respondent to take prompt action in the matter of the collection of rents.

The appeal fails and must be dismissed with costs, subject, however, to two minor modifications in the provisions of the decree:—(i) Substitute for the direction about exhibiting books and accounts for the examination of worshippers the following:—The dharmakarta shall during the month of August every year allow worshippers of the temple to inspect the temple accounts between the hours of 3 and 5 P.M. every day, and for that purpose shall cause the books and accounts to be kept in a conspicuous and convenient place in the temple in charge of one of his subordinates. Among the books to be so kept for the examination by

(1) I.L.R., 8 Bom., 432 at p. 452.

(2) I.L.R., 23 Mad., 28.

(3) I.L.R., 3 Calc., 563.

worshippers there shall be a register showing the various immoveable properties belonging to the institution, as also all the valuable moveable properties, inclusive of jewels. The dharmakarta should have the register duly revised annually. (ii) Insert the following direction as to investment of surplus funds:—The dharmakarta should invest the surplus funds of the temple in any of the modes enumerated in section 20 of the Indian Trusts Act when such surplus exceeds the sum of Rs. 3,000.

Either party may, if necessity arises, apply for further orders as to the manner in which the dharmakarta should carry out the directions contained in the decree herein.

The memorandum of objections was not pressed, and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Davies.

AVUTHALA (DEFENDANT), APPELLANT,

v.

DAYUMMA AND ANOTHER (PLAINTIFF AND ASSIGNEE OF THE DECREE), RESPONDENTS.*

Limitation Act—Act XV of 1877, sched. II, arts. 111, 116—Suit to recover unpaid purchase money and to enforce vendor's lien.

A suit to recover unpaid purchase money due in respect of a sale of land, and to enforce the vendor's lien, is governed by article 111 of schedule II to the Limitation Act.

Natesan Chetti v. Soundararaja Ayyangar, (I.L.R., 21 Mad., 141), followed. *Har Lal v. Muhamdi*, (I.L.R., 21 All., 454), discussed.

Where, on a sale of land, there was no contract in writing between the vendor and purchaser as to the payment of the purchase money, but only a registered sale-deed, which recited that the price had been paid:

Held, that article 116 did not apply.

Suit to recover unpaid purchase money due in respect of a sale-deed and to enforce the vendor's lien. The sale-deed was executed on 8th September 1894, and plaintiff alleged that the consideration had never been paid. The document, which had been registered,

* Second Appeal No. 982 of 1899 against the decree of A. Venkataramana Pai, Subordinate Judge of South Malabar, in Appeal Suit No. 815 of 1898 affirming the decree of T. V. Anantan Nayar, District Munsif of Kutnad, in Original Suit No. 130 of 1898.

ANNASAMI
PILLAI
v.
RAMAKRISHNA
MUDALIAR.

1900.
October
17, 18.

AVUTHALA
v.
DAYUMMA.

contained a recital to the effect that the purchase money had been paid. The defence was that the amount had been paid and that the suit was barred by limitation. The suit had been filed on 25th February 1898. Two issues were framed, namely, (1) whether the suit was barred by limitation, and (2) whether the money claimed had been already paid, as pleaded by defendant. The District Munsif found both issues in favour of plaintiff and gave a decree for the amount claimed. The Subordinate Judge, on appeal, concurred with the Munsif in both findings. On the question of limitation he said:—"I also concur in the District Munsif's finding that the suit is not barred. The covenant to pay the price is one implied by law (section 55 of the Transfer of Property Act, 1882). A covenant of title, so implied, has been held in the case of a registered sale-deed to be 'a contract in writing registered' within the meaning of article 116 of the Limitation Act, 1877 (*Krishnan Nambiar v. Kannan*(1)). The principle of the ruling applies and the covenant to pay to plaintiff under the registered deed, exhibit A, must be held to be a contract in writing registered and the limitation period is six years from the date of the sale, exhibit A (1st November 1894). The suit is brought in 1898. When a case falls under two or more articles of the Limitation Act prescribing different periods of limitation, the plaintiff is entitled to take advantage of the longer of the periods so prescribed. Even supposing, therefore, that the three years' period prescribed by article 111 begins to run from the date of the registration of the sale-deed, exhibit B, and not from the plaintiff's loss of possession of the property (see Grigsby's 'Story,' section 506, note, page 331) the plaintiff is entitled to claim the six years' limitation period under article 116." He dismissed the appeal.

The defendant preferred this second appeal.

Govinda Menon (for *Appu Nedungadi*) for appellant.—This is a suit brought by a vendor of immoveable property to recover from the purchaser the unpaid purchase money by sale of the property. The sale-deed was executed and registered in September 1894 and the suit was brought in February 1898. The defendant contended that the suit was barred by limitation. Both the lower Courts held that the suit was governed by article 116 of the Indian

(1) I.L.R., 21 Mad., 8.

AVUTHALA
v.
DAYUMMA.

Limitation Act and relied upon *Krishnan Nambiar v. Kannan*(1). They held that the covenant to pay the price is one implied by law by section 55 of the Transfer of Property Act and, the suit being one for compensation for breach of a contract in writing registered, article 116 applied and the suit was not barred. It is submitted that the article which applies is article 111 of the Indian Limitation Act and it has been so held in *Natesan Chetti v. Soundararaja Ayyangar*(2). No doubt the Bombay High Court in *Virchand Lalchand v. Kumaji*(3) and *Chuni Lal v. Bai Jethi*(4) took a different view. According to this view, article 132 applies to suits for unpaid purchase money sought to be recovered by sale of the property. In *Har Lal v. Muhamdi*(5) the Bombay ruling is followed. But it is submitted that the decision in *Natesan Chetti v. Soundararaja Ayyangar*(2) is correct. Neither does article 116 apply, as there is no contract in writing registered, here, which has been broken. The sale-deed recites that the purchase money has been paid and not that the purchaser will pay it in future.

J. L. Rosario for respondents.—The view that is taken by the Bombay and the Allahabad High Court is right, and *Har Lal v. Muhamdi*(5) expressly dissents from *Natesan Chetti v. Soundararaja Ayyangar*(2). The difficulties in the way of adopting the Madras view are pointed out by Strachey, C.J. It would be anomalous to hold that the remedy against the property is barred by article 111, while the remedy against the person is not barred, and this is really what was held in *Natesan Chetti v. Soundararaja Ayyangar*(2). If article 132 does not apply, article 116 applies. See *Krishnan Nambiar v. Kannan*(1).

Govinda Menon in reply.—If article 116 applies to all breaches of contracts in writing registered, article 115 will apply to all breaches of contracts not in writing registered. All other articles, therefore, of the Limitation Act which relate to breaches of contracts might as well be eliminated. *Vairavan Asari v. Ponnayya*(6) shows that article 116 ought not to be extended and this view is correct.

JUDGMENT.—The suit is brought to recover the unpaid purchase money due in respect of a sale-deed executed on the 8th

(1) I.L.R., 21 Mad. 8.
(3) I.L.R., 18 Bom., 48.
(5) I.L.R., 21 All., 454.

(2) I.L.R., 21 Mad., 141.
(4) I.L.R., 22 Bom., 846.
(6) I.L.R., 22 Mad., 14.

AVUTHALA
v.
DAYUMMA.

September 1894, and to enforce the vendor's lien. If article 111 of the second schedule to the Limitation Act is the article to be applied, the suit is barred by limitation, since it was not brought within three years from the date above mentioned, which we think, in the absence of evidence to the contrary, must be taken to be the date for completing the sale.

In terms the article precisely applies to this suit and it has been held by this Court in *Natesan Chetti v. Soundararaja Ayyangar* (1), notwithstanding the prior decision in Bombay, that this article and not article 132 should be applied to such a case. We are asked to re-consider that decision on the strength of a recent case in *Har Lal v. Muhamdi* (2), where the subject is discussed at length by Strachey, C.J., with the result that the view expressed in Bombay, is preferred to that which has been expressed in this Court. Notwithstanding the anomalies which, according to the learned Chief Justice, are involved in the latter view, we are not convinced that it is erroneous. The Chief Justice starts with the assertion that the expression "suit to enforce a vendor's lien" may be taken to denote a claim for his personal remedy as well as his claim against the land. We cannot assent to that proposition. In the case of a sale of land the obligation to pay the purchase money has attached to it by way of security the right against the land itself which is called the vendor's lien. While in article 111 the Legislature refers to that lien, we can see no reason why its language should not be taken in its plain sense as referring not to the personal obligation which is not mentioned, but to the right against the land which is mentioned. We fail to see how the Legislature could have expressed its meaning more clearly, if, as we take it, it was intended that the vendor's right against the land should be enforced by suit only within three years of the dates mentioned. With such plain language before us we do not consider it necessary to examine the consequences which may ensue from an application of the article. When there is a special provision made for a specific case, there can be no doubt that it, rather than a general provision such as is found in article 132, must be put in force. Otherwise no effect can be given to the article. The learned Chief Justice refers to the section of the Transfer of Property Act which deals with vendor's lien, and apparently draws

(1) I.L.R., 21 Mad., 141.

(2) I.L.R., 21 All., 454.

AVUTHALA
v.
DAYUMMA.

from that consideration an argument against the application of article 111. In our opinion an Act which was passed in 1877 ought not to be interpreted with reference to an enactment on a totally different subject which was made some five years later. If anomalies have resulted from this latter enactment, it is for the Legislature to amend the Act of 1877. For these reasons we adhere to the case of *Natesan Chetti v. Soundararaja Ayyangar* (1).

A second point taken was that the respondent was entitled, as regards the personal remedy, to the benefit of the six years given by article 116, since the sale-deed was a registered instrument. Article 116 pre-supposes a contract in writing registered which contract has been broken. Here there was no contract in writing so far as regards the payment of the purchase money. On the contrary the registered document states that the money has been paid, and it is therefore in spite of the document and not under it that the plaintiff sues. The obligation on the part of the buyer to pay the purchase money is different from the obligation arising under a covenant for title such as was in question in the case cited (*Krishnan Nambiar v. Kannan* (2)). The obligation to pay arises from the contract between vendor and purchaser, whereas the covenant for title is implied or expressed in the conveyance. The present case is therefore distinguishable from *Krishnan Nambiar v. Kannan* (2). In our opinion article 116 cannot properly be applied to this case, and it follows that the suit ought to have been dismissed. The appeal is allowed and the decrees of both the Courts below are reversed. The defendant is entitled to all costs.

(1) I.L.R., 21 Mad., 141.

(2) I.L.R., 21 Mad., 8.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS,

v.

CHENCHI REDDI.*

1900.
October 19.

Criminal Procedure Code—Act V of 1898, s. 556—Disqualification of Magistrate to try a case—Directing the prosecution of an accused—Subsequent trial by same Magistrate—Legality of trial.

A Deputy Tahsildar made a report concerning A to the Tahsildar, who, in turn, reported the matter to the Deputy Magistrate. The latter authorized the Tahsildar to prosecute A, on such charges as might be capable of being proved in a Criminal Court, and a prosecution was accordingly instituted. The case was tried by the same Deputy Magistrate, and on the objection being raised that under section 556 of the Code of Criminal Procedure that Magistrate was disqualified from trying the accused:

Held, that he was not disqualified. The act of the Deputy Magistrate was an authorization and not a direction that the accused should be prosecuted.

Girish Chunder Ghose v. The Queen-Empress, (I.L.R., 20 Cal., 857), *In the matter of the petition of Ganeshi*, (I.L.B., 15 All., 192), and *Queen-Empress v. Narain Singh*, (I.L.R., 22 All., 340), referred to.

APPEAL against an acquittal. An accused was tried by the Deputy Magistrate of Kurnool, on a charge of criminal breach of trust by a public servant under section 409 of the Indian Penal Code, and convicted and sentenced to three months' rigorous imprisonment. The case had been taken up by the Magistrate in the following manner, as stated by him in his judgment:—"The second prosecution witness (the Deputy Tahsildar) made a report to the Tahsildar, the first prosecution witness. He, in his turn, reported the matter to the Divisional officer (*i.e.*, myself), who authorized him to criminally prosecute the accused on such charges as may be capable of being proved in a Criminal Court. Hence this prosecution." An objection was raised under section 556 of the Code of Criminal Procedure, on behalf of the accused after the close of the case, that the Magistrate was disqualified from trying it, on the ground that he, as a Divisional officer, had sanctioned the prosecution. The Magistrate dealt with it as

* Criminal Appeal No. 560 of 1900 under section 417 of the Code of Criminal Procedure, against the judgment of acquittal passed on the accused in Criminal Appeal No. 44 of 1899, by the Sessions Judge of Kurnool.

follows:—"Having regard to the illustration under that section given in the Code, it is not a point for consideration. I was conscious of this provision when I, as a Divisional officer, received the report about this embezzlement from the Tahsildar and I passed an order in the terms noted *supra*. As the case comes before me in the natural course in my magisterial capacity, I did not wish to go into it then and left it to the discretion of the Tahsildar. He then lodged the criminal complaint. As under the existing circumstances a Divisional officer is ordinarily the only First-class Magistrate, who has to try cases of embezzlement brought against village officers within his division and as, on the other hand, such prosecutions are usually authorized by him as the officer who appoints the village officers, it follows that, in the event of its being considered that he is precluded under section 556, Code of Criminal Procedure, from trying such cases himself, all such cases arising in one division will have to be tried by a Magistrate outside the division, to the serious inconvenience of the parties and witnesses, and it may further result in delays. I cannot suppose that this result would have been intended and I think that the provisions of section 556 do not apply to the circumstances of the present case."

The Sessions Judge reversed the finding and sentence on the ground that, under section 556 of the Criminal Procedure Code, the Deputy Magistrate was disqualified from trying the case, he having as Deputy Collector directed his subordinate, the Tahsildar, to prosecute the accused. He referred to section 556 and the illustration to it. He acquitted the accused.

Against this order an appeal was preferred by Government, under section 417 of the Code of Criminal Procedure.

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

The accused was not represented.

JUDGMENT.—So far as the words of section 556 of the Criminal Procedure Code are concerned, we should have felt no doubt that the Deputy Magistrate was not disqualified to try the case. The terms of the illustration however give rise to a difficulty.

The question whether a given case falls within the provisions of section 556 must be a question of fact to be determined by the circumstances of the particular case. In the Calcutta case to which our attention has been called (*Girish Chunder Ghose v. The*

QUEEN-
EMPRESS
v.
CHENCHI
REDDI.

QUEEN-
EMPRESS
v.
CHENCH
REDDI.

Queen-Empress(1)), where the Magistrate was held disqualified to try the case, it appeared that he had taken a very active part in connection with the case as an executive officer. On the other hand, in the two Allahabad cases (*In the matter of the petition of Ganeshi*(2) and *Queen-Empress v. Narain Singh*(3)), the Court held the Magistrate was not disqualified. The illustration says: "A, as Collector upon consideration of information furnished to him, directs the prosecution of B for a breach of the Excise Laws. A is disqualified from trying this case as a Magistrate."

The word used is 'directs', which we take it, means institutes, or gives orders for the institution of the prosecution.

In the present case the order of the Magistrate was in these terms:—The second prosecution witness made a report to the Tahsildar, the first prosecution witness. He, in his turn, reported the matter to the Divisional officer (*i.e.*, myself) who authorized him to criminally prosecute the accused on such charges as may be capable of being proved in a Criminal Court.

This is an authorisation and not a direction.

In our judgment the Deputy Magistrate was qualified to try the case.

In any case the Sessions Judge ought to have directed a re-trial and not to have acquitted the accused.

We must set aside the order of the Sessions Judge and remand the appeal to him to be dealt with on the merits.

Ordered accordingly.

(1) I.L.R., 20 Calc., 857.

(2) I.L.R., 15 All., 192.

(3) I.L.R., 22 All., 340.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice and Mr. Justice Subrahmania Ayyar.

SALDANHA (PETITIONER), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
(COUNTER-PETITIONER), RESPONDENT.*

Court Fees Act—Act VII of 1870, sched. I, cl. 11—Assessment of value of estate principally consisting of a chose-in-action.

A petition for probate set out that the estate of the deceased consisted, at the time of her death, of property in possession worth only about Rs. 125 and the subject-matter of a suit in which she claimed some Rs. 17,000. The petitioner declared the value of the estate at under Rs. 1,000:

Held, that there was nothing to enable the Court to determine the value of the right which the petitioner (as executor) was seeking to enforce in the suit and that the Court could not say that the estate had been under-valued. Probate was accordingly directed to be issued without payment of stamp duty (it being declared at under Rs. 1,000) but the petitioner was ordered, on the termination of the suit, to file in Court a statement showing its result.

PETITION for probate filed under section 244 of the Succession Act. The petition set out that the deceased testatrix was at the time of her death possessed of property worth only about Rs. 125; that she had been allowed to sue in *formâ pauperis* during the year then current, and that the bulk of the property which deceased had left was that which constituted the subject-matter of that suit, and of two others filed in the previous year the claims in which amounted to some Rs. 17,000. The petition, under the circumstances, declared the value of the estate of the deceased testatrix to be below Rs. 1,000, and that no Court fee was payable pending the decision of the suit. The District Judge passed the following order:—"I decline to follow the ruling in *In the goods of Abdool Aziz*(1), which, I think, a doubtful authority. The ruling in *In the goods of Ram Chunder Ghose*(2) is a later one, and clearly lays down that probate duty must be paid on debts which are even doubtful of recovery. Probate duty must be paid on the entire estate according to the Collector's valuation which is Rs. 22,194-8-6 as stated by the Government Pleader. Time given for one month."

* Appeal No. 98 of 1899 against the decree of F. H. Hamnett, District Judge of South Canara, in Miscellaneous Petition No. 703 of 1898.

(1) I.L.R., 23 Calc., 577.

(2) I.L.R., 24 Calc., 567.

1900.
October
23.

SALDANHA
v.
THE
SECRETARY
OF STATE
FOR
INDIA IN
COUNCIL.

Petitioner preferred this appeal.

Mr. C. Krishnan and K. P. Madhava Rao for the appellant.

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

JUDGMENT.—The order of the District Judge was passed before the Court Fees Amendment Act, 1899, came into operation. The question for determination is, therefore, governed by the Act of 1870. The stamp duty payable on an application for probate is 2 per cent. on the amount or value of the property in respect of which the grant is made. When the amount or value does not exceed Rs. 1,000 no stamp duty is payable. In the present case the deceased's estate consists of property in possession to the value of about Rs. 125 and a chose-in-action, viz., a suit which she instituted before her death in which she claims some Rs. 17,000. In a case like this there is nothing to enable the Court to determine the amount or value of the right which the deceased was seeking to enforce in her suit, and we cannot say that the petitioner, in assessing the amount or value of the estate at a sum under Rs. 1,000, under-estimated its value.

The case of *In the goods of Ram Chunder Ghose*(1) was a case in which the liability to pay any Court fee in respect of a debt, the recovery of which was uncertain, was disputed. The case of *In the goods of Abdool Aziz*(2) was a decision that where there were no materials upon which the Court could assess the value of a chose-in-action there was nothing to prevent the Court from accepting the valuation of the person applying for probate. It is scarcely necessary to add that the mere fact that an item of property is the subject of litigation does not in itself prevent the value of the property from being assessed for the purposes of stamp duty on an application for probate. The question is one of fact.

In a case like this the revenue is protected by section 19 E of the Court Fees Act.

We accordingly direct probate to issue without payment of stamp duty, but we direct the executor (the petitioner) on the termination of the suits referred to in the petition to file in Court a statement showing the result of these suits and to furnish the Government Pleader with a copy of this statement.

(1) I.L.R., 24 Calc., 567.

(2) I.L.R., 23 Calc., 577.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmanya Ayyar.

MUHAMMAD JAFAR AND ANOTHER (PLAINTIFFS), APPELLANTS,

1900.
October 23,
24.

MUHAMMAD IBRAHIM AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

Religious Endowments Act—Act XX of 1863, s. 14—Suit for declaration—Maintainability when ancillary to claim for dismissal of manager—Ground of dismissal—Bonâ fide claim by manager to property of the institution.

In a suit brought under the Religious Endowments Act, a declaration that property belongs to an institution and that a mortgage over it is not binding on the institution, may be asked for and made when it is ancillary to a claim for the removal of the manager.

The plaintiffs in a suit under the Religious Endowments Act based their claim for the removal of a defendant from his office of manager of a mosque on the ground that he had set up a right of private property in the mosque. They sued for a declaration that certain property was the property of the mosque, and that a mortgage created over it was invalid. They also asked that defendant might be removed:

Held, that they were entitled to the declarations prayed for. With regard to the claim for the removal of the defendant, as it seemed probable, on the evidence, that he, in setting up a right of private property in the mosque was acting under the *bonâ fide* belief that it was the private property of his family, and as, apart from that, there was practically no evidence of misconduct, it was not necessary to dismiss him from his office, but he was ordered to pay the costs of the suit.

SUIT for a declaration and for the removal of first defendant from the office of manager of a masjid and ashurkhana. Plaintiffs sued under section 14 of the Religious Endowments Act, (XX of 1863), leave having been obtained under section 18 of that Act. Plaintiffs alleged that there was a masjid near the burial place to the north of the village of Pedana, in the Kistna District, which had been there from time immemorial, wherein Muhammadaus performed their religious duties; and that there was also an ashurkhana, or house in which festivals were celebrated, and an inam garden which had long ago been set apart as an endowment for the masjid and ashurkhana. First defendant was manager of the properties and plaintiffs claimed that he was bound to appropriate the income derivable from the inam garden towards

* Appeal No. 155 of 1899 against the decree of W. C. Holmes, District Judge of Kistna, at Masulipatam, in Original Suit No. 10 of 1898.

MUHAMMAD
JAFAR.
v.
MUHAMMAD
IBRAHIM.

the upkeep of the musjid and ashurkhana, being entitled only to any balance that might remain as remuneration for his services, and they charged that, though he had no personal right to the properties, first defendant had mortgaged the inam garden for his own benefit to second defendant. Plaintiffs also alleged that first defendant had discontinued his duties, and prayed for a declaration that the inam garden was the property of the musjid and ashurkhana; and that the mortgage in favour of second defendant was invalid. They also asked that the first defendant might be removed from the office of manager. The defences were:—That the mosque was not a public one but belonged to first defendant's family; and that the inam land attached to it was also theirs, though they had voluntarily appropriated some of the income arising from it towards its support. Both defendants denied plaintiffs' right to question the mortgage. The District Judge held that the mosque was not a public one and that section 14 of the Religious Endowments Act did not apply to it. He also held that it had not been proved that the inam garden was the property of the mosque and ashurkhana. He held that plaintiffs had no right of suit as against second defendant, under the Religious Endowments Act, and as against first defendant he dismissed it.

Plaintiffs preferred this appeal.

Nagabhushanam for appellants.—It is clear from the evidence that the mosque is a public one, and no express proof of dedication is necessary. Even though the mosque may now be in ruins, the property in it cannot revert to the original founder or his descendants, if any. (*Vide* Baillie's 'Digest of Muhammadan Law,' part I, pages 604, 605 and 606 and 'Tagore Law Lectures' for 1884 by Syed Ameer Ali, page 233.) It is also conclusively shown that the inam is attached to the mosque, the extract from the inam fair register describing it as "devadayam." The expression "devadayam" means a pious or religious endowment. If the mosque is public and the inam is an inam attached to it, the first defendant cannot claim them to be his own; and it is submitted that apart from any specific acts of mismanagement or malversation on his part the very assertion of a private right disentitles him to the office of manager of the mosque. It must be conceded that, on the authority of the ruling in *Sivayya v. Rami Reddi*(1), this suit,

(1) I.L.R., 22 Mad., 223.

MUHAMMAD
JAFAR
v.
MUHAMMAD
IBRAHIM.

under Act XX of 1863, cannot be maintained against the second defendant, who is an alienee of the inam.

K. Srinivasa Ayyangar (for *Sundara Ayyar*) and *K. Subrahmanya Sastri*, for respondents, submitted that the evidence did not support the finding of the District Judge as to the character of the mosque. A further objection to the suit was that a declaration was asked for, whereas no relief by way of declaration is provided for in section 14 of Act XX of 1863. They contended that the suit, which was brought under that Act, was not maintainable, and referred to *Mahalinga Rau v. Vencoba Ghosami*(1).

JUDGMENT.—This suit is brought under the Religious Endowments Act XX of 1863. As regards the second defendant the suit does not lie under the Act and as against him it must be dismissed, (*Sivayya v. Rami Reddi*(2)).

As regards the first defendant it has been argued on his behalf that no suit lies inasmuch as the plaintiffs ask for a declaration and section 14 of the Act does not, in terms, confer upon the Civil Court jurisdiction to make a declaration. The first defendant relied on the decision of this Court in *Mahalinga Rau v. Vencoba Ghosami*(1). In that case, however, there was no claim for the removal of the manager. In the present case the plaintiffs ask for the removal of the manager and their prayer for a declaration is introductory or ancillary to that claim. Upon this ground the present case is distinguishable from the case of *Mahalinga Rau v. Vencoba Ghosami*(1).

The fact that the inam which is the source from which the expenses of the mosque have been mainly defrayed is described in exhibit C as "devadayam" shows beyond question that the mosque is a public mosque and not the private property of the first defendant. In the face of this evidence the defendant's vakil did not attempt to support the finding of the District Judge that the mosque is not a public mosque.

We think the plaintiffs are entitled to a declaration that the inam garden is the endowed property of the musjid which is a public mosque and that the mortgage deed of November 28th, 1892, is not binding on the institution in so far as it relates to the inam property; and we direct the first defendant within six

(1) I.L.R., 4 Mad., 157.

(2) I.L.R., 22 Mad., 223.

MUHAMMAD
JAFAR
v.
MUHAMMAD
IBRAHIM.

months from this date to pay off the incumbrance created by that mortgage in so far as it affects the inam property.

As regards the claim for the removal of the first defendant from his office as manager it seems probable on the evidence that the first defendant, in setting up a right of private property in the mosque, was acting under the *bonâ fide* belief that the mosque was the private property of his family. This is really the only ground upon which the claim for his removal is based, since, apart from this, there is practically no evidence of misconduct by the first defendant in his capacity as manager.

We accordingly allow the appeal and make a declaration in the terms indicated above.

We have not thought it necessary to go the length of dismissing the first defendant from his office of manager, but we think he ought to pay the costs of this suit here and in the Court below. As regards the second defendant we make no order as to costs.

APPELLATE CIVIL.

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

SRINIVASA AYYAR (PLAINTIFF), APPELLANT,

v.

MUTHUSAMI PILLAI AND OTHERS (DEFENDANTS NOS. 2 TO 6
AND REPRESENTATIVE OF DEFENDANT NO. 1), RESPONDENTS.*

Landlord and tenant—Denial by tenant of landlord's title—Option on part of landlord to determine tenancy—Limitation Act—Act XV of 1877, sched. II, art. 139—Period of limitation as from determination of tenancy by landlord.

The defendants in a suit for ejectment occupied land of which their predecessor in title had acquired possession under a deed which had been executed in 1836, and which created a tenancy from year to year in favour of that predecessor in title. That lease had been executed by the leading mirasidars of the village. In 1871, defendants had, to the knowledge of plaintiff, set up a right of permanent occupancy in the lands in question, thereby repudiating their landlords' title. In 1894, plaintiff gave defendants notice to give up possession of the lands, but until that time had not evinced any intention to determine the lease. In 1895, plaintiff, on behalf of himself and the other

* Second Appeal No. 391 of 1899, against the decree of L. C. Miller, Acting District Judge of Trichinopoly, in Appeal Suit No. 122 of 1897, affirming the decree of A. David, District Munsif of Srirangam, in Original Suit No. 161 of 1895.

villagers, brought this suit for ejectment. On its being contended that the suit was barred by limitation inasmuch as it was brought more than twelve years after the repudiation of the tenancy by defendants:

Held, that the suit was not barred by limitation. A tenant repudiating the title under which he entered becomes liable to immediate eviction at the option of the landlord; but until the landlord indicates that he intends to exercise his option, the tenancy subsists. This principle applies to tenancies from year to year.

SCIT for possession of land with mesne profits. Plaintiff's case was that the lands mentioned in the plaint were samudayam lands owned by all the pangalis of a certain village; that the lands had been leased on 16th October 1805 by the leading mirasidars to one Perumal Maniagar, the ancestor and predecessor in title of the defendants, on condition that he should improve the land by planting sugarcane, &c.; that on 26th July 1836 another lease had been given to the same Perumal by some of the mirasidars of the village by which Perumal covenanted to pay to his lessors a rent of Rs. 60 per annum for the said lands. The village was divided into forty pangus, of which plaintiff had purchased sixteen pangus. Plaintiff alleged that he had, in October 1894, sold by public auction with the permission of the other pangalis the right to lease the said lands, and a lease-deed had been accordingly executed. The suit was brought by plaintiff under section 30 of the Code of Civil Procedure on behalf of himself and all the villagers. The first defendant denied the alleged lease to Perumal, and claimed that a portion of the land (item No. 5), which she had occupied for thirty years, was not samudayam land. She said that the rest of the land had been in the possession of her family for more than sixty years; and that she and her family had set up title to the lands in a suit in which they were defendants in 1871 and which had been brought against them by the villagers, who had withdrawn their claim in respect of those lands and compromised the suit in respect of other lands which were then in dispute. She pleaded limitation. The other defendants supported defendant No. 1, and alleged that a portion of the land was in their possession. The leases of 1805 and 1836 were filed as exhibit R and exhibit S, respectively;

Exhibit R contained the following terms:—"Deed of agreement executed on 16th October 1805, in favour of Perumal Maniagar by all the Mahajanams of the village of You having been asked to form a padugai by raising a Vaganai

SRINIVASA
Ayyar
v.
MUTHUSAMI
Pillai.

SRINIVASA
AIYAR
v.
MUTHUSAMI
PILLAI.

planting reeds and paikkarumboo, and putting up a fence, you shall form a padugai and until two years after raising crops thereon you shall not reap a single reed, paikkarumboo, &c., but afterwards, you shall enjoy the produce thereof such as reeds, paikkarumboo, &c. In doing so, you shall not touch the reeds and paikkarumboo to the extent of fifty feet on the borders of the Malattar, situated, as aforesaid, to the west of the path and to the east of Kulandai Mudaliar's garden, but shall enjoy the produce of the reeds and paikkarumboo in the other parts of this padugai. While so enjoying, if you be dismissed and another raiyat be appointed, you shall receive half varam for the reeds and paikkarumboo planted at your expense of repairs. Thus have we all the Mahajanams consented and executed this deed of agreement to Perumal Maniagar."

Exhibit S contained the following provisions:—"Deed of agreement executed, on 26th July 1836, in favour of Perumal Maniagar, residing in Veereswaram, by all the Mahajanams, who are the residents of Timmarayasamudram, in respect of the Adiyavai punjai of the samudayam of the said village, situate As you have represented, in the village, and requested that you will rear up fruit-bearing trees in the land lying within the aforesaid limits, with the exception of the border land of Brahmavastoo (Brahmin quarters) along the borders of the Nattoo vaikkal, inclusive of the Nadu Thittoo Narasam attached thereto, and received this cowle, you shall plant reeds, paikkarumboo, and fruit-bearing trees, and raise crops below thereon, within the aforesaid limits, and enjoy the same, paying annually a rent of Rs. 60 according to instalments. While so enjoying, if any were to agree for a higher amount of lease, in future, in respect of the aforesaid land, you shall receive half varam for the reeds, paikkarumboo, and fruit trees, planted by you. You shall also pay, out of kudivaram, as usual, the perquisites due to the karnam and watchman. Thus have we all consented and executed this deed of agreement."

The Munsif held that the suit was barred by limitation. He found exhibit R to be a genuine document, but considered that it did not create a tenancy as between the villagers and Perumal. He doubted the genuineness of exhibit S and held that even if it should be accepted as genuine, there was a repudiation by first defendant of the title of the villagers more than twelve years before the institution of the suit. He referred to *Maidin Saiba v.*

Nagapa(1); *Krishnaji Ramchandra v. Antaji Pandurang*(2); and *Huronath Roy v. Jogendur Chunder Roy*(3); and dismissed the suit. The District Judge, on appeal, held exhibit R and exhibit S to be genuine contracts, and considered that the villagers granted, in effect, the kudivaram right in perpetuity to Perumal, reserving to themselves the right to lease the melvaram to some one else and fixing the varam at half in that event, and at Rs. 60 so long as Perumal had to pay it direct to them. Reading exhibit R with exhibit S he thought there was little doubt that the villagers intended to make a permanent grant of the kudivaram to Perumal and that the defendants could not therefore be ejected now. He also held the suit to be barred by limitation by reason of the assertion by the defendants of a plea of permanent occupancy in 1871. The villagers, he said, knew from 1871 onward that defendants claimed to hold on a permanent tenure and from that date limitation would run against them in so far as they claimed a right of ejectment (*Maidin Saiba v. Nagapa*(1)). He further held that plaintiff was not entitled to eject first defendant from item No. 5. He dismissed the appeal.

Plaintiff preferred this second appeal.

V. Krishnasami Ayyar, for *Sundara Ayyar*, for appellant.

Sivasami Ayyar for respondents Nos. 1, 2, 6 and 7.

The other respondents were not represented.

JUDGMENT.—Two points were raised on behalf of the appellants—(1) that the learned Judge misconstrued the two exhibits R and S in holding that their effect was to confer an occupancy right in perpetuity on the defendants' predecessor in title; (2) that the learned Judge erred in law in holding that a suit in ejectment was barred by limitation.

With regard to the construction of documents exhibits R and S, we are unable to agree with the view taken by the learned Judge. He was of opinion that the effect of exhibit S was to grant the kudivaram right in perpetuity to the defendants' predecessor in title (one Perumal) with a reservation of the right to lease the melvaram to some one else. The effect of exhibit S, in our opinion, was to constitute Perumal a tenant from year to year of the lands in question at an annual rent of Rs. 60. If the tenancy was put an end to, he was entitled to receive from the

SRINIVASA
AIYAR
v.
MUTHUSAMI
PILLAI.

(1) I.L.R., 7 Bom., 96 at p. 99. (2) I.L.R., 18 Bom., 256 at p. 259.
(3) 6 W.R., (C.B.), 218.

SRINIVASA
Ayyar
v.
MUTHUSAMI
PILLAI.

landlords half the produce of the seeds, paikkaramboo and fruit trees which had been planted by him. That is to say, if the landlords determine the tenancy, they become liable to pay Perumal as compensation for improvements effected by him during the term of his tenancy one half the produce of the seeds and fruit trees. Under exhibit S there would, of course, be no privity of contract as between Perumal and any new tenant, but Perumal, on the determination of the tenancy, would have the right to recover, as against the landlords, half the produce of the seeds and fruit trees. If exhibits R and S are to be read as amounting to a grant of a permanent occupancy right, it seems impossible to place any reasonable construction on the words "while so enjoying, if you be dismissed, &c." in exhibit R, and the words "while so enjoying, if any were to agree for a higher amount of lease, &c." in exhibit S. In our opinion, under exhibits R and S, the rights acquired by Perumal were merely the rights of a lessee.

With regard to the question of limitation, the learned Judge held that inasmuch as in 1871 the defendants to the knowledge of the plaintiffs set up a right of permanent occupancy in the lands in question, thereby repudiating their landlords' title, any suit in ejectment was barred by limitation. Under article 139 of the second schedule to the Limitation Act, the period of limitation is twelve years and the time from which the period runs is the date of the determination of the tenancy. The learned Judge held that the tenancy was determined as from the time when the landlords knew that the defendants had set up a right of permanent occupancy in the lands in question. We think he was wrong in so holding. The lands demised were agricultural lands and consequently section 111 of the Transfer of Property Act does not apply. But although the express provisions of this section do not apply to the present case, the section contains an exposition of the general law which is applicable. Section 111 of the Transfer of Property Act provides that a lease of immoveable property determines by forfeiture in case the lessee renounces his character as such by claiming title in himself and the lessor does some act showing his intention to determine the lease. A tenant repudiating the title under which he entered becomes liable to immediate eviction at the option of the landlord—see the case of *Vishnu Chintaman v. Balaji bin Raghujii*(1). Until the landlord

(1) I.L.R., 12 Bom., 352 at p. 356.

SRINIVASA
Ayyar
v.
MUTHUSAMI
PILLAI.

indicates that he intends to exercise his option the tenancy subsists. In the present case the lessor did nothing to show his intention to determine the lease until he served the defendants with notice to quit. It appears to be settled law that, in the case of a person in possession under a tenancy for a term of years, or for life, a mere notice by the person in possession that he claimed to be holding under a perpetual or hereditary tenure does not make his possession, after notice, adverse within the meaning of the Limitation Act—see the judgment of the Privy Council in *Maharani Beni Pershad Koeri v. Dudh Nath Roy*(1). Even if, after the tenant's repudiation of the landlord's title had come to the knowledge of the latter, the tenants are to be regarded as in the same position as tenants for a term of years who are holding over after the expiration of the term, time does not begin to run as against the landlord until the tenancy on sufferance, or the tenancy at will, has been determined—see *Adimulam v. Pir Ravuthan*(2).

The respondents' vakil was driven to contend that a distinction must be drawn between a tenancy for a term of years or a tenancy for life and a tenancy from year to year, and that, in the case of a tenancy from year to year, the setting up of an adverse right by the tenant *ipso facto* puts an end to the tenancy. This proposition cannot be maintained on any principle of law and is unsupported by authority. The case of *Maidin Saiba v. Nagapa*(3) is no authority for the proposition. It was held in that case that the tenant's alleged tenancy was a pretended tenancy. His possession, from the first, as against the landlord, was wrongful. He was a mere trespasser. In the present case the defendants' possession was under the lease. This possession, as against the plaintiffs, did not become wrongful, and therefore could not be adverse until the landlord exercised his option to determine the tenancy.

The observations of Sir Subrahmania Ayyar in his judgment in *Ittappan v. Manavikraman*(4) have been cited in support of the respondents' contention. We do not think, however, that the learned Judge intended to lay down that a tenancy from year to year was *ipso facto* determined by disavowal of the landlord's title. It may be that such a disavowal renders the tenant liable to

(1) L.R., 26 I.A., 216; I.L.R., 27 Cal., 156.

(2) I.L.R., 7 Bom., 96.

(3) I.L.R., 8 Mad., 424.

(4) I.L.R., 21 Mad., 153.

SRINIVASA
 AYYAR
 v.
 MUTHUSAMI
 PILLAI.

be ejected without notice to quit, but it does not preclude the landlord from waiving the forfeiture and treating the tenancy as a subsisting one.

The decision in *Doe d Davies v. Evans*(1) has no bearing upon the question raised in the present case. It was merely a decision that, in the circumstances of that case, a notice to quit was not necessary to entitle the plaintiffs to recover in ejectment.

In *Doe dem Graves v. Wells*(2) the only question was whether an oral disclaimer by a tenant worked a forfeiture in law.

We think the plaintiffs are entitled to sue in ejectment, and we allow the appeal except as regards the lands referred to as item No. 5. As the plaintiffs have succeeded with regard to the substantial part of their claim, the appeal will be allowed with costs throughout.

The plaintiffs are entitled to mesne profits, the amount of which will be determined in execution.

APPELLATE CIVIL.

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

THE COMMERCIAL BANK OF INDIA (LIMITED)
 (PETITIONERS), APPELLANTS,

v.

SABJU SAHEB AND OTHERS (PLAINTIFF AND DEFENDANTS),
 RESPONDENTS.*

*Letters Patent, art. 15—Refusal to order assignee of plaintiff to be brought on record—
 Appeal—Civil Procedure Code—Act XIV of 1882, s. 372—Application to be
 brought on record in substitution for plaintiff and for postponement of decree.*

An order dismissing on its merits an application by the assignee of a plaintiff in a suit to be brought upon the record either in addition to or in substitution for the plaintiff, is a judgment within the meaning of article 15 of the Letters Patent and an appeal lies therefrom.

The plaintiff in a suit, after its institution, assigned to A the subject-matter of the suit, and gave him power and authority to continue it either in addition to or in substitution for the plaintiff, and further constituted A his attorney. The suit was referred to a Judge in Chambers to take accounts, and a certificate was agreed to by the first defendant in it which left certain matters undetermined.

(1) 9 M. & W., 84.

(2) 10 A. & E., 427.

* Original Side Appeal No. 13 of 1899 against the decree of Mr. Justice Boddam, in Civil Suit No. 160 of 1895.

The case was set down for hearing in order that a decree might be passed in terms of the certificate. A thereupon applied to be brought on the record in addition to or in substitution for the plaintiff in the suit and asked that the passing of a final decree therein might be postponed until the matters left undetermined by the certificate had been enquired into and determined:

Held, that the application was a reasonable one and should be complied with as A was directly interested in the matters to be settled by the decree.

APPLICATION under section 372 of the Code of Civil Procedure to be brought upon the record in Civil Suit No. 160 of 1895 in addition to or in substitution for the plaintiff therein, and that the passing of a final decree in the suit should be postponed pending a finding being come to, and a report being made on, the enquiries referred to in the Judge's certificate filed in the suit and left undetermined by such certificate. The applicants were the Commercial Bank of India, Limited, and, on 27th February 1899, by their Inspector of Branches, deposed to the following facts:—That plaintiff in the said suit No. 160 of 1895 had, after its institution, namely, on 15th November 1895, assigned to the Bank all the subject-matter of the suit, and had given the Bank full power and authority to continue the suit either in addition to or in substitution for the plaintiff, and had irrevocably constituted the Bank his attorney to demand, sue for, recover and receive and give effectual receipts and discharges for the plaintiff's share so to be ascertained; that by a decretal order, dated 26th January 1898, the suit had been referred to a Judge in Chambers to take certain accounts; that a certificate had been agreed to by first defendant in February 1899, and that the case had been set down for hearing on 28th February 1899 in order that a decree might be passed in terms of the certificate; that it appeared from the certificate that it had been found that no report could be made in respect of a certain account which had been directed to be taken by the order of reference and that a certain enquiry therein directed to be held could not be held until certain accounts should have been settled and adjusted, and that no report could be made in respect of a certain enquiry which had been ordered to be made. It was further stated that the plaintiff was indebted to the Bank in a larger sum than his share would amount to and that the Bank was therefore more interested than plaintiff in obtaining a decree in the suit which would be capable of execution; and that if a decree should be passed, the further necessary enquiries and accounts to enable the Court to determine the matters left undetermined by the certificate might be taken and made and that the passing of a

COMMERCIAL
 BANK
 OF INDIA,
 LIMITED
 v.
 SABJU SAHEB.

1900.
 October 31.

COMMERCIAL
BANK OF
INDIA,
LIMITED
v.
SABJU SAHEB.

decree should for that purpose be postponed. The application was dismissed.

The applicant preferred this appeal.

Mr. K. Brown for appellants.

Kumarasami Sastri for respondents Nos. 5 and 6.

Mr. J. H. M. Ryan and W. Barton for respondent No. 2.

JUDGMENT.—This was an application under section 372 of the Code of Civil Procedure by the Commercial Bank, the appellants, to be brought upon the record of Civil Suit No. 160 of 1895 as plaintiffs with T. Sabju Saheb, as the mortgagee from him of the subject-matter of the suit.

The application was rejected by the learned Judge, and the first question is whether an appeal lies from his order. We can find nothing on record as to the Judge's reasons for refusing the application, and as, in our opinion, it was not made too late with reference to the facts of the case we must treat the order as one disposing of the application on the merits. In that view it was a judgment within the meaning of article 15 of the Letters Patent and therefore appealable.

We think the application should have been complied with, as the Bank was directly interested in the matters to be settled by the decree, and was justified in asking the Court to postpone the passing of a final decree until the matters left undetermined by the certificate were enquired into and determined. That was a reasonable request, as the certificate had in fact left matters undetermined, and the decree, subsequently passed upon the footing of the certificate, carries the final decision of the case no further. It is doubtful what the nature of that decree is, as in its terms it is not final, leaving other matters still to be adjudicated upon. Taking it, as far as it goes, to have the effect of a decree, we cannot join the Bank as a party to the suit except subject to that decree, but we are of opinion that, being so subject thereto, they should be brought on the record as co-plaintiffs, and we order accordingly. Although this will not enable them to re-open questions already settled, it will give them an opportunity of taking part in the further proceedings contemplated by the decree. We reverse the learned Judge's order as to costs relating to this application in his Court and direct that the appellants' costs in this appeal be paid by the defendants Nos. 1, 4 and 5.

Messrs. Barclay, Orr & David—Attorneys for petitioners.

Messrs. Branson & Branson—Attorneys for defendant No. 1.

APPELLATE CIVIL.

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

ARUMUGA MUDALI (PLAINTIFF), APPELLANT,

v.

VIRARAGHAVA MUDALI (DEFENDANT), RESPONDENT.*

Hindu Law—Husband and wife—Rights of husband as legal guardian of wife—Custom for wife to remain in custody of parents until maturity.

Though a husband is the legal guardian of his wife from the moment of his marriage with her, he is, by the general custom prevailing among the Hindu community in this Presidency, not entitled to the actual custody of his wife until she attains maturity, unless such custody should be necessary in the interests of the girl.

Suit by plaintiff to obtain custody of his wife. The plaint was as follows:—"The plaintiff married Thayammal *alias* Akhilandam, aged ten years, daughter of the defendant, in the month of August 1897. The plaintiff is, according to the Hindu Law, guardian of his minor wife. Further, the wife, though a minor, is bound to reside with her husband from the time of her marriage. The defendant has no right to detain the aforesaid Thayammal in his custody or possession from the time of her marriage contrary to the wishes of her husband, according to the provisions of the Hindu Law. The aforesaid Thayammal resided with her husband from the time of her marriage till Dipavali of the same year, which took place on 25th October 1897. After that, the defendant, with the consent of Thayammal's husband and her mother-in-law, took her from her husband's house, promising to re-send her to him within four or five days. Having thus taken her, the defendant unlawfully detains her in his custody and possession, and though demanded on many an occasion to place the aforesaid Thayammal in the plaintiff's possession, absolutely refuses to do so at present. Instead of treating her in a way consistent with the position in life and means of the plaintiff, the defendant is directing her to go after cattle mornings and evenings, for storing cowdung, and to do such other menial services which are repugnant to the plaintiff's feelings and which impair plaintiff's status. Under these

* Second Appeal No. 1179 of 1899 against the decree of H. H. O'Farrell, District Judge of Chingleput, in Appeal Suit No. 36 of 1899, affirming the decree of S. Saminathi Sastri, District Munsif of Chingleput, in Original Suit No. 141 of 1898.

1900.
October 30.

ARUMUGA
MUDALI
v.
VIRABAGHAVA
MUDALI.

circumstances the plaintiff prays that this Honourable Court will be pleased to direct the defendant to place the abovesaid Thayammal in the plaintiff's possession and to pay the plaintiff his costs, and to grant such other relief as the nature of the case may require."

Defendant contended that his daughter (plaintiff's wife) was nine years old, that he (defendant) was taking proper care of her; that, according to the usages obtaining among the Hindus and among the class to which the parties belonged, the home for a girl-wife is her parents' and not her husband's, and that the allegations contained in the plaint were false. He also added that he would have no objection to send his daughter to plaintiff's house after she attained puberty. The following issue was raised:—"Whether plaintiff is entitled to the custody of his wife?" On this the District Munsif said:—"The defendant examined some witnesses to establish usage among the people of his caste that the residence of a married girl was the house of her parents till the girl attains her age. I have to observe that the defendant has not succeeded in making out a valid custom. But, apart from the evidence of witnesses examined by the defendant, there are ample reasons to show that the defendant's daughter, a young girl of nine years, should not be allowed to live with her husband just now. Plaintiff has two sisters, both of whom follow the profession, if profession it may be called, of prostitutes. There is no disagreement between the plaintiff and his sisters. On the contrary, they are proved to be on friendly terms. One of the sisters is said to live with plaintiff and in his village. Plaintiff denies the same, and states that his sisters live at Chingleput. Plaintiff admits frequenting his sisters. I do not think, in these circumstances, it would be conducive to the moral training of plaintiff's wife to be left with him at present. Plaintiff is, after all, a young lad. He has scarcely passed out of his teens. I was very much impressed that he has brought this suit under the evil advice of his sisters and others. I have also to observe that there is a custom among Hindus for the immature wife to reside with her parents. In section 413 of Mr. Mayne's 'Hindu Law and Usage,' 4th edition, he lays down the law on the matter as follows:—"Where the wife is immature it is the custom that she should reside with her parents, and they maintain her as a matter of affection, but not of obligation. If, from inability, unwillingness, or any other cause, they choose to demand her maintenance from her husband, he is bound to pay it." In the case

ARUMUGA
MUDALI
v.
VIRABAGHAVA
MUDALI.

of *Ramaïen v. Condammal*(1), the pundits, to whom the question was referred by the Judges, declared that 'the duty of maintaining a female legally rests with her husband from the moment of her marriage; but, according to custom, she, while immature, resides with her parents, and they maintain her from affection.' Section 414 of Mr. Mayne's 'Hindu Law and Usage' begins with the statement that 'as soon as the wife is mature, her home is necessarily in her husband's house.' In section 91 of the same treatise where the question of the custody of wife is discussed, Mr. Mayne points out that the husband's right to require his wife to live in his house 'does not exist, where by custom or agreement the wife is to remain in her parents' house until puberty is established.' Such a custom was found to exist by the pandits to whom the question was referred by the Madras Judges, and the said futwa of the pandits was accepted by the Judges in the case of *Ramaïen v. Condammal*(1). I have therefore to find that the custom in this country is against the right of husband to require his immature wife to live in his house. I have also found, with reference to the peculiar surroundings of the plaintiff, he cannot be a fit custodian of his wife till she attains her maturity. I decide the issue in the negative. My decree is that the plaintiff is not entitled to the custody of his wife so long as she is immature and in the peculiar circumstances of this case, and that the suit is dismissed with costs."

Plaintiff appealed to the District Judge who said:—"The plaintiff, who is described as a young lad, sues for the custody of his wife who is a child of nine years of age. The defendant is the girl's father, with whom (and with her mother) she is living. The authorities, some of which are cited by the District Munsif, show that it is the general (and I may add very humane and proper) custom in this Presidency for a child-wife, if immature, to live with her parents. The plaintiff has not made out any special custom to the contrary. On this ground alone the decree of the lower Court is clearly sustainable, and I accordingly confirm it, and reject the appeal under section 551, Civil Procedure Code."

Plaintiff preferred this second appeal.

Seshagiri Ayyar for appellant.—It is settled law that as soon as a marriage is celebrated the husband becomes the wife's legal guardian; Mayne's 'Hindu Law,' 6th edition, page 117; Manu,

(1) Sudder Decisions of 1858, p. 154.

ARUMUGA
MUDALI
v.
VIRARAGHAVA
MUDALI.

chapter IX, verse 3, and chapter V, verse 148. Moreover the wife is entitled to be maintained by the husband and she has no right to claim maintenance from her parents, Mayne's 'Hindu Law,' 6th edition, page 586, and *Bai Mangal v. Bai Rukhlmini*(1). It was held in *Suntosh Ram Doss v. Gera Pattuck*(2) that the husband is entitled also to the custody of the wife, and the mere fact that she is an infant will not disentitle him from claiming such custody to the exclusion of the parents. Of course, if the parents can prove an established custom to the effect that the child-wife should remain with them until she attains maturity the husband may be debarred from claiming custody even though he is the legal guardian of the girl. See Banerji on 'Marriage and Stridhanam,' 1879 edition, pages 116 and 117; Mayne's 'Hindu Law,' 6th edition, page 117. In this case it has not been established by evidence that such a custom exists in the class of people to which the parties belong. In the case referred to by the lower Court, (*Ramaïen v. Condammal*(3)), the question was whether a minor widow who is residing in her parents' house is entitled to maintenance from her husband's family. In replying to this question the pandits said that according to custom the female, while immature, resides with her parents, but the husband is legally bound to maintain her. It is to be noted that the parties to that case were Brahmins, among whom marriage before puberty is universal. Here the parties are Sudras, and there is no evidence on record to prove that this custom prevails amongst Sudras also. In the absence of such evidence it is submitted that the husband is entitled to the custody of his child-wife.

Kothandarama Ayyar for respondent.—No doubt the husband becomes the guardian of the wife from the date of marriage; but where there is a well-defined custom, the parents are entitled to the custody as against him. It is a well-known fact that Sudras also have adopted the practice of marrying their girls before puberty. The custom therefore regulating the right to custody applies equally to them, and in fact such a custom has been found by the lower Courts to exist.

Seshagiri Ayyar in reply.

JUDGMENT.—There is no doubt, according to the authorities to which our attention has been drawn, that the husband is the

(1) I.L.R., 23 Bom., 291.

(2) 23 W.R., (C.R.), 22.

(3) Sudder Decisions of 1858, p. 154.

ARUMUGA
MUDALI
v.
VIRARAGHAVA
MUDALI.

legal guardian of his wife from the moment of the marriage whether the marriage is consummated or not. The real question in this case is whether the husband is entitled to the custody of his wife as against the parents when she has not yet attained her maturity, no special reason having been shown why the girl should be taken from their custody. As found by both the Courts below, it is the general practice among the Hindu community in this Presidency for a girl-wife to be left with her parents until she attains puberty. The case of *Ramaïen v. Condammal*(1) is a direct authority on this point. To hold that the husband is not entitled by general custom to the custody of his immature wife as against the parents does not really detract from his general rights as her legal guardian. Even in the matter of custody he would be entitled to it if it should appear necessary in the interests of the girl, but in the absence of evidence to the contrary, her custody by the parents is presumably preferential, which is no doubt the foundation for the general custom. In this view we think the lower Courts were right in dismissing the plaintiff's suit for the recovery of his child-wife.

The second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Subrahmaniam Ayyar and Mr. Justice Davies.

SURIJ MULL (PLAINTIFF), APPELLANT,

v.

HUDSON (DEFENDANT), RESPONDENT.*

Stamp Act—Act I of 1879, s. 16—“Stamped at the time of execution”—Stamp Act—Act II of 1899—Affixing and cancelling stamp immediately after signature—Letters Patent, art. 12—Part of the cause of action—Promissory note payable in Madras or Secunderabad—Payments of interest in Madras—Jurisdiction.

A promissory note was executed in plaintiff's favour at Vizianagram, payable in Secunderabad or Madras. Payments of interest due on the note were made in Madras. The note was signed first, the stamp having been affixed and cancelled after signature, the acts being practically simultaneous. Leave to sue in the High Court had been obtained under article 12 of the Letters Patent:

(1) Sudder Decisions of 1858, p. 154.

* Original Side Appeal No. 18 of 1900 against the decree of Mr. Justice Boddam, in Civil Suit No. 15 of 1900.

1900.
November 1.

SURIJ MULL
v.
HUDSON.

Held, that part of the cause of action had arisen in Madras. Also, that the note was stamped at the time of the execution, within the meaning of section 16 of the Stamp Act (I of 1879).

SUIT to recover money due on a promissory note. The plaintiff alleged that defendant had executed, in favour of plaintiff, at Vizianagram, on 1st February 1897, a promissory note for Rs. 1,660, and undertook to repay the same on demand at Secunderabad or Madras, with interest thereon at 2 per cent. per mensem. It alleged that Rs. 2,511-7-6 remained due on the note, namely, Rs. 1,660 as principal, and Rs. 851-7-6, balance of interest after giving credit for Rs. 327-4-0, received on account of interest. The cause of action was alleged to have arisen in Madras. Leave to institute the suit had been granted under article 12 of the Letters Patent. The evidence of the plaintiff's brother and agent was as follows:—"I saw defendant execute this promissory note, (dated 1st February 1897), interest at 2 per cent. per mensem. After the promissory note was executed the stamp was affixed and cancelled by the defendant before it was delivered. The interest due up to date is Rs. 897-15-6. The total due is Rs. 2,557-15-6. The note was executed at Vizianagram. I have held the note since execution. . . . He made payments of interest. He paid interest for nine months. It was sent by money order in the name of the plaintiff—Rs. 327-4-0 in all. I received the money and signed the money order. I have not got books here. They are at Vellore." From the findings of the Appellate Court, it appears that payments of interest had been made in Madras. Also that the stamp had been affixed and cancelled after the execution of the note, though the signing and stamping had been practically simultaneous; also that plaintiff had proved non-payment of amount claimed. The judgment of the Court was as follows:—"It seems to me that in the absence of proof of payment at Secunderabad or refusal to pay there, where the defendant clearly has an option to pay, it would be unduly straining the authorities to hold that part of the cause of action arose in Madras so as to give this Court jurisdiction. Moreover the note was not stamped as required at the time of execution but afterwards. There are therefore two legal objections in addition to the fact that the plaintiff has not been called or his books put in to show that the note has not been paid. On the whole, I think, I ought to dismiss the plaintiff's suit." The suit was dismissed.

SURIJ MULL
v.
HUDSON.

Plaintiff preferred this appeal.

Masilamani Pillai for appellant.

The respondent was not represented.

JUDGMENT.—We are unable to agree with the learned Judge that no part of the cause of action arose in Madras. Not only was the note payable in Madras but payments of interest had actually been made here. The fact that the note was also payable at Secunderabad does not affect the matter. The obligation to pay in either place gave a cause of action in both.

We must also disagree with the Judge's decision that the promissory note sued upon was inadmissible in evidence on the ground that the stamp was affixed and cancelled after the signature to the note was made. The uncontradicted evidence of the plaintiff shows that the acts were practically simultaneous, and the stamping therefore was done "at the time of execution" within the meaning of section 16 of the Stamp Act, (I of 1879), which is the Act governing the present case. Even under the present Act, (II of 1899), where "execution" is defined as meaning "signature," we do not think it would make any difference if the stamp is affixed and cancelled immediately after the signature, the signing and the stamping being continuous acts in the same transaction. Moreover, in determining whether a document is sufficiently stamped with reference to its admissibility in evidence, we must look at the document itself as it stands without having recourse to collateral circumstances to be proved by extraneous evidence (see *Ramen Chetty v. Mahomed Ghouse*(1) and *Royal Bank of Scotland v. Tottenham*(2)).

The plaintiff having proved non-payment of the amount claimed, it was not necessary for him in the absence of any defence to the action to produce further evidence in the shape of his account books or otherwise.

We must, therefore, reverse the decision of the learned Judge and give the plaintiff a decree for Rs. 2,511-7-6, together with interest at 24 per cent. per annum on the principal amount of Rs. 1,660 from date of plaint to the date of Mr. Justice Boddam's decree, viz., the 24th April 1900. Further interest at 6 per cent. per annum is allowed on the decree amount up to date of payment. The defendant must also pay the plaintiff's costs throughout.

(1) I.L.R., 16 Cal., 432.

(2) [1894] 2 Q.B., 715.

APPELLATE CRIMINAL.

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

1900.
November 2.

QUEEN-EMPRESS

v.

ABDULLA SAHEB AND OTHERS.*

Criminal Procedure Code—Act V of 1898, ss. 144, 487—Order to “abstain from a certain act”—Trial by Magistrate who made the order of persons alleged to have disobeyed it.

On a petition being filed in the Court of a Sub-Divisional First-class Magistrate setting out that a breach of the peace was likely to arise from the simultaneous use of a certain mosque by members of the Hanifi and Shafi sects, the Magistrate passed an order addressed to ten members, who were named, and several others of the Hanifi sect, and to three members, who were named, and several others of the Shafi sect. The order concluded as follows:—“I do order hereby that the following order should be observed in regard to the entry of the said mosque by any of you or any other Mussalmans of the Hanifi and Shafi sects for a period of two months from this date unless in the meanwhile you establish your right in a Court of competent civil jurisdiction.” It set out five periods of half an hour each during which each sect, respectively, might enter the mosque on ordinary days, and two periods of one hour each in which each sect might enter the mosque on other days:

Held, that the order was within the powers conferred by section 144 of the Criminal Procedure Code.

Certain members of the Hanifi sect having entered the mosque in disobedience to the order hereinbefore referred to, they were charged under section 188 of the Indian Penal Code with disobedience to an order by a public servant. The case was tried by the Magistrate who had passed the order:

Held, that the Magistrate was not competent to try the case, inasmuch as he had made the order under section 144.

PETITION to revise an order of the First-class Sub-Divisional Magistrate of Chittoor, convicting certain accused under section 188 of the Indian Penal Code for disobedience to an order by a public servant made under section 144 of the Code of Criminal Procedure. On 11th April 1900 the Sub-Divisional First-class Magistrate of Chittoor passed the following order on a petition filed in his Court:—“Whereas it has been made to appear to me that you [here follow ten names] and several others of the Hanifi sect, and

* Criminal Revision Case No. 328 of 1900, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the order of the First-class Sub-Divisional Magistrate of Chittoor, in Summary Register Case No. 3 of 1900.

you [here follow three names] and several others of the Shafi sect are about to go at one and the same time to the mosque at Chittoor for the purpose of offering prayers, &c., and that your entry to the said mosque at one and the same time is likely to lead to a riot or an affray or other breach of the peace, I do order hereby that the following order should be observed in regard to the entry of the said mosque by any of you or any other Mussalmans of the Hanifi and Shafi sect for a period of two months from this date, unless in the meanwhile you establish your right in a Court of competent civil jurisdiction:—*Ordinary days*.—4 to 4-30 A.M., Shafi; 5 to 5-30 A.M., Hanifi; 12 noon to 1 P.M. Shafi; 2 to 3 P.M., Hanifi; 3-30 to 4-30 P.M., Shafi; 4-30 to 5 P.M., Hanifi; 6 to 6-15 P.M., Shafi; 7 to 7-15 P.M., Hanifi; 8 to 9 P.M., Shafi; 10 to 11 P.M., Hanifi. *Kutba days—Bakiri and Ramzan*.—9 to 10 A.M., Shafi; 11 A.M. to 12 noon, Hanifi; *Fridays—Johar*.—12 noon to 1 P.M., Shafi; 2 to 3 P.M., Hanifi.”

On 21st April 1900 thirteen persons belonging to the Hanifi sect were charged under section 188 of the Indian Penal Code with having disobeyed the said order on 13th April 1900. They were tried by the same First-class Sub-Divisional Magistrate who had passed the order, five being convicted and sentenced to pay a fine of Rs. 5 each, with simple imprisonment for one week in default.

The accused preferred this revision.

Mr. C. Krishnan, for petitioners, contended that by section 487 of the Code of Criminal Procedure the Magistrate was debarred from trying the offence, which was one committed in contempt of his authority. *Reg v. Ranchhod Dayal*(1). He also submitted that the order dated 11th April 1900 was not a lawful order within the meaning of section 144 of the Code, as it prohibited numerous acts and was directed to numerous persons.

Mr. D. Chamiar, for the Public Prosecutor, argued that disobedience of an order passed by a Magistrate was not an offence committed in contempt of his authority; and that *Reg v. Ranchhod Dayal*(1) did not apply as it was decided under the old Code. He contended that the order was a valid one. *Ramanuja Jeyarsvami v. Ramanuja Jeyar*(2), and *Palaniappa Chetti v. Dorasami Ayyar*(3) were referred to.

(1) 10 Bom. H.C.R., 424.

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

(3) I.L.R., 18 Mad., 402.

QUEEN-
EMPRESS
v.
ABDULLA
SAHEB.

QUEEN-
EMPRESS
v.
ABDULLA
SAHEB.

JUDGMENT.—Two points have been raised on behalf of the petitioners,—first, that the conviction of the petitioners by the Magistrate is invalid upon the ground that the Magistrate, who convicted the petitioners of an offence under section 188 of the Indian Penal Code—the offence being a breach of an order made under section 144 of the Criminal Procedure Code—is the same Magistrate who made the order under section 144 of the Criminal Procedure Code; secondly, that the order which purports to have been made under section 144 of the Criminal Procedure Code was beyond the powers conferred by the section, and was therefore made without jurisdiction. Section 487 of the Criminal Procedure Code provides as follows:—“(1) Except as provided in sections 477, 480 and 485 no Judge of a Criminal Court or Magistrate other than a Judge of a High Court and the Recorder of Rangoon shall try any person for any offence referred to in section 195 when such offence is committed before himself or in contempt of his authority or is brought under his notice as such Judge or Magistrate in the course of a Judicial proceeding; (2) nothing in section 476 or section 482 shall prevent a Magistrate empowered to commit to the Court of Session or High Court from himself committing any case to such Court. The words “in contempt of his authority” are general and are not to be construed as limited to cases where the alleged offence is in the nature of a “contempt of Court.” It is to be observed that chapter X of the Penal Code, the chapter in which section 188 occurs is headed “of contempts of the lawful authority of public servants,” whilst the language of section 144 of the Criminal Procedure Code which gives jurisdiction to a Magistrate to direct any person to “abstain from a certain act or to take certain order with certain property” is the same as the language of section 188 of the Indian Penal Code, which constitutes a breach of an order duly promulgated by a public servant an offence punishable under the latter section.

On the construction of the sections of the Penal Code and of the Criminal Procedure Code referred to above we are of opinion that a Magistrate who makes an order under section 144 of the Code of Criminal Procedure is not competent to try a person for an alleged offence under section 188, Indian Penal Code, the offence being an alleged breach of the order made under section 144, Criminal Procedure Code. This is also the view taken by the

Bombay High Court in *Reg v. Ranchhod Dayal*(1), a case decided under the Code of 1872 the material provisions of the law being the same then as now.

As regards the second point it seems to us that the order made on 11th April 1900, was within the powers conferred by section 144 of the Criminal Procedure Code. In form, no doubt, it may be said that the order is not one to abstain from a certain act. In substance and effect, however, we think the order was an order directing certain persons to abstain from certain acts, and that being so it cannot be said to have been made without jurisdiction.

We think that by reason of section 487 of the Code of Criminal Procedure the Magistrate had no jurisdiction to try the petitioners. We must accordingly set aside the conviction and direct that the petitioners be re-tried before the District Magistrate or any other competent Magistrate whom the District Magistrate may appoint.

The fines, if paid, will be refunded.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Davies.

NAGAPPA (COUNTER-PETITIONER No. 1), APPELLANT,

v.

VENKAT RAO (PETITIONER), RESPONDENT.*

Landlord and tenant—Relief against forfeiture for non-payment of rent though stipulation for payment contained in compromise decree—Civil Procedure Code—Act XIV of 1882, s. 244—Decree containing general stipulation—Power of Court to relieve against penalty in execution proceedings.

Certain lands were held on lease, and the rent fell into arrears. A suit was then brought for the arrears and for possession, but the parties arrived at a compromise and a decree was passed in terms of that compromise. The decree contained a stipulation that if default should be made in payment of rent within the time fixed for payment each year, the lease should be forfeited. Default was made, and possession of the lands and the arrears of rent were sought for in execution of the decree, when it was objected that the stipulation for forfeiture

(1) 10 Bom. H.C.R., 424.

* Civil Miscellaneous Second Appeal No. 13 of 1900 against the decree of M. J. Murphy, District Judge of South Canara, in Appeal Suit No. 190 of 1899, affirming the decree of O. V. Nanjunda Ayyar, District Munsif of Karkal, on Execution Petition No. 20 of 1899.

QUEEN-
EMPRESS
v.
ABDULLA
SAHEB.

1900.
October 18,
19.
November 5.

NAGAPPA
v.
VENKAT RAO.

for non-payment of rent was a penal one, and should not be given effect to, even though it was contained in a decree which was capable of execution:

Held, that inasmuch as the decree passed by the Court was a mere adoption of the contract which existed between the parties to it, the Court must be taken to have adopted the contract with all its incidents. It was therefore competent to the Court to relieve against the forfeiture.

Shirekuli Timapa Hegda v. Mahabliya, (I.L.R., 10 Bom., 435), dissented from; *Rai Balkishen Dass v. Raja Run Bahadoor Singh*, (L.R., 10 I.A., 162; I.L.R., 10 Calc., 305), referred to.

APPLICATION for execution of a decree. Certain lands were held by the father of first and second counter-petitioners on mulgeni lease. The rent having, in or before the year 1860, fallen into arrears contrary to the provisions of the lease, Original Suit No. 315 of 1860 was brought for possession and for the arrears of rent then due. The suit resulted in a compromise, and a decree was passed in accordance therewith. The material parts of it are as follows:—"The plaintiff Shanteramma filed a suit against me for the recovery of land yielding Rs. 20, house hatti kottige valued at Rs. 20 the balance of geni Rs. 93-1-10. In that suit though I made some objections in the beginning still as the geni fell into arrears and the mulgeni right was cancelled and the delivery of geni, land, &c., by me according to the plaint was true, I effected a compromise with the plaintiff And as Nagappa and Mallu, sons of my ancestor Kollura, who obtained on mulgeni from the plaintiff's foster son, the plaint lands bagayath, house, hatti and kottige also, lying within the under-mentioned boundaries formerly, are under my protection, and as I am also issueless I obtained (the properties) on mulgeni from the plaintiff for them on this date and the geni settled is 13 muras of rice of good sort and Rs. 11 in cash; out of this, I shall send the cash amount to the plaintiff's house within the end of March and also the 13 muras of rice within the end of May from the beginning of the year Durmukhi next, within the vaida of each year, and obtain a receipt therefor. I should keep the said lands in proper condition, &c., till Nagappa, out of the sons of Kollura, attains his majority, afterwards, they and their descendants should continue to do the same from generation to generation. Out of the geni payable according to the vaidas, if any geni is allowed to stand in arrears, or if the mulgeni right is alienated by mortgage, sale or in any other way the said mulgeni right shall be cancelled and the plaintiff shall obtain possession of the plaint lands,

house, hatti and also kottige by execution and the said mulgeni right shall not be liable for any debt and the trees, &c., shall not be given to any one else. If out of the aforesaid conditions any condition is observed properly and the land kept in good state neither the plaintiff nor her descendants have any reason to say either that an increase of geni should be paid or that the land should be delivered. As I and also plaintiff have made a razi that the jack tree standing dead in the land No. 2 should be used between us taking half each, orders are solicited for confirming this razi. Orders are solicited for cancelling surety of Porthi Budam Sahib whom I offered as surety in this suit."

The Munsif passed the following order:—"Consent written by Devappayya, wakil on behalf of plaintiff on the said date. As it is true that the plaintiff and the defendants have made a compromise among them as stated above by the defendants if this razi is confirmed the plaintiff consents to it." After examining the parties, in connection with the execution of the razinamah, the Munsif added the following memorandum:—"This razi has the force of a decree upon which the plaintiff may take execution proceedings, if necessary. If any other razi, agreement, payment, &c., be made in the matter of this razi settlement unless both parties immediately represent the same in writing to this Court it cannot be approved. If no proceedings are taken within three years before a petition is made for the execution of this razi settlement to keep this decision, valid orders will not be issued for its execution."

Petitioner in 1890 purchased the mulgeni right of the lands, and the decree was transferred to him by the original holder of it. He now complained that counter-petitioners had made default in payment of rent in respect of the year 1895-96, and sought to be put into possession of the lands according to the terms of the decree. He also claimed the rent which was in arrear and interest. The District Munsif referred to *Subbaraya v. Krishna* (1) and *Shirekuli Timapa Hegda v. Mahabliya* (2) and held that the doctrine of penalties could have no application to stipulations contained in a decree; he found that there had been default, and ordered counter-petitioners to surrender the lands to plaintiff and to pay the arrears due. The counter-petitioners appealed to the District Judge, who said:—

(1) I.L.R., 6 Mad., 159 at p. 164.

(2) I.L.R., 10 Bom., 435.

NAGAPPA
v.
VENKAT RAO.

NAGAPPA
v.
VENKAT RAO.

"The plaintiff (respondent) is the holder of a razi decree which was transferred to him by the original decree-holder Shanteramma. Shanteramma was the plaintiff in Original Suit No. 315 of 1860 of the Karkal Munsif's Court. It was a decree for arrears of rent and recovery of possession against Parameshri who, together with her deceased husband's brother Kollura (father of appellants), had allowed the rent to fall into arrears. I gather that between the accrual of the arrears and the date of the decree Kollura had died. The razi decree contained a stipulation that on failure to pay the rent within the time fixed for each year, the lease was to be forfeited and also in the event of any alienation of the mulgeni right (which was the right under which the tenants held). The Munsif found in the present suit that the proper amount of rent was not tendered for the year Manmatha (1895-96). He accordingly decreed for the enforcement of the above-mentioned stipulation in the decree. The question of fact, viz., the non-payment of rent has not been disputed in appeal. It is urged by the appellant's pleader that the penal provision for forfeiture of the lease cannot be allowed and ought to be relieved against. . . . He quotes *Subbaraya v. Krishna*(1) and *Narayana v. Narayana*(2). These rulings do not however apply. The former dealt with an alienation enforceable by law as distinct from a voluntary alienation. There is no question of an alienation here. The latter ruling does not apply either because the stipulation regarding the penal provision is part of the decree. And in reference to the decree the doctrine of penalties does not apply. *Shirekuli Timapa Hegda v. Mahabhya*(3). On this point then I decide against the appellants. The provision regarding forfeiture is one which may be enforced. The second argument is based partly on the assertion that there has been a waiver of the claim and partly on a remark of somewhat doubtful meaning appended to the decree to the effect apparently that if, within three years from an application for its execution, some steps are not taken to keep the decree alive, its execution would not be allowed. I concur with the lower Court that the subsequent withdrawal of Execution Petition No. 201 of 1898 (brought for non-payment of rent in 1894-95) because the rent was subsequently paid does not operate as a waiver for future defendants. As regards the other point the decree with the stipulation is very

(1) I.L.R., 6 Mad., 159 at p. 164. (2) I.L.R., 6 Mad., 327. (3) I.L.R., 10 Bom., 435.

much akin to that dealt with in *Muhammad Islam v. Muhammad Ahsan*(1), and its true construction is, I am of opinion, the same as that put upon the decree in that case, viz., that an independent right to execution arises on recurrence of each default and the case is governed as regards each default by article 178 of the Limitation Act." He dismissed the appeal.

The counter-petitioners preferred this second appeal.

Mr. C. Krishnan (K. P. Madhava Rao with him) for the appellant.—A clause of forfeiture for non-payment of rent, occurring in a lease, is always regarded as penal (*Subbaraya v. Krishna*(2)), its intention being merely to secure the payment of rent. The existence of such intention is not negatived by the mere fact that the parties further agreed to obtain a decree in terms of the compromise. Penal provisions in contracts recorded in decrees are relieved against in England (*Charrington v. Laing*(3)).

K. Naraina Rao (H. Narayana Rao with him) for the respondent.—The decree in the case of *Charrington v. Laing*(3) was obtained on a *cognovit actionem*. The Court did not scrutinise the terms of the contract before passing the decree. In India the Civil Procedure Code requires that the Court shall see if the compromise is lawful, before passing a decree in accordance with it. When a decree is so passed, every provision in it must be enforceable, as if it were a decision of the Court. In *Cutenho v. Souza*(4) in 1862, it was held that a forfeiture for non-payment of rent could not be relieved against. The parties here must be presumed therefore to have contracted with reference to the law so laid down, especially as that decision affected this particular district. If the decree did not correctly express that intention, a separate suit should be brought to set it aside (*Ainsworth v. Wilding*(5)). The cases directly in point are *Shirekuli Timapa Hegda v. Mahabhya*(6) and Second Appeal No. 80 of 1879, referred to in *Subbaraya v. Krishna*(2). As regards the case of *Rai Balkishen Dass v. Raja Run Bahadoor Singh*(7), to which reference has been made, this High Court has held in *Nanjappa v. Nanjappa*(8) that it merely confirms the rule laid down in the case of *Shirekuli Timapa Hegda v. Mahabhya*(6).

(1) I.L.R., 16 All., 237.

(3) 8 L.J., (C.P.), 50; 6 Bing., 242.

(5) (1896) 1 Ch., 673.

(7) L.R., 10 I.A., 162; I.L.R., 10 Cal., 305.

(2) I.L.R., 6 Mad., 159 at p. 164.

(4) 1 M.H.C.R., 15.

(6) I.L.R., 10 Bom., 435.

(8) I.L.R., 12 Mad., 161 at p. 164.

NAGAPPA
v.
VENKAT RAO.

NAGAPPA
v.
VENKAT RAO.

JUDGMENT.—The only point to be decided is whether the principle of relieving against a forfeiture for non-payment of rent can be applied to a case where the terms of the holding are embodied in a razinamah presented in a suit and accepted by the Court with the observation that it should have the force of a decree. But for the fact that there is a decree, this case is not distinguishable from that in *Kottal Uppi v. Edavalath Thathan Nambudiri*(1).

Although the proceedings are most informal we do not think that execution could not issue. And it is accordingly argued that as there is a decree the Court must enforce it in its literal terms without regard to considerations which would arise if a mere contract was in question. The case cited (*Shirekuli Timapa Hegda v. Mahablya*(2)) is an authority in favour of the view. But the weight of this authority is diminished by the omission to refer to the manner in which the Judicial Committee in *Rai Balkishen Dass v. Raja Run Bahadoor Singh*(3) dealt with the decree which was there under discussion. The point decided in that case was that a certain provision for interest was not penal. The fact that the committee did not decline to discuss that question because the provision was contained in a decree certainly affords ground for the inference that the doctrine of relieving against a penalty was considered to be applicable.

If the strict view propounded by West, J., is correct, it must follow as the District Munsif rightly points out that in a case like the present the tenant cannot claim any compensation for improvements, because there is no provision for it in the decree. West, J., must say that it is not permissible to consider the terms which having regard to the usage of the country the parties would assume to be embodied in their contract. In fact the circumstance that there has been a contract must be ignored when once a decree is founded on it. In a case where there is nothing more on the part of the Court than a mere adoption of the contract it seems to us that the Court must be taken to adopt the contract with all its incidents. If the parties really did not intend the mulgeni to be forfeited on account of default in the payment of some trifling sum we do not see why it should be said that the Court had that

(1) C M.H.C.R., 258.

(2) I.L.R., 10 Bom., 435.

(3) L.R., 10 I.A., 162; I.L.R., 10 Calc., 305.

intention. Holding this view and having regard to the case above cited (*Rai Balkishen Dass v. Raja Run Bahadoor Singh*(1)), we are unable to follow the decision in *Shirekuli Timapa Hegda v. Mahablya*(2), and must hold that it was competent to the Court to relieve against the forfeiture.

With regard to the merits it is said that the tenant is entitled to no indulgence because he has been in effect denying the landlord's title and deliberately withholding rent. We have no sufficient materials for saying whether the circumstances are such as to entitle the tenant to be relieved against the consequences of his default.

The District Judge is directed to return a finding after taking such evidence as may be adduced on the question whether in the circumstances of the case the tenant is entitled to relief, and if so, on what terms. If it is found that the tenant is not so entitled the District Judge must estimate the value of the improvements.

The finding should be submitted within four weeks from the date of this order. Ten days will be allowed for filing objections after the finding has been posted up in this Court.

APPELLATE CRIMINAL.

Before Mr. Justice Davies and Mr. Justice Benson.

RATTIGADU (ACCUSED),

v.

KONDA REDDI (COMPLAINANT).*

Regulation XI of 1816, s. 10—Confinement of Native Christian in stocks
—Legality of order.

By section 10 of Regulation XI of 1816, heads of villages are given summary powers of punishment in cases of a trivial nature, such as using abusive language, and if the offenders "shall be of any of the lower castes of the people on whom it may not be improper to inflict so degrading a punishment," they may be put in the stocks. A person, who was a Mala, or Hindu pariah, by birth, and who had become a convert to Christianity, was convicted of having used abusive language

(1) L.R., 10 I.A., 162; I.L.R., 10 Calc., 305. (2) I.L.R., 10 Bom., 435.

* Criminal Revision Case No. 308 of 1900, referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by R. Morris, District Magistrate of Kistna, in his letter, dated 26th July 1900.

BATTIGADU
v.
KONDA
REDDI.

and sentenced to two hours' confinement in the stocks under the said regulation. His profession was that of a weaver, but he, in fact, worked as a cooly. On the question of the legality of the sentence being referred to the High Court:

Held, that to render a person liable to confinement in the stocks under the regulation there must be a concurrence of two circumstances, viz., (1) he must be a person belonging to one of the lower castes of the people, and (2) he must be a person on whom from his social standing or otherwise it may not be improper to inflict so degrading a punishment. That the test is not what is the offender's creed, but what is his caste.

Seemle, that a person who has changed his creed but continues to belong to his caste may be within the purview of the regulation if the caste is of the nature therein referred to; but if he abandons his caste he cannot longer be said to "belong to one of the lower castes of the people" and punishment by confinement in the stocks would no longer be legal.

The Queen v. Nabi, (I.L.R., 6 Mad., 247), discussed.

THE following facts appeared from the letter of reference: One Emmari Konda Reddi lodged a complaint before the Village Munsif that he had been abused by Vemurri Rattigadu, a Christian by religion, and a weaver by profession. Before his conversion to Christianity, Rattigadu had been a Hindu of the Mala or pariah caste, which was, in the opinion of the District Magistrate, "one of the lower castes." After trial, the Munsif convicted Rattigadu and under section 10 of Regulation XI of 1816, sentenced him to be confined in the village stocks for two hours. The District Magistrate thought that the complainant annoyed the feelings of the accused by pasturing his cattle in a burying ground, and that there had been an altercation, but that the use of abusive language by the accused was doubtful. The reference did not dwell upon this, but rather on the legality of the punishment. The District Magistrate said:—"The High Court in *The Queen v. Nabi*(1) laid down the rule that a Muhammadan cannot be said to belong to lower castes of the people. Now a Muhammadan is a person who professes a particular form of religion, and may have been, prior to the acceptance by him of Islam, a Hindu of a very low caste. It is notorious that in Malabar conversions to Islam from among the extremely low caste Cherumars are of daily occurrence. Under the ruling of the High Court quoted, an ex-Cherumar Muhammadan could not be confined in stocks. It seems to me that a professor of the Christian religion is entitled to as much consideration as a professor of the Muhammadan religion without regard to his former position in Hindu society. If this position is

(1) I.L.R., 6 Mad., 247.

correct, the sentence was illegal. Native Christians do regard themselves in this district as of a higher status than Hindus of the Mala caste, and look upon the punishment of confinement in stocks as very degrading. Malas do not so regard it."

Sivasami Ayyar for complainant.

The accused was not represented.

BENSON, J.—One. Rattigadu, a Mala, or Hindu pariah by birth, but now a convert to Christianity, and a weaver by profession according to the District Magistrate, but who, in fact, earns his living by cooly work according to the Village Magistrate, was convicted by the latter of having used abusive language, and was sentenced to two hours' confinement in the stocks under section 10 of Regulation XI of 1816 of the Madras Code.

The District Magistrate, relying on *The Queen v. Nabi*(1), refers to the sentence as illegal on the ground that a Native Christian is not a person belonging to one "of the lower castes of the people" so as to be within the purview of the regulation. In the case of *The Queen v. Nabi*(1) the High Court held that "a Muhammadan cannot be said to belong to the lower castes of the people," and the District Magistrate points out that conversions to Islam from the low caste Cherumars of Malabar are of daily occurrence, and that if they by reason of their creed are exempt from confinement in the stocks so ought converts to Christianity to be exempt even though born in one of the lower castes of the people.

To render a person liable to confinement in the stocks under the regulation there must be a concurrence of two circumstances, viz., (1) he must be a person belonging to one of the lower castes of the people, and (2) he must be a person on whom from his social standing or otherwise it may not be improper to inflict so degrading a punishment. As pointed out by this Court in *The Queen v. Nabi*(1) the framers of the regulation probably had in view those castes who, prior to the introduction of British rule, were regarded as servile, and it was apparently from this point of view that the Court held that a Muhammadan could not be said to belong to the lower castes of the people. Save in the Mopla districts of the West Coast, where conversions from the low Hindu castes are common, the name Muhammadan ordinarily implies a race,

(1) I.L.R., 6 Mad., 247.

RATTIGADU
v.
KONDA
REDDI.

as well as a creed, distinction. Broadly speaking Muhammadans are foreigners by race, who have no connection with any of the castes of the people. There is nothing in *The Queen v. Nabi* (1) to show, or to suggest, that he was a convert to Islam from one of the lower castes of the people, and it may be doubted whether the case can be regarded as an authority for holding that every professor of the creed of Islam, whatever caste he may have belonged to before conversion or after it, is outside the purview of the regulation. The framers of the regulation probably had not in mind the question which has now arisen, and so made no special provision for it. But the regulation is a penal one and must be construed strictly, and in case of doubt, in favour of the liberty of the subject. The test seems to be not what is the offender's creed, whether Muhammadan, Christian or Hindu, but what is his caste. If he belongs to one of the lower castes a change of creed would not, of itself, in my judgment make any difference, provided he continues to belong to the caste. Ordinarily, as I understand, a convert to Christianity abandons his caste, whether high or low; but I do not know that this is always, or necessarily, so. It will be a question of fact in each case. If he continues to accept the rules of the caste in social and moral matters, acknowledges the authority of the headmen, takes part in caste meetings and ceremonies, and, in fact, generally continues to belong to the caste, then, in my judgment, he would be within the purview of the regulation.

If, on the other hand, he adopts the moral standards of Christianity, instead of those of his caste, if he assimilates his social ideals to those of the Christian community which he joins, if he accepts the authority of his pastors and teachers in place of that of the headmen of the caste, if he no longer takes part in the distinctive meetings and ceremonies of the caste, and if, in a word, he abandons his caste, then he can no longer be said "to belong to one of the lower castes of the people," and his punishment by confinement in the stocks is no longer legal.

The District Magistrate says that "Native Christians in this district do regard themselves as of a higher status than Hindus of the Mala caste, and look upon the punishment of confinement in the stocks as very degrading. Malas do not." This is a con-

(1) I.L.R., 6 Mad., 247.

RATTIGADU
v.
KONDA
REDDI.

sideration which concerns the second condition required by the regulation to render an offender liable to confinement in the stocks. The question is not whether Native Christian as a class regard the punishment as degrading, but whether the individual offender is from his social standing or otherwise (*e.g.*, from his education) a person on whom it may not be improper to inflict so degrading a punishment.

As pointed out in the proceedings of this Court, No. 1732, dated 9th October 1879, (Weir's 'Law of Offences', third edition, page 685), the word "whom" in section 10 of the regulation refers back to the words "the offending parties" not to the words "the lower castes of the people."

In the present case there appears to be no reason to think that Rattigadu was exempt under the second condition, and the District Magistrate's letter does not show that he was exempt under the first condition, though it is not improbable that he was. If the District Magistrate, having regard to the remarks made above, should find that Rattigadu was exempt under the first condition, it will be open to him to make a further representation with a view to a formal declaration that the punishment inflicted was illegal.

DAVIES, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Subrahmaniam Ayyar and Mr. Justice Benson.

PANGA AND OTHERS (PLAINTIFFS NOS. 1 TO 6 AND 8 TO 39),
APPELLANTS,

1900.
November 6.

v.

UNNIKUTTI AND OTHERS (DEFENDANTS NOS. 1, 2, 7, 8 AND 11 TO 19
AND 4, 5, 6, 9, 10 AND PLAINTIFF No. 7), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 13—Res judicata—Suit in Subordinate Court—Previous suit in Munsif's Court—Valuation of a suit for declaration as to membership of tarwad—Specific Relief Act—Act I of 1877, s. 42.

A suit was brought in the Court of a Subordinate Judge for a declaration that the plaintiffs and defendants therein had no community of interest, and

* Second Appeal No. 1228 of 1899 against the decree of W.H. Welsh, District Judge of South Malabar, in Appeal Suit No. 782 of 1898, reversing the decree of O. Chandu Menon, Acting Subordinate Judge of South Malabar at Calicut, in Original Suit No. 39 of 1897.

PANGA
v.
UNNIKUTTI.

were not members of a tarwad having joint property. The property of the tarwad was valued by plaintiffs at Rs. 3,000, and this was held to be a true valuation, but it appeared that the value of the plaintiffs' interest in it was Rs. 2,000 only. In a previous suit between the parties, which had been brought in the Court of a District Munsif, it had been held that the parties belonged to the same family; and this finding had been upheld on appeal. Plaintiffs did not ask, by way of further relief, for possession of a portion of the property, which was in the enjoyment of the defendants:

Held, that the suit was barred, both as *res judicata*, and by section 42 of the Specific Relief Act.

The value of a suit for a declaration that certain persons are or are not members of a tarwad is the value of the share of the tarwad property which would be allotted to them if a partition were made by common consent.

Suit for a declaration. Plaintiffs sued for a declaration that they and defendants had no community of interest with each other and were not members of a tarwad having joint property. Defendants traversed the claim, and set up the plea that the suit was barred by *res judicata*; and also by section 42 of the Specific Relief Act, since plaintiffs had not claimed consequential relief. In support of the first plea they relied upon a decision in Original Suit No. 428 of 1894, in the Shernad Munsif's Court, in which the Munsif had held that plaintiffs and defendants belonged to the same family. This finding had been upheld on appeal by the High Court. Defendants said that the value of the property of the tarwad had been enhanced so that the present suit might be brought in the Subordinate Court, and the effect of the said judgment as *res judicata* avoided. The following issues were framed:—
“1. Whether the suit is barred by *res judicata*? 2. Whether the suit is barred by reason of misjoinder? 3. Whether the suit is enhanced in value in order to bring it in this Court? 4. Whether the plaintiffs and defendants have no community of interest and do not form a tarwad having property jointly?” The Acting Subordinate Judge found that the suit had been properly valued at Rs. 3,000 and was not barred by the decision in the Shernad Munsif's Court. He passed a decree as sued for. Defendants appealed to the District Judge, who held that the suit was barred by *res judicata*, and by section 42 of the Specific Relief Act. Dealing with the former question he said:—“Issue i is whether the suit is bad under section 13 of the Civil Procedure Code. The result depends in great measure upon the construction of exhibit N, a deed of 1884, whereby property was divided amongst mem-

PANGA
v.
UNNIKUTTI.

bers of the Oravingal family. In paragraph 10 of the judgment under appeal this deed is held to prove that plaintiffs and defendants have only attaladakam and no rights of property existing in them 'conjointly.' The High Court held in Second Appeal No. 106 of 1897, that it was rightly construed by the Shernad Munsif in Original Suit No. 428 of 1894. The matter in contest there was whether the present first and second defendants were entitled to maintenance as being of one family with the present plaintiffs. The Munsif held that persons contesting belonged to one and the same family. But plaintiffs sue for a declaration that they have no community of interest with each other. This suit is, therefore, contrary to section 13 of the Civil Procedure Code, and must be dismissed.” He upheld the finding that the tarwad property was worth Rs. 3,000. Dealing with the latter point he said:—“It is contended that the suit is bad under Specific Relief Act, section 42, since plaintiffs were entitled to consequential relief as pleaded in the written statement of first and second defendants. The appealing defendants suggest as the consequential relief which plaintiffs ought to have claimed, the eviction of defendants Nos. 1 and 2 (and perhaps other defendants) who occupy huts on plaintiffs Tattarat paramba, item 1 in plaint schedule. This occupation is asserted by plaintiffs to have been permissive on the part of plaintiffs. The suit of those defendants in Original Suit No. 428 of 1894, Shernad, is consistent with their occupation by leave of plaintiffs. If plaintiffs failed in their present suit, the occupation would still be permissive not adverse. But if plaintiffs succeed in the suit the occupation may probably become adverse and plaintiffs ought therefore either to evict or to claim rent. In illustration (g) to section 42, the plaintiff was in possession and was able to sue for a declaration of his right to hold the property. Here the plaintiff is not in possession of the particular property which defendants Nos. 1 and 2 live in. Yet he sues for a declaration which would hereafter entitle him to evict or to claim rent for part of item 1 plaint schedule. The proviso to section 42 forbids any Court to make such a declaration. I hold that the suit is bad.”

Plaintiffs preferred this second appeal.

Govinda Menon for appellants:—This is a suit to declare that the plaintiffs and defendants are members of different families

PANGA
v.
UNNIKUTTI.

having no community of interest with each other. The suit is valued at Rs. 3,000 and both the lower Courts find that the value of the property which the plaintiffs claim to be their exclusive property is the amount at which the plaintiffs have valued their suit. The suit which gave rise to this suit was one for maintenance brought by the defendants against the plaintiffs. It was brought in the Munsif's Court and the decree in it cannot be pleaded as *res judicata* in the present suit which, on the findings, has been rightly brought in the Subordinate Court. As to the plea of section 42 of the Specific Relief Act the defendants have been occupying one of the items of land only, with the permission of the plaintiffs, and the latter need not therefore seek to obtain possession of it.

Mr. C. Krishnan and K. P. Madhava Rao for respondents Nos. 1 to 4:—The suit is barred by *res judicata*, for although the present suit is brought in the Subordinate Court and the previous suit (Original Suit No. 428 of 1894) was in the Munsif's Court, the present suit, if rightly valued, ought also to have been brought in a Munsif's Court. This suit is to declare that the defendants were not members of the plaintiffs' tarwad; for such a suit the valuation for purposes of jurisdiction is the total value of the shares which the defendants would be entitled to on a voluntary partition, if they were members of the tarwad, see *Krishnan Nambiar v. Chathu Nambiar*(1) and *Komappan Nambiar v. Chathu Nambiar*(2). Hence, although the value of the tarwad property is Rs. 3,000, inasmuch as the value of their shares is only about Rs. 800, the suit was cognizable by a Munsif's Court. Section 13 of the Code of Civil Procedure therefore applies. The suit is also barred by section 42 of the Specific Relief Act, as the defendants are in possession of property belonging to the tarwad, and their possession, if they are not members of the tarwad, cannot be considered to be permissive but must be adverse. The plaintiffs are therefore bound to ask for possession of the property as consequential relief.

JUDGMENT.—We agree with the District Judge that the suit is barred both as *res judicata* and by section 42, Specific Relief Act. In the unreported decision of this Court in *Krishnan Nambiar v.*

(1) Appeal No. 135 of 1885 (unreported).

(2) Second Appeal No. 442 of 1883 (unreported).

PANGA
v.
UNNIKUT

Chathu Nambiar(1) it was held that "the value of a suit to have it declared that certain persons are or are not members of a tarwad is the value of the share of the tarwad property which would be allotted to them if a partition were made by common consent." In this view the value of the plaintiff's suit would be $\frac{2}{3}$ ths, i.e., two-thirds of Rs. 3,000 which is the value of the whole property. In other words the value of the suit for purposes of jurisdiction is only Rs. 2,000 and the suit was therefore triable by a District Munsif. Consequently the decision in Original Suit No. 428 of 1894, Shernad District Munsif's Court, that there was a community of interest, is conclusive between the parties in the present suit.

As regards section 42, Specific Relief Act, we think that the plaintiffs, in addition to the declaration asked for, were in a position to ask for the further relief of possession of the portion of the property which was in the enjoyment of the defendants on a claim that they were members of the family. Not having done so, plaintiff's suit for a bare declaration could not be sustained, with reference to section 42, Specific Relief Act. In the result we dismiss this second appeal with costs of respondents Nos. 1 to 4.

APPELLATE CIVIL.

Before Mr. Justice Subrahmanya Ayyar and Mr. Justice Benson.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
(DEFENDANT), APPELLANT,

1900.
November

PERUMAL PILLAI AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 424—Notice previous to suing Secretary of State for India in Council or public officer—Notice by two out of three joint owners of land—"Cause of action."

Three joint owners of land sued to recover a sum of money paid as water-rates, which they alleged had been illegally levied from them by Government in

(1) Appeal No. 135 of 1885 (unreported).

* Second Appeal No. 1140 of 1899 against the decree of J. W. F. Dumergue, District Judge of Tinnevely, in Appeal Suit No. 300 of 1898, affirming the decree of N. Sarvothama Rao, Temporary Subordinate Judge of Tinnevely, in Original Suit No. 26 of 1896.

SECRETARY
OF STATE
FOR INDIA
IN COUNCIL
v.
PERUMAL
PILLAI.

respect of faslis 1302 and 1303. Notice of suit had been given by only two of the plaintiffs, and that notice omitted to state the imposition of the rate for fasli 1303 as a cause of action, as at the date of its being given the rate for fasli 1303 had not been levied. On its being contended that the notice was invalid and that the suit founded thereon was unsustainable:

Held, that the notice was not invalid on the ground that it proceeded from only two out of three of the joint owners. The object of the notice required by section 424 of the Code of Civil Procedure is to give the defendant an opportunity for settling the claim, if so advised, without litigation, and that object had been fully attained by two out of three plaintiffs giving the notice.

Held also, that the notice was not invalid by reason of the fact that the collection of rate for fasli 1303 had not been stated as a cause of action. The collection of a further sum for a subsequent fasli, after notice of the suit had been given, was not a fresh cause of action requiring a further notice under section 424 of the Code of Civil Procedure. The term "cause of action," in section 424, should not be construed in a narrow sense, the object of the section being merely to inform the defendant substantially of the ground of complaint.

Suit for a declaration, for the recovery of a sum of money collected by defendant from plaintiffs, and for an injunction. Plaintiffs were the mittadars of Kunnakudi. In fasli 1302 Government levied from plaintiffs Rs. 266-11-6, being fasli-jasti or water-rate. In fasli 1303 Government also levied Rs. 1,049-14-8 as fasli-jasti. Plaintiffs alleged that the rate had been illegally levied and prayed for a declaration that Government had no right to levy it, and sought to recover the sums mentioned, which had been collected from them, and for a perpetual injunction restraining the defendant from imposing fasli-jasti thereafter. Notice of intended suit had been given by plaintiffs Nos. 2 and 3 only, and it did not mention the imposition of the water-rate for fasli 1303 as a cause of action. The three plaintiffs were, (as the District Judge found), joint owners of the mitta, their shares never having been apportioned or divided. At the time at which notice of action was given the rate for fasli 1303 had not been levied. The effect of the notice was that defendant had no right to collect anything on account of fasli-jasti and that the collection which had been made on that account for fasli 1302 was illegal. Defendant set up the plea, among others, that no notice of suit had been given by all the three plaintiffs who sued: and that the notice relied on by plaintiffs had been given by only two of them. It was further objected that even this notice made no statement regarding the payment of rate for fasli 1303. Defendant contended that the notice was invalid and that the suit founded

thereon was unsustainable. The written statement also contained the following allegations:—"That the wet lands on which the present fasli-jasti has been imposed were but single crop lands at and after the permanent settlement and the peishcush fixed in the Mulkent-i-Istimrar sanad represents the assessment due for only one crop and does not exempt them from any charge or cess which may become payable in respect of the use of Government water for raising an additional crop thereon. That the water stored in the plaintiffs' tank is Government water and is obtained from an artificial channel maintained by Government and situated in Government lands. That a second crop has admittedly been raised on the said lands and Government water has been used therefor. The imposition of fasli-jasti for such user, chargeable under the rules, is, therefore, right and proper and it contravenes no provisions of the permanent sanad." The first issue framed was as follows:—"Whether the notice of suit given by plaintiffs Nos. 2 and 3 is sufficient in law or not, either as regards parties or as regards the claim?" The eleventh issue raised the question whether plaintiffs were entitled absolutely to the water of the tanks. The Subordinate Judge held that the notice was sufficient and decreed as prayed. The District Judge, on appeal, confirmed the decree. On the merits he said:—"It is contended that the water used for the irrigation of the lands in the mitta is obtained by means of channels constructed or maintained by Government and that, therefore, Government is entitled under Act VII of 1865 to levy the water-rate complained of. There is on record evidence which tends to show that the means of irrigation are maintained jointly by the mittadars and the Government, but it is unnecessary to discuss this matter because I am of opinion, in the first place, that Act VII of 1865 certainly does not give Government the right claimed, in this case, because it is clear from section 1 of the Act that the only land on which water cess can be levied is unirrigated or punja land. Here the lands are admittedly irrigated or nanja and do not therefore come within the scope of the Act. Moreover, in 1835-36, the Sökkampatti zamindari was sold for arrears of revenue and was bought in by Government. It remained in the hands of Government until 1859 and in that period attempts were made to improve all the wet lands into double crop lands. In 1859 the zamindari was restored to the original zamindar's heir and a sanad was granted to him. At the same

SECRETARY
OF STATE
FOR INDIA
IN COUNCIL
v.
PERUMAL
PILLAI.

SECRETARY
OF STATE
FOR INDIA
IN COUNCIL
v.
PERUMAL
PILLAI.

time a draft muchalka was drawn up containing a provision that only half the usual tax should be levied by the zamiadar from the tenants in respect of a second crop. It is, therefore, abundantly manifest that the subject of a second crop did not escape the notice of the Government, but nevertheless the right of the Government to impose any additional tax for second crop cultivation is not reserved in the sanad. *Expressum facit cessare tacitum*. On the whole, therefore, I am of opinion that the imposition of water-rate by Government in this case was not authorised or justified either by law or by contract. The decree of the lower Court is accordingly confirmed and this appeal is dismissed with costs."

Defendant preferred this second appeal.

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

V. Krishnasami Ayyar for respondent No. 2.

JUDGMENT.—We do not think that any valid objection can be taken to the notice given on the ground that it proceeded from only two out of the three joint owners. It has been repeatedly held that the object of the notice required by section 424, Civil Procedure Code, is to give the defendant an opportunity of settling the claim, if so advised, without litigation. That object is fully attained by two out of the three plaintiffs giving the notice, and the same consideration shows that the second objection to the notice, viz., that no notice was given of the claim in respect of the amount collected as fasli-jasti for fasli 1303 is invalid. The notice given was that the defendant had no right to collect anything on account of fasli-jasti, and that the collection which had been made, on that account, for fasli 1302 was illegal. The fact that a further sum for a subsequent fasli was collected after notice of the suit had been given should not, we think, be held to be a fresh cause of action requiring a further notice under section 424.

The "cause of action" in that section should not, we think, be taken in a narrow sense, the object of the section being merely to inform the defendant substantially of the ground of complaint (cf. *Jones v. Bird*(1)) and this was done, for all practical purposes, in the present case, by the notice actually given.

Turning now to the merits, the undisputed facts appear to be as follows :—

SECRETARY
OF STATE
FOR INDIA
IN COUNCIL
v.
PERUMAL
PILLAI.

The plaintiffs' mitta is part of a zamindari originally granted on a permanent sanad in 1803. It was sold for arrears of revenue in 1836 and was purchased by Government, but was granted again in 1859 under a permanent sanad. In the interval between 1836 and 1859 Government repaired and improved a dam across the river at the point where the channel, which supplies the Kunnakudi tank situated in the zamindari, leaves the river, thus improving the supply of water to the tank and the zamindari lands irrigated by it. The surplus water of the tank passes on to another village which is still Government property. The grant in 1859 was made after these improvements had been effected. There is no provision in the grant limiting the use which the grantee was entitled to make of the water stored in the tank either in irrigating dry land or in raising second crop on wet land. This being so, it cannot be held that the grantee is limited to such use only of the water as was actually made at the time of the grant.

The mere fact that there has been an extension of wet cultivation or other improvement in the resources of the zamindari does not entitle the Government to increase the peishcush. The only ground on which, in a case like this, the Government could demand fasli-jasti would be when the water in respect of which the demand is made is shown to belong to Government, but from what has been already stated, it is clear that the whole of the water stored in the tank belongs to the grantee, not to Government.

For this reason the Government was not entitled to levy fasli-jasti on account of second crops raised with such water.

We must therefore dismiss this second appeal with costs.

Our observation that the whole of the water stored in the tank belongs to the grantee should not be understood as determining any question between the grantee and those who may be entitled to the surplus water of the tank according to established usage.

(1) 5 B. & A., 837 at p. 844.

APPELLATE CRIMINAL.

Before Mr. Justice Davies and Mr. Justice Benson.

JAGANNADHA RAO AND OTHERS (PRISONERS), ACCUSED,

v.

KAMARAJU (COMPLAINANT), RESPONDENT.*

Penal Code—Act XLV of 1860, ss. 361, 363, 366—Kidnapping from lawful guardianship—“Lawful guardian”—Continuance of parent’s possession though physical possession temporarily with another.

S, a girl of the age of eight years, lived ordinarily under the guardianship of her father. A sister of S was married to a nephew of one K, and, with her husband, lived in the house of K. S, with her father’s knowledge and consent, visited her sister in K’s house, and had remained there for about a month when four brothers (being cousins of S) came to K’s house one night and took S to their own house, which was close by, and S was at once married to one of them. The father of S was not asked for his consent, and it was known by the nephews and by K that the father objected to such a marriage. K was present at the marriage and consented to it, hoping to reconcile the girl’s father to it subsequently. The father, however, sought the aid of the police, to whom S was given up by her cousins after having been detained by them in their house for thirty-six hours. The four cousins were then charged, under section 366 of the Indian Penal Code, with kidnapping S from lawful guardianship with intent that she might be compelled to marry one of them. The charge was framed in general terms and did not state from whose guardianship the kidnapping was alleged to have taken place. The trial was, however, conducted on the footing that the kidnapping was from the guardianship of K. The accused were acquitted, on the ground that K was at the time the lawful guardian of the girl and it had not been shown that she had been taken without K’s consent. Upon an appeal being preferred by Government against that acquittal:

Held, that the accused had been rightly acquitted of the charge of kidnapping S from the guardianship of K; but that the question whether they were guilty of kidnapping S from the guardianship of her father had not been and ought to be tried. The word “include” in the explanation to section 361 of the Indian Penal Code is not intended to limit the protection which the section gives to parents and minors, but rather to extend that protection by including in the term “lawful guardian” any person lawfully entrusted with the care or custody of the minor. The fact that a father allows his child to be in the custody of a servant or friend for a limited purpose and for a limited time does not determine the father’s rights as guardian or his legal possession for the purposes of the Criminal Law. If the facts are not inconsistent with a continuance of the father’s legal possession of the minor, the latter must be held to be in the father’s possession or keeping even though the actual possession should be temporarily with a friend or other person.

* Criminal Appeal No. 511 of 1900, under section 417 of the Criminal Procedure Code, against the judgment of acquittal passed on the accused in Calendar Case No. 49 of 1899 by the Sessions Judge of Gódvári.

APPEAL against an acquittal under section 417 of the Code of Criminal Procedure. Four persons were charged under section 366 of the Indian Penal Code with having kidnapped a minor from lawful guardianship. The minor was one Sarasamma, a girl of the age of eight years and daughter of one P. Acharlu, Tahsildar of Tenali. The minor had, with her father’s knowledge and consent, a month prior to the alleged offence, gone to stay with a sister, who was married to a nephew of one Kamaraju, at Bhogapuram, and lived in Kamaraju’s house. The accused, who were brothers, were nephews of Acharlu, the minor’s father, and came one night late to Kamaraju’s house and took the minor to their own house close by, where she was at once married to the third accused. The further facts of the case are fully set out in the judgment of the Court, which follows. The Sessions Judge after dealing with the evidence said:—“Both the assessors find the accused not guilty because Sarasamma does not say she was put under any restraint and was apparently quite content with her position. They also think that if the kidnapping had really taken place the Village Munsif would have reported the matter even without any complaint being made to him. I am not prepared to differ from the finding of the assessors. As shown above there are reasonable grounds for doubting that the accused acted without the consent of Kamaraju, who was the girl’s guardian for the time being. At the close of the trial the public prosecutor argued that Kamaraju might be himself looked upon as the kidnapper seeing that he had no authority to marry the girl to Chalapati and requested that a charge of abetment of kidnapping might be added. I thought it improper to do so at that stage of the case. Accepting the finding of the assessors, I acquit the accused of the offence of kidnapping under section 366 with which they are charged. The accused, who are on bail, are discharged.”

Against this acquittal this appeal was preferred by Government.

Mr. N. Subrahmaniam for the Public Prosecutor.—Assuming that Kamaraju was a consenting party, he colluded with the accused knowing well that the father had not given his consent to the marriage and that he would not give his consent even if asked. But Kamaraju’s complicity does not save the accused for their liability for having committed the offence of kidnapping. Kamaraju was a temporary guardian only for a special purpose, as a schoolmistress might be. He was not the lawful

1900.
September
25.
November 8.

JAGANNADHA
RAO
v.
KAMARAJU.

JAGANNADHA
RAO
v.
KAMARAJU.

guardian under section 361 of the Penal Code. The girl had not been committed to his custody for purposes of marriage. He allowed her to be taken away knowing well that she would be compelled to marry one of the accused. In Roscoe's 'Criminal Evidence,' 11th edition, page 254, it is laid down that, by the fraud of a temporary guardian, the latter forfeits all his right to the possession of the child, who reverts in law to the possession of her natural guardian. It is submitted that the offence really committed by the accused was that of kidnapping from the lawful guardianship of the father, and not of Kamaraju. In *Empress v. Pemantle*(1), it was held that even a mother had committed the offence of kidnapping by taking a girl from her father's house for the express purpose of marrying her without his consent. Here, Kamaraju's position is worse. The section is intended to protect parental rights. By the explanation to section 361, the father's rights over the girl are extended to temporary guardians, but the father is not deprived of his right to bring an action when a fraud is committed upon his rights. That physical custody is not necessary is laid down clearly in *Reg v. Mycock*(2), where Willes, J., held that a girl in the street is in the possession of her father unless she has given up all intention of returning home. So also in *The Queen v. Manktelow*(3), where the girl met the accused at a distance from her father's house and went away with him.

V. Krishnasami Ayyar and K. Subrahmania Sastri for the accused.—The girl was sent with the father's knowledge and consent to Kamaraju to stay there for an indefinite period and not for any temporary purpose. Kamaraju was therefore the lawful guardian within the meaning of the explanation to section 361. Since he was a consenting party to the removal, there was no removal from the guardianship of Kamaraju without his consent and hence the accused committed no offence. The test is whether Kamaraju would have been entitled to bring an action under that section if somebody else had deprived him of the custody of the girl. Certainly he could have done so. If Kamaraju had celebrated the marriage in his own house, the accused would have committed no offence under the section. In *The Queen v. Buldeo*(4), an orphan girl had been removed from the custody of a

(1) I.L.R., 8 Calc., 971.

(3) 22 L.J., (M.C.), 115.

(2) 12 Cox. Cr. C., 28.

(4) 2 N.W.P.H.C.R., 286.

JAGANNADHA
RAO
v.
KAMARAJU.

person who took her away from the custody of a woman who had placed herself in *loco parentis*. It was held that no offence had been committed. In *Hicks v. Gore*(1), the mother placed the girl under the care of Lady Gore, who caused the girl, without her mother's consent, to marry her own son. Lord Herbert held that no offence had been committed. The contention that the girl reverted to the custody of the father on the celebration of the marriage cannot be supported. In this case, the father was at Tenali, some hundreds of miles away. Under the section, there must be actual removal from the lawful guardianship of the person who has physical possession of the girl. The explanation is clear. The act of celebration of marriage had nothing to do with the offence of kidnapping. If fraud was committed, the validity of the marriage might possibly be questioned in a civil suit. The cases quoted to show that physical possession is not necessary are cases where the girl went out of the house while under the guardianship of the father. This is a case where the father had given up control over the girl and entrusted the general custody of her to another. He was not in a position to exercise any immediate control over her. The case of a schoolmistress is also different, as she would not be a general guardian in the position that Kamaraju occupied, but would hold custody for a special purpose. The girl was, in fact, a member of Kamaraju's family at the time. He referred to *Reg v. George Kipps*(2); *Reg v. Henkers*(3); and *Reg v. Miller*(4).

BENSON, J.—In this case the accused have been acquitted of the offence of taking a girl under the age of 14 years out of the keeping of her lawful guardian, without his consent, with intent that she should be compelled, or knowing it to be likely that she would be compelled, to marry against her will (sections 361, 363, 366, Indian Penal Code).

Government appeals against the acquittal.

I think the facts have been correctly found by the Sessions Judge, and may be briefly stated as follows:—

The girl, Sarasamma, aged 8 years, is the daughter of P. Acharlu, a Tahsildar. Her sister, Ramamma, is married to a nephew of Kamaraju. Sarasamma had been on a visit with her sister, Ramamma, in the house of Kamaraju for about a month, with her father's knowledge and consent. The accused are four

(1) 3 Mod., 84.

(3) 16 Cox. Cr. C., 257.

(2) 4 Cox. Cr. C., 167.

(4) 13 Cox. Cr. C., 179.

JAGANNADHA
RAO
v.
KAMARAJU.

brothers, and they are the nephews of P. Acharlu. About midnight on the 10th June they came to the house of Kamaraju, which is close to their own, and took the girl, Sarasamma, to their own house, where she was at once married to the third accused. The consent of P. Acharlu was not asked for, nor obtained, and the accused and Kamaraju knew that it would be refused if asked for. Kamaraju after the marriage pretended that the girl was taken away without his consent, but the finding is that he was present at the marriage and really consented to it, hoping to persuade P. Acharlu to accept accomplished facts after the marriage was over. The girl was kept for some 36 hours in the house of the accused, and was then given up to the Police whose aid had been sought on behalf of P. Acharlu.

The Sessions Judge acquitted the accused on the ground that Kamaraju was the lawful guardian of the girl at the time, and the prosecution had failed to show that the taking of the girl was without his consent. It was suggested to the Sessions Judge that Kamaraju, if a party to the taking, should be charged as an abettor, but this the Sessions Judge refused to do.

The question raised in this appeal is one of great importance, and of considerable difficulty owing to the indefiniteness of section 361 of the Indian Penal Code. The section requires that a taking or enticing out of the keeping of the lawful guardian without the consent of the guardian should be established, and the explanation to the section states that the words "lawful guardian" include "any person lawfully entrusted with the care or custody of such minor." It cannot, I think, be doubted that Kamaraju had been entrusted with the care and custody of the minor for a temporary, but indefinite, period, and was therefore a lawful guardian for the time being, within the meaning of the section, so that a taking out of his possession, without his consent, would have been an offence. But the evidence is that he was a consenting party, so that the taking from his house was no offence so far as his guardianship was concerned. It is, however, urged for the prosecution that the guardianship of Kamaraju did not extend to the giving of the girl in marriage, and that, for that purpose, she was still under the guardianship of her father, and reliance is placed on the language of Sir Hyde East in reference to the case of *Hicks v. Gore*(1). In that case the mother, who was the

(1) 8 Mod., 84.

JAGANNADHA
RAO
v.
KAMARAJU.

guardian of the girl, placed her under the care of Lady Gore, who caused the girl, without her mother's consent, to marry Lady Gore's own son. Lord Herbert having regard to the terms of the statute (4 and 5 Philip and Mary, ch. 8, s. 2) held that no offence was committed. In reference to this Sir Hyde East says:—"It deserves good consideration before it is decided that an offender, acting in collusion with one who has the temporary custody of another's child, for a special purpose, and knowing that the parent or proper guardian did not consent, is yet not within the statute. For, then, every schoolmistress might dispose in the same manner of the children committed to her care, though such delegation of the custody of a child for a particular purpose be no delegation of the power of disposing of her in marriage, but the governance of the child in that respect may still be said to rest with the parent." (1 East Pleas of the Crown, page 457.)

In reference to this opinion Mr. Mayne says:—"I think there can be no doubt that if a schoolmistress were to connive at the elopement of one of her pupils with a man, she would be convicted under section 361. She could have no authority to consent to such an act and he could not have supposed that she had." (Mayne's 'Criminal Law of India,' page 643) and Mr. Roscoe suggests that the correct view "is to hold that, by the fraud of the temporary guardian, the latter loses all right to the possession of the child, who reverts into the possession of her natural guardian" and he states that in accordance with the above view Amphlett, B., in a case tried at Leeds Assizes (after consulting Coleridge, C.J.), ruled that by the fraud of the temporary guardian the right to possession of the child had reverted (Roscoe's 'Criminal Evidence,' 11th edition, page 254).

In *In the matter of the petition of Prankrishna Surma*(1) the mother of a little girl removed her from her father's house at night, without his consent, and got her married to a certain man. The conviction under section 363, Indian Penal Code, was upheld, the High Court remarking "under any ordinary circumstances, the custody of the mother is the custody of the father, and any removal of the children from place to place by the mother ought to be taken to be consistent with the rights of the father as

(1) I.L.B., 8 Calc., 969 at p. 971.

JAGANNADHA
RAO
v.
KAMARAJU.

"guardian and not as a taking out of his keeping. But the present case is very peculiar. The mother removed the girl from the father's house for the express purpose of marrying her without his consent, and thereby depriving him for ever of her guardianship and custody. This did, we think, amount to a taking out of the keeping of the lawful guardian."

In the present case, though Kamaraju was a guardian within the meaning of section 361, he was not the only guardian. The explanation to the section says that the words "the lawful guardian" include any person lawfully entrusted, &c. Such a temporary guardianship does not exclude the higher legal guardianship of the father. That remains in full force. Here Kamaraju was a lawful guardian and the girl's father also was her legal and lawful guardian. It cannot, of course, be said that the accused removed the girl from the immediate or physical keeping or possession of her father, but such possession on the part of the father is not necessary. In the case of *Reg v. Mycock*(1) the girl, aged sixteen, met the accused by appointment at some distance from her father's house and went away with him voluntarily. Willes, J., in summing up said that "the Statute (24 and 25 Vict., cap. 100, section 55), upon which the prosecution was based was for the protection of the rights of parents, and the prisoner had no more right to deprive the father of the girl of his property, as it were, in her, and his possession of her, than he would have a right to go into his shop and carry away one of his telescopes or optical instruments. The girl was, also, just as much in the possession of her father when she was walking in the street, unless she had given up the intention of returning home, as if she had actually been in her father's house when taken off." Again, in the *Queen v. Manktelow*(2) the girl met the accused at a distance from her father's house and went away with him. In the course of the argument Alderson, B., remarked "what is to determine the father's possession? Suppose the prisoner meets the girl in the garden and takes her away from that place with him, does he not take her out of her father's possession? Or suppose she is walking a mile from the house, or going on a message for her father, and the man meets her and carries her away, is she not in her father's possession? Suppose she is staying on a visit, is this any difference?"

(1) 12 Cox. Cr. C., 28.

(2) 22 L.J., (M.C.), 115.

JAGANNADHA
RAO
v.
KAMARAJU

Jervis, C.J., delivered the judgment of the Court (all five Judges concurring), upheld the conviction, and said "according to the opinion of Maule, J., in the *Reg v. George Kipps*(1), it is not necessary that there should be an actual possession by the father. "So long as she continues a member of her father's family and is subject to his control, she is in his possession. The facts of this case show that there was a continuing possession in the father." The case of *Reg v. Henkers*(2) is not opposed to this view, for there the girl, aged under 18 years, had been living in London employed as a barmaid, while her father was living in Wimbledon. There is a clear and wide distinction between a girl of nearly eighteen who has gone into employment away from her father and is earning her livelihood apart from him, and a child who is still habitually living in her father's house and is dependent on him for support and who goes on a merely temporary visit to the house where her sister is staying. The English Statutes are intended to protect the rights of parents and to safeguard the interests of minors and these are also the objects of the provisions of the Indian Penal Code in sections 361 and 363. The explanation to section 361 is not intended to limit the protection which the section gives to parents and minors. It is intended to extend that protection by including in the term "lawful guardian" any person lawfully entrusted with the care or custody of the minor. The fact that a father allows his child to be in the custody of a servant or friend, for a limited purpose and for a limited time, cannot, in my judgment, determine the father's rights as guardian or his legal possession for the purposes of the Criminal Law. This was clearly the view of Alderson, B., and of the Court in *Queen v. Manktelow*(3) already referred to. To hold otherwise would, I think, deprive parents and minors of a protection which they need, and which the law desired to give them. The result of the cases seems to be that the Court must consider all the facts and see whether they are consistent or not with the continuance of the father's legal possession of the minor. If they are not inconsistent, the minor must be held to be in the father's possession or keeping even though the actual physical possession should be temporarily with a friend or other person. In the present case the accused knew that the father of Sarasamma did not, and would not, consent to her removal from the house of Kamaraju for the purpose of being married to

(1) 4 Cox. Cr. C., 167.

(2) 16 Cox. Cr. C., 257.

(3) 22 L.J., (M.C.), 115.

JAGANNADHA
RAO
v.
KAMARAJU.

the third accused. When Kamaraju connived at the taking he knew that it was contrary to the wishes of the girl's father and that he had no authority to consent to the taking, and his connivance thereat was a fraud upon the rights of the father as guardian. A fraudulent consent of this kind, known to the accused to be fraudulent, would not, in my judgment, be of any avail to the accused. So long as the girl was in the house of Kamaraju where the father allowed her to be temporarily, she was still in the father's legal keeping and he was able to exercise control over her through Kamaraju. But when the accused carried her off to their own house, the father had no longer any control over her. By this act they took her from his keeping within the meaning of section 361, and Kamaraju, in conniving at their act was, in my judgment, guilty as an abettor.

It remains to consider what the result of these conclusions is with reference to the appeal against the acquittal of the accused. The charge against them under section 366, Indian Penal Code, is framed in general terms and does not state from whose lawful guardianship the kidnapping took place, and the acquittal is in equally general terms. The records in the case, however, show that the trial was conducted on the footing that the kidnapping was from the guardianship of Kamaraju and of that offence the accused were rightly acquitted. Whether the accused were guilty of kidnapping the girl from the lawful guardianship of her father was not really tried, though on the evidence that would seem to be the offence of which they were guilty.

The charge, however, and the acquittal being in general terms, the acquittal might, I think, be pleaded under section 403, Criminal Procedure Code, in bar of a new trial on a charge of kidnapping from the father unless this Court in terms sets aside the acquittal so far as it relates to this offence.

I would therefore allow the appeal and set aside the acquittal so far as it relates to the offence of kidnapping from the lawful guardianship of P. Acharlu, and I would dismiss the appeal so far as the acquittal relates to the offence of kidnapping from the lawful guardianship of Kamaraju.

I would also direct that the accused be re-tried on the charge of kidnapping the girl from the lawful guardianship of P. Acharlu.

It is of course open to the prosecution to take steps against Kamaraju as an abettor.

DAVIES, J.—I agree.

APPELLATE CIVIL.

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

SABHAPATHI GURUKKAL (PETITIONER), APPELLANT,

1900.
November 8.

LAKSHMU AMMAL AND OTHERS (COUNTER-PETITIONERS),
RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, ss. 16, 16-A, 17, 373—Suit instituted by leave and withdrawn with liberty to bring fresh suit on same cause of action—Subsequent refusal of leave to bring such fresh suit—Legality of order of refusal—Letters Patent, art. 12—Exhaustion of leave by filing suit.

Leave was obtained for the institution of a suit under article 12 of the Letters Patent, and a suit was instituted in pursuance thereof, but, at the settlement of issues, was withdrawn, leave being given to plaintiffs under section 373 of the Code of Civil Procedure to institute a fresh suit upon the same cause of action if so advised. Plaintiffs again applied for leave under article 12 of the Letters Patent to institute the fresh suit, which was refused, and against that order of refusal plaintiff appealed:

Held, that the force of the original order granting leave to institute the suit was exhausted by its institution in pursuance thereof; and that, in consequence, when leave was again applied for, in respect of the institution of the fresh suit, there was nothing to prevent the Court from dealing with the application, and granting or refusing leave, as it deemed proper.

Held also, that the order which was passed by the Court in the due exercise of its discretion must be upheld.

APPEAL from an order passed on the Original Side of the High Court, refusing leave to institute a suit under article 15 of the Letters Patent. On 27th October 1897, the appellant, with others, had obtained leave under article 15 of the Letters Patent to institute a suit on the Original Side of the Madras High Court against the counter-petitioners. Leave was granted by BODDAM, J. The suit was for a declaration of plaintiffs' right as dharmakartas to the Thiagarajaswamiyar devastanam at Tiruvottiyur in the Chingleput District, for the restoration to plaintiffs of their post as gurukkals in the devastanam, for the removal of the defendants (counter-petitioners) from the possession and management of the devastanam and its properties, and for possession of the same. Plaintiffs as well as defendants were described as being residents

* Original Side Appeal No. 30 of 1900, against the order of Mr. Justice Shephard, dated 9th October 1900, made on Civil Miscellaneous Petition in connection with Civil Suit No. 59 of 1898.

ABHAPATHI
GURUKKAL
v.
LAKSHMU
AMMAL.

in Madras, and some of the properties sued for were situate within the ordinary original civil jurisdiction of the High Court. On 9th August 1898, the suit came on for settlement of issues, when petitioners withdrew it upon leave being given them under section 373 of the Code of Civil Procedure by the Court (SHEPARD, OFFG. C.J.) to file a fresh suit upon the same cause of action if so advised. In September 1900, the petitioner (and others) applied for leave under article 12 of the Letters Patent to institute the fresh suit. On 9th October 1900, the Court (SHEPARD, J.) refused to grant leave. Against that order of refusal the petitioner now preferred this appeal.

Mr. John Adam for the appellant.—The learned Judge should not have refused to grant leave. At any rate leave was once granted by the Court and, though the suit was withdrawn with leave to bring a fresh suit, the original order granting leave remains in force. The fact that the previous suit was withdrawn with leave shows that the Court granted permission to bring a fresh suit on the same cause of action. No fresh order was really necessary. The case of *Vythelinga Mudelly v. Cundasawmi Mudelly*(1) is exactly in point. The effect of the withdrawal of a suit under section 373 of the Civil Procedure Code is discussed in *Behari Lal Pal v. Srimati Baran Mai Dasi*(2), where it was held that the effect was to leave the parties in the same position as if the suit had never been brought. Consequently, the original order granting leave remains in force; and the subsequent proceedings should be treated as a nullity.

Kumarasami Sastri for respondents Nos. 1 and 3.—The order permitting the withdrawal of the suit terminated all prior proceedings therein. It cannot be contended that the leave originally granted to sue remains in force, as the order exhausts itself on the filing of the suit. If an order for production or discovery were made, and, before it could be complied with, the suit were withdrawn, could it be said that the order continued any longer in force? The granting of leave depends upon the circumstances existing at the date of the application, and subsequent events might render the granting of leave inexpedient. The case of *Vythelinga Mudelly v. Cundasawmi Mudelly*(1) only lays down that, where an order is refused, it is not open to the parties to renew their application on the same cause of

(1) 8 M.H.C.R., 21.

(2) I.L.R., 17 All., 53.

SABHAPATHI
GURUKKAL
v.
LAKSHMU
AMMAL.

action, and the case of *Behari Lal Pal v. Srimati Baran Mai Dasi*(1) does not refer to orders passed during the progress of the suit or at the institution of it. Leave to sue must be specially asked for and cannot be assumed to have been granted when the order was made permitting the former suit to be withdrawn with liberty to bring a fresh suit. See *Jairam Narayan Haji v. Atmaram Narayan Raje*(2).

JUDGMENT.—In the case of *Vythelinga Mudelly v. Cundasawmi Mudelly*(3) cited for the appellants, the order by which leave to sue was refused remained in force when a subsequent application was presented praying for the grant of leave to institute a suit substantially the same as that for the institution of which leave had been refused. The order granting leave passed on such an application by a Judge other than the Judge who had refused the leave was held to be irregular, as it amounted to a review by the former Judge of the decision of the latter under circumstances which did not permit of the review. The present case is clearly distinguishable. For, in pursuance of Mr. Justice Boddam's order granting leave, a suit was brought, though it was subsequently withdrawn with permission to sue again in respect of the same matter. The force of the order granting leave was exhausted by the institution of the suit in pursuance of the order. Consequently when the appellants applied for leave to institute a fresh suit regarding the same subject-matter, there was nothing to prevent Mr. Justice Shephard from dealing with the application and granting or refusing leave as he deemed proper.

The order which was passed by the learned Judge in the due exercise of his discretion and which refused leave must be upheld and the appeal dismissed with costs.

(1) I.L.R., 17 All., 53. (2) I.L.R., 4 Bom., 482. (3) 8 M.H.C.R., 21.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Boddam.

1900.
October 26.

SAVITRI ANTARJANAM AND OTHERS (DEFENDANTS NOS. 5, 10
AND 11), APPELLANTS,

v.

RAMAN NAMBUDEI AND OTHERS (PLAINTIFF AND DEFENDANTS
NOS. 2 TO 4 AND 6 TO 9), RESPONDENTS.*

Malabar Law—Denial of uralan's title by his co-uralan—Suit by one of two uralans without consulting co-uralan—Maintainability of suit, co-uralan being impleaded as defendant.

One of two co-uralans had for a considerable time denied the title of the other uralan. The latter brought a suit to redeem a kanom without first consulting his co-uralan or asking him to join in it. He impleaded the co-uralan as a defendant giving as his reason that inasmuch as his co-uralan had denied his title it was unnecessary to consult him as to the institution of the suit:

Held, that the suit was not maintainable. It is only when one perversely declines to co-operate with the other, after being invited to do so, and when it is for the benefit of the institution that proceedings should be taken, that one uralan can sue, impleading the other as defendant.

Suit to recover possession of land. Plaintiff sued, as one of the two uralans of the Chunakal devasom, to redeem a kanom of 1882 held by defendants Nos. 1 to 4 over the properties belonging to the devasom. The fifth to eleventh defendants' mana was the other uralan of the devasom. Defendants Nos. 1 and 5 to 8 denied the plaintiff's claim to be co-uralan of defendants Nos. 5 to 11, and pleaded, *inter alia*, (1) that the suit was not maintainable as the plaintiff had not consulted the other co-uralan as to the advisability of bringing it, and (2) that the plaintiff could not sue alone without joining the other co-uralan as co-plaintiff. The District Munsif at first dismissed the suit on a preliminary point, holding "that there being no evidence that the plaintiff consulted defendants Nos. 5 to 11 or any of them about the necessity for this suit or asked them to join as co-plaintiffs, the suit cannot be maintained." On appeal the Subordinate Judge reversed the decree and remanded the suit for determination on

* Second Appeal No. 1098 of 1899 against the decree of A. Venkataramana Pai, Subordinate Judge of South Malabar, in Appeal Suit No. 852 of 1898 affirming the decree of K. Imbichunni Nayar, District Munsif of edunganad in Original Suit No. 298 of 1896.

the merits. He said:—"The District Munsif held that the plaintiff had not consulted the fifth to eleventh defendants as to the institution of the suit, and dismissed the suit. Apparently he relies on the ruling in *Parameswaran v. Shangaran*(1) in support of his decree, dismissing the suit on the ground that the plaintiff had not consulted his co-uralan (the representative member of the fifth to eleventh defendant's mana) as to the institution of the suit; but in that case there was no evidence that the defendant-uralan had repudiated the plaintiff's right to sue in conjunction with himself, whereas in the present case the plaintiff's claim as uralan is denied and (it is asserted) has been denied for over 30 years past. This being so, that ruling is distinguishable. No other authority is cited to support the District Munsif's conclusion. I reverse the Munsif's finding that the plaintiff's omission to consult the fifth to eleventh defendants' mana as to the institution of the suit is fatal to the maintenance of the suit." The District Munsif, after the remand, decreed in favour of the plaintiff on the merits, and his decision was confirmed by the Subordinate Judge on appeal. The Subordinate Judge concluded his judgment by holding that "the plaintiff's title as co-uralan being denied by the opposing defendants, it was unnecessary for him to ask them to join as co-plaintiffs. Plaintiff is therefore entitled to sue alone, impleading his co-uralan's family (fifth to eleventh defendants) as defendants."

Defendants Nos. 5, 10 and 11 preferred this second appeal.

Sundara Ayyar and *Anantakrishna Ayyar* for the appellants.—The suit is not maintainable. The District Munsif distinctly finds, and that finding is apparently accepted by the lower Appellate Court, that the plaintiff did not consult the other admitted co-uralan (the fifth to eleventh defendants' mana) as to the advisability of ejecting the tenants (defendants Nos. 1 to 4) of the plaint devasom. Even admitting that the plaintiff is also a co-uralan, he cannot eject the tenants of the devasom without consulting the other uralan, and discussing the matter with him. All uralans have the right to be consulted in all devasom matters. It has been held that acts of the majority of uralans will be binding on the dissentient minority only if the majority acted after giving proper notice of the matter to the minority and

SAVITRI
ANTARJANAM
v.
RAMAN
NAMBUDEI

(1) I.L.R., 14 Mad., 489.

SAVITRI
ANTARJANAM
v.
RAMAN
NAMBUDRI.

after giving them an opportunity to express their views on the matter, so that the minority may have an opportunity to persuade the majority by arguments in support of their views—*vide Teramath v. Lakshmi*(1). This applies all the more to the present case, where plaintiff wishes to eject the tenants of the devasom, and the other admitted co-uralan is not consulted at all in the matter. The Subordinate Judge holds that the plaintiff can maintain the suit, because the other co-uralan denied the plaintiff's right to be co-uralan. It is submitted that the Subordinate Judge is wrong. The plaintiff cannot ignore his co-uralan, and act as if he were the sole uralan because the co-uralan denies plaintiff's right. The denial of the plaintiff's right by his co-uralan cannot confer on the plaintiff higher rights than he already possesses. In the case of public trusts the general rule is that no act is binding on the trust unless it is done after consultation with all the trustees. Moreover there is no allegation that the defendants were consulted in the matter of the present suit. The plaintiff cannot sue alone. He ought to have invited the other co-uralan to join as co-plaintiff. He is not, as of right, entitled to sue alone, making the other co-uralan a defendant.

J. L. Rosario for respondents.—The contesting defendants denied the plaintiff's right, and they said that plaintiff was not an uralan at all of the plaint devasom. It was, consequently, quite useless for the plaintiff to consult them in any devasom matter. Only one answer could have been given, namely, a repudiation of plaintiff's right to interfere in any way. The cases in *Parameswaran v. Shangaran*(2) and *Puramathan Somayajipad v. Sankara Menon*(3) are really in the plaintiff's favour. When a plaintiff's title is denied, he is relieved from the necessity of consulting his co-uralan. As to the defendants Nos. 5 to 11 not having been made co-plaintiffs, they repudiated the plaintiff's right to sue in conjunction with themselves. It is submitted therefore that the suit is maintainable.

Sundara Ayyar in reply.—There is a clear distinction between the right to be consulted whether any suit should be brought at all on behalf of the devasom, and the right to be made a co-plaintiff in such a suit. If, after determining that a suit is to be instituted,

(1) I.L.R., 6 Mad., 270 at p. 272.

(2) I.L.R., 14 Mad., 489.

(3) I.L.R., 23 Mad., 82.

one who might join in it is not willing to be a co-plaintiff, he may be impleaded as defendant. But it is submitted that no suit could be brought at all on behalf of the devasom without first consulting with all the uralans as to the advisability of instituting it.

JUDGMENT.—The District Munsif found that the suit was instituted by the plaintiff without consulting the defendants Nos. 5 to 11 or even asking them to join and the Subordinate Judge does not disagree with this finding. We must assume therefore that he agreed with it. The Subordinate Judge proceeds to find that it was unnecessary for the plaintiff to ask the defendants Nos. 5 to 11 to join because they had denied his title. We cannot agree with that opinion. If one uralan whose title is denied by the other may bring suits and do other acts without consulting his fellow-uralan, he is virtually constituting himself sole uralan, whereas it is clear law that two co-uralans must act jointly. It is only when one perversely declines to co-operate with the other after being invited to do so and when it is for the benefit of the institution that proceedings should be taken that one uralan can sue impleading the other as defendant.

We think the original decree was right and we therefore reverse the decree of the Subordinate Judge and restore the original decree of the District Munsif with all costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Boddam.

RAMAMIRTHAM AND ANOTHER (DEFENDANTS NOS. 6 AND 7),
APPELLANTS,

No

RANGANATHAN AND OTHERS (PLAINTIFF NO. 2 AND
DEFENDANTS NOS. 1 TO 5), RESPONDENTS.*

*Hindu Law—Bequest to daughter and her sons from generation to generation—
Testator predeceased by legatee who left daughters—Lapse of legacy—Succession
Act—Act X of 1865, ss. 92, 96.*

A Hindu testator, who had no male issue, bequeathed certain real property to his eldest daughter and her sons from generation to generation. The legatee,

* Second Appeal No. 1804 of 1899 against the decree of I. L. Narayana Rao, Acting Subordinate Judge of Kumbakonam, in Appeal Suit No. 570 of 1898, reversing the decree of B. Krishna Rao, Acting District Munsif of Valangiman, in Original Suit No. 161 of 1897.

SAVITRI
ANTARJANAM
v.
RAMAN
NAMBUDRI.

RAMA-
MIRTHAM
v.
RANGA-
NATHAN.

who had daughters, predeceased the testator, who then also died, leaving a widow and other daughters him surviving. The daughters of the deceased legatee claimed the property as the lineal descendants of the testator, contending that although section 96 of the Indian Succession Act did not apply to the case it should be held to govern it by analogy, as affording a guide to justice, equity and good conscience:

Held, that the words used in the will must be construed as meaning "heirs," and that the provision contained in section 96 of the Indian Succession Act could not be extended to such a case.

SUIT for possession of a house. By his will, dated 26th November 1893, one Rangu Vayadi directed that a house and other property "should, after his death, be in the enjoyment of his eldest daughter Velayi and her sons, &c. . . from generation to generation," and that his said daughter Velayi and after her death her heirs should properly maintain the testator's wife. Three other daughters and a grand-daughter of the testator, were alive at the date of the will to each of whom he made bequests. The will also contained the following further provision:—"Should any of my daughters leave no heirs, the other daughters should take her property, in proportion to their shares." The testator had no male issue. Velayi predeceased her father, who also died, leaving his widow and the other legatees him surviving. The widow, who was now impleaded as second defendant, sold the house to the first defendant, who, in turn, sold it to plaintiff, who now sued for possession. Defendants Nos. 2, 3 and 4 were joined as being in possession of the house; third defendant was also a daughter of the testator. Defendants Nos. 6 and 7 were daughters of the late Velayi, and had been joined on their own application. The pleas set up by the various defendants were as follows:—First defendant, who had sold the house to the plaintiff, contended that possession had been given, that the house was not in his possession and that he did not oppose possession being given. Second defendant, who had sold it to first defendant, admitted having executed the sale-deed, but alleged that it had been executed without consideration, and that no title had in fact passed. Defendants Nos. 3, 4 and 5 also contended that the sale was invalid, and the third defendant further claimed the house as heiress of her deceased sister Velayi. Defendants Nos. 6 and 7 claimed the house as the daughters of the legatee Velayi, and relied on the provisions of the will. On the latter claim the following issue was framed:—"Have the defendants Nos. 6 and 7 acquired any title to the house in question under

RAMA-
MIRTHAM
v.
RANGA-
NATHAN.

the will left by Rangu Vayadi?" On this the Munsif said:—"Neither the Hindu Wills Act nor the Indian Succession Act is applicable to the present case (see section 2 of the Hindu Wills Act and section 331 of the Indian Succession Act). Testamentary dispositions which are intended to take effect after the proprietor's death are unknown in Hindu Law. Hence the validity of bequests made under wills and devolution of properties bequeathed thereunder must depend upon principles of justice, equity and good conscience, which could be gathered best by following the rules of law laid down in the Indian Succession Act and extended to Hindus living in the Presidency Towns of Madras and Bombay or possessing property therein. Section 92 of the Indian Succession Act provides that, if the legatee does not survive the testator, the legacy cannot take effect but shall lapse, and form part of the residue of the testator's property unless it appear by the will that the testator intended that it should go to some other person; and contains an explanation that in order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator; but section 96 provides that where a bequest shall have been made to any child or other lineal descendant of the testator and the legatee shall die in the lifetime of the testator, but any lineal descendant of his shall survive the testator, the bequest shall not lapse but shall take effect as if the death of the legatee had happened immediately after the death of the testator unless a contrary intention shall appear by the will. Velayi is the eldest daughter of the testator and her daughters are the sixth and seventh defendants. It would appear from section 96 that they would get the benefit made in favour of Velayi. There is no reason why the rule laid down in section 96 above quoted should not be made applicable to the present case. I can see nothing in the will which would prevent the application of this rule, and I therefore find that the properties bequeathed to Velayi devolve on her daughters (the sixth and seventh defendants)." He held that second defendant had no title to the house at the date of its sale to first defendant, and that the alienation was void. He, however, found that the sales by second defendant to first defendant and by first defendant to plaintiff, were *bonâ fide*, and had been made for good consideration. He dismissed the suit. Plaintiff's son appealed (plaintiff having died). The Subordinate Judge said:—

RAMA-
MIRTHAM
v.
RANGA-
NATHAN.

"The plaintiff prefers this appeal, and contends that, as Velayi predeceased her father, the testator, her children could not claim the benefit of the bequest which lapsed on her death and that the second defendant became the heiress to the testator under the ordinary principles of the Hindu Law of Succession. It is admitted on both sides that the suit house originally belonged to the second defendant's husband, the late Rangu Vayadi, who died without male issue. He made a registered will on 26th November 1893, bequeathing all his property to his daughters. The suit house and some other property were to be taken by Velayi, the mother of the defendants Nos. 6 and 7, but Velayi having predeceased the testator, there would be an intestacy in regard to the properties bequeathed to her. She was to take the property only after the death of the testator, and she had no vested interest in the property during her lifetime. Consequently, Rangu Vayadi continued to be the full owner of the said property until his death, and, after his death, his widow, the second defendant, inherits the estate under the Hindu Law. The will itself does not contain any expressions as to what should become of the bequest, if any of the testator's daughters predeceased him. He did not at all contemplate that any of his daughters would die before him. He clearly thought, as observed by the District Munsif that Velayi would get the bequest and enjoy the properties allotted to her in the will. There is a provision in the will to the effect that, if any of the daughters should die without issue, her share must go to the other daughters, but the said provision was not, in my opinion, intended to cover the case of a legatee predeceasing the testator. It refers to the case where any of the daughters die without issue after having acquired the properties under the will upon the death of the testator. As the testator did not contemplate the contingency of any of his daughters predeceasing him and as he did not otherwise dispose of the property bequeathed to the sixth and seventh defendants' mother Velayi, the devolution of the said property must be governed by the Hindu Law of Inheritance. The Hindu Wills Act and the Indian Succession Act do not admittedly apply to the present case, but still the District Munsif thinks it best to follow the rules laid down in section 96 of the Indian Succession Act in his attempt to decide the question upon principles of justice, equity and good conscience. I think that he is evidently in error in doing so when he has clear principles of the Hindu Law for his

RAMA-
MIRTHAM
v.
RANGA-
NATHAN.

guidance in the matter. . . . There can be no doubt that if the provisions of the Succession Act be made applicable to the present case, the sixth and seventh defendants should become entitled to the suit property. But the said enactment applies only to persons and property lying within the Presidency towns, i.e., within the limits of the ordinary original civil jurisdiction of the High Courts, and we have provisions of the Hindu Law which govern the cases of the others. The rule that a devise which cannot take effect at all is as if it had never been made, is applicable to the present case. The provisions of the Succession Act above referred to cannot therefore, operate to disinherit the second defendant in the case of the property in question, which continued to be the property of her husband up to the time of his demise. In these circumstances I hold that the second defendant inherited the suit property as the heiress of her husband, who did not otherwise dispose of it during his lifetime and subsequently to the death of his daughter Velayi. The *bonâ fides* of the sales of the suit house by the second to the first defendant and by the first defendant to the plaintiff have not been questioned at the time of the hearing of this appeal. The legal reversionary heirs can only raise that question in a suit brought by them for that purpose." He allowed the appeal and decreed in plaintiff's favour.

Defendants Nos. 6 and 7 preferred this second appeal.

V. Krishnasami Ayyar, for appellants, argued that the will conferred an estate on the daughter of the legatee since it was clearly the intention of the testator to confer a benefit upon her issue in the event of her death. The words used in the will conferred the estate not merely on the daughter Velayi but also on her heirs from generation to generation. There was an estate conferred on Velayi and an independent estate on her heirs. These were words of 'purchase' in favour of Velayi's heirs, and not merely words of 'limitation' in respect of the estate taken by the said Velayi. He next contended that inasmuch as Velayi was a lineal descendant of the testator, the gift under the will in favour of Velayi did not fail although she predeceased the testator, inasmuch as she left lineal heirs at the time of the death of the testator. The rule of English Law was well established that a legacy in such a case as this did not lapse, but took effect in favour of the legatee's heirs. The rule was also extended by the Indian Legislature by section 96 of the Indian Succession Act, and was made applicable to

RAMA-
MIRTHAM
v.
RANGA-
NATHAN.

certain classes of Hindus under the Hindu Wills Act. The fact that the application of the rule had been extended to certain classes of Hindus, was a clear indication that it was a reasonable rule, and fit to be extended to sections of the Hindu community. It was also one which could be recommended as in accord with equity and good conscience, and there was nothing in Hindu Law opposed to it in principle. In the absence of any positive direction in Hindu Law, the Courts, under the Madras Civil Courts Act, were bound to act according to rules of equity and good conscience.

Sundara Ayyar and Ramachandra Ayyar for respondents.—The words employed by the testator in conferring an estate on Velayi are words of limitation and not of purchase. The words used in such cases only mark out the quantum of the estate taken by the legatee and are not to be construed as independent gifts in favour of the heirs, who may or may not be in existence. The Privy Council has decided that such language is to be construed as words of limitation only. (See *Ram Lal Mookerjee v. The Secretary of State for India*(1)). Further, the special rule of English Law or the provisions contained in section 96 of the Indian Succession Act or the Hindu Wills Act are not applicable to the parties in the present case. The rule of law in question is a special rule of construction adopted by the English Courts with regard to wills in respect of dispositions in favour of lineal descendants; and though it has been extended by the Legislature in certain special cases in Indian Law, it cannot be said to have become the common law of India, and is therefore not to be put forward as a rule of equity and good conscience. The general rule as to wills is certainly that a legacy lapses if the legatee dies before the testator, because a will can take effect only from the death of the testator. The exception in the case of a legacy to a lineal descendant is a special rule of construction as to the intention of the testator, apparently established for a long time in English Law, but authoritatively introduced by the Indian Legislature only in certain special cases. Such an exceptional rule cannot be applied as a general rule of equity and good conscience, because there is a rule of Hindu Law that governs the case, and it is only in the absence of any special customary law on the point that the Courts here can apply a general rule that is in accord with equity and good conscience.

(1) L.R., 8 I.A., 46; I.L.R., 7 Cal., 304.

The other respondents were not represented.

JUDGMENT.—The words, “sons and grandsons” used in the will have, in our opinion, no other effect than the term ‘heirs’ would have in an English will.

It is argued that because, according to the English Statute and the Indian Succession Act, a gift to the testator’s child does not lapse on the legatee dying before the testator, leaving lineal descendants, the same rule must by analogy apply to this case.

We cannot adopt this view. The provision in the Indian Succession Act is an exceptional one made for a certain class of cases only and we have no power to extend it.

We dismiss the second appeal with costs.

RAMA-
MIRTHAM
v.
RANGA-
NATHAN.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

1900.
November 15.

YAMANA RAO.*

Criminal Procedure Code—Act V of 1898, s. 545—Order for payment of expenses of prosecution out of fine—Court Fees Act—Act VII of 1870, s. 31—Re-payment to complainant of fees paid in criminal Courts.

A person who was convicted by a Deputy Magistrate of having caused hurt, was ordered to pay a fine of Rs. 15, and also the complainant’s costs of the prosecution. In the month following the conviction the Deputy Magistrate issued a warrant for the collection of Rs. 12-4-0 from the accused, of which Rs. 2-4-0 was levied under section 31 of the Court Fees Act as Court fees paid by the complainant, and Rs. 10 under section 545 of the Code of Criminal Procedure for two fees of Rs. 5 each paid by the complainant to the medical officer for a certificate and for giving evidence in the case. Objection having been made to the recovery of these sums, the case was referred to the High Court for orders:

Held, that the levy of Court fees was warranted by section 31 of the Court Fees Act, which is not modified by section 545 of the Code of Criminal Procedure.

Held also, that the Deputy Magistrate’s order passed under section 545 of the Code of Criminal Procedure for the payment of expenses incurred in the

* Criminal Revision Case No. 322 of 1900, referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by S. Gopalachariar, Acting Sessions Judge of Kistna, in letter No. 513, dated 21st August 1900.

QUEEN-
EMPRESS
v.
YAMANA
RAO.

prosecution was unsustainable, and such expenses could only be awarded to the complainant out of the fine levied from the accused and not in addition to it.

CASE referred for the orders of the High Court. The facts are set out in the head-note and appear more fully in the following judgment.

The parties were not represented.

JUDGMENT.—In a reference of this kind the Sessions Judge should have stated the facts clearly and consecutively. They are as follows :—

One Yamana Rao was convicted of an offence under section 323 of the Indian Penal Code by the Deputy Magistrate of Narsaraopet on the 24th April 1899, and was ordered to pay a fine of Rs. 15 and also to pay “the complainant’s costs of the prosecution.”

In May 1900 the Deputy Magistrate issued a warrant for the collection of Rs. 12-4-0 from the accused. This sum was made up as follows :—Rs. 2-4-0 Court and process fees paid by the complainant; Rs. 10 two fees of Rs. 5 each paid by the complainant to the medical officer for a certificate and for giving evidence in the case.

The accused objected to the recovery of these sums on the ground that they were not assessed at the time when the judgment of the Deputy Magistrate was pronounced, but the Deputy Magistrate refused to review his order or withdraw the warrant.

In the explanation furnished by the Deputy Magistrate to the Sessions Judge, the Deputy Magistrate states that the sum of Rs. 2-4-0 was levied under section 31 of the Court Fees Act, and that the levy of the Rs. 10 was intended to be made under section 545, Criminal Procedure Code.

The Sessions Judge refers the case on the ground that the whole order of the Deputy Magistrate to levy Rs. 12-4-0 was illegal. We are unable to agree in this view so far as concerns Rs. 2-4-0. The levy of this sum was warranted by section 31 of the Court Fees Act. The opinion of the Sessions Judge that this section must be held to be modified by section 545, Criminal Procedure Code, is incorrect. Each section provides for a separate matter. Section 31 of the Court Fees Act requires the Magistrate to direct the accused to repay to the complainant in certain cases the amount of Court and process fees paid by the

QUEEN-
EMPRESS
v.
YAMANA
RAO.

complainant under the provisions of the Court Fees Act. Section 545, Criminal Procedure Code, gives a Magistrate a discretion in certain cases to grant to the complainant out of any fine levied from the accused, the expenses properly incurred in the prosecution and also compensation for injury caused by the offence committed. The duty of the Magistrate to order payment of Court and process fees under section 31 of the Court Fees Act is imperative, whereas under section 545 of the Code of Criminal Procedure he has a discretion to award the expenses of the prosecution or to refuse to do so. It follows that section 545 of the Criminal Procedure Code must be taken to exclude those expenses in regard to which the Court has no discretion.

The order of the Deputy Magistrate therefore as regards Rs. 2-4-0 must be upheld.

The order as to Rs. 10 is clearly unsustainable, for although the medical officer’s fees were expenses properly incurred in the prosecution, they could only be awarded to the complainant out of the fine levied from the accused, and could not be levied from the accused in addition to the fine.

That part of the Deputy Magistrate’s order must be cancelled. In lieu thereof, however, we direct that the sum of Rs. 10 be paid to the complainant out of the fine collected from the accused.

APPELLATE CIVIL.

Before Mr. Justice Subrahmanya Ayyar and Mr. Justice Boddam.

SUBRAHMANIA AYYAR (PLAINTIFF), APPELLANT,

v.

RANGAPPA KALAKKA THOLA UDAYAR (DEFENDANT),
RESPONDENT.*

1900.
November 21.

Rent Recovery Act (Madras)—Act VIII of 1886, s. 33—Sale of distrained property—Bid for one item sufficient to meet arrears of rent—Failure by bidder to complete purchase—Re-sale of item with others—Legality of sale—Satisfaction of arrears.

A landholder distrained the property of a tenant and brought it to sale under

* Second Appeal No. 1040 of 1899 against the decree of L. C. Miller, Acting District Judge of Trichinopoly, in Appeal Suit No. 121 of 1898, affirming the decree of C. Ranga Rao, District Munsif of Ariyalur, in Original Suit No. 949 of 1896.

SUBRAHMANYA
 AYYAR
 v.
 RANGAPPA
 KALAKKA
 THOLA
 UDAYAR.

section 33 of the Rent Recovery Act (Madras), 1865, when a bid was made for the first item which was sufficient to satisfy the arrear. The bidder, however, paid only a small portion on account of his bid; and failed to pay the balance, and the item was subsequently put up for sale again, with others, and purchased by the landholder. A suit was then brought to set aside the sale, when it was contended that inasmuch as a bid equal to the amount of the arrear had been made for a portion of the property the claim of the landholder had been satisfied, under section 33 of the Rent Recovery Act, though the whole amount bid had not in fact been paid: also that a subsequent sale of the rest of the tenant's property was illegal and that the landholder's proper remedy lay in taking proceedings against the defaulting purchaser:

Held, that the contention could not be upheld. An arrear of rent is only satisfied by a sale when the amount bid is paid, till when the debt subsists.

Held further, that notice of the second sale was not necessary under section 39 of the Rent Recovery Act (Madras), 1865.

Suit to set aside a sale held for the recovery of rent and to recover the surplus of the proceeds of a prior sale. Plaintiff was a raiyat under the defendant, the zamindar of Udayarpalayam, in respect of six items of land. Rent having fallen into arrears, defendant distrained upon the plaintiff's interest in the land, and brought the same to sale under section 33 of the Rent Recovery Act (Madras), 1865. The land was sold in lots, and the bid for the first lot was equal to the amount of rent in arrears. The bidder, however, only paid Rs. 5, and failed to pay the balance; and the lot No. 1, together with the other items, was subsequently put up for sale again and purchased by the defendant. Plaintiff now sued to set aside this sale, and to recover the land. The District Munsif dismissed the suit. The District Judge, on appeal, after setting out the facts, said:—"The plaintiff sued to set aside this sale and recover the land and the question for decision is therefore whether the second sale was a legal sale. The plaintiff contends that the zamindar was bound to proceed only against the defaulting purchaser at the first sale. The defendant denies this, contending that the second sale was legal and the plaintiff should go against the defaulting purchaser, if damnified. In the sale of moveable property, the distress is to be withdrawn as soon as the arrear is satisfied (section 33 of the Rent Recovery Act). In the sale of interests in land, section 40 requires that the same rules should be applied: that is to say, the notice that the land is to be sold (section 39) should be withdrawn in regard to unsold land as soon as the arrear is satisfied by the sale of a portion of the land. The question then is, can the arrear be said to be satisfied when a sum

equal to it is bid, though not paid. I think not: it seems to me that satisfaction involves a payment, not merely an offer to pay, and that, until payment, the notice need not be withdrawn. But, so long as the notice remains in force, the further sale can legally take place without further notice, at least I find nothing in the Act to prevent this. It does not appear to me that the remedy for default given by section 35 is necessarily the only remedy open to the landholder: that section applies when the whole property has been sold or when a portion has been sold and the distress in regard to the rest withdrawn; but the fact that such remedy is given is not a warrant for holding that a distress or sale notice may not be maintained even after a portion of the property is sold until the arrear is satisfied. The sale was, I think, legal." He dismissed the appeal.

Plaintiff preferred this second appeal.

Balasubrahmaniam Ayyar for appellant.—As soon as the sale is over and a sum sufficient to cover the arrears is realised thereby the liability of the tenant ceases—see section 33 of Act VIII of 1865 which provides that if the arrear be satisfied by the sale of part of the property and not by payment to the landlord, the distress shall immediately be withdrawn. Section 35 expressly providest hat in case of a re-sale, the defaulting purchaser shall be liable for the loss. And clause (3) of the same section provides that the difference or increase of the amount realised in the second sale shall be the property of him on whose account the first sale was made, and not of the tenant. Having regard to these sections it is submitted that the tenant's liability ceases with the first sale, and his property is not liable any further. Even if it be otherwise, the tenant is entitled to be notified if the purchaser makes default and that the property, even the unsold part of it, is going to be sold. This is not a case in which collusion is alleged, much less proved between the tenant and the defaulting purchaser. Here the landlord took advantage of the default of the purchaser and brought about a sale of the tenant's property for a low price, the landlord having been the only person present at the second sale. Though there is no specific provision for resales in the Rent Act, the procedure prescribed for the first sale in sections 39, 40 and 18 of Act should be followed. Section 309 of the Civil Procedure Code lays down such a rule and equity and good conscience requires it to be followed in the case of rent sales.

SUBRAHMANYA
 AYYAR
 v.
 RANGAPPA
 KALAKKA
 THOLA
 UDAYAR.

SUBRAHMANIA
AYYAR
v.
RANGAPPA
KALAKKA
THOLA
UPAYAR.

Tiruwenkatachariar for respondent.—Section 33 provides that if the arrear be 'satisfied' the distress shall be withdrawn. The arrears can be 'satisfied' only by payment and not by a mere bid equivalent to the arrear. The arrear subsists as a debt till the bid is paid (*Khiroda Moyee Dossee v. Golam Somdanee*(1)). The landlord's claim in case of default by a purchaser is not only as against the defaulting purchaser but also as against the tenant, who is not discharged except by payment of his debt. It has been so held under the analogous provisions of the Civil Procedure Code (see *Anandray Bapuji v. Shekh Buba*(2)). There is no obligation to give notice for a resale. The tenant is apprised of his liability. Further, there is no allegation in the plaint of any want of publication of the second sale. Even if there were any irregularity in publishing or conducting sales under the Rent Act, section 36 lays down that the sale is not thereby vitiated. It is not provided, as it is under section 311 of the Civil Procedure Code that if such irregularity causes damage the sale can be set aside.

Balasubrahmania Ayyar in reply.

JUDGMENT.—The plaintiff (appellant) seeks to set aside a sale of his immoveable property under a distress for rent.

It is contended that, because a bid equal to the amount of the arrears was made for a portion of the plaintiff's property which had been so distrained for arrears of rent, the landlord's claim was thereby satisfied under section 33 of Act VIII of 1865 though the amount bid was not paid; and also that a subsequent sale of the rest of his property was illegal as the only remedy lay in taking proceedings against the defaulting purchaser. We cannot agree with this contention (see *Anandray Bapuji v. Shekh Baba*(2)).

The arrear is only satisfied by a sale when the amount bid is paid, till when the debt is still subsisting (*Khiroda Moyee Dossee v. Golam Somdanee*(1)). Notice to the plaintiff of the second sale was not necessary under section 39 of Act VIII of 1865.

There was no allegation in the plaint nor proof that the requirements of the law in regard to publication of the second sale were not complied with. Even if there were any irregularity in that respect, we are of opinion that that would not be a sufficient ground for setting aside the sale.

The second appeal is dismissed with costs.

(1) 21 W.R., (C.R.), 149.

(2) I.L.R., 2 Bom., 562.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and
Mr. Justice Subrahmania Ayyar.

CHAKRAPANI CHETTIAR (COUNTER-PETITIONER
No. 3 AND DECREE-HOLDER), PETITIONER,

1900.
November
23.

DHANJI SETTU AND OTHERS (PETITIONER AND COUNTER-
PETITIONERS NOS. 1 AND 2, AND REPRESENTATIVE OF COUNTER-
PETITIONER No. 2), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 311—Setting aside sale in execution of decree—Postponement of sale from proclaimed date, and subsequent sale without fresh proclamation—Waiver of fresh proclamation by judgment-debtor—Objection to sale by other judgment-creditor for want of proclamation—Sustainability.

A, the decree-holder in a suit, attached property of his judgment-debtor. B, the holder of another decree against the same judgment-debtor, brought the property to sale in execution of his decree. The sale was at first proclaimed for a certain date, but was twice postponed on the application of the judgment-debtor, who consented to waive the making of a fresh proclamation. A claimed to have the sale set aside on the ground of irregularity:

Held, that a waiver by a judgment-debtor of a fresh proclamation after a sale has been adjourned does not necessarily prevent a judgment-creditor from objecting to a sale so held, on that ground.

Seem, that the refusal by a Court to issue a fresh proclamation, if applied for by a judgment-creditor in such a case, would constitute a ground on which the regularity of the sale might be impeached.

PETITION to revise an order setting aside a sale. Counter-petitioner, one Mulji Dhanji Settu, had obtained a decree against one Ahamed Koya in Original Suit No. 378 of 1897, and the properties of the judgment-debtor were attached for the decree-debt, being worth over Rs. 1,000. A plaintiff in another suit, (Original Suit No. 477 of 1898), also obtained a decree against the same judgment-debtor, and the properties of the judgment-debtor were brought to sale in execution of that decree. The sale had at first been proclaimed for 23rd January 1899: but the judgment-debtor applied on two occasions for a postponement, at the same time

* Civil Revision Petition No. 33 of 1900, under section 622 of the Civil Procedure Code, praying the High Court to revise the order of W. H. Welsh, District Judge of South Malabar, in Civil Miscellaneous Appeal No. 26 of 1899, presented against the Order of P. Govinda Menon, Principal District Munsif of Calicut, in Civil Miscellaneous Petition No. 460 of 1899 (Original Suit No. 477 of 1898).

CHAKRAPANI
CHETTIAR
v.
DHANJI
SETTU.

agreeing that no further proclamation should be necessary. On the first application the District Munsif passed the following order:—"Sale is stayed for one month." On the second he said:—"Sale adjourned to the 6th of March." The sale took place on the latter date without further proclamation. Counter-petitioner, decree-holder in Original Suit No. 378 of 1897, who had applied for rateable distribution under section 295 of the Code of Civil Procedure, thereupon sought to set that sale aside alleging that it had been brought about by collusion, that the proceeds, which only amounted to Rs. 15, were far below the value of the properties sold, and that the decree-holder in Original Suit No. 477 of 1898 was himself the real purchaser, though the purchase had been made in the name of his clerk, one Chakrapani Chettiar, the present petitioner in the High Court. He complained that there had been no proclamation and that particulars of the Government revenue, rent, &c., had not been properly shown in the notice. The Munsif held that the sale had been conducted in an irregular manner and set it aside. He said:—"The sale in the case was certainly held in an irregular way. The irregularity consisted in not advertising the sale for the day (6th March 1899) on which it was carried out. The sale was carried out in pursuance of a proclamation in which the sale was fixed for the 23rd January 1899. On that day the decree-holder and judgment-debtor put in joint application praying for adjournment of the sale for a month, which was granted (Miscellaneous Petition No. 148 of 1899). On the 23rd February following they made another application for adjournment of the sale to the 6th March which was also granted (Miscellaneous Petition No. 338 of 1899). On that day the sale took place without a fresh proclamation. It may be that the judgment-debtor could not himself object on the score of want of a fresh proclamation, seeing that he consented, by the applications for adjournment, to the sale being carried out without a fresh proclamation. But the petitioner in this case was another decree-holder of the same judgment-debtor and had attached the same property for his decree. As against him the absence of a fresh proclamation amounted to an irregularity under section 291 of the Code of Civil Procedure. The irregularity being established, the next question is whether, in consequence of it, substantial loss was sustained. The evidence of the petitioner's first witness, who conducted the sale, shows that, at the sale, there was hardly any

one else to bid except the decree-holder's clerk Chakrapani Chetti, to whom it was knocked down for the ridiculously small price of Rs. 15. The property is shown to be worth between Rs. 1,000 and 1,500. . . . The description of the property as given in the proclamation is also defective to a certain extent; but I do not think that that has contributed to the fall in the price. There seems to me to be also considerable force in the petitioner's allegation, that the counter-petitioner is a purchaser benami for the decree-holder. He is decree-holder's clerk who came to instruct the decree-holder's vakil, and he managed somehow to drive away the other bidders by letting it be understood that the sale was going to be adjourned again. The evidence of the decree-holder to the effect that he did not ask his clerk to bid for him and that of the clerk to the effect that he purchased for his own use is not entitled to credit. I am of opinion that there was material irregularity in the publication, if not also in the conduct (on the particular day) of the sale, and that substantial loss has been sustained in consequence. The nature and extent of the loss is clear from the fact that property worth more than a thousand rupees was knocked down for Rs. 15. The sale must be and is hereby set aside."

Against that order the purchaser, Chakrapani Chettiar, appealed. The District Judge said:—"It appears that there was a material irregularity; that is, the first adjournment of sale on 23rd January was not to a specified day and hour but "for one month." The hour on 6th March, when the property was actually knocked down, does not appear to have been specified nor was there any subsequent proclamation nor beat of drum. The first proclamation does not show what the patam is, nor does it contain mention of such encumbrances as that in exhibit I, as required by section 287, Civil Procedure Code, clause (c). As for substantial injury, the decree-holder's clerk who bought the property for Rs. 15 admits that the annual rent is Rs. 96. . . . I am not satisfied that there is any reason for dissenting from the conclusion arrived at by the Court. The judgment-debtor's pleader also supports the order of the Court." He dismissed the appeal.

Against that order of dismissal, the purchaser preferred this civil revision petition.

Sundara Ayyar and *Anantakrishna Ayyar* for the petitioner.—The lower Courts had no jurisdiction to set aside the sale under

CHAKRAPANI
CHETTIAR
v.
DHANJI
SETTU.

CHAKRAPANI
CHETTIAR
v.
DHANJI
SETTU.

section 311, Code of Civil Procedure, on the application of one who had obtained a decree against the same judgment-debtor and who had applied for rateable distribution under section 295, Code of Civil Procedure. [SUBRAHMANIA AYYAR, J.—It has been held in *Lakshmi v. Kuttunni*(1) and *Ajudhia Prasad v. Nand Lal Singh*(2) that one entitled to a share under section 295, Code of Civil Procedure, may apply under section 311, Code of Civil Procedure, to have a sale set aside on the ground of irregularity.] It is submitted that as the judgment-debtor waived his right to have a fresh proclamation and on that understanding the sale was from time to time adjourned, and eventually held on an adjourned date, another decree-holder of the same judgment-debtor cannot complain of the absence of a fresh proclamation and claim to have the sale set aside on the ground of irregularity. Section 291 of the Code gives the judgment-debtor the right to consent to waive a fresh proclamation. Another decree-holder of the judgment-debtor cannot be in a better position than the debtor himself, and there is no question of fraud or collusion between the former decree-holder and the judgment-debtor here. *Girdhari Singh v. Hurdeo Narain Singh*(3), and *Arunachellam Chetti v. Arunachellam Chetti*(4) lay down that the judgment-debtor could not, under such circumstances, impugn the sale. The fact that the price fetched was low is, by itself, no ground for setting aside the sale. See *Olpherts v. Mahabir Pershad Singh*(5); *Lakshmi v. Krishnabhat*(6); *Girdhari Singh v. Hurdeo Narain Singh*(3). [SUBRAHMANIA AYYAR, J.—How do you bring your case under section 622 of the Code?] The lower Court had no jurisdiction to set aside the sale under section 311 of the Code, unless material irregularity and consequent substantial injury were proved. See *Lakshmana v. Najimudin*(7); *Birj Mohun Thakoor v. Rai Uma Nath Chowdhry*(8); and *Joseph v. The Salt Company*(9). Here the conditions necessary to give the Court jurisdiction to set aside the sale are wanting. [SUBRAHMANIA AYYAR, J.—The first Court finds that the decree-holder himself purchased the properties in the name of

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

(2) I.L.R., 15 All., 318.

(3) L.R., 3 I.A., 230.

(4) L.R., 15 I.A., 171; I.L.R., 12 Mad., 19.

(5) L.R., 10 I.A., 25; I.L.R., 9 Cal., 656.

(6) I.L.R., 8 Bom., 424.

(7) I.L.R., 9 Mad., 145.

(8) L.R., 19 I.A., 154; I.L.R., 20 Cal., 8.

(9) I.L.R., 17 Mad., 371.

his clerk. Apparently there was no leave to bid granted under section 294 of the Code. It would appear that the sale was rightly set aside.] No such ground is taken in the petition which was put in for setting aside the sale. Neither of the lower Courts make any mention of want of leave under section 294; and the point cannot be raised for the first time in the High Court.

Subrahmania Sastri, for the respondent, was not called upon.

JUDGMENT.—It is not disputed that it was competent for the petitioner in the Court of First Instance who, as decree-holder in Suit No. 378 of 1897, was entitled to rateable distribution of the assets realized in the sale in execution of the decree in Suit No. 477 of 1898, to apply under section 311 of the Civil Procedure Code to have the sale in execution of the decree in Suit No. 477 set aside on the ground of irregularity. See *Lakshmi v. Kuttunni*(1). The sale was twice adjourned with the consent of the judgment-debtor, and finally took place, also with the consent of the judgment-debtor, without a fresh proclamation. The argument of the petitioner before this Court is that by reason of the judgment-debtor having consented to the adjournments, and to the sale taking place without a fresh proclamation, the Court of First Instance, in setting aside the sale exercised a jurisdiction not vested in it by law or acted in the exercise of its jurisdiction illegally or with material irregularity. It has been held by this Court that when a Court professing to act under section 311 of the Code of Civil Procedure set aside a sale without proof of substantial injury the order was passed without jurisdiction within the meaning of section 622, Code of Civil Procedure. See *Lakshmana v. Najimudin*(2).

It is no doubt the interest of the judgment-debtor to require a proclamation to issue, but it does not follow because section 291 allows a sale to take place after an adjournment without a proclamation, if the judgment-debtor waives his right to a proclamation, that it is not competent under any circumstances for a judgment-creditor to object to the sale taking place without a fresh proclamation or to impeach the regularity of the sale on the ground that there has been no fresh proclamation. It might well be that a judgment-creditor desires a fresh proclamation to issue notwithstanding the waiver by the judgment-debtor.

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

(2) I.L.R., 9 Mad., 145.

CHAKRAPANI
CHETTIAR
v.
DHANJI
SETTU.

CHAKRAPANI
CHETTIAR
v.
DHANJI
SETTU.

If, on an application by the judgment-creditor that a fresh proclamation should issue, the Court declined to allow it to issue, we should be disposed to hold that this was a ground on which the regularity of the sale could be impeached by the judgment-creditor. But it is not necessary for us to decide this point.

There was no doubt a mis-description of the property but as the District Munsif finds expressly that there was no loss by reason of this mis-description it cannot be relied upon as a ground for setting aside the sale.

The District Munsif finds that the property was bought by the decree-holder's clerk, and he finds that the evidence of the decree-holder to the effect that he did not ask his clerk to bid for him and of the clerk to the effect that he purchased for his own use is untrue. The decree-holder did not obtain leave to bid. The District Munsif does not in terms refer to section 294 of the Code of Civil Procedure, but he finds in effect that there had been a violation of its provisions.

The District Munsif also holds that there was substantial loss by reason of the property having been bought by the decree-holder's clerk, and the District Judge states that he is not satisfied that there is any reason for dissenting from the conclusion arrived at by the District Munsif. There can be no doubt, therefore, that the sale was invalid. The fact that section 294 of the Code of Civil Procedure was not referred to in the petition or in the judgments of the Courts below does not preclude us from holding the sale to be invalid as the point was expressly raised and determined in the Court of First Instance.

In our opinion it cannot be said that the Court of First Instance acted without jurisdiction in setting aside the sale and this petition must be dismissed with costs.

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

QUEEN-EMPRESS

v.

KUPPUMUTHU PILLAI.*

1900.
November
27.

Criminal Procedure Code—Act V of 1898, s. 528—Transfer of case at request of Magistrate—Notice.

An order for the transfer of a case, made at the request of the Magistrate on whose file the case stands, and not on the application of a party, is an exception to the general rule that an order for transfer should not be made under section 528 of the Code of Criminal Procedure without notice to the other side.

PETITION for the revision of an order of the District Magistrate of Tinnevely transferring a case on the file of the Sub-Magistrate of Palamcottah to that of the Sub-Magistrate of Tuticorin. The order of the District Magistrate had been passed on reading the petition and affidavit of the accused in the case in which transfer was asked for, and a report from the Sub-Magistrate of Palamcottah. The District Magistrate passed the following order:—"The case is transferred to the file of the Sub-Magistrate of Tuticorin for trial and disposal according to law. The Sub-Magistrate of Palamcottah has himself suggested the desirability of the case being transferred from his file and there is no necessity to enquire how far all or any of the allegations in the petitions are sustainable. The Sub-Magistrate of Palamcottah will forward the records of the case direct to the Sub-Magistrate of Tuticorin." No notice of the application for transfer had been given to petitioner, who was the complainant in the case.

Complainant now preferred this criminal revision petition.

Mr. Joseph Satya Nadar, for the petitioner, contended that notice was necessary, and that the transfer should not have been made without it.

JUDGMENT.—The order for transfer was in effect made at the request of the Sub-Magistrate, not on the application of a party.

* Criminal Revision Case No. 426 of 1900, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the order of J. P. Bedford, District Magistrate of Tinnevely, in No. 614, dated 31st August 1900.

QUEEN-
EMPRESS
v.
KUPPUMUTHU
PILLAI.

Such a case is an exception to the general rule that an order should not be made under section 528 of the Criminal Procedure Code without notice to the other side. The Court to which the case was transferred was selected by the District Magistrate as the most convenient for the parties. We see no reason to interfere with the exercise of his discretion.

The petition must be dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Davies and Mr. Justice Benson.

1900.
December 7.

QUEEN-EMPRESS

v.

LAKSHMANNA AND OTHERS.*

Cattle Trespass Act—Act I of 1871, s. 24—Rescue of cattle after seizure for trespassing on public property—Conviction—Omission to record finding as to whether locality was public property—Legality of conviction.

Certain persons had been fined for rescuing cattle after seizure under section 24 of the Cattle Trespass Act, 1871. The judgment contained no finding to the effect that the land on which the cattle had been seized was public property in charge of the Public Works Department:

Held, that the conviction must be set aside, and the case remanded.

PETITION to revise a judgment of the Head Assistant Magistrate of Kistna confirming the conviction of the petitioners by the Sheristadar Second-class Magistrate of Nuzvid. The petitioners had been fined under section 24 of the Cattle Trespass Act, 1871, for rescuing cattle after seizure. According to the prosecution, the cattle, some thirty-five in number, were seized, while grazing on the banks of the Pullera canal, by the gumastah in charge and driven towards the pound by him and his coolies. The cattle were then rescued by the accused when within twenty yards of the pound. On appeal, the Acting Head Assistant Magistrate upheld the conviction. Neither the Second-class Magistrate nor the Head Assistant Magistrate recorded a finding to the effect that the land

* Criminal Revision Case No. 381 of 1900, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of J. F. Bryant, Acting Head Assistant Magistrate of Kistna, in Criminal Appeal No. 17 of 1900, affirming the finding and sentence passed by the Sheristadar Second-class Magistrate of Nuzvid in Calendar Case No. 313 of 1899.

upon which the cattle had been seized was public property and in charge of the Public Works Department.

From the above conviction the accused preferred this criminal revision petition.

V. Krishnasami Ayyar and Subrahmania Sastri for the accused.

JUDGMENT.—The conviction under section 24 of the Cattle Trespass Act can only be supported if the cattle were “liable to be seized under this Act.” If the cattle were not “liable to be seized” their rescue was no offence, and the fact that the rescuers had a special remedy under section 20 does not affect the matter.

The cattle were not liable to be seized in this case by the officers of the Public Works Department unless they were trespassing on public property in charge of the officers of the Public Works Department (*Vide* section 11 of the Act). Neither of the Magistrates has decided that the land on which the cattle were seized was public property and in charge of the Public Works Department. The conviction must be set aside and the case remanded for disposal by the Second-class Sheristadar Magistrate of Nuzvid according to law.

APPELLATE CRIMINAL.

Before Mr. Justice Davies and Mr. Justice Benson.

1900.
December 7.

QUEEN-EMPRESS

v.

VIRASAMI.*

Stamp Act—Act II of 1899, s. 69—Court Fees Act—Act VII of 1870 (as amended by Act XII of 1891), s. 34—Sale by thief of stolen stamps—Offence.

A person who had been convicted of stealing two stamps was charged, under section 69 of the Stamp Act, 1899, with having sold them, he not being a licensed vendor of stamps:

Held, that the words “sells or offers for sale,” which occur in section 69 of the Stamp Act and in section 34 of the Court Fees Act include the case of a thief who exchanges a stolen stamp for a sum of money, even though the thief cannot give a legal title by the transaction.

* Criminal Appeal No. 845 of 1900, under section 417 of the Code of Criminal Procedure against the judgment of acquittal passed on the accused in Calendar Case No. 80 of 1900 by K. V. Srinivasan, Head Quarters Deputy Magistrate, Masulipatam, Kistna District.

QUEEN-
EMPRESS
v.
VIRASAMI.

APPEAL against an acquittal. One Virasami was charged with having committed an offence under section 69 of the Stamp Act, 1899, by selling two stamps of the value of Rs. 10 each, he not being a licensed vendor of stamps. The accused admitted the sale, but stated that he did not know it was an offence. It appeared that he had been already convicted for the theft of the stamps. The judgment of the Deputy Magistrate was as follows:—"The accused in this case is one Vali Virasami who was previously convicted for the theft of certain impressed stamps. He sold these stamps to two persons and being a person not licensed to sell stamps is now prosecuted under section 69(a) of the Stamp Act. The fact of delivering the stamp to another and taking money from him is admitted by the accused. There is also no question that, if the property disposed of by a thief who had stolen it were not stamps or other such articles on the sale of which the restrictions are laid, the disposal of the stolen property by the thief is itself no offence. The disposal of the property is however a distinct transaction from the original theft, and if the former is an offence by virtue of a special incident there is no reason why a person should not be convicted of both the offences. The question in the present case is merely whether the disposal by a thief of the stamp paper that he has stolen amounts to a sale under the Stamp Act. There is no definition of the word sale in the Stamp Act, and in the absence of such definition it should, I think, be understood in the sense that it is used in legal phraseology which may be gathered from the definition of this word in the Contract Act and the Transfer of Property Act. In this sense it involves a transfer of ownership from the seller to the buyer and presumes ownership in the property sold of the seller. A thief cannot be said to have such ownership and the person with whom a stolen property is found is liable to be deprived of it. I am strengthened in this view by the fact that the word sale is defined in the Madras Abkari Act and given a wider sense and the presumption therefore is that, where there is no such special definition, the strict and narrower meaning should be adopted. For these reasons I consider that the accused has committed no offence under the Stamp Act and he is therefore acquitted."

Against this judgment of acquittal the Public Prosecutor preferred this appeal, under section 417 of the Code of Criminal Procedure, on the grounds, among others, that the acquittal was

QUEEN-
EMPRESS
v.
VIRASAMI.

wrong; that the charge had been wrongly framed under section 69, clause (a), of Act II of 1899; and that it should have been framed under section 34, clause (3) of the Court Fees Act.

Mr. N. Subrahmaniam for the Public Prosecutor.

The accused was not represented.

JUDGMENT.—We do not agree with the Deputy Magistrate that, because a thief cannot give a legal title in regard to a stamp stolen by him, he is incapable of committing an offence under section 69 of the General Stamp Act or section 34 of the Court Fees Act. The words of those sections are,—whoever "sells or offers for sale" any stamp shall be punished, &c., unless he is a person who has been appointed by Government to sell stamps. We think there can be no doubt but that these words include the case of a thief who exchanges a stolen stamp for a sum of money. We, therefore, set aside the acquittal. The judgment of the Deputy Magistrate treats the offence as one under section 69 of the General Stamp Act, but the appeal petition states that it is one under section 34 of the Court Fees Act. The stamps are not on the record and we are unable to say against which Act the offence was, in fact, committed. We therefore do not ourselves pass sentence but direct the Deputy Magistrate to restore the case to his file and dispose of it according to law.

APPELLATE CRIMINAL.

Before Mr. Justice Davies and Mr. Justice Benson.

QUEEN-EMPRESS

v.

RAMASAMI.*

1900.
November
30.
December
3, 11.

Criminal Procedure Code—Act V of 1898, ss. 337, 339—Pardon—Withdrawal of pardon and commitment for trial—Procedure.

It was charged with having committed the offence of dacoity, with others. In consequence of a confessional statement made by B, pardon was tendered to

* Criminal Revision Case No. 452 of 1900 referred for the orders of the High Court, under sections 438 and 215 of the Criminal Procedure Code, by A. C. Tate, Acting Sessions Judge of Chingleput, in letter No. 1148, dated 6th November 1900.

QUEEN-
EMPRESS
v.
RAMASAMI.

him by the Stationary Sub-Magistrate, under the District Magistrate's order. R was subsequently examined as a witness for the prosecution at a preliminary enquiry into the dacoity held by the Magistrate under chapter XVIII of the Code of Criminal Procedure, but he retracted his former statement, (which, he said, had been made in consequence of police torture), and asserted that he knew nothing about the dacoity. The dacoity case came on for trial in the Sessions Court, but R was not called as a witness, and, in the end, the persons charged were acquitted. Upon the subsequent application of the police, the District Magistrate withdrew the pardon which had been tendered to R, on the ground that the latter had withdrawn and contradicted his first statement. R was in due course charged before the same Sub-Magistrate with having been one of the dacoits, and was committed for trial:

Held, that the commitment was legal. The words "in the case," which occur in section 337 (2) of the Code of Criminal Procedure, include a preliminary enquiry, and do not refer to the trial alone. If there is reason to believe that a person to whom pardon has been tendered will give false evidence, there is no duty on the prosecution to put him forward as a witness. Pardon conditionally granted may be at once withdrawn as soon as good faith has been broken, and good faith is broken if the witness does not disclose the truth to the Magistrate. The proper authority to withdraw a pardon is the authority which granted it.

Queen-Emress v. Manick Chandra Sarkar, (I.L.R., 24 Cal., 492), followed.

Semble, that when pardon is revoked, no steps should be taken against the person who so forfeits it until after the trial of the other accused is over; and that his trial should then proceed *de novo*.

Queen-Emress v. Brij Narain Man, (I.L.R., 20 All., 529), and *Queen-Emress v. Bhanu*, (I.L.R., 23 Bom., 493), considered.

CASE referred for the orders of the High Court. The facts appear from the headnote and are fully set out in the following judgment:—

Mr. W. Barton for the Public Prosecutor.

The accused was not represented.

BENSON, J.—The facts of the case are stated by the Sessions Judge in paragraph 4 of his letter of reference as follows:—

"The facts of the present case seem to be these—Ramasami, the present accused, was originally charged by the Police with being one of a band of dacoits whose crime was committed on the night of 3rd February 1900 at Egattoor. He is said to have made a confessional statement to the Stationary Sub-Magistrate of Trivellore on the 15th February 1900 (exhibit A). Pardon was tendered to him by the Stationary Sub-Magistrate under the District Magistrate's order (not sent to this Court, but *vide* Sub-Magistrate's proceedings, dated 15th March). Subsequently, on 7th March 1900 he was examined by the same Sub-Magistrate as fifth prosecution witness at a preliminary enquiry into the dacoity held

under chapter XVIII, Criminal Procedure Code. He then (*vide* exhibit B) retracted his former statement, protested that he knew nothing about the crime, and asserted that he had made the statement, exhibit A, in consequence of police torture.

"At the trial in this Court (Calendar Case No. 12 of 1900) before my predecessor Mr. O'Farrell and a Jury, he was not put into the witness box as a prosecution witness, nor was his evidence heard at that trial, which ended on 26th April 1900 in the acquittal of the twelve men, who were then tried for the crime.

"The Police applied on 7th May 1900 to the District Magistrate for withdrawal of the pardon tendered to Ramasami, and on 22nd August 1900 the District Magistrate in his proceedings, Dis. No. 756/M of 1900, passed the following order:—'Ramasami having withdrawn and contradicted his first statement, the pardon tendered to him under section 337 is hereby withdrawn.'

"Thereupon the police have charged Ramasami before the same Sub-Magistrate for having been one of the dacoits, and Ramasami now stands committed by the Sub-Magistrate for trial by this Court."

The Sessions Judge considers the commitment illegal and recommends that it be quashed on two grounds. The first is that section 337 (2), Criminal Procedure Code, requires that every person accepting a tender of pardon "shall be examined as a witness in the case," and that the words "in the case" mean before the Sessions Court and are not satisfied if the witness is examined only in the preliminary enquiry, as in the present case.

I do not think that this view is correct. I think the words "in the case" are purposely used so as to include the preliminary enquiry and do not refer to the trial only. There are many cases in which there would be no need to examine the approver as a witness before the Court of Sessions, *e.g.*, where the Magistrate discharges the accused, or where the accused dies before the trial, or where the accused pleads guilty before the Sessions Court and is convicted on the plea. Could it be held that if the approver in these cases, when examined at the preliminary enquiry, kept back material evidence within his knowledge, the pardon could not be withdrawn, and that the witness must go scot-free though guilty of the offence of which he had been pardoned on condition of making a full disclosure? I can see no reason for such a conclusion. The case relied upon by the Sessions Judge

QUEEN-
EMPRESS
v.
RAMASAMI

QUEEN-
EMPRESS
v.
RAMASAMI.

(*Queen-Empress v. Natu*(1)) is not an authority which supports his view, for in that case the commitment was quashed for other reasons. The Judges, no doubt, considered that the person to whom tender of pardon was made ought to have been made available for examination before the Sessions Court and gave that as an additional reason for quashing the commitment, but it was not the primary reason. Moreover, in the present case the man was sent up as a witness to the Sessions Court and was available as a witness though not, in fact, examined by either side. On the other hand in *Queen-Empress v. Brij Narain Man*(2) the Court clearly was of opinion that failure on the part of the approver to fulfil the conditions of the pardon when examined at the preliminary enquiry before the Magistrate was a sufficient reason for at once revoking the sanction and committing the witness to stand his trial for the offence originally charged against him.

It may, perhaps, be doubted whether the opinion of the Judges in that case that the approver might be at once committed to stand his trial with those who were originally his co-accused is correct. The better opinion seems to be that beyond revoking the pardon nothing should be done against him until after the trial of the other accused is over, and that his trial should then proceed *de novo* (*Queen-Empress v. Bhau*(3) and cases there quoted).

This is exactly the procedure observed in the present case.

The Sessions Judge is of opinion that the man should have been given an opportunity of earning his pardon in the Sessions Court, and says that, if he had, he might, in that Court, have complied with the conditions on which pardon was granted. I do not think that this view is correct. The man having failed to comply with the conditions of his pardon when examined on oath before the Magistrate, there was no reason for the prosecution to think that he would give other evidence before the Sessions Court. There was, in my judgment, no reason why the prosecution should, in the Sessions Court, put forward as a witness for the prosecution a man who they had every reason to think would give false evidence. He was bound over and was available for examination if the Court or the accused wished to examine him, but I do not think that there was any duty on the prosecution to examine him. Even if he were examined in the Sessions Court and gave the evidence

QUEEN-
EMPRESS
v.
RAMASAMI.

originally expected from him when pardoned, his evidence would be of little or no value in consequence of his previous contradictory evidence before the Magistrate. In fact, if the prosecution was bound to follow the course proposed by the Sessions Judge, the provisions of the law which aim at securing convictions by the grant of pardons would become nugatory for the approver could always save himself without materially assisting the prosecution. It would only be necessary for him to give false evidence before the Magistrate, and reserve the truth for the Sessions Court. The latter would "earn his pardon," while the former would deprive the latter of any weight it might otherwise have in favour of the prosecution. When a pardon has been tendered and has been accepted, the utmost good faith must be kept on both sides. Good faith is broken if the witness does not disclose the truth to the Magistrate, and, in my opinion, the conditional pardon may be at once withdrawn as soon as good faith has been broken.

The second objection to the commitment taken by the Sessions Judge is on the ground that the District Magistrate had no power to withdraw the pardon after the Sessions trial was over, and that such power rested with the Sessions Court alone. The Criminal Procedure Code does not specify by whom a pardon may be withdrawn. Ordinarily the authority which makes an offer has power to withdraw it, and in the case of *Queen-Empress v. Manick Chandra Sarkar*(1) it was expressly ruled that the proper authority to withdraw a pardon is the authority which granted it (in that case the Joint Magistrate) even after the trial has been held in the Sessions Court. I am of opinion that that ruling is correct.

Lastly, it was suggested in the course of the argument that the District Magistrate has given no sufficient reason for withdrawing the pardon, that the withdrawal is therefore illegal, and, as a consequence, that the commitment is also illegal. This is not a ground taken by the Sessions Judge, and, in my opinion, there are no materials before us from which we can say that the withdrawal was not made until after the conclusion of the Sessions trial when all the facts of the case and the evidence must have been before the District Magistrate. There is no appeal before us against the order of the District Magistrate, nor is there any application before us to revise it. I think we must take it that the District Magistrate

(1) I.L.R., 27 Calc., 137. (2) I.L.R., 20 All., 529. (3) I.L.R., 23 Bom., 493.

(1) I.L.R., 24 Calc., 492.

QUEEN-
EMPRESS
v.
BANABAMI.

was satisfied that the approver when he withdrew and contradicted his first statement was giving false evidence or was wilfully concealing essential facts. If he was so satisfied, he had power under section 339, Criminal Procedure Code, to withdraw the pardon.

I would inform the Sessions Judge that the commitment is not illegal and that he should proceed with the trial according to law.

DAVIES, J.—I concur.

APPELLATE CIVIL.

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

LAKSHMANA CHETTI AND ANOTHER (DEFENDANTS
Nos. 1 AND 2), APPELLANTS,

v.

CHINNATHAMBI CHETTI AND OTHERS (PLAINTIFFS AND
DEFENDANT No. 3), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, ss. 375, 462—Agreement to refer to arbitration during pendency of suit—No order of reference made by Court—Power to give effect to agreement in the suit.

During the pendency of a suit for partition between members of an undivided Hindu family, the division of the properties was referred by the parties to arbitrators, and an adjournment was granted by the Court to enable an award to be made. An order of reference was not, however, asked for, or made by the Court. An award was made, whereupon plaintiffs requested that it should be filed and that a decree might be passed in its terms. Defendants objected to the filing of the award. On the question whether the award could be given effect to in the suit:

Held, that the agreement to refer to arbitration had not been lawfully entered into, as the submission related to the rights of minors, who were parties to the suit, and leave of the Court had not been obtained under section 462 of the Code of Civil Procedure either before the submission to arbitration or after the award; and that the adjustment was in consequence not binding on the minors, nor (regard being had to the nature of the suit) on the major members of the family. The effect of the submission was to take away from the Court the power of adjudicating upon the rights of the minors and to leave such adjudication to a private tribunal. Such an agreement fell within section 462 of the Code of Civil Procedure.

* Appeal No. 164 of 1899 against the decree of C. Manavedan Raju, District Judge of North Arcot, in Original Suit No. 38 of 1897.

Semle, that assuming the award to be but the completion of an agreement lawfully entered into by the parties, and that such agreement plus the award affected the rights of the parties in the pending suit, it could only do so as an agreement adjusting the suit: and as such could be recorded and acted upon under section 375 of the Code of Civil Procedure.

Whether an award filed under section 525 of the Code of Civil Procedure and obtained under similar circumstances, would be invalid.—*Quere.*

Suit for partition. Plaintiffs Nos. 2 and 3 and defendant No. 2 were minors. The facts material to the point reported are thus stated by the District Judge:—"While the suit was pending the parties put in a petition for an adjournment stating that they had appointed certain arbitrators to settle their disputes. This was on the 29th August 1898. An adjournment was accordingly granted. At the request of the parties the period which was fixed for the submission of the award was extended from time to time. Eventually the suit was posted to the 30th January 1899. An award was made by the arbitrators on the 29th January. On the 31st January when the suit came on for hearing, the plaintiffs' vakil stated that an award had been submitted and represented to the Court that it be filed and a decree passed in terms of it. The case was adjourned to the 16th February for argument. On that day the defendants put in a counter-petition raising various objections to the filing of the award. These will now be considered. In paragraphs 2 to 7 it is said that the defendants never intended to submit to an arbitration and that the alleged reference is untrue. There are three petitions applying for adjournment. The first is dated 29th August 1898 signed by the plaintiffs and the pleader for the defendants. In this it is stated that the parties have appointed five persons as arbitrators to settle their disputes out of Court in a month. In the face of this, it is not possible to believe that there was no intention to refer to arbitration. The next petition was on the 29th September 1898. This petition stated that some of the disputes were settled and others remained to be settled. It was therefore requested that the time be extended by another month. This was signed by the plaintiffs alone. But there is reason to think that the first defendant was not ignorant of the presentation of the petition on the 31st October; a third petition was put in signed by the pleaders on both sides. This last petition stated that 'at the desire of both parties the disputes have been referred to certain mediators for settlement; that the matter has not been finally settled so as to enable the parties to compromise'

LAKSHMANA
CHETTI
v.
CHINNA-
THAMBI
CHETTI.

LAKSHMANA
CHETTI
v.
CHINNA-
THAMBI
CHETTI.

and for this purpose the prayer was repeated for another adjournment. I think this is sufficient evidence of the fact that there was a formal and regular reference to arbitrators. If further evidence is wanted we have it in exhibits A and B. These are lists of properties which it was proposed to divide among the parties. First defendant admits that it was he that made these lists and that they were furnished by him to the arbitrators. This shows that he made not only a reference to arbitrators, but actively assisted them in making the enquiries. Paragraph 8 enumerates various objections to the reference and award. I have already shown that all the parties were parties to the reference. It is true that the award was not passed within the first month. But the time was formally extended by the Court. One of the arbitrators swears that due notice of proceedings was given to the defendant and that a copy was also given to each of the parties. There is no reason to discredit his statement. Second defendant is a minor. But the ruling in *In the matter of Romon Kissen Sett v. Hurrololl Sett*(1) is an authority for the proposition that a natural guardian of a minor has power to submit to arbitration, provided the arbitration and the award are for the benefit of the minor. It is not expressly alleged and it was not argued that the award is in any way detrimental to the interests of the minor. The case (*Mudhoo Manjee v. Rajah Nil Monee Singh Deo*(2)) shows that in arbitrations not started with the sanction of the Court, it is not necessary that the agreement should be reduced to writing before it can be binding. The case (*Harivalubdas Kalliandas v. Utamchand Manekchand*(3)) says that the mere fact that a suit is pending with respect to the matters in dispute referred to private arbitration is not of itself a sufficient reason to induce the Court to refuse to file the agreement. The only other objection that remains to be considered is the last. It is contended for the defendant that the only agreement in existence is the agreement to refer to arbitration, and that, taken by itself, that agreement is neither a compromise nor an adjustment, and it is impossible to pass a decree in terms of that agreement. This is true. Plaintiff's contention, however, is that the reference coupled with the award should be considered as the adjustment. And in support of this view is cited the case of *Samibai v. Premji*

(1) L.R., 19 Cal., 334. (2) 18 W.R., (C.R.), 533. (3) I.L.R., 4 Bom., 1.

LAKSHMANA
CHETTI
v.
CHINNA-
THAMBI
CHETTI.

Pragji(1). If that decision is to be followed, then there is no question that a decree must be passed as prayed for by the plaintiffs. But on behalf of the defendant the decisions in *Uthatchadayan Haji v. Ramen Nambiar*(2), *Vasudeva Shanbog v. Naraina Pai*(3), and *Muhammad Zahur v. Cheda Lal*(4) are cited in support of the proposition that a decree can be passed only if the agreement is sufficient in itself to be made the ground of a decision. It is said that section 375 does not refer to the case of an agreement in which 'if the party should do certain things a decree should be passed in his favour, and if he failed to do those things then in favour of the other, so that what decree should be passed would depend upon the result of an enquiry, whether subsequent to the agreement certain acts had or had not been performed.' I have carefully read all the decisions and I am not satisfied that they are applicable to a case of the kind now under consideration. The decisions relate to decrees passed under the Oaths Act. Naturally it was held that before passing a decree it ought to be ascertained that the parties expressed their consent, after the oath was taken, to the mode of disposal mentioned in the agreement. In the present case no such enquiry appears to be necessary. The parties agreed that the dispute be settled by certain persons. The disputes are accordingly settled. The two combined. The reference and the settlement form the adjustment. I do not think that the Judges who decided the cases referred to by the defendants' pleader had in contemplation a case of this kind. In these circumstances, I must overrule all the objections raised on behalf of the defendants, and taking the agreement of reference coupled with the award as an adjustment of the suit, direct that the award be recorded and decree passed in accordance therewith so far as it relates to the suit."

Against this decision defendants Nos. 1 and 2 preferred this appeal.

Sir V. Bhashyam Ayyangar, Desikachariar and A. S. Krishnasami Ayyar for appellants.

Sundara Ayyar for respondents Nos. 1 and 5.

Kuppusami Ayyar (for Seshachariar) for respondent No. 2.

(1) I.L.R., 20 Bom., 304.
(3) I.L.R., 2 Mad., 356.

(2) 4 M.H.C.R., 422 at p. 424.
(4) I.L.R., 14 All., 141.

LAKSHMANA
CHETTI
v.
CHINNA-
THAMBI
CHETTI.

JUDGMENT.—It was urged on behalf of the appellants that there was in truth no submission to arbitration, but only an understanding that the dispute was to be settled by certain persons acting as friendly mediators. Although the petitions to the Court may leave the matter in doubt, yet the clear language in exhibit A, in which the first appellant states that the division of the properties had been referred for the decision of the therein-mentioned arbitrators, supported by the evidence of one of the said arbitrators puts the question beyond dispute. We are therefore satisfied that there was a reference to arbitration by agreement of parties to the suit. This reference, however, not having been by submission through the Court, the question is whether the award which deals with the subject-matter of the suit can be given effect to in the suit, and if so how. In *Ghellaibhai v. Nandubai*(1), it was considered by Farran, C.J., that a submission and award under such circumstances can only be taken cognizance of in the suit or an adjustment of it under section 375 of the Code of Civil Procedure. The correctness of this view was somewhat doubted by O'Kinealy, J., in *Brojodurlabh Sinha v. Ramanath Ghose*(2).

Assuming, however, that the award is but the completion of the agreement of the parties, and that such agreement plus the award affects the rights of the parties in the pending suit, it can only be as an agreement adjusting the suit, and as such could be recorded and acted upon under section 375 of the Code of Civil Procedure, of course provided it was a lawful agreement. We are compelled in this case to hold that the agreement was not lawful inasmuch as the submission related to the rights not only of the adult parties but of minors who were also parties to the suit. Leave of the Court was not obtained under section 462 of the Code of Civil Procedure, either before the submission to arbitration or after the award, and the adjustment was therefore not binding on the minors. The effect of the submission was to take away from the Court the power of adjudicating upon the rights of the minors, and to leave such adjudication to a private tribunal. Such an agreement seems to us to be clearly one falling within section 462 of the Code of Civil Procedure. It is not analogous to the cases that arose under the Oaths Act (*Chengal Reddi v. Venkata Reddi*(3) and *Sheo Nath Saran v. Sukh Lal Singh*(4))

(1) I.L.R., 21 Bom., 335 at p. 341.

(2) I.L.R., 24 Calc., 908 at p. 928

(3) I.L.R., 12 Mad., 483.

(4) I.L.R., 27 Calc., 229.

LAKSHMANA
CHETTI
v.
CHINNA-
THAMBI
CHETTI.

which were cases relating to proof and subject to the discretionary power of the Court to allow such proof. It was then urged for the plaintiffs that the adjustment should at all events be held binding upon the parties thereto who were not minors. But the suit was a suit for partition among the members of an undivided Hindu family, and a partial adjudication in such a suit is impossible. In these circumstances the agreement must be held to be altogether incapable of being acted upon under section 375 of the Code of Civil Procedure.

It was then further urged on behalf of the plaintiffs that the award should be taken as an award filed under section 525 of the Code of Civil Procedure. As a matter of fact proceedings were not taken under that section, and it is therefore unnecessary for us to say whether the award, if filed under that section, would not in the pending suit be open to the same objections as those upon which we have rejected it as an adjustment of the suit. In the view we have taken it is not necessary to consider whether the objections to the award itself on the ground of want of notice, etc., are well founded. We must reverse the decree of the District Judge, and remand the suit for disposal according to law. The parties will bear their own costs of this appeal without prejudice to the appellant's right to refund of stamp duty under section 13 of the Court Fees Act.

APPELLATE CIVIL.

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

VALAMBAL AMMAL (PLAINTIFF), APPELLANT,

v.

VYTHILINGA MUDALIAR (DEFENDANT), RESPONDENT.*

Court Fees Act—Act VII of 1870, s. 28—Plaint insufficiently stamped—Dismissal of suit—Appeal by plaintiff to District Court—Stamp on memorandum of appeal also insufficient—Second appeal by plaintiff properly stamped—

* Second Appeal No. 1136 of 1899 against the decree of H. G. Joseph, District Judge of Trichinopoly, in Appeal Suit No. 111 of 1898, affirming the decree of S. Mahadeva Sestriar, District Munsif of Kulitalai, in Original Suit No. 679 of 1896.

1900.
October 3
December

VALAMBAL
AMMAL
v.
VYTHILINGA
MUDALIAR.

Maintainability of second appeal—Order by High Court for payment of proper duty on plaint and on memorandum of first appeal.

The plaint, in a suit for the cancellation of a sale deed for Rs. 2,500, was filed with a ten-rupee stamp. The suit was dismissed, and an appeal was preferred by the plaintiff to the District Court, on which Rs. 10 was also paid as stamp duty. The appeal was dismissed, whereupon plaintiff preferred a second appeal, upon which he paid Rs. 150 as stamp duty. On its being objected that the second appeal could not be entertained on the ground that insufficient stamp duty had been paid on the plaint and in the lower Appellate Court:

Held, that inasmuch as the plaint had been filed and used without being properly stamped through a mistake of law as to the Court fee payable, the case was within section 28 of the Court Fees Act. An order was accordingly made by the High Court for a Court fee of Rs. 150 to be paid on the plaint and on the memorandum of first appeal, within a specified time.

Suit for the cancellation of a sale deed executed by plaintiff to defendant for Rs. 2,500. The suit was dismissed by the District Munsif, and his decree was affirmed on appeal to the District Court. Defendant pleaded, among other defences, that the plaint was insufficiently stamped. The plaint bore a ten-rupee stamp, and the same duty had been paid on the appeal to the District Court. On second appeal, plaintiff-appellant paid Rs. 150 as stamp duty. The judgment is reported only in so far as it deals with the question of the maintainability of the appeal, it being contended that insufficient stamp duty had been paid in the two lower Courts.

Sundara Ayyar and Ramachandra Ayyar for appellant.

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

JUDGMENT.—This is a suit for the cancellation of a sale deed for Rs. 2,500 executed by the plaintiff. In this Court, on second appeal, a stamp duty of Rs. 150 was paid. On behalf of the respondent the objection was raised that this Court could not entertain the appeal, because in the Court of First Instance and in the lower Appellate Court a stamp duty of Rs. 10 only had been paid. As regards the appeal to the lower Appellate Court the effect of section 582-A of the Code of Civil Procedure is to enable a defective memorandum of appeal to be retrospectively validated if the insufficiency of the stamp was caused by mistake on the part of the appellant. This section appears to have been introduced for the purpose of meeting a decision of a Full Bench of the Allahabad High Court—a decision which was dissented from

VALAMBAL
AMMAL
v.
VYTHILINGA
MUDALIAR.

by this Court in *Chennappa v. Raghunatha*(1) and *Patcha Saheb v. Sub-Collector of North Arcot*(2) to the effect that if a memorandum of appeal is not, when tendered, properly stamped, it is not at that time a memorandum of appeal, and the subsequent affixing of the proper stamp cannot have a retrospective effect so as to validate the original presentation unless it has been done by order of the Court, and the Court cannot make any such order unless the memorandum has been received, filed or used through mistake or inadvertance on the part of the Court or its officers (*Balkaran Rai v. Gobind Nath Tiwari*(3)).

This section makes it clear that, at any rate as regards memoranda of appeals and applications for review when the document is insufficiently stamped by reason of the mistake of the party, the defect may be afterwards made good and the document will be as valid as if it had been properly stamped in the first instance. The argument on behalf of the respondent was that inasmuch as the Legislature in section 582-A had dealt expressly with insufficiently-stamped memoranda of appeals without reference to insufficiently-stamped plaints, the inference was that a defective plaint could not be subsequently validated so as to avoid the operation of the law of limitation. We do not think that such an inference ought to be drawn. The Allahabad decision only had reference to a defective memorandum of appeal, and section 582-A was apparently intended to meet this particular decision.

As regards the plaint, the argument on behalf of the defendant was that the plaint not having been properly stamped the suit must be regarded as not having been instituted within the prescribed period, and that any order made under section 28 of the Court Fees Act would not operate retrospectively since that section must be read subject to the express provisions of section 4 of the Limitation Act. It was contended that inasmuch as the plaint was not stamped in accordance with the requirements of section 6 of the Court Fees Act there had been no plaint at all, and that illustration (a) to section 4 of the Limitation Act shows that this Court has no alternative but to dismiss the suit as being now barred by limitation.

(1) I.L.R., 15 Mad., 29.

(2) I.L.R., 15 Mad., 78.

(3) I.L.R., 12 All., 129.

VALAMBAL
AMMAL
v.
VYTHILINGA
MUDALIAR.

In the present case the plaint was filed and used without being properly stamped through mistake of law as to the Court fee payable. The case therefore falls within the express words of the second paragraph of section 28 of the Court Fees Act. The decision of this Court in *Venkatramayya v. Krishnayya*(1) is, in our opinion, clearly distinguishable from the present case. In that case the plaint was presented on the day before the period of limitation expired and was rejected under section 54 (b) of the Code of Civil Procedure. The plaint was re-presented on the proper stamp paper within the time required by the Court, the period of limitation having then expired, and the Court held that the suit was not instituted in time upon the ground that section 54 of the Code of Civil Procedure does not give a Court any power to extend the ordinarily prescribed period of limitation for suits. In *Jaini Prasad v. Bachu Singh*(2) a Full Bench of the Allahabad High Court took the same view. When the Court acts under section 54 of the Code of Civil Procedure it rejects the plaint. In *Venkatramayya v. Krishnayya*(1) the period of limitation expired before the plaint was accepted. There was thus, according to the view taken in that case, no suit in existence at the time the period of limitation expired. In the present case the plaint was never rejected. It was accepted and acted upon by the Court and the plaintiff's claim has been adjudicated upon both by the Court of First Instance and the lower Appellate Court. In the present case it cannot be said that there was no existing suit at the time the period of limitation expired.

We hold that the proper Court fee payable on the plaint and the memorandum of appeal is Rs. 150, and we make an order under section 28 of the Court Fees Act that a Court fee of Rs. 150 be paid on the plaint and on the memorandum of appeal within twenty-one days.

[The case was then dealt with on its merits.]

(1) I.L.R., 20 Mad., 319.

(2) I.L.R., 15 All., 65.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice
Subrahmania Ayyar.

PALANI GOUNDAN (COUNTER-PETITIONER No. 3), PETITIONER,

1900.
November
23.

KUPPANDA GOUNDAN AND OTHERS (PETITIONER AND COUNTER-
PETITIONERS Nos. 1 AND 4), RESPONDENTS.*

Village Courts Act (Madras)—Act I of 1889, s. 73—Revision by District Munsif of Village Court's proceedings—Payment under protest by a defendant to a Village Munsif to avoid attachment and sale under a decree—Order by District Munsif setting aside all proceedings and for refund by Village Munsif—Legality of order.

By section 73 of the Madras Village Courts Act, 1889, the District Munsif may set aside the decree or order of a Village Munsif on certain grounds. A Village Munsif, having passed a decree against a defendant in a suit before him, attached, in pursuance thereof, property belonging to the defendant, who thereupon paid the amount to the Village Munsif under protest. Defendant then applied under section 73 to the District Munsif, who set aside the decree and attachment and declared them to be void and ordered the Village Munsif to refund the money he had recovered from the defendants:

Held, that the order in so far as it related to a refund of the money by the Village Munsif was made without jurisdiction and must be set aside without prejudice to the rights (if any) of the defendant to proceed against the Village Munsif for damages suffered by reason of his misconduct. Under section 73 a District Munsif has power only to set aside the decree or order complained of, and cannot make an order for payment against the Village Munsif, the section applying to proceedings between litigants.

PETITION to revise an order of a District Munsif that a Village Munsif should refund a sum of money, under section 73 of the Madras Village Courts Act, 1889. Petitioner was the Village Munsif of Nambiampalayam, in the Palladam taluk. It was alleged by one Kuppanda Goundan that a false suit had been brought against him in the Village Munsif's Court, for a balance alleged to be due in respect of the purchase by defendant of a cow. The suit was heard by the petitioner's father, who then held the office of Village Munsif, and Kuppanda Goundan charged that an *ex parte* and fraudulent decree had been passed against him.

* Civil Revision Petition No. 93 of 1900 under section 622 of the Civil Procedure Code praying the High Court to revise the order of the District Munsif of Erode in Civil Miscellaneous Petition No. 1600 of 1899.

PALANI
GOUNDAN
v.
KUPPANDA
GOUNDAN.

therein. Petitioner then took office, and issued a notice to Kuppanda Goundan, threatening execution of the decree if the amount due thereunder should not be paid; and in fact attached a buffalo, belonging to Kuppanda Goundan, who thereupon paid the money under protest. Kuppanda Goundan applied to the District Munsif, under section 73 of the Madras Village Courts Act, 1889, and prayed that the decree and attachment might be set aside and declared void, and that the Village Munsif might be ordered to refund the money paid under protest. The person who was alleged to have brought the suit against Kuppanda Goundan filed a petition denying that he had done so, or that any decree had been executed. The District Munsif cancelled the decree and execution proceedings and ordered the present Village Munsif, petitioner, to refund to Kuppanda Goundan the amount received.

Against this order the Village Munsif now proffered this civil revision petition.

Tiruvengkatachiar (for *Kasturiranga Ayyangar*) for petitioner.

Mr. Joseph Satya Nadar for respondents.

JUDGMENT.—Section 73 of the Village Courts Act does not contemplate a Village Munsif being made a party to proceedings taken under that section. The section applies to proceedings between litigants and empowers a District Munsif to set aside any decree or order affecting the rights of litigants for any of the reasons specified in the section, amongst others corruption, gross partiality or misconduct on the part of the Village Munsif. Even if corruption, gross partiality or misconduct is made out, all that the District Munsif can do is to set aside the decree or order complained of. He cannot, while setting aside any decree or order, make any order for payment as against the Village Munsif himself. So far as the Village Munsif is concerned the proper course for the District Munsif, if he is satisfied that there has been corruption, gross partiality or misconduct on the part of the Village Munsif, is to proceed under section 74 and report the case to the District Judge.

The order of the District Munsif in so far as it ordered the third counter-petitioner the Village Munsif to refund, was clearly made without jurisdiction and must be set aside. This, of course, is without prejudice to the rights (if any) of the petitioner before the lower Court to proceed against the Village Munsif for damages by reason of his alleged misconduct. The order of the District

PALANI
GOUNDAN
v.
KUPPANDA
GOUNDAN.

Munsif cancelling the decree and the execution proceedings was made without trial or inquiry and upon the unsworn statement of the first counter-petitioner's pleader. The District Munsif should have gone into the question whether the first counter-petitioner before the lower Court had, in fact, received the twenty rupees which was claimed from him, and if he was satisfied that he had received this sum or was otherwise responsible therefor, the District Munsif ought to have directed the repayment of this amount by the first counter-petitioner to the petitioner.

We must therefore set aside the order of the District Munsif and direct him to restore the petition to his file in so far as the first counter-petitioner is concerned and dispose of it according to law.

The objection that the third counter-petitioner was improperly made a party was not taken in the lower Court nor in the grounds of the petition to this Court. We accordingly make no order as to costs.

APPELLATE CRIMINAL.

*Before Sir Arnold White, Chief Justice, and
Mr. Justice Benson.*

QUEEN-EMPRESS

KUNIYIL RARU AND ANOTHER.*

1900.
December
17.

Criminal Procedure Code—Act V of 1898, s. 203—Dismissal of complaint—Refusal by Magistrate to take cognizance of case—Subsequent trial by him.

A complaint was laid in the Court of a Town Magistrate, charging certain persons with having committed offences under the Registration Act. The Town Magistrate dismissed the complaint on the ground that sanction, which he deemed to be necessary, had not been obtained. The complainant obtained sanction and thereupon the Town Magistrate proceeded with the case and convicted the accused. On appeal, the Deputy Magistrate, while agreeing that the accused were guilty, reversed the conviction on the ground that inasmuch

* Criminal Revision Case No. 440 of 1900, referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by G. W. Dango, District Magistrate of Malabar, in letter, dated 15th October 1900 (Reference on Criminal Revision No. 46 of 1900).

QUEEN-
EMPRESS
v.
KUNIVIL
BABU.

as the Town Magistrate had once thrown out the complaint under section 203 of the Code of Criminal Procedure, he could not subsequently entertain it. On the case being referred to the High Court for orders:

Held, that though, in form, the Town Magistrate's order purported to dismiss the complaint under section 203, in substance it refused to take cognizance of the offence on the ground that sanction was necessary and had not been obtained; and that the acquittal must be set aside.

CASE referred for the orders of the High Court. A complaint was filed in the Court of the Second-class Magistrate of Calicut Town against two persons for committing an offence under the Registration Act. The Magistrate dismissed the complaint on the ground that it had been filed without sanction. Complainant then obtained sanction and the Town Magistrate proceeded with the case, and convicted the accused. On an appeal being preferred against that conviction, the Deputy Magistrate agreed with the Town Magistrate that the accused were guilty, but reversed the conviction on the technical ground that, as the Town Magistrate had once thrown out the complaint under section 203 of the Code of Criminal Procedure, he could not subsequently entertain it. He relied upon *Queen-Empress v. Adam Khan*(1), and the cases cited therein. This reference was, in consequence, made by the District Magistrate.

Mr. D. Chamier, for the Public Prosecutor, in support of the reference, contended that sanction was not in fact necessary for the institution of the proceedings against the accused; and that *Queen-Empress v. Adam Khan*(1), relied on by the Sub-Magistrate, did not support the proposition laid down by him. In that case it was held that a matter could not be re-opened by another tribunal having the same powers; and the Judges expressly stated that their ruling did not conflict with Calcutta cases in which it had been held that a Magistrate who had dismissed a complaint was not precluded from himself entertaining again what was in substance the same complaint. He also referred to *Nilratan Sen v. Jogesh Chundra Bhattacharjee*(2), and *Komal Chandra Pal v. Gour Chand Audhikari*(3).

Govinda Menon for the accused.

JUDGMENT.—Section 203 of the Code of Criminal Procedure refers to the procedure of a Magistrate who has taken cognizance of a case. Section 195 of the Code of Criminal Procedure debars

(1) I.L.R., 22 All., 106. (2) I.L.R., 23 Calo., 983. (3) I.L.R., 24 Calo., 286.

QUEEN-
EMPRESS
v.
KUNIVIL
BABU.

a Magistrate from taking cognizance of certain offences unless sanction has been obtained. In form, no doubt, the Magistrate before whom, in the present case, the complaint was preferred, purported to dismiss the complaint under section 203 of the Code of Criminal Procedure. In substance what he did was to refuse to take cognizance of the offence on the ground that sanction to prosecute was necessary and sanction had not been obtained.

In the Calcutta cases and in the Allahabad case to which our attention has been called (*Queen-Empress v. Adam Khan*(1), *Nilratan Sen v. Jogesh Chundra Bhattacharjee*(2) and *Komal Chandra Pal v. Gour Chand Audhikari*(3)), the Magistrate before whom the first complaint was preferred took cognizance of the alleged offence and, after adjudicating upon the case, made an order under section 203 of the Code of Criminal Procedure.

These cases are clearly distinguishable from the present case.

We must set aside the acquittal and direct the Magistrate to deal with the appeal according to law.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Boddam.

YAMUNA BAI RANI SAHIBA (DEFENDANT), APPELLANT,

v.

SOLAYYA KAVUNDAN (PLAINTIFF), RESPONDENT.*

Rent Recovery Act (Madras)—Act VIII of 1865, s. 78—Six months from date of cause of action—Illegal attachment by landholder of tenant's property—Retention for more than six months—Continuing wrong—Limitation.

By section 78 of the Rent Recovery Act (Madras), 1865, a suit may be brought to recover damages in respect of anything professedly done under the authority of that Act, provided that it be instituted within six months from the time at which the cause of action arose. A landholder illegally attached goods of his tenant and detained them for longer than six months. The tenant then sued to recover the goods and damages for the illegal detention:

Held, that the claim was not barred: the detention being a continuing wrong.

(1) I.L.R., 22 All., 106. (2) I.L.R., 23 Calo., 983. (3) I.L.R., 24 Calo., 286.
* Second Appeal No. 1130 of 1899 against the decree of H. G. Joseph, District Judge of Trichinopoly, in Appeal Suit No. 236 of 1893, affirming the decree of O. Runga Rao, District Munsif of Ariyalur, in Original Suit No. 64 of 1897.

1901.
January 7.

YAMUNA BAI
RANI SAHIBA
v.
SOLAYYA
KAVUNDAN.

Suit to recover certain moveable properties illegally distrained, and damages. Plaintiff was a raiyat under defendant. Defendant in May 1896 attached moveable property belonging to plaintiff, for rent. Plaintiff contended that the attachments were illegal and instituted two summary suits against defendant in 1896 in both of which the Revenue Court upheld his contention. He now sued in the Court of the Munsif to recover the moveables attached, or their value, and for damages suffered by him by reason of the illegal attachment. Defendant set up, among other pleas, that the claim was time-barred. The suit was filed more than six months but less than one year from the date of attachment. The Munsif gave plaintiff a decree for the restoration of his moveables, together with damages. An appeal against that decree was dismissed by the District Judge, who, on the question of limitation, said:—"As to the question of limitation, it is urged that the cause of action should be held to be the date of distraint and therefore the suit should be held to be barred. *Bhagirathi Panda v. Padala Gopaludu*(1) is referred to to support this contention. It is not a decision on the point at all: but on the analogy of that decision the cause of action in this suit would be either a continuing one so long as the property continued under attachment or one accruing from the date at which the attachment was declared to be illegal."

Defendant preferred this second appeal.

V. Krishnasami Ayyar for appellant.

Sivasami Ayyar for respondent.

JUDGMENT.—As to the points raised by the first issue, it was not taken in the lower Appellate Court and whether or not the order by the Revenue officer is conclusive as to the legality of the distraint, there is certainly evidence to show that it was illegal.

On the question of limitation we have to consider whether the cause of action arose within six months prior to the date of the institution of the suit. What happened was that the seizure was effected in May 1896, but the effects remained in the defendant's possession until a later date within the six months.

We are of opinion that the term cause of action used in section 78 of the Rent Recovery Act (VIII of 1865) must be taken to be used in the ordinary sense, for the intention was to preserve the ordinary rights of action, subject only to the two provisos.

(1) I.L.R., 3 Mad., 121.

Assuming that the detention is an act professedly done under the authority of the Act so as to make section 78 of the Act applicable, we think that the detention was a continuing wrong and that therefore the suit was not barred by that section. It was certainly not barred by the provision of the general law of limitation, for according to the Limitation Act (XV of 1877), a period of one year calculated from the date of the distress is allowed and that period had not elapsed when the suit was filed. We dismiss the appeal with costs.

YAMUNA BAI
RANI SAHIBA
v.
SOLAYYA
KAVUNDAN.

APPELLATE CIVIL.

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

VASUDEVA RAVI VARMAN (SUPPLEMENTAL IN THE PLACE OF JUDGMENT-DEBTOR), APPELLANT,

1900.
November
16.

v.

NARAYANA PATTAR AND OTHERS (PETITIONER, COUNTER-PETITIONERS, NOS. 1 TO 3, AND 1ST COUNTER-PETITIONER'S REPRESENTATIVE), RESPONDENTS.*

1901.
January 7.

Civil Procedure Code—Act XIV of 1882, ss. 235, 273—Execution—Decree for money—Attachment of a right to recover mesne profits by way of restitution.

A judgment-debtor was compelled by a decree obtained against him to deliver up possession of certain land. On appeal, the High Court reversed the decree under which he had been dispossessed and declared him to be entitled to recover possession with mesne profits. The holder of another decree against the same judgment-debtor attached, in execution of his decree, the judgment-debtor's right to recover the mesne profits. The decree-holder then applied under section 273 of the Code of Civil Procedure to recover the mesne profits by way of execution:

Held, that he was not entitled to do so. The right of the judgment-debtor to recover the mesne profits by way of restitution was not a decree for money within the meaning of section 273 of the Code of Civil Procedure. Such a right might be enforced by suit or by summary process in execution under section 583 of the Code of Civil Procedure, but was not a decree within the meaning of section 273. Section 273 applies only to cases in which the right attached is one expressly settled by the decree.

* Civil Miscellaneous Second Appeal No. 41 of 1899 against the order of A. Venkataramana Pai, Subordinate Judge of South Malabar at Palghat, in Appeal Suit No. 122 of 1899, reversing the order of M. Subbayar, District Munsif of Temelprom, on Miscellaneous Petition No. 750 of 1898 (in the matter of Original Suit No. 446 of 1892).

VASUDEVA
RAVI
VARMAN
v.
NARAYANA
PATTAR.

Seemle, that if a summary order under section 583 awarding mesne profits had been made prior to the decree-holder's attachment, it might have amounted to a decree within the meaning of section 273.

APPLICATION for execution of a decree, under section 235 of the Code of Civil Procedure, by the representative of the decree-holder in Original Suit No. 94 of 1897. The property which the applicant sought to attach was a right to recover mesne profits by way of restitution. The District Munsif dismissed the petition. The facts were stated by the Subordinate Judge, on appeal, as follows:—"This is plaintiff's appeal against the District Munsif's order holding that he is not entitled to apply for execution of the decree attached by him in execution of his money decree in Original Suit No. 94 of 1897. In execution of his money decree in Original Suit No. 94 of 1897 the plaintiff-appellant attached the decree for mesne profits of certain land to which the judgment-debtors were entitled by way of restitution under the High Court's decree reversing the lower Court's decree in Original Suit No. 446 of 1892 awarding possession of the land to the plaintiff therein. In pursuance of the said attachment the plaintiff-appellant applied for execution of the attached decree and for realization of the amount of mesne profits due to the judgment-debtors under the High Court's decree. Two objections are raised, namely:—(1) that the defendants in the Suit No. 446 of 1892 are not entitled to any mesne profits under the High Court's decree, and (2) that the decree for mesne profits is not a decree for money which the attaching creditor can execute under the provisions of section 273 of the Code of Civil Procedure. The District Munsif finds that the defendants are entitled to recover mesne profits under the decree and that, therefore, the decree was liable to attachment, but he also held that the decree is not a "decree for money" within the meaning of section 273 of the Code of Civil Procedure, and that, therefore, the attachment must be made under an order prohibiting the debtor from alienating or charging the same in any way and by selling the attached property by auction in the ordinary way and that until such auction sale the attaching decree-holder is not entitled to execute the attached decree. As regards the judgment-debtor's right under the attached decree, I agree with the District Munsif in thinking that the judgment-debtors are entitled to recover the profits of the land for the period the land was in the possession of the plaintiff therein under the decree since reversed by the High

VASUDEVA
RAVI
VARMAN
v.
NARAYANA
PATTAR.

Court in second appeal. Section 583 of the Code of Civil Procedure clearly gives this right by way of restitution under the second appeal decree. Suit No. 446 of 1892 was brought by one Vaithi Pattar for recovery of a land with arrears of rent. He claimed as melchart holder from the late Zamorin of Calicut. The District Munsif and, on Appeal No. 136 of 1894, the Subordinate Judge, awarded the claim, but in *Manavikrama v. Vaithi Pattar*(1) High Court reversed the said decrees and dismissed the plaintiff's suit. That the second appeal had been preferred by the present Zamorin (the ninth defendant therein) and not by the tenants in possession makes no difference. The suit is dismissed and the property taken in execution of the lower Court's decrees must be restored, not to the party not in possession but to the party from whom it had been taken in execution. The award of mesne profits for the period the decree-holder was in possession follows as a matter of course. As regards the other point, namely, whether the decree for mesne profits is a money decree within the meaning of section 273 of the Code of Civil Procedure so as to entitle the attaching creditor to apply for execution, I am unable to agree in the District Munsif's finding that it is not a money decree and not capable of execution on the application of the attaching creditor. Section 255 of the Code of Civil Procedure clearly shows that a decree for mesne profits is a decree for money, though the amount of such mesne profits may not be specified in the decree. It may not be an 'ordinary decree for money' until such amount is ascertained but still it is a decree for money. The procedure prescribed by section 273 of the Code of Civil Procedure for attachment has been followed in this case. The Court has ordered the attachment of the decree. The attaching creditor is, therefore, entitled to apply for execution of the attached decree (See also the ruling in *Peary Mohun Chowdhry v. Romesh Chunder Nundy*(2) relied on by the District Munsif). It is unnecessary to decide whether, in case of decrees other than decrees for money, the attaching creditor could apply for execution without having first brought the attached property to sale by auction as any other property."

He reversed the Munsif's order and declared that the appellant was entitled to execute the attached decree with a view to having

(1) Second Appeal No. 978 of 1895 (unreported). (2) I.L.R., 15 Cal., 371.

VASUDEVA
RAVI
VARMAN
v.
NARAYANA
PATTAR.

the proceeds applied in satisfaction of his own decree under section 273 of the Code of Civil Procedure.

A party who had been added in place of the judgment-debtor preferred this appeal.

Sankaran Nayar for appellant.

Sundara Ayyar for respondents.

JUDGMENT.—In this case the appellant as lessee from a former Zamorin sued for possession of property in the hands of a tenant who held under that Zamorin. The suit was instituted after the death of that Zamorin, and the contention of the succeeding Zamorin, who with the tenant was a defendant in the suit, was that the lease in plaintiff's favour was not binding on him. This contention was upheld by the High Court in *Manavikrama v. Vaithi Pattar*(1), and the decree of the lower Appellate Court awarding possession to the plaintiff was reversed and the suit dismissed. Before the decree of the High Court was passed the decree of the first Court had been executed and the tenant had given up possession of the land and received compensation for improvements from the plaintiff.

Although the appeal was by the Zamorin only, we must take it that the suit was dismissed not only as against the Zamorin but also as against the tenant. Consequently the tenant was entitled to recover possession with mesne profits. His right to mesne profits was attached by the respondent in execution of a decree held against him by the first respondent. The first respondent applied under section 273 (b), Code of Civil Procedure, to recover mesne profits by way of execution and his application was granted. Appellant contends that even assuming that he was liable to the tenant for the mesne profits claimed, the right to recover them by way of restitution is not a decree for money within the meaning of section 273, Code of Civil Procedure. We think that this contention is well founded. The right to restitution in a case like this may, notwithstanding section 583, Code of Civil Procedure, be enforced by suit (*Shama Purshad Roy Chowdery v. Hurro Purshad Roy Chowdery*(2), *Kalianasundram v. Egnavedeswara*(3), *Narayana v. Narayana*(4), and *Dorasami Ayyar v. Annasami Ayyar*(5)), or it may be enforced

(1) Second Appeal No. 978 of 1895 (unreported).

(2) 10 M.I.A., 203.

(3) I.L.R., 11 Mad., 261.

(4) I.L.R., 13 Mad., 437.

(5) I.L.R., 23 Mad., 306.

by summary process in execution under section 583. If a summary order awarding mesne profits had been made before the attachment under which the first respondent claimed, it may be that such an order would be a decree within the meaning of section 273, Code of Civil Procedure, but before such an order is made it is difficult to hold that the right to restitution is property which is a decree within the meaning of section 273. To hold this would be inconsistent with the conclusion that the right may be enforced by suit. The language of section 273 seems to apply only to cases where the right attached is a right expressly settled by the decree and not a right arising from the decree by way of restitution. In this view we must hold that the first respondent was not entitled to apply under section 273, Code of Civil Procedure. We must therefore set aside the order of the lower Appellate Court and restore that of the District Munsif with costs in this and in the lower Appellate Court.

VASUDEVA
RAVI
VARMAN
v.
NARAYANA
PATTAR.

APPELLATE CIVIL.

Before Mr. Justice Subrahmanya Ayyar and Mr. Justice Benson.

MAHARAJAH OF JEYPORE (PLAINTIFF), PETITIONER,

1901.
January 7,
8.

JAMMANADHORA AND OTHERS (DEFENDANTS NOS. 1 TO 4 AND
6 TO 8 AND FIRST DEFENDANT'S LEGAL REPRESENTATIVES),
RESPONDENTS.*

Ganjam and Vizagapatam Agency Courts Act—Act XXIV of 1839—Validity of Agency Rules Nos. XX and XXXI passed under the Act—Application to High Court to direct Agent to review his decision—Maintainability.

In a suit in the Court of the Senior Assistant Agent to the Governor, in Vizagapatam, a decree was passed in favour of the plaintiff for possession of certain villages. On appeal to the Court of the Agent, this decree was reversed. Plaintiff thereupon filed a petition in the High Court praying that the Agent might be directed to review his judgment. The petition was filed under Rule No. XX of the Agency Rules, which is as follows:—"All decrees passed by the Agent on appeals from decrees of his subordinates shall be final, the Sudder

* Civil Miscellaneous Petition No. 478 of 1899 praying that, in the circumstances stated therein, the High Court will be pleased to direct the Agent to the Governor at Vizagapatam to review his judgment in Appeal Suit No. 5 of 1898 on the file of his Court presented against the decree of the Acting Senior Assistant Agent, Vizagapatam District, in Original Suit No. 6 of 1898.

MAHARAJAH
OF
JEYPORE
v.
JAMMANA-
DHORA.

Court having the power, on special grounds, to require him to review his judgment, as directed by them." A preliminary objection was taken to the hearing of the petition on the grounds (1) that the latter part of Rule No. XX is *ultra vires*, and (2) that even if it be not *ultra vires*, the application should have been presented to the Governor in Council, under Rule No. XXXI, and not to the High Court:

Held, that Rule No. XX is not *ultra vires*; and that Rule No. XXXI has no application to a case of this nature.

Maharajah of Jeypore v. Papayyamma, (I.L.R., 23 Mad., 329), referred to.

PETITION presented by the plaintiff in a suit under Rule No. XX of the Agency Rules passed under Ganjam and Vizagapatam Agency Courts Act (XXIV of 1839), praying the High Court to direct the Agent to the Governor at Vizagapatam to review his judgment passed in an appeal on the file of his Court. In his judgment the Agent reversed the decision of the Acting Senior Assistant Agent giving a decree in favour of the petitioner for possession of certain villages. Petitioner, therefore, filed this petition.

Sundara Ayyar and *Nagabhushanam* for the respondents:—

There is a preliminary objection, namely, that the High Court is not competent to entertain this application. The application is made under Rule No. XX of the Agency Rules and asks the Court to direct the Governor's Agent in Vizagapatam to review his judgment in an appeal. The first portion of Rule No. XX provides that appellate decisions of the Agent shall be final. So far the rule is perfectly valid. But the latter part of it, which gives the High Court power on special grounds to direct the Agent to review the judgment, is *ultra vires* of Act XXIV of 1839, which regulates the administration of justice in the Agency Tracts. Section 4 of that Act gives power to the Government to say in what cases an appeal shall lie to the High Court and in what cases the Agent's decision is final. It does not empower the Government to declare by rule that even in cases in which no appeal lies to the High Court the High Court is to have appellate or revisional jurisdiction to direct a review of the Agent's judgment. The latter part of Rule No. XX is inconsistent with section 4. The observations of the learned Chief Justice upon the construction of that section in *Maharajah of Jeypore v. Papayyamma*(1) are in point and support the objection and if the latter part of Rule

MAHARAJAH
OF
JEYPORE
v.
JAMMANA-
DHORA.

No. XX is *ultra vires*, its invalidity is not cured by section 25 of the Indian Councils Act. No doubt the rule was made before 1860 and if the decision in *Maharajah of Jeypore v. Papayyamma*(1) were to be followed the rule in question might be a good rule. But it is submitted that section 25 of Councils Act cannot cure the invalidity of such rules. The scope and effect of that section are explained in Ilbert's "Government of India." The point was really not argued and no reasons are given for the decision in *Maharajah of Jeypore v. Papayyamma*(1). It seems to have been assumed. Another ground of objection is that even if the latter part of Rule No. XX is valid the High Court cannot entertain the present petition under Rule No. XXXI which provides that all petitions against Agent's proceedings must, in the first instance, be submitted to the Government which, will, when necessary, refer it to the High Court. The High Court has no jurisdiction except when the matter is referred to it by Government. The policy of the Agency rules is to have everything controlled by Government except appeals which lie direct to the High Court. The present application, therefore, cannot be entertained.

Sir *V. Bhashyam Ayyangar* and *S. Srinivasa Ayyangar* (for *Tiruvengkatachariar*) for the petitioner.—The first objection raised has really been overruled by this Court in *Maharajah of Jeypore v. Papayyamma*(1). The construction placed by Benson, J., on section 4 of Act XXIV of 1839 is the right one and ought to be followed. The striking difference in the phraseology in section 4 shows it to be so. That section empowers Government to determine to what extent the decisions of the Agents in the civil suits shall be final and in what suits an appeal shall lie to the Sudder Adalat. The section ought not to be read as if it provided for a determination in what suits the Agent's decision is to be final and in what suits an appeal is to lie to the Sudder Adalat. The Government is empowered by that section to determine to what extent the Agent's decision is to be final in suits where an appeal does not lie to the Sudder Adalat; namely, it can declare the Agent's decision to be final, subject to the High Court directing the Agent to review. The rule is perfectly valid and even if it were otherwise it would be validated by section 25 of the Councils Act. That point was decided after elaborate

(1) I.L.R., 23 Mad., 329.

MAHARAJAH OF JEYPORE v. JAMMANA-DHORA. argument and the reasons are given both by the Chief Justice and Benson, J. The gist of the argument is that such a rule could have been enacted under the legislative powers possessed by the local Government prior to 3 and 4 William IV, chapter 82, and section 25 of the Councils Act provides that in respect of rules made for non-regulation provinces the local Government is to be deemed to have the legislative powers of which they were deprived in 1833. Apart, therefore, from Act XXIV of 1839 the rule in question is valid under the legislative powers conferred by section 25. The second ground of objection is equally untenable. Rule No. XXXI does not apply to a case like the present but to cases which are not specifically provided for by the rules. Rule No. XX having provided for an application like the present, Rule No. XXXI has no bearing. Besides, the High Court may exercise its power of its own motion and does not require an application before it can interfere, and under Rule No. XXI the petition of appeal is to be presented to the High Court and is not governed by Rule No. XXXI.

Sundara Ayyar in reply.

The preliminary objection was overruled, and the application was argued on the merits.

JUDGMENT.—This is an application presented by the Maharajah of Jeypore under Rule No. XX of the Agency Rules praying the High Court to direct the Agent to the Governor in Vizagapatam to review his judgment in Appeal Suit No. 5 of 1898 reversing the decision of the Senior Assistant Agent giving a decree in favour of the Maharajah for possession of certain villages, on the ground that he was entitled to resume the villages as the terms on which they had been granted to the defendants had been violated.

On behalf of the defendants two preliminary objections are raised:—(1) that the latter part of Rule No. XX under which the application is made is *ultra vires*, and that therefore no such application can be entertained by this Court; and (2) that even if the latter part of Rule No. XX is not *ultra vires* this application should not have been presented to this Court but to the Governor in Council under Rule No. XXXI.

As regards the first objection Rule No. XX runs as follows:—“All decrees passed by the Agent on appeals from decrees of his subordinates shall be final, the Sudder Court having the power on

special grounds to require him to review his judgment, as directed by them.”

The contention of the defendants is that the portion of the rule which follows the word “final” is *ultra vires*, inasmuch as the rules purport to be framed under section 4 of Act XXIV of 1839 and that section, it is contended, merely authorizes the Governor in Council to determine in what classes of suits the decision of the Agent shall not be liable to appeal to the Sudder Court but shall be final, and does not authorize the Governor in Council to allow the Sudder Court to direct a review in cases in which no appeal lies. We are unable to accept this contention. Section 4 runs as follows:—“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 Sudder 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 Faujdari Adalat.”

The defendants rely upon the observations of the learned Chief Justice in *Maharajah of Jeypore v. Papayyanma*(1) to the effect that, in this section, the words “to what extent” mean substantially the same as the words “in what suits” in the following clause of the same section. With all deference to the learned Chief Justice we are unable to take the same view.

The latter part of the section beginning with the words “and to determine” seems in substance to lay down that the Governor in Council may determine, firstly, in what suits an appeal against the decision of the Agent shall lie, and, secondly, in cases where no appeal lies, the conditions subject to which the Agent’s decision shall be final, and it is with reference to the second matter that the words “to determine to what extent the decision of the Agent shall be final” were intentionally inserted. If it was not intended to provide for two distinct matters there would have been no need whatever for the introduction of this clause. If the intention of the Legislature was to provide for one matter only, viz., in what suits an appeal should lie, that would have been sufficiently

MAHARAJAH
OF
JEYPORE
v.
JAMMANA-
DHORA.

(1) I.L.R., 23 Mad., 329.

MAHARAJAH
OF
JEYPORE
v.
JAMMANA-
DHORA.

provided for by the rest of the section without this clause. Moreover, the words "to what extent" seem to refer in their grammatical sense to cases where, though no appeal lies, the finality of the decision is not intended to be absolute, but is subject to qualifications or conditions. In this view Rule No. XX, which provides that the finality of the Agent's decision shall be subject to the power of the Sudder Court to direct the Agent to review his decision on special grounds, is not, in our opinion, *ultra vires*.

As regards the second objection we are clearly of opinion that Rule No. XXXI has no application to a case like the present under Rule No. XX.

The express language of Rule No. XXI, relating to the appeals to the Sudder Court shows that an appeal petition may be presented direct to the Sudder Court and we can see no reason why an application to the Sudder Court to Act under Rule No. XX should be presented to the Governor in Council to be passed on by him, as a matter of course, to the Sudder Court.

Moreover, as contended on behalf of petitioner, the Sudder Court may act of its own motion under Rule No. XX, as the rule does not require any application by a party as a condition precedent to the exercise of its powers.

We therefore overrule the preliminary objections.

[The Court then proceeded to deal with the petition on the merits, and in the result directed the Agent to review his judgment in the light of the observations so made.]

APPELLATE CIVIL.

*Before Sir Charles Arnold White, Chief Justice, and
Mr. Justice Davies.*

GURURAJAMMAH (PLAINTIFF), APPELLANT,

v.

VENKATAKRISHNAMA CHETTI AND OTHERS
(DEFENDANTS), RESPONDENTS.*

*Civil Procedure Code—Act XIV of 1822, s. 13—Res judicata—Suit by A against B
in City Civil Court—Subsequent suit in High Court by B against A raising*

* City Civil Court Appeal No. 19 of 1900 against the decree of C. R. Venkatakrishnama Ayyar. City Civil Judge, Madras, in Original Suit No. 53 of 1898.

*same questions—Decision first arrived at in High Court—Subsequent trial of
A's suit in City Civil Court—Effect of High Court Judgment as res judicata.*

A instituted a suit against B in the Madras City Civil Court. B, subsequently, instituted a suit in the Madras High Court on its Original Side against A. The parties in both Courts were the same and the matters in controversy between them were substantially the same. The latter related to the prescriptive right of B to light and air in respect of certain windows situated in a wall abutting on A's house. Issues were framed in both Courts relating to this question. By consent, A's suit in the City Civil Court was adjourned from time to time to await the final decision of the High Court. This was duly arrived at in a judgment of an Appellate Court, after which A's suit came on for hearing in the City Civil Court. The question then first raised and considered was whether the decision of the High Court barred the trial of the suit, it being contended on behalf of A that inasmuch as A's suit had been filed prior to B's, the decision in B's suit did not operate as a bar:

Held, that the suit was barred. The doctrine of *res judicata* so far as it relates to prohibiting the re-trial of an issue refers, not to the date of the commencement of the litigation but to the time when the Judge is called upon to decide the issue.

Balkishan v. Kishan Lal, (I.L.R., 11 All., 148), approved and followed.

Suit for an injunction. Plaintiff filed a suit in the Madras City Civil Court, claiming a perpetual injunction against the defendants restraining them from opening certain windows, seven in number, in a wall abutting on plaintiff's house, and from interfering with the building of a wall by plaintiff facing the said windows. On 16th April 1898, *i.e.*, after the plaint had been filed, and before their written statements had been filed in the City Civil Court, the defendants instituted a suit on the Original Side of the High Court, at Madras, in which they sought a perpetual injunction restraining the present plaintiff from constructing the wall which she had commenced to build, and from interfering with their right to light and air through their windows. The present plaintiff filed her written statement in the suit in the High Court on 29th April 1898, and stated therein that she had already instituted this suit in the City Civil Court and that it was pending. Issues were framed both in the City Civil Court and in the High Court raising the question whether the defendants had a prescriptive right to light and air in respect of six of the windows referred to. Plaintiff's suit in the City Civil Court was adjourned from time to time, by consent of both sides, to the final decision of the High Court. On 15th July 1898 the High Court granted a perpetual injunction against the present plaintiff in respect of six windows, and on appeal, that order was, on 14th December 1898,

GURU-
RAJAMMAH
v.
VENKATA-
KRISHNAMA
CHETTI.

GURU-
RAJAMMAH
v.
VENKATA-
KRISHNAMA
CHETTI.

varied, an injunction being, however, granted in respect of four of the windows. On 6th March 1899 an issue was framed by the then City Civil Judge as to whether the suit in the City Civil Court was barred by the judgment in the High Court. Before that issue had been decided the Judge retired, and when the suit came on before his successor, objection was taken on behalf of the defendants that the value of the suit exceeded the pecuniary jurisdiction of the City Civil Court. This objection was upheld, and the plaint was returned for presentation to the proper Court, the defendants being disallowed their costs in consequence of their omission to raise the objection until so late a stage. An appeal was then presented by the plaintiff against the order returning the plaint, and the High Court ordered the case to be restored to the file of the City Civil Court. The case was tried accordingly, the issue relating to the question of the effect of the judgment of the High Court as *res judicata* being first considered. This issue, as amended, was as follows :—"Does the decision of the High Court in Original Side Appeal No. 37 of 1898 bar the trial of this suit or any or all of the issues Nos. 1 to 4 raised in this suit?" The City Civil Court Judge held that both under the general law of *res judicata* and on the construction of section 13 of the Code of Civil Procedure, plaintiff was barred by the findings arrived at in the judgment and decree of the High Court. He pointed out that the parties in both suits were the same and that the matters in controversy between them were substantially the same, and said :—"The point for determination is whether the plaintiff Guru-rajammah is not barred by the rule of *res judicata* from impeaching the findings arrived at by the High Court. As has been remarked by Brett, M.R., in *In re May*(1), the doctrine of *res judicata* is not a technical but a very substantial doctrine. It rests not only on considerations of justice to the litigant who ought not to be twice vexed for the same cause (*Nemo debet bis vexari pro una et eadem causa*) but also on considerations of public policy. The plaintiff's counsel contends that the doctrine ought not to be made applicable in this case because the suit in this Court was commenced earlier than the suit in the Original Side of the High Court, and the findings of the High Court had not been arrived at at the time when the suit was begun in this Court.

(1) L.R., 28 Ch. D., 516 at p. 518.

GURU-
RAJAMMAH
v.
VENKATA-
KRISHNAMA
CHETTI.

But, as pointed out by Mr. Justice Mahmood with the concurrence of Edge, C.J., and Straight, J., in *Balkishan v. Kishan Lal*(1) 'the doctrine so far as it relates to prohibiting the re-trial of an issue, must refer not to the date of the commencement of the litigation but to the time when the Judge is called upon to decide the issue.' Even though the High Court decided the matters in issue between the parties in a suit instituted subsequent to the present suit, the decision on those issues is binding on them in this suit. The observations in *Ram Lal v. Chhab Nath*(2) are also in point, though the facts are not fully stated, and the judgment of their Lordships Edge, C.J., and Brodhurst, J., is by no means exhaustive. The general law, as stated by Sir Montague E. Smith in *Krishna Behari Roy v. Brojeswari Chowdranee*(3), is that where a material issue has been tried and determined between the same parties in a proper suit and in a competent Court as to the status of one of them in relation to the other it cannot again be tried in another suit between them. The doctrine of *res judicata* is one which is independent of the provisions of section 13 of the Code of Civil Procedure, and though this section is an improvement on the corresponding section in the old Code (Act VIII of 1859) it has been repeatedly held that it is not complete or exhaustive. But even limiting ourselves to the four corners of the section, it is difficult to resist the conclusion that the findings arrived at in the judgment of the High Court are binding on the parties in this suit. The matters directly and substantially in issue in the present suit were the matters directly and substantially in issue in the suit in the High Court, and they were heard and finally decided by the High Court, which is of course a Court of jurisdiction competent to try the suit in this Court in which the issues have now been raised for trial. The only question is whether the suit in the High Court was 'a former suit' between the parties. It is argued by the plaintiff's counsel that these words must be taken to mean 'a previously instituted suit.' On the other hand, the defendant's counsel contends that the words only mean 'a suit that has been already determined.' It is rather significant that while section 12 of the Code of Civil Procedure refers to 'a suit previously instituted there is a change of phraseology when we come to section 13.' 1

(1) I.L.R., 11 All., 148 at p. 162.

(2) I.L.R., 12 All., 578.

(3) L.R., 2 L.A., 283 at p. 284.

GURU.
RAJAMMAH
v.
VENKATA-
KRISHNAMA
CHETTI.

am of opinion that section 13 refers, not to a suit previously begun but to a suit already ended in which the matters in issue have been finally determined. The decision of the issues, though in a subsequently instituted suit, would thus bar the trial of the same issues in a suit previously instituted. The real question appears to be whether, at the time when the issues are raised for trial in any suit, there has already been an adjudication between the same parties on the said issues in another suit, whether the suit was previously instituted or not. I hold on this issue that both under the general law of *res judicata* and on the construction of section 13 of the Code of Civil Procedure the plaintiff is barred by the findings arrived at in the decree and judgment of the High Court."

On the other issues he recorded findings in accordance with those of the High Court, and held that plaintiff was entitled, not to the injunction prayed for but to one restraining defendants from preventing her building a wall in her house in such a manner as not to obstruct the free passage, through the four windows of the defendants, of such an amount of light and air as would have flowed to them as they existed prior to 1878. The suit was dismissed as to the rest of plaintiff's claim.

Plaintiff preferred this appeal.

Mr. K. Brown for appellant.

The Advocate-General (Hon. Mr. J. P. Wallis) for respondents.

JUDGMENT:—We think this appeal might be disposed of on the ground that, as found by the City Civil Court Judge, the present suit was adjourned from time to time with the consent of both sides to await the disposal of the suit in the High Court. In this state of things it seems to us that it is not now open to the plaintiff to seek to go behind the judgment of the High Court.

Apart from this, however, we are clearly of opinion that the plaintiff's claim for an injunction in the form asked for in the plaint is *res judicata*. In the High Court suit the present plaintiff was the defendant. The first issue in the suit was whether the then plaintiffs had a prescriptive right to certain lights which they claimed as ancient lights. It was held by Boddam, J., and by the Appellate Court that they had this right (the decree of the Appellate Court modifying the decree of Boddam, J., as regards three out of the seven windows) and that the agreement of 29th March 1878, did not operate as a waiver or surrender of this prescriptive right.

GURU.
RAJAMMAH
v.
VENKATA-
KRISHNAMA
CHETTI.

The decisions of the Courts in this country as to how far a decision based on a mistake of law operates as *res judicata* are not altogether uniform, but it is not necessary to consider these decisions because, in our opinion, the judgment in the High Court suit was not a decision on a point of law. The decision was that the plaintiffs in the suit of 1898 did not intend by the agreement of 1878 to abandon or surrender their right to certain ancient lights. This is a decision on a question of fact, not on a point of law.

The argument addressed to us by Mr. Brown that the legal effect of the agreement of 1878 was to extinguish any prescriptive right which the plaintiffs in the High Court suit had acquired was not put forward on behalf of the defendant either in the Original Court or in the Appellate Court. That question therefore is also *res judicata* by virtue of Explanation II to section 13 of the Code of Civil Procedure.

It has also been argued on behalf of the appellant that the plaintiff's claim is not *res judicata* because her suit was instituted before the High Court suit, although the matter in dispute was adjudicated upon in the High Court suit before there was any adjudication upon the question in the present suit. As regards this point we agree with the statement of the law in the judgment of the Allahabad High Court (*Balkishan v. Kishan Lal*(1)) "the doctrine so far as it relates to prohibiting the re-trial of an issue must refer not to the date of the commencement of the litigation but to the time when the Judge is called upon to decide the issue."

We think the plaintiff was only entitled to an injunction in the terms as granted by the City Civil Court Judge.

This appeal is dismissed with costs.

Messrs. Branson & Branson—Attorneys for appellant.

Messrs. Short & Roll—Attorneys for respondents.

(1) I.L.R., 11 All., 148.

APPELLATE CIVIL.

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

KARUNAKARA KURUP (PLAINTIFF)

v.

MUNIPERANAN AND OTHERS (DEFENDANTS).*

1901.
January 15.

Provincial Small Cause Courts Act—Act IX of 1887, s. 15, sched. II, art. 8.—Suit for rent with cross-demand for value of improvements—Jurisdiction of Small Cause Court.

Plaintiff sued to recover arrears of rent due by defendants and also prayed that the value of improvements due to the defendants might be made liable for the claim :

Held, that the suit was one for rent and triable by a Court of Small Causes.

CASE stated for the opinion of the High Court, as follows :—
“Plaintiff sued to recover from defendants Rs. 293-14-0 made up of arrears of rent of faslis 1069 to 1074 (Rs. 160) and interest (Rs. 133-14-0) due under a registered kaichit executed by first defendant to plaintiff on 3rd July 1890. It was also prayed that the value of improvements due to the defendants might be made liable for the plaintiff claim. The plaintiff was presented on the original side of the Principal District Munsif's Court of Calicut and transferred to the Additional District Munsif for disposal. The Additional District Munsif returned the plaintiff with the following order :—‘The plaintiff as jenmi alleging that the defendants hold under a verumpattam tenure sues to recover arrears of rent. He also prays to have the improvements belonging to the defendants sold for the arrears of rent. I doubt very much whether plaintiff can maintain this suit on the regular side and get the relief he wants. The plaintiff is returned to be presented to the proper Court. Costs of the other side must be paid.’ The suit was then presented to the Principal District Munsif's Court who returned the plaintiff with the following order :—‘The prayer in the plaintiff to hold the improvements responsible for arrears of rent is based on an express contract. Hence the suit lies on the regular side. It may be admitted on the regular side.’

* Referred Case No. 26 of 1900, stated under section 646 (C) of the Civil Procedure Code by S. Russell, Acting District Judge of South Malabar at Calicut, in Original Suit No. 212 of 1900 on the file of the Principal District Munsif's Court of Calicut.

The suit was again transferred to the Additional District Munsif's Court for disposal. The Additional District Munsif returned it with the following order :—‘On the defendants' side it is objected that the plaintiff cannot be entertained on the regular side, the order of this Court whether right or wrong in returning the plaintiff for presentation on the small cause side not being set aside. The plaintiff's vakil cannot cite any authority by which the objection raised may be overruled. The plaintiff must, I think, be returned once more for presentation to the proper Court on the small cause side. Ordered accordingly. Costs to be paid to the other side.’ The suit was then presented to the Subordinate Judge's Court on the small cause side who returned it with the following order :—‘This is a plaintiff presented by the plaintiff's vakil on the 4th July last, and is returned to him for presentation to the proper Court (District Munsif's Court) which has jurisdiction to try this case on the regular side. Inasmuch as the plaintiff wants to establish his right to sell the improvements (which are immoveable property) for the amount of the plaintiff and as the claim cannot *prima facie* be said to be made without good faith, this Court, on its small cause side, has no jurisdiction to try it; the plaintiff is returned. Perhaps the re-filing of the plaintiff in the Principal Munsif's Court was unnecessary before the views of this Court were known. But now the plaintiff can go with the plaintiff to the District Munsif who has jurisdiction to try this suit. Each party to bear his own costs in this Court.’”

A petition was presented in the District Court praying that the matter might be referred.

The parties were not represented.

JUDGMENT.—The contract alleged as to some specific liability of the tenants' improvements for arrears of rent does not appear to be in writing nor is the allegation in the plaintiff with regard to it intelligible. In a case like this, if arrears of rent are due on the one side and value of improvements on the other, the two items should ordinarily be dealt with as cross-demands arising under the same contract, but give rise to no ground for treating the suit otherwise than as a suit for rent.

Such suit is therefore triable by a Court of Small Causes.

We therefore direct the suit to be received by the Court of Small Causes.

KARUNAKARA
KURUP
v.
MUNI-
PERANAN.

APPELLATE CIVIL.

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

1901.
January 21.

SRIMANTU RAJA YARLAGADDA DURGA PRASADA
NAYADU AND ANOTHER (PETITIONERS), APPELLANTS,

v.

SRIMANTU RAJA YARLAGADDA MALLIKARJUNA
PRASADA NAYADU (COUNTER-PETITIONER), RESPONDENT.*

*Letters Patent, art. 15—Order of a single Judge refusing a stay of execution—
“Judgment”—Appeal.*

An order, made by a single Judge, refusing a stay of execution, is not a judgment within the meaning of article 15 of the Letters Patent, and no appeal lies therefrom.

R. v. R., (I.L.R., 14 Mad., 88), commented on.

APPEAL preferred under article 15 of the Letters Patent against an order of a single Judge of the High Court refusing stay of execution. Appellant had prayed, under sections 545 and 546 of the Civil Procedure Code, for an order that execution of a decree passed by the Subordinate Court of Kistna might be stayed pending the disposal of an appeal therefrom. The Court passed the following order:—“I do not think in the circumstances that I ought to stay execution. The District Judge, as long ago as 1891, refused to set apart for the defendants premises in the fort and in lieu thereof gave them an allowance. As the only defence to the action is admittedly adverse possession for the statutory period and the defendants’ claim is based upon no title, I dismiss this petition with costs.”

Against this order the appellant preferred this appeal under article 15 of the Letters Patent.

V. Krishnasami Ayyar and Sundaranana Rao for appellants.

Sundara Ayyar for respondent.

* Letters Patent Appeal No. 40 of 1900 under section 15 of the Letters Patent from the order of Mr. Justice Boddam, dated 8th November 1900, dismissing with costs Civil Miscellaneous Petition No. 585 of 1900, presented for stay of execution of the decree of the Subordinate Judge of Kistna in Original Suit No. 29 of 1898, pending the disposal of Appeal No. 131 of 1900 on the file of the High Court.

JUDGMENT.—This is an appeal under article 15 of the Letters Patent against an order made by Mr. Justice Boddam refusing a stay of execution.

A preliminary objection has been taken that no appeal lies since the order appealed against is not a judgment within the meaning of article 15 of the Letters Patent.

We think this objection is well founded. The order appealed against does not affect the merits of the question between the parties by determining any right or liability in dispute in the suit or appeal. Section 545 of the Civil Procedure Code expressly provides that execution of a decree shall not be stayed by reason only of an appeal having been preferred against the decree, but the Appellate Court may, for sufficient cause, order the execution to be stayed. Section 608 of the Civil Procedure Code, which deals with the powers of the High Court in the case of appeals to the Privy Council, gives a similar discretionary power to the High Court in language which is substantially the same as that used in section 545. The Calcutta High Court in *Mohabir Prosad Singh v. Adhikari Kunwar*(1) has held that an order refusing to stay execution in the exercise of the discretion given to the Court under section 608 of the Civil Procedure Code is not a decision which affects the merits of any question between the parties by determining a right or liability, and that no appeal from such an order lies under clause 15 of the Letters Patent. We think this case was rightly decided and that the decision covers the point raised in the present case. The decision of this Court in *Ramayyar v. Dorasami Ayyar*(2) appears to us to be an authority for the proposition that no appeal lies under the Letters Patent against an order refusing a stay of execution.

Our attention has been called to *R. v. R.*(3) in which this Court no doubt entertained an appeal under article 15 of the Letters Patent against an order for an adjournment made in a matrimonial suit. The question whether the order appealed against was a “judgment” was not discussed in that case. It appears from the judgment that the appeal was entertained on the ground that an appeal lies against every order of a single Judge except when the right of appeal is curtailed by legislation subsequent to the

SRIMANTU
RAJA
YARLAGADDA
DURGA
PRASADA
NAYADU
v.
SRIMANTU
RAJA
YARLAGADDA
MALLI-
KARJUNA
PRASADA
NAYADU.

(1) I.L.R., 21 Calo., 478. (2) Letters Patent Appeal No. 5 of 1900 (unreported).
(3) I.L.R., 14 Mad., 88.

SRIMANTU
RAJA
YARLAGADDA
DURGA
PRASADA
NAYADU
v.
SRIMANTU
RAJA
YARLAGADDA
MALI-
KARJUNA
PRASADA
NAYADU.

Letters Patent. Having regard to the later decisions of this Court we do not think that this very general statement can be accepted as a correct exposition of the law.

The case of *Maharajah of Jeypore v. Papayamma*(1) is clearly distinguishable from the present case. The order of transfer in that case was made on the erroneous assumption that the Court had jurisdiction to make the order. The question there involved was not one of discretion but of right.

The appellant has also relied on section 244 of the Civil Procedure Code and has argued that inasmuch as by section 2 of the code an order determining any question mentioned or referred to in section 244 is a "decree" within the definition given in section 2, and a question relating to the stay of execution of a decree is a question mentioned in section 244, the order appealed against is a "decree" and consequently must be regarded as a judgment within the meaning of article 15 of the Letters Patent. No doubt an order determining a question referred to in section 244 is, for the purpose of the Civil Procedure Code, a decree under the special words of section 2, although it is not a decree under the general words of that section.

But, of course, it does not follow that because the Legislature have provided that for a special purpose an order under a special section should be technically a decree that such an order is a judgment within the meaning of article 15 of the Letters Patent. The preliminary objection is allowed.

The appeal is dismissed with costs.

(1) I.L.R., 23 Mad., 329.

APPELLATE CIVIL.

Before Mr. Justice Subrahmaniam Ayyar and Mr. Justice Davies.

VENKATARATNAM NAIDU AND ANOTHER (PLAINTIFFS),
APPELLANTS,

v.

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

Limitation Act—Act XV of 1877, ss. 14, 19—Deduction of period during which plaintiff had been prosecuting another proceeding—Former proceeding dismissed for misjoinder of causes of action—Written statement of defendant treated as an acknowledgment.

Plaintiff had previously filed against the same defendants a suit which had been dismissed on the ground of misjoinder of causes of action. He now filed this suit, which would be barred by limitation unless the period during which the first suit had been pending should be deducted, under section 14 of the Indian Limitation Act:

Held, that plaintiff was entitled to have that period deducted, inasmuch as he had prosecuted the first suit with due diligence.

The written statement of the defendant in the first suit was treated as an acknowledgment, under section 19 of the Limitation Act, from the date of which the period of limitation should be calculated.

SUIT for settlement of accounts. The present suit was filed on 1st September 1896. In a written statement, dated 7th December 1892, and filed by the present defendant, in Original Suit No. 15 of 1892, brought against him by the present plaintiff, defendant had acknowledged plaintiff's right to have accounts taken. That suit, which had been filed on 30th September 1892 was dismissed for misjoinder of causes of action. The said written statement was now filed by plaintiff as exhibit F, and relied upon by him as an acknowledgment under section 19 of the Limitation Act, and plaintiff contended that the period during which Original Suit No. 15 of 1892 was pending, namely, from 30th September 1892, until 23rd October 1893, (when it was dismissed), should be deducted under section 14 of the Limitation Act. If it was so deducted, the present suit would not be barred. On this point the judgment of the Acting Subordinate Judge on appeal was as follows:—

* Second Appeal No. 1154 of 1899 against the decree of C. G. Kuppusami Ayyar, Acting Subordinate Judge of Cocanada, in Appeal Suit No. 116 of 1898, affirming the decree of V. G. Narayanayya, District Munsif of Amalapur, in Original Suit No. 551 of 1896.

1900.
October 29.
1901.
January 21.

VENKATA-
RATNAM.
NAIDU
v.
RAMARAJU.

"The next point urged by the plaintiff is that the time during which Original Suit No. 15 of 1892 was pending in the District Court should be counted in plaintiff's favour. The said suit was instituted on the 30th September 1892 for the recovery of the profits due in respect of all the transactions which are now covered by these suits and it was dismissed for misjoinder on the 23rd October 1893 (*vide* exhibit A). The interval between the institution and the disposal of that suit cannot be deducted in plaintiff's favour, as a misjoinder of this description cannot come under the words 'or other cause of a like nature' in section 14 of the Limitation Act. The decision quoted in *Tirtha Sami v. Seshagiri Pai*(1) favours the defendant's contention, while *Subbarau Nayudu v. Yagana Pantulu*(2) and *Venkiti Nayak v. Murugappa Chetti*(3) do not support the plaintiff's argument. Moreover, this is an objection not taken in the lower Court but urged before me for the first time, though it is not one purely of law. I hold therefore that the time during which Original Suit No. 15 of 1892 was pending in the District Court, cannot be deducted from the computation of the period of limitation. These three suits were instituted on the 1st September 1896, that is, more than three years after the transactions covered by them came to a close. The plaintiff relies on certain documents which he says constitute acknowledgments under section 19 of Act XV of 1877 calculated to extricate his claims from the clutches of limitation. In paragraph 15 of his judgment the District Munsif has correctly found that exhibits H and J, dated 8th March and 21st June 1890, respectively, constitute such acknowledgments within the purview of the said section. It cannot be positively asserted that the letter exhibit K, dated the 26th December 1890, is also an acknowledgment, for it is too general in its terms, and there is nothing therein to show that it refers to the suit transactions. I therefore differ from the District Munsif and hold that the exhibit K is no acknowledgment. On the other hand, paragraphs 14 and 15 of exhibit F, dated the 7th December 1892, which is the written statement filed by the defendant in Original Suit No. 15 of 1892, in the District Court, embody an acknowledgment of the plaintiff's right to look into the accounts of the partnership and to be paid any sum that might be found due

(1) I.L.R., 17 Mad., 299.

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

(3) I.L.R., 20 Mad., 49.

on settlement thereof. Exhibit F should, therefore, be held an acknowledgment under section 19 of the Limitation Act (*Sitayya v. Rangareddi*(1)). He held that the period of limitation applicable to the suit was three years, and that inasmuch as the suit had been filed more than three years after exhibit F, it was barred by limitation. He dismissed the appeal and upheld the decree of the District Munsif, who had also dismissed the suit as barred by limitation.

Plaintiffs preferred this second appeal.

Sundara Ayyar for appellants.

Seshachariar for respondents.

JUDGMENT.—Mr. Ross, the District Judge, held that the suit, No. 15 of 1892 on the file of the District Court of Godavari, was not sustainable as causes of action were wrongly joined, and the consequence was the plaintiff had to bring three separate suits in the Munsif's Court. The period during which the original combined suit was pending in the District Court, viz., from the 30th September 1892 to 23rd October 1893, is a period, which the plaintiff is entitled to deduct under section 14 of the Limitation Act, this case being analogous to that decided in *Assan v. Pathumma*(2), following the Full Bench decision of this Court in *Venkiti Nayak v. Murugappa Chetti*(3) (see also *Mathura Singh v. Bhawani Singh*(4)). When such deduction is made from the period to which the plaintiff was entitled under exhibit F, which is the latest acknowledgment, this suit is in time if the former suit was prosecuted with due diligence. We must ask the Subordinate Judge to submit a finding on this point.

[In compliance with the above order, the Subordinate Judge submitted a finding to the effect that the former suit had been prosecuted with due diligence.]

The appeal and the memorandum of objections put in by the first respondent coming on for final hearing after the receipt of the above finding, the Court delivered the following

JUDGMENT.—We accept the finding of the lower Appellate Court and therefore hold that the suit was not barred by limitation. The decrees of both the lower Courts are reversed, and the appeal is remanded for disposal upon the merits.

(1) I.L.R., 10 Mad., 259.

(2) I.L.R., 22 Mad., 494.

(3) I.L.R., 20 Mad., 48.

(4) I.L.R., 22 All., 248.

APPELLATE CIVIL.

*Before Sir Arnold White, Chief Justice, Mr. Justice Shephard,
and Mr. Justice Subrahmania Ayyar.*

1900.
December
10, 11, 20.

1901.
February
4, 6, 8, 12.

KRISHNASAMI PANNIKONDAR (COUNTER-PETITIONER),
PETITIONER,

v.

MUTHUKRISHNA PANNIKONDAR (PETITIONER),
RESPONDENT.*

Succession (Property Protection) Act—Act XIX of 1841, ss. 3, 5, 8—Appointment of curator—Omission to take evidence before making order—Civil Procedure Code—Act XIV of 1882, s. 622—Want of jurisdiction—Material irregularity.

On an application under Act XIX of 1841 to recover possession of the properties of a deceased zamindar by summary suit and for the appointment of a curator pending the determination of the suit, the District Judge omitted to examine the complainant or inquire further under section 3 of the Act, but called for a report from the Collector under section 8, and on receipt thereof made an order under section 5 appointing a curator:

Held, (SUBRAHMANIA AYYAR, J., dissenting), that the order must be set aside under section 622 of the Code of Civil Procedure. The Judge was bound to hold an enquiry under section 3 before appointing a curator under section 5. The provisions of section 3 are mandatory and not merely directory.

Per Sir ARNOLD WHITE, C.J.—The Judge acted without jurisdiction or with material irregularity.

Per SHEPPARD, J.—The Judge acted within his jurisdiction but with material irregularity.

PETITION to revise an order of the District Judge of Tanjore, made under Act XIX of 1841, appointing a curator of the properties of the zamindar of Sillathur pending the determination of a summary enquiry into the right to possession of the properties. Counter-petitioner had on 11th September 1900 filed a petition, verified in the usual form, in the District Court under the Act referred to, alleging that he was entitled to succeed as heir to the properties of the deceased zamindar of Sillathur, and that petitioner had taken wrongful possession thereof. He asked the Court to enquire into the right to the possession of the said properties and

* Civil Revision Petition No. 336 of 1900, under section 622 of the Civil Procedure Code, praying the High Court to revise the order of G. F. T. Power, District Judge of Tanjore, passed on Miscellaneous Petition No. 739 of 1900.

to deliver possession of them to him, and in the meanwhile to appoint a curator to take charge of them. No enquiry was made by the Judge as to the facts alleged in the petition. Section 3 of the Act is in the following terms:—"The Judge to whom such application shall be made shall, in the first place, enquire by the solemn declaration of the complainant, and by witnesses and documents at his discretion, whether there be strong reasons for believing that the party in possession or taking forcible means for seizing possession has no lawful title, and that the applicant, or the person on whose behalf he applies, is really entitled and is likely to be materially prejudiced if left to the ordinary remedy of a regular suit, and that the application is made *bonâ fide*." On 21st September the Judge called upon the Collector for a report under section 8 of the Act, which was duly made, and on 6th November 1900 the Judge made an order under section 5, appointing a curator of the properties pending the determination of the summary inquiry; the said curator being authorised to take possession of and manage all the properties, to collect rents and profits and debts due, and to defend suits on behalf of the zamindari.

Against the above order the counter-petitioner preferred this civil revision petition.

The Advocate-General (Hon. Mr. J. P. Wallis), V. Krishnasami Ayyar, and Sankara Narayana Sastri for petitioner.

Sir V. Bhashyam Ayyangar and Gopalasami Ayyangar for respondent.

The petition first came on for hearing before Sir ARNOLD WHITE, C.J., and SUBRAHMANIA AYYAR, J., when their Lordships delivered the following judgments:—

SIR ARNOLD WHITE, C.J.—This is a petition under section 622 of the Code of Civil Procedure, praying the High Court to revise the order of the District Judge of Tanjore made under Act XIX of 1841 appointing a curator of the properties of the zamindari of Sillathur pending the determination of a summary enquiry into the right to possession of the properties.

On 11th September 1900 one Muthukrishna Pannikondar presented a petition in the District Court under Act XIX of 1841 alleging that he was entitled to succeed as heir to the properties of the deceased zamindar of Sillathur, that one Krishnasami Pannikondar had taken wrongful possession thereof, and asking the

KRISHNA-
SAMI
PANNI-
KONDAR
v.
MUTHU-
KRISHNA
PANNI-
KONDAR.

KRISHNA-
SAMI
PANNI-
KONDAR
v.
MUTHU-
KRISHNA
PANNI-
KONDAR.

Court to inquire into the right to possession of the said zamindari properties and deliver possession thereof to the petitioner and in the meanwhile to appoint a curator to make an inventory of the said properties and take charge of the same.

The Judge made no inquiry into the facts alleged in the petition.

On 21st September the Judge made an order calling on the Collector under section 8 of the Act for a report.

The Collector's report was duly furnished.

On 6th November the Judge made the order which we are now asked to revise.

The material sections of the Act are sections 1, 3, 4, 8 and 14.

The Advocate-General contended, on behalf of Krishnasami Pannikondar, that the District Court, in making the order of 6th November, had exercised a jurisdiction not vested in it by law, or had acted in the exercise of its jurisdiction illegally or with material irregularity, inasmuch as the conditions precedent prescribed by the Act of 1841 to the exercise of jurisdiction under that enactment had not been fulfilled.

The application to the Judge was by petition which was verified in the usual form, but it cannot be said—in fact it was not contended by Sir V. Bhashyam Ayyangar, who appeared to support the order of the District Court,—that the mere perusal of the petition amounted to an inquiry by the solemn declaration of the complainant within the meaning of section 3 of the Act; but it was urged, first, that when the Judge called for a report under section 8 of the Act, the requirements of section 3 might be dispensed with, and, secondly, that, even if section 3 applies when the report of the Collector is called for, the word “shall” in that section is directory and not mandatory and that a compliance with the requirements of section 3 is not a condition precedent to the exercise of jurisdiction under the Act.

No doubt the case of *Papamma v. The Collector of Godavari*(1) which was strongly relied upon by the Advocate-General, is distinguishable from the present case. In the first place, the verified petition in *Papamma v. The Collector of Godavari*(1) did not contain averments which, if true, would satisfy the requirements of the Act. In the present case it seems to me that, if the reading of the petition could be regarded as an inquiry by the

(1) I.L.R., 12 Mad., 341.

KRISHNA-
SAMI
PANNI-
KONDAR
v.
MUTHU-
KRISHNA
PANNI-
KONDAR.

solemn declaration of the complainant, the averments of the petition would satisfy the requirements of the Act. In the second place, in the case of *Papamma v. The Collector of Godavari*(1) there was no report by the Collector and consequently the effect of section 8 of the Act had not to be considered. The point which we have to consider is whether the order appointing the curator is a valid order. With regard to this I am prepared to accept the reasoning and the conclusion of this Court in the case referred to. In dealing with this point their Lordships say :—

“As regards the omission to comply with the procedure prescribed by section 3, it is certainly a material error of procedure having a bearing on the *interim* order which we are asked to revise. It is not denied that the Judge has, under the Act, general jurisdiction over the property of the deceased proprietor. Nor is there any doubt that sections 3 and 4 impose an obligation on the Judge to satisfy himself by some inquiry before citing the party complained against, that there are strong reasons for believing that the party in possession has no lawful title and that the party suing is likely to be materially prejudiced if left to a regular suit. The scheme of the Act is that the finding of the Judge on the two points mentioned in section 3 is a condition precedent to the Act being put in force; for, section 4 enacts that in case the Judge is satisfied of the existence of such strong ground of belief, but not otherwise, he shall cite the party complained of. No witnesses were apparently examined nor documents produced in this case before the Judge made his order. Though the application is verified, neither the Collector nor any one acquainted with material facts was examined, nor does the application embody any information in regard to the claim set up by the petitioner when she refused to allow the Collector to take possession or in regard to the grounds on which that claim was considered untenable. As the inquiry directed by section 3 ought to be held prior to the citation of the petitioner, the party applying under the Act was bound to show, and if he did not, it was incumbent upon the Judge to call upon him to show in the language of section 3, strong reasons for the belief that the party in possession had no lawful title and that the minor was likely to be materially prejudiced if the Court of Wards was left to the ordinary remedy of a regular suit. It is no doubt in the Judge's discretion to call for

(1) I.L.R., 12 Mad., 341.

KRISHNA-
SAMI
PANNI-
KONDAR
v.
MUTHU-
KRISHNA
PANNI-
KONDAR.

witnesses or documents if the solemn declaration of the complainant affords sufficient information and enables him to form an opinion as directed by section 3. The omission to follow the procedure has in this case deprived the petitioner of the protection to which she was entitled under the Act before she could be cited. In this sense the irregularity was material."

And again with reference to section 5:—"It will thus be observed that the conditions subject to which a curator is to be appointed are (1) that there must be an application and an examination as aforesaid, (that is to say as directed in section 3), (2) that the Judge must be in a position to say upon such application and examination that danger is to be apprehended of misappropriation or waste of the property before the summary suit can be determined, and (3) that the delay in obtaining security from the party in possession or its insufficiency is likely to expose the party out of possession to considerable risk. On referring to the Collector's application we find no averment showing that any of these conditions existed and when the Judge made his order he had no other evidence before him. We must come to the conclusion that at the time the order before us was made the Judge overlooked the conditions subject to which alone he was authorized to appoint a curator."

As regards Sir V. Bhashyam Ayyangar's first contention, viz., that when section 8 applies the requirements prescribed by section 3 may be dispensed with—it involves, first, the reading into section 3 and section 5 some such words as "subject to the provisions of section 8", and secondly, the construction of section 8 so as to extract from that section an implied authority to the Judge to exercise the summary powers conferred by the Act on the report of the Collector, if he thinks fit to do so. It is true that under section 8 if the Judge is not prepared to act in conformity with the report of the Collector he must state his reasons to the High Court, and may be directed by the High Court to proceed conformably with the report, but it does not follow that, because he may be directed to proceed conformably with the report, he is entitled to proceed upon the report and the report only.

The Act no doubt presents some difficulties of construction, but it seems to me to have been the intention of the Legislature that the Judge should himself exercise a judicial discretion before making use of the summary powers conferred by the Act. If we

were to give effect to Sir V. Bhashyam Ayyangar's contention, the necessity for the exercise of a judicial discretion in cases to which section 8 applies would be done away with altogether, or, at any rate, the supposed exercise of a judicial discretion would, in practice, become a mere form, since the Judge would be nothing more than the mouth-piece of the Collector.

With regard to the second ground upon which it has been sought to support the order, viz., that the word "shall" in section 3 is merely directory, there are no doubt numerous authorities to show that, in matters of procedure, mandatory words may be construed as directory; but these authorities have no application to a case where an enactment which creates a special jurisdiction provides that certain things should be done before that jurisdiction is exercised.

The principle applicable to cases of this sort was laid down by the Privy Council in *Nusserwanjee Pestonjee v. Meer Mynooddeen Khan Wullud Meer Sudroodeen Khan Bahadoor*(1). In that case their Lordships say:—"The present question turns upon this principle, that wherever jurisdiction is given to a Court by an Act of Parliament, or by a Regulation in India (which has the same effect as an Act of Parliament), and such jurisdiction is only given upon certain specified terms contained in the Regulation itself, it is a universal principle that these terms must be complied with, in order to create and raise the jurisdiction, for if they be not complied with, the jurisdiction does not arise."

It seems to me that the order of the District Judge was made without jurisdiction. If not made without jurisdiction, I think the Judge acted in the exercise of his jurisdiction with material irregularity. I think the order ought to be set aside.

SUBRAHMANIA AYYAR, J.—One Muthukrishna Pannikondar presented under Act XIX of 1841 to the District Judge of Tanjore an application dated 11th September 1900 to the following effect:

Viziaraghunadha Krishnasami Pannikondar, Zamindar of Sillathur, having died on the 15th March 1900 unmarried and intestate, the petitioner, as his nearest surviving sapinda, was entitled to succeed to the estate; as the deceased had been adopted into the Sillathur family, Krishnasami Paunikondar, his natural father, the counter-petitioner, had no right whatever to the estate of the deceased; the counter-petitioner, however, subsequent to the death

KRISHNA-
SAMI
PANNI-
KONDAR
v.
MUTHU-
KRISHNA
PANNI-
KONDAR.

(1) 6 M.I.A., 184 at p. 155.

KRISHNA-
SAMI
PANNI-
KONDAR
v.
MUTHU-
KRISHNA
PANNI-
KONDAR.

of the zamindar, fabricated a will purporting to have been executed by the zamindar and to bequeath the zamindari to the counter-petitioner and under that pretended claim took wrongful possession of the whole of the moveable property left by the deceased and some of the zamindari lands and was attempting to take possession of the remainder; some of the moveables so wrongfully taken had been secreted, some others sold and attempts were being made to secrete the rest; before the petitioner could institute a regular suit for the recovery of the property, all the moveable property was likely to disappear and the petitioner would not be able to recover either their value or the mesne profits of the landed estate which the counter-petitioner might receive in the meanwhile; the petitioner prayed for possession of the estate and the immediate appointment of a curator.

The District Judge on the 29th September called upon the Collector of the District under section 8 of the Act to submit a report on the case. The Collector sent his report on the 17th October and recommended that action be taken under the Act. Thereupon, the District Judge directed on the 30th October that the counter-petitioner be cited and fixed 30th November as the day for enquiry; meanwhile in conformity with the opinion of the Collector he appointed, on the 6th November, the person recommended by the Collector as curator to take possession of the estate.

The question raised before us is whether the District Judge's order appointing the curator is valid? In arguing against its validity the learned Advocate-General, on behalf of the counter-petitioner, contended, *inter alia*, that the petitioner not having been examined on oath as required by section 3 the order was made without jurisdiction, and in support of that contention he laid great stress on the words "shall in the first place enquire by the solemn declaration of the complainant" in section 3. Sir V. Bhashyam Ayyangar, on the other hand, urged for the petitioner that the provision that the complainant should be examined is only directory and that in a case like the present, to which section 8 applies, the District Judge, without any reference to section 3, may appoint a curator solely on the report of the Collector, if he and the Collector agree in the matter.

In order to determine the force of these respective contentions, we must carefully examine the provisions of the Act. No doubt, the Act being intended to apply to extraordinary cases ought not

KRISHNA-
SAMI
PANNI-
KONDAR
v.
MUTHU-
KRISHNA
PANNI-
KONDAR.

to be put in force unless strong grounds are shown to exist and consequently its provisions which form as it were the condition precedent for putting the Act in force must be strictly followed. Now, section 1 says that any person claiming a right by succession to the property, moveable or immoveable, of a deceased person may apply for relief to the District Judge. Section 3 says that the Judge on receipt of the application shall enquire whether the conditions laid down in that section for taking action under the Act exist. Section 4 says that unless the Judge finds strong grounds for believing that those conditions exist he shall not cite the party complained of. Section 5 lays down what further condition is necessary for the appointment of a curator. Having thus laid down in these sections what the Judge has to do when an application under section 1 is made to him, the Legislature goes on to provide in section 8 for the case where the estate to which the dispute relates consists wholly or partly of land paying revenue to Government. Now, the fact that the Legislature, having said what the Judge's procedure ought to be on an application in respect of moveable or immoveable property generally of a deceased person, proceeds now to consider only one portion of immoveable property, that is land paying revenue to Government, and to prescribe the Judge's procedure with reference thereto, is itself significant. It looks as though the Act prescribes a special procedure in respect of such land different from the Judge's ordinary procedure. This is confirmed when we look to the language of section 8. That section says that when the land pays revenue to Government the Judge shall, in all matters regarding the propriety of citation, of appointment of curator, etc., demand a report from the Collector and the Collector is required to furnish the same. It is evident from this that, whereas in the case of property other than land paying revenue to Government, the Judge must, in order to determine whether a party is to be cited or a curator is to be appointed, satisfy himself by an enquiry under section 3, in the case of land paying revenue to Government, for the determination of the propriety of citing the party or appointing curator the Judge need not make any enquiry but may make the Collector's report the basis of his action. The Collector's report is not considered to be supplemental to an enquiry under section 3 but is treated as the finding by a specified authority. There is nothing surprising in such a course, and, indeed, good

KRISHNA-
SAMI
PANNI-
KONDAR
v.
MUTHU-
KRISHNA
PANNI-
KONDAR.

reasons may be suggested for it. The Collector is responsible for the due collection of public revenue and it is he who should guard against default in the punctual payment of revenue being made in consequence of disputes between rival claimants in a case of disputed succession. Besides, the fact that if the Judge is not prepared to act in conformity with the Collector's report, the difference between the Judge and the Collector must be settled by a higher tribunal, i.e., the Sudder Dewani Adawlat, seems also to point to the conclusion that it is not essential that the District Judge should make enquiry under section 3. It follows, therefore, that in a case like the present to which section 8 applies, the demand for the report and action thereunder are independent of the enquiry under section 3; though, in a case of urgency, when the Judge may proceed in the first instance without a report, the provisions of section 3 would have to be followed by him.

In this view, which is sufficient to dispose of the case, it perhaps becomes unnecessary to consider the effect of the words "shall in the first place enquire by the solemn declaration of the complainant" in section 3. However, as the Advocate-General, as stated before, laid great stress upon them, I proceed to notice it. Obviously the words "in the first place" do not lay down that the very first step to be taken by the District Judge proceeding under the Act is the examination on oath of the complainant and that until such examination takes place nothing whatsoever can be done by the Judge in the matter of the application. Suppose, for instance, that on the day the petition was posted for enquiry under section 3 the petitioner was unable to attend in consequence of illness, but his witnesses were present. Could not the Judge at once record the evidence and examine the petitioner on a subsequent day? If the Judge adopted that course, should the evidence of those witnesses be considered to have been illegally recorded and therefore be discarded from consideration? The words "in the first place" in section 3 have reference to the enquiry whether there are sufficient grounds for interference which should precede the citation of the party complained of but not to the relative sequence of steps to be taken in the conduct of the enquiry. The meaning of sections 3 and 4, taken together, is that a citation shall not, as in ordinary suits, issue with reference to the allegation in the petition or the plaint itself, but that an enquiry shall be made as to the truth of the allegations and the *bonâ fide* character of the

KRISHNA-
SAMI
PANNI-
KONDAR
v.
MUTHU-
KRISHNA
PANNI-
KONDAR.

application, before the Judge decides to cite the party complained of. In other words, such party should be cited only after the Judge is satisfied in regard to the said points as a result of an enquiry made by him, the enquiry being regular and formal, evidence oral and documentary being received and the former being taken on oath. I am therefore unable to accept the learned Advocate-General's contention under consideration.

I should only add that the case of *Papamma v. The Collector of Góddavari*(1) is distinguishable from the present, for there, not only did the petition not contain the requisite allegations, but there was also no enquiry under section 3 and no report by the Collector under section 8.

In my judgment, the revision petition fails, and I would dismiss it with costs.

[Owing to the above difference of opinion the petition was referred to SHEPARD, J., under the provisions of section 575 of the Code of Civil Procedure. The petition was accordingly heard by his Lordship who delivered the following:—]

JUDGMENT.—The matter of this petition having been referred to me under section 575 of the Code of Civil Procedure, I have to decide whether or not in my judgment the prayer of the petition should be allowed. The question was argued before me on lines which do not seem wholly to accord with those on which it was discussed by the learned Judges who referred the matter. Before them, two contentions only appear to have been made. On the one hand it was argued that the Act of 1841 created a special jurisdiction and that, accordingly, the principle enunciated in *Nusserwanjee Pestonjee v. Meer Mynooddeen Khan Wullud Meer Sudroodeen Khan Bahadoor*(2) should be applied. On the other hand it was argued that the procedure prescribed in section 8 of the Act was intended by itself to be sufficient and that the report of the Collector was, in the cases to which the section applies, to be regarded as a substitute for the evidence directed to be taken in other cases.

In regard to the former contention the question really turns on the meaning of the term "jurisdiction" and assistance in answering it is afforded by the judgment in *Dale's Case*(3). There, one point taken was that the coercive process of the Court of Arches could not properly be called in aid to give effect to a judgment

(1) L.L.R., 12 Mad., 341.

(2) 6 M.I.A., 134 at p. 155.

(3) L.R., 6 Q.B.D. 376 at p. 451.

KRISHNA-
SAMI
PANNI-
KONDAR
v.
MUTHU-
KRISHNA
PANNI-
KONDAR.

under the Public Worship Regulation Act because the jurisdiction conferred by that Act was a new jurisdiction. James, L.J., in dealing with this point observed that since the Court of Arches always had jurisdiction to deal with the matter in hand, and the person in question and the mode of bringing the matter into Court and of dealing with it were not matters of jurisdiction but matter of procedure, there was no new jurisdiction created (page 451). Other Lords Justices used similar language. I think the same considerations apply to the present case arising under the Act of 1841. No new jurisdiction was given either in respect of person or property, but power in regard to matters already within the jurisdiction of an existing Court was given to that Court to deal with those matters in a new manner. The Act of 1841 no more created a new jurisdiction than did section 15 of Act XIV of 1859 in regard to suits to recover possession of immoveable property wrongfully taken. *Nusserwanjee Pestonjee v. Meer Mynodeen Khan Wullud Meer Sudroodeen Khan Bahadoor*(1) is altogether a different case. There the Regulation, while requiring the reference to arbitration to comply with certain conditions, gave the force of a decree to the award thereupon made by the arbitrator, and the point decided was that an award made under a reference which did not comply with those conditions could not be regarded as a decree. It might be that the award was good in itself, but it was not good as an award under the Regulation, because the conditions precedent to the making of such an award had never been fulfilled. It is clear that apart from the Regulation the arbitrator could have no power to make an award which should be equivalent to a decree. For these reasons I am unable to agree with the opinion of the learned Chief Justice in so far as it is founded on *Nusserwanjee Pestonjee v. Meer Mynodeen Khan Wullud Meer Sudroodeen Khan Bahadoor*(1). I do not think it can be said that the District Judge acted without jurisdiction by reason of his omission to comply with the terms of section 3 of the Act.

But I am equally unable to accede to the extreme contention made on behalf of the respondent. I do not think that section 8 can be read as containing an alternative statement of the course to be pursued in the cases therein mentioned so that the Judge can properly dispense with the examination of witnesses and

(1) 6 M.I.A., 134 at p. 155.

act upon the report of the Collector only. There are no such words as might be expected to be found in sections 3 and 5 if it had been intended that section 8 should be read in that way and not as directing that an additional precaution should be taken in certain cases. The language of section 8, moreover, shows that the examination of witnesses was contemplated even in cases of land paying revenue to Government, because the section authorises the Judge in cases of urgency to proceed without such report, and that must mean that he should proceed upon evidence taken in the ordinary way.

Holding that section 3 does apply to cases in which section 8 is applicable, it remains for me to consider whether the District Judge, in disregarding section 3, acted illegally or with material irregularity in the exercise of his jurisdiction within the meaning of section 622 of the Code of Civil Procedure. If the directions of the Act had been complied with there would have been an examination of the complainant and possibly of his witnesses and documents, the Judge would have satisfied himself that there were strong reasons for believing that the party in possession had no lawful title, that the applicant was really entitled and was likely to be prejudiced if left to the ordinary remedy, and that the application was made *bona fide*, and then before appointing a curator he would have satisfied himself as to the matters mentioned in section 5, and, further, he would have demanded a report from the Collector in which report the Collector would have recorded his opinion "regarding the propriety of citing the party in possession, of appointing a curator and of nominating individuals to that appointment." In the present case the complaint made is that there was no examination of witnesses, that there is no such report as is required, and that, whatever belief the Judge may have entertained, he has not recorded any finding as to the matters in respect of which he had to be satisfied. Although it must be admitted that the report is carelessly drawn up and that the order of the Judge is defective in not reciting that he was satisfied as to the need for the appointment of a curator, I do not think these defects would by themselves justify me in interfering with the order under the provisions of section 622 of the Code of Civil Procedure. I think it must be inferred that the Judge was satisfied as to the two points mentioned in section 5 and, treating the report as evidence, I can hardly say that there is absolutely no evidence to justify such a conclusion.

KRISHNA-
SAMI
PANNI-
KONDAR
v.
MUTHU-
KRISHNA
PANNI-
KONDAR.

KRISHNA-
SAMI
PANNI-
KONDAR
v.
MUTHU-
KRISHNA
PANNI-
KONDAR.

But the omission to take evidence under section 3 stands, I think, on a different footing. If the section is imperative, if the examination was prescribed as an essential step in the proceedings, then it is clear that the omission was a material irregularity. It is said that, at most, the section is only directory and that it is by the report and not by the other evidence that the Judge was intended to be guided—the report, it was argued, might be regarded as a verdict which might prevail even against the opinion of the Judge. In my opinion this argument is open to the objection that it reduces the Judge to the position of a mere instrument, whereas the Act, as I read it, clearly intends that he should exercise a judicial discretion. The Act, as well in the preamble as in the operative part, is emphatic in requiring the Judge to be satisfied by strong proof of the necessity for taking action. It is not correct to say that by section 8 he is required to take any action in contradiction of his own opinion; he is only required to send the report up to the superior Court so that that Court may decide whether or not the satisfactory proof has been furnished. Meanwhile, the order of the Judge must prevail. If, in spite of the report, he does not consider the proof satisfactory, the possession remains undisturbed; if, in spite of the report, he is so satisfied and accordingly appoints a curator, that appointment must hold good until the superior Court has decided to the contrary.

It is impossible, therefore, to say that the examination of witnesses is a mere formality or that the evidence when taken is of no material value. In the circumstances of the present case it may be that the evidence would have had no material effect, but when it is once shown that it might be otherwise and that the Judge might be justified in acting on the evidence alone, I think it may well be inferred that the direction to take evidence was intended to be an imperative direction. And it is somewhat difficult to see what stronger language the Legislature could have used to indicate that intention. It is possible that, notwithstanding section 2, a hard case might arise owing to inability of the complainant to appear, but I do not think that such a bare possibility ought to influence a Court in the construction of the Statute.

The conclusion at which I arrive is that while the Judge was acting within his jurisdiction he acted with material irregularity. His order must, therefore, be set aside and respondent must pay the costs.

PRIVY COUNCIL.

IMMUDIPATTAM THIRUGNANA KONDAMA NAIK

AND ANOTHER (DEFENDANTS), APPELLANTS,

P.C.*

1900.

November 15.
December 8.

PERIYA DORASAMI AND ANOTHER (PLAINTIFFS), RESPONDENTS.

[On appeal from the High Court at Madras.]

Hindu Law—Impartible zamindari—Alleged transfer—Not in manner prescribed by the Transfer of Property Act, 1882—Recital of acts done, and arrangement made, in a deed executed by the zamindar and his family, inoperative to transfer—Effect of petitions and applications to Revenue officers the same.

On the claim made by a person who was the heir to an impartible zamindari for a declaration of his right, and that he was entitled to redeem a usufructuary mortgage upon the property, the defence was that the estate had been transferred to the defendant by the plaintiff's father, who was the predecessor in estate, by executing, before the birth of the plaintiff, a deed, to which were parties all the members of the joint family including the defendant, who was then the presumptive heir; a proceeding which was followed by other acts indicating transfer to the latter. The deed was unilateral, and was addressed to the mortgagee. Reciting the fact of the mortgage it required the mortgagee to surrender the estate, on payment of the mortgage debt, by either the family or the defendant, to the latter. It also required that petitions should be sent notifying the transfer to the Collector and to the Deputy Collector of the district; these were sent and a statement to the same effect was made by the zamindar to the Tahsildar. Mutation of names followed in the defendant's favour:

Held, (1) that at the date of the deed a transfer such as that alleged could not be effected except by a registered deed, as required by the Transfer of Property Act, 1882; (2) that neither the mortgage nor the petitions effected the transfer; (3) that the deed was both in form and substance a transaction between the family and the mortgagee, and not one between the several members of the family; (4) that it did not show that a contract founded on good consideration had been, in fact, made for a transfer, though if such a well-founded contract had existed it would have been an answer to the claim; (5) the family being joint, and the estate, though impartible, being held jointly, the object was to strengthen the mortgagee's title, not to effect changes in the family as to the right of property.

CONSOLIDATED appeals from two decrees (29th July 1897) of the High Court reversing two decrees (30th March 1896) of the Subordinate Judge of Madura, and decreeing in favour of the plaintiff in the suits the claims which the Subordinate Judge had dismissed.

* Present: Lords HOBHOUSE, DAVEY, and ROBERTSON, and Sir RICHARD COUCH.

IMMUDI-
PATTAM
THIRUGNANA
KONDAMA
NAIK
v.
PERIYA
DORASAMI.

These two suits, Nos. 53 and 54 of 1895, were instituted, free of Court fees, on the 9th April 1895 by the plaintiff, now respondent, Periya Dorasami, a minor, suing by his mother and guardian, Angammal, as heir to an impartible zamindari. In suit No. 54 of 1895, the judgment wherein embraced the case in No. 53 of 1895, the plaintiff asked for a declaration of his proprietary right, and of his right to redeem a usufructuary mortgage on the greater part of the zamindari estate. Lakshmanan Chetti, now the second respondent on this appeal, sued as first defendant, was the mortgagee. The co-defendants with him were Thirugnana Ovala Kondama Naik, first cousin of the plaintiff, and Dorasami, the minor son of the latter. The mortgagee was a party defendant only in suit No. 54 of 1895. The other suit (No. 53 of 1895) related to other property, not subject to the mortgage. This other property consisted of a palace, and a temple, with lands forming the endowment of the temple.

On these appeals Thirugnana, and his son, a minor by his father and guardian, were the appellants; Periya Dorasami, the plaintiff, and Lakshmanan Chetti, the mortgagee, were the respondents in suit No. 54 of 1895. In the other suit (No. 53 of 1895), the same persons were appellants, and Periya Dorasami, the plaintiff, was the sole respondent.

In both appeals the question was the same;—whether the plaintiff's father when zamindar had, by a transaction in 1882, before the birth of the plaintiff which took place in 1883, transferred his title to the zamindari of Ayakudi, forming with the mitta of Rettayambadi, an impartible estate. By an undisputed custom of primogeniture this estate descended to a single heir. Thirugnana, as the son of the brother of the plaintiff's father, defended the suits, alleging title by that transfer.

There was no question as to the facts, which were established by documents of which the making was not in dispute, and as to which the only question was what was their legal effect, in regard to the right of ownership; and they are sufficiently set forth in their Lordships' judgment. The main facts were that, as the family property had been much reduced by mismanagement, the father, Ovala, came to a family arrangement to mortgage the two zamindaris by usufructuary mortgage to Lakshmanan Chetti. This arrangement was embodied in a deed poll, or unilateral deed, of the 4th November 1882, addressed to

Lakshmanan Chetti, whose brother Ramanathan Chetti had for some years previously held a usufructuary mortgage by way of lease of the property. He was now deceased, having left his brother his heir. All the members of the family of full age joined in executing this deed, which added up the loans from the mortgagee stating the debt at Rs. 2,47,000. The contents are stated, with all the particulars, in their Lordships' judgment, where are stated the petitions which the deed required to be presented to the Revenue authorities notifying the matter, including the requirement that as soon as the mortgage amount and expenses shall have been paid, the mortgagee should "surrender the said zamin and the mitta to Thirugnana."

The petitions by Ovala to the District Revenue officers were presented, and he made a statement to the Tahsildar as to the deed of the 4th November 1882.

The complaints in both suits stated that the plaintiff's father, Ovala, was the last zamindar, and that he died on the 4th May 1890 leaving two sons, of whom the plaintiff was the elder, and was entitled to the whole of the family property; that Thirugnana, the defendant, son of Ovala's brother, fraudulently influenced him, Ovala, to have his (Thirugnana's) name entered in the collectorate books in respect of the property now sued for. The relief claimed was a declaration that the plaintiff was the owner of the property mortgaged, and that he was entitled to redeem it, and that the necessary accounts should be taken for that purpose. Lakshmanan Chetti, the mortgagee, professed willingness that the mortgage should be redeemed by any one who was authorized so to do. Thirugnana, for himself and his son, denied fraud and asserted that since November 1882 he had a complete title as zamindar. He alleged that the plaintiff not having been born till December 1883, could not dispute his father's acts. He relied on other defences, one being limitation.

The Subordinate Judge, delivering his principal judgment in suit No. 54 of 1895, dismissed both suits. He held that, as to the question of title, the mortgage deed of 4th November 1882, supported by the zamindar's petitions to the Revenue officers, was conclusive in favour of Thirugnana, the second defendant in that suit. He was of opinion that, as the plaintiff was not in being on that date, he could not assert a right to question the transfer which his father had made. The objection that under the Transfer

IMMUDI-
PATTAM
THIRUGNANA
KONDAMA
NAIK
v.
PERIYA
DORASAMI.

IMMUDI-
PATTAM
THIRUGNANA
KONDAMA
NAIK
v.
PERIYA
DORASAMI.

of Property Act, 1882, such a transfer was invalid, as not being made by a registered instrument, he refused to consider, it not having been raised on the issues between the parties. He dismissed the allegation of fraud, as not having been supported by evidence. In any case he thought the suit barred by limitation. In suit No. 53 of 1895 he merely referred to his judgment in No. 54 of 1895.

The High Court (COLLINS, C.J., and SHEPHARD, J.) reversed this decision as to both the suits. They held that in the mortgage suit the transfer relied on was inoperative to transfer the property. Nor were the arzis operative for this. With regard to the mortgage they remarked that it might be said that there was a declaration of an intention on the part of the plaintiff's father to divest himself of his ownership of the zamindari, but nothing having been done to give legal effect to that intention, and no registered deed of transfer having been executed, it was not competent to him to thus pass the property, whether it was in the nature of a sale, or in the nature of a gift. There was no evidence to support the suggestion that there was a family arrangement that the estate should be transferred. The argument that the terms of the mortgage deed, if they did not amount to a transfer of title, at all events evidenced a contract, for good consideration, to make such a transfer, was in their opinion one that might have prevailed, if proved, but it had not been put forward distinctly, nor had it been made the subject of an issue, and was not proved. As regards limitation, the possession of the alleged new zamindar was a merely permissive occupation.

The High Court, giving judgment in suit No. 54 of 1895, declared that the plaintiff was entitled to possession subject to the mortgage, and directed a reference to take the usual accounts. In suit No. 53 of 1895 they merely directed that possession should be delivered to the plaintiff.

On appeals by Thirugnana for himself and as guardian—

Mr. J. D. Mayne, for the appellants, contended that the main part of the family arrangement of which the terms were contained in the deed of the 4th November 1882 was the absolute transfer, by the zamindar, Ovala, of title to the zamindari. The petitions to Revenue officers, the mutation of names, and other proceedings, were the machinery by which this arrangement was carried out. Taken altogether, the mortgage deed and other transactions

IMMUDI-
PATTAM
THIRUGNANA
KONDAMA
NAIK
v.
PERIYA
DORASAMI.

established a binding contract as made, upon the evidence, to effect the transfer, which the deed contemplated if it did not carry out. This contract, regarded as a contract, did not require registration as did a deed of transfer. The High Court should have held this defence to be admissible, under the pleadings and on the issues. The documents showed that the zamindar intended to divest himself of all possession from November 1882. His act, followed by mutation of names, the evidence of transmutation of possession, was an irrevocable one. The possession of the person to whom transfer was intended was adverse, even if not authorized by legal alienation to him, as against the person who might have sued to have it set aside. This involved limitation. The appearance of the mortgagee, who was only a formal party, was not necessary.

Mr. A. Phillips, for the plaintiff, the first respondent, was not called upon.

Mr. J. H. A. Branson, for the second respondent, the mortgagee, contended that the latter was made a party, and was entitled, therefore, to appear in the absence of any arrangement or notice that his appearance was not requisite. He, therefore, asked for costs.

JUDGMENT.—The subject of this litigation is the impartible zamindari of Ayakudi. In the year 1882 Ovala was its owner. Transactions then took place by virtue of which Thirugnana, his nephew, claims to be owner. He, along with his minor son, is the substantial defendant below and now appellant. Afterwards in the year 1883 Periya, the plaintiff below and now respondent, was born to Ovala by his wife Angammal. He also claims to be owner by inheritance from his father who died in the year 1890.

There are, in fact, two suits, Nos. 53 and 54 of 1895. But the only difference between them is that the bulk of the property which is comprised in one suit is subject to a mortgage which the plaintiff seeks to redeem: and that a small portion of it, consisting of the palace, the temple, and some endowments, comprised in the other suit, is not so subject. The question in both suits is the same, viz.: what was the effect of the transactions in the year 1882? Other issues have been raised, but have not been urged at this bar. The Subordinate Judge decided in favour of the defendant. The High Court decided the other way; and the defendant appeals from their decision.

IMMUDI-
PATTAM
THIRUGNANA
KONDAMA
NAIK
v.
PERIYA
DORASAMI.

Ovala came to the zamindari in the year 1872 by transfer from his father, who declared himself to be old and unable to manage the affairs. He seems to have been no more capable than his father, and in his hands the debts of the estate, which were large before, became larger. In the year 1879, he executed an usufructuary mortgage by way of lease for nineteen years to one Ramanathan Chettiar in consideration of advances of money and of a sum of Rs. 3,000 per annum to be paid by the mortgagee for the maintenance of the family. Debts, however, went on increasing, and on the 4th November 1882, a new arrangement was made with Lakshamanan Chettiar, who was the heir of Ramanathan and is the present mortgagee.

The deed of that date is a deed poll executed by (1) Ovala the zamindar, (2) his brother Karutha, (3) the defendant Thirugnana, son of Karutha, and (4) another son of Karutha: and addressed by them to the mortgagee Lakshamanan. It commences by stating the "particulars of our having usufructually mortgaged the zamindari to him for Rs. 2,47,000." It gives an account of the debts affecting the estate, of which much the largest is the debt already due to Lakshamanan. Other subsequent items amount to about Rs. 65,000, all of which the four parties to the deed declare to be due by them. Among them is specified "Rs. 10,000 borrowed from you on this date in order that, after a settlement of the differences existing between the members of our family, the same might be paid as a recompense to the said I. Ovala Kondama Naikar Ayyan Avergal, one of us, for his transferring even now the right to Ayakudi zamin and Rettayambadi Mitta to I. Thirugnana Sammanda Ovala Kondama Naikar Ayyan Avergal and his addressing an arzi to the Collector of Madura district stating the said fact."

The parties then state that they had importuned the mortgagee to take an usufructuary mortgage on the estate in lieu of interest on his debt, that he had kindly agreed to do so, and that they had conveyed twenty-eight villages with their incidents or appurtenances to him. They stipulate that he shall pay the peishcush and road-cess to Government, and also an allowance "for our maintenance at the rate of Rs. 270 per mensem." Clauses 24 and 25 are as follows:—"24. We shall not only inform the Collector of the Madura district, the Sub-Collector of the Dindigul Division and the Tahsildar of the Palni taluk by means of arzis and yadast

IMMUDI-
PATTAM
THIRUGNANA
KONDAMA
NAIK
v.
PERIYA
DORASAMI.

"that a conveyance on usufructuary mortgage has been made to you, and that all the proceedings in revenue matters should be conducted in your name, but also cause the said fact to be published by means of proclamation in the villages. 25. As soon as the above-mentioned mortgage amount, the amount spent by you on repairs and the amount of expenses incurred by you in suits, are paid in full at the end of any fasli either by all of us jointly or by I. Thirugnana Sammanda Ovala Kondama Naikar Ayyan Avergal, you should surrender the said zamin and the mita to I. Thirugnana Sammanda Ovala Kondama Naikar, one of us."

The arzis contemplated in the deed were presented by Ovala on the 7th November. One is addressed to the Deputy Collector of Madura as follows:—"As besides being too old and infirm to bear and manage our two zamindaris of Ayakudi and Rettayambadi and all other immoveable and moveable properties appertaining thereto and the duties of Hukdar of Pachala Naickenpatti village attached to Sri Agobalesvara Perumal Devasthanam, we are also issueless, we have transferred the right to Immudipattam Thirugnana Sammanda Ovala Kondama Naikar, who is the eldest son of our brother Karutha Kondama Naikar and who is the next heir to get the said zamin and all other possessions, and have at this very moment delivered the said zamin and all other possessions into the hands of the said Thirugnana Sammanda Ovala Kondama Naikar after entering into an arrangement with him that he should be paying us month by month at the rate of Rs. 250 per mensem for the maintenance of ourself and those attached to our family. Therefore, I request that the name of the said Thirugnana Sammanda Ovala Kondama Naikar may be entered in the register and that orders may in future be issued for conducting all the revenue proceedings through him as the zamindar for the zamins and as hukdar for the devasthanam in our place."

The other is addressed to the Collector of Madura in similar terms.

On the 17th November Ovala made a statement before the Tahsildar of Palni taluk, which is in the following terms:—"The arzi, dated the 7th instant, now read and shown is the one addressed by me to the Sub-Collector. I have also written to the Collector on the said date. As I have surrendered to my

IMMUDI-
PATTAM
THIRUGNANA
KONDAMA
NAIK
v.
PERIYA
DORASAMI.

"brother's son Thirugnana Sammunda Ovala Kondama Naikar, "son of Kondama Naikar, the villages and all other possessions "attached to the zamin, in consequence of my inability to look "after all the affairs relating to the said zamin and for other "reasons as stated in the said arzi, all proceedings relating to the "Government should, in future, be conducted through him."

After this was signed by Ovala and the Tahsildar, another question was put to Ovala, to which he answered "I have no issue," and this again is signed by him and the Tahsildar.

These are the transactions relied on by the defendant to prove the transfer under which he claims. It is not disputed that according to the law established at this time such a transfer could not be effected except by a registered deed. The arzis and the statement made to the Collector clearly do not bear any such character. Mutation of names in the Collector's books seems to have been effected in the year 1888; though possession of the twenty-eight villages has always been with the mortgagee, and it does not appear that Ovala was ever put out of possession of the other property. But even if a complete change had been effected in these respects, it would at the utmost do no more than give a starting point for the law of limitation. It would not supply the conditions of the law of transfer.

The Subordinate Judge would not allow the plaintiff the benefit of this law because he had not made it the subject of express pleading and issue. In this he was wrong, because the party who relies on a transfer must prove it, and the second issue, as the High Court point out, raises the question whether by the stated arrangements the property had passed to the defendant.

The question then is whether the mortgage effects the alleged transfer. Directly, it does not. It contemplates such a transfer and an arzi stating the fact, and it requires that the mortgagee, if paid off either by all the family or by the defendant, shall surrender to the defendant. But both in form and in substance it is a transaction between the family and the mortgagee and not one between the several members of the family.

The defendant's case is then put in a different way, and this is the point principally argued at the bar. It is contended that though the mortgage may fall short of an actual transfer it shows a good contract for one and that the defendant may now call upon

Ovala's heir to implement that contract. Certainly if such a right exists it would be an answer to the plaintiff's claim and the exact form in which it could be enforced need not be considered. The High Court held it to be fatal to the defendant that his case was not put in that way in the Court below, and that no evidence was tendered upon it. Clearly it was for the defendant to allege a contract between himself and Ovala, founded on valuable consideration, that Ovala should cease to be owner and that he should become owner. In the absence of such an allegation the circumstances which led Ovala to execute the mortgage and to present the arzis have not been examined.

If the documents in proof contained on their face clear evidence of a valuable consideration passing to Ovala, it would have to be considered whether it was open to the defendant to make such a case on appeal. Mr. Mayne has argued the case very fully on the supposition that it is open. So treating it, their Lordships cannot find that the existence of a contract for valuable consideration between the defendant and Ovala is proved by the mortgage deed. It is suggested that the transfer was part of a general family arrangement; but there is no proof of that. It is contended that the family were making themselves liable for payment to the mortgagee. But, as the High Court point out, the family was a joint family, and the estate a joint estate, though impartible; and the object was to strengthen the mortgagee's title, not to effect changes in the family. It did not signify to the mortgagee whether the estate when redeemed went back to Ovala or to the defendant. All wished to save it from sale, and in the then position of Ovala it was likely that either his brother Karutha or his nephew the defendant would be zamindar on his death. No reason is given why a transfer of interest from the uncle to the nephew should form part of a joint effort by the family to keep the estate in the family. If there was any reason it should have been alleged and proved.

As to pecuniary benefits accruing directly to Ovala only two are mentioned. One is the pension of Rs. 250; which is only a continuance of a similar payment by Ramanathan, and which is for the maintenance of all the members of the family. The other is the sum of Rs. 6,000 said to be given to Ovala as a recompense for his transfer of the property. But there is no evidence that this recompense ever really reached Ovala's hands, and the

IMMUDI-
PATTAM
THIRUGNANA
KONDAMA
NAIK
v.
PERIYA
DORASAMI.

IMMUDI-
PATTAM
THIRUGNANA
KONDAMA
NAIK
v.
PERIYA
DORASAMI.

documents give reason for doubting it. It was to be paid "after a settlement of the differences existing between the members of our family." No evidence has been given of any such settlement. To treat the intended payment as the consideration for Ovala's transfer is inconsistent with his arzis presented three days later and with his statement to the Tahsildar made thirteen days later. In none of these documents does he allude to the receipt of money, except that he is to have Rs. 250 per mensem for maintenance of himself and family. The reasons he assigns for the transfer are that he is infirm, that he has no issue, and that Thirugnana is the next heir. If there had been any substance in the allegation that the mortgagee had paid Rs. 6,000 to Ovala as consideration for transferring the estate, it is inexplicable that it should not be mentioned in the arzis which were intended to effect the legal transfer.

With such imperfect evidence on the face of the documents it was imperative on the defendant that in order to avail himself of an antecedent contract he should, by his pleadings and evidence, have put it in a proper course of trial. Not having done so, he has been rightly adjudged to have failed on that issue.

The case is not free from obscurity or difficulty. But their Lordships think that the High Court has arrived at the sound legal conclusion, viz., that though there may have been an intention to transfer the property it never was effected in the mode required by law; and that the intended transferee cannot now call for implement of the intention because he fails to show any contract founded on valuable consideration.

The mortgagee has been added as a respondent in these appeals. Mr. Mayne now asks that he may be relieved from paying that respondent's costs, because, as nobody sought to attack his interests, he need not have appeared. The mortgagee is clearly interested to watch the litigation in the redemption suit; but he has judiciously kept himself from doing more; treating the controversy between the cousins as a matter indifferent to himself. It is quite possible that arrangements might have been made with him to dispense with his appearance. But none have been made; and he appears here, maintaining the same attitude of neutrality as before. The appellants say that they were obliged to bring the mortgagee here as a matter of procedure. If so, it is one of the necessary incidents of the appeal, and the costs of it must be taken as part of the costs of this appeal.

In giving the foregoing reasons their Lordships have not distinguished between the more important suit for redemption, and the other for possession. The result in both is governed by substantially the same considerations, and the cases have been so treated by the High Court. Their Lordships will humbly advise Her Majesty to dismiss both appeals as against both respondents, whose costs the appellants must pay.

Appeals dismissed.

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

Solicitor for the first respondent, Periya Dorasami:—Mr. R. T. Tasker.

Solicitors for the second respondent, Lakshmanan Chetti:—Messrs. Keen, Rogers & Co.

C.B.

PRIVY COUNCIL.

VASUDEVA PADHI KHADANGA GARU, (DEFENDANT),
APPELLANT,

MAGUNI DEVAN BAKSHI MAHAPATRULU GARU,
(PLAINTIFF), RESPONDENT.

[On appeal from the High Court at Madras.]

Hindu Law—Rights to villages granted to one member of a Hindu joint family—Bar of limitation after three years from cessation of disability—Application of ss. 7, 18 and 28, and of arts. 142 and 144 of sched. II, Act XV of 1877 (Limitation Act).

Subject to a proviso, the effect of section 7 of the Limitation Act, 1877, is that a person under disability may, after the disability has ceased, institute a suit within the same period that would have been allowed to him under the schedule, as if he had not been under disability. The proviso governing this is that the time allowed after the period during disability shall not, in any case, extend over more than three years from the date when the disability ceased.

Direct evidence was absent as to the circumstances under which a grant was made to one of two brothers, since deceased, who were joint in estate. The question was raised between the parties to this suit, (who were the sons of those

P.C.*
1900.
November
16, 21 and
23.
1901.
February
28;
March
6 and 23.

* Present: Lords HOBHOUSE, MACNAGHTEN, DAVEY, ROBERTSON and LINDLEY, and Sir FORD NORTH.

VASUDEVA
PADHI
KHADANGA
GARU
v.
MAGUNI
DEVAN
BAKSHI
MAHA-
PATRULU
GARU.

brothers respectively), whether the grant had operated in favour of the donee exclusively, for his benefit, or was for that of the two members of the joint family and formed part of the joint estate as between these first cousins.

It was clear, however, that the exclusive possession of the defendant, who was the son of the donee, had been discontinued, in favour of the joint estate, from the year 1858 when the then surviving brother had died. This defendant was, at the death of his father, a minor; and afterwards came of age about the year 1871.

Within the period of limitation, as determined by the above section and by either article 142, or 144 of the schedule, the defendant had not sued to establish the right of exclusive ownership. The possession of the joint estate was adverse to his separate title. It followed upon this that the defendant's title, if any, to the two villages, in the character of separate estate, was by the operation of section 28, extinguished. This extinction was established by the evidence and needed not to have been pleaded. The result was that the decree of the High Court, (whose judgment was in the plaintiff's favour on the merits), was maintained upon the law of limitation, and upon title by non-claim.

APPEAL from a decree (25th March 1896) of the High Court reversing a decree (17th October 1894) of the District Judge of Ganjam, who had dismissed the suit.

The plaintiff, respondent, and the defendant, appellant, were first cousins, the sons of two brothers, respectively. The brothers were a Hindu family joint in estate. Both the brothers deceased before the end of 1858; both left a widow and her minor son. The elder brother, Bayana Padhi, was the father of the defendant, Vasudeva Padhi, who attained full age about 1869. The younger brother Gurunatha Padhi was the father of the plaintiff, Maguni Devan Bakshi, said to have come of age in the year 1871. It was admitted that the elder brother received a grant of two inam villages in the Ganjam district, named Rajendrapuram and Brandurana Chandrapuram, from the Raja of the Chekati taluk.

Of these villages, the plaintiff claimed in this suit partition, alleging himself to be jointly interested therein with the appellant as a co-sharer in joint family estate. The question argued on this appeal was whether the grant made originally in the sole name of the defendant's father, was intended to be held for the joint benefit of the grantee and his brother, as a gift to members of a joint family,—or, on the other hand, the villages were granted to the defendant to be held for his exclusive benefit and that of his descendants. Upon that question the Courts in India had differed; the first Court having decided in favour of the defendant and the High Court on the plaintiff's appeal having reversed that decision.

The appeal was twice argued before the Judicial Committee. The facts are all stated in their judgment.

The plaint filed in 1891 claimed partition of the above villages with a one-half share, and the mesne profits thereof, from the date of the plaintiff's dispossession which he alleged to have taken place in 1888, the defendant having then held exclusively for the first time. The defendant in his written statement admitted joint possession of the plaintiff with himself down to 1878, but contended that the villages had been granted by the Raja to his father alone, without any gift of them to the joint estate of the brothers. That the plaintiff's father was jointly entitled the defendant denied. Of the fact he himself had not always been aware, but having been made aware in 1878, he had since then been in exclusive possession without interruption till the present. On this case he also set up the defence of limitation.

The issues fixed were: (1) whether the grant of the villages was to the defendant's father alone or to the two brothers jointly; (2) whether the defendant or the plaintiff was right in the conflicting statements as to the date of dispossession of the plaintiff; (3) whether the plaintiff was barred or not by time.

The District Judge on the 17th October 1892 found upon the first issue that the plaintiff had entirely failed to prove that the two villages had been given as a joint gift to his father as well as to the father of the defendant. Upon the other issues he found that the evidence produced by the plaintiff to prove possession by himself for twelve years before ouster in 1888 was not worthy of credit; and he dismissed the suit.

On appeal the High Court (PARKER and SHEPHARD, JJ.) on 30th April 1894 set aside that judgment, and remanded the suit for re-trial upon the evidence already on the record, and upon any further evidence which the defendant might adduce; but such further evidence was limited to the examination of such witnesses as were originally named, or summoned, for the first trial.

Upon evidence so taken the suit was heard by a Judge who had succeeded the one who gave the first judgment. The suit was again dismissed on the 17th October 1894.

The plaintiff appealed to the High Court with the result that a Bench (SHEPHARD and SUBRAHMANIA AYYAR, JJ.) reversed that decision. In their judgment they said:—"Assuming that the cowl was made in the name of the elder brother, who was at

VASUDEVA
PADHI
KHADANGA
GARU
v.
MAGUNI
DEVAN
BAKSHI
MAHA-
PATRULU
GARU.

VASUDEVA
PADHI
KHADANGA
GARU
v.
MAGUNI
DEVAN
BAKSHI
MAHA-
PATRULU
GARU.

"the time joint with the other members of the family, we think that the evidence of the enjoyment of the property is strong to show that the family took, and not the one brother exclusively."

At the conclusion of their judgment they said that they thought the inference on the case to be drawn was that the cowle was in fact intended to convey the property to the family, and that it was so understood by the parties.

On this appeal, Mr. J. H. A. Branson, for the appellant, argued that the High Court should have held that the respondent had failed to establish that he was entitled to share the villages with the defendant. There was no sufficient ground for the inference that in virtue of the cowle granted by the zamindar to the elder brother, Bayana Padhi, the joint brothers, on account of their joint interest in other property must be entitled. It had been considered that the cowle was intended to convey the villages for the benefit of the family and not for Bayana alone; but there was neither presumption nor evidence to bear this out; and, on the general case made, the property should have been held to be his separate acquisition. It had not been proved that the income derived from the villages had been applied to the purposes of the joint family after the death, before 1858, of Bayana, the elder brother; and it had been assumed, rather than proved that, during the minority of the cousins, the villages had been held as joint property by the widows who appointed the manager. At all events since the year alleged by the plaintiff to have been 1888, and by the defendant to have been 1878, the defendant had been in sole possession.

In order to have established that the property was joint there must either have been proved an acquisition joint from the first or if originally there had been a separate acquisition, in that case it should have been shown that there had been a subsequent addition of the property to the common holding of the family. And in the latter case that the villages had been dealt with as held in coparcenary by the family, as those competent to deal with the property. Neither of these requirements had been satisfied by the evidence. The intention of the grantor had to be considered, and that, *prima facie*, was to benefit Bayana alone. The gift should have been regarded as personal to him, and construed so as to make over the villages to him alone. Then, in the next place, on the evidence as to possession, it should have been found by the Courts that the defendant had been in a possession, exclusive and adverse, for

more than the period of limitation. On the other hand, there was no evidence to support a finding, that the defendant would have been barred by time on account of the period which had elapsed during the joint possession, if the defendant had sued to assert his exclusive right.

The defendant's case was to be distinguished from those in which a member of a joint family had the advantage of resorting to the family resources in making an acquisition. The Hindu law applicable in cases where there was acquirement by one member, sanctioning rights of unseparated co-sharers in the family estate, did not govern the present case; the reasons for the application of that law not here existing.

Reference was made to *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick*(1); *Gudadhur Serma v. Ajodheeram Chowdhri*(2); *Kishoree Lall v. Chummun Lall*(3); *Gooroochurn Doss v. Goluckmoney Dossee*(4); *Narayan Babaji v. Nana Manohar*(5); *Sri Raju Chelikani Venkataramanayamma Garu v. Appa Rau Bahadur Garu*(6); *Shiyu Golam Sing v. Baran Sing*(7); *Dhurm Das Pandey v. Mussumat Shama Soondri Dibiah*(8); *Badul Singh v. Chutterdharee Singh*(9); *Chand Hurree Maitee v. Rajah Norendro Narain Roy*(10); *Umritnath Chowdhry v. Goureenath Chowdhry*(11); and to Strange's 'Hindu law,' volume 1, chapter 9, on partition, pages 208 and 209, edition of 1830; and the case in volume 2, page 365.

Mr. J. D. Mayne, for the respondent, argued that the original grant in the name of the senior member of the joint family, in which position the elder brother was, carried with it no presumption that it was intended for his sole benefit. On the other hand, there was good evidence showing that the villages were treated, (so far as the history of the case was traceable), on all hands, as the joint property of the parties to this suit. Both the legal presumption applicable to family property, and the evidence concurred to support the joint title, and to negative the separate

VASUDEVA
PADHI
KHADANGA
GARU
v.
MAGUNI
DEVAN
BAKSHI
MAHA-
PATRULU
GARU.

(1) (1857) 6 M.I.A., 526, 538.

(3) (1852) 1 S.D.A., 111.

(4) (1843) Fulton's Rep., 164, 169, 171, 175, 183.

(5) (1870) 7 Bom. H.C.R. (A.C.), 153, 176.

(6) (1897) LLR., 20 Mad., 207.

(8) (1843) 3 M.I.A., 229, 240.

(10) (1873) 19 W.B., (C.R.), 231.

(2) (1794) 1 Sel. Rep., G, 7.

(7) (1868) 1 B.L.R., 164, 166.

(9) (1868) 9 W.R., (C.R.), 558.

(11) (1870) 13 M.I.A., 512, at p. 547.

VASUDEVA
PADHI
KHADANGA
GARU
v.
MAGUNI
DEVAN
BAKSHI
MAHA-
PATRULU
GARU.

acquisition alleged. It would have taken a strong case for the defendant to outweigh the presumption in favour of the joint estate; and it had not been displaced. To establish that the villages were granted as separate property the burden had been on the defendant asserting it to have been so granted. This burden had not been discharged. Consequently, the decree for the plaintiff for partition and mesne profits in respect of his share was right. It had been well established in the case of a gift that it must be shown with what intention it was given and taken; the onus being, in the case of a gift to a member of a joint family, to show, if it be claimed as his separate property, that a separate acquisition was contemplated by both donor and receiver. It was material to ascertain the object which the donor had in view in giving. Also it was important that the manner in which the gift was dealt with by the donee should appear. And further the onus was on the other side, if any money or other property had been used in the acquisition, to show that no joint estate was used in the case for the purpose of the acquisition. Reference was made to the 'Mitakshara,' part II, chapter I, section 4; 'Manu,' chapter IX, verse 206; 1 Strange's 'Hindu law,' 208, 209, 215; 2 Strange's 'Hindu law,' 365; and to the cases above cited (*Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick*(1); *Dhurm Das Pandey v. Mussumat Shama Soondri Dibiah*(2); *Badul Singh v. Chutterdharee Singh*(3); and *Umrithnath Chowdhry v. Goureenath Chowdhry*(4). The grant here made was not for any particular reason connected with the appellant; the circumstance tended to show that it was intended for the family; and the legal presumption would bear strongly in that direction. For the gift there was no known reason unconnected with the family, and no motive had been assigned specially applicable to a gift intended for the appellant's father. As to the evidence of possession by whom, and for what length of time, held, it was argued that nothing was known of the manner in which the property was dealt with from 1847 to 1858. But after that date the evidence was that it had been dealt with as joint estate. Had it been separate it would have descended as the separate estate of the elder brother, but it was apparent that, on his death, the villages were dealt

(1) (1857) 6 M.I.A., 526, 538.
(3) (1868) 9 W.R., (C.R.), 558.

(2) (1843) 3 M.I.A., 229, 240.
(4) (1870) 13 M.I.A., 542, at p. 547.

with as part of the general, family, joint, estate; and, in the possession of the widows, the income was collected by the manager whom they appointed. No claim to the property as separate was made, according to the defendant, till 1879. Then, arose the question of limitation, and the time of the accrual of the cause of suit. That must have been when the defendant was dispossessed of his separate property, (if separate property he had), by those who claimed that the property was joint. Reference was made to sections 4, 7 and 18 of Act XV of 1877 (Limitation). According to section 7 the defendant had only three years from the date on which he attained majority within which to bring his suit to assert his right to the villages. The possession of them as joint property was adverse to any claim that they were his separate property. Within the three years from the defendant's attaining full age no such suit was brought by him; and the result was that his right was extinguished by the effect of section 28, if it ever existed. The right, on the other hand, on which the plaintiff respondent insisted, was secured by that extinction.

Mr. J. H. A. Branson replied, and cited *Massumat Mahamaya Dibe v. Goureenath Chowdhry*(1).

Afterwards, on the 23rd March 1901 their Lordships' judgment was delivered by Lord DAVEY:—

JUDGMENT.—This is an appeal against a judgment of the High Court of Madras, dated the 25th of March 1896, reversing a decree of the District Judge of Ganjam of the 17th of October 1894.

The appellant, who is defendant in the action, is the only son of Bayana Padhi, who died shortly before the year 1858. The appellant was then seven or eight years of age. The respondent, the plaintiff in the action, is the first cousin of the appellant, and is the son of Gurunatha Padhi, who died in the year 1858. The respondent was about two years older than the appellant. The two brothers Bayana Padhi and Gurunatha Padhi were members of a Hindu family joint in property.

The question in the case is whether the two villages in suit are joint or separate property. It is admitted that these villages were granted to Bayana Padhi by the zamindar of the Chikati taluk. The deed is not forthcoming, and the only information their Lordships have as to the grant is contained in two orders from the

VASUDEVA
PADHI
KHADANGA
GARU
v.
MAGUNI
DEVAN
BAKSHI
MAHA-
PATRULU
GARU.

(1) (1808) 1 S.D.A., Sel. Rep., 236.

VASUDEVA
PADHI
KHADANGA
GARU
v.
MAGUNI
DEVAN
BAKSHI
MAHA-
PATRULI
GARU.

Collector of Ganjam to the zamindar. The first order is dated the 10th August 1847, and is in these words:—"I have approved of "the permanent cowle you have granted to one Bayana Padhi "Khadanga of Jayantipuram under section 15 of Regulation "XXX of 1802 in respect of the forest land called Rajendra- "puram attached to your taluk, fixing a kattubadi of Rs. 45 a "year, and defining the boundaries (chekubandi). But you are "informed that there should be no disputes by the Jalandhra "people regarding the boundaries thereof." The other order of the Collector was dated 22nd July 1848. It states that the Collector has, "under section 15 of Regulation XXX of 1802, approved "of the gift of 840 bharanams of forest land, which was granted "to Bayana Padhi-Khadanga by the late zamindar of the taluk, "Sri Brundavana Chandra Rajendra Dev Garu after fixing the "kattubadi, and the boundaries thereof. You shall inform the "said Khadanga that he might improve the said land, and make "it fruitful, and collect from him every year, commencing from the "current year, the kattubadi fixed at Rs. 50 a year." There is no evidence of the circumstances under which this grant was made, or of the manner in which the property was enjoyed or whether it was treated as joint or separate property from the date of the grant until the death of the survivor of the two brothers in the year 1858. On that event the widows of the two brothers concurred in appointing a manager of the property, and it is not disputed that during the appellant's minority it was treated or enjoyed as joint family property; and, after he attained his majority in or about the year 1870, it continued to be so treated by the appellant and the respondent for several years. The Subordinate Judge fixed the date up to which that state of things lasted as the year 1880; and their Lordships assume that date for the purpose of their judgment. A quarrel took place between the two cousins, and the appellant thereupon asserted his right to the villages as the separate property of his father to which he was entitled as his heir, and ousted the respondent. Hence this suit, which was instituted by the respondent on 11th November 1891. The Subordinate Judge held it to be the separate property of the appellant; but his decree was reversed by the High Court, who held it to be joint family property, and decreed a partition. Their Lordships find the question whether the property was the separate property of Bayana, or had been acquired and held by him in his own name for the benefit of

VASUDEVA
PADHI
KHADANGA
GARU
v.
MAGUNI
DEVAN
BAKSHI
MAHA-
PATRULI
GARU.

the joint family, to be one of some difficulty, owing to the absence of any direct evidence as to the circumstances under which the grant was made, or the manner in which the property was treated during Bayana's lifetime; and they accordingly desired that the case should be argued a second time. On the second argument counsel for the respondent raised the question of limitation, and their Lordships have come to the conclusion that the respondent ought to succeed on that ground. The seventh section of the Act of Limitation is in these terms:—"If "a person entitled to institute a suit, or make an application, be "at the time from which the period of limitation is to be reckoned "a minor, or insane, or an idiot, he may institute the suit, or "make the application within the same period, after the disability "has ceased, as would otherwise have been allowed from the time "prescribed therefor in the third column of the second schedule "hereto annexed." Then there is provision as to double and successive disabilities, and a provision for the case of the continuing of the disability up to the death of the person under disability; and the end of the section is in these terms:—"Nothing in this section applies to suits to enforce rights of "pre-emption, or shall be deemed to extend for more than three "years from the cessation of the disability, or the death of the "person affected thereby, the period within which any suit must "be instituted, or application made." The effect of that section, therefore, is this,—that a person under disability may institute a suit within the same period after the disability has ceased as he would otherwise have been allowed under the schedule, but subject to a proviso that the time shall not in any case be extended for more than three years from the cessation of the disability. Illustration (b) exactly illustrates the present case. Their Lordships, for the purpose of their judgment, will make the assumption which is most favourable to the appellant, and they will assume in his favour that up to the year 1858, the date of the death of the surviving brother, it was treated as, and was, separate property of Bayana, to which the appellant was entitled to succeed as his heir. But on that assumption the appellant was dispossessed, or discontinued his possession of his separate property, in favour of the joint estate at least on the death of his uncle in the year 1858; and the case comes within No. 142 in the second schedule; but if that be not so the possession of the joint family

VASUDEVA
PADHI
KHADANGA
GARU
v.
MAGUNI
DEVAN
BAKSHI
MAHA-
PATBULU
GARU.

was at any rate adverse to his separate estate from the same date; and it thus comes within No. 144. It is immaterial for the present purpose which article it comes under. That being so, the appellant could not have brought an action after the expiration of three years after he attained his majority (say) 1873. Then comes in section 28, by which his right to the property is extinguished at the determination of the period limited for bringing a suit for possession of it. The point does not require to be expressly pleaded, as it is only evidence of the respondent's title; but that question does not arise in this case, as it undoubtedly was a matter of controversy in the Court below, and in fact forms the subject of the third issue: whether the plaintiff has acquired any title by possession. The Subordinate Judge finds against the plaintiff on that issue, but it does not appear on what grounds.

The same point is also raised in the sixth reason for appeal to the High Court, though it was unnecessary for that Court, in the view they took of the case, to express any opinion upon it. The only answer which could be made to the argument would be one founded on section 18, namely, that the existence of the original grant was fraudulently concealed from the appellant. This answer is, perhaps, sufficiently pleaded by paragraph 3 of the defence, although there is no mention in that paragraph of fraud; but their Lordships do not think that any such case is proved with such precision as is necessary in a charge of fraud. There is, undoubtedly, some evidence that the original grant found its way into the respondent's possession; and it is not produced by him. On the other hand, the defendant gave evidence on his own behalf, but merely put in a copy of another document, and did not even say that he was ignorant of the original grant, or when he first discovered it, or say anything about it.

Their Lordships do not think that this is sufficient to support a charge of fraud. They are, therefore, of opinion that the appeal ought to be dismissed, on the ground that the defendant's right of possession (if it ever existed) has been extinguished by limitation; and they will humbly advise His Majesty accordingly.

The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant:—Messrs. *Lawford, Waterhouse, & Lawford*.

Solicitor for the respondent:—*Mr. R. T. Tasker.*

C.B.

APPELLATE CIVIL.

*Before Sir Arnold White, Chief Justice, and
Mr. Justice Davies.*

MITHIRAM BHAT AND ANOTHER (DEFENDANTS NOS. 2 AND 3),
APPELLANTS,

1
Jan
1

SOMANATHA NAICKAR AND OTHERS (PLAINTIFFS NOS. 1 AND 2
AND DEFENDANT NO. 1), RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, s. 100—Mortgage—Suit by sons against father for partition—Subsequent mortgage of suit property by father—Consent decree in partition suit—Subsequent decree in a suit on the mortgage against the father alone—Liability of property in execution—Effect of instrument intended to be a mortgage but defective in form—Charge.

Plaintiffs, who were the sons of first defendant, had, on March 18th, 1893, instituted a suit against their father for partition. On 24th July 1893, their father executed a deed purporting to mortgage the house to defendants Nos. 2 and 3. That deed was, however, attested by only one witness. On 24th December 1894, a razinamah was filed and a decree based on it was passed in the partition suit between plaintiffs and their father, by which the father conveyed to plaintiffs the whole of his interest in the immoveable family property, retaining only sufficient money to satisfy certain encumbrances which existed on the property. These were in fact paid off and the plaintiff took possession. Defendants Nos. 2 and 3 obtained, against the father alone, a decree for the amount of their mortgage and for sale in default of payment; and purchased it at a sale in execution thereof; and obtained possession through the Court. Plaintiffs then applied under section 332 of the Code of Civil Procedure for an order restoring them to possession, and, as that application was dismissed, filed the present suit:

Held, that plaintiffs were entitled to recover possession. As against the plaintiffs, the decree obtained by defendants Nos. 2 and 3 must be regarded as merely a personal decree against the father on his covenant to pay; and the house was not available in execution of it, inasmuch as it was the separate property of the plaintiffs, under the decree in the partition suit, at the time when the decree was obtained.

Whether an instrument which was intended to be a mortgage, but is invalid by reason of its not fulfilling the requirements of law, should be held as between the parties to it to operate so as to create a charge under section 100 of the Transfer of Property Act.—*Quære.*

Tofaluddi Peada v. Mahar Ali Shaha, (I.L.R., 26 Cal., 79), considered.

SUIT FOR A DECLARATION THAT A MORTGAGE OF A CERTAIN HOUSE EXECUTED BY FIRST DEFENDANT IN FAVOUR OF DEFENDANTS NOS. 2 AND 3, AND A DECREE PASSED THEREON, WERE INVALID AS AGAINST PLAINTIFFS, AND FOR AN ORDER THAT POSSESSION OF THE HOUSE BE GIVEN TO PLAINTIFFS.

* Original Side Appeal No. 19 of 1900 against the decree of Mr. Justice Boddam in Civil Suit No. 22 of 1900.

MITHIRAM
BHAT
v.
SOMANATHA
NAICKAR.

THE facts of the case are set out in the headnote and appear in the judgment.

Seshachariar and Kumarasami Sastri for appellants.

Sivasami Ayyar and Venkatasubbaramayya for respondents Nos. 1 and 2.

JUDGMENT.—The plaintiffs are the infant sons of the first defendant and they sue by their next friend who is the mother of the first defendant.

The plaintiffs ask for a declaration that a mortgage of a certain house executed by the first defendant in favour of the second and third defendants and a decree passed thereon in favour of second and third defendants are invalid and inoperative against the plaintiffs, and for an order that possession of the house be given to the plaintiffs.

The circumstances in which the suit is brought are shortly as follows:—On March 18th, 1893, the plaintiffs by their next friend instituted a partition suit against the first defendant.

On July 24th, 1893, the first defendant executed a deed by which he purported to mortgage the house in question to the second and third defendants for Rs. 1,000.

On December 13th, 1894, a razinamah decree was passed in the partition suit.

It seems clear that by the agreement upon which the razinamah decree was based the first defendant conveyed to the plaintiffs the whole of his interest in the immoveable family property whilst he only retained as much cash as was required to pay off the incumbrances on the property. The two mortgages on the property were paid off and the plaintiffs took possession of the house in April 1896.

The second and third defendants (the mortgagees from the first defendant under the deed of July 24th, 1893) brought a suit against the first defendant on this mortgage deed and obtained a decree for their mortgage debt and costs and for sale on default of payment. The plaintiffs were not parties to this suit. In execution of this decree the house was brought to sale and purchased by the mortgagees (the second and third defendants) on October 31st, 1898, and they obtained a writ of possession and took possession thereunder. The plaintiffs then applied in the City Civil Court under section 332 of the Code of Civil Procedure for an order restoring them to possession. The application was dismissed on

MITHIRAM
BHAT
v.
SOMANATHA
NAICKAR.

the ground that the house had been mortgaged before the decree in the partition suit and that it had not been shown that the debt of the father (first defendant) was not binding on the sons (the plaintiffs). The plaintiffs then brought the present suit, and a decree was passed by Boddam, J., in the terms of the prayer to the plaint.

The deed of July 24th, 1893, was prior in date to the decree in the partition suit, and the first question for consideration is whether that deed is effective as a mortgage of, or a charge upon, the house in question. It is clear that the instrument is not effective as a mortgage inasmuch as the requirements of section 59 of the Transfer of Property Act had not been complied with, the deed being attested by only one witness. It has been contended, however, on behalf of the second and third defendants that though the instrument is ineffective as a mortgage it operates so as to create a charge under section 100 of the Transfer of Property Act upon the house in question in favour of the second and third defendants upon the principle that the legal effect should, if possible, be given to a legal intention clearly expressed. This point was considered by the Calcutta High Court in *Tofaluddi Peada v. Mahar Ali Shaha*(1), and the Court expressed the view that section 100 applies to a case where the transaction does not amount to a mortgage, although property is made security for the payment of money, not to a case where property is intended to be mortgaged, but the deed is invalid as a mortgage by reason of its not fulfilling the requirements of the law. We should feel some difficulty in accepting this view in a case where the point arose—as in *Tofaluddi Peada v. Mahar Ali Shaha*(1)—between the parties to the instrument. In the present case, however, the plaintiffs were not parties to the instrument and were not parties to the suit brought upon the instrument. As against the plaintiffs at any rate it seems to us that the decree in the suit brought by the second and third defendants against the first defendant must be regarded as merely a personal decree against the first defendant on his covenant to pay.

In considering the legal effect of a personal decree against the father in a suit to which the infant sons were not parties the first question to be determined is—at the time the decree was obtained

(1) I.L.R., 26 Calc., 78.

MITHIRAM
BHAT
v.
SOMANATHA
NAICKAR.

were the family divided, or was the first defendant the managing member of an undivided family? If the family had been divided at the time the decree was obtained, the house, as being the separate property of the sons, would not, of course, be available in execution of a personal decree against the father.

The plaintiffs' case is that the family ceased to be an undivided family from the passing of the decree in the partition suit. The argument on behalf of the defendants is that the decree can be impeached and ought to be set aside on the ground that the agreement in pursuance of which it was passed is voidable under section 53 of the Transfer of Property Act as a transfer of immoveable property made with intent to defeat or delay creditors. There is an allegation in the written statement of the second and third defendants that the agreement and the decree were entered into and obtained for the purpose of defeating the creditors of the first defendant, and an issue was raised as to whether the razi-mah decree was fraudulent. The learned Judge finds it was not.

It seems to us that, even if the learned Judge had been of opinion that the decree was fraudulent as against creditors, it would not have been competent for him to have treated it as a nullity, seeing that no suit had been brought or application made by creditors to have it set aside. If it would not have been competent for the Judge who tried the suit to treat the decree as a nullity it is not competent for us to treat it as a nullity. This being so, the decree must be regarded as being still in force.

As things stand, therefore, we have a subsisting decree of this Court by virtue of which the family became divided and the house in question became the separate property of the plaintiffs and we have a personal decree against the first defendant obtained after the decree in the partition suit was passed. In this state of things it seems to us that, in their suit under section 332 of the Code of Civil Procedure, the plaintiffs made out their case for a declaration that they had a right to the present possession of the property and for an order that they should recover possession thereof. It is not necessary for us to express our opinion as to whether the second and third defendants could successfully impeach the decree in the partition suit in a suit instituted for that purpose.

The appeal is dismissed with costs.

APPELLATE CIVIL.

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

MARUDAMUTHU PILLAI (PLAINTIFF), APPELLANT,

RANGASAMI MOOPPAN AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

Abkari Act (Madras)—Act I of 1886 — Restriction prohibiting licensed vendor of toddy from having interest in the sale of arrack—Partnership agreement between licensed vendor of toddy and licensed vendor of arrack—Illegality—Void agreement.

A held a license for the sale of toddy, while B held a license for the sale of arrack. A entered into an agreement of partnership with B in the business of vending arrack and toddy. At the time when this agreement was entered into, a rule framed under the Abkari Act prohibited a person having a license for the sale of toddy from being interested in the sale of arrack, or a person having a license for the sale of arrack from being interested in the sale of toddy. A subsequently sued B for dissolution of partnership and for the recovery of money due to him in respect of the partnership.

Held, that the agreement had been entered into in contravention of the rule framed under the Abkari Act; that the rule in question was not one merely for the protection of the revenue but had also for its object the regulation of the liquor traffic in the interests of the public; and that the agreement was, in consequence, void *ab initio*, as being opposed to public policy.

Inasmuch as the provisions of the Abkari Act, as a whole, show that every person carrying on abkari business as a principal must be licensed under the Act, such a business cannot be carried on by a partner who does not hold such a license.

Suit for dissolution of partnership and for the recovery of money due to plaintiff in respect of the said partnership. The facts are stated by the District Munsif in the following judgment:—
“Plaintiff's case is that he was taken as a partner by the first defendant in the privilege of selling country spirits which first defendant had acquired under a license from Government. The alleged contract is said to have taken place on 1st April 1891 and the business is alleged to have been carried on under that contract till 31st March 1894. The suit is to recover the amount due

* Second Appeal No. 1371 of 1899 against the decree of I. T. Narayana Rao, Acting Subordinate Judge of Kumbakonam, in Appeal Suit No. 386 of 1898, affirming the decree of A. Narayanan Nambiar, Acting District Munsif of Shiyali, in Original Suit No. 296 of 1897.

MARUDA-
MUTHU
PILLAI
v.
RANGASAMI
MOOPPAN.

to plaintiff in respect of the said partnership' since it is no longer possible to continue the partnership on account of obstructions created by the first defendant. Second defendant is also alleged to be one of the partners. First defendant denies the alleged contract of partnership and pleads that the alleged contract is illegal and invalid being against the provisions of the Abkari Act and the rules thereunder and that therefore plaintiff is not entitled to any relief. He also pleads that the claim for first two years is barred by limitation. Second defendant supports the plaintiff and claims his share. The second issue alone has been argued, namely:—Is the said contract of partnership illegal and invalid in consequence of the plaintiffs having carried on any toddy business for any portion of the plaint period? Is plaintiff therefore not entitled to enforce his rights under the partnership as against the defendants? It is admitted by plaintiff that he carried on toddy business under a license for one year from 1st October 1891 to 30th September 1892. The license is filed as exhibit I. Under the conditions of that license, plaintiff is prohibited from having any interest in the privilege of selling country spirits during the continuance of that license (*vide* condition 23 of exhibit I). The plaintiff says that the business in toddy was also a partnership transaction between him and first defendant. If so, it is worse for him. He is not only prohibited from allowing a licensee of country spirits to take any interest in the toddy business, but also from himself taking any interest in the business of country spirits. According to plaintiff therefore, he is doubly guilty. He has allowed first defendant to take a share in his business of toddy and participated in the arrack business of first defendant. This is defeating the provisions of the Abkari law and the rules thereunder. I do not think plaintiff is entitled to any assistance from a Court of law when, according to himself, he has been doubly contravening the provisions of the law. The violation of any of the conditions is made penal. It is urged by plaintiff that the Abkari law being only a revenue enactment solely for the promotion of revenue, any contract in breach of any of the conditions thereof cannot be said to be prohibitory and void. This is not the present state of the law. It is now settled law that 'every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself doth not mention that it shall be so but only

inflicts a penalty on the defaulter because a penalty implies a prohibition though there are no prohibitory words in the statute' (*vide* Chitty 'On Contract,' tenth edition, page 641). Besides, the Abkari law is not simply a revenue enactment. Regulating intoxicating drinks is more for public policy than for revenue, though it incidentally adds to the revenue also. The aim of Madras Act I of 1886 specially is public policy mainly. The preamble of the Act runs thus:—'Whereas it is expedient to consolidate and amend the law relating to the import, export, transport, manufacture, sale and possession of intoxicating liquor and of intoxicating drugs, it is enacted as follows.' If the collection of revenue was the main object or at least one of the main objects of the enactment, that would have appeared in the preamble as is generally found in the Revenue Acts. The Bengal Excise Act (Bengal Act VII of 1878) may be referred to. There, the preamble, besides containing the above clause, contains the following also:—'the collection of the revenue derived therefrom.' The object of the Act is generally stated in the preamble. There is no doubt that the Abkari Act is not a Revenue Act solely and that it is against public policy to enter into any contract in breach of any of its provisions. The object of the agreement which is now sought to be enforced being thus unlawful, under section 23 of Contract Act the agreement itself is void and consequently plaintiff is not entitled to any relief on that agreement, (*Boistub Churn Naun v. Wooma Churn Sen*(1), *Hormasji Motabhai v. Pestanji Dhanjibhai*(2), *Raghunath Lalman v. Nathu Hirji Bhate*(3), and *Debi Prasad v. Rup Ram*(4)). I may also observe that the arrack license to defendant prohibits him from selling, transferring or sub-letting his interest. There is no doubt that the intention of the Legislature was to restrict the licensee alone to the privilege. Therefore, the admitting of a partner to share with him the privilege is, I think, against the provision of law. Admitting a partner is, in effect, the same as selling or transferring one's interest to that extent. Probably the individual qualifications of the persons to whom licenses are to be issued form the essential consideration in granting or withholding license. Whatever might be the reason for it the

MARU
MUTH
PILLAI
v.
RANGAS
MOOPAN.

(1) I.L.R., 16 Calc., 436 at p. 440.
(3) I.L.R., 19 Bom., 626.

(2) I.L.R., 12 Bom., 422.
(4) I.L.R., 10 All., 577.

MARUDA-
MUTHU
PILLAI
v.
RANGASAMI
MOOPPAN.

provision is contained in the license. Condition 28 of the license granted to defendant for arrack business contains it (exhibit A). Both parties to this suit are fully aware of the provision. They wanted to defeat the policy of law by one man taking toddy contract and the other arrack contract for the benefit of both. In such an arrangement if one party gets any advantage over the other, I do not think that a Court of law can give any relief to the aggrieved party. He has only to thank himself for having entered into an agreement to defeat law. The parties must be left to themselves. I hold therefore that the alleged contract of partnership is illegal and void, and that plaintiff is not entitled to any relief from this Court on that contract."

He dismissed the suit. The Acting Subordinate Judge, on appeal, upheld the order of dismissal and dismissed the appeal.

Plaintiff preferred this second appeal.

Sundara Ayyar and *Tiruvenkatachariar* for appellant.

Sivusami Ayyar and *Ramachandra Ayyar* for respondent No. 1.

JUDGMENT.—According to the plaintiff he entered into an agreement with the defendant that they should be partners in the business of vending arrack and toddy, the plaintiff having a license for toddy, and the defendant having a license for arrack. At the time this contract was entered into, it was a rule of the Government under the Abkari Act that no person having a toddy license should be interested in an arrack business and *vice versa*. So that the contract between the parties was clearly in contravention of that rule. Such a rule was not made merely for the protection of the revenue, but also to regulate the liquor traffic in the interest of the public (see *Boistub Churn Naun v. Wooma Churn Sen*(1)). The contract was therefore void *ab initio* as being opposed to public policy.

Apart from this, we should hold that the contract was invalid also on the ground that the license in each case was to be obtained by only one of the partners. The provisions of the Abkari Act, as a whole, show clearly that every person carrying on abkari business as a principal must be licensed under the Act. The reason is obvious that, unless he were licensed, there could be no control over him. To hold that a person who has not got a license could

(1) I.L.R., 16 Cal., 486 at p. 440.

still be partner with one who has a license and as such partner carry on the business with or without the other would enable the unlicensed partner to evade the liabilities intended by the law to be cast on persons carrying on abkari business.

The second appeal therefore fails and is dismissed with costs of the first respondent.

MARUDA-
MUTHU
PILLAI
v.
RANGASAMI
MOOPPAN.

APPELLATE CIVIL.

Before Mr. Justice Subrahmaniam Ayyar and Mr. Justice Davies.

APPADORAI PILLAI (PLAINTIFF), APPELLANT,

v.

SOLAI AMMAL AND OTHERS (DEFENDANTS) RESPONDENTS.*

1901.
January
30, 31.
February

*Limitation Act—Act XV of 1877, s. 3, sched. II, art. 118—"Plaintiff"—
Suit to set aside an adoption—Effect of bar on immediate reversioner.*

S died leaving a widow and two daughters him surviving. He also left immoveable property of which the widow took possession. About eight years after, namely in March 1886, the widow took A in adoption, in pursuance of authority alleged to have been given by her late husband. From that date A claimed as adopted son to be entitled to the estate of S; and both the daughters of S were aware of that claim, from 1886.* In 1893 a son was born to one of the daughters; and within six years of his birth, namely in 1898, the present suit was instituted on his behalf to set aside A's adoption. A in defence contended that the suit was barred by article 118 of schedule II of the Limitation Act. For the plaintiff it was claimed that limitation could only run as against him from the date of his birth:

Held, that the suit was barred. The daughters, as immediate reversioners, represented the inheritance, and plaintiff, as a remote reversioner, was a person claiming through or from the daughters within the meaning of section 3 of the Limitation Act.

SUIT to set aside an adoption. One Subbaraya Pillai had died some twenty years prior to the institution of this suit leaving a widow (defendant No. 1) and two daughters (defendants Nos. 2 and 3) him surviving. The deceased left immoveable property of which the widow took possession at his death. In March 1886, the widow purported to take defendant No. 4 in adoption, acting

* Appeal No. 12 of 1900 against the decree of K. C. Manavedan Raja, District Judge of North Arcot, in Original Suit No. 41 of 1898.

ATTADORA
PILLAI
v.
SOLAI
ANMAL.

in pursuance of authority, which she, at that time, stated, had been given her by her late husband in that behalf. Plaintiff, being the son of one of the daughters, namely of third defendant, was born in November 1893. The present suit was instituted on his behalf in 1898, and the cause of action was stated, in the plaint, to have arisen at the date of his birth. The widow (defendant No. 1) admitted the act of adoption of defendant No. 4, but supported plaintiff by saying that it had in fact been effected without authority, in consequence of evil advice. The fourth defendant relied upon the adoption as being valid, and stated that he had succeeded to the properties in possession of first defendant, and had enjoyed possession of them ever since the date of the adoption. He claimed that the suit was barred by limitation and also set up other defences. It was not disputed that plaintiff's mother (defendant No. 3) had been aware of the claim made by the fourth defendant, since 1886, the date of his adoption. An issue was framed on the question of limitation and the District Judge held that the suit was not barred. He said:—"The case is governed by article 118. The period is six years from the time the alleged adoption becomes known to the plaintiff. Plaintiff is a minor not yet six years old. But it is said that, as the adoption had all this time been known to plaintiff's mother and to his grandmother, plaintiff's suit is also barred. This argument is not sound. Under section 3 of the Limitation Act, plaintiff includes also any person from or through whom a plaintiff derives a right to sue. Here plaintiff takes not as heir to his mother or to his grandmother, but as heir to his grandfather. It is from or through his mother's father that plaintiff claims and not through his mother. The knowledge of his mother or of his grandmother cannot affect plaintiff's claim. I find the issue for the plaintiff." He, however, upheld the adoption, and dismissed the suit.

Plaintiff now preferred this appeal.

Hon. Mr. E. Norton for the appellant.

Sundara Ayyar for respondent No. 4.

JUDGMENT.—This is a suit by a minor aged five to set aside the alleged adoption of the fourth defendant by the first defendant, the plaintiff being the daughter's son of one Subbaraya Pillai, the deceased husband of the first defendant. The adoption is said to have taken place in March 1886, the plaintiff was born in 1893 and this suit was instituted in November 1898.

ATTADORA
PILLAI
v.
SOLAI
ANMAL.

The first question for determination is whether the suit is barred by limitation under article 118 of the second schedule to the Limitation Act.

The District Judge, whilst dismissing the plaintiff's suit on the merits, held that the suit was not barred by limitation, but it appears to us to be clearly barred. At the date of the adoption, besides his widow there were two daughters of Subbaraya Pillai, the second and third defendants, the latter being the mother of the plaintiff. That these two daughters were aware of the claim made by the fourth defendant as the alleged adopted son since 1886 is not disputed, and if they had brought a similar suit after six years from March 1886, it would undoubtedly have been barred under article 118 of the schedule to the Limitation Act. Though this was conceded, it was contended on behalf of the plaintiff that, his right as daughter's son to inherit the estate of his grandfather being independent of the daughter's right, limitation, so far as he is concerned, must be taken to start from the time he became aware of the adoption which could not have been earlier than 1893 when he was born and the suit was brought within six years from that time. On behalf of the respondents it was urged that, in cases like this, daughters as immediate reversioners must be taken to represent the inheritance, and that a remote reversioner such as the plaintiff should be held to be a person claiming through or from the daughters within the meaning of section 3 of the Limitation Act, and in this view the suit would be barred. This contention seems to us to be unanswerable. To hold otherwise would be holding that the time for reversioners to impeach an adoption is practically unlimited and would be directly opposed to the policy on which article 118 is based, as it would leave the question of title founded on adoption in a state of uncertainty and open to litigation for ever and a day. It is established law that, with reference to *res judicata*, a qualified heir, such as the daughter, represents the inheritance, and a decision properly and fairly obtained against her in regard to a matter connected with the inheritance is binding upon persons entitled to take the estate in succession to her as reversionary heirs of the last male owner.

Now, with reference to the effect of limitation also a similar view must be taken on principle. A contrary conclusion would be also inconsistent with the ruling of the Judicial Committee in

ATTYADORAI
PILLAI
v.
SOLAI
AMMAL.

Mussummat Lachhan Kunwar v. Anant Singh(1). The authorities on which the learned counsel for the plaintiff laid much stress are decisions in cases governed by article 141, where limitation does not begin to run till the death of the qualified female owner takes place and the right of the reversioner to possession accrues. Those authorities have no bearing on the present case, for, where a plaintiff's suit depends upon the setting aside of an adoption, article 118 is the one applicable and recourse cannot be had to article 141 (*Parvathi Ammal v. Saminatha Gurukul*(2)). The learned counsel also laid stress on *Kandasami v. Akkammal*(3) and other decisions to the effect that the intervention of reversioners with a life estate like the daughters in this case does not preclude a male reversioner entitled to take after them from obtaining a declaration in respect of property alleged to have been improperly alienated by a qualified female owner. Those cases rest on special grounds applicable to declaratory suits in respect of such alienations. But an adoption of a son by a Hindu widow to her husband is of course the introduction of an heir and concerns a matter of status, and such an introduction cannot be treated to be in effect nothing more than a mere transfer of property. On the ground that the suit is barred by limitation we dismiss the appeal with costs.

APPELLATE CIVIL.

1901.
February 5.

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

BUTCHANNA (PLAINTIFF), APPELLANT,

v.

VARAHALU AND OTHERS (DEFENDANTS AND ELEVENTH
DEFENDANT'S REPRESENTATIVES), RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, s. 60—Redemption suit—Claim alternative—Effect on suit where there has been no previous tender or payment of mortgage amount.

(1) L.R., 22 I.A., 25; I.L.R., 22 Cal., 415.

(2) I.L.R., 20 Mad., 40. (3) I.L.R., 13 Mad., 195.

* Second Appeal No. 675 of 1899 against the decree of M. D. Bell, District Judge of Godavari, in Appeal Suit No. 603 of 1898, reversing the decree of D. Venkoba Rao, District Munsif of Tanuku, in Original Suit No. 553 of 1896.

BUTCHANNA
v.
VARAHALU.

A mortgagor who institutes a suit for the redemption of his mortgaged property is entitled to put an alternative claim before the Court. He may aver that the mortgage money has been repaid, and, in the alternative, in the event of the Court finding any sum to be still due under the mortgage, that he is prepared to pay such further sum. Section 60 of the Transfer of Property Act raises no bar to a suit for redemption where the mortgage money has not been paid or tendered.

Suit for redemption. Plaintiff alleged in his plaint that certain land had been mortgaged with possession, as security for a loan, to defendant No. 11, as managing member of the defendants' family; that a registered mortgage bond had been executed, that the amount of the mortgage debt had been repaid, and that the defendants had no right to retain the mortgaged property any longer. In the alternative, the plaint stated that if the Court should find that the amount had not been paid plaintiff was prepared to pay it, and would then be entitled to obtain possession of the land. The District Munsif found a sum to be still due on the mortgage, and decreed that on receipt of that sum the defendants should surrender the mortgaged property to plaintiff, and that in default, plaintiff should pay the amount into Court, and take possession through the Court. The fourth issue was as follows:—"Whether the suit fails on account of plaintiff's omission to inform the defendants of his readiness to pay the mortgage debt, if any, due?" On this the District Munsif said:—"Plaintiff admittedly did not give any notice to defendants stating that he would pay them the debt due under the mortgage deed. Plaintiff puts his case in the plaint in the alternative. He says, first, that the mortgage has been discharged. He further says that if the said mortgage be held not to have been discharged, then he would pay the amount due under it as fixed by the Court. The question is whether the plaintiff's omission before suit to inform the defendants of his readiness to pay the mortgage debt is fatal to this suit. In Shephard and Brown's 'Commentaries on the Transfer of Property Act' (third edition) the following observations are made on pages 205 and 206:—"Although a mortgagor cannot obtain the relief to which he may be entitled under this section, except on payment of the mortgage money, a suit for redemption is not dismissed because the money has not been paid or even tendered. In strictness the mortgagor seeking to redeem ought to be ready with the full sum due, but it has not been the practice to dismiss suits in which a larger sum than that tendered is ultimately found to be due."

BUTCHANNA
v.
VARAHALU.

Relying on these observations, which are entitled to great weight I must answer the question raised above in the negative and in favour of the plaintiff. I find this issue for the plaintiff." He passed a decree as above stated.

Defendants appealed to the District Judge, who reversed the Munsif's decree. After setting out the facts, the District Judge said :—" Plaintiff asserts that the mortgage has been discharged. He states in the alternative that he is willing to pay any amount which the Court may find to be due under it and asks for delivery of the suit property with future mesne profits and costs. Defendants contend that, under the usufructuary mortgage . . . which has not been discharged, they are entitled to retain possession of the suit land until the debt has been discharged, that plaintiff cannot call upon them to receive the money now and that his suit is not maintainable as he has not given them notice of his willingness to pay the mortgage debt. . . . The points for determination are whether the suit should fail owing to plaintiff's failure to give defendants notice of his readiness to discharge the mortgage debt, and whether he is entitled to redeem now. I am of opinion that the suit is not maintainable. Under section 60 of the Transfer of Property Act, the plaintiff could only redeem the property on payment or tender of the amount due under the mortgage. He has neither paid nor tendered the amount due and has admittedly not given defendants notice of his willingness to pay. In fact the two pleas put forward by plaintiff are wholly inconsistent, and on this ground alone I must hold that the suit is not maintainable. He pleads first of all that he has discharged the debt due under the mortgage bond by certain specified means. If this plea is true, there is nothing due under the mortgage bond. He goes on however to ask that, if this plea is found to be false, he may be permitted to pay whatever sum may be found by the Court to be due under the bond. He attempted to substantiate his plea of discharge by evidence which was obviously false and which was rightly discredited in the lower Court. A suit which is based on such wholly inconsistent pleas cannot be maintained (*Iyyappa v Ramalakshamma*(1)). As regards the question of plaintiff's right to redeem I would concur with the Munsif, for the reasons given ^{strictly} _{of} _{6.}

(1) I.L.R., 13 Mad., 549.

by him, in holding that, but for the defects mentioned above, he would have the right." He dismissed the suit.

BUTCHANNA
v.
VARAHALU.

Plaintiff preferred this second appeal.

Venkatarama Sarma for appellant.

Sundara Ayyar for respondents.

JUDGMENT.—The District Judge is in error in considering that it is not open to a mortgagor seeking redemption to assert that the mortgage has been paid off, but that if it be found by the Court that anything is due under the mortgage he is prepared to pay it. Such an alternative case is not opposed to any rule of pleading and there is really no inconsistency. As to section 60 of the Transfer of Property Act we are unable to agree with the contention of the respondents' Vakil that the non-tender or non-payment of the amount due upon a mortgage previous to suit is a bar to a suit for redemption. It would be impracticable to make such a tender or payment in cases where there was a dispute as to the amount payable or where an account had to be taken, or where the parties seeking to redeem are other than the mortgagor. (Section 91 of the Transfer of Property Act.) Consequently, in practice the objection has never been allowed. Other provisions of the Transfer of Property Act relating to redemption such as section 92 are not consistent with the suggested interpretation of section 60. We must therefore reverse the decree of the District Judge, and remand the appeal for him to pass a proper redemption decree, after taking an account and settling the amount due. The respondents will pay the appellant's costs in this and in the lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Subrahmanya Ayyar and Mr. Justice Davies.

1901.
February 15.

MALLIKARJUNA SASTRI (COUNTER-PETITIONER),
APPELLANT,

v.

NARASIMHA RAO (PETITIONER), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, s. 258—Agreement by purchaser of mortgaged property to pay an agreed sum to mortgagee holding decree for sale—Transfer of Property Act—Act IV of 1882, s. 57—Payment into Court by purchaser of mortgaged property in pursuance of adjustment of decree out of Court—Limitation Act—Act XV of 1877, sched. II, art. 173A—Application for adjustment of decree to be recorded.

The mortgagee of certain property brought a suit on his mortgage and obtained a decree for sale. Petitioner then negotiated with the mortgagor for the purchase of the lands. The mortgagee consented to the proposed purchase and agreed to accept from petitioner a sum of money in full satisfaction of his mortgage decree. Petitioner completed the purchase accordingly and tendered the agreed sum to the mortgagee, who refused to accept it. Petitioner thereupon filed this petition, under section 57 of the Transfer of Property Act, asking to be allowed to pay the amount into Court and praying for a declaration that the property was freed from encumbrance. The mortgagee contended that the application fell under section 258 of the Code of Civil Procedure, in which case it would be barred under article 173A of the Limitation Act:

Held, that section 57 of the Transfer of Property Act did not govern the case, as it involved a question of the adjustment of a decree out of Court; also that section 258 of the Code of Civil Procedure was not applicable, and that petitioner was not precluded by article 173A of the Limitation Act from proving the agreement set up by him under section 244, clause (c), of the Code of Civil Procedure, and that he was entitled, on payment of the money into Court, to the declaration sought.

PETITION filed under section 57 of the Transfer of Property Act, praying the Court to permit petitioner to pay Rs. 2,700 into Court, in respect of a certain mortgage, and to declare the mortgaged property free from encumbrances. The petition set out that petitioner had purchased certain immoveable properties described in a sale-deed now filed; that these properties had been previously mortgaged by the vendor to the counter-petitioner;

* Civil Miscellaneous Appeal No. 54 of 1900 against the decree of J. H. Munro, Acting District Judge of Gódvári, in Civil Miscellaneous Petition No. 89 of 1900.

that counter-petitioner had brought a suit and obtained a decree on his mortgage; that while petitioner was negotiating with the vendor for the purchase of the properties, counter-petitioner gave petitioner a written undertaking to the effect that he would accept from petitioner a certain sum of money in full satisfaction of his mortgage decree, and that he consented to the proposed purchase of the properties by petitioner; that petitioner had accordingly completed the purchase, retaining the agreed sum for counter-petitioner, who requested him to send it in a particular manner. Petitioner had duly tendered the sum to counter-petitioner, who, however, refused to accept it. Petitioner now asked to be permitted to pay the agreed amount into Court, and prayed for a declaration that the properties in question were freed from encumbrance. Counter-petitioner contended, *inter alia*, that the encumbrance had become merged into his decree and that, in consequence, section 57 of the Transfer of Property Act did not apply to the case, also that the application was one falling under section 258 of the Code of Civil Procedure, in which case it would be barred by limitation under article 173A of the Limitation Act.

The District Judge made the following order:—"There is evidence to prove the execution of the agreement, and the counter-petitioner, who is present in Court, has not ventured into the box to deny it. From other admitted letters there can be little doubt the counter-petitioner did write it, and no attempt has been made to point out any difference in the handwriting. I therefore find the agreement true and counter-petitioner is bound by it, as the petitioner bought the property in pursuance of the agreement. The money has been deposited in Court and the property is declared free from incumbrance. The counter-petitioner will pay the costs."

Against that order the counter-petitioner preferred this appeal.
Rama Rao for appellant.

Ramachandra Rao Saheb and *Nagabhushanam* for respondent.

JUDGMENT.—Section 57 of the Transfer of Property Act does not apply to this case, as it involves a question of the adjustment of a decree out of Court.

The decree of this Court is not a decree for payment of money, but an ordinary mortgage decree for sale in case the money due is not paid.

MALLI-
KARJUNA
SASTRI
v.
NARASIMHA
RAO.

MALLI-
KARJUNA
SASTRI
v.
NARASIMHA
RAO.

That being so, section 258, Code of Civil Procedure, is not applicable (compare *Sankaran Nambiar v. Kanara Kurup*(1)). The respondent was therefore not precluded by limitation under article 173A of the second schedule of the Limitation Act from proving the agreement set up by him under section 244, clause (c), of the Code of Civil Procedure.

There being no doubt as to the agreement, the appeal fails and is dismissed with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Subrahmanya Ayyar and Mr. Justice Davies.

1901.
February 15.

QUEEN-EMPRESS

v.

DORASAMI AYYAR (ACCUSED No. 2).*

Criminal Procedure Code—Act V of 1898, s. 288—Statement of witness before committing Magistrate treated as evidence at a trial before Court of Session—Evidence duly taken.

Under section 288 of the Code of Criminal Procedure the Court is not restricted to admitting the evidence of a witness duly taken before the committing Magistrate merely for the purpose of contradicting that witness when he is called as a witness at the Sessions Court. The section is intended to enable the Court to read the previous evidence as substantive evidence in the case, at the trial, where, for the purposes of justice, the adoption of such a course is found necessary by the Judge.

CHARGES of voluntarily causing hurt for the purpose of extorting a confession or information which might lead to the detection of an offence, under section 330 of the Indian Penal Code, and of voluntarily causing hurt for the purpose of constraining a person to do an illegal act, under section 327 of the Indian Penal Code. During the trial at the Court of Session the Sessions Judge, having reason to doubt the evidence then given by some of the witnesses called on behalf of the prosecution, permitted the statements of those witnesses before the committing Magistrate to be treated as

(1) I.L.R., 22 Mad., 182.

* Criminal Appeals Nos. 1085 of 1900 and 18 of 1901 against the sentences of R. D. Broadfoot, Sessions Judge of South Arcot, in Calendar Case No. 49 of 1900.

evidence in the case. He made the following statement in the course of his judgment:—"The present is one of that troublesome class of cases in which the chief witnesses have been palpably gained over by the defence. The Public Prosecutor could hardly obtain an intelligible reply from either of the women, while questions put by the pleaders for the defence were clearly and promptly answered. Most of the other witnesses endeavoured to minimise their knowledge of what had taken place. I therefore allowed several of the depositions given in the lower Court to be filed under section 288, Criminal Procedure Code." These witnesses had not been cross-examined. The accused, two in number, were both convicted, and preferred these appeals.

Mr. D. Chamier, for the accused in Appeal No. 1035 of 1900.

Mr. Joseph Satya Nadar for the accused in Appeal No. 18 of 1901.

In the course of the argument a question was raised as to the admissibility in evidence of the statements which the prosecution witnesses had given before the committing Magistrate. It was suggested that those statements could not be "evidence duly taken" within the meaning of section 288 of Criminal Procedure Code, inasmuch as the witnesses had not been cross-examined; and their mere statements as given in examination-in-chief could not be accepted as reliable. It was the general practice to reserve cross-examination of prosecution witnesses before committing Magistrates in cases likely to be committed for trial. That practice was adopted in the interests of accused persons. If such statements of prosecution witnesses before committing Magistrates could be filed under section 288 it would be unsafe to reserve cross-examination, and the interests of accused persons would be prejudiced. The only reasonable construction of section 288 was that the previous statement of a witness might be put to him with a view to contradict his evidence at the trial if the latter were questioned. Reference was made to *Queen-Empress v. Sagal Samba Sajao*(1); *Queen v. Amanulla*(2) and *Queen-Empress v. Dan Sahai*(3).

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

JUDGMENT.—We are unable to accede to the contention that section 288 of the Criminal Procedure Code permits the production

(1) I.L.R., 21 Cal., 642.

(2) 12 B.L.R., Appx. 15.

(3) I.L.R., 7 All., 862.

QUEEN
EMPRESS
v.
DORASAMI
Ayyar

QUEEN-
EMPRESS
v.
DORASAMI
AYYAR.

of the evidence given before the committing Magistrate only for the purpose of contradicting the witness at the Sessions trial. If that were all, the provision would be quite unnecessary and superfluous inasmuch as such evidence could be adduced for the purpose stated under the Evidence Act. There can be no doubt the provision was intended to enable the Court to read the previous evidence as substantive evidence in the case at the trial where, for the purposes of justice, the adoption of such a course is found necessary by the Judge. Such evidence may be used as much in favour of the defence as in support of the prosecution. In this case we think the Judge was well advised in adopting the course he took. The evidence of the first prosecution witness, even as it was given at the trial, is, in our opinion, sufficient to warrant the conviction of both prisoners. There never has been any doubt as to the commission of the offence charged, and the only question is whether the policemen who committed the offence were the two prisoners. The woman was admittedly in the custody of the first prisoner during the period the hurt was caused and the second prisoner was present all the time, and as the superior officer engaged in the investigation of the case he was *prima facie* responsible for anything done to the woman while in police custody. It is impossible that the hurt could have been caused to the woman without the cognizance of these two men, if they did not themselves cause it, as the woman in her earlier deposition expressly stated they did, and in her present evidence implies the same. The conduct of the prisoners in not reporting in their report (exhibit N) the marks of injuries on the person of the woman, which were discovered two days afterwards, is a concealment on their part telling strongly against them. We have therefore no hesitation in confirming the convictions and sentences and dismissing the appeals.

APPELLATE CRIMINAL.

Before Mr. Justice Davies and Mr. Justice Benson.

QUEEN-EMPRESS

v.

GANGAYYA.*

1901.
March 13.

*Abkari Act (Madras)—Act I of 1886, s. 55 (g)—“Wash” fit for distillation—
“Materials” for manufacturing liquor.*

A liquid mixture known as “wash,” consisting of jaggery and babool bark and proved to be fit for distillation, constitutes “materials” for the purpose of manufacturing liquor within the meaning of section 55 (g) of the Abkari Act.

CHARGE of illicitly possessing wash fit for illicit distillation of arrack and concealing the same, preferred under section 55 (g) of Madras Act I of 1886. The Sub-Inspectors, as first and second prosecution witnesses, deposed that “wash” is a mixture of jaggery, babool bark and other intoxicating drugs, and is fit for distillation. The Magistrate acquitted the accused in the following judgment:—
“The Inspector of Salt and Abkari Revenue, Cuddapah Circle, charged the accused for illicitly possessing wash waste fit for illicit distillation of arrack and concealing the same in a field near Tavvaripalli, an offence punishable under section 55 (g) of Act I of 1886. The prosecution evidence shows that when the witnesses were marching in the street they observed, before daybreak on 6th February 1900, the accused issuing from a house with a pot and proceeding towards a paddy-field, depositing the pot there and going away, when he was arrested. The pot is said to have contained what is called wash, which is explained to be a mixture of jaggery, babool bark and other intoxicating drugs. It is said to be fit for distillation. The liquid wash was not analysed to find out what, if any, intoxicating drugs it contained. The accused said that he carried no pot, but that, when he was proceeding in the street, he was unjustly arrested. The witnesses for the defence bear out the accused’s statement. The pleader Mr. Nanjundappa brings to notice in his argument that wash, such as it is called, is neither material nor implement, or apparatus used for the purpose

* Criminal Appeal No. 691 of 1900 under section 417 of the Criminal Procedure Code against the judgment of acquittal passed on the accused in Calendar Case No. 35 of 1900 by C. Krishna Rao, Second-class Magistrate of Cuddapah.

QUEEN-
EMPRESS
v.
GANGAYYA.

of manufacturing liquor, and under *Queen-Empress v. Sondi Donnai Sabu*(1) it is no offence to possess wash even if it is possessed, which the accused did not possess. In the case referred to in the foregoing paragraph, the accused had been charged for being in possession of mixture of some boiled rice with dried ginger and nuts of the marking-nut plant, which mixture the accused in that case admitted he had for manufacturing liquor. The High Court observed that the mixture was certainly not an implement for the manufacture of liquor. The mixture was not liquor which the accused intended to manufacture liquor with the mixture. The conviction was therefore quashed by the High Court. This seems a case similar to that. Here the man is alleged to have taken the pot containing the wash, not from the accused's house, but from the house of somebody else. The wash is said to be not liquor fit for drinking. Section 55 (g), under which the accused is charged, only makes it punishable to possess, use or keep any materials, still, utensil, implement or apparatus whatsoever for the purpose of manufacturing liquor other than toddy or any intoxicating drug. The wash in question cannot be deemed materials or any of the other things named, nor does the possession of wash independently amount to an offence under any clause of section 55. I find, under these considerations, the accused not guilty and acquit him under section 245 of the Code of Criminal Procedure. Under section 517 of the Code of Criminal Procedure, the wash will be destroyed."

Against that acquittal this appeal was preferred by the Public Prosecutor.

Mr. N. Subrahmanyam, (for the Public Prosecutor), for the Crown.

The accused was not represented.

JUDGMENT.—The Second-class Magistrate is entirely wrong in supposing that the "wash" consisting of a liquid mixture of jaggery and babool bark is not "materials" for the purpose of manufacturing liquor. The evidence of the Abkari officers on that point is clear and is not contradicted.

The case to which the Second-class Magistrate refers (Weir's 'Criminal Rulings,' page 417) in support of his view is totally irrelevant. It was passed (as appears from the report itself) with

(1) Weir's 'Criminal Rulings,' p. 417.

QUEEN-
EMPRESS
v.
GANGAYYA.

reference to the language of section 23A of Act III of 1864 as amended by Act V of 1879, which Acts were repealed by the present Act I of 1886. The former Acts were defective in not providing for the case of possession of "materials" for distillation, but the defect was remedied by the present Act, and it was under the present Act that the charge was made.

We set aside the acquittal and convict the accused (Gangi-reddi Gangayya) of an offence punishable under section 55 (g) of Act I of 1886, and sentence him to pay a fine of Rs. 10, or in default of payment to suffer one month's rigorous imprisonment.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Bhashyam Ayyangar.

GURUSAMI CHETTI (PETITIONER), PETITIONER,

1901.
March 19

v.

KRISHNASAMI NAIKAR AND OTHERS (COUNTER-PETITIONERS),
RESPONDENTS.*

Religious Endowments Act—Act XX of 1863, s. 18—Suit sanctioned for removal of trustees—Leave to sue in formâ pauperis—Civil Procedure Code—Act XIV of 1882, ss. 402, 407.

The provisions of Chapter XXVI of the Code of Civil Procedure do not preclude a person, who has obtained leave to sue under section 18 of the Religious Endowments Act for the removal of the trustees of a temple, from being permitted to sue in formâ pauperis.

PETITION by persons who had been accorded leave under section 18 of the Religious Endowments Act to sue for the removal of the trustees of a temple for leave to bring their suit in formâ pauperis. A counter-petition was filed, in which it was contended that a suit under section 14 of the Act could not be brought in formâ pauperis. The District Judge passed the following order:—"These are applications by persons to whom I have given leave, under section

* Civil Revision Petition No. 213 of 1900, under section 622 of the Civil Procedure Code, praying the High Court to revise the order of G. F. T. Power, District Judge of Tanjore, in Civil Miscellaneous Petition No. 869 of 1899.

GURUSAMI
CHETTI
v.
KRISHNASAMI
NAIKAR.

18, Act XX of 1863, to institute suit against the trustees of certain religious institutions, for permission to sue *in formâ pauperis*. I do not think permission ought to be given. It is true that suits under section 14 of Act XX of 1863 are not suits of the kind which the Civil Procedure Code expressly says shall not be allowed to be brought *in formâ pauperis*, but the provisions of Chapter XXVI of the Code have never, so far as I know, been applied to cases of this kind, and it appears to me that the intention of the framer of Act XX of 1863 (manifest from the provision of section 18) to protect temple trustees from vexatious and unnecessary suits would be in great danger of being defeated if persons to whom leave to institute suits has been given were allowed to sue as *pauperis*. I have, I think, a discretion in this matter, and I think I shall exercise it rightly if I refuse the permission applied for. These applications are rejected with costs."

Against this order the petitioners preferred this civil revision petition.

Desikachariar, for petitioners, contended that the Judge had erred in thinking, as he had apparently done, that the provisions of section 18 of the Religious Endowments Act impliedly precluded pauper suits from being brought against the trustees of temples. Petitioners, as plaintiffs, had already obtained leave to sue under section 18, and now asked to be allowed to sue as paupers. He referred to section 402 of the Code of Civil Procedure and to section 18 of the Religious Endowments Act and contended that the reason given for the refusal of leave was a mistaken one.

Sivasami Ayyar, for respondents, argued that the procedure laid down in section 402 and Chapter XXVI of the Code of Civil Procedure was intended to apply only to suits for the enforcement of personal claims. This was shown by the nature of the exceptions in section 402, which all related to such claims or to the enforcement of individual rights. [BHASHYAM AYYANGAR, J., remarked that section 402 was precise in laying down the grounds on which the Court might refuse to grant leave.] Similarly, suits under section 539 could not, he submitted, be brought *in formâ pauperis*.

JUDGMENT.—In Chapter XXVI of the Code of Civil Procedure and particularly in sections 402 and 407, the restrictions on the liberty of the right to sue as a pauper are expressly prescribed. We should be adding to those restrictions if we held that a man

should not be allowed to sue as a pauper when his suit is one that is brought under the Devasthanam Act.

We must reverse the order and remand the case for the proper disposal of the petitions. Respondents must pay the costs of the present petitions.

GURUSAMI
CHETTI
v.
KRISHNASAMI
NAIKAR.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Bhashyam Ayyangar.

MURUGESA CHETTI (PLAINTIFF), PETITIONER,

v.

CHINNATHAMBI GOUNDAN AND OTHERS (DEFENDANTS),
RESPONDENTS.*

1901.
March 22, 29.

Transfer of Property Act—Act IV of 1882, ss. 107, 117—Lease for agricultural purposes—Registration Act—Act III of 1877, s. 17, cl. (d)—Lease reserving annual rent—Term exceeding five years.

Defendants executed an instrument by which they leased a betel garden from plaintiff for an indefinite period at an annual rent of Rs. 35. The instrument was not registered. Rent having fallen into arrears, plaintiff sued to recover the same, when it was pleaded in defence that the instrument of lease was inadmissible in evidence for want of registration. The Munsif dismissed the suit on the grounds (1) that the lease was not for agricultural purposes and that therefore its registration was compulsory under section 107 of the Transfer of Property Act, and (2) that assuming it to be an agricultural lease its registration was compulsory under section 17, clause (d), of the Indian Registration Act, inasmuch as it was not a lease for a term not exceeding five years. On a petition being filed to revise the Munsif's decree:

Held, (1) that a lease of land for the cultivation of betel is an agricultural lease. *Kunhayen Haji v. Mayan*, (I.L.R., 17 Mad., 98), not followed;

(2) that although the lease might continue beyond five years in the event of neither party determining it in the meanwhile, it was not a lease for a term exceeding five years, as either party might determine it before the expiration of that period. *Virammal v. Rungayyengar*, (I.L.R., 4 Mad., 381), followed.

Inasmuch as the annual rent was under Rs. 50, registration was optional and plaintiff was not precluded from proving the letting by oral evidence or by proof of the unregistered instrument.

By an instrument, dated 20th December 1895, the four defendants leased a betel garden from the plaintiff. The instrument, which was not registered, was addressed to the plaintiff in the following

* Civil Revision Petition No. 337 of 1900 praying the High Court to revise the decree of D. Venkoba Rao, District Munsif of Arni, in Small Cause Suit No. 324 of 1900.

MURUGESA
CHETTI
v.
CHINNA-
THAMBI
GOUNDAN.

terms:—"As we and our men have, during the last Adi month, planted betel garden in No. 1062-B measuring about 1 acre 12 cents of nanjah land held in patta in your name in the said Padi village, we shall be paying year after year Rs. 38 as rent for the said lands for each year beginning from the past Adi month. If we vacate the said garden, we shall pay off the rent due up to 30th Masi of such year, take the firewood ourselves and deliver the land to your possession. Whatever may be the year in which we vacate it, we shall not deliver possession of it to you in any other month than Masi. Excepting the betel garden, &c., now planted, we shall raise no produce of any other kind. If the plantation while young happens by some accident to be blown down by wind, we shall pay the rent due to it, and vacate your land. Payments of the said rent will be entered in this deed. You need not acknowledge payments said to have been made in other ways. We shall be giving you every day 50 choice leaves as the landlord's share of betel from the date on which betel leaves are begun to be gathered. On failure to do so, we shall pay the cost thereof at the rate of the season. To this effect we have executed this lease deed of betel garden with our full consent."

Rent having fallen into arrears, plaintiff instituted a suit against defendants in the Court of the District Munsif, who delivered the following judgment:—"This is a suit brought by the plaintiff to recover Rs. 78-3-5 from the defendants under a lease deed executed by them to him on 20th December 1895. The defendants plead that the plaint lease is inadmissible in evidence for want of registration. They also contend that they have paid the rent, &c., due to plaintiff. The points for consideration are:—

- (1) Whether the plaint muchalka executed by defendants to plaintiff is inadmissible in evidence for want of registration?
- (2) Whether the defendants have paid the rent, &c., due under the lease? The lease on which this suit is admittedly based is in respect of a betel garden. It is a lease from year to year and not for any definite period. In the first place it is not an agricultural lease and section 107 of the Transfer of Property Act applies (see *Kunhayen Haji v. Mayan*(1)); assuming that it is an agricultural lease, as it is not for a period not exceeding five years it requires to be registered. I therefore hold that the muchalka in question

(1) I.L.R., 17 Mad., 98.

requires registration and as it is not registered it is inadmissible in evidence. I find the first point in favour of the defendants."

He dismissed the suit.

Plaintiff filed this civil revision petition.

S. Subrahmania Ayyar for petitioner.

The respondents were not represented.

BHASHYAM AYYANGAR, J.—This suit is brought for the recovery of rent due under an unregistered instrument of lease of a betel garden, dated 20th of December 1895, reserving an annual rent of Rs. 385. The District Munsif dismissed the suit on two grounds, viz.—

(1) that it was not a lease for agricultural purposes and therefore its registration was compulsory under section 107 of the Transfer of Property Act;

(2) that, assuming it was an agricultural lease, its registration was compulsory under section 17, clause (d) of the Indian Registration Act, 1877, inasmuch as it was not a lease "for a period not exceeding five years."

The second ground is clearly untenable and the Munsif has evidently overlooked the ruling of this Court in *Virammal v. Rungayyanganar*(1). The term of the lease may no doubt continue beyond five years in the event of neither party determining it in the meanwhile, but as either party may determine it before five years, it cannot be said to be a lease for "a term exceeding five years" and inasmuch as the annual rent is below Rs. 50, its registration is optional under clause (c) of section 18 of the Registration Act.

The Munsif is also, in my opinion, wrong in holding that a lease of land for betel cultivation is not an agricultural lease. The case cited by him (*Kunhayen Haji v. Mayan*(2)) is not, as I understand it, a decision in point. In that case, it was held that the lease was of the coffee plants only and not of the land.

The primary meaning of agriculture is the cultivation of the ground ('The Century Dictionary') and in its general sense, it is the cultivation of the ground for the purpose of procuring vegetables and fruits for the use of man and beast including gardening or horticulture and the raising or feeding of cattle and other stock (Anderson's 'Dictionary of Law'). Its less general

(1) I.L.R., 4 Mad., 381.

(2) I.L.R., 17 Mad., 98.

MURUGESA
CHETTI
v.
CHINNA-
THAMBI
GOUNDAN.

MURUGESA
CHETTI
v.
CHINNA-
THAMBI
GOUNDAN.

and more ordinary signification is the cultivation with the plough and in large areas in order to raise food for man and beast ('The Century Dictionary') or, in other words, "that species of cultivation which is intended to raise grain and other field crops for man and beast." (Anderson's 'Dictionary of Law.') Horticulture, which denotes the cultivation of gardens or orchards, is a species of agriculture in its primary and more general sense. In section 117 of the Transfer of Property Act the word "agriculture" is, in my opinion, used in its more general sense as comprehending the raising of vegetables, fruits and other garden products as food for man and beast, though some of them may be regarded in England as products of horticulture as distinguished from agriculture. A reference to section 106 which deals with all leases of immoveable property and in which the same expression "agricultural purpose" occurs, would clearly show that the Legislature could not have intended that the word "agriculture" was to be understood as excluding a large class of leases of garden lands in this country some or many of which in England may perhaps be regarded as horticultural. That section provides that, in the absence of a contract to the contrary, a lease for agricultural purposes shall be presumed to be one from year to year, but that a lease for other purposes shall be presumed to be only from month to month. It could not have been the intention of the Legislature that in respect of leases of garden lands to be cultivated as vegetable or other garden, the presumption, in the absence of a contract to the contrary, is to be that the lease is one from month to month. Section 117 of the Transfer of Property Act exempts from the operation of Chapter V of that Act, not merely agricultural leases but all leases for agricultural purposes. A lease of land as a yard for ploughing-cattle, or as a habitation for agriculturists or as pasture for ploughing-cattle, or for the purposes of storing manure or growing plants to be used as manure for agriculture, will be a lease for agricultural purposes. Is it to be supposed that, if such a lease were given in connection wholly or partly with the cultivation of vegetable or fruit gardens and orchards, section 117 is not to apply to it? The distinction between agriculture when it is used otherwise than in its primary and more general sense and horticulture is a fine one even in England and in India, especially, it will be impossible in the case of several products of the land to draw a line between agriculture and horticulture according to

MURUGESA
CHETTI
v.
CHINNA-
THAMBI
GOUNDAN.

English notions. The only practical distinction which I can suggest and one which will give effect to the policy of the Legislature in exempting agricultural leases from the operation of section 107, &c., of the Transfer of Property Act is to regard as agriculture, as distinguished from horticulture, not only all field cultivation by tillage but also all garden cultivation for the purpose chiefly of procuring vegetables or fruits as food for man or beast and other products fit for human consumption by way of luxury, if not as an article of diet. In the definition of "agriculturist" (Deccan Agriculturists' Relief Act, 1879) the Legislature could not have intended to exclude from its beneficial operation persons who earn their livelihood by cultivating vegetable and fruit gardens and orchards. In *Venkayya v. Ramasami*(1), it was held that a tenant having a right of occupancy in nunja lands cultivated with paddy and ragi did not change the character of the holding by converting it into a cocoanut tope. It was held that instead of raising one kind of crop (paddy or ragi) by tillage, he raised without tillage another kind of crop (cocoanuts). That decision proceeds, in my opinion, on the principle that the holding is used as an agricultural holding whether the crop be a cereal one or a garden crop. The expression "agricultural purpose" occurs in section 32 of the Highways and Locomotives (Amendment) Act, 1878, (41 and 42 Vict., chap. 77). The concluding part of that section exempts locomotives used solely for agricultural purposes from the necessity of obtaining licenses. In *Ellis & Co. v. Hulse*(2), the question arose whether the owner of a locomotive who owned it for the purpose of making profit by letting it for hire solely for carrying manure to be used on farms was rightly convicted for not having obtained a license for such locomotive. The conviction was quashed as illegal. It does not appear from the report whether the manure was used solely for ordinary field cultivation, or also for the cultivation of gardens or orchards, if any, attached to the farm. Even if it had been used solely or partly for the latter, it could hardly have been contended that, under section 32 of the said Statute, the conviction would be good in law. In that case Cave, J., observed as follows in regard to the policy of the exemption:—"The very object of "this exemption is the well-known one of favouring agriculture—

(1) I.L.R., 22 Mad., 39.

(2) L.R., 23 Q.B.D., 24.

MURUGESA
CHETTI
v.
CHINNA-
THAMBI
GOUNDAN.

"an old object of English Legislation in favour of a very important "industry." This observation of Mr. Justice Cave will apply with much greater force in this country where the agricultural industry is more important than in England and is one that is common to wet cultivation as to garden and dry cultivation, the object of all such cultivation being chiefly to procure food for men and cattle and other products of the soil which are usually consumed by the people as gentle stimulants or by way of luxury. Betel leaf is an article of daily consumption with all classes in this country as tobacco leaf is with most classes and betel vine is generally grown side by side with plantains, the products of which are among the chief articles of vegetable food. The lease in this case being one for the cultivation of betel is, according to the usage and custom of the country, an agricultural lease and, as such, falls under section 117 of the Transfer of Property Act, and is not therefore governed by section 107 of that Act and its registration is optional under the Indian Registration Act.

For these reasons the decree of the District Munsif should, in my opinion, be reversed, and the suit remanded for its disposal on the merits. Costs of this petition will abide and follow the result.

SHEPARD, J.—In ordinary parlance a man who planted fruit trees or bushes in an enclosed space would be said to keep a garden. Neither he, nor still less one who planted and maintained trees for firewood or other such purposes, would be called an agriculturist. The term "agriculture," however, is capable of being applied to tillage of the soil in the widest sense and after considering the context in which the expression "agricultural purposes" is used in the Transfer of Property Act, viz., in sections 37, 106 and 108, I cannot say that it was intended to limit its denotation in any way. I think I was wrong in the opinion I expressed with regard to a coffee garden and that a lease of a betel garden is a lease for agricultural purposes within the meaning of the Act.

It follows that the plaintiff was not precluded by section 107 of the Act from proving the letting of the betel garden by oral evidence or by proof of an unregistered document.

As to the other question there can be no doubt.

The document, which is a lease for the purpose of the Registration Act, clearly does not provide for a term which exceeds five years. It therefore does not require registration under that Act.

I agree in the order proposed by Mr. Justice Bhaashyam Ayyangar.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmanya Ayyar.

RAMAN (PLAINTIFF), APPELLANT,

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

1900.
December 4
5, 6, 7, 10.
1901.
January 29

Suits Valuation Act—Act VII of 1887, s. 11—Improper valuation for jurisdictional purposes—Case not finally disposed of by lower Appellate Court but only remanded for findings—Validity of order of remand.

Section 11 of the Suits Valuation Act (VII of 1887) has the effect of ousting a want of jurisdiction caused by improper valuation not only in cases where there has been a final disposal by the lower Appellate Court, but also where a case has been remanded by the lower Appellate Court to the Court of First Instance for a finding.

SUIT to recover land. Plaintiff sued the Secretary of State for India for possession of certain immoveable property, which he alleged to be the jenmam properties of his stanom. For the purposes of the Court fee he valued the relief claimed as follows:—Amount to be recovered, means profits for the three years prior to suit, at Rs. 140 per annum, Rs. 420; also fifteen times the net annual produce of the properties, Rs. 2,100; total Rs. 2,520. The defendant, in his written statement, pleaded that the valuation of the suit and the Court fee paid were not correct; and contended that the market value of the properties was about Rs. 10,000, and that Court fees ought to have been paid on that sum. Issues were framed by the Subordinate Judge as to what was the correct annual income of the properties and whether the suit was properly valued and stamped. On the latter issue, he said:—"The plaint hills, &c., are valued for the purpose of Court fees at Rs. 2,100, being fifteen times Rs. 140 which is stated to be the annual income in the plaint. The defendant in the written statement roughly calculates the market value of the properties to be Rs. 10,000. The issues were framed by my predecessor and,

* Appeal No. 150 of 1899 against the decree of O. Chanda Menon, Acting Subordinate Judge of South Malabar, in Original Suit No. 40 of 1896 (Original Suit No. 23 of 1896, Palghat Subordinate Court).

RAMAN
v.
SECRETARY
OF STATE
FOR INDIA
IN COUNCIL.

when I commenced to hear the case, neither the plaintiff's counsel nor the defendant's vakil ever mentioned the dispute about the valuation of the suit. It was on the 22nd instant that defendant's vakil brought to my notice in course of the argument the dispute about the valuation of the suit. Of course, I must remark the defendant's vakil has not adduced any evidence that the hill was worth Rs. 10,000. Any how plaintiff states in his plaint that Rs. 2,100 is the value of the properties sought to be recovered, and in an ejectment suit the value given by the plaintiff of the properties, unless it is otherwise shown by the opposite party, must be taken as the value of the suit."

There was also an issue as to whether the suit was barred by limitation and the Subordinate Judge held that it was. He accordingly dismissed the suit.

Plaintiff appealed to the District Judge who remanded the suit for further findings, *e.g.*, as to whether plaintiff had title to the property and whether he had been in possession of any portion of it within the twelve years preceding the suit. Findings were returned in due course to the effect that plaintiff's title was proved; also that the income derived from the property was Rs. 12-12-0 per annum. On these findings the District Judge held that the value of the suit was above Rs. 5,000 and that he had no jurisdiction to hear the appeal. He therefore returned the appeal memorandum for presentation to the proper Court.

Plaintiff accordingly filed this appeal in the High Court.

J. L. Rosario, for respondent, took the objection that the order of the lower Appellate Court remitting the case to the Subordinate Court for a finding on the issue as to title had been made without jurisdiction, inasmuch as that Court had held that it had no jurisdiction to hear the appeal.

Sundara Ayyar and *Anantakrishna Ayyar* for appellant.

JUDGMENT.—It has been objected on behalf of the respondent that the order of the lower Appellate Court remitting the case to the Court of First Instance for a finding on the issue as to title was made without jurisdiction and that anything done in pursuance of that order must be treated as a nullity. The objection is based on undervaluation. In a case like this the effect of section 11 of the Suits Valuation Act is to cure the want of jurisdiction unless the Appellate Court is satisfied that the undervaluation has prejudicially affected the cause on the merits. If the lower

Appellate Court had finally disposed of the appeal on the merits, it might be said that the party against whom the decision went had been prejudicially affected, but there has been no disposal on the merits, and it is open to this Court to deal with the findings and go into the question of their correctness. We are unable to accept the respondent's suggestion that section 11 of the Suits Valuation Act only applies when there is a final disposal by the lower Appellate Court. The objection must be overruled.

RAMAN
v.
SECRETARY
OF STATE
FOR INDIA
IN COUNCIL.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Benson.

NAGALINGAM PILLAI (DEFENDANT), APPELLANT,

v.

RAMACHANDRA TEVAR (PLAINTIFF), RESPONDENT.*

1901.
February 13.
March 4.

Hindu Law—Bequest of self-acquired property by a testator to his sons—Intention expressed by will that property should be taken in severalty, but its terms otherwise consistent with ordinary rules of inheritance—Birth of grandson and subsequent alienations by gift—Validity of alienations—Property having quality of ancestral property though taken under the will—Intention—Presumption in favour of ancestral nature of estate.

A Hindu father possessed of self-acquired property may deal with that property as he pleases, either by gift or by testamentary disposition, and his sons cannot dispute the disposition, even though it be in favour of a stranger. Any of the observations made in *Tura Chand v. Reeb Ram*, (3 M.H.C.R., 50), which conflict with this proposition cannot now be regarded as good law. A father may leave his self-acquired property to descend to his sons as ancestral property, or, if he makes any disposition of it in favour of a son, he is at liberty to preserve for it the quality of ancestral property. Whether in any given case the property was intended to pass to the son as ancestral or as self-acquired property is a question of intention turning on the construction of the instrument of gift. If there are no words indicating the contrary intention, the natural inference should be that the father intended the sons to take his property as their ancestral estate. If partition is made by the father on the footing that the property is partible property, although there is in point of law a disposition made by the father the intention of the father will be taken to be that the quality of the ancestral property shall remain.

* Appeals Nos. 32, &c., of 1899 against the decree of T. Varada Rao, Temporary Subordinate Judge of Madura (East), in Original Suits Nos. 53, &c., of 1897.

NAGALINGAM
PILLAI
v.
RAMA-
CHANDRA
TEVAR.

Plaintiff's father made voluntary gifts of certain property to the defendant after the date of plaintiff's birth. Plaintiff now sued to set these alienations aside, and to recover the property, one ground being that the property alienated was ancestral property in the hands of his father, in which plaintiff had acquired an interest by birth, and that his father had, in consequence, no power to make the alienations. The whole of the property in question had been self-acquired, originally, by plaintiff's paternal grandfather, who had disposed of it by will to his three sons, of whom plaintiff's father was one. Plaintiff, however, contended that notwithstanding this fact the property had the quality of ancestral property in his father's hands. From the terms of the will it appeared that the testator intended his sons to take the property in severalty, but in other respects the dispositions contained in the will were consistent with the ordinary rules of inheritance under the Hindu Law. There were no words in the will indicating any intention that the sons should hold their shares free from the incidents of ancestral property:

Held, that plaintiff was entitled to recover.

SUIT to recover property of which defendant was said to be in illegal possession. The plaint stated that plaintiff's father, one Kotasami Tevar, had inherited large properties, moveable and immoveable, from his father Ponnusami Tevar; that Kotasami had made no self-acquisitions during his lifetime, and that all the property of which he was possessed during his life was ancestral, having been inherited from his father or acquired by purchases or savings from property so inherited; that Kotasami had died in 1894, leaving plaintiff, an only son, him surviving; plaintiff having been born on 7th January 1888, and having become by right of birth a joint owner with Kotasami of all his property. It further alleged that defendant had been a personal attendant upon plaintiff's father, and had exercised undue influence over him; that defendant was in possession of the properties now claimed, and refused to give them up, alleging that they had been made over to him by way of gift by plaintiff's father. Plaintiff contended that the gifts relied upon by defendant were null and void, his father (Kotasami) having had no right in law to make them.

In defence it was denied that the late Kotasami's properties were ancestral. Defendant contended that as to some of them they were the self-acquisitions of Kotasami's father, Ponnusami, and had been devised to Kotasami; and as to the rest, that they were Kotasami's self-acquisitions. The undue influence was also denied. The alienations complained of, as stated by the Appellate Court, had been made after the date of plaintiff's birth. The Subordinate Judge stated the following facts to have been either

NAGALINGAM
PILLAI
v.
RAMA-
CHANDRA
TEVAR.

proved or admitted:—"Ponnusami Tevar of Ramnad, a well-known personage in the Madura district, left three sons, viz., (1) Kotasami Tevar, plaintiff's father; (2) Sivagnanasami alias Seemai Sami Tevar; and (3) Pandia Dorasami Tevar. Kotasami and Pandia Dorai were born of the same mother. Ponnusami died on 18th December 1869, leaving a will behind. He appointed Sri Seshadri Ayyangar (plaintiff's fifth witness) as his executor. Kotasami brought, on his coming of age, Original Suit No. 2 of 1879, against the executor to obtain his share of his father's properties. One-third share of the moveable and immoveable property of the estate of Ponnusami was made over in execution of the decree in that suit to Kotasami upon a division into three lots, one of which fell to Kotasami. Plaintiff's fifth witness says that he gave, on division to Kotasami, one lakh of rupees in Government promissory notes and immoveable properties yielding about Rs. 50,000 or Rs. 58,000 a year. Kotasami came into possession of this large estate in 1880, from which year he began to keep accounts in his own name. It is also admitted that Kotasami did not make any self-acquisition during his lifetime. He held no salaried office, nor did he engage in trade. He, however, embarked in speculative litigation which, in the result, caused only loss. On his death on the 25th August 1894, the estate was involved in debt, so much so that on the 12th June 1897 the Court of Wards had to execute a hypothecation bond and borrow the large sum of one lakh and fifty thousand rupees to pay off debts. The principal defendant in these cases—Nagalingam Pillai—came into Kotasami's service in February 1891, and continued therein until his death. The immoveable properties under dispute were all conveyed by way of gift by Kotasami in his lifetime to the said Nagalingam Pillai. As regards the moveables, plaintiff alleges that some items were given by Kotasami to Nagalingam, some were carried away by the latter without permission, and that others were given as a loan by Kotasami, but not returned yet by Nagalingam. Nagalingam admits the gift of the immoveables and some of the moveable properties, and denies the rest."

The first and principal issue raised the question whether plaintiff's father had absolute powers of control and alienation over the plaint property. The material portions of Ponnusami's will were as follows:—"Will executed by me, Ponnusami Tevar, son

NAGALINGAM
PILLAI
v.
RAMA-
CHANDRA
TEVAR.

of Sivagnana Tevar Avergal, residing in Ramnad, as follows:—
(1) As I got myself divided from all my dayadis on 30th September 1862 by a partition deed, and moreover as I possess self-acquired properties on a large scale, I have right over all kinds of properties which are in my possession, which can be brought under my possession, and which are under my control. I therefore make arrangements myself in regard to my properties. The arrangements which I hereby make I alone have power to alter and amend from time to time at my pleasure.” [The will proceeded to appoint an executor. It also recited that the testator, by his three legitimate wives, had three sons and three daughters, the eldest of the sons being Kotasami, aged 8 years.] “(4) I make the following arrangements for the division of my properties among the aforesaid three sons and three daughters and the sons and daughters who may be hereafter born to me, as I am still capable of begetting children. (5) The accounts . . . which were separately written in regard to all my self-acquisitions—moveable and immoveable and in regard to my small ancestral property are herewith appended. (6) The different kinds of properties which will become mine hereafter should be brought under the respective accounts. (7) Out of the villages mentioned in the accounts . . . and other villages forming freehold estates or those over which I possess absolute rights, and the permanent cowle villages, that is, those held on permanent lease—excepting the under-mentioned properties given over to my three daughters aforesaid, the remaining villages as well as similar landed estates which will hereafter belong to me shall be divided in equal shares under the Hindu Law by my three sons who are now alive and the sons, if any, who may be born to me hereafter, on one and all of them attaining proper age. To put the matter more clearly, my three sons aforesaid who are now alive, together with all the sons who may be born to me hereafter shall divide all my properties into as many equal shares and each son should take one share. If any son or sons who have previously come of age among the aforesaid sons do not wish to wait until the other sons have attained sufficient age, but ask the executor to divide his share or their shares out of the properties under the control of the executor, the executor should accordingly divide and deliver such share, or shares before (the others attain their age). If any son or sons who have not attained sufficient age or their mothers or any of the relations were to ask that the share or shares of such

NAGALINGAM
PILLAI
v.
RAMA-
CHANDRA
TEVAR.

son or sons should be divided and given, the executor should not comply with such requests. But, immediately on their attaining proper age, the share of each should be given to him. (8) Out of the topes . . . and the bungalows and other buildings . . . all the sons aforesaid shall divide the buildings and topes necessary for their residence and enjoyment, retain the rest in common, rent or leave them out, &c., through the eldest son and divide the amount derived therefrom. My three wives should live during their lifetime in the house called Puthuvai palace in Ramnad. Before their death, the sons should not divide it. The said sons shall live together or in separate rooms or portions in the said house. After the death of all the said wives the said palace shall be valued at Rs. 10,000, and if the eldest son Kotasami liked, he might give the shares remaining after excluding his share to his brothers and take the palace. If he did not like it, he might give it over to any brother at his pleasure under the said arrangement. Though the said house had been built at a greater cost, it would not be worth more than the aforesaid price in this town. Out of the said amount which is fixed as the value of the said house, the share of the son who finally takes it shall be deducted, and the balance divided among the other sons. (9) The profits derived from the shares in the trade in respect of indigo vat . . . from the market . . . and the lease in respect of dyeing barks and any other business which may be undertaken hereafter, after deducting all expenses, shall be divided by all the sons annually. But their management shall be conducted by the eldest son Kotasami Tevar. (10) Before the said sons effect a division no loans should be given to zamindars, palayapatdars, my relations, nor any presents made to any person out of my properties besides, neither the executor nor my relations should give the slightest room to any of my relations to exercise authority in respect of my family affairs or properties subsequent to my death; neither can they interfere. To put this more emphatically, none of my relations should interfere even in the slightest degree to exercise authority in respect of any of the affairs of my family, or of my properties. But for the ceremonies that may be performed in my family my relations will be pleased to come and honour and favour the members of my family with their presence . . . (12) For the expenses of the marriage stridhanam of each of my daughters whose marriages had not been performed

NAGALINGAM
PILLAI
v.
RAMA-
CHANDRA
TEVAR.

and for whom dowries had not been given in my lifetime, out of my . . . daughters who are at present alive and of the daughters who may be born hereafter Rs. 15,000 shall be paid out of the moveable properties, namely, simple debt bonds, &c., . . . by my sons, or if it should be necessary to perform the marriages, &c., of the said daughters before the sons have attained sufficient age, by the executor. But, in the event of the said moveable properties being converted into immoveables within my lifetime, the amount fixed shall be paid as aforesaid out of the income of the . . . villages mentioned in . . .

(13) In the event of any of the daughters aforesaid dying without leaving any issue, male or female, the stridhanam property referred to above shall revert to the shares of my sons. [Some provisions for the testator's mother and wives follow.] (17) The moveable properties remaining at the time of partition shall be divided equally by all the sons. (18) The jewels, vessels, &c., which are in the possession of my three wives shall be taken by them respectively as their own, and should not be included in the division. (19) The sum of Rs. 30,000 lent by my first wife . . . to . . . is her own property, neither I, executor, nor any other sons than her own, have any claim thereto. (20) As my uterine brother has been given away in adoption and as that adoption has been confirmed by the decision of the Privy Council, he has no claim whatever to any of my properties. [The benefits arising from certain agreements, &c., were then directed to be enjoyed by all the sons.] (27) If it should happen that the obsequies of myself, my mother and any of my wives should be performed during the minority of all my sons, the executor should spend the amount required therefor at the time, from the moveable properties. If they should take place after all the sons have attained majority and effected a division or after some of them have attained their majority and effected a division, then only, the obsequies of myself, my mother and in case of the death of my second wife Mangaleswari Nachiar without male issue, her obsequies also shall be performed by all the sons out of the income from the properties reserved as common to them all or the income from the properties which they respectively obtain on partition. But the obsequies of the first and third wives shall be met by their respective sons out of the income from their respective shares of the properties. (Signed) Ponnusami."

NAGALINGAM
PILLAI
v.
RAMA-
CHANDRA
TEVAR.

Construing this will, the Subordinate Judge said:—"I think that, taking all these circumstances together, Ponnusami meant that his estate should be taken absolutely by his sons by way of demise rather than by descent. In all the matters set forth above, Ponnusami has, in his will, varied the consequence of the application of the rules of ordinary inheritance. It would be a violent presumption and contrary to the expressed intentions of the testator to suppose that he intended, under the will, to confer a limited estate upon his sons. . . . Upon the materials before me, my conception of Ponnusami is that he was a cultured man of the world with liberal ideas who would not hesitate to express with clearness whatever he intended to say. If, therefore, he intended to convey to his sons no more than what they would be entitled to by inheritance, it seems to me that Ponnusami was doing a needless act when he executed a will and that, having done so, he was wanting in clearness in expressing himself as to what he actually intended to pass by bequest to his sons. Both these inferences seem to be opposed to the character and the intelligence of the man." He referred to *Tara Chand v. Reeb Ram*(1), *Muddun Gopal Thakoor v. Ram Buksh Pandey*(2), *Hardai Narain v. Haruck Dhari Singh*(3), *Jugmohandas Mangaldas v. Sir Mangaldas Nathubhoy*(4), *Ponnappa Pillai v. Pappuwayyengar*(5), *Subbayya v. Surayya*(6), *The Court of Wards v. Venkata Surya Mahipati Ramakrishna Rao*(7), and other cases, and also to Mayne's 'Hindu Law,' and held, on the first issue, that plaintiff was not entitled to question the validity of the gifts made by his father to defendant, as his father had acquired the property by bequest.

The second issue raised the question whether the gifts to defendant had been brought about by undue influence. The Subordinate Judge found that they had been so brought about. In the result, therefore, he set aside the alienations and decreed in plaintiff's favour.

There were seven connected suits, the first issue being common to all of them, and the second issue being raised in all but one.

Defendant preferred this appeal.

(1) 3 M.H.C.R., 50.

(3) 12 C.L.R., 104.

(5) I.L.R., 4 Mad., 1 at p. 42.

(7) I.L.R., 20 Mad., 167 at p. 183.

(2) 6 W.R., (C.R.), 71.

(4) I.L.R., 10 Bom., 528 at p. 574.

(6) I.L.R., 10 Mad., 251.

NAGALINGAM
PILLAI
v.
RAMA-
CHANDRA
TEVAR.

Sundara Ayyar and *K. Srinivasa Ayyangar* for appellant, argued on the evidence that undue influence had not been made out, and contended that the claim was barred by limitation under article 126 of the Limitation Act.

Mr. *W. Barton*, for respondent, contended, in support of the judgment of the lower Court, that the properties in question were in fact ancestral and that Kotasami had no power to dispose of them. The fact that Ponnusami had made a will did not necessarily alter the character of the property which his son Kotasami had taken under that will. He referred to the will; also to *Nunnu Meah v. Krishnasami*(1), *Tara Chand v. Reeb Ram*(2), *Muddun Gopal Thakoor v. Ram Buksh Pandey*(3) and Mayne's 'Hindu Law,' 6th edition, paragraphs 276, 331 and 337. He also dealt with the question of undue influence, and contended that article 120 of the Limitation Act governed the case.

Sundara Ayyar, in reply, argued that the proposition stated in *Tara Chand v. Reeb Ram*(2) was no longer law. He referred to *Balwant Singh v. Rani Kishori*(4), *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur v. The Court of Wards*(5), and *Jumohandas Mangaldas v. Sir Mangaldas Nathubhoy*(6), followed in *Nanabhai Ganpatrao Dhairyawan v. Achatsai*(7), and *Rai Nursingh Dass v. Rai Narain Dass*(8). He contended that whatever a person may devise he may give. Also that the estate which Kotasami had taken under the will was an absolute one.

SHEPHARD, J.—These are appeals against decrees made in several suits brought by the plaintiff to recover property alienated by or taken from his late father Kotasami Tevar. One ground of the plaintiff's claim to recover property so alienated is that the property, which is of various kinds, was ancestral property in the hands of the plaintiff's father, in which, accordingly, he acquired an interest on birth. The alienations complained of were made after the date of the plaintiff's birth. If the property, which was originally acquired by Kotasami's father Ponnusami Tevar, devolved upon Kotasami by inheritance, it was unquestionably ancestral property in the hands of the latter. In point of fact,

(1) I.L.R., 14 Mad., 274.

(3) 6 W.R., (C.R.), 71.

(5) I.L.R., 22 Mad., 385 at p. 397.

(7) I.L.R., 12 Bom., 122 at p. 131.

(2) 3 M.H.C.R., 50.

(4) I.L.R., 20 All., 267.

(6) I.L.R., 10 Bom., 528 at p. 574.

(8) 3 N.W.P.H.C.R., 217 at p. 235.

NAGALINGAM
PILLAI
v.
RAMA-
CHANDRA
TEVAR.

Kotasami being one of three sons of Ponnusami took his share of Ponnusami's property under his father's will, but it is argued that notwithstanding this the property was still ancestral property in Kotasami's hands. Now, there can be no doubt that it was fully competent to Ponnusami to deal as he pleased with his self-acquired property of whatever kind either by gift or by testamentary disposition (*Balwant Singh v. Rani Kishori*(1), *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur v. The Court of Wards*(2)). He might therefore have bequeathed his property to a stranger and his sons could not have called the disposition in question. Any of the observations made in *Tara Chand v. Reeb Ram*(3), which conflict with these propositions cannot, I think, now be regarded as good law. As the father is at liberty to make any disposition he pleases or to leave his self-acquired property to descend as ancestral property, so when making any disposition in favour of his son he is at liberty to preserve for the property the quality of ancestral property. Whether in any given case the property was intended to pass to the son as ancestral property or as self-acquired property must be a question of intention turning on the construction of the instrument of gift. Following the principle laid down in *Mahomed Shumsool v. Shewukram*(4), I think that if there are no words indicating the contrary intention, the natural inference should be that the father intended his sons to take his property as their ancestral estate.

If a partition is made by the father on the footing that the property is partible property, although there is in point of law a disposition made by the father, there can be no doubt that the father intends that the quality of ancestral property shall remain. That is the case in *Muddun Gopal Thakoor v. Ram Buksh Pandey*(5), although other reasons were given for the decision. In the present case I think there was the same intention. No doubt he did not intend that his sons should take the property precisely in the same way as they would have taken it had there been no will. He intended they should take the property in severalty, but otherwise the dispositions, especially the provision that the property allotted for maintenance should fall into the mass of the property bequeathed to the sons, are consistent with

(1) I.L.R., 20 All., 267.

(3) 3 M.H.C.R., 50.

(2) I.L.R., 22 Mad., 385 at p. 397.

(4) L.R., 2 I.A., 7.

(5) 6 W.R., (C.R.), 71.

NAGALINGAM
PILLAI
v.
RAMA-
CHANDRA
TEVAR.

the ordinary rules of inheritance and there are no words in the will indicating any intention that his sons should hold their shares free from the incidents of ancestral property. In *Jugmohandas Mangaldas v. Sir Mangaldas Nathubhoy*(1), it was considered that the will contained words showing an intention to create an estate different from that which the devisee would take as heir under Hindu law. Here I can find no such words. In my opinion the issue which is raised in all the suits as to Kotasami's power of alienation ought to have been decided in the plaintiff's favour and therefore as it is admitted that Kotasami acquired no property himself, the plaintiff is entitled to a decree in respect of all property given by Kotasami to the defendant. [His Lordship then dealt with the evidence relating to the items of property that were proved to have been given to defendant, and, BENSON, J., concurring, the Court decreed accordingly.]

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Benson.

1901.
March 11.

KANNAN AND ANOTHER (DEFENDANT NO. 2 AND PLAINTIFF),
APPELLANTS,

v.

PAZHANIANDI AND ANOTHER (DEFENDANTS NOS. 1 AND 3),
RESPONDENTS.*

Malabar Law—Appointment of trustee to tarwad charities by karnavan—Validity.

Though the karnavan of a Malabar tarwad has the power, unless specially limited by family usage or agreement, of himself managing the trust property of the tarwad, he has no inherent right, as karnavan, to appoint another to take his place as such trustee.

Suit for the recovery of land with arrears of rent. Plaintiff, who had been appointed manager of a chattram by the karnavan of the tarwad to which plaintiff and defendants Nos. 2 and 3

(1) 1.L.R., 10 Bom., 528 at p. 574.

* Second Appeal No. 2 of 1900 against the decree of A. Venkataramana Pai, Subordinate Judge of South Malabar, in Appeal Suit No. 316 of 1899, reversing the decree of M. Subbayyar, District Munsif of Temelprom, in Original Suit No. 257 of 1898.

belonged, sued to recover some land which, he alleged, belonged to the chattram. The karnavan, who was impleaded as second defendant, supported plaintiff's claim. The lessee of the land (first defendant) pleaded that the land belonged to another branch of the tarwad, of which third defendant was the manager. The latter supported first defendant. The Munsif found that the land belonged to the common tarwad of plaintiff and of defendants Nos. 2 and 3. He also held that plaintiff had been validly appointed manager of the chattram by the karnavan (second defendant) and decreed in plaintiff's favour. Defendant No. 3 appealed, whereupon the Subordinate Judge upheld the finding that the chattram belonged to the common tarwad of plaintiff and defendants Nos. 2 and 3; but held that second defendant was not competent, alone, to appoint plaintiff as manager of it; and that plaintiff was not entitled to sue. He said:—"The chattram and its properties belong to the common tarwad of plaintiff and second and third defendants. The third defendant himself admitted it in his plaint, exhibit F in 1881, but by the razinamah, exhibit G, filed in Original Suit No. 37 of 1887, which has been held to be binding on the whole tarwad (see the High Court judgment, exhibit H), it is declared that management of the chattram is vested in the Eravamannattil branch. The razinamah, exhibit G, after confirming the management of Shekhara Mannadiar, the then karnavan or senior male member of Eravamannattil branch, proceeds to provide that in case of mismanagement, the karnavans (evidently the karnavans of the remaining branches) should select some other member of Eravamannattil house to succeed him in the management. Now Shekhara Mannadiar is dead and the plaintiff is not the karnavan of Eravamannattil branch. Narayana Mannadiar is the present karnavan of Eravamannattil branch. It is not even alleged that Narayana Mannadiar has mismanaged the chattram or its properties. Plaintiff's appointment by Rakunni Valia Mannadiar, the common karnavan (second defendant) is invalid for the reason that no occasion has arisen for the exercise of the power of selection conferred by the razinamah, exhibit G, and that the second defendant is not entitled alone to make the appointment, that is, without the consent of the branch karnavans." Paragraph 3 of exhibit G contained the following provision:—"If, however, any neglect or delinquency was shown in the management by him, it has been settled that the karnavan

KANNAN
v.
PAZHANI-
ANDI.

KANNAN
v.
PARAKANI-
ANDI.

has a right and power to remove him from the management and to appoint another member of Eravamannattil branch itself to manage the affairs." He dismissed plaintiff's suit.

Against that decree defendant No. 2 and plaintiff preferred this second appeal.

Sundara Ayyar and Bhaskara Menon for appellants.

Sankaran Nayar for respondent No. 2.

JUDGMENT.—We cannot agree with the Subordinate Judge that the word 'karnavans' in the plural in paragraph 3 of the razinamah, exhibit G, was intended to include the karnavans of the three branches. The heads of the three branches are nowhere in exhibit G referred to or recognised as karnavans. Throughout exhibit G only one karnavan is recognised, that is, the karnavan of the whole tarwad (the second defendant) and he is the only signatory who signs as karnavan. The word 'karnavans' in paragraph 3 evidently means the several karnavans of the tarwad in succession and this conclusion is supported by the fact that in their written statement the defendants did not contend that the heads of the branches had the right of appointment under paragraph 3.

But we think that the Subordinate Judge is right in the second reason which he gives for dismissing the plaintiff's suit. The power of dismissal and appointment given to the karnavan in paragraph 3 of exhibit G is a special power given on the occurrence of a contingency which has never arisen.

The question remains as to whether the karnavan has an inherent right as karnavan and independently of exhibit G to make an appointment to a trusteeship in the tarwad. No doubt the karnavan, unless specially limited by family usage or agreement, has the power of himself managing the trust property of the tarwad, but we are not aware of any authority for the position that he can appoint another to take his place as trustee, a position clearly opposed to the general law of trusts. No family custom or agreement having been proved in this case, we must hold that the karnavan (second defendant) had no power to appoint the plaintiff to be trustee of the charities in suit.

Plaintiff's suit was therefore rightly dismissed, and we dismiss this second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Bhishyam Ayyangar.

SELLAM (PLAINTIFF), APPELLANT,

1901.
March 18.

CHINNAMMAL AND OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act—Act XV of 1877, sched. II, art. 127—Proof of exclusion from joint family property—Mere non-participation in or refusal to live on joint property insufficient—Hindu Law—Suit by one of three widows against her two co-widows for partition of widow's estate in their late husband's property—Proof of unchastity on part of plaintiff during widowhood no ground for refusal—Tenant-in-common—Partition a matter of right.

One Panguni died in or about the year 1881, leaving three widows him surviving. The three widows, as tenants-in-common, participated for some time in the profits of their late husband's property. After his decease, one of the widows began to lead an immoral life and refused to live with the other two. In 1895 she sued her co-widows for partition and for an allotment of her one-third share of the property. She claimed to have participated in the profits of the family property until 1890, but the defendants contended that she had ceased to participate therein for more than twelve years before the institution of the suit and raised the plea of limitation. They also pleaded that plaintiff was not entitled to claim partition, by reason of her unchastity. It was proved that plaintiff had been living with her paramour subsequent to her husband's decease, and had supported herself without recourse to the family property and had refused to live with defendants.

Held, that the burden lay on the defendants of proving that plaintiff, who was admittedly a tenant-in-common with them till 1882, was excluded from enjoyment of the property. Mere proof of refusal on the part of the plaintiff to live with her co-widows, or of non-participation by her in the family property, did not establish ouster or exclusion by defendants and there was no other evidence to show that she had abandoned her interest to their knowledge.

Held also, that proof of plaintiff's unchastity after her husband's death did not disentitle her to claim partition of the property by metes and bounds. A widow, being a tenant-in-common, is entitled to partition as a matter of right and the Court has no discretion in the matter.

SUIT by a widow against her co-widows for partition. Plaintiff and the first two defendants were widows of one Panguni deceased. Plaintiff alleged that her husband had died in or about the year 1881

* Second Appeal No. 69 of 1900 against the decree of K. Ramachandra Ayyar, Subordinate Judge of Negapatam, in Appeal Suit No. 419 of 1898, reversing the decree of B. Krishna Rao, Acting District Munsif of Valangiman, in Original Suit No. 335 of 1896.

SELLAM
v.
CHINNAMMAL.

and that she had since his death enjoyed his properties with her co-widows until 1890, after which the common enjoyment had ceased, owing to disagreements between the widows. She stated that it was now impossible for her to live jointly with defendants Nos. 1 and 2, and that a partition of the property was necessary. She laid her cause of action as having arisen in 1891, when she demanded partition, and now sued for an allotment of her share of the property. The plaint was first presented in the Subordinate Court in August 1895, and to the Court of the Munsif in 1896, in pursuance of an order of the Subordinate Judge. Defendants Nos. 1 and 2 set up in defence that plaintiff had lived an unchaste life during their late husband's lifetime and since his death; and that this was the reason why she had ceased to live with her co-widows. They denied that plaintiff had participated in the enjoyment of the properties till 1890, denied her right to them, and pleaded that she had not been in possession within twelve years preceding the suit. They also denied plaintiff's right to claim partition. The Munsif found that plaintiff's life had been chaste during the lifetime of her late husband, but that she had subsequently led a life of open immorality. He also found that plaintiff's participation in the profits of the family properties had ceased at some date not earlier than September 1883, and that in consequence the suit was not barred by limitation. He decreed in plaintiff's favour in respect of a third share of the properties claimed (with certain exceptions); and ordered a proper division to be made, and plaintiff's one-third share to be allotted to her. Defendants Nos. 1 and 2 appealed to the Subordinate Judge who considered the following three points:—“(1) Whether plaintiff was unchaste in her husband's lifetime and has therefore forfeited her right to enjoy a widow's estate in his property? (2) Whether the suit is barred by limitation? (3) Whether plaintiff is entitled to be put in possession of a definite one-third share?” He said:—“The ruling of the Privy Council in *Moniram Kolita v. Kerry Kolitany* (1) although decided with reference to the Bengal Law, has the concurrence of the Courts in Bombay, North-Western Provinces and the Punjab. The decision is that unchastity after a husband's death does not divest the widow of the estate which has vested in her. That no occasion for the enunciation of the rule has arisen in this Presidency

(1) L.R., 7 I.A., 115; I.L.R., 5 Cal., 776.

can only be traced to the consciousness of the people of the futility of agitating such a contention after the estate has once vested. The appellant's vakil contended that there must be a departure in this Presidency against the rule. The mischievous consequences which would flow from adopting the contention are fully set forth by their Lordships of the Judicial Committee, consequences not peculiar to any particular portion of the country. Courts must hesitate therefore to re-open a question which has, it might be said, been settled after an exhaustive consideration of the subject in all its bearings.”

On the evidence he found that plaintiff had not been unchaste during her husband's lifetime, and had not on that account forfeited her right to enjoy a widow's estate in his property. On the question of limitation he found that time had begun to run from a date prior to May 1883, or more than twelve years prior to the first presentation of plaint. He held that the suit was barred under section 127 of schedule II to the Limitation Act.

Plaintiff preferred this second appeal.

Sundara Ayyar for appellant.

Sankaran Nayar and *Krishna Ayyar* for respondents Nos. 1 and 2.

JUDGMENT.—It is clear that the burden lay on the defendants to prove that the plaintiff, who was admittedly a tenant-in-common with them till March 1882, was excluded from enjoyment of the property. The only fact proved is that the plaintiff, living an immoral life with her paramour, refused to live with the defendants and thenceforward supported herself without recourse to the family property. It is impossible to hold that refusal or non-participation, on the part of the plaintiff, amounts to or is any proof of ouster or exclusion by the defendants. There is no other evidence to show that she abandoned her interest to the knowledge of the defendants.

An attempt is made to support the decree of the Subordinate Judge by contending that a widow who has been guilty of adultery after her husband's death ought not to be allowed a partition of the property by metes and bounds inasmuch as presumably she would not use her share for the purposes for which property ought to be used by a widow. In our opinion a widow, being a tenant-in-common, is entitled to partition as a matter of right and the Courts have no discretion in the matter. The rights of the other

SELLAM
v.
CHINNAMMAL.

SRELLAM
*
CHINNAMMAL.

widows are in no way prejudiced by a partition because, on the death of the divided widow, her share devolves on the surviving widows as the then nearest heirs of the husband. If we had a discretion in the matter we see no reason why we should not use it in favour of the plaintiff seeing that she cannot live with the other widows.

The decree of the Subordinate Judge is reversed and that of the District Munsif restored with costs in this and the Court below.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Bhashyam Ayyangar.

1901.
March 18.

AHMED (PLAINTIFF), APPELLANT,

v.

MOIDIN AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 13—Denial of plaintiff's title in a suit for rent—Decree in favour of defendants—Subsequent suit by same plaintiff against same defendants for possession—Res judicata—Oaths Act—Act X of 1873—Decree upheld in appeal on strength of oath—Final adjudication.

In 1898 A sued B, C, D and E in a Munsif's Court to recover six years' rent alleged by A to be due in respect of certain land on a registered deed of lease. B, C and D denied A's title and pleaded that they were not liable for rent, and that the land belonged to and was in the possession of E. This defence was upheld by the Court of First Instance and on appeal. In 1899 A brought the present suit against B, C, D and E, in the same Court, on the same deed of lease; this time claiming possession of the same land, together with rent for less than two years. It was contended that this suit was not barred under section 13 of the Code of Civil Procedure inasmuch as the Court which had tried the former suit was not a Court competent to try the present suit, within the meaning of the section referred to, for the reason that the former suit was cognizable by a Small Cause Court, whereas the present suit was for the recovery of land, and a second appeal would lie from a decree passed in it:

Held, that the Court which had tried the former case was a Court competent to try the present suit within the meaning of section 13 of the Code of Civil Procedure.

* Second Appeal No. 279 of 1900 against the decree of A. Thompson, District Judge of North Malabar, in Appeal Suit No. 377 of 1899, affirming the decree of A. Annasami Ayyar, District Munsif of Badagara, in Original Suit No. 234 of 1899.

Subbammal v. Huddleston, (I.L.R., 17 Mad., 273), and *Bhugwanbutti Chowdhurani v. Forbes*, (I.L.R., 28 Cal., 78), followed. *Srirangachariar v. Ramasami Ayyangar*, (I.L.R., 18 Mad., 189), referred to.

AHMED
v.
MOIDIN.

The suit of 1898 had been affirmed on appeal on the strength of an oath taken under the Oaths Act:

Held, that it was a confirmation of the original decree. As between the parties, a decree arrived at after the taking of an oath on a question of fact in the case is none the less a final adjudication.

SUIT to recover a paramba with arrears of rent. Plaintiff claimed the paramba as his jenm property and averred that he had leased it to the mother of defendants Nos. 1 to 3 in 1886 by registered lease; that defendants Nos. 1 to 3 held the paramba under that lease; that rent was in arrears; and that the term of lease had expired. He sued for possession and rent. Defendants Nos. 1 and 2 denied plaintiff's title, as well as his right to maintain the suit; they also denied possession of the paramba, which, they said, belonged to fourth defendant, and was in his possession. They further pleaded that the suit was barred by section 13 of the Code of Civil Procedure. Third defendant was *ex parte*. The fourth issue raised the question of *res judicata*. It appeared that plaintiff had, in Original Suit No. 261 of 1898, sued the same defendants in the same Munsif's Court for six years' rent then alleged by plaintiff to be due in respect of the same paramba under the same registered lease of 1886. The defendants, (who were then impleaded under the same numbers as in the present suit), had pleaded that the paramba was not plaintiff's property, that the tenants did not hold as plaintiff's tenants, that it was the property of the fourth defendant, and that plaintiff was not entitled to be paid the rent. The first issue in that suit was whether the paramba was the property of the plaintiff or of the fourth defendant, and the Court found that issue against the plaintiff and in favour of the fourth defendant, and dismissed the suit. That decision was upheld on appeal.

The District Munsif now held that the decision in Original Suit No. 261 of 1898 was binding on plaintiff and that the question now raised was *res judicata*. He dismissed the suit.

Plaintiff appealed to the District Judge, whose judgment was as follows:—"Plaintiff-appellant sued to recover a paramba with arrears of rent as being plaintiff's jenmam and leased by him to the mother of defendants Nos. 1 to 3. In Original Suit No. 261 of 1898 plaintiff sued the present defendant for arrears of rent and

AHMED
v.
MOIDIN.

defendants then denied plaintiff's title and their tenancy under plaintiff. The lower Court found in that suit, on issue I, that plaintiff had no title to the paramba and could not maintain the suit for rent against defendants, and dismissed the suit. Plaintiff appealed and then offered to be bound by the oath of second defendant as to whether the paramba belonged in jenmam to second defendant and was not plaintiff's jenmam nor held under plaintiff. Second defendant took oath, and the Appellate Court found accordingly that the paramba did not belong to plaintiff and was not held under plaintiff, and dismissed the appeal. Appellant relies on the decision in *Keshava v. Rudran*(1). The head-note of the report of that case seems to be too generally worded. What was there decided was that the decision of a question of title in accordance with the Oaths Act is not an adjudication which will operate as an estoppel when the same question of title is again raised in another suit regarding other property. In that case it had been found by a decision passed on the oath of a party that one, Shangaran, had not acquired a title to the property of a certain illoin, and the High Court held that that finding, although conclusive as to the property involved in the former suit, did not constitute the matter *res judicata* as regards other property claimed on the same title. But in the case now before me the property is identical in both suits. It seems clear that plaintiff, having failed in the former litigation in the lower Court by an adjudication on evidence, and having consented in the Appellate Court to abide by defendant's oath, and having failed in consequence, is not entitled to initiate fresh litigation in respect of the same property, although his claim to any other property on the same title may not be affected. I agree with the finding that plaintiff's suit is barred by section 13 of the Code of Civil Procedure." He dismissed the appeal.

J. L. Rosario for appellant.

Sundara Ayyar for respondents Nos. 1 and 4.

JUDGMENT.—Two questions are raised in this second appeal. It is first contended that the Court which tried the original case was not a Court competent to try the present suit within the meaning of section 13 of the Code of Civil Procedure because the former suit was cognizable by a Small Cause Court, whereas the present suit is a suit to recover land and therefore a second appeal is

(1) I.L.R., 5 Mad., 259.

AHMED
v.
MOIDIN.

admissible. Following the case of *Subbammal v. Huddleston*(1) which we find to be in accordance with the view accepted in Calcutta (*Bhugwanbutti Chowdhrami v. Forbes*(2)) we hold that the present suit was within the competency of the Court which tried the other suit notwithstanding that in that other case there could have been no second appeal. We see that in *Srirangachariar v. Ramasami Ayyangar*(3) the case of *Subbammal v. Huddleston*(1) was not cited. It was apparently overlooked.

The other question relates to the fact that the first decree was affirmed on the strength of an oath taken under the Oaths Act. We do not think that that makes any difference. There was a confirmation of the original decree. Moreover as, between the parties, we are of opinion that a decree arrived at after the taking of an oath on a question of fact involved in the case is none the less a final adjudication. The case of *Jenkins v. Robertson*(4), which appears to have been misunderstood, has been explained in *In re South American and Mexican Company*(5). In the circumstances of the present case however the case of *Keshava v. Rudran*(6) does not in strictness apply, for now the precise question decided in the former case is the question which arises in the present suit.

We dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Bhashyam Ayyangar.

VENKATAPATHI NAIDU (COUNTER-PETITIONER), APPELLANT,

v.

TIRUMALAI CHETTI (PETITIONER), RESPONDENT. *

Civil Procedure Code—Act XIV of 1882, ss. 493, 588—Order by Munsif dismissing petition under section 493 to commit for disobedience to injunction—Appeal to District Court under section 588—Reversal of Munsif's order and remand to Munsif for disposal—Appeal to the High Court—Maintainability of appeal.

A petition was filed in the Court of a District Munsif, under section 493 of the Code of Civil Procedure, praying for the committal of the counter-petitioner

- (1) I.L.R., 17 Mad., 273. (2) I.L.R., 28 Calc., 78. (3) I.L.R., 18 Mad., 189.
(4) L.R., 1 H.L., Sc., 117. (5) [1895] 1 Ch., 37. (6) I.L.R., 5 Mad., 259.

* Civil Miscellaneous Appeal No. 63 of 1900 against the order of H. H. O'Farrell, District Judge of Chingleput, in Civil Miscellaneous Appeal No. 2 of 1900, setting aside the order of N. Sambasiva Ayyar, District Munsif of Conjevaram, in Miscellaneous Petition No. 27 of 1900.

1901.
March 18.

VENKATA-
PATHI NAIDU
v.
TIRUMALAI
CHETTI.

for disobedience to an injunction of the Court. The Munsif having dismissed the petition, the petitioner appealed, under section 588, to the District Judge, who set aside his order and remanded the petition to the Munsif. Against this order the counter-petitioner preferred an appeal to the High Court:

Held, that every order passed in an appeal under section 588 is final and that no appeal lay.

PETITION presented in the Court of a District Munsif, under section 493 of the Code of Civil Procedure, praying for the committal of counter-petitioner to prison for disobedience to an injunction of the Court restraining counter-petitioner from bringing certain properties belonging to petitioner to sale. The Munsif dismissed the petition, whereupon petitioner appealed to the District Court, under section 588 of the Code of Civil Procedure. The District Judge passed the following order:—"The District Munsif was clearly wrong in law. If there was wilful disobedience to the injunction the defendant was liable to punishment as provided in section 493, sub-section 3. The argument that such punishment cannot be said to 'enforce' the injunction, because the disobedience has already taken place is a ridiculous quibble which, if allowed, would make the section of no avail. The order of the District Munsif is set aside and he will proceed to deal with the petition on the merits."

Against that order counter-petitioner preferred this appeal.

Seshagiri Ayyar, for respondent, took the preliminary objection that no appeal lay from the order of the District Judge, section 588 providing that orders passed in appeals under that section shall be final. He referred to *Mathura Nath Ghose v. Nobin Chandra Kundu Biswas*(1) and *Umakanta Roy v. Dino Nath Sarayal*(2).

Seshachariar for appellant.

The Court allowed the preliminary objection.

JUDGMENT.—The order appealed against is an order passed on appeal against an order passed under section 493 of the Code of Civil Procedure. According to section 588 of the Code any order passed on appeal against an order passed under section 493 is final and no appeal lies. It is true that the order appealed against happens to be an order of remand and the same section 588 shows that in the case of some such orders an appeal does lie. But, in

(1) I.L.R. 24 Cal., 774.

(2) I.L.R., 28 Cal., 4.

our opinion, that makes no difference. The words used are clear and amount to this, that every order which is passed in an appeal presented under the provisions of section 588 is final.

There are orders of remand which are not passed on such appeals, but in the present case it is clear that the appeal to the District Court was an appeal given by section 588.

The appeal must be dismissed with costs.

VENKATA-
PATHI NAIDU
v.
TIRUMALAI
CHETTI.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Bhashyam Ayyangar.

RAMASAMI PATTAR (DEFENDANT No. 2), APPELLANT,

v.

CHINNAN ASARI (PLAINTIFF), RESPONDENT.*

1901.
March 20, 21.
April 3.

Transfer of Property Act—Act IV of 1882, ss. 54, 60—Mortgage with right of pre-emption in favour of mortgagee—Assignment of equity of redemption—Non-exercise of pre-emptive right for over twenty years—Suit for redemption—Validity of defence based on pre-emptive right—Specific Relief Act—Act I of 1877, s. 27—Limitation.

In 1872, A mortgaged certain land with possession to S to secure an advance of Rs. 100. The instrument of mortgage contained a covenant conferring upon the mortgagee a right of pre-emption in the following terms:—"If we assign our right over these properties to any one, the land delivered possession of to you for appropriating the interest shall be assigned to you alone and it shall not be assigned to anybody else. When we assign the land, we shall receive 50 fanams more from you, and then we shall assign the land for these two amounts together." In 1873, A sold his equity of redemption to V, and before 1893 V's interest was sold in execution of a decree against him and bought by plaintiff. In 1897, plaintiff instituted this suit for redemption against the representative of S, the mortgagee, who pleaded in defence the right of pre-emption created in his favour by the mortgage deed, and contended that in consequence thereof the assignment to V and the subsequent purchase of V's interest by plaintiff were invalid. The defendant did not, however, bring the price fixed into Court:

Held, that plaintiff was entitled to redeem.

Per SHEPHARD, J.—Under the covenant and by reason of section 54 of the Transfer of Property Act, defendant had no interest in the property. His right

* Second Appeal No. 322 of 1900 against the decree of A. Venkataramana Pai Subordinate Judge of South Malabar, in Appeal Suit No. 351 of 1899, affirming the decree of A. Annasami Ayyar, District Munsif of Temelprom, in Original Suit No. 106 of 1897.

RAMASAMI
PATTAR
v.
CHINNAN
ASARI.

could be no other than a right to specific performance available under section 27 of the Specific Relief Act, against a transferee who had taken with notice of the covenant. But notice of a contract such as is required to satisfy the section must be notice of an existing obligation. Plaintiff was not a transferee who took with notice of the contract now sought to be enforced, the time for the performance of which had long passed without anything being done and the natural inference being that the right arising under it had been waived or otherwise discharged.

Assuming that there was notice of the contract, and that it was otherwise a valid contract, defendant could not be allowed to use it as an answer to plaintiff's suit, inasmuch as no suit could now be brought to enforce the contract.

Per BHASHYAM AYYANGAR, J.—The rule that a mortgagee may stipulate for the collateral advantage of pre-emption, if such advantage does not directly or indirectly "clog the equity of redemption," is based upon the principle that the option of sale is still left with the mortgagor, who may redeem or sell as he likes; the only stipulation being that, in the event of his choosing to sell, he shall give the mortgagee the refusal. But by the terms of the stipulation under consideration the mortgagee was entitled to exercise his option by paying, not the market price of the day or the price offered by a stranger, but the price fixed in the instrument of mortgage. In considering whether a mortgagee could effectually secure a right of pre-emption where the mortgagor was so tied down as to price, the question is whether the collateral advantage stipulated for by the mortgagee is or is not unconscionable or oppressive, though it does not clog the redemption. In the present case the collateral advantage, namely, the right of pre-emption, was one that could be enforced only by the equitable remedy of specific performance, and, *prima facie*, a bargain by which the mortgagor is tied down to a price by the instrument of mortgage, whenever the occasion for exercising the right of pre-emption may arise, is oppressive and unconscionable.

Where a right of pre-emption springs from contract, it rests only upon a covenant which does not run with the land, and stands no higher than a contract of sale of immoveable property, and does not of itself create any interest in, or charge on, the immoveable property which is subject to the right of pre-emption. Until the contract is carried out by specific performance, either by act of parties or decree of Court, the pre-emptor acquires no title to or interest in such property, which alone can extinguish the mortgagor's right of redemption, though he may have a right to call for a conveyance of the property.

The equity of redemption in an usufructuary mortgage is an "intangible thing," within the meaning of section 54 of the Transfer of Property Act, and its transfer by sale can be made only by registered instrument, even though its value may be less than Rs. 100.

The equity of redemption in a simple mortgage may be tangible immoveable property and its sale can be effected, if its value be less than Rs. 100, without a registered instrument, by mere delivery of the property.

The right of a simple mortgagee in the property mortgaged is an intangible thing, within the meaning of section 54 of the Transfer of Property Act, and a transfer by sale of a hypothecation executed to secure a debt under Rs. 100 can be made only by a registered instrument. *Subramaniam v. Perumal Reddi*, (I.L.R., 18 Mad., 454), referred to.

Inasmuch as the cause of action for specific performance had accrued in 1873, when the right of pre-emption had been infringed by the assignment of the

equity of redemption, the right to enforce the right of pre-emption was barred. The fact that S had been in possession of the property as mortgagee could not save him from the operation of the law of limitation on his right to sue for specific performance of the contract of pre-emption. *Krishna Menon v. Kesavan*, (I.L.R., 20 Mad., 305), referred to.

Whether such a covenant for pre-emption transgresses the rule against perpetuities.—*Quære*.

SUIT for redemption. The following statement of facts is taken from the judgment of Mr. Justice Shephard:—"On the 31st July 1872 an instrument of mortgage was executed by Appavu Pillai and his son in favour of Samu Ayyar. According to that instrument the mortgagors delivered over to the mortgagee 'for the interest on the sum of Rs. 100 (then advanced) the possession of the land'—and the instrument concludes with the following covenant made in favour of the mortgagee:—'If we assign our right over these properties to any one, the land delivered possession of to you for appropriating the interest shall be assigned to you alone and it shall not be assigned to anybody else. When we assign the land, we shall receive 50 fanams more from you, and then we shall assign the land for these two amounts together.' On the 25th July 1873 Appavu and his family sold their interest in the land to Vedanayakam. Before July 1893 Vedanayakam's interest was sold in execution of a decree against him and bought by the plaintiff, who instituted the present suit in February 1897."

The defendants were the representatives in interest of the mortgagee, Samu Ayyar. The material portion of the mortgage deed (which was filed as exhibit I) has been set out. The District Munsif dismissed the suit as being opposed to section 43 of the Code of Civil Procedure, on the ground that the mortgage deed related to other lands, besides those now sought to be redeemed and the suit, therefore, did not include the whole of plaintiff's claim. The District Judge remanded the suit for disposal on its merits, pointing out that the deed gave possession of only the lands which plaintiff sought to redeem, the other lands being merely hypothecated. The District Munsif decreed, when the case came before him on remand, "that, upon plaintiff depositing in Court within two months from this date the sum of Rs. 48, which is the difference of the mortgage amount of Rs. 100 and the rent due Rs. 49 with Rs. 3 awarded to plaintiff for removing the path C and putting up the bund, the defendants do restore the

RAMASAMI
PATTAR
v.
CHINNAN
ASARI.

RAMASAMI
PATTAR
v.
CHINNAN
ASARI.

plaint lands (A1), (A2) and (A3) in the plan to plaintiff. Defendants to pay plaintiff future rent of the lands at 7 paras of paddy a year from 1073 for three years or until delivery, whichever happens first, and plaintiff's costs with interest at 6 per cent. per annum from this date up to payment."

Second defendant appealed to the Subordinate Judge, who affirmed the Munsif's decree. He said:—"The right to redeem cannot be extinguished by any stipulation in the deed of mortgage itself. Such right can be extinguished by an act of the parties, but this must be under a contract other than the instrument of mortgage. This distinction has been clearly pointed out by their Lordships of the High Court in *Perayya v. Venkata*(1) and *Kanaran v. Kuttooly*(2). In the present case the mortgage deed, exhibit I, after declaring the mortgagee's right to redeem proceeds to stipulate that in case the mortgagor determines to sell the property he should sell to the mortgagee alone and for a specified amount. The principle of the latter ruling, *Kanaran v. Kuttooly*(2), applies. That was a case in which the mortgagor in default of re-payment of the debt agreed to sell the property to the mortgagee for a price to be fixed by mediators. The effect of this contract is clearly to fetter the right of redemption. Moreover, if the mortgagor can redeem, himself, there is no reason why he should not transfer his property to a third party."

He held that plaintiff was entitled to redeem and that second defendant possessed no right of pre-emption.

Defendant No. 2 preferred this second appeal.

Sundara Ayyar and *Anantakrishna Ayyar* for appellant.—The lower Courts have held that the provision in the mortgage deed giving the mortgagee a right of pre-emption is invalid, as a "clog on the equity of redemption." It is submitted that this view is unsustainable and that it is not a clog on the equity of redemption. It does not prevent the mortgagor from redeeming the mortgage on payment of the mortgage amount; nor does it affect the estate which he is to get back on payment of the mortgage amount. The effect of the stipulation is merely that, in case the mortgagor should wish to sell the mortgaged property before redemption, he is to sell it to the mortgagee. There is nothing unreasonable

(1) I.L.R., 11 Mad., 403.

(2) I.L.R., 21 Mad., 110.

RAMASAMI
PATTAR
v.
CHINNAN
ASARI.

in such a stipulation. The mortgagor is not bound to sell at all, and he may, at any time, within the sixty years, redeem the mortgage. If he should decide to sell the property, then, and in that case only, would the stipulation come into force. The lower Appellate Court relies on *Perayya v. Venkata*(1), and *Kanaran v. Kuttooly*(2), but it is submitted that those cases have no application. In them the stipulation was that if the debt was not paid in three years the mortgage should be treated as a sale, the right of redemption being lost. [BHASHYAM AYYANGAR, J.—But in the present case, the price to be paid by the mortgagee, in case the property is sold under the stipulation, is fixed. The mortgagee's right is a right of pre-emption for a fixed price.] That does not invalidate the stipulation. Instead of leaving the price to be determined in the future, the parties determine it in the mortgage deed. Unless the transaction is proved to be oppressive or unconscionable, Courts will not interfere. *Bimal Jati v. Biranja Kuar*(3) is on all fours with the present case. There, as here, there was to be a right of pre-emption in the mortgagee, in case the mortgagor should wish to sell the property, and the price was also fixed. The Court held that the stipulation was good. Recent English cases show that a mortgagee may stipulate for a collateral advantage. Such a stipulation has nothing to do with the doctrine of "clogging the equity of redemption." In consideration of the loan, the mortgagor promises to pay interest and to repay the principal; and he also agrees to sell the property to the mortgagee at a fixed price in case he should decide to sell it. All this forms the consideration for the loan. It is open to the parties to make any contract that they please. And unless coercion or undue pressure, or undue influence or fraud be proved, Courts will enforce such contracts. No presumption will arise that such a covenant in a mortgage deed has been entered into under pressure. [He referred to *Biggs v. Hoddinott*(4), *Santley v. Wilde*(5), *Rice v. Noakes & Co.*(6), *Haris Paik v. Gahurudin Gazi*(7), Fisher on 'Mortgages,' 4th edition, paragraph 1130, and *Bimal Jati v. Biranja Kuar*(3).] [BHASHYAM AYYANGAR, J., pointed out that the mortgage deed had been executed in 1872,

(1) I.L.R., 11 Mad., 403.

(3) I.L.R., 22 All., 238.

(5) [1899] 2 Ch., 474.

(7) 2 Calo. W.N., 575.

(2) I.L.R., 21 Mad., 110.

(4) [1898] 2 Ch., 307.

(6) [1900] 2 Ch., 445.

RAMASAMI
PATTAR
v.
CHINNAN
ASARI.

and that, the sale to the plaintiff's vendor had taken place in 1873, and enquired whether the right to sue for specific performance of the agreement to sell was not barred by limitation under article 10 of schedule II to the Limitation Act.] My right to sue as plaintiff for specific performance may be barred; but I am in possession of the properties, and so long as I remain in possession I may set up my right of pre-emption as a ground of defence to a suit for redemption. The Limitation Act in terms applies only to plaintiffs. The right of the defendant in possession to urge a ground of defence does not become barred or extinguished. [On this point he referred to *Kanharankutti v. Uthotti*(1), *Orr v. Sundra Pandia*(2), *Krishna Menon v. Kesavan*(3), and *Hargovandas Lakshmidas v. Bajibhai Jyibhai*(4).] Moreover the question of the mortgagee being precluded by limitation from setting up this defence was not raised in either of the lower Courts. If it had been, further evidence, as of acknowledgments, might possibly have been filed. [BHASHYAM AYYANGAR, J., enquired whether the stipulation in question was not rather a personal undertaking by the mortgagor to do something on the happening of a contingency; and if so, whether the mortgagee's remedy was not a suit for damages for breach of that undertaking.] The right created is a real right and is created by the very instrument of mortgage. It concerns the property mortgaged and is attached to it. [BHASHYAM AYYANGAR, J.—If it is a real right affecting the mortgaged property, you can exercise it only by paying the price fixed. Under section 60 of the Transfer of Property Act, unless the mortgagee shows that the right of redemption has been lost by act of the parties or by decision of the Court, the mortgagor has the right to redeem. In this case there has been no decision of the Court extinguishing that right. And no act of parties can extinguish it except by a registered document, (see section 54 of the Transfer of Property Act), and there has been no such document. The words of section 60 are clear, and it is noticeable that that section does not, (unlike the previous sections), begin with the words "in the absence of contract to the contrary." It is submitted that the mortgagee has already acquired a right to have the pre-emption clause carried into effect on payment of 50

(1) I.L.R., 13 Mad., 490.
(3) I.L.R., 20 Mad., 305.

(2) I.L.R., 17 Mad., 255.
(4) I.L.R., 14 Bom., 222.

RAMASAMI
PATTAR
v.
CHINNAN
ASARI.

fanams, under the registered mortgage deed of 1872. That was long before the Transfer of Property Act. That right became vested in the mortgagee at the date of mortgage and the subsequent purchaser, (the present plaintiff), is bound by it. [He referred to cases of landlord and tenant and restrictive covenants running with the land.] [BHASHYAM AYYANGAR, J.—Is not the condition void under the rule against perpetuities? See *London and South Western Railway Co. v. Gomm*(1), and *Nobin Chandra Soot v. Nabab Ali Sarkar*(2).] An argument based on the rule against perpetuities was urged in *Haris Paik v. Gahurudin Gazi*(3), but did not prevail. I submit that the plaintiff is bound by the covenant for pre-emption, and the mortgagee is entitled to have a sale-deed executed to him by the plaintiff on his paying the 50 fanams, which he is ready to do. [He then dealt with the amount awarded in the decree of the lower Court and contended that it had been wrongly arrived at, a portion being barred by limitation.]

Govinda Menon, for respondent, was only called upon with reference to the amount to be awarded by the decree.

SHEPHARD, J.—The facts, which are imperfectly stated in the judgment of the Subordinate Judge, are as follows:—[His Lordship set out the facts as above, and proceeded:—] Except for the covenant above set out the defendants, who are representatives in interest of the mortgagee, clearly have no answer to the suit and must submit to be redeemed.

As between the mortgagor Appavu and his mortgagee, Samu, the only question which could arise would be whether the covenant was invalid as being made in restriction of Appavu's right of redemption or for any other reason. Samu's right was to have Appavu's interest in the property conveyed to him in 1873, when he meditated selling it to Vedanayakam. If the covenant is to be read as giving a right which was to subsist for all time and even after the redemption of the mortgage by Appavu, then I am of opinion that the covenant would be invalid because it would be a clog on the equity of redemption in the sense that Appavu would not have been able to get his property back free from all hold on it by Samu. See *Rice v. Noakes & Co.*(4)

(1) I.L.R., 20 Ch. D., 562.
(3) 2 Calc. W.N., 575.

(2) 5 Calc. W.N., 343.
(4) [1900] 2 Ch., 445 at p. 457.

RAMASAMI
PATTAR
v.
CHINNAN
ASARI.

If however the covenant is to be read, as probably it ought to be read, as a covenant operative only as long as the mortgage might remain unredeemed, different considerations arise. It would then be necessary to consider whether a covenant to sell, not at the market price of the day, but at a price fixed beforehand, was not objectionable on the ground of unfairness (see *In re Edwards's Estate*(1) in Fisher on 'Mortgages,' fifth edition, paragraph 1397). That is how the matter stands as between the original parties to the mortgage. I should not be prepared to decide the point without further inquiry.

The defendant however is seeking to use this covenant against a person who bought in 1893 from one who himself bought in 1873. Under the covenant the defendant has no interest in the property. That is clear, for section 54 of the Transfer of Property Act expressly says that a contract of sale creates no interest in the property to which it relates. His right can be no other than a right to specific performance available under section 27 of the Specific Relief Act against a transferee who has taken with notice of the covenant. Of what can the plaintiff be said to have had notice? By reading the mortgage instrument he must have learnt that his vendor's vendor might on the defendant being informed of his intention to sell have insisted on the property being transferred to him. He would have learnt that there was a covenant and that the occasion when it should have been enforced had happened twenty years ago. In my opinion, notice of a contract such as is required to satisfy the section must be notice of an existing obligation. When a transferee, hearing of a contract, is also informed that the time for performance has long passed without anything being done, the inference he would naturally draw is that the right has been waived or otherwise discharged. It is not pretended that any fact was brought to the plaintiff's knowledge except the fact that the mortgage contained a covenant for pre-emption and that notwithstanding it the vendor had sold his interest to Samu Ayyar. I find therefore that the plaintiff is not a transferee who took with notice of the contract now sought to be enforced.

Assuming that there was notice of the contract and that it was otherwise a valid contract, I further hold that inasmuch as no suit

(1) 11 Ir. Ch. Rep., 367.

RAMASAMI
PATTAR
v.
CHINNAN
ASARI.

to enforce it could now be brought the defendant cannot be allowed to use it as an answer to the plaintiff's suit. The cases relating to covenants in leases for renewal are exactly in point; and having regard to them I think we may disregard the recent case (*Krishna Menon v. Kesavan*(1)) which is in the main founded on *Kanharankutti v. Uthotti*(2). In these cases moreover it seems to have been assumed that the right of pre-emption involved an interest in the property. If that was the case the covenant would, according to the ruling in *London and South Western Railway Co. v. Gomm*(3), be open to the objection that it is an attempt to create a perpetuity. Such distinction as can be made between a covenant in a lease to renew and a covenant in a deed of mortgage or sale to convey by way of sale is in favour of the defendant. For a covenant to renew is a covenant which according to the English law, runs with the land and which, according to section 109 of the Transfer of Property Act creates a liability enforceable against the lessor's transferees; whereas covenants of the latter sort are only enforceable under section 40 of the same Act against transferees who have taken without consideration or with notice. It would be strange if the person claiming under such a covenant were put in a better position than a person claiming under a covenant to renew.

Modifying the decree by substituting the figure 98 for 48 and striking out the words "which is the difference of the mortgage amount of Rs. 100 and the rent due Rs. 49 with Rs. 3 awarded to plaintiff for removing the path C and putting up the bund," I would otherwise dismiss the appeal with costs.

BEASHYAM AYYANGAR, J.—The two grounds which have been chiefly relied upon in support of this appeal are:—(1) that the right of pre-emption conferred upon the mortgagee by the instrument of mortgage is not "a clog upon the right of redemption" as held by the lower Appellate Court, and (2) that the suit ought to be dismissed inasmuch as the plaintiff claims to redeem under a title which was derived in contravention of the mortgagee's right of pre-emption and which therefore is invalid as against the mortgagee and his legal representatives.

The validity of the first contention depends, in my opinion, upon the right construction to be placed upon the usufructuary

(1) I.L.R., 20 Mad., 305.

(2) I.L.R., 13 Mad., 490.

(3) I.L.R., 20 Ch. D., 562.

RAMASAMI
PATTAR
v.
CHINNAN
ASARI.

mortgage deed (exhibit I). If the mortgage deed had conferred upon the mortgagee a right of pre-emption which could be exercised even after the mortgagor should redeem the mortgage, such a right would be "a clog upon redemption" for though such a stipulation may not bar a suit for redemption, yet it precludes the mortgagor from redeeming the mortgaged property in the same unfettered state in which he held it when he mortgaged the property, inasmuch as after redemption he will have to hold it subject to a right of pre-emption which the mortgagee had secured under the instrument of mortgage. That such a collateral advantage bargained for by the mortgagee is really a clog upon the right of redemption is clearly established by the recent case of *Rice v. Noakes & Co.*(1). In that case Rigby, L.J., lucidly expressed himself as follows:--
 "The property which comes back to the mortgagor must not be worse than it was when it was mortgaged and the mortgagee must not either expressly or by implication reserve to himself any hold upon the property after the time for redemption has arrived and the right of redemption has been put in force. Now, if those maxims are still in force to their full extent—and I do not doubt that they are—it would be idle to talk about not clogging the equity of redemption when a house is to be taken back as a tied house which was mortgaged as a free house. The equity of redemption is clogged to an extent which it would almost be impossible to exaggerate in the case of a public house in London."

As I understand exhibit I the right of pre-emption is secured to the mortgagee only in respect of the equity of redemption and will not exist after the mortgage is redeemed. The provision contained in the instrument that if the mortgagee exercises the right of pre-emption, the mortgagor is to receive "50 fanams more" from the mortgagee and sell the land for that amount plus the mortgage debt of Rs. 100 places the matter beyond doubt.

That a mortgagee may stipulate for the collateral advantage of a right of pre-emption in consideration of his advancing the mortgage loan, if such advantage does not directly or indirectly "clog the equity of redemption" is now clearly established by authority. [*Orby v. Trigg*(2), *Biggs v. Hoddinott*(3), *Santley v. Wilde*(4), *Rice v. Noakes & Co.*(1)]. The principle of these

(1) [1900] 2 Ch., 445, at p. 457.
 (3) [1898] 2 Ch., 307, at p. 321.

(2) 9 Mod., 2.
 (4) [1899] 2 Ch., 474.

RAMASAMI
PATTAR
v.
CHINNAN
ASARI.

decisions is that the option of sale is still left with the mortgagor and he may redeem or sell as he likes; the only stipulation being that, in the event of his choosing to sell, he shall give the mortgagee the refusal (Patch on 'Mortgages,' page 20). This is tacitly admitted by the case of *O. by v. Trigg*(1) though in that case the decision was against the defendant, the mortgagee, apparently on the ground of fraud, for, after getting hold of the counterpart of the mortgage, the mortgagee had frequently refused to give a copy of the mortgage to the plaintiff, the representative of the mortgagor insisting only on the principal money and interest till after the estate was sold. But for the stipulation contained in the mortgage deed (exhibit I) that the pre-emptor, the mortgagee, can exercise his option by paying, not the market price of the day nor the same price as that offered by a stranger, but the price fixed in the instrument of mortgage itself, the point would be clear in favour of the pre-emptor and covered by authority, including the recent decision of the Allahabad High Court in *Bimal Jati v. Biranja Kuar*(2) and a decision of the Calcutta High Court in *Haris Paik v. Gahurudin Gazi*(3). The real question to be considered is whether a mortgagee can effectually secure a right of pre-emption if the mortgagor is tied down to price as in this case. In note (f) at page 670 of Fisher on 'Mortgages,' fifth edition, *In re Edwards's Estate*(4) is quoted as a case in which such a covenant was disallowed. The report of the case not being available here, it cannot be relied on as an authority that such a covenant is invalid merely because the price is fixed. In *Biggs v. Hoddinott*(5) above cited, the Master of the Rolls notices this case as follows:—"The proposition laid down by Hargreave, J., in *In re Edwards's Estate*(4) that where an onerous contract entered into by a mortgagor with his mortgagee is part of the arrangement for the loan and is actually inserted in the mortgage deed, it is presumed to be made under pressure, and is not capable of being enforced, goes too far, though the decision of the learned Judge was correct; for the stipulation with which he had to deal was unreasonable, and one which ought not to be enforced." I think the true principle is whether the collateral advantage stipulated for himself by the mortgagee is or is not unconscionable or

(1) 9 Mod., 2.
 (3) 2 Calc. W.N., 575.
 (5) [1898] 2 Ch., 307 at p. 321.

(2) I.L.R., 22 All., 238.
 (4) 11 Ir. Ch. Rep., 367.

RAMASAMI
PATTAI.
v.
CHINNAN
ASARI.

oppressive though it does not clog the redemption. Romer, L.J., observes as follows in *Santley v. Wilde*(1) already cited:—"I take it that it is clearly established now, in the first place, that there is no such principle as is suggested, namely, that a mortgagee shall not stipulate for any collateral advantage for himself. He may so stipulate; and if he does, he may obtain a collateral advantage; nothing can be said against it, and he can enforce it, always assuming that the bargain is not unconscionable or oppressive. In the second place, I take it also to be clear that there is now no such principle as is suggested, namely, that where a collateral advantage is stipulated for by the mortgagee as a condition for the loan, that advantage or contract is to be presumed to have been given or made under pressure. There is no such presumption; but each case must be decided according to its own circumstances. The Court will look into the circumstances of each case and see whether the bargain come to is unconscionable or oppressive." In the present case, the collateral advantage, namely, the right of pre-emption, is one that can be enforced only by the equitable remedy of specific performance and *prima facie* a bargain by which the mortgagor is tied down to a price by the instrument of mortgage whenever the occasion for exercising the right of pre-emption may arise is oppressive and unconscionable. The ordinary period of limitation for a redemption suit is 60 years and the period may be extended by an acknowledgment in the meanwhile and the right of pre-emption for a fixed price can be claimed whenever the mortgagor may have occasion to sell the property before redemption. The term of the mortgage may also be a long one and in such cases the result of the bargain will be that even if the market value of the land rises enormously in the course of 40 or 50 years and a stranger is then prepared to pay twenty times the price fixed in the mortgage instrument the mortgagor should either refrain from selling his property at all or sell the property to the mortgagee for $\frac{1}{2}$ th of the market value. It is conceivable that a right of pre-emption for a fixed price may not be oppressive or unconscionable in exceptional cases and if it were necessary for the disposal of this appeal to decide whether the stipulation in exhibit I tying down the mortgagor to a fixed price is or is not an oppressive one under the circumstances of

RAMASAMI
PATTAI.
v.
CHINNAN
ASARI.

this case an issue would have to be sent to the lower Court if the appellant should insist upon it. But, as the appeal substantially fails on other grounds, it is unnecessary to remit the issue.

The second ground urged on behalf of the appellant is entirely untenable and, assuming that a right of pre-emption was validly created by the mortgage instrument, the defendant was not at the date of the suit and is not now in a position to resist this suit for redemption. Though the Transfer of Property Act does not apply to this mortgage, which was executed in 1872, yet the principle of law embodied in section 60 of the Transfer of Property Act is applicable as much to mortgages executed before the Act (*Kanaran v. Kuttooly*(1)) as to those executed since. The mortgagor's right of redemption can be extinguished only by some act of the parties or by order of a Court subsequent to the mortgage transaction (*Perayya v. Venkata*(2)). In the present case if the right of pre-emption secured to the mortgagee as a collateral advantage by the instrument of mortgage had subsequently resulted in the extinguishment of the right of redemption by act of the parties while the mortgagor proposed to sell the equity of redemption in 1873 to the plaintiff's vendor or by a decree of Court enforcing the right of pre-emption before or after such sale, the appellant, of course, would have a complete defence to the suit. But it is urged that though the appellant had not enforced the right of pre-emption before the suit, yet, on equitable grounds and in view to avoid multiplicity of suits, he should be allowed to enforce his right of pre-emption in this suit. In the first place, he has not offered either in the written statement or subsequent thereto to exercise his right of pre-emption by depositing in Court the price fixed. On the contrary he relied upon the right of pre-emption as a bar to the suit and further pleaded section 43, Civil Procedure Code, as a bar to the suit, and the latter plea prevailed in the Court of First Instance. Apart from this, there are weightier reasons why he ought not and cannot be allowed to enforce the right of pre-emption in this suit. In cases in which the right of pre-emption springs from a contract it rests only upon a covenant which does not run with the land. Being only a species of contract for the sale of immoveable property the contract of pre-emption stands on no higher footing than a contract for the sale of immoveable property

(1) [1899] 2 Ch., 474 at pp. 478, 479.

(1) I.L.R., 21 Mad., 110 at p. 112.

(2) I.L.R., 11 Mad., 403.

RAMASAMI
PATTAR
v.
CHINNAN
ASARI.

and does not of itself create any interest in or charge on the immoveable property which is subject to the right of pre-emption—*vide* section 54 of the Transfer of Property Act. Until the contract is carried out by specific performance either by act of parties or decree of Court, the pre-emptor acquires no title to or interest in such property which alone can extinguish the mortgagor's right of redemption though he may have a right to call for a conveyance of the property. In cases in which a registered instrument is essential under the Transfer of Property Act for the acquisition of a title to or interest in immoveable property, it would be contravening the object and policy of that Act if a Court were by its own decree to establish or recognize such title or interest without the intervention of the registered instrument or treats the covenantee as having by fiction of law such title in the absence of such conveyance. The Transfer of Property Act in so far as it insists upon registration as essential to certain transfers in addition to a written instrument goes further than the Statute of Frauds, the policy of the Indian Legislature being gradually to secure a public register of title to landed property. Under the English law a covenantee has an equitable title or interest in the property; but under the Transfer of Property Act, the covenant does not itself create any interest in or charge on the property. The decisions of English Courts in analogous cases cannot therefore be implicitly followed in this country especially as some of the eminent Judges in England have expressed their regret that the provisions of the Statute of Frauds have, in no small degree, been frittered away by some decisions of the Court of Equity.

Under the Transfer of Property Act a sale of tangible immoveable property of the value of Rs. 100 and upwards or of any intangible thing of what value soever can be effected only by a registered instrument and until such instrument is executed, the pre-emptor acquires no title to the property. If the appellant were in a position to enforce his contract of pre-emption by specific performance, his proper course was a suit for specific performance, and if he were legally entitled to enforce such right, the plaintiff or his predecessor in interest would have been compelled to execute a registered instrument which, of course, would have extinguished the mortgagor's right of redemption. In a suit for redemption it would be acting contrary to the express provision of section 60 of the Transfer of Property Act not to pass a decree for redemption

RAMASAMI
PATTAR
v.
CHINNAN
ASARI.

if the same had not been extinguished at the date of the suit. I may here observe that the form of decree prescribed by section 214 of the Civil Procedure Code in a suit to enforce the right of pre-emption is based on the decision of the Allahabad High Court (*Shaikh Ewaz v. Mokuna Bibi*(1)), which was passed prior to the Transfer of Property Act and which followed an earlier decision of the same Court (*Sheo Pershad Lall v. Thakoor Rai*(2)). In cases in which the right of pre-emption has to be enforced subsequent to the Transfer of Property Act, the form of decree prescribed by section 214 has to be supplemented by directing the execution of a registered instrument of sale by the defendant. Though the contract for sale may have been entered into prior to the Transfer of Property Act, yet if the sale itself had not been effected prior thereto, no subsequent sale can be effected unless it complies with the provision of section 54 of the Transfer of Property Act. It was urged on behalf of the appellant that the consideration fixed for the sale is 50 fanams only, which is less than Rs. 100, and therefore no instrument or registered instrument is necessary for enforcing the right of pre-emption. A reference to exhibit I would clearly show that this is not so, but that the consideration for the sale is the mortgage amount of Rs. 100 plus 50 fanams. Even if the contemplated sale can be regarded merely as a sale of the equity of redemption for less than Rs. 100, a registered instrument would be necessary for effecting such sale. The equity of redemption in a usufructuary mortgage is only an intangible thing like "a reversion" which immediately precedes the expression "or other intangible thing" (*vide* Williams on 'Real Property,' 18th edition, pages 30, 31), and it can be transferred by sale only by a registered instrument and not by delivery of the property. Equity of redemption in a simple mortgage may be tangible immoveable property, and its sale can be effected if its value be below Rs. 100 without a registered instrument by mere delivery of the property. The right of a simple mortgagee in the property mortgaged is in my opinion only an intangible thing like a charge on immoveable property within the meaning of section 54, and I am unable to concur in the decision of this Court reported in *Subramaniam v. Perumal Reddi*(3) to the effect that a transfer by sale of a

(1) I.L.R., 1 All., 132.

(2) 3 Agra H.C.R., 254.

(3) I.L.R., 18 Mad., 454.

RAMASAMI
PATTAR
v.
CHINNAN
ASARI.

hypothecation executed to secure a debt under Rs. 100 may be made otherwise than by registered instrument.

Assuming that the mortgagee secured a valid right of pre-emption, such right was infringed in 1873 when the equity of redemption was assigned by the mortgagor to the plaintiff's vendor who, in his turn, assigned the same in 1893 to the plaintiff. The mortgage deed, which is filed in the case as exhibit I, was in the possession of the mortgagee and the clause of pre-emption finds a place in it. The appellant will not be entitled to specific performance of the contract of pre-emption if either the plaintiff or his vendor was assignee for value without notice of the contract of pre-emption. Whether the plaintiff or his vendor was or was not an assignee without notice, the appellant's cause of action for specific performance accrued in 1873 and his right to enforce the right of pre-emption is *prima facie* hopelessly barred both under article 113 or 118 of Act IX of 1871 and under article 10, Act XV of 1877, and the learned pleader for the appellant has not been able to show on what circumstance he relies in bar of the ordinary law of limitation. The English law does not, I think, provide a period of limitation for a suit for specific performance, but a Court of Equity will refuse that relief if the party seeking it has been guilty of laches. The appellant in this case would certainly not get that relief in an English Court of Equity on such a stale claim of right of pre-emption as the one advanced by him. The fact that the appellant has ever since 1872 been in possession of the property as mortgagee cannot save him from the operation of the law of limitation if he were to sue for specific performance of the contract of pre-emption, and, under the Transfer of Property Act, he cannot acquire title as transferee by sale of the mortgaged property without a registered instrument.

The learned pleader for the appellant principally relied upon the decisions of this Court in *Kanharankutti v. Uthotti*(1) and *Krishna Menon v. Kesavan*(2), both of which were suits for redemption against a mortgagee who was in possession and pleaded a right of pre-emption which an ottidar has under the customary law of Malabar. In both these cases, it was held, and if I may say so rightly, that a suit by a pre-emptor is not a suit for possession of the property in respect of which he has the right of pre-emption

(1) I.L.R., 13 Mad., 490.

(2) I.L.R., 20 Mad., 305 at p. 311.

RAMASAMI
PATTAR
v.
CHINNAN
ASARI.

and that therefore his right of pre-emption is not extinguished by operation of section 28 of Act XV of 1877. In *Krishna Menon v. Kesavan*(1), it appears to have been further argued that, though section 28 might not be applicable to the case, yet, that, as a suit by the pre-emptor for specific performance would be barred by limitation, the pre-emptor could not urge his right by way of defence. This argument was overruled as follows:—"This contention is manifestly untenable. For, if, notwithstanding that an otti mortgagee's right to sue to enforce his right of pre-emption has become barred, that right of pre-emption, owing to the inapplicability of section 28 to the case, is still unextinguished, it is difficult to see on what principle such right is to be held to be unavailable by way of defence." But in neither of those cases was the question raised or argued with reference to the stringent provisions of section 54 of the Transfer of Property Act, nor was the attention of the Court drawn to section 60 of the Transfer of Property Act, and in particular to the conspicuous absence therein of the usual saving clause "in the absence of a contract to the contrary." When a mortgagee is allowed to plead in bar of redemption a contract of pre-emption secured by the mortgage instrument itself you really import into section 60 the above saving clause which has been deliberately omitted by the Legislature. The mortgagees in those cases, like the mortgagee in this case, have been in possession simply as mortgagees, and such possession, how long soever it may continue for less than the statutory period, cannot extinguish the right of redemption.

In none of these cases did the pre-emptor, who was in possession as mortgagee, offer to exercise his right of pre-emption, and give notice that he would hold possession thenceforward as vendee under his right of pre-emption, ready to pay the price. I do not pause to consider whether that would really make any difference nor to consider whether an ottidar having a right of pre-emption under law would stand on a different or higher footing than a pre-emptor under a contract. I may observe that in the former case the right of pre-emption is not collateral to the mortgage, but is one which is an incident of an otti mortgage. In the latter case, the right of pre-emption of the mortgagee is not *qua* mortgagee, but is a collateral advantage resting upon express contract. In *Ukku v. Kutti*(2)

(1) I.L.R., 20 Mad., 305 at p. 311.

(2) I.L.R., 15 Mad., 401,

RAMASAMI
PATTAR
v.
CHINNAN
ASARI.

which was also a suit for redemption in which the otti mortgagee pleaded a right of pre-emption based upon customary law, a decree for redemption was passed only on condition of the defendant failing to pay within two months the price he had to pay for exercising the right of pre-emption and obtaining a conveyance from the plaintiff, who was directed by the same decree to execute the conveyance on the defendant making the payment. In this case, the Transfer of Property Act was not ignored, but specific performance was decreed as if there was a cross suit for that purpose by the defendant, it being apparently assumed upon the facts of that case that a suit for specific performance would not be barred by limitation.

Assuming that it would not be irregular to adopt such a course in a suit for redemption, I have already stated that the appellant has entirely failed to show that he was at the date of the suit in a position to enforce his right of pre-emption by a suit for specific performance. Under English Law, there is authority for the position that, in certain cases and under certain circumstances, a Court of Equity would act on the supposition that what ought to be specifically performed has been performed and give relief to the party entitled thereto on such supposition. But even in that class of cases, equity would not give the relief unless the party would be entitled to specific performance if he seeks for it. The same course may be adopted even here, as in fact it is in cases in which it can be done without contravening the express and fundamental provisions of the Transfer of Property Act or of any other positive enactment. I may here quote the following passage from the judgment of the Master of the Rolls in *Swain v. Ayres*(1):—"I should therefore be disposed to say that, when there is such a state of things that a Court of Equity would compel specific performance of an agreement for a lease by the execution of a lease both in the equity and common law divisions, the case ought to be treated as if such a lease had been granted and was actually in existence. There would then be the equivalent of a lease, that is to say, the lease of which equity would compel the execution in specific performance of the agreement. That is a very different thing from saying that, where equity would not compel specific performance by the execution of a lease, the lease of which equity

(1) L.R., 21 Q.B.D., 289 at p. 293.

RAMASAMI
PATTAR
v.
CHINNAN
ASARI.

"would not decree execution is to be considered in equity as existing. That contention seems to me quite untenable. It seems to me quite impossible to say that equity would consider a lease in existence, though it would not grant specific performance by decreeing execution of a lease. Such a contention seems to me to make the doctrine of equity on the subject self-contradictory."

Another question which arises in the case but which has not been argued is one of considerable difficulty and importance. That question is whether the covenant for pre-emption in the present case transgresses the rule against perpetuities and is therefore void. Of course if the covenant were construed as one enforceable only during the mortgagor's lifetime, though the mortgage may continue beyond his lifetime, it will not be obnoxious, at any rate to the law of perpetuities as based upon English doctrine. But if its right construction be, as I think it is, that the parties intended that the right of pre-emption is to last until the redemption of the mortgage, the covenant will, according to English Law as settled by the decision of the Court of Appeal in *London and South Western Railway Co. v. Gomm*(1), overruling the decision of Fry, J., in *Birmingham Canal Company v. Cartwright*(2), and followed by Bacon, V. C. in *Trevelyan v. Trevelyan*(3), be void for remoteness. This view was acted upon by a Division Bench of the Calcutta High Court in the recent case of *Nobin Chandra Soot v. Nabab Ali Sarkar*(4). In that case the plaintiff sued to enforce the right of re-purchase by way of pre-emption against defendant No. 1 and other defendants claiming under a sale made by first defendant, the covenant for re-conveyance in favour of the plaintiff having been made by the first defendant's father (deceased).

The Division Bench, professing to follow the decision of the Court of Appeal in *London and South Western Railway Co. v. Gomm*(1), and of Bacon, V. C. in the case cited above and on the authority of a dictum of Markby, J., in *Sreemutty Tripoora Soonduree v. Juggur Nath Dutt*(5), dismissed the plaintiff's suit on the ground that the first defendant was not bound by his father's covenant. The decision in *London and South Western Railway Co. v. Gomm*(1), does not proceed on the ground that the covenant

(1) L.R., 20 Ch. D., 562.

(4) 5 Calc. W.N., 343.

(2) L.R., 11 Ch. D., 421.

(5) 24 W.R., (C.R.), 321.

(3) 53 L.T., N.S., 853.

RAMASAMI
PATTAR
v.
CHINNAN
ASARI.

cannot be enforced against the legal representative or assignee the covenantor, but on the ground that it was void for remoteness and therefore not binding upon the covenantor himself. The Division Bench does not notice an earlier decision of the Calcutta High Court by another Division Bench in *Haris Paik v. Juhurud Gazi*(1) already quoted, in which the covenant for pre-emption was enforced and the argument based on the decision in *London and South Western Railway Co. v. Gomm*(2), which was cited in the argument, was ignored. The decision in *London and South Western Railway Co. v. Gomm*(2), proceeds on the principle that a covenant to convey, though it does not run with the land, binds it and creates an equitable interest in the land in favour of the person entitled to call for a conveyance and that therefore the rule against perpetuity is applicable as much to executory equitable estates in land as to legal estates. In the same case as well as in the case of *Borland's Trustee v. Steel Brothers & Co., Limited*(3) it is recognised that the rule against perpetuity has no application whatever to personal contracts and that position is incontrovertible. Under the Transfer of Property Act it is expressly provided that a contract for the sale of immoveable property does not of itself create any interest in or charge on such property and in the Indian Registration Act the same view is adopted—*vide* clause (h), section 17. Again, the English doctrine of perpetuities, which seems to be founded upon special considerations, has no place in Hindu Law though the principle underlying the English doctrine is not foreign to Hindu Law. (*Vide* Mayne's 'Hindu Law,' 6th edition, page 548, and the cases quoted in foot-note (a)). Though the English doctrine of perpetuities, with some modification, is enacted in section 14, Transfer of Property Act, yet clause (d) of section 2 expressly provides that nothing in the second chapter of the Act, in which section 14 occurs, shall be deemed to affect any rule of Hindu Law. The power of a Hindu to transfer property has therefore to be regulated by Hindu Law and, according to the decision of the Privy Council in *Jatindra Mohan Tagore v. Ganendra Mohan Tagore* (4) no Hindu can, either by act *inter vivos* or by will, make a gift in favour of a person not in existence at the time when the gift is made or at the death of the testator as the case may be.

(1) 2 Calc. W.N., 575.

(3) [1901] 1 Ch., 279.

(2) L.R., 20 Ch. D., 562.

(4) 9 B.L.R., (P.C.), 377; 18 W.R., 359.

RAMASAMI
PATTAR
v.
CHINNAN
ASARI.

Thus, it will be seen that in this respect the power of a Hindu is under the Hindu Law more restricted than under the English doctrine of perpetuities and the corresponding provision enacted by section 14, Transfer of Property Act. The above rule of Hindu Law, which in terms applies only to donees, will probably be equally applicable to transferees for consideration and has, in fact, been so applied by the Privy Council in *Chundi Churn Barua v. Rani Sidheswari Debi*(1). The question as to the application of this principle of Hindu Law, or of the general doctrine of perpetuities, to transactions other than gifts by Hindus has not yet been judicially considered in any case except possibly in the Privy Council case (*Chundi Churn Barua v. Rani Sidheswari Debi*(1)) last cited. And it will certainly be revolutionary to follow in this country the decision of the Court of Appeal in *London and South Western Railway Co. v. Gomm*(2), and the recent decision of the Calcutta High Court in *Nobin Chandra Soot v. Nabab Ali Sarkar*(3). Both section 14 of the Transfer of Property Act and the English doctrine of perpetuities apply to transfer of interest in property, and, on the simple ground that a contract for the sale of land does not under the Indian Law create any interest in the land, it will be easy to hold that the decision of the Court of Appeal in *London and South Western Railway Co. v. Gomm*(2), does not apply to contracts for the sale of land in India. But it must be admitted that there is really no substantial difference between English and Indian Law in respect of contracts of sale of immoveable property, and it does seem reasonable and in accordance with principles of general jurisprudence that there should be some limit of time beyond which the performance of contracts for the transfer of property by way of sale, pre-emption or otherwise must not be allowed to be held in suspense or postponed. Although section 14 deals only with transfers, the provisions of that section could in some cases be practically defeated if covenants are not held to be void for remoteness on the ground that by themselves they create no interest in property. But the result of extending the rule against perpetuities to covenants may possibly be that, in the case of a Hindu, a covenant which would not necessarily vest the future

(1) L.R., 15 I.A., 149; I.L.R., 16 Calc., 71.

(2) L.R., 20 Ch. D., 562.

(3) 5 Calc. W.N., 343.

RAMASAMI
PATTAR
v.
CHINNAN
ASARI.

interest contemplated to result from the covenant in a person who is in existence at the time of the covenant would be void. I am glad to be able to refrain from expressing any opinion on this difficult and important question of the application and the limits of the application of the doctrine of perpetuities to covenants, as it has not been really argued in this case and as in fact it is unnecessary to consider and decide it in this case. I shall not be surprised if ere long the decision in *London and South Western Railway Co. v. Gomm*(1), is further considered and expounded more elaborately in the Court of Appeal and possibly in the House of Lords. On the ground that the right of redemption was subsisting and had not been extinguished at the date of the suit and also on the ground that the appellant has entirely failed to show that he either was at the date of the suit or is now in a position to enforce his right of pre-emption if any, I would substantially dismiss the second appeal with costs. The decree appealed against, however, has to be modified by disallowing the value of produce at seven paras per annum which became due more than six years before the date of suit. The respondent's vakil admits that he cannot claim the value of produce which became due more than six years before date of suit. The decree appealed against will accordingly be varied by substituting the sum of Rs. 98 for Rs. 48 and striking out the words "which is the difference of the mortgage amount of Rs. 100 and the rent due Rs. 49 with Rs. 3 awarded to plaintiff for removing the path C and putting up the bund." The decree will be confirmed in other respects.

(1). L.R., 20 Ch. D., 562.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Shephard, and Mr. Justice Davies.

MANAVIKRAMAN ETTAN THAMBURAN (DEFENDANT No. 16),
APPELLANT,

v.

AMMU AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 TO 15 AND
17 TO 20), RESPONDENTS *

1900.
February 9,
23.
March 12, 30.
April 9.
August 31.
1901.
April 16.

Limitation Act—Act XV of 1877, sched. II, art. 134—"Purchased"—Sub-mortgage by a mortgagee as if complete owner—Possession by sub-mortgagee for over twelve years—Suit for redemption by original mortgagor—Right of sub-mortgagee to be redeemed.

In 1864, A mortgaged certain lands to B for Rs. 750. In 1881, B mortgaged the same lands to C for Rs. 5,000. In so doing, B represented himself as the absolute owner of the property, and did not profess to transfer merely the interest which he possessed, and which was, in fact, only that of a mortgagee. C enjoyed possession of the lands for a period exceeding twelve years from the date of his mortgage. A then instituted a suit for redemption; when, it was contended on behalf of C that A was bound to redeem C's mortgage before he could recover possession of the property on the ground that C's mortgage, which, but for the law of limitation would have been invalid as against A, had become good by C's possession for twelve years, the property having been "purchased" from a mortgagee, within the meaning of article 134 of schedule II to the Limitation Act:

Held, (DAVIES, J., dissenting) that C had "purchased" within the meaning of article 134.

SUIT for redemption. The lands now sought to be redeemed were the jenm lands of defendant No. 17 and had been demised by him in 1864 to one Chiruthevi Amma, since deceased, a member of the tarwad of defendants Nos. 1 to 5, on a kanom of Rs. 750. Plaintiff had since acquired the melkanom right to the lands, from defendant No. 17, through an intermediate assignee. Defendants Nos. 1 to 5 were the heirs of Chiruthevi Amma (the original kanomdar). Defendant No. 6 claimed an interest as mortgagee

* Second Appeal No. 154 of 1899 against the decree of O. Chandu Menon, Acting Subordinate Judge of South Malabar, in Appeal Suit No. 282 of 1888, affirming the decree of K. Govindan Nambiar, District Munsif of Ernad, in Original Suit No. 279 of 1896.

MANAVIKHA-
MAN ETTAN
THAMBURAN
v.
AMMU.

in some of the lands. Defendants Nos. 7 to 9 and 12 to 15 admitted the demise sued on, but also claimed an interest as mortgagees in some of the lands. Defendant No. 10 claimed to be in possession of one item, and defendant No. 11 claimed to hold certain other items under defendant No. 16. Defendant No. 16 denied the demise sued on; he contended that the lands were not held thereunder; that the suit was barred by adverse possession; that he held a mortgage of Rs. 5,000 over some of the lands and had purchased them and other portions in execution of his decree in Original Suit No. 17 of 1887 and at another sale; he also questioned the validity of plaintiff's melkanom. His contention was that plaintiff was bound to redeem his mortgage before recovering possession of the property. The mortgage on which defendant No. 16 relied had been executed in his favour in 1881, by the tarwad of defendants Nos. 1 to 5, the lands having been represented as the jenm lands of that tarwad. Defendant No. 16 claimed to have been in possession since the date of the mortgage, a period exceeding twelve years, and now contended that, under article 134 of the Limitation Act, he had acquired a right in the lands to the extent of his mortgage interest, which plaintiff was in consequence bound to redeem before possession of the lands could be recovered. Defendant No. 17 supported plaintiff. Defendant No. 18 claimed to have purchased several items. Defendant No. 19, while admitting the demise contended that defendant No. 17 had no power to grant a melcharth to plaintiff. The other defendants were *ex parte*. The District Munsif found that the lands now sought to be redeemed belonged to defendant No. 17 in jenm; that the demise sued on was true; that the lands in question were held under it; that plaintiff had obtained a valid melcharom right to them; and that the suit was not barred by time. He gave plaintiff a decree for redemption on depositing the amount of the original kanom for Rs. 750, with certain deductions, in Court. Defendant No. 16 appealed to the Subordinate Judge who upheld the Munsif's decree. He now preferred this second appeal.

The case first came on for hearing before SHEPARD and DAVIES, JJ.

Sankaran Nayar and *Ryru Nambiar* for appellant.—The lands were let on kanom to defendants Nos. 1 to 5 or to their tarwad. They mortgaged some of the items to defendant No. 16 who

subsequently enforced his rights as mortgagee and became possessed of the property by purchasing the mortgage decree. He does not now rely on his purchase, as twelve years have not passed since its date. But more than twelve years have passed since the date of the mortgage,—which was executed in 1881, and appellant contends that plaintiff is bound to redeem his mortgage and that otherwise the suit should be dismissed. Exhibit XIII is the mortgage deed, which was executed by defendants Nos. 1 to 5 as if they were jenmis, in favour of defendant No. 16. Article 134 of the Limitation Act is relied on, the wording of which is “to recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards purchased from the trustee or mortgagee for a valuable consideration,” the period of limitation being “twelve years from the date of purchase.” *Pennu Kutti v. Valia Rani of Ambadi Kovilagam* (1), a Madras decision, was followed

MANAVIKHA-
MAN ETTAN
THAMBURAN
v.
AMMU.

(1) Second Appeal No. 613 of 1878 (unreported): The judgment, which was delivered by TURNER, C.J., and MUTTUSAMI AYYAR, J., on 8th December 1879, is as follows:—“The District Court, while finding that the appellant acquired his title as a mortgagee in the faith that his mortgagor had an absolute title as proprietor, considers that he is not entitled to plead the period of limitation provided by article 134, second schedule, Act IX of 1871, inasmuch as he is not what is commonly meant by a purchaser as distinguished from a mortgagee. The District Judge refers in support of his opinion to the decision of the Privy Council in *Radanath Doss v. Gisborne*, (14 M.I.A., 1). We have considered that ruling, but are unable to accept the view taken of it by the District Judge. In that case it was not only found that the persons, from whom Gisborne & Co. claimed title, were mortgagees, but that the conveyance to Gisborne & Co. purported to confer on them no other interest than the rights of their sellers in others: it purported to be and operated only as an assignment of the mortgagees' rights. In such a transaction the party acquiring the interest could clearly not claim the protection accorded to purchasers for value without notice. In terms the article applies to suits brought for the recovery of property mortgaged and afterwards ‘purchased’ from the mortgagee in good faith and for value. The word ‘purchased’ is not to be restricted to transactions dealing with, or purporting to deal with, the whole proprietary interest. It applies equally to cases in which a less interest is expressed to be created. A mortgagee, *quoad* the interest he takes, is a purchaser, so also is a lessee, and if the interest is acquired from a person who represents himself as and whom the mortgagee or lessee after reasonable inquiry believes to be entitled to create it he can claim the benefit of the provisions of the law which are intended for the protection of *bona fide* purchasers for value. In respect then of his kanom rights the appellant is entitled to resist the respondents' claim and may insist on the redemption of the kanom before he is compelled to return the property. The auction sale in 1877 conferred on the appellants only the right, title and interest of the judgment-debtor, and, inasmuch as twelve years have not elapsed since the sale, the plea which protects him in the retention of his kanom rights will not avail him. The

MANAVIKRA-
MAN ETTAN
THAMBURAN
v.
AMMU.

in Bombay. The Subordinate Judge, in deciding against the present appellant, relied on *Manu Varma Valia Raja v. Kesava Potuval*(1). The only question is whether appellant was a

title of the plaintiff-respondent to the five plots of land held by the appellant therefore may at least be declared subject to the redemption of the kanom held by the appellant. But these conclusions necessitate an alteration of the decree of the lower Appellate Court and indeed the decree was, in the view taken by the lower Appellate Court, imperfect. Out of the balance of the sum due on the original kanom irrespectively of the value of improvements, a part should be set aside sufficient to satisfy the money due on the kanom executed to the appellant irrespectively also of the value of improvements. If the kanom held by the appellant can be at once redeemed, the sum may be paid to him together with the value of improvements effected on the five plots since the execution of his kanom, and, in that case, the plaintiff-respondent may obtain a decree for the five plots held by the appellant. The first defendant and the persons claiming under him who are not parties to this appeal are entitled to the value of the improvements effected on the rest of the mortgaged property. The appellant, as the purchaser of the rights of the first defendant in the five plots, is entitled to a part of the balance of the sum due on the original kanom, according to the proportion borne by the value of the property purchased by him to the whole value of the property mortgaged and to the value of the improvements, if any, effected on that portion of the property from the date of the original kanom to the date of his kanom. Inasmuch as the materials necessary for the passing of a proper decree are not before the Court, we set aside the decree made by the Judge so far as it affects the appellant and the seventh defendant who claims under him, and in so far as it orders the payment of the balance of the kanom money to the first defendant, the second respondent, and remand the appeal suit to the lower Appellate Court that that Court may, after such enquiry as may be necessary, pass a decree determining the rights of the parties abovementioned. The appellant will recover the costs of this appeal from the respondents."

(1) Second Appeal No. 510 of 1895 (unreported): The judgment, which was delivered by COLLINS, C.J., and BENSON, J., on 9th October 1896, is as follows:— "The plaintiff, as trustee of the Iringanur devasom, sued to redeem two parcels of land demised on kanom (exhibit A) in 1797 to Kanankulath Krishnan Embrandiri, who sold his kanom in 1807 to the ancestor of first defendant. In 1864 the second defendant obtained the lands on kanom from first defendant who represented himself to be the jenmi of the lands and this kanom was renewed in 1880 (exhibits I and II). The lower Appellate Court found that the kanom demise of 1797 was true and that the title of the plaintiff's devasom was acknowledged in 1838 (exhibit L in Second Appeal No. 511 of 1895), and in 1858 (exhibit K in Second Appeal No. 511 of 1895) by the first defendant's ancestor so as to save the rights of the plaintiff to redeem the kanom of 1797, but following the ruling in the case of *Yesu Ramji Kalnath v. Balkrishna Lakshman*, (I.L.R., 15 Bom., 583), it held that the suit was barred by article 134, schedule II of the Indian Limitation Act of 1877, on the ground that the second defendant by virtue of his mortgages of 1864 and 1880 was a 'purchaser for valuable consideration' within the meaning of that article, and that a suit against him would be barred after twelve years from the date of his mortgage. Against this decree the plaintiff appeals. We have no doubt but that the appeal is well founded. It is true that the case of *Yesu Ramji Kalnath v. Balkrishna Lakshman*, (I.L.R., 15 Bom., 583), refers to, and follows, an unreported case of this Court (*Pennu Kutti*

'purchaser.' For a purchase, valuable consideration must be given and a transfer must be taken and such transfer must purport to be one from a jenmi. Here, the mortgagee claims as one who has had the jenmi property mortgaged to him, that is, he claims to have acquired the rights of a first mortgagee instead of second defendant. The decision in *Manu Varma Valia Raja v. Kesava Potuval*(1) shows that where one who pretends to be the jenmi sells or mortgages land, describing it as jenmi property, and twelve years pass, the real jenmi cannot get the land. *Muthu v. Kambalinga*(2) was a case of purchase of absolute title. The

MANAVIKRA-
MAN ETTAN
THAMBURAN
v.
AMMU.

v. *Valia Rani of Ambadi Korilagam*, Second Appeal No. 613 of 1878, (unreported)) which is quoted in Shephard's work on the Limitation Act, but that case was, it appears, not reported, and we are, therefore, not bound by it as an authority (section 3, Act XVIII of 1875). The meaning of the word 'purchaser' in article 134 was fully discussed in the case of *Muttu v. Kambalinga*, (I.L.R., 12 Mad., 316), and it was there pointed out that article 134 must be read with article 148, which prescribes sixty years for a suit against a mortgagee to redeem or recover possession of immoveable property mortgaged and that, when so read, it is clear that the purchase contemplated in article 134 is that of the absolute title to, or property in, the subject of the mortgage. This view is in accordance with the view taken by the Privy Council in the case of *Juggernath Sahoo v. Syud Shah Mahomed Hossein*, (L.R., 2 I.A., 48), which followed their previous decision in *Radanath Doss v. Gisborne*, (14 M.I.A., 1). In the present case the second defendant did not purchase an absolute title to the property. He merely acquired a kanom mortgage over it, which the first defendant has the right to redeem. If the decree of the Courts below is allowed to stand, the first defendant may redeem the property from second defendant, and thus become its absolute owner. Such an interpretation would put a premium on fraud such as cannot have been intended. We are of opinion that article 134 has no application to the present case. It is, however, sought to support the decree of the lower Appellate Court, on the ground that the acknowledgment in exhibit L of 1838 is not sufficient to save the bar by limitation. Section 1, clause 15 of Act XIV of 1859, which corresponds to section 19 of the present Limitation Act, merely requires that the title of the mortgagor should have been acknowledged in writing signed by the mortgagee within sixty years of the date of the mortgage. The particulars of items 5 and 7 in exhibit L leave no doubt on our minds but that they are the lands now sued for, and this does not appear to have been questioned in the Courts below. It is true that exhibit L does not refer to the date of the kanom on which the lands were held, but the kanom of 1797 is proved and there is no suggestion that the lands were held on any other kanom. In exhibit L, then, first defendant's ancestor admitted in 1838 that the plaintiff lands were then held by him on a subsisting kanom under the plaintiff's devasom. That is a sufficient acknowledgment to save the bar by limitation. The result is that the second appeal is allowed with costs throughout. The decrees of the Courts below are set aside and judgment is given for plaintiff in the usual terms. He will have three months from the receipt of this decree in the lower Appellate Court wherein to redeem."

(1) Vide footnote (1) on pp. 474 and 475.

(2) I.L.R., 12 Mad., 316.

MANAVIKRA-
MAN ETTAN
THAMBURAN
v.
AMMU.

documents on which appellant relies all purport to show that the mortgagors were jenmi. *Mana Varma Valia Raja v. Kesava Potuval*(1) proceeded on different facts. There a mortgagee represented himself as the jenmi and mortgaged the land to the defendant. On suit being brought, the contention was that it should be dismissed, under article 134, as twelve years had elapsed. The contention of the appellant here is different, for he only contends that he, as mortgagee, has an interest in the property, a contention that was not raised in *Mana Varma Valia Raja v. Kesava Potuval*(1). [They referred to the following cases:—*Yesu Ramji Kalnath v. Balkrishna Lakshman*(2); *Pandu v. Vithu*(3); *Maluji v. Fakirchand*(4); *Gobindnath Roy Bahadoor v. Rancee Luchmee Koomaree*(5) on the Act of 1859, section 5 of which is in terms similar to those of the present article 134; *Nilmony Singh v. Jagabandhu Roy*(6) which decided that a 'purchase' includes a 'mortgage'; *Behari Lal v. Muhammad Muttaki*(7); and to Darby and Bosanquet's 'Law of Limitation.']

Sumlala Ayyar for respondent No. 1.—The word 'purchaser' does not include a 'mortgagee.' Appellant cannot claim the larger sum because he acquired from a mortgagee. Article 148 governs the suit. If the right to recover is barred, plaintiff cannot succeed by paying a larger sum than defendant paid. [SHEPARD, J.—The word has a well-known meaning, and in English Law is used in opposition to heirs.] It is submitted that the word 'purchaser' is used in its ordinary sense. The word 'recover' in article 134 does not include a suit for redemption—compare article 148. In articles 136, 137 and 138 the word 'purchased' is used, and the word there must mean 'bought outright.' If so, the same meaning should be attributed to it in article 134 and it should not be held to include a mortgage. *Gobindnath Roy Bahadoor v. Rancee Luchmee Koomaree*(5) was decided on the former section and in *Behari Lal v. Muhammad Muttaki*(7), Blair, J., does not decide the point either way, whilst Aikman, J., decides that the word does not include a mortgage, the context showing that it is used in its literal sense.

(1) *Vide* footnote (1) on pp. 474 and 475.

(3) I.L.R., 19 Bom., 140.

(5) 11 W.R., (C.R.), 36.

(7) I.L.R., 20 All., 482.

(2) I.L.R., 15 Bom., 583.

(4) I.L.R., 22 Bom., 225 at p. 229.

(6) I.L.R., 23 Cal., 536.

The use of the word 'assign' in section 10 of the Limitation Act shows that in that section a wider effect was contemplated.

Sankaran Nayar in reply.

Govindan Nambiar for respondent No. 18.

The Court made the following ORDER OF REFERENCE TO THE FULL BENCH:—

"SHEPARD, J.—If the appellant is a purchaser within the meaning of the 134th article of the second schedule to the Limitation Act, the appeal must be allowed; for it is found that he acquired the title under which he claims in 1881 and that from that time he was in possession through his tenants. The fact that subsequently he bought the property at the sale in execution of a decree against the persons from whom originally he acquired title does not preclude him from asserting that title against the first respondent.

"There is no doubt—and indeed it was not disputed—that the persons who executed the mortgage of 1881 represented themselves as absolute owners of the property and that they did not profess to transfer merely the interest which they possessed, which was the interest of mortgagees. The case therefore is not affected by the decision in *Radanath Doss v. Gisborne*(1), where it was pointed out that the purchaser under the corresponding section of the Act of 1859 cannot mean a person who purchases a mortgage as a mortgage and thus takes an assignment of a mortgage. Here there was no assignment of a mortgage. There was a mortgage executed by a person who though in fact a mortgagee professed to be dealing with the property as absolute owner. The language used by the Judicial Committee had reference to the case before it and ought not, I think, to be read as applicable to a different case.

"It does not seem likely that the Judicial Committee would, in construing an Act which is in part derived from an English Statute, have put a construction on the term 'purchaser' which is strange to English lawyers and is not the construction which has been put on the Statute without giving any reasons for so doing. No reason for restricting the meaning of the term was suggested in argument and if it is just and politic to protect by a rule of limitation persons in whose favour a conveyance of the largest interest in property has been executed, it is difficult to see why

(1) 14 M.I.A., 1.

MANAVIKRA-
MAN ETTAN
THAMBURAN
v.
AMMU.

MANAVIKRA-
MAN ETTAN
THAMBURAN
v.
AMMU.

mortgagees and lessees should not similarly be protected. The result, no doubt, will be to put a person who originally acquired nothing more than the right of a sub-mortgagee in a position higher than that of the mortgagee. But that is always so. The same would be the result if a purchaser took from a trustee; he would acquire, by force of limitation, an absolute title.

"In all the cases, except one, decided upon the point in this country the ordinary legal interpretation of the word 'purchase' has been held to be the correct one. The point was so decided with reference to the Act of 1859 (*Gobindnath Roy Bahadoor v. Rane Luchmee Koomaree*(1)) and again in 1879 by a Division Bench of this Court with reference to the present Act—the latter decision has been followed in Bombay in several cases (*Yesu Ramji Kalnath v. Balkrishna Lakshman*(2), *Pandu v. Vithu*(3), and *Maluji v. Fakirchand*(4)). The excepted case is a recent unreported decision of this Court in which the Court refers to the Privy Council decision and to *Muthu v. Kambalinga*(5) as if the point had practically been decided in those cases. This, as I have already endeavoured to show, is a mistake, and in support of my view I may further refer to the judgment of Sargent, C.J. (in *Yesu Ramji Kalnath v. Balkrishna Lakshman*(2)) before whom, as it would seem, the same line of argument was adopted.

"Some attempt was made to show by reference to other articles of the schedule that the terms 'purchaser' and 'purchase' were not used in the ordinary but in a restricted sense, and it is true that in some articles the context shows that a transaction of sale only was intended. There are also articles in which the expressions 'alienation' and 'alienor' are used. I do not think any inference can safely be drawn from such materials in a case in which the burden of proof is on him who asserts that the term to be interpreted was used in the present Act in a different sense from that in which it was formerly used by the Legislature. If the Legislature had intended to alter the law and to restrict the protection formerly given to persons dealing with mortgagees and trustees, surely that intention would have been enunciated by a change of language in the particular article.

(1) 11 W.R., (C.R.), 36.
(3) I.L.R., 19 Bom., 140.
(5) I.L.R., 12 Mad., 316.

(2) I.L.R., 15 Bom., 583.
(4) I.L.R., 22 Bom., 225 at p. 229.

"In the state of the authorities of this Court I think we are at liberty to form our own judgment in the matter. For the reasons given, both on principle and on authority, I hold that the appellant was a purchaser within the meaning of the Act. As, however, there is a difference of opinion and the point is important, I agree to refer to a Full Bench the question "Whether the appellant, being a mortgagee, has purchased within the meaning of the article 134."

"DAVIES, J. —The question is whether the term 'purchased' in article 134 of the second schedule of the Limitation Act of 1877 includes a mortgagee or whether it refers only to the purchaser of an absolute title. A Division Bench of this Court in *Pennu Kutti v. Valia Rani of Ambadi Kovilagam*(1) decided that the term did apply to a mortgagee while another Division Bench of this Court also, in an unreported case (*Mana Varma Valia Raja v. Kesava Potuval*(2)) decided that it did not apply to a mortgagee. The decisions of the two learned Judges in *Muthu v. Kambalinga*(3) are clearly to the effect that the purchaser referred to in article 134 is the purchaser of an absolute title. In their view that was the ruling of the Privy Council in *Radanath Doss v. Gisborne*(4) and *Juggernath Sahoo v. Syud Shah Mahomed Hossein*(5) and they point out that article 148 of the second schedule of the Limitation Act is reconcilable with article 134 only on that construction. If the contrary view is held it comes to this that a sub-mortgagee could get a prescriptive title in twelve years, while the mortgagee from whom he derives could not get such a title for sixty years. This to my mind seems anomalous, and it would lay open the widest door for fraud, as a mortgagee would only have to arrange with some person as a sub-mortgagee to cut down the mortgagor's right of redemption of the mortgaged property to twelve years.

"I am, therefore, of opinion that the term 'purchased' in article 134 refers only to the purchaser of an absolute title and does not include a mortgagee. In regard, however, to the conflicting rulings of the Judges of this Court in *Pennu Kutti v. Valia Rani of Ambadi Kovilagam*(1) and *Mana Varma Valia Raja v.*

(1) *Vide* footnote (1) on pp. 473 and 474.

(2) *Vide* footnote (1) on pp. 474 and 475.

(3) I.L.R., 12 Mad., 316.

(5) I.L.R., 2 I.A., 48.

(4) 11 M.I.A., 1.

MANAVIKRA-
MAN ETTAN
THAMBURAN
v.
AMMU.

MANAVIKRA-
MAN ETTAN
THAMBURAN
v.
ANMU.

Kesava Potuval(1), I would refer the question to a Full Bench of this Court for determination."

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

Sankaran Nayar, (*Ryru Nambiar* with him) for appellant, referred to article 144 of the Limitation Act by way of illustration; also to *Madhava v. Narayana*(2) which had been repeatedly followed. It was not necessary for him to contend that plaintiff had lost his entire interest in the property, but only that he was liable to redeem the appellant, whose possession had been adverse to plaintiff for more than twelve years and who had acquired a limited interest to the extent of the mortgage. The present article first appeared as section 5 of Act XIV of 1859; and the Privy Council case of *Radanath Doss v. Gisborne*(3), which was conclusive, was decided on that section. The words '*bonâ fide*' had been dropped from the present Act, but that omission made no difference to the question of limitation. English terms had been used in the drafting of the Act and it must be assumed that the word "purchased" had been used in the sense well known to English law. *Sitha Ummal v. Rungasami Iyengar*(4). In English law a 'purchaser' included a mortgagee—*Willoughby v. Willoughby*(5) per Lord Hardwicke. The cases were collected in *Basset v. Nosworthy*(6). [He referred to Darby and Bosanquet's 'Law of Limitation,' pages 443 and 447, Act XIV of 1859; *Gobindnath Roy Bahadoor v. Rane Luchmee Koomaree*(7); *Maharani Braja Sundari Debi v. Rani Lachmi Kumari*(8); and the Indian Trusts Act, 1882, sections 62, 64, as to the use of the word 'purchase.'] The observations in *Muthu v. Kambalinga*(9) must be considered with reference to the question then before the Court, which was the extent of the interest which had been conveyed, and not limitation. *Maluji v. Fakirchand*(10) showed that a mortgagee was *pro tanto* a purchaser; and *In re King's Leasehold Estates*(11) that a

(1) Vide footnote (1) on pp. 474 and 475.

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

(4) 5 M.H.C.R., 385 at p. 389.

(6) 2 White & Tudor's Equity Cases, 7th ed., p. 150 at p. 168.

(7) 11 W.R., (C.R.), 36.

(9) I.L.R., 12 Mad., 316 at p. 317.

(11) L.R., 16 Eq., 521 at p. 525.

(3) 14 M.I.A., 1.

(5) 1 R.R., 397 at p. 402.

(8) 2 B.L.R., (A.C.), 155.

(10) I.L.R., 22 Bom., 225 at p. 228.

MANAVIKRA-
MAN ETTAN
THAMBURAN
v.
ANMU.

tenant's interest is that of a purchaser to the extent of his lease. *Radanath Doss v. Gisborne*(1) had been followed in *Juggernath Sahoo v. Syud Shah Mahomed Hossein*(2). [He also referred to *Yesu Ramji Kalnath v. Balkrishna Lakshman*(3), *Behari Lal v. Muhammad Muttaki*(4), *Nilmony Singh v. Jagabandhu Roy*(5), and the unreported cases in the Madras High Court, *Pennu Kutti v. Valia Rani of Ambadi Kovilagam*(6) and *Mana Varma Valia Raja v. Kesava Potuval*(7).] He further contended that the same consideration should be shown to a mortgagee as to a vendee.

Sundara Ayyar, for respondent No. 1, argued that it was material to consider the sense in which the words 'purchaser' and 'purchase' were used in other articles of the schedule, e.g., articles 133, 136, 137, 138, 145, and to compare section 10, in which suits against trustees are not barred by time. In article 133 the word used was 'bought,' which had no technical meaning. [SHEPARD, J., suggested that the word 'bought' might include a conditional sale.] The whole interest must be conveyed, whether it were a mortgage interest or otherwise; and the word was so used in every other article. Under the Act of 1871, section 10 would probably have included a mortgagee; but the word 'assign' has been substituted in the corresponding 10th section of the present Act. *Bank of England v. Vagliano Brothers*(8) laid down the rule as to the construction of Statutes. Section 5 of Act XIV of 1859 provided that "In suits for the recovery from the purchaser or any person claiming under him of any property purchased *bonâ fide* and for valuable consideration from a trustee, depositary, pawnee, or mortgagee, the cause of action shall be deemed to have arisen at the date of the purchase: provided that, in the case of purchase from a depositary, pawnee, or mortgagee, no such suit shall be maintained unless brought within the time limited by clause 15, section 1." Act IX of 1871 divided this into two clauses, namely, articles 133 and 134. *Radanath Doss v. Gisborne*(9) was relied on in *Mana Varma Valia Raja v. Kesava Potuval*(7), as showing that a mortgagee is not a purchaser. In *Gobindnath Roy Bahadoor v. Rane Luchmee Koomaree*(10) the sole

(1) 14 M.I.A., 1.

(3) I.L.R., 15 Bom., 583.

(5) I.L.R., 23 Calc., 536.

(7) Vide footnote (1) on pp. 474 and 475.

(9) 14 M.I.A., 1.

(2) L.R., 2 I.A., 48.

(4) I.L.R., 20 All., 482.

(6) Vide footnote (1) on pp. 473 and 474.

(8) [1891] A.C., 107.

(10) 11 W.R., (C.R.), 36.

MANAVIKRA-
MAN ETTAN
THAMBURAN
v.
AMMU.

question was one of *bona fides*. [He also referred to *Muthu v. Kambalinga*(1), *Behari Lal v. Muhammad Muttaki*(2), *Nilmoney Singh v. Jagabandhu Roy*(3) and *Ramchandra v. Sheikh Mohidin*(4).]

Sankaran Nayar replied.

Govindun Nambiar for respondent No. 18.

Sir ARNOLD WHITE, C.J.—The question in this case is whether certain immoveable property which had been mortgaged was ‘purchased’ by the appellant within the meaning of article 134 of the Indian Limitation Act, 1877. Article 134 re-produces section 5 of Act XIV of 1859 in so far as that section applies to immoveable property, whilst article 133 re-produces it in so far as it applies to moveable property. The section is an expansion of section 25 of the English Act which is an exception engrafted upon section 24 of that Act.

The point arises in this way. In 1864 A mortgaged certain lands to B for Rs. 750. In 1881 by an instrument which recites that the lands in question were the jenmam properties of B, B mortgaged these lands to C for Rs. 5,000. A brings a redemption suit. C contends that A is bound to redeem C’s mortgage before he can recover possession of the property. C does not set up an absolute title. He admits A’s right to possession on payment of C’s mortgage, but he says that, as A’s suit to recover possession is brought more than twelve years after C’s purchase, article 134 gives C the right to be redeemed, in other words, that C’s mortgage, which, but for the law of limitation, would be invalid as against A, became good as against A after the lapse of twelve years from the date of C’s ‘purchase.’

Purchase, as used in English Statutes with reference to real property, includes a mortgage, legal or equitable. See *Willoughby v. Willoughby*(5), *Dolphin v. Aylward*(6), *Lister v. Turner*(7). For the purposes of the Conveyancing and Law of Property Act, 1881, and the Conveyancing Act, 1882, the word ‘purchaser’ includes “a lessee or mortgagee or an intending purchaser, lessee or mortgagee or other person who for valuable consideration takes or deals with property.” Unless concluded by authority to the

(1) I.L.R., 12 Mad., 316 at p. 317.

(3) I.L.R., 23 Cal., 536.

(5) 1 R.R., 397 at p. 402.

(7) 5 Hare, 281.

(2) I.L.R., 20 All., 482.

(4) I.L.R., 23 Bom., 614.

(6) L.R., 4 H.L., 486.

MANAVIKRA-
MAN ETTAN
THAMBURAN
v.
AMMU.

contrary, I should certainly be prepared to hold that the word ‘purchaser’ must be construed in the sense in which it is used in English Statutes relating to land as including mortgagee. For the purpose of the application of the law of limitation it is difficult to see any principle on which a distinction can be drawn between an out and out sale and a mortgage. The one seems to fall as much within the equity of the article as the other.

As regards the authorities, in *Pennu Kutti v. Valia Rani of Ambadi Kovilagam*(1), this Court held that the words ‘purchased from’ in article 134 must be construed as including ‘mortgaged by.’ The judgment in the case in question contains the following passage:—“In terms the article applies to suits brought for the recovery of property mortgaged and afterwards ‘purchased’ from the mortgagee in good faith and for value. The word ‘purchased’ is not to be restricted to transactions dealing with, or purporting to deal with, the whole proprietary interest. It applies equally to cases in which a less interest is expressed to be created. A mortgagee, *quoad* the interest he takes, is a purchaser, so also is a lessee.” In my opinion this is a correct exposition of the law upon the point in question. In the same judgment, in dealing with the case of *Radanath Doss v. Gisborne*(2), where it was held by the Judicial Committee that the person who took the conveyance was not protected by the article, it is pointed out that, in the Privy Council case, the conveyance to the persons who claimed the benefit of the article only purported to be, and only operated as, an assignment of the rights of a mortgagee. In the case then before this Court, and in the present case, there was a mortgage executed by a person who, though in law a mortgagee, professed to be dealing with the property as absolute owner. The judgment in *Pennu Kutti v. Valia Rani of Ambadi Kovilagam*(1) was not reported and is consequently not binding upon us (section 3, Act XVIII of 1875), but I agree with the conclusion at which the Court arrived and with the reasons upon which that conclusion was based. The case has been followed by the Bombay High Court in *Yesu Ramji Kalnath v. Balkrishna Lakshman*(3) and in later decisions of that Court. The point was raised before a Full Bench of the Allahabad High Court (*Behari Lal v. Muhammad Muttaki*(4)),

(1) Vide footnote (1) on pp. 473 and 474.

(2) 14 M.L.A., 1.

(4) I.L.R., 20 All., 482.

(3) I.L.R., 15 Bom., 583.

MANAVIKRA-
MAN ETTAN
THAMBURAN
v.
AMMU.

but it was not necessary to determine it for the purposes of the case then before the Court and the two Judges who dealt with the point differed in their views. As regards the Calcutta High Court it would seem from the judgment in *Nilmony Singh v. Jagabandhu Roy*(1), that the Judges who decided that case were prepared to construe article 134 as it has been construed by this Court and by the Bombay High Court.

It will thus be seen that there is abundance of authority in support of the view that the word 'purchased' in article 134 means purchased in the sense in which it is familiar to English lawyers and not in the restricted sense.

As regards the authorities which may be said to support the opposite view, as has already been pointed out, the transaction in the case which came before the Judicial Committee was essentially different from the transaction in the present case. In *Radanath Doss v. Gisborne*(2) the person who claimed to be entitled to the benefit of the article merely took an assignment of a mortgage. The decision of the Judicial Committee turned upon the construction of section 5 of Act XIV of 1859 which provided as follows:—"In suits for the recovery from the purchaser or any person claiming under him, of any property purchased *bonâ fide*, and for valuable consideration from a trustee, depository, pawnee or mortgagee, the cause of action shall be deemed to have arisen at the date of the purchase." With regard to the Privy Council decision, it is to be observed, in the first place, that their Lordships were considering the question—not whether the person who, in the case before them, claimed to be protected as a 'purchaser' had acquired, under the law of limitation, a right to be redeemed by the original mortgagor, but whether he had acquired an absolute title as against the mortgagor. This is clear from the passage in the judgment in which their Lordships observe:—"Their Lordships desire to say that the provision of this section is founded, no doubt, upon considerations of high policy,—of a policy which their Lordships do not at all doubt is one which is extremely beneficial to India, having regard to the circumstances of that country. But their Lordships cannot fail to observe that the provisions of this section are of an extremely stringent kind. They take away and cut down the title, which *ex hypothesi* is a

(1) I.L.R., 23 Cal., 536.

(2) 14 M.I.A., 1 at p. 15.

MANAVIKRA-
MAN ETTAN
THAMBURAN
v.
AMMU.

good title of a *cestui que trust*, or of a person who has deposited, pawned, or mortgaged property; they cut down that title as regards the number of years that the person would have had a right to assert it; from a very great length of time, sixty years, they cut it down to twelve years. It is, therefore, only proper that any person claiming the benefit of this section should clearly and distinctly show that he fills the position of the person contemplated by this section, as a person who ought to be protected." This passage is cited with approval by the Judicial Committee in their judgment in *Juggernath Sahoo v. Syud Shah Mahomed Hoossein*(1). In the present case the purchaser only claims that he has acquired under the law of limitation the right to be redeemed. With regard to the meaning of the word 'purchaser' their Lordships observe:—"It cannot be a person who purchases a mortgage as a mortgage, because that would be equivalent to an assignment of a mortgage; it would be a case of a person taking a mortgage with a clear and distinct understanding that it was nothing more than a mortgage. It therefore must mean, in their Lordships' opinion, some person who purchases that which *de facto* is a mortgage upon a representation made to him and in the full belief that it is not a mortgage, but an absolute title." The question, therefore, seems to depend upon the interest which the assignor represents himself as capable of conveying. In the case before the Privy Council he merely represented himself (as their Lordships in effect held) as capable of conveying a mortgage interest and he merely purported to convey this interest. In other words, he assigned a mortgage. In the present case he represented himself as capable of conveying what would be called in England a fee-simple title and he purported to execute a mortgage of an estate in fee-simple.

For the reasons above stated I think the present case is distinguishable from the case before the Privy Council, and I do not think that the decision of the Privy Council is a decision which precludes us from holding that the appellant, in the present case, is a 'purchaser' within the meaning of article 134.

As regards the case (*Muthu v. Kambalinga*(2)), it would seem that the observation in the judgment of Sir Muttusami Ayyar—"The party relying on article 134 . . . is bound to show that

(1) L.R., 2 I.A., 48.

(2) I.L.R., 12 Mad., 316.

MANAVIKKA-
MAN ETTAN
THAMBURAN
v.
AMMU.

he purchased the absolute title and that he paid value for it"—is made with reference to the purchase of an absolute title in contradistinction to the purchase, or assignment, of a mortgage. Sir Muttusami Ayyar was a member of the Court which decided (*Pennu Kutti v. Valia Rani of Ambadi Kovilagam*(1)), and I do not think that, in the latter case, the learned Judge intended to lay down any proposition of law which was inconsistent with his judgment in the earlier case. In *Mana Varma Valia Raja v. Kesava Potuval*(2), the facts were, for the purposes of the point in question, practically the same as the facts in the present case, and the Court held that article 134 did not apply. The learned Judges were of opinion that the case was governed by the decision of the Privy Council. For the reasons which I have already stated I do not think it was.

It is not necessary to infer that because the word 'purchaser' occurs in other articles of the schedule in its restricted sense as indicating a person who acquires a title as absolute owner that the word is used in that sense in article 134. The meaning of the word in any given article must depend upon the context. I do not think that the use of the word 'assigns' in section 10 of the Act and of the word 'purchased' in article 134 affords any indication that the latter word is used in its non-legal sense. In section 10 the expression used is 'legal representatives or assigns' and is obviously the only appropriate expression.

In the judgment in *Mana Varma Valia Raja v. Kesava Potuval*(2) this Court appears to have assumed that, if 'purchased from' is to be construed as including 'mortgaged by,' a premium would be put upon fraud, inasmuch as the original mortgagee might redeem the property from his mortgagor and thus become the absolute owner as against the mortgagor. The same assumption is made by Davies, J., in his order of reference in the present case. This assumption does not appear to me to be well-founded. By redeeming his mortgage the original mortgagee would, as against the original mortgagor, be in no better position than his mortgagor, who had merely acquired a prescriptive right to be redeemed by the original mortgagor. It of course follows that if the original

mortgagor before he can recover possession has to pay off the sub-mortgagee instead of the original mortgagee, the original mortgagee benefits by having made what is, *ex hypothesi*, a false representation to his mortgagees, but it is not a question of the original mortgagee benefiting, but of a *bona fide* 'purchaser' being protected. The law of limitation necessarily operates in many cases to the prejudice of the rights of innocent parties. But the policy of the law is to give rights by prescription—a policy which, as pointed out by the Judicial Committee, is extremely beneficial to India, having regard to the circumstances of this country.

I am assuming that there is no procedure by which the original mortgagor can recover from his mortgagee any moneys which he has had to pay to the sub-mortgagee as a condition of his recovery of possession. As to this I desire to express no opinion.

For the reasons stated above the answer to the reference made to us should, in my judgment, be in the affirmative.

SHEPARD, J.—I desire to add a few words by way of explanation of my previous judgment. When I put the case of a man purchasing from a trustee and said that by force of limitation he would acquire an absolute title, I did not mean that he would acquire a larger interest than that which was in terms conveyed to him. If the conveyance were by way of outright sale, the title acquired would be absolute. If the conveyance were by way of mortgage or lease, the title acquired would correspond. As the interest which a man can acquire by adverse possession may be limited by the nature of his possession (*Radanath Doss v. Gishborne*(1) as to trust estate and limitation), so the interest which the law gives a man who has taken from a trustee or mortgagee cannot be greater than that which was ostensibly conveyed to him. It follows that, in the case of a mortgage taken from a mortgagee or trustee, the real owner still has a right of redemption against him on the footing of the mortgage under which he claims. The effect of limitation is to put his mortgage given by a mortgagee or trustee on the footing of a mortgage executed by the real owner and on no higher footing.

A point is made of the change of language in section 10, the word 'assignee' being substituted for 'purchaser' which is found in section 10 of the Act of 1871. The reason for the change

(1) *Vide* footnote (1) on pp. 473 and 474.

(2) *Vide* footnote (1) on pp. 474 and 475.

(1) 14 M.L.A., 1.

MANAVIKKA-
MAN ETTAN
THAMBURAN
v.
AMMU.

MANAVIKRA-
MAN ETTAN
THAMBURAN
v.
AMMU.

of language appears to me quite obvious. The explanation appended to the section of the Act of 1871 as an expedient for saving purchasers in good faith from the effect of the section was decidedly awkward, because it is not usual to include 'purchasers' in the term 'representatives.' It was natural to alter the structure of the section and equally natural for the Legislature when using the term 'representatives' to couple with it the phrase usually associated with that term or with the term 'executors or administrators,' viz., the term 'assignee.'

DAVIES, J.—The question is whether the term 'purchased' in article 134 of the second schedule to the Limitation Act of 1877 includes a mortgagee or whether it refers only to the purchaser of an absolute title. The contention is that the term is used in its legal signification in England which would undoubtedly include a mortgagee. But the doubt is whether the Indian Legislature has used the term in that sense. I think not. I may first remark that the Indian Legislature is not in the habit of using English technical law terms in the Acts it frames for India. And I next remark that this very term 'purchaser' is a striking illustration of my former observation. In every other article of the schedule where the word 'purchaser' is used, namely, articles 136, 137, 138, 165, 166 and 167, it relates to a sale exclusively, and so also in article 133 the word 'purchase' is used as the correlative of property 'bought.' The word thus having been used everywhere else in its ordinary sense of a buyer, I cannot see why an exception should be made as to its meaning in the single case of article 134. A further indication of the intention with which the Legislature used the word, that is, in its ordinary as opposed to its technical sense, is that in section 10 of the same Limitation Act where they wish to indicate a purchaser in the technical sense of the term, they have instead of using that word, used the word 'assigns.' It seems to me clear that had they intended the word 'purchaser' in article 134 to include mortgagees and lessees they would have used the word 'assigns' as they have done in section 10. In the case of *Radanath Doss v. Gisborne*(1), Lord Cairns, in discussing the use of the term 'purchaser' in the 5th section of the Limitation Act, XIV of 1859, then in force, corresponding to articles 133 and 134 now under consideration, states that it relates to a purchaser

(1) 14 M.I.A., 1.

MANAVIKRA-
MAN ETTAN
THAMBURAN
v.
AMMU.

'according to the proper meaning of that term,' by which I understand him to have meant not in the peculiar sense in vogue among lawyers in England. This view is confirmed by the passage in his judgment which follows:—"Now, what is the meaning of the term 'purchaser' in this section? It cannot be a person who purchases a mortgage as a mortgage, because that would be merely equivalent to an assignment of a mortgage; it would be the case of a person taking a mortgage with a clear and distinct understanding that it was nothing more than a mortgage. It, therefore must mean, in their Lordships' opinion, some person who purchases that which *de facto* is a mortgage upon a representation made to him, and in the full belief that it is not a mortgage, but an absolute title." The purchaser there contemplated is surely one who is buying or thinks he is buying a complete title. The language here and elsewhere in the judgment of the Judicial Committee unmistakeably alludes to an outright sale—a vendor on the one part and a purchaser on the other. It does not refer to a person mortgaging as if he had an absolute title to mortgage, which is our present case, but to a person selling as if he had an absolute title to sell. That is the effect of the decision of the learned Judges in *Muthu v. Kambalinga*(1) and in *Mana Varma Valia Raja v. Kesava Potuval*(2). A further ground for holding that my interpretation is correct is the iniquitous results that would follow if the term 'purchaser' were held also to include a mortgagee. One anomaly has already been pointed out by me in the order of reference, viz., that a sub-mortgagee would get a prescriptive title in twelve years, while the mortgagee from whom he derives would not get such a title for sixty years, by which fraud would be made easy. In order perhaps to meet this objection the appellant's pleader says that he does not now claim what article 134 would give him, that is, an absolute title, but only a mortgage right. He claims only to have prescribed for a mortgage right, and would allow the plaintiff the usual sixty years for redemption. But supposing that is right, another difficulty arises which is insurmountable. It is throwing upon the plaintiff the burden of paying off a mortgage which he never made and the fruits of which he has never enjoyed. The original mortgagee

(1) I.L.R., 12 Mad., 316.

(2) Vide footnote (1) on pp. 474 and 475.

MANAVIKRA-
MAN ETTAN
THAMBURAN
v.
AMMU.

has taken the money raised on the sub-mortgage and if the plaintiff has to pay off the sub-mortgagee instead of the first mortgagee doing so, the latter will be allowed to benefit by his own fraud. There is no means suggested by which the original mortgagee can be made to redeem the sub-mortgagee. So that if the plaintiff does want to get his property back he will have to pay a charge upon it which he did not create and of the existence of which he was unaware, while the original mortgagee who gave a bad title and the sub-mortgagee who took a bad title are to benefit at the innocent owner's expense. When the plaintiff has paid off the sub-mortgagee, there seems no means by which he could recover the money from the original mortgagee, for the original mortgagee not being willing and anxious to redeem, the payment made by the plaintiff would only be a voluntary payment and therefore irrecoverable. In the case of the out and out purchaser from the mortgagee, who is protected under article 134, it would be quite different, because the purchase money would be in the hands of the mortgagee, and he could no doubt be made to disgorge it in a suit properly framed on an account or by way of damages. But such a course does not appear to be open in the case before us. Leading then, as I think it would, to such monstrous results if a mortgagee is considered to be a purchaser within the meaning of article 134, I must hold that he is not, and therefore answer the reference made to us in the negative.

PRIVY COUNCIL.

RANGAYYA GOUNDAN AND ANOTHER (PLAINTIFFS), APPELLANTS,
v.
NANJAPPA RAO AND OTHERS (DEFENDANTS), RESPONDENTS.

P.C.*
1901.
June 18.
July 13.

[On appeal from the High Court at Madras.]

Relinquishment of, or omission to sue for, portion of claim—Civil Procedure Code—Act XIV of 1882, s. 13, expl. 3, and s. 43—Omission to claim remedy in former suit to which plaintiff was entitled—Res judicata—Omission to put forward ground of defence.

The appellants and respondents entered into an agreement in March 1891 for the sale by the latter to the former of a coffee estate. The appellants were from the date of the agreement, to provide the expenditure for, and to carry on, the cultivation; but, in order to protect certain mortgages on the estate made to a third person, the possession was, until 31st July, to remain with the respondents, whose manager however was to be subject to the directions and control of the appellants and to carry out their orders. On that date the sale was to be completed. The terms of the agreement were observed for a time, but objections were taken by the respondents to the proposed conveyance, and delay took place in the completion of the sale, each party accusing the other of causing the delay. Disputes arose and interference by the respondents with the working of the estate took place which led to litigation. Each party brought a suit against the other, but neither in their defence to the respondents' suit, nor in the plaint in their own suit did the appellants claim any right to have the sale completed, although the respondents in their pleadings asserted that it had come to an end: the pleadings and issues in those suits raised only questions as to possession and compensation for disturbance, and the decisions in the suits dealt with no questions except those:

Held, by the Judicial Committee that a subsequent suit brought by the appellants for specific performance of the agreement was barred by section 43 of the Civil Procedure Code. The agreement was the only cause of action in both suits brought by the appellants, and in the former suit they had made it the basis of claims to possession and damages, and they could not now make it the basis of a claim for transfer of the estate, which they had in the former suit omitted to do.

The High Court had held that the previous litigation operated also as a *res judicata* under section 13 of the Civil Procedure Code, on the ground that the appellants might and ought to have put forward their claim to specific performance by way of defence to the suit against them by the respondents in 1891, and that their right to that remedy was therefore barred by explanation 3 of that section. The Judicial Committee, without deciding that point, affirmed the decision of the High Court on section 43.

* *Present*: Lord HOBHOUSE, Lord DAVEY, Lord ROBERTSON, and Sir RICHARD COUCH.

RANGAYYA
GOUNDAN
v.
NANJAPPA
RAO.

APPEAL from a decree (1st September 1896) of the High Court at Madras, whereby the decree (28th April 1898) of the Subordinate Judge of the Nilgiris in favour of the appellants (the plaintiffs), was reversed.

Previously to the 23rd March 1891 the respondents, who were brothers and members of a joint Hindu family, of which Nanjappa Rao, the first respondent, was manager, were the owners of a coffee estate in the Nilgiri Hills known as the "Tudor Valley Estate," which they had mortgaged to Sir E. Gore Langton by two mortgages for Rs. 25,000 and Rs. 10,000, respectively.

On 23rd March 1891 the appellants and respondents entered into an agreement for the sale of the Tudor Valley Estate by the latter to the former for the sum of Rs. 77,500, of which, as the agreement recited, Rs. 7,500 had already been paid in advance by the appellants to the respondents. By this agreement the respondents guaranteed a crop for the then current season of 30 tons of coffee, and agreed that the appellants should retain in their hands as a guarantee for such crop the sum of Rs. 10,000. And it was stipulated that the appellants should pay the mortgagee Rs. 25,000, and that they should pay to the respondents the remaining balance of Rs. 55,000 between the 1st April and 31st July 1891. The agreement contained further conditions fixing penalties on either side in case of default, and providing that the expenditure on the estate should be paid by the appellants, but that possession of the estate should, in order to protect the two mortgages, remain until 31st July 1891 with the respondents, whose manager, however, was to be subject to the directions and control of the appellants, and to carry out their orders.

The appellants accordingly entered upon the cultivation and management of the estate by their own servants, and provided and made all necessary expenditure and gathered the guaranteed crop. Some delay however took place in completing the transaction; but, towards the end of August 1891, the mortgages were paid off and other payments made by the appellants which, amounting in all to Rs. 44,420, left a balance of Rs. 33,080 payable by them to the respondents in respect of the price of the estate.

On 22nd August the appellants, having had the necessary draft conveyance prepared, submitted it to the first respondent and it was by him signed for himself and on behalf of the other respondents, in token of his approval. The conveyance, after

being engrossed, was sent to the other respondents, who retained it but did not execute it.

On 5th September 1891 the respondents wrote to the appellants setting out certain objections to the conveyance and concluding as follows:—

"Within five days from this date you should, according to agreement complete the document, attend the registrar's office with money, get the registration effected and take over possession of the estate. If you fail I hereby positively make known to you that we will make you liable to the penalty as per stipulations mentioned in the agreement."

Further correspondence passed between the parties, and the respondents on 11th September wrote to the appellants as follows:—

"As you have not completed this business within the further time given you in my letter of 5th instant, I have decided to act in accordance with the agreement between us, dated 23rd March last. I am giving instructions to my superintendent for the carrying on of the estate work and write to request you or your people not to interfere with the property."

On the same date the appellants wrote to the respondents maintaining that the conveyance which they had forwarded for execution correctly embodied the terms of the agreement, and requiring the respondents to carry it out. On the night of the 11th September the first respondent proceeded to the estate and ejected the appellants' servants. This resulted in a criminal case against the first respondent which was dismissed on 10th February 1892, but on revision by the Magistrate the first respondent was found guilty and fined.

Pending the trial of and decisions in the criminal proceedings the respondents, on 21st September 1891, filed suit No. 55 of 1891 against the appellants in the Court of the Subordinate Judge of the Nilgiris. In the plaint in that suit after reciting the agreement of 23rd March 1891 and their contention that the appellants had failed to carry out its terms the respondents stated that, on 11th September 1891, they had written the letter of that date already set out, and that, on 15th September, the appellants had instituted a criminal charge for trespass and rioting against the first respondent, and had, on 16th September, re-entered in the estate and ejected the respondents therefrom, and had then and there taken possession of the estate which possession they had ever since retained knowing that they had "no right or excuse

RANGAYYA
GOUNDAN
v.
NANJAPPA
RAO.

RANGAYYA
GOUNDAN
v.
NANJAPPA
RAO.

for so doing;" and the respondents prayed that the Court would "put them into possession" of the estate, and grant them such further and other relief as the circumstances of the case required. On filing that plaint the respondents applied for an interim injunction which was granted *ex parte* but was afterwards dissolved.

The appellants filed their written statement in that suit (No. 55 of 1891) in which they relied upon the original agreement and the series of acts done by themselves in conformity with it, and contended that their possession, so far as it went, was in accordance with the agreement and could not be interfered with by the Court. They claimed Rs. 1,000 as damages for the expenses and injury they had sustained by reason of the action of the respondents as to the injunction.

On 23rd September 1891 the appellants filed a plaint in the Court of the Subordinate Judge of the Nilgiris in suit No. 73 of 1891 against the respondents seeking damages for the trespass and ouster, and asking for restoration of possession under section 9 of the Specific Relief Act (I of 1877), and for an injunction restraining the respondents from interfering with their possession and management of the estate.

In that suit (No. 73 of 1891) the respondents filed their written statement denying the appellants' right to possession or to damages, on the grounds that the appellants had broken the contract, and that it had been treated by themselves as being at an end, and setting up their own rights. In these suits the following issues were settled for trial. In suit No. 55 of 1891 (in which the respondents were plaintiffs, and the appellants defendants) the issues were (1) what possession of the plaint land are either of the parties in this suit entitled to by reason of the terms of the agreement of 23rd March 1891? (2) Have the terms of the agreement of 23rd March 1891 as to the right of possession which it conferred on either party hereto been subsequently varied in any way and, if so, how? (3) Whether defendants have unlawfully dispossessed plaintiffs from the plaint property? (4) Whether plaintiffs are entitled to possession of the plaint property? (5) Whether defendants are entitled to the whole or any portion of the compensation they claim?

In suit No. 73 of 1891 (brought by the appellants against the respondents) the issues were (1) Whether plaintiffs can obtain compensation in this case and, if so, to what extent? (2) Whether

plaintiffs were in possession of the plaint premises at the time of filing their suit, and, if so, how and to what extent their prayer for possession in this suit can be granted? (3) Whether for any reason the plaintiffs are entitled to the injunction they ask for?

By agreement the two suits were tried on the same evidence.

On 10th August 1893 the Subordinate Judge delivered a separate judgment in each suit.

In suit No. 55 of 1891 he held on the first issue that the plaintiffs (the respondents) were entitled to have possession of the estate until the sale agreed upon in the agreement of 23rd March 1891 should be carried out and effected; on the second issue that the terms of the agreement, so far as they related to the right of possession of the estate had not been subsequently varied; on the third issue that the defendants (the appellants) had unlawfully dispossessed the plaintiffs (the respondents); on the fourth issue that the plaintiffs (the respondents) were entitled to possession; and on the fifth issue that the defendants (the appellants) were entitled to the costs of resisting the plaintiffs' (the respondents') application for an injunction which they had made in the suit. At the end of his judgment he said:—"In conclusion I would observe that I have confined myself in this case to the simple fact of possession and dispossession as I have intimated to counsel at the hearing that I would do. It seems to me that I have nothing but these facts to deal with in the case."

In suit No. 73 of 1891 the Subordinate Judge held on the first issue that the plaintiffs (the appellants) were not entitled to any compensation; on the second issue that as they were in fact in possession, and also because they were not entitled to possession, they were not entitled to a decree for possession; and on the third issue that they were entitled to a temporary injunction restraining the defendants (respondents) from interfering with their management of the estate.

Appeals from the decrees in both suits were brought to the District Judge, who, on the 11th October 1893, delivered one judgment in both appeals. He agreed with the findings of fact arrived at by the first Court, and upheld the decrees of the Subordinate Judge, except that he altered the terms of the injunction issued in suit No. 73 of 1891. He held that that injunction went beyond the terms of the agreement of 23rd March 1891, and he accordingly altered it so as, in his opinion, to carry into effect the terms of the

RANGAYYA
GOUNDAN
v.
NANJAPPA
RAO.

RANGAYYA
GOUNDAN
v.
NANJAPPA
RAO.

agreement, making it an injunction restraining the vendors (the present respondents) "from working the estate otherwise than as the vendees" (the present appellants) "might appoint unless and until the agreement of 23rd March 1891 should be rescinded or superseded by agreement of the parties or should be declared or should become invalid by due course of law."

On 14th November 1893 the suit, out of which the present appeal arose, was brought by the appellants in the Court of the Subordinate Judge of the Nilgiris. In the plaint, after setting out the agreement of 23rd March 1891, and the events which had followed it, and alleging that they were ready and willing to carry out the terms of the agreement and pay the balance of the price of the estate, they stated that they had sent a proper conveyance to the respondents for execution by them, but that they had failed and refused to execute it; they prayed for specific performance of the agreement, and for damages for the breach of it, or in the alternative for damages, and for return of the money they had paid with interest thereon, and that for such damages they might have declared their lien on the estate.

The respondents filed a written statement in which they denied the appellants' right to specific performance or to damages, and attributed the non-performance of the agreement to the appellants' dilatory and wrongful conduct and asserted that they had improperly taken possession of the estate without tendering the draft agreement asked for, or payment of the balance of the purchase-money. They also relied on the decisions given in their favour in the former suits Nos. 55 and 73 of 1891.

At the hearing an objection was raised which had not been taken in the pleadings that, under the provisions of section 43 of the Civil Procedure Code, the suit was not maintainable, because the appellants had not asked for specific performance of the agreement in their suit No. 73 of 1891. The Subordinate Judge gave judgment in the suit on 28th April 1894. As to the above objection he said:—"In addressing the Court, Mr. Barton raised a plea not taken in the statement. It was urged by him that the suit is bad as against the provisions of section 43 of the Civil Procedure Code, inasmuch as the plaintiffs did not sue for the present relief when filing Original Suit No. 73 of 1891. That suit was filed by the plaintiffs as I have explained as a cross suit against defendants' earlier suit numbered as Original Suit No. 55 of 1891. The

defendants claimed for possession and the plaintiffs claimed for an injunction restraining defendants from interfering with the estate in their possession and management. I do not see how the present claim is barred by the section quoted. The relief sought in the previous suit filed by the plaintiff was on the particular cause of action that the defendants had violated the terms of the agreement and summarily removed plaintiffs from the possession and management of the estate which they were entitled to under the agreement. The defendants, on the other hand, by their suit claimed to be entitled to possession, and the parties were confined to these questions and to their respective rights and status under the agreement. The plaintiffs did not relinquish their right to sue for specific performance of the contract by first suing to protect their rights under the agreement. The defendants have not sued for rescission of the contract and the decisions passed in these suits are in effect to place both parties in their proper positions. I therefore do not think plaintiffs are precluded from suing for the relief they now claim."

In the result he gave the plaintiffs a decree for specific performance, and Rs. 5,000 damages.

The defendants (the present respondents) appealed from this decision to the High Court.

The grounds of appeal, so far as they are material, were that the suit was barred by section 43 of the Civil Procedure Code, and that the plaintiffs were therefore not entitled to a decree for specific performance, nor to damages.

The High Court (SHEPARD and BEST, JJ.) gave judgment in the suit on 21st October 1895 holding that the plaintiffs were not entitled to specific performance, on the grounds that the suit was barred as being *res judicata* by the former litigation, and also as being not maintainable with reference to the provisions of section 43 of the Civil Procedure Code. They held, however, that the plaintiffs were entitled to recover all moneys paid by them as purchase-money, together with interest thereon at the rate of 9 per cent. from the dates of payment, and that they must, on the other hand, account for all the profits they had enjoyed from the time they had taken possession of the estate. They accordingly set aside the decree of the Subordinate Judge and remanded the case to him to take the necessary accounts.

RANGAYYA
GOUNDAN
v.
NANJAPPA
RAO.

RANGAYYA
GOUNDAN
v.
NANJAPPA
RAO.

The Subordinate Judge in due course found that nothing was due to the plaintiffs on the account.

On 1st September 1896 the High Court (SHEPHARD and DAVIES, JJ.) made the final decree in the case by which they dismissed the suit with costs.

On the points of law above mentioned the High Court (SHEPHARD and BEST, JJ.) observed:—"If this present suit had been brought in September 1891 instead of November 1893 there would have been no questions to be decided between the parties except as regards the exact amount of the balance due and the exact terms of the conveyance. A mistake had been made by the plaintiffs as to the amount, and perhaps, though that is not clear, a mistake had been made by the defendants. There had been no breach of any essential term of the contract such as to disentitle the plaintiffs to specific performance under the provisions of the 24th section of the Specific Relief Act. Nor can it be said that since September 1891 the plaintiffs have shown any disposition to give up the bargain and abandon their claims under the contract. In our opinion, however, the omission of the plaintiffs to insist on their right under the contract when attacked by the defendants in the suit of 1891 is fatal to their present claim. The suit No. 55 of 1891 was brought by Nanjappa and his partner to recover possession of the estate. It was in effect alleged in the plaint that the contract of sale had gone off owing to the default of the purchasers. The purchasers in their written statement rightly insisted on the existence of the contract and alleged their possession in pursuance of it. The finding was that the purchasers had previously to the 11th September 1891, when their servants were ejected by the vendors, practically been in possession of the estate. This is what the plaintiffs themselves say in their present plaint (paragraph 2) and there is no doubt that it was the fact. Their possession, whether joint with the vendors or exclusive, was possession granted to them as purchasers, and it is immaterial that the written contract did not provide for it. This being so, the answer which the plaintiffs made to the claim laid against them in the suit of 1891 was a good answer. Being thus entitled to specific performance of the contract on payment of the balance due, they were entitled to say that their possession was lawful. They could not say they actually had a good title to the property, but they could say that it was owing to the default of the vendors in not

RANGAYYA
GOUNDAN
v.
NANJAPPA
RAO.

executing a conveyance that their title was not completed. The existence of the contract was a matter which might and ought to have been made a ground of defence in the suit of 1891. It makes no difference that the defence was raised and was overruled, for presumably it would not have been overruled if the facts had been established by proper evidence. It follows, therefore, that the question of the contract must be held to be *res judicata*, and the suit so far as it seeks specific performance must fail. Another and independent ground on which, we think, the plaintiffs' suit must fail is that the cause of action on which their suit is based is identical with that on which they based their suit in 1891. The Subordinate Judge considers that this latter suit was simply a suit for disturbance of possession, but, looking at the plaint and comparing it with the plaint in the present suit, we find that the material allegations in the two plaints are alike. In both the plaintiffs assert the existence of the contract and possession taken by them under it. In support of their claim in 1891 the plaintiffs had to adduce, and did adduce, the evidence relating to the contract which they have adduced in the present suit. Thus another test of the identity of the causes of action is satisfied (see cases cited in *Brunsdon v. Humphrey*(1)). Possibly, the plaintiffs might, in the former suit, have relied on the mere fact of their possession and might not then have been precluded from bringing the present suit, but they did not reserve the contract as a ground for another suit. They put it in issue in 1891 and founded upon it their claim for possession. In the present suit they seek to put it in issue again and found upon it a claim for specific performance. The relief which they ask for is different, but the fundamental facts giving them a cause of action are identical in the two cases. For these reasons we think that the prayer for specific performance cannot be allowed, and that the decree made in accordance with it must be set aside."

After the decision of the High Court the plaintiffs (the present appellants) brought a suit (No. 74 of 1896) against the defendants (the present respondents) in which as assignees of the mortgagees of the Tudor Valley Estate they obtained in the High Court a decree for the amount of the mortgage held by Sir E. Gore Langton with interest and costs.

(1) (1884) L.R., 14 Q.B.D., 141 at p. 145.

RANGAYYA
GOUNDAN
v.
NANJAPPA
RAO.

On this appeal, Mr. J. H. A. Branson, for the appellants, contended that the suit was not barred by section 13 of the Code of Civil Procedure as being a *res judicata*. For a suit to be barred under that section the matter in issue must have been finally decided in the former suit. The subject-matter of this suit has never been finally decided. (*Parsotam Gir v. Narbada Gir*(1) was referred to.) As to section 43 of the Code the appellants were not, when they brought suit No. 73 of 1891, in a position to ask for specific performance of the agreement: the question at that time was whether the parties could or could not work the estate under the agreement. There had been no conveyance to the appellants, so that they could not ask for possession, and were not entitled to specific performance. There has, therefore, been no omission of a claim or remedy to which they were entitled within the meaning of section 43. The grounds on which the High Court has decided the case were not pleaded by the respondents, nor put in issue in the first Court: and the plea of *res judicata* was not even taken in the grounds of appeal to the High Court.

Mr. J. D. Mayne for the respondents.—Though not distinctly raised in the pleadings and issues, the grounds of the High Court's decision were argued in both Courts below, and the irregularity, if any, is, under section 378 of the Code, not a ground of appeal. At the time of the former suits Nos. 55 and 73 of 1891 the question of carrying on the estate under the agreement was over, and the appellants were in possession of it. Why did they not, then, put forward their claim to specific performance of the agreement? Not having put it forward then, they are now, under explanation 3 of section 13 and under section 43 of the Civil Procedure Code, debarred from suing for specific performance. Moreover, by suit No. 74 of 1896 the appellants have disabled themselves from carrying out the agreement which they now claim to enforce: their position in that suit as mortgagees is quite inconsistent with their claim in the present suit. If the decision of the High Court is reversed on the grounds in which it is given, the case should be remanded for the decision of the High Court on the other questions.

Mr. Branson in reply referred to the case of *Sheosagar Singh v. Sitaram Singh*(2).

(1) (1899) L.R., 26 I.A., 175; I.L.R., 21 All., 505.

(2) (1896) L.R., 24 I.A., 50; I.L.R., 24 Cal., 616.

RANGAYYA
GOUNDAN
v.
NANJAPPA
RAO.

On 13th July the judgment of their Lordships was delivered as follows by Lord HOBHOUSE:

JUDGMENT.—The respondents in this appeal, who were defendants in the original suit, are a Hindu family of which Nanjappa is the manager. On the 23rd March 1891 they made a written agreement with the appellants, the plaintiffs below, to sell to them a coffee plantation, of which the defendants were owners subject to mortgages.

The agreement is somewhat peculiar. The price is fixed at Rs. 77,500, of which Rs. 7,500 was paid down. The vendors guarantee a yield of 30 tons of coffee up to March 1892, and as security for that the purchasers are to retain Rs. 10,000 in their hands. The purchasers are to pay Rs. 25,000 to the mortgagee, leaving Rs. 10,000 due to him. The balance, being Rs. 35,000, is to be paid in cash between the 1st April and the 31st July 1891. Penalties are stipulated for non-performance of the agreement on either side. The following provision was made for the cultivation of the land:—"As the said estate will be in our possession till the 31st of July 1891, we are bound to take care (of the estate) by getting our Superintendent to do, in all obedience, the works that you may prescribe to be done in the estate. We shall within the 1st April next give you a list of the things appertaining to the said estate and also at once hand over the cattle to you within the said date."

Down to the latter part of August 1891 the terms of the agreement were observed except that the time of completion was delayed. The purchasers cultivated the estate, and paid off the mortgages, and made some other payments on behalf of the vendors, which altogether amounted to Rs. 44,420, and left Rs. 33,080 due. Then disputes arose, and each party accused the other of delay. Early in September each called on the other to complete within four or five days, threatening in case of failure to sue for the stipulated penalties. The vendors interrupted the work of the purchasers. The criminal proceedings common in such cases took place, and then the litigation in the Civil Court which led up to the present appeal.

On the 21st September 1891 the vendors instituted suit No. 55 of 1891 against the purchasers. They prayed for possession of the estate and for general relief. The purchasers defended themselves in that suit, and they also instituted a suit of their own, No. 73 of

RANGAYYA
GOUNDAN
v.
NANJAPPA
RAO.

1891, against the vendors. In suit No. 55 the purchasers insisted on the agreement, and asked damages for disturbance of their works. In suit No. 73 they prayed: first, for restoration of possession under the provisions of section 9 of the Specific Relief Act, which are provisions confined to the recovery of possession upon a dispossession otherwise than in due course of law; secondly, for Rs. 1,000 damages for disturbance; thirdly, for an injunction to protect their possession and management. In defence the vendors gave their version of the dispute, and insisted that the contract was broken by the purchasers' failing to complete, had been treated by the vendors as at an end on the 10th September, and that no relief could be had under it.

The two suits were heard on the same evidence, and on the 10th August 1892 the Subordinate Judge delivered judgment in each separately. In suit No. 55 he held that by the terms of the agreement the parties intended that the vendors should have possession until the sale was completed, and that the purchasers had unlawfully dispossessed them, but he did not declare them entitled to any compensation. In suit No. 73 he decided to the same effect as regards possession; and he held that the purchasers were not entitled to any compensation, but that they were entitled to a temporary injunction restraining the vendors from interfering with the management. In his judgment in suit No. 55 he made the following observations:—"In conclusion I would observe that I have confined myself in this case to the simple fact of possession and dispossession as I intimated to counsel at the hearing that I would do. It seems to me that I have nothing but these facts to deal with in the case."

In fact there was no relief prayed and no issue framed in either suit on any point except possession or compensation. The purchasers did not ask for completion of the agreement nor the vendors for its cancellation.

The purchasers appealed to the District Judge in both suits. On the 11th October 1893 he affirmed both decrees, only modifying the form of injunction. As modified it operates to "restrain the vendors from working the estate otherwise than as the vendees may appoint unless and until the agreement (exhibit A) shall be rescinded or superseded by agreement of the parties or be declared or become invalid by due course of law."

RANGAYYA
GOUNDAN
v.
NANJAPPA
RAO.

On the 14th November 1893 the purchasers filed their plaint in the present suit praying for specific performance of the agreement of the 23rd March 1891.

On the 28th April 1894 the Subordinate Judge gave them a decree. At the trial before him the vendors took an objection of law not raised by their pleas nor by the issues. It was founded on section 43 of the Civil Procedure Code which provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; and that if a plaintiff omit to sue in respect of any portion of his claim he shall not afterwards sue in respect of the portion so omitted. The learned Judge considered that the case did not fall within that section, because suit No. 73 of 1891 was a cross-action to suit No. 55, and neither party sought to deal with anything but possession or compensation.

The vendors appealed to the High Court, repeating their grounds of defence in the First Court, and adding their defence under section 43. On the hearing of the appeal they further contended that the point was decided against the purchasers by the judgments in the suits of 1891.

On the 21st October 1895 the High Court decided the appeal. They held that the suit was not maintainable; first, because the matter was *res judicata*, and, secondly, because the case fell within section 43. As to the first of these grounds there is great difficulty, looking at the frame of the suits of 1891 and at the judgments by which they were concluded; but their Lordships need not come to any decision upon it, because they are in entire agreement with the learned Judges on the second ground. The agreement was the cause of action in suit No. 73 of 1891. There was no other. The purchasers, it is true, sued only for possession; but independently of the agreement they had no claim to the possession which was refused to them, nor to the management which was allowed to them. The vendors asserted that the agreement was no longer in force. The obvious course for the purchasers was to demand completion of it. For some reason or other they did not do so. They did make the agreement the basis of a claim for possession and damages. In this suit they make it a basis of a claim for transfer of the estate. But that is precisely what the Code says they shall not do.

KANGAYYA
GOUNDAN
v.
NANJAPPA
RAO.

The High Court held that the purchasers were entitled to recover what they had paid in respect of the purchase money, but were also bound to account for the profits which they had received during their management. The suit was remanded for accounts to be taken, when it was found that nothing was due to the purchasers. The High Court therefore, on the 1st September 1896, dismissed the suit with costs. Their Lordships will humbly advise His Majesty to dismiss this appeal. The appellants must pay the costs.

Appeal dismissed.

Solicitor for the appellants:—Mr. R. T. Tasker.

Solicitors for the respondents:—Messrs. Cowdell & Armstrong.

J. V. W.

APPELLATE CIVIL.

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

KADALA REDDI AND ANOTHER (PLAINTIFFS NOS. 2 AND 3),
APPELLANTS,

v.

NARISI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 463—Suit against a lunatic not so adjudged—Lunacy (District Courts) Act—Act XXXV of 1858, ss. 2, 23—Appointment by Court of guardian ad litem to lunatic—Practice.

The plaintiff in a suit against several defendants described the first defendant, (a widow, and not a minor), as of unsound mind, and sued her as being represented by her mother and guardian. The first defendant had not been adjudged of unsound mind under the Lunacy (District Courts) Act XXXV of 1858; nor did it appear that the Court of First Instance had satisfied itself that first defendant was, in fact, a lunatic or that it had approved of the guardian named and appointed by the plaintiff, as a fit and proper person. The suit was only contested by the second defendant. By section 463 of the Code of Civil Procedure the provisions contained in sections 440 to 462, (which relate to the conduct of suits by and against minors), are directed to apply, *mutatis mutandis*, in the case of persons of unsound mind adjudged to be so under Act XXXV of 1858 or under any other law for the time being in force. The contention having been raised

* Second Appeal No. 328 of 1899, against the decree of M. D. Bell, District Judge of Gódvári, in Appeal Suit No. 120 of 1898, modifying the decree of T. Krishnasami Naidu, Acting District Munsif of Narasapur, in Original Suit No. 114 of 1897.

that the suit was bad and must be dismissed because first defendant had not been so adjudged:

Held, that inasmuch as the right of suit against the lunatic was unquestionable, in the absence of any provision in the Code of Civil Procedure for the maintenance of suits against persons of unsound mind who have not been so adjudged under the Act, the Court should appoint a fit and proper person as guardian *ad litem*, upon its being established that the first defendant was, in fact, of unsound mind.

Suit for a declaration. Plaintiff claimed that he and defendants Nos. 3 to 9 were entitled as reversioners, under the Hindu Law, to certain property which had devolved upon first defendant by way of widow's life estate. First defendant, (a widow, but not a minor), was, however, of unsound mind, and the property was in the possession and enjoyment of her brother, who was impleaded as second defendant in the suit. Plaintiff charged that first defendant's mother and guardian had, with a view to defraud the reversioners of their reversionary rights, conveyed the property to second defendant by means of a sale-deed which had been registered but which was collusive and not supported by consideration and for which there had been no legal necessity. Plaintiff stated that he had purchased the reversionary interests of defendants Nos. 3 to 9 and was therefore entitled as sole reversioner; and also that the husband of first defendant had died eighteen years prior to the suit. Of the defendants, the second alone defended the suit. He traversed all the averments in the plaint. First defendant was described in the plaint as being of unsound mind, and was sued as if represented by her mother as guardian. Plaintiff having died after the institution of the suit his two sons were brought on the record. The claim was for a declaration that the conveyance was void in so far as it purported to convey more than the first defendant's widow's life estate. The District Munsif dealt with the suit on the merits and in the result dismissed it. Plaintiff's sons appealed to the District Judge who, in his judgment, pointed out that the widow, first defendant, was described as being of unsound mind and was represented in the suit by her mother. Referring to section 463 of the Code of Civil Procedure he said that a guardian could only be appointed to a person of unsound mind after the latter had been so adjudged under Act XXXV of 1858. He referred to *Subbaya v. Buthaya*(1). First

KADALA
REDDI
v.
NARISI.

(1) I.L.R., 6 Mad., 380.

KADALA
REDDI
v.
NARISI.

defendant had not been adjudged a lunatic and he therefore held that the suit was bad and dismissed it on that ground.

Plaintiffs Nos. 2 and 3 preferred this second appeal.

K. Ramachandra Ayyar, (for *Sundara Ayyar*), for appellants, contended that even although a person of unsound mind had not been so adjudged under Act XXXV of 1858, he could sue by a next friend, or be sued if represented by a guardian *ad litem*. In the present case first defendant had been described as a person of unsound mind and had been represented in the suit by her mother, as guardian *ad litem*. The Civil Procedure Code was silent on the point, as section 463 only applied to cases in which persons had been adjudged under the statute. That being so, the Court had inherent power to act as a Court of Equity, in the interests of justice, as the English Court of Chancery would act in such circumstances, and it could appoint a guardian to an incompetent party. The provisions of the Code of Civil Procedure are not exhaustive, (*Nabhu Khan v. Sita*(1); *Pransukhram v. Bai Lakkor*(2)), nor does section 463, in a case like this, compel a Court to appoint a guardian, or prohibit it from acting in any other way. If this contention were not the correct one, a creditor of a lunatic could be debarred of all right of action if the relatives of the lunatic declined to have him adjudged under the Statute, for under Act XXXV of 1858, only relatives are entitled to apply for such an adjudication, (*Subbaya v. Buthaya*(3)). He contended that the substantive right of a creditor to sue his debtor could not be taken away by a Code of Procedure. The following cases were also referred to:—*Venkatramana Rambhat v. Timappa Devappa*(4); *Tukaram Anant Joshi v. Vithal Joshi*(5); *Sanku v. Puttamma*(6); *Umasundari Dasi v. Ramji Haldar*(7); and *Narayana v. Krishna*(8).

P. Nagabhushanam, for respondents Nos. 1 and 2, submitted that the English Chancery practice was not a guide in matters of procedure in India. Where a party to a suit is found to be of unsound mind a guardian can be appointed to him only under section 463 of the Code of Civil Procedure. That section only

(1) I.L.R., 20 All., 2.

(3) I.L.R., 6 Mad., 380.

(5) I.L.R., 13 Bom., 656.

(7) I.L.R., 7 Calo., 242.

(2) I.L.R., 23 Bom., 653.

(4) I.L.R., 16 Bom., 132.

(6) I.L.R., 14 Mad., 289.

(8) I.L.R., 8 Mad., 214.

KADALA
REDDI
v.
NARISI.

provides that the provisions of chapter XXXI, Code of Civil Procedure, shall apply to persons of unsound mind if they have been adjudged to be so under Act XXXV of 1858. The reason for such a provision is that an inquiry into soundness or unsoundness of mind is a more responsible and difficult one than an inquiry as to age—namely as to majority or minority, requiring, as it does, a consideration of scientific or expert evidence which cannot be expected of all the forums to which the Civil Procedure Code applies. The Code therefore wisely provides that whereas guardians may be appointed by Courts to all persons who are found or proved to be minors, the Courts shall not appoint guardians to persons of unsound mind unless the latter have been adjudged as such under the Lunacy (District Courts) Act (XXXV of 1858), which applies to the mufassal. Under that Act an inquiry as to lunacy can only be conducted by or under the control of a District Court, (see sections 2 and 23), and thus a better guarantee is provided for the soundness of the inquiry. That a plaintiff-creditor who wishes to obtain relief against a lunatic-debtor through the Civil Courts should first have an inquiry held to obtain an adjudication of lunacy might appear to involve hardship, but there were other provisions involving equal hardship, *e.g.*, the necessity for providing a guardian *ad litem* for a minor-defendant. He submitted that plaintiff must therefore first obtain an adjudication under Act XXXV of 1858 and then ask the Court to appoint a guardian. The enumeration of persons entitled to apply for an enquiry as contained in section 3 of Act XXXV of 1858 did not appear to be exhaustive, as had been contended. As had been clearly pointed out in *Narayana v. Krishna*(1) a suitor can and ought to apply for an inquiry under Act XXXV of 1858, and (after obtaining an adjudication that the person sought to be proceeded against is of unsound mind) should make him a party to the suit represented by a properly appointed guardian.

JUDGMENT.—The effect of the Judge's ruling is to deny justice to persons who may be entitled to sue the lunatic, but who, not being relatives, are unable to get the lunatic adjudged to be such under the Act XXXV of 1858. This difficulty does not appear to have been present to the mind of the Court in the case of *Narayana v. Krishna*(1), where it was assumed that any suitor could obtain

(1) I.L.R., 8 Mad., 214 at p. 217.

KADALA
REDDI
v.
NARISI.

an adjudication in lunacy as a matter of course, although it had been pointed out in the case quoted by the Judge (*Subbaya v. Buthaya*(1)), that only certain specified persons could move in the matter. In the absence then of any provision in the Code of Civil Procedure for the case of persons of unsound mind who have not been adjudged to be so under the Act, we must adopt the rule which prevails in English Courts and provide for the protection of the lunatic defendant by the appointment of a proper guardian *ad litem*, the right of suit against the lunatic being unquestionable. A similar course has been followed by the Bombay and Allahabad High Courts (*Venkatramana Rambhat v. Timappa Devappa*(2); *Nabhu Khan v. Sita*(3); and *Paransukhran v. Bai Lakkar*(4)).

The decree of the lower Appellate Court is therefore reversed and the appeal remanded for disposal in due course. It does not appear whether the District Munsif satisfied himself that the first defendant was a lunatic and approved of the proposed guardian *ad litem* as a fit and proper person. If these things have not yet been done, they must now be done according to law. Costs in this Court will abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Bhashyam Ayyangar.

HARISCHANDRA DEO (PLAINTIFF), APPELLANT,

v.

NARAYANA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 586—Suit of a small cause nature—Plaint based on muchalka but containing prayer as for the enforcement of a charge—Second appeal.

In a suit filed in a Munsif's Court the plaintiff, a zamindar, alleged that first defendant, a tenant on his estate, had executed a muchalka which was registered in respect of certain lands and that second defendant was in possession of the

(1) I.L.R., 6 Mad., 380.

(2) I.L.R., 16 Bom., 132.

(3) I.L.R., 20 All., 2.

(4) I.L.R., 23 Bom., 653.

* Second Appeal No. 145 of 1900 against the decree of F. Murray, District Judge of Ganjam, in Appeal Suit No. 86 of 1899, affirming the decree of D. Raghavendra Rao, District Munsif of Sompeta, in Original Suit No. 584 of 1897.

lands and that default had been made in the payment of the kist referred to in the muchalka. The plaint contained no other allegations, but prayed for a decree for the arrears of kist and concluded with a prayer as for the enforcement of a charge in respect of the kist:

Held, that the plaint must be read as one for the enforcement of the terms of the muchalka, and that the suit was therefore of a small cause nature and no second appeal lay.

Mullapudi Balakrishnayya v. Venkatanarasimha Appa Rau, (I.L.R., 19 Mad., 329), followed.

SUIT for Rs. 41-11-4. The plaint was as follows:—"On the 26th January 1881, the first defendant executed and gave a registered muchalka in favour of plaintiff, providing that, among other terms, he (first defendant) would pay at Rs. 7-1-0 per year in two equal instalments—one on 15th July and the other on 15th October every year for acres 3·13 cents of jirayati cocoanut garden lands given to him in the jirayati Melakotturu . . . forming plaintiff's zamindari and that, in default of payment on the date of instalment, he would pay the same with interest at Re. 1 per cent. per month. The defendants have not paid till now the kists for faslis 1303, 1304, 1305 and 1306 and the first instalment kist of fasli 1307. The cause of action for this suit arose on the 16th July and October of the years 1893, 1894, 1895 and 1896 and from 16th July 1897 in the village of Melakotturu . . . within the jurisdiction of this Court." (After setting out particulars in tabular form, amounting in all to Rs. 41-11-4, the plaint concluded with the following prayer):—"Plaintiff, therefore, prays for a decree recovering the said amount (Rs. 41-11-4), together with costs and subsequent interest as also such other reliefs which to the Court may seem proper, from the defendants and by means of the sale of the cocoanut garden aforesaid which they are enjoying. As it is learnt that the said garden is in the possession of the second defendant, he is made a party to this."

The Munsif decreed in plaintiff's favour, as against first defendant only, for the amount claimed. He said:—"The next question for determination is whether the plaintiff is entitled to claim a charge on the land to which the suit muchalka relates. According to the latest decision of our High Court this question has to be answered in the negative (*vide Gajapati Rajah v. Suryanarayana*(1)). If the plaintiff be not entitled to claim a charge

(1) I.L.R., 22 Mad., 11.

HARISCHAN-
DRA DEO
v.
NARAYANA.

this suit which is brought for the recovery of less than Rs. 50 would be one cognizable by this Court on its small cause side. The second defendant has taken objection on that score. So I have considered the question as to whether the plaint should be returned to the plaintiff in order that he might present it on the small cause side in case of his being disposed to do so or the suit might be allowed to stand as a suit on the original side. At the time the suit was brought there was an authority in the shape of a decision by our High Court for holding that in a case like this there would be a charge on the land in favour of the landlord for the kist due on it (*vide* note made in *Venkatarama Doss v. Maharajah of Vizianagaram*(1) and the case referred to therein). Plaintiff was justified in putting in his suit on the regular side of the Court. It appears to me that the effect of the recent decision, which has changed the law bearing on the subject, need not be carried so far as to make the suit unsustainable as a suit on the said side of the Court and necessitate the filing of it on the small cause side. Plaintiff no doubt is not entitled to get a charge created on the land but the suit need not be taken away from the regular side on which it was maintainable when it was brought. I find this issue accordingly. In the result I give a decree for plaintiff only against first defendant for the sum sued for and costs with interest at 6 per cent. per annum from the date of suit up to the date of payment. Second defendant is exonerated. He is to bear his own costs." The District Judge affirmed this decree on appeal.

Plaintiff preferred this second appeal, claiming that the decree should have been passed against second defendant as well.

Sundara Ayyar for appellant.

V. Krishnasami Ayyar for respondent No. 2.

SHEPHARD, J.—In my opinion the nature of the suit must be ascertained by considering all the allegations in the plaint and the prayer.

In the present plaint a muchalka is alleged to have been executed by the first defendant and the second defendant is said to be in possession. There are no other allegations made.

Then there is the prayer as for the enforcement of a charge. There is nothing in the allegations to justify such a prayer. I therefore think that the plaint must be read simply as a plaint for

(1) I.L.R., 19 Mad., 103 note.

the enforcement of the terms of the muchalka and that the suit is therefore of a small cause nature.

The second appeal is dismissed with costs.

BHASHYAM AYYANGAR, J.—If the question were *res integra* I should be inclined to hold that, in determining whether or not a second appeal is barred by section 586 of the Civil Procedure Code, we ought to regard the suit not as it ought to have been framed but as it is in fact framed and brought, unless the plaintiff has, with the object of evading the jurisdiction of a Court of Small Causes and bringing the suit in the ordinary Courts, added a claim for a relief to which he knows he is not in law entitled. But following the decisions of this Court in *Mullapudi Balakrishnayya v. Venkatanarasimha Appa Rau*(1) and the decision in *Padmavathemma v. Venkatagiri Rajah*(2), I concur in dismissing the second appeal with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and
Mr. Justice Shephard.

KUPPUSAMI CHETTI (DEFENDANT No. 2), APPELLANT,
v.

RATHNAVELU CHETTI AND OTHERS (PLAINTIFF AND
DEFENDANTS Nos. 1, 3, 4 AND 5), RESPONDENTS.*

Letters Patent, art. 15—Judgment—Order directing receiver in suit to advance money for defence by guardian ad litem—Appeal.

An order directing a receiver in a suit to advance money to a guardian *ad litem* to enable him to conduct the defence on behalf of a defendant is not

(1) I.L.R., 19 Mad., 329.

(2) Second Appeal No. 593 of 1899 (unreported). The judgment, which was delivered by SUBRAHMANIA AYYAR and DAVIES, JJ., on 2nd November 1900, is as follows:—"Upon the finding that these cesses have been paid as part of the rent, they do not fall within clause (13) of the second schedule of the Provincial Small Cause Courts Act. They are therefore rent just as the jodi is, and according to the recent Full Bench ruling in *Soundaram Ayyar v. Sennia Naickan* (I.L.R., 23 Mad., 547), all suits for rent are of a nature cognizable by a Court of Small Causes. The amount here being under Rs. 500, no second appeal lies. The fact that the plaintiff asserted that he was entitled to recover the jodi, &c., on the liability of the land does not alter the nature of the suit in a case like this (see *Mullapudi Balakrishnayya v. Venkatanarasimha Appa Rau* (I.L.R., 19 Mad., 329). The second appeal therefore fails and is dismissed, but without costs."

* Original Side Appeal No. 24 of 1900 against the judgment of Mr. Justice Boddam in Civil Suit No. 30 of 1900.

HARISCHAN-
DRA DEO
v.
NARAYANA.

1901.
April 17.

KUPPUSAMI CHETTI v. RATHNAVELU CHETTI. a judgment within the meaning of article 15 of the Letters Patent and no appeal lies therefrom.

SUIT for partition. Second defendant had been appointed receiver in the suit and was called upon by summons to show cause why he should not pay fourth defendant Rs. 500 out of the funds in his hands for defraying the expenses of the defence of first defendant, for whom fourth defendant had been appointed guardian *ad litem* by the Court. An order was passed by the learned Judge sitting in chambers directing second defendant to pay the amount.

Against this order second defendant preferred this appeal.

Krishnamachariar and *V. Bhashyam Ayyangar*, for respondents, raised the preliminary objection that no appeal lay under article 15 of the Letters Patent, this not being a judgment within the meaning of that article.

Seshagiri Ayyar (with him *S. Subrahmania Ayyar* and *V. Krishnasami Ayyangar*) for appellants:—The decision in *R. v. R.*(1) lays down that even when an adjournment is refused an appeal lies. [SHEPARD, J.—The question of adjournment was very subsidiary in that case.] There was a distinct pronouncement in that judgment that an order refusing an adjournment is a judgment. Moreover, the definition of a judgment in *The Justices of the Peace for Calcutta v. The Oriental Gas Company*(2) covers an order like the present. In a more recent case, *Commercial Bank of India, Limited v. Sahju Saheb*(3), it has been held that an order under section 372 is appealable. The definition of “judgment” in the Civil Procedure Code also suggests that an appeal lies.

Krishnamachariar, in reply, contended that the order in question was merely interlocutory and did not finally decide the rights of the parties.

JUDGMENT.—The question whether the order appealed against is a judgment within the meaning of the Letters Patent must be considered with reference to the circumstances as they stood when the order was made. It is an order requiring the appellant, as receiver, to advance a sum of money to one of the parties to the suit for her defence. Ordinarily, when money is so advanced

(1) I.L.R., 14 Mad., 88.

(2) 8 B.L.R., 433.

(3) I.L.R., 24 Mad., 252.

provision is ultimately made for it in the decree. If the plaintiff succeeds in a suit the money which he has been required to advance for the defence conducted on behalf of a minor-defendant is recoverable as part of the costs of plaintiff. On the face of the order it is an order to make an advance of money which in a certain event will be recoverable. In that sense it is not a final order and does not finally determine any right or question between the parties. We cannot distinguish the present order from an order for stay of execution or for giving security for costs. In *R. v. R.*(1) it was not necessary to decide that the order in so far as it was an order for adjournment was appealable. That part of the order under appeal was left untouched by the Court of Appeal.

We must dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Benson.

ALABI KOYA AND ANOTHER (DEFENDANTS NOS. 7 AND 8),
APPELLANTS,

v.

MUSSA KOYA AND OTHERS (DEFENDANTS NOS. 4 TO 6),
RESPONDENTS.*

Muhammadan Law—Gift of one-third of donor's interest in property—Donees not put into possession—Validity of gift—Doctrine of “musha,” or confusion—Civil Courts Act (Madras)—Act III of 1873, s. 16.

Certain property having been taken up under the Land Acquisition Act, two persons claimed a share in the compensation to be paid in respect of it, alleging that the property in question had been assigned to them by a registered deed of gift and that it had devolved upon their assignor as a sharer under the Muhammadan Law, in the estate of a deceased relative. The deed of gift recited the fact that the assignor had become entitled to 14 out of 24 shares in the said estate and authorised the claimants to collect the assignor's shares from tenants and others who were in possession of the properties by means of suits or mediation and directed the claimants to take as a gift to their mosque one-third of the net balance so collected. The claim was disallowed by the Court of First Instance on the ground that the gift was invalid under Muhammadan Law, because the

(1) I.L.R., 14 Mad., 88.

* Appeal No. 66 of 1900 against the award of K. Krishna Rao, Subordinate Judge of South Malabar at Calicut, in Land Acquisition Miscellaneous Petition No. 891 of 1899.

KUPPUSAMI CHETTI v. RATHNAVELU CHETTI.

1901.
February
12, 13.
May 2.

ALABI KOYA claimants, as donees, had not been put into possession of the property, and also because the gift was of an undefined share and therefore invalid according to MUSSA KOYA. Muhammadan Law by reason of "musha" or confusion:

Held, that even if the doctrine of "musha" was in force in the Presidency of Madras, the claimants were entitled to be paid the compensation claimed.

Whether the doctrine of "musha" is in force in the Presidency of Madras.—*Quare*.

Per BENSON, J.—The validity of the gift was not "a question regarding succession, inheritance, marriage or caste, or any religious usage or institution," as referred to in the Madras Civil Courts Act, 1873, and therefore the rules of Muhammadan Law with regard to gifts were not necessarily the rules by which the question should be decided.

The Muhammadan Law as adopted by our Courts does not require immediate possession to be given in all cases, and it may be doubted whether even the restricted rule as to possession is any longer adapted to modern requirements and whether the mode of transfer laid down as obligatory on Europeans and Hindus by section 123 of the Transfer of Property Act and adopted by the parties in this case, (namely, by registered instrument attested by two witnesses and signed by the donor), ought not in equity and good conscience to be held to be as efficacious as delivery of possession in the case of Muhammadans. *Mahomed Buksh Khan v. Hosseini Bibi*, (L.R., 15 I.A., 81; I.L.R., 15 Calc., 684), referred to.

APPEAL against the decision of a Subordinate Judge in respect of an award made by a Special Deputy Collector and referred by him under section 30 of the Land Acquisition Act. The Special Deputy Collector had taken up a piece of land for the railway extension to Cannanore, and allowed compensation amounting to Rs. 129-5-10, in respect of it. This sum was claimed by a number of persons, amongst whom were defendants Nos. 7 and 8, who pleaded that one E. Kunhayan Koya (deceased) had held a mortgage of Rs. 100 on the land in question; that the said Kunhayan Koya died, leaving as his heirs a widow, a half sister, and his father's brother's son's son Kandamkolangare Mammad; that according to the Muhammadan Law, the heirs were entitled to different shares; and that Mammad had assigned one-third of his share by a registered deed of gift to defendants Nos. 7 and 8 bearing date 27th August 1897. The material parts of this deed (which was filed as exhibit I) were as follows:—"To the properties left by the deceased Kunhayan Koya, (son of S. K., who was brother of my deceased father's father A), K, the sister of full blood of the deceased Kunhayan Koya, his wife B, and myself, alone are entitled. Kunhayan Koya died on the 25th January 1897. All his properties are, according to Islamshra, to be divided into 24 divisions, his wife getting a fourth share, *i.e.*, $\frac{1}{24}$, his

sister K getting a sixth share, *i.e.*, $\frac{1}{24}$, and I getting the rest, *i.e.*, $\frac{11}{24}$. ALABI KOYA. I execute this karar in favour of you thangals, abovenamed, MUSSA KOYA. [defendants Nos. 7 and 8] to collect my shares according to Islamshra, from tenants and others who are in possession of the properties, in accordance with the terms hereinafter mentioned. I authorize you thangals and the following persons namely whom I associate with you for rendering you personal assistance in this behalf, to collect and realize my 14 shares by mediation or by suits, and you thangals should spend all moneys necessary and incidental to the same. After deducting the expenses from the sums so collected, I agree to divide the balance into three shares, one share to be taken as a gift to your (thangals') mosque, one share to be given to me, and the remaining one share to be divided into six, of which two shares to be taken by you thangals and the remaining four shares to be given to I hereby give you thangals full power and authority to collect the amounts due to my share, you and others to do all things necessary for the same. I further agree that neither I, thangals or any others, should act in contravention to the terms of this karar, and if any one does so act, such act or acts are invalid."

The Subordinate Judge, in considering whether the transfer set up by defendants Nos. 7 and 8 of one-third share of Mammad's claim in the property was a valid one, said:—"I think that even if their transferor Mammad was one of the kanomdar Kunhayan's heirs, their claim is unsustainable. Their transfer deed (exhibit I) executed by Mammad is, under the Muhammadan Law, invalid. It is really a deed of gift and as the property thereby given was not put in possession of the donees, the gift cannot be upheld. This invalidity is not the less clear because the deed deals with the undefined share alleged to belong to the donor. The share was capable of partition and so the prohibition according to the rule of *musha* applied to it (*Hussain v. Shaik Mira*(1)) must prevail. The rule has been stated generally by the Allahabad High Court in *Rahim Bakhsh v. Muhammad Hasan*(2) as follows:—"Actual delivery of possession of the gift of property is a condition precedent to the validity of the transfer of ownership to the donee, and, indeed, it is in consequence of the stringent requirements of that law on this point, that gifts of property held in joint

(1) I.L.R., 18 Mad., 46.

(2) I.L.R., 11 All., 1 at p. 9.

ALABI KOYA v. MUSSA KOYA. co-parcenership (musha) have been held to be invalid, because perfect and exclusive possession of joint undivided shares cannot be given to the donee. *Vide* note No. 4 at page 520, Baillie's 'Digest.' He disallowed the claim of defendants Nos. 7 and 8 and ordered them to pay the costs of the reference.

Against that decision defendants Nos. 7 and 8 preferred this appeal.

J. L. Rosario for appellant:—The contention of the appellants is (1) that exhibit I is not a deed of gift but a transfer for consideration and (2) that even if it be a deed of gift it is valid, the rules of Muhammadan Law not being applicable. As to the first contention the deed shows that it is not a gift, and it is submitted that the Subordinate Judge's construction is erroneous. On the second contention my argument is that the Courts in the Madras Presidency are empowered to administer Muhammadan Law only under section 16 of the Civil Courts Act. By that section, Courts are not authorized to administer the Muhammadan Law as to gifts even among Muhammadans. Courts, no doubt, have administered the Muhammadan Law of gifts but not as a rule of Muhammadan Law but as a rule of justice, equity and good conscience under clause (c) of section 16 of the Civil Courts Act. [He referred to *Mussumat Shumsh-ool-nissa v. Mussumat Zohra Beebee*(1); *Mussumat Chando v. Hakeem Alim-ood-deen*(2); *Ibrahim Saib v. Munt Mir Udin Saib*(3); *Sheikh Kudratulla v. Mahini Mohan Shaha*(4); and *Gobind Dayal v. Inayatullah*(5).] Since the enactment of the Transfer of Property Act the Courts are no longer at liberty to act under clause (c) of section 16 of the Civil Courts Act, because a "specific rule" (namely, that enacted by the Transfer of Property Act) as to gifts does now exist. The rules of Muhammadan Law as to gifts, therefore, cannot now be administered whether as rules of Muhammadan Law or as rules of justice, equity and good conscience. Nor does section 129 of the Transfer of Property Act render the Act inapplicable to Muhammadans. That section simply means that where Courts are empowered to administer Muhammadan Law, they will continue to administer it,—the Transfer of Property Act applying to all India and in some parts of India the Muhammadan Law of gifts being

(1) 6 N.W.P.H.C.R., 2.

(4) 4 B.L.R., 134.

(2) 6 N.W.P.H.C.R., 28.

(5) I.L.R., 7 All., 775.

(3) 6 M.H.C.R., 26.

constituted the law of the country by statutory enactment, (see Punjab Laws Act XII of 1878, section 1; Central Provinces Laws Act XX of 1875, section 5; Oudh Laws Act XVIII of 1876, section 3). The Subordinate Judge should have applied the law provided by the Transfer of Property Act, and under that Act there is nothing to render exhibit I invalid. Even if Courts can administer the Muhammadan Law of gifts—not as a rule of Muhammadan Law but as a rule of equity and good conscience, they will hesitate before adopting the Muhammadan Law of "musha." It was condemned by the Privy Council in *Sheikh Muhammad Mumtaz Ahmad v. Zubaida Jan*(1) as wholly unadapted to a progressive state of civilization and can hardly therefore be called a just or equitable rule.

Sundara Ayyar for respondents Nos. 1 and 2:—My first submission is that the appellants have no right to carry on proceedings in their own name. Exhibit I is only a power-of-attorney. In such a case the proceedings should be conducted in the name of the principal. The law is clear on the point. If exhibit I is a deed of gift, and the consideration set out is really no consideration, it is submitted that the Subordinate Judge was right in applying the Muhammadan Law of gifts. Section 129 shows that the Transfer of Property Act, so far as it refers to gifts, does not apply to Muhammadans and therefore, even if the Court has no power to administer the Muhammadan Law, it will do so as a rule of equity and good conscience under clause (c) of section 16 of the Civil Courts Act. The Courts have been administering Muhammadan Law, and it is now too late to assert that it should not be applied in this presidency. I submit that it should be applied to this case. No possession is given under exhibit I. The Madras cases have, till now, proceeded on the understanding that the Muhammadan Law of gift applies to Muhammadans. See *Hussain v. Shaik Mira*(2) and *Sharifa Bibi v. Gulam Mahomed Dastagir Khan*(3). Even under the Madras Civil Courts Act, section 16, this is a question regarding succession, as succession will be affected by gift. There is nothing repugnant to equity and good conscience in applying the Muhammadan Law of gifts to Muhammadans.

(1) L.R., 16 I.A., 205; I.L.R., 11 All., 460.

(2) I.L.R., 13 Mad., 46.

(3) I.L.R., 16 Mad., 43.

ALABI KOYA v. MUSSA KOYA. J. L. Rosario in reply:—No doubt Courts have administered the Muhammadan Law but not as a rule of Muhammadan Law,—only as a rule of justice and equity. (*Sheikh Kudratulla v. Mahini Mohan Shaha*(1) and *Ibrahim Saib v. Muni Mir Udin Saib*(2).) The question whether there is power to so administer that law after the enactment of the Transfer of Property Act has never been considered.

SHEPARD, J.—Now that we have had the document of 27th August 1897 translated, I think that the appellants being the tangals are clearly entitled to the money which represents the share assigned to the mosque by Mammad. By that document he gave the tangals power to collect his share of the estate of Kunhayan Koya. They would, I apprehend, have been entitled to demand from the Collector the whole of Mammad's share in the particular fund and having collected it to keep a third for the mosque. In my opinion this is not a case to which the doctrine of *musha* can be applied, assuming that the doctrine is in force in this Presidency. I would reverse the award and remand the case for disposal according to law. Costs will abide the result.

BENSON, J.—In this case one Kunhayan is said to have held a kanom (usufructuary mortgage) over certain land for Rs. 100. On his death his rights as kanomdar are said to have passed to his widow, his half-sister and his father's brother's son's son, Mammad, as sharers under Muhammadan Law. This Mammad assigned one-third of his share by a registered deed of gift to the seventh and eighth defendants in the suit. The land was taken up under the Land Acquisition Act and the seventh and eighth defendants claimed a share of the compensation paid.

The Subordinate Judge disallowed their claim on the ground that the gift was invalid under Muhammadan Law because the property given was not put into possession of the donees, and also because what was given was an undefined share and therefore invalid according to Muhammadan Law by reason of "*musha*" or confusion. The questions raised for our determination are—

(1) Whether the rules of Muhammadan Law are applicable to the case? and

(2) If so, whether the gift is invalid according to that law?

(1) 4 B.L.R., 134.

(2) 6 M.H.C.R., 26.

I am of opinion that the Muhammadan Law as such and of its own force has no application, but the rule which would be applicable to such a case under Muhammadan Law may be applied by us if it is in accordance with justice, equity and good conscience to do so. This is clear from section 16 of the Madras Civil Courts Act, 1873, which enacts as follows:—

"Where, in any suit or proceeding, it is necessary for any Court under this Act to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution;

"(a) The Muhammadan Law in cases where the parties are Muhammadans, and the Hindu Law in cases where the parties are Hindus; or

"(b) Any custom (if such there be) having the force of law and governing the parties or the property concerned, shall form the rule of decision unless such law or custom has by legislative enactment been altered or abolished;

"(c) In cases where no specific rule exists the Court shall act according to justice, equity and good conscience."

The validity of the gift in this case is not "a question regarding succession, inheritance, marriage or caste, or any religious usage or institution," and therefore the rules of Muhammadan Law with regard to gifts are not necessarily the rules by which we should decide the question. This view is in accordance with that of the Full Bench of the Allahabad High Court in *Gobind Dayal v. Inayatullah*(1). In construing the Bengal Civil Courts Act, 1871, the terms of which are similar to those of the Madras Civil Courts Act, it was there held that "the Court is not bound to administer the Muhammadan Law in claims of pre-emption, but on grounds of equity that law has always been administered as between them in claims for pre-emption."

Again in the Full Bench case of *Sheikh Kudratulla v. Mahini Mohan Shaha*(2) Sir Barnes Peacock, C.J., says at page 169, "The Muhammadan Law is not the law of British India. It is only the law so far as the laws of India have directed it to be observed. . . . We are bound by Regulation IV of 1793, except so far as that law has been modified by Regulation VII of 1832." He then refers to section 15 of the former Regulation which is, for

(1) I.L.R., 7 All. 775, at p. 815.

(2) 4 B.L.R., 134, at p. 169.

ALABI KOYA v. MUSSA KOYA. our present purposes, similar in terms to the Bengal Civil Courts Act, 1871, and to section 16 of the Madras Civil Courts Act. So also in the case of *Ibrahim Saib v. Muni Mir Udin Saib*(1) Holloway, Ag. C.J., says :—"The Muhammadan Law binds Muhammadans "no more than others except in the matters to which it is declared "applicable. It is then law because of its reception as one of our "law sources in the matters to which it applies. Where, however, "not so received, it can only be prevailing law because consistent "with equity and good conscience" "The question, "therefore, resolves itself into whether it is consistent with equity "and good conscience to import an exceptional rule opposed to the "principle of law administered here." He then examined the ground on which the rule of Muhammadan Law as to pre-emption sought to be enforced in that case was founded and concluded "I "am of opinion that it is manifestly opposed to both (equity and "good conscience) and that no such obligation in this Presidency "binds a Muhammadan or any one else."

It was suggested in argument that section 129 of the Transfer of Property Act by implication makes the Muhammadan Law applicable, but this is not so. Section 129 merely enacts that "nothing in this chapter (as to gifts) shall be deemed to affect any rule of Muhammadan Law," that is, if there is any rule of Muhammadan Law which is administered as law by the Courts, it shall not be affected by anything in this chapter. It will continue to be administered as law by the Courts just as if this chapter was not enacted. In considering this section of the Transfer of Property Act and also in considering the case law of other parts of India it is necessary to bear in mind that in the Civil Courts Acts of many Provinces the Muhammadan Law of gifts is specifically declared to be applicable in those Provinces as between Muhammadans (*e.g.*, Central Provinces, section 5, Act XX of 1875; Punjab, section 5, Act XII of 1878; Oudh, section 3, Act XVIII of 1876). In those Provinces the Muhammadan Law as to gifts applies by virtue of the Civil Courts Acts and is not affected by the rules of the Transfer of Property Act as to gifts. In other parts of India rules of Muhammadan Law, though not made applicable by legislation, have been adopted by the Courts as in accordance with equity and good conscience and have been consistently enforced,

(1) 6 M.H.C.R., 26 at p. 31.

as such, between Muhammadans. Some of the rules of the Muhammadan law of pre-emption have, in this way, been adopted in Bengal and in the North-West Provinces, though not in Madras. Such rules would apparently be unaffected by the Transfer of Property Act so long as the Courts continued to enforce them as being in accordance with equity and good conscience.

Turning now to the facts of the present case, I am of opinion that the gift is not invalid for either of the reasons assigned by the Subordinate Judge. The rule of Muhammadan Law with regard to "*musha*" is defined by the Privy Council as the rule "that a gift of an undivided share in a subject capable of division is not good because it would lead to confusion." We have not been referred to, nor am I aware of, any case in which this Court has held that the rule as laid down in Muhammadan Law is applicable in this Presidency. In the case of *Hussain v. Shaik Mira*(1), a father having a share in a house gave to his daughter a moiety of the share to which he was entitled. Objection was taken to the validity of the gift because of confusion or *musha*, but the Court held that the gift was not void for indefiniteness. I can see no reason why the present gift should be regarded as more indefinite or more likely to lead to confusion than the gift in that case. In the Privy Council case already referred to (*Mahomed Buksh Khan v. Hosseini Bibi*(2)) their Lordships referring to the doctrine of *musha* observed that by Muhammadan Law one of two sharers might give his share to the other and add "supposing there are three sharers what is there to "prevent one of the three giving his share to either of the other two? "Mr. Doyme was asked what confusion that would introduce. Mr. "Doyme took refuge in the doctrine itself which he said was a very "refined doctrine. To extend it to this case would be a refinement on "a refinement amounting, in their Lordships' opinion, almost to "a *reductio ad absurdum*," (page 701). The fact seems to be that the doctrine of *musha* is a vague and shadowy one. There is nothing to show that it has been adopted by the Courts in this Presidency, nor is there any reason in equity and good conscience why we should hold that the present gift is invalid because of indefiniteness.

With regard to the objection that possession was not given to the donees, I observe that the Muhammadan Law adopted by our

(1) I.L.R., 13 Mad., 46. (2) L.R., 15 I.A., 81 I.L.R., 15 Calc., 684 at p. 701.

ALABI KOYA
v.
MUSSA KOYA.

Courts does not require immediate possession to be given in all cases and it may be doubted whether even the restricted rule as to possession is any longer adapted to modern requirements and whether the mode of transfer laid down as obligatory on Europeans and Hindus by section 123 of the Transfer of Property Act and adopted by the parties in this case, viz., by registered instrument attested by two witnesses and signed by the donor, ought not in equity and good conscience to be held to be as efficacious as delivery of possession in the case of Muhammadans. The certainty, publicity and formality which attend delivery of possession, are at least as well secured by a registered and attested instrument, and no case has been quoted in which a transfer evidenced in this way has been held to be invalid in this Presidency for want of delivery of possession.

In the case of *Khader Hussain Sahib v. Hussain Begum Sahiba*(1) the document was apparently not registered and the donor continued to take the profits of the land until her death. However that may be, in the case of *Mahomed Buksh Khan v. Hosseini Bibi*(2) already referred to, the Privy Council held that it was not necessary for the donor to give immediate possession to the donees; and that where the instrument entitles the donee to take possession and the donor has done all in his power to perfect the contemplated gift, no objection can be taken to the gift on the score of want of possession by the donor or because possession was not given to the donee at the time. In this case exhibit I gives the donees authority to realize the property "from tenants and others who are in possession" by means of suits or by negotiation. The gift, therefore, cannot be regarded as invalid for want of possession in the donor or donees at the time of transfer.

I would therefore set aside the award of the Subordinate Judge and remand the petition for disposal according to law.

(1) 5 M.H.C.R., 114.

(2) L.R., 15 I.A., 81; I.L.R., 15 Cal., 684.

APPELLATE CRIMINAL.

Before Mr. Justice Davies, Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

KING-EMPEROR

v.

TIRUMAL REDDI AND OTHERS.*

KING-EMPEROR

v.

SUBBI REDDI.†

Criminal Procedure Code—Act V of 1893, ss. 285, 537—Commencement of trial for murder by Judge and two assessors—Absence of one assessor during portion of the trial—Resumption of his seat by assessor and his opinion expressed and recorded by the Judge—Loyalty of trial—Conspiracy—Abetment—Penal Code—Act XLV of 1860, s. 109.

A trial for murder, conspiracy to murder, and abetment of murder, duly commenced before a Sessions Judge and two assessors, and continued for about seven weeks. During that period one of the assessors was permitted to absent himself during two whole days, and five half days respectively; at first, so that he might visit his mother on her death-bed, and subsequently, to perform the daily obsequies rendered necessary by her decease. He then resumed his seat as an assessor and continued so to act until the termination of the trial, all the depositions recorded in his absence having been read by him on his return. At the conclusion of the trial the Sessions Judge invited the opinion of each assessor, and recorded it. The opinion of each was that all the accused were

* Referred Trial No. 61 of 1900, referred by W. M. Thorburn, Sessions Judge of Kurnool, for confirmation of the sentence of death passed in Sessions Case No. 53 of 1900. In this case, accused Nos. 1, 4 and 5 preferred Criminal Appeal No. 875 of 1900; accused No. 2 preferred Criminal Appeal No. 874 of 1900; accused Nos. 3 and 6 preferred Criminal Appeal No. 876 of 1900, against the sentence of transportation for life; accused Nos. 7 and 8 preferred Criminal Appeal No. 877 of 1900; accused No. 9 preferred Criminal Appeal No. 878 of 1900. The Public Prosecutor preferred Criminal Appeal No. 1028 of 1900, under section 417 of the Criminal Procedure Code, against the judgment of acquittal of accused Nos. 1, 2 and 9, on the charge of entering into a conspiracy to murder.

† Referred Trial No. 9 of 1901, referred by G. W. Elphinstone, Sessions Judge of Kurnool, for confirmation of the sentence of death passed in Sessions Case No. 1 of 1901. In this case, the accused preferred Criminal Appeal No. 143 of 1901.

KING-
EMPEROR
v.
TIRUMAL
REDDI.

guilty and the Judge, concurring in that opinion, convicted the accused. The prisoners appealed to the High Court, where it was contended that the Judge had acted contrary to law in allowing the assessor who had been absent to resume his seat as an assessor, and in inviting and taking into consideration his opinion in deciding the case; and that the conviction ought to be quashed:

Held, (DAVIES, J., dissenting), that the finding and sentence appealed against had been passed by a Court of competent jurisdiction within the meaning of section 537 of the Code of Criminal Procedure and that the defect in the trial did not affect its validity and was cured by that section if the irregularity had "not in fact occasioned a failure of justice"; and that no such failure of justice had been shown:

Per BHASHYAM AYYANGAR, J.—Under the Indian Penal Code conspiracy except in cases provided for by sections 311, 400, 401, 402, and 121A of the Code is a mere species of abetment where an act or an illegal omission takes place in pursuance of that conspiracy, and amounts to a distinct offence for each distinct offence abetted by conspiracy.

CHARGES of murder, conspiracy to murder and abetment of murder. In the first referred trial, (Sessions Case No. 53 of 1900), nine persons were charged as aforesaid. In the second referred trial, (Sessions Case No. 1 of 1901), one person was charged with conspiracy to murder and murder. The accused in the latter case was tried separately because he had not been arrested in time to be tried with the accused in the former, the evidence being, for all practical purposes, identical in both cases.

The indictment in Sessions Case No. 53 of 1900 contained the following counts:—“(i) That you, . . . accused Nos. 1 and 2, on or about the 19th day of March 1899 at . . . , entered into a conspiracy with . . . Subbi Reddi [accused in Sessions Case No. 1 of 1901] and accused No. 9 to murder the deceased . . . Ranga Reddi; that, in pursuance of that conspiracy, the deceased Ranga Reddi was murdered on the 11th June 1900 at Rallavagu at about 11 A.M., and that you have thereby committed an offence punishable under sections 302 and 109 of the Indian Penal Code, and within the cognizance of the Court of Sessions, Kurnool. (ii) That you, accused Nos. 3, 4, 5, 6, 7 and 8 with the accused Nos. 1 and 2 and Subbi Reddi on or about the 11th day of June 1900 at Rallavagu vanka within the limits of . . . did murder the deceased . . . Ranga Reddi and that you have thereby committed an offence punishable under section 302 of the Indian Penal Code, and within the cognizance of the Court of Sessions, Kurnool. (iii) That you, accused No. 9 . . . on or about the 19th day of March

KING-
EMPEROR
v.
TIRUMAL
REDDI.

1899 at . . . , entered into a conspiracy with the accused Nos. 1 and 2 and Subbi Reddi to murder . . . Ranga Reddi, in consequence of which the said Ranga Reddi was murdered on the 11th June 1900; that you abetted the murder of Ranga Reddi by giving information of the movements of Ranga Reddi on the 11th June 1900 to the first accused in pursuance of which information prisoners Nos. 1 to 8 murdered Ranga Reddi at Rallavagu on the 11th June 1900 and that you have thereby committed an offence punishable under sections 302 and 109 of the Indian Penal Code and within the cognizance of the Court of Sessions, Kurnool.”

The indictment in Sessions Case No. 1 of 1901 contained the following counts:—“(i) That you [Subbi Reddi] on or about the 19th day of March 1899 at . . . entered into a conspiracy with . . . [accused Nos. 1, 2 and 9 in Sessions Case No. 53 of 1900] to murder one . . . Ranga Reddi of Gooty in pursuance of which conspiracy the said Ranga Reddi was murdered on 11th June 1900 and thereby committed an offence punishable under sections 302 and 109 of the Indian Penal Code and within the cognizance of the Court of Sessions, Kurnool. (ii) That you on or about the 11th day of June 1900 at Rallavagu vanka within the limits of . . . committed murder by causing the death of the said Ranga Reddi and thereby committed an offence punishable under section 302 of the Indian Penal Code, and within the cognizance of the Court of Sessions, Kurnool.”

The following short statement of the effect of the prosecution evidence has been prepared from the judgments delivered in the High Court:—The deceased Ranga Reddi, B.A., B.L., was a first-grade pleader, who practised in the district of Anantapur at Gooty. Accused No. 1 was a brother-in-law of accused No. 2, both of them being men of some wealth and position. Accused Nos. 3, 4 and 5 were servants of accused No. 1. It was alleged that accused Nos. 6, 7 and 8 had been employed by accused No. 2 or by the accused in the other case, Subbi Reddi, to commit the murder; accused No. 9 was a second-grade pleader in practice at Gooty, and an undivided brother of accused No. 1. The accused in Sessions Case No. 1 of 1901, namely, Subbi Reddi, was also a brother-in-law of accused No. 1 in the earlier case, he having married Subbi Reddi's sister. According to the prosecution, the murder of Ranga Reddi took place in the following manner:—On the 11th June 1900

KING-
EMPEROR
V.
TIRUMAL
REDDI.

the deceased pleader, B. Ranga Reddi, was travelling in his cart from Rayalcheruvu railway station, which he left at 10 A.M., to his father's house in Chimalavagupalli, seven miles off, accompanied by his gumastah Narayan Reddi and by two clients belonging to a distant village named Rayampalli, the cart being driven by a bandyman named Hanumantu. On the way, the two clients got down to drink at a stream and then followed at a little distance behind the cart. When the cart got to the dry bed of a stream called Rallavagu or vanka, the time then being about 11-30 A.M., the first eight accused in the earlier case and Subbi Reddi met the bandy, threw stones at it and stopped it, the first accused firing his revolver at the bandy but without effect. Ranga Reddi fired a shot in return from a revolver which Narayan Reddi had brought with him from Chimalavagupalli but also without effect. Accused Nos. 5 and 6 then gave the bandyman a couple of blows with sticks on the leg and knocked him down, and accused No. 7 cut the rope which fastened the bullocks to the pole. Narayan Reddi, the gumastah, jumped down from the cart and tried to run away but was pursued and stopped by accused Nos. 5 and 8, who then turned back and stopped the two Rayampalli men (who had run up on seeing the disturbance) and threatened to kill them if they came further. Accused Nos. 2, 4 and 7 meantime dragged Ranga Reddi out of the cart and the accused No. 2 and Subbi Reddi cut him with their axes, accused No. 1 finally cutting his throat from ear to ear. When going away accused No. 1 took with him the revolver which the deceased had fired. Accused No. 3 was present armed with a stick but was not said to have taken any active part in the murder. Two raiyats who were in the fields half a mile or so from the spot, hearing the revolver shots, ran up to the scene of offence in time to see the murderers going away. They recognized accused Nos. 1 and 2 and Subbi Reddi, whom they had previously known, and spoke to Narayan Reddi about the murder.

All the accused pleaded not guilty, and the defence of all was that they had been elsewhere at the time of the murder, and that they knew nothing as to how or by whom it had been committed. They suggested that they had been falsely charged because the real offenders were not known, and because there had been long-standing and notorious enmity between the father of the deceased and accused Nos. 1 and 9; and that the other, being more or less

KING-
EMPEROR
V.
TIRUMAL
REDDI.

connected with them by relationship or position, had been falsely implicated for that reason.

The trial of the accused in Sessions Case No. 53 of 1900 was commenced in the Court of Session, consisting of the Judge sitting with two assessors, on 23rd August 1900, and closed on 24th October 1900. On 5th September, after 2 P.M. the first assessor, by permission of the Judge, absented himself from Court, and remained absent on 6th and 7th September, the trial proceeding. There was no sitting of the Court on 8th or 9th September and the first assessor resumed his attendance on 10th September and was present throughout the remainder of the trial, excepting on 16th, 17th, 18th and 19th September, on each of which days he was absent, by permission, until 1 P.M. The cause of this absence was a sufficient one and is referred to in the judgments of DAVIES and BHASHYAM AYYANGAR, JJ. Sessions Case No. 1 of 1901 was subsequently heard and determined. The result of the cases was as follows:— In Sessions Case No. 53 of 1900 the first eight accused were convicted of murder, the ninth accused being convicted of abetment of murder. The first, second and ninth accused were acquitted on the charge of conspiracy. Sentence of death was passed upon all excepting the third and sixth, who were sentenced to transportation for life. In Sessions Case No. 1 of 1901, the accused was also convicted and sentenced to death.

All the accused appealed.

The Public Prosecutor also appealed under section 417 of the Code of Criminal Procedure against the judgment of acquittal of the first, second and ninth accused in Sessions Case No. 53 of 1900, on the charge of entering into a conspiracy to murder. This appeal was numbered Criminal Appeal No. 1028 of 1900.

Mr. John Adam, for accused Nos. 1, 4 and 5 in Referred Trial No. 61 of 1900 and Criminal Appeal No. 875 of 1900, raised the preliminary objection that the trial in the Sessions Court was vitiated by reason of the absence of the first assessor during part of the trial. He contended that the evidence which had been recorded during his absence was very material, and that he had been wrongly allowed to give his opinion on the case as a whole. The first assessor, he said, was a retired Sub-Magistrate and his opinion would carry much weight and must undoubtedly have influenced the opinion, not only of the other assessor, but also of the Judge himself. He

KING-
EMPEROR
v.
TIRUMAL
REDDI.

referred to *Queen-Empress v. Babu Lal*(1). Even if no objection had been raised on behalf of the accused in the lower Court the Appellate Court would consider it now, as there could be no waiver in a criminal trial, especially where the jurisdiction of the Court was in question. He contended that under section 268 of the Code of Criminal Procedure, a Court of Session is not properly constituted unless there are at least two assessors, and that section 295 of the Code of Criminal Procedure contemplates the presence of at least two assessors throughout the trial; also that section 285 of the Code, though it lays down a special course of procedure upon the absence of an assessor, makes no provision for an assessor who has been absent to resume his seat at a later stage, and give his opinion on the case as a whole. The absence of the assessor, he submitted, was not a mere irregularity capable of being cured by section 537. The trial, no doubt, was valid in its earlier stages but it had become illegal from the moment at which the absent assessor was allowed to resume his seat, or at all events when the opinion of the absent assessor was asked and recorded. *Queen-Empress v. Munna Lal*(2) and section 289, sub-section (2), of the Code of Criminal Procedure were referred to, as indicating that the whole procedure in the Court below was vitiated. It was impossible to merely eliminate the first assessor's opinion, since the real question was as to the effect produced by that opinion in influencing the opinions alike of the second assessor and of the Judge. He referred to *Queen-Empress v. Muhammad Mahmud Khan*(3), *Queen-Empress v. Babu Lal*(1), *Proceedings of the Madras High Court, dated 22nd July 1869*(4) and *Queen-Empress v. Ram Lal*(5), as showing that the whole proceedings in the lower Court were illegal. Also to *Queen v. Matam Mal*(6) as showing that the Judge was bound to consult the opinion of each of the assessors and that, in consequence, the opinion of the first assessor could not be treated as mere surplusage.

Mr. C. Sabhapathi Ayya, for accused No. 2, contended that the taking of the opinion of the first assessor was not a mere error of procedure but that it went to the root of the trial and cited *Queen-Empress v. Appa Subhana Mendre*(7).

(1) I.L.R., 21 All., 106.

(2) I.L.R., 10 All., 414.

(3) I.L.R., 13 All., 337.

(4) Weir's Cr. Rul., 3rd ed., p. 927.

(5) I.L.R., 15 All., 136.

(6) 22 W.R., (Cr.R.), 34.

(7) I.L.R., 8 Bom., 200.

KING-
EMPEROR
v.
TIRUMAL
REDDI.

Mr. C. Krishnan, for accused Nos. 3 and 6, argued the same point.

K. Ramachandra Ayyar, for accused Nos. 7 and 8, referred to the case of *Empress of India v. Anant Ram*(1).

Sankaran Nayar and Sundara Ayyar, for accused No. 9, took the same objection and contended that the opinion of an assessor could not be considered in the same light as the testimony of an expert, as the trial in this case must be treated as one conducted by a Judge with the aid of two assessors. The opinion of the assessor was incapable of being expunged. The recording of the opinion was an illegal act. Section 537 of the Code of Criminal Procedure applies only to those cases where the proceedings are valid in law, though an irregularity has crept in of such a nature as not to affect the merits of the case. They contended that if persons who have no right to do so are called in to assist the Court, the constitution of the Court becomes illegal. They referred to the article on "Assessors" at pages 348, 349 of volume I of the Encyclopædia of the Laws of England.

Seshachariar and M. R. Krishna Ayyar for the accused in Referred Trial No. 9 of 1901 and Criminal Appeal No. 143 of 1901.

The Public Prosecutor, (Mr. E. B. Powell), in both cases and also in the appeal filed on behalf of the Crown, contended that though the procedure complained of might have been irregular it did not vitiate the trial and was cured by section 537 of the Code of Criminal Procedure. The objection that had been taken at the trial had not been clearly persisted in and the course taken had, he thought, been taken practically without opposition. The opinion of the absent assessor might be disregarded and treated as surplusage and as a nullity. If he had remained and never returned, no question could have arisen. The fact that he had resumed his seat and had expressed an opinion after hearing all the evidence which had been recorded in his absence read to him could not have caused any failure of justice.

On the 1st May 1901, their Lordships delivered judgments on the preliminary objection as follows:—

DAVIES, J.—As regards the preliminary objection that the convictions of the several appellants are bad in law inasmuch as

(1) I.L.R., 4 All., 293 at p. 295.

the case was not tried by a competent tribunal, the following are the facts:—The trial began on the 23rd August 1900 with the aid of two assessors as was right, and was regularly continued with the aid of the two assessors from day to day until the 5th of September. On the afternoon of that day and for the two following days, the 6th and 7th of September, the first assessor was allowed to absent himself on account of the illness and death of his mother while the trial proceeded with the aid of the one remaining assessor. The Judge did not dispense with the further services of the first assessor as he might have done under section 285 (1), Code of Criminal Procedure, and as he ought to have done if he could not adjourn the hearing, for on the assessor's return to the Court on the 10th of September, which was the next date of hearing after the 7th, the Judge reinstated him as first assessor, and the depositions of the prosecution witnesses Nos. 47 to 62 which had been taken during his absence for the 2½ days were then "shown to, and read by, him." The trial went on with the two assessors until the 14th September, but on the following 3 or 4 days (the Judge in his report is not very precise as to the dates) the first assessor was again allowed to absent himself every day up to 1 P.M. in order to perform his mother's funeral ceremonies, and the trial proceeded during his absence, as before, with only the remaining assessor, but "he read the depositions recorded "during his absence before he resumed his seat in the afternoons." The depositions taken on these occasions were those of defence witnesses. From the 19th September till the 29th idem, when the examination of witnesses was concluded, and up to the 15th October, when the trial was closed, both assessors sat together and, at the end of the trial, the opinion of each was taken and duly recorded.

It is thus clear that the trial purports to have been conducted with the aid of two assessors, and it is so made to appear on the face of the Judge's record. Neither in his judgment nor elsewhere is there anything to indicate that the two assessors had not sat together throughout the trial.

Now my learned colleagues are of opinion that it must be considered that the trial on and after the 5th September was held with the aid of only one assessor, which was permissible under section 285 (1), Code of Criminal Procedure, and that the resumed sittings of the first assessor and his taking part in the proceedings

after his absence from the 5th to 7th September should be treated as an irregularity not occasioning a failure of justice. I am unable to accept this view. In the first place the Judge did not, as a matter of fact, act under section 285 (1) nor does he profess to have done so, and in the second place the opinion of the first assessor finding the appellants guilty must have done them positive harm. The first assessor happens to be a retired Sub-Magistrate versed in criminal affairs and it is highly probable that his opinion had great effect on the mind of the second assessor, who is an ordinary trader devoid of forensic knowledge. Had the second assessor been left to give his own opinion without hearing the first assessor's opinion he might have given one different from what he did. In any case, the taking of the first assessor's opinion resulted in the concurrent opinion of two assessors which must necessarily have carried more weight with the Judge than the single opinion of one. The opinion of an assessor is given in the exercise of a judicial function imposed on him by law, and the Judge is bound to take it into consideration. He cannot dispense with it. Considering the status of the first assessor the Judge was doubtless influenced by his opinion in coming to his own conclusions on the many doubtful points in the case, which he has himself set out in his judgment, but he had no right to ask for or take that opinion, and by having it his judgment was vitiated. I can see no analogy between assessors in civil cases in England and the assessors we have in criminal cases in India. A Court consisting of a Judge and two or more assessors by which every person must be tried before a Court of Session when he is not tried by jury, appears to me a compromise between a trial by Judge and jury, and by a single Judge. It is a constitutional privilege, the benefit of which is not confined to the subject, for in an appeal by a person convicted in an assessor's case, the Crown can as well rely on the opinion of the assessors if it is in favour of a conviction as the prisoner can when their opinion is the other way.

I must therefore take it as the fact that this trial was a trial held with the aid of two assessors as the law requires (section 268, Code of Criminal Procedure). It began with two assessors and it ended with the two same assessors and the depositions taken during the absence of the first assessor were handed to him for perusal as a functionary who was taking part in the whole trial.

KING-
EMPEROR
v.
TIRUMAL
REDDI.

KING-
EMPEROR
v.
TIRUMAL
REDDI.

The absence of the first assessor extended in all to 4 or 4½ days, upon which the evidence of witnesses both for the prosecution and for the defence was being taken, out of a total of 30 days occupied in their examination. So that, there was a lawfully constituted Court for 26 days while for 4 days there was not. The question then is whether if in a trial held by a Judge with the aid of two assessors, one of the assessors is absent for a considerable portion of the time during which the most important part of the trial, viz., the examination of witnesses, is proceeding, the Court ceases to be a Court of competent jurisdiction. It seems to me that there can be no doubt that in such circumstances the trial is rendered null and void, for section 295, Code of Criminal Procedure, lays down the rule that if a trial is adjourned, as this was, from day to day, "the jury or assessors shall attend at the adjourned sitting and at every subsequent sitting until the conclusion of the trial." It follows that, in my opinion, the conviction of the appellants must be set aside and a re-trial ordered.

BENSON, J.—I do not think that there is any validity in the preliminary objection.

The law does not require that a trial should be held with the aid of two assessors throughout. It requires that a trial shall be commenced with the aid of two assessors, but it makes a special provision (section 285, Criminal Procedure Code) for the unavoidable absence of one of the assessors after the trial has commenced. In such case the law allows the trial to proceed and to be completed with the aid of one assessor only. It is only if both assessors are unavoidably absent that the proceedings are to be stayed and a new trial, with the aid of fresh assessors, held. In the present case one assessor was present throughout, and if the second assessor had not been allowed to return after absenting himself for a time, there could be no question as to the validity of the trial. The law, it is true, does not contemplate that an assessor, having once absented himself, should return and take part in the proceedings at a later stage, and the Sessions Judge ought not to have allowed him to do so in this case. His having done so was, no doubt, an irregularity, but the law expressly provides (section 537, Criminal Procedure Code) that an irregularity in the proceedings is no ground for setting aside a finding or sentence "unless the irregularity has, in fact, occasioned a failure of justice." The onus is on the appellant to show that there has, in fact, been a failure

of justice owing to the irregularity. This has not been shown in the present case. In my opinion, therefore, the preliminary objection has no validity and should be overruled.

BHASHYAM AYYANGAR, J.—These are appeals in Sessions Case No. 53 of 1900 before the Sessions Judge of Kurnool Division. The trial of the said case commenced on 23rd August 1900 and closed on 15th October 1900 when judgment was reserved. The judgment was given on 24th October 1900 and the first eight accused in the case were convicted of murder and the ninth of abetment of murder. The trial before the Court of Session was with the aid of two assessors, viz., Gundu Rao and P. Seshayya Chetti, hereinafter referred to as the first and second assessor respectively. The first assessor was allowed by the Judge to go to Gooty to the death-bed of his mother at 2 P.M. on the afternoon of 5th September 1900 and he was also absent on the 6th and 7th September, but the trial proceeded during his absence. There was no trial of the case on Saturday the 8th and Sunday the 9th idem, and it was adjourned to Monday the 10th, on which day the first assessor returned and continued to attend the trial throughout, except on 16th, 17th, 18th and 19th September, on each of which days he was allowed to absent himself till 1 P.M. to enable him to perform the daily obsequies of his deceased mother. It appears that all the depositions recorded in his absence were shown to and read by him. It is not contended that there was no sufficient cause for his absence on the days above mentioned, and it appears that no objection was raised on either side to the Judge permitting him to absent himself on those days. The Judge in his letter, dated 20th March 1901, further reports that when the first assessor returned "some doubts were expressed as to the legality of the '(assessor's)' return and felt by myself, but finally it was decided with the concurrence of both parties, that he might be allowed to return, as the validity of the trial could not be affected in either case, so long as one assessor was present throughout the trial, according to section 285, Criminal Procedure Code." The counsel who represented all the accused in the Sessions Court also appeared in this Court as counsel for the second accused, the appellant in Appeal No. 874 of 1900, and says that he did not waive his objection though he did not press it or make any protest after the Judge ruled that the trial could not be affected by the return of the first assessor. The statement of the counsel made in this Court, that he did not waive the objection,

KING-
EMPEROR
v.
TIRUMAL
REDDI.

KING-
EMPEROR
v.
TIRUMAL
REDDI.

must be accepted, though the Judge might have misunderstood counsel as concurring in the view of the Judge. It is very much to be regretted that any doubt should have been felt on a point which is so plain and that the first assessor should have been allowed to resume his seat as an assessor instead of the trial proceeding, as it undoubtedly could, with the aid of the remaining assessor alone under section 285, clause (1). The Public Prosecutor, who also appeared in the Sessions Court, now admits that the first assessor ought not to have been allowed to resume his seat as assessor. At the conclusion of the trial the Sessions Judge invited the opinion of each assessor and recorded it, viz., that all the accused were guilty, and the Judge concurring in such opinion, convicted the accused. Upon the above facts a preliminary ground has been raised and argued in the above appeals, that the Judge having acted contrary to law in allowing the first assessor to resume his seat as assessor and in inviting and taking into consideration his opinion in deciding the case, the trial ought to be set aside and the conviction quashed.

In my opinion, the finding and sentence appealed against is one passed by a Court of competent jurisdiction within the meaning of section 537 of the Criminal Procedure Code and that the defect in the trial does not affect its validity and is one that can be cured under that section, if the irregularity "has not in fact occasioned a failure of justice."

The chief contentions raised in support of the preliminary ground are, that assessors are members of the Court, that, therefore, the Court was illegally constituted from the time when the first assessor was allowed to resume his seat as assessor on 10th September, and that, even if assessors are not members of the Court, yet, inasmuch as the Sessions Judge invited the opinion of the first assessor when in law he had not the status of an assessor, and decided the case in concurrence with such opinion, the finding and sentence appealed against cannot be regarded in law as one passed by a Court of competent jurisdiction. If either of these contentions be well founded, it will go to the root of the case and the result will be that a new trial will have to be ordered. Section 268, Criminal Procedure Code, provides that all trials before a Court of Session shall be either by jury or with the aid of assessors. In the latter case it is provided by section 284 that at least two assessors shall be chosen by the Judge. The next section 285

KING-
EMPERO
v.
TIRUMA
REDDI.

provides that if an assessor be prevented from any sufficient cause from attending throughout the trial, the trial shall proceed with the aid of the remaining assessor or assessors only and that, if all the assessors are so prevented or absent themselves, the proceedings shall be stayed and a new trial shall be held with the aid of fresh assessors.

With reference to these provisions, it is conceded that the trial commenced validly with two assessors and that no exception could be taken to the trial of the case including the finding and sentence if the second assessor alone continued as assessor from 2 P.M. on the 5th September when the first assessor departed on leave. The authorities cited simply establish that the trial will be invalid if it commenced really with only one assessor, though nominally there was a second assessor who, by reason of blindness or deafness, was incapable of understanding the proceedings (*Proceedings of the Madras High Court, dated 22nd July 1869*(1), *Queen-Empress v. Babu Lal*(2)), or if it ended without the last remaining assessor having attended the trial throughout (*Queen-Empress v. Muhammad Mahmud Khan*(3)), or if a portion of the trial which consisted in the taking of the additional evidence took place after the discharge of the assessors (*Queen-Empress v. Ram Lal*(4)). The principle of these decisions is that in cases not tried by jury, it is imperative that the Judge should commence his trial with the aid of at least two assessors and that at least one of them should continue to attend the trial throughout. This being mandatory, the jurisdiction of the Sessions Judge to commence the trial and his jurisdiction to continue the trial are dependent upon his choosing at least two assessors to aid him and on the continuation of at least one of them throughout the trial. In other words, the above two requisites are conditions precedent to the exercise of his jurisdiction, and, therefore, any finding or sentence passed by a Sessions Judge in contravention of either of those requisites will not be one passed by a Court of competent jurisdiction and the defect is not one which can be cured by section 537 of the Criminal Procedure Code or section 167 of the Evidence Act.

In *In the matter of the petition of Narain Das*(5), it was held by a single Judge that the acquittal of an accused person, without

(1) Weir's Cr. Ral., 3rd ed., p. 927.

(2) I.L.R., 21 All., 106.

(3) I.L.R., 13 All., 337.

(4) I.L.R., 15 All., 136.

(5) I.L.R., 1 All., 610.

KING-
EMPEROR
v.
TIRUMAL
REDDI.

asking the assessors their opinion, was only an irregularity though a serious one and that it could be cured under sections 283 and 300 of Act X of 1872 corresponding to section 537 of Act V of 1898. In the view I have already expressed, I need hardly add that I dissent from that decision and that if a Sessions Judge should decide a case without inviting the opinion of the assessors, he virtually holds the trial without the aid of assessors and that his finding or sentence cannot be regarded as one passed by a Court of competent jurisdiction. (*Queen v. Matam Mal*(1), and *Queen-Empress v. Munna Lal*(2)). In the present case there has been no violation of either of the said conditions precedent and the question raised as to the effect of allowing an assessor who absented himself for some time after he had attended a portion of the trial to resume his seat and to give his opinion at the conclusion of the trial is not governed by any direct authority and the case, therefore, being new in the instance ought "to be governed by the established "principles and the analogies which have heretofore prevailed "in like cases" (per Willes, J., in *Juttendromohun Tagore v. Ganendromohun Tagore*(3), per Lord Wenleysdale in *Mirehouse v. Rennell*(4)).

I now proceed to consider the principles and the analogies which bear on the question raised in this case. The principles are clearly deducible from the provisions in regard to trial with the aid of assessors as contrasted with the provisions in regard to trials by jury. In the latter case, the trial is by jury before a Court of Session and the functions of the two tribunals forming a mixed tribunal are respectively defined in sections 298 and 299 of the Code of Criminal Procedure.

The jury form a tribunal or body with a foreman and the verdict is the verdict of the body, and when there is no unanimity among the members of the body, the opinion of the majority prevails as the verdict of the body. The jurors are sworn after the foreman has been appointed. And after the Judge has finished his charge, the jury may retire to consider their verdict, and if they are not unanimous, the Judge may require them to retire for further consideration. If, in the course of a trial by jury, any juror unavoidably absents himself, or if it appears that any

(1) 22 W.R., (Cr. R.), 34.

(2) I.L.R., 10 All., 414.

(3) L.R., I.A., Sup. Vol., 47 at p. 68.

(4) 1 Cl. & Fin., 546.

KING-
EMPEROR
v.
TIRUMAL
REDDI.

juror is unable to understand the language in which evidence is given or the language in which it is interpreted, a new juror shall be added or the jury discharged and a new jury chosen. But in either case the trial shall commence anew. But in the case of a trial with the aid of assessors, the assessors do not form a body and each acts and expresses his opinion individually, and the Judge is to invite the opinion of each separately and record it. The Judge is the sole judge of law and fact and the responsibility of the decision rests only with him, though, in the decision of the case, he is expected to take into consideration the individual opinion of each assessor and during the trial of the case, he may also consult them on any point in connection with the examination of witnesses or otherwise. The assessors are not to retire for consultation and forming their opinion. In the case of assessors the principle is that the Judge should have before him the individual and the independent opinion of each assessor. Before the enactment of the Criminal Procedure Code, Act X of 1882, the Judge had to invite the opinion of the assessors without summing up the evidence to them. The object was to preclude the possibility of the assessors being influenced by the Judge in forming or giving their opinion. On this point the Indian Law Commissioners appointed under 16 and 17 Vic., cap. 98, section 22, in their first report accompanying the draft Code which formed the basis of the Criminal Procedure Code of 1861 observe at page 152 as follows:—
"A difference is proposed in the mode of taking the verdict of a jury from that of taking the opinion of the assessors. In the former case, the Judge will sum up the evidence for the guidance of the jury and then call for their verdict. In the latter, the Judge will call for the opinions of the assessors without any expression of his own. There is a reasonable apprehension that the native assessor when his own opinion is to be subjected to discussion in open Court is likely to be unduly biassed by the opinion of the presiding Judge: we have endeavoured to obviate this by the order of procedure which we have described." But in the Code of 1882, an enabling provision was introduced which is also retained in the present Code empowering the Judge to sum up the evidence to assessors before inviting their opinions. In my opinion this provision should be availed of by the Judges only in cases where the facts are intricate or complicated and it may therefore be expedient to explain or marshal the same. Even in those cases,

KING-
EMPEROR
v.
TIRUMAL
REDDI.

the Judge should not, as he may do in charging a jury, express his opinion upon any question of fact arising in the case. The contrast between trial by jury and trial with the aid of assessors is that, in the former, the jury is the real tribunal but is aided by the Judge, and in certain matters directed by the Judge, but in the latter the Judge is the sole tribunal aided by each of the assessors.

"The tribunal which has to try the case is the Judge himself, and the judgment is his and his alone. The assessors who assist the Judge take no part in the judgment whatever; they are not responsible for it and have nothing to do with it. They are there for the purpose of assisting the Judge" (per Brett, M. R., in *In re Beryl*(1)).

For the above reasons I am decidedly of opinion that assessors do not form members of the Sessions Court and that, therefore, the Sessions Court was not illegally constituted since the first assessor was allowed to resume his seat as assessor. If assessors are members of the Court, and the first assessor acted as a member of the Court after his return, though he ceased to be an assessor in the case when once he departed on the 5th September and the case proceeded during his absence, it may be that the finding and sentence cannot be regarded as passed by a Court of competent jurisdiction and the defect could not be cured under section 537. In the course of argument, it was put to Mr. Adam, counsel for the appellant in No. 875, whether the finding and the sentence would have had to be quashed if the Judge had, at the conclusion of the trial, discovered his mistake in having permitted the first assessor to resume his seat as assessor and had therefore refrained from inviting his opinion but had invited the opinion of the other assessor only and had taken it into consideration. But for obvious reasons, the learned counsel did not venture to give a direct answer. The argument that assessors form members of the Court would have carried weight, if the question had arisen under Act VII of 1843 or under the Criminal Procedure Code of 1861; at any rate such argument would have been very plausible under section 32 of the said Act and under section 324 of that Code which ran as follows:—"In a trial before the Court of Session not by jury the trial shall be conducted with the aid of two or more assessors as members of the Court."

(1) L.R., 9 P.D., 141.

KING-
EMPEROR
v.
TIRUMAL
REDDI.

The phrase "as members of the Court" disappeared in the corresponding section 232 of Act X of 1872 and has not been re-introduced either in the Code of 1882 or in that of 1898.

Though assessors do not form members of the Court, yet inasmuch as it is mandatory that the Court should be aided till the conclusion of the trial by at least one assessor attending the trial throughout and giving his opinion, can it be maintained that the second assessor cannot, under the circumstances, be legally regarded as the remaining assessor who validly attended the trial subsequent to the return of the first assessor?

This question was not raised or argued. But to my mind that was the only question that required consideration, and it was with reference to that in particular that I have drawn attention to the various provisions of the Code relating to the constitution and the status of jurors and assessors. If assessors, like a jury, act as a body, though when the body is reduced to one the remaining assessor may act alone, the argument that the second assessor cannot be regarded as having legally continued to act as the remaining assessor after he was associated with the first assessor who ought not to have been allowed to resume his seat as assessor and thus the two formed a body, would be conclusive. For, in that case, the opinion given would be not his individual opinion, but the opinion of the body consisting of himself and the first assessor and the constitution of the body being illegal, it would be just the same as if the trial had been continued without the aid of any assessor. But, for the reasons already given, it is clear that assessors do not form a body or tribunal, but each forms an entity in himself acting independently of his fellow assessor or assessors. The status, therefore, of the remaining assessor and the validity of his opinion as such is in no way legally affected by the first assessor having been, contrary to law, allowed to resume his seat as assessor and that probably in juxtaposition to the former.

The second contention above referred to in support of the preliminary ground is chiefly relied upon by the learned pleader who appeared for the appellant in Appeal No. 878. He argues that the Judge having invited the opinion of the first assessor as an assessor and having presumably taken the same into consideration in arriving at his conclusion in the case, his judgment is thereby vitiated and should therefore be set aside. He further argues that he is entitled to the judgment of the Sessions Court and that this Court as a Court of reference or appeal cannot substitute its own

KING-
EMPEROR
v.
TIRUMAL
REDDI.

judgment for that of the Sessions Judge, after expunging from the record the opinion of the first assessor which was taken into consideration by the Sessions Judge. If this argument were sound, its result would simply be that the conviction and sentence would be quashed and the Sessions Judge would be directed to give a fresh judgment upon the evidence on the record without taking into consideration the opinion of the first assessor. One need hardly predict what the result would be in an assessor's case in which the Judge decides according to his own judgment and on his own responsibility, though he takes into consideration the opinions of the assessors. It is not alleged that beyond giving his opinion when he was invited to do so at the conclusion of the trial, the first assessor, after his return, took any part in the trial by putting any questions to the witnesses through the Court, or otherwise took any part in the trial beyond attending to it. Can it be argued that, though the second assessor validly continued as the remaining one assessor from and after the 5th of September, his opinion is vitiated and therefore invalidated by the first assessor having been invited to express his opinion first? If such a position can be maintained, it may then be said that it will be just the same as if the Judge had decided the case without inviting the opinion of assessors, in which case a new trial would have to be held. It may be that the first assessor happens to be a retired Sub-Magistrate and that the second assessor is an ordinary trader devoid of "forensic knowledge." But that circumstance cannot lead to any presumption either of fact or of law that the former is more competent to form an opinion upon the evidence in the case than the latter, or that the latter was influenced in giving his opinion by the previously expressed opinion of the former, assuming, as I suppose was the case, that such opinion was expressed in the presence of the latter. Even, if in fact, he was so influenced, his opinion will not be invalidated, whatever may be the value to be attached to such opinion, any more than the opinion of an assessor in any Sessions trial would be invalidated if in forming such opinion he was influenced by the eloquence or personality of the counsel for the accused in the case or the opinion of the Judge expressed now and then during the trial of the case. Under the law the opinion of an assessor, as I have already explained, is his own individual opinion, and it must be accepted as such whatever considerations may have weighed with him in forming his opinion, and no evidence will be admissible to establish that his opinion

KING-
EMPERO
v.
TIRUMA
REDDI.

was influenced by the opinion of a co-assessor or any other person, or by any other circumstance. If such a doctrine were accepted, where are we to stop? Suppose, in the present case, both the assessors had attended the trial throughout, would the trial have to be set aside because the opinion of the second assessor, which echoed the opinion of the first assessor, was invalidated because it was influenced by it, and the Judge in a trial with the aid of two assessors is to have the benefit of the opinion of each assessor but that in reality "he had the opinion of only one assessor, which "opinion resulted in the concurrent opinion of two assessors which "must necessarily have carried more weight with the Judge than "the single opinion of only one"?

The whole argument proceeds on a misapprehension of the functions of a Court of reference or appeal under the Indian law. It is not a mere Court of error, but the Court, as a Court of reference, appeal or revision is enjoined by sections 537, Criminal Procedure Code, and 167 of the Indian Evidence Act, not to reverse or alter the finding or sentence passed by a Court of competent jurisdiction on account of any error, omission, irregularity, improper admission or rejection of evidence, unless in its judgment such error, omission or irregularity has, in fact, occasioned a failure of justice or unless independently of the evidence objected to and admitted there was not sufficient evidence to justify the decision, or that if the rejected evidence had been received, it ought to have varied the decision. The only question which has now to be considered is, whether the error or illegality committed by the Judge is one that is cured under either of the above sections, if this Court is satisfied, after rejecting the opinion of the first assessor, that the conviction is right and that there has been, in fact, no failure of justice and that the accused have in no way been prejudiced in their defence by the first assessor having been allowed to resume his seat. Section 167 of the Evidence Act does not directly apply to the case, because it applies only to improper admission or rejection of evidence, and technically the opinion of an assessor, which the Judge is to take into consideration in arriving at his conclusion, cannot be regarded as evidence any more than the confession of a co-accused affecting himself and others jointly tried with him for the same offence, which confession, under section 30 of the Evidence Act, the Court may take into consideration against such others, can be regarded technically as evidence (*Queen-Empress v. Khandia bin Pandu*(1)).

(1) I.L.B., 15 Bom., 66.

KING-
EMPEROR
v.
TIRUMAL
REDDI.

The case, therefore, has to be dealt with under section 537 as an error or irregularity committed by the Judge in his proceedings during trial in that he invited and took into consideration the opinion of the first assessor as an assessor when in fact and law he had forfeited his status as assessor when he departed on leave and the further trial was not adjourned until his return. In determining whether such error or irregularity has in fact occasioned a failure of justice, this Court as a Court of reference or appeal will be guided by the principle laid down by section 167 of the Evidence Act in the analogous case of improper admission of evidence. Such is the course which is adopted when the Court below convicts a person upon the evidence on record taken along with the supposed confession of a co-prisoner if this Court considers that the so-called confession is no confession at all within the meaning of section 30, or that for some other reason it ought not to have been taken into consideration by the Judge. This Court does not and ought not to quash the conviction simply on that ground and order a new trial or direct the Sessions Judge to pass a fresh judgment after dismissing from his consideration such supposed confession. But this Court takes and ought to take the responsibility of deciding whether independently of and apart from such confession the conviction ought to be upheld or set aside. Such confession not being technically evidence against the co-accused, the case is not dealt with directly under section 167 of the Evidence Act but has to be dealt with as an error or irregularity within the meaning of section 537 of the Code of Criminal Procedure. But in determining whether the error or irregularity is cured under that section, the Court is guided by the principle laid down by section 167 of the Evidence Act and I am at a loss to understand how it can be maintained that even if the finding and sentence appealed against were passed by a Court of competent jurisdiction, yet it cannot be cured under section 537 though this Court might come to the conclusion that the prisoners were not prejudiced in their defence by the irregularity complained of and that the conviction was right upon the evidence on record after expunging the opinion of the first assessor. It is argued that the opinion of an assessor is a judicial opinion and is not on the same footing as the opinion evidence of expert witnesses or on the same footing as the confession of a co-accused and therefore section 537, Criminal Procedure Code, cannot be applied to the case. No doubt an assessor, like a jurymen, is a public servant, *vide* section 21,

KING-
EMPEROR
v.
TIRUMAL
REDDI.

clause (5), Indian Penal Code, and like a jurymen he is expected to form and give his opinion on the evidence given at the trial and not to act upon his personal knowledge of any relevant facts of the case without giving evidence of the same as a witness in the case (*vide* section 294, Criminal Procedure Code) and he may also, like the jury, be allowed to put questions through the Court to witnesses under examination (*vide* section 166 of the Evidence Act). But the opinion of an assessor is certainly not a judicial opinion in any sense, though one may not be so hypercritical as to object to its being characterised or referred to as *quasi-judicial*. But in my opinion, assessors are analogous to expert witnesses and in principle the opinion of an assessor is substantially on the same footing as the opinion evidence of expert witnesses. A brief retrospect of Indian legislation in regard to trial of criminal cases with the aid of assessors would clearly show that such is the correct view and it is also in conformity with the institution of assessors in England in civil cases, especially in admiralty, ecclesiastical, patent and similar cases (*vide* volume I of Encyclopædia of Laws of England, page 348). The earliest Indian legislation which authorised European functionaries presiding in Courts of Session to constitute two or more respectable natives to assist them as assessors "with a view to the advantages derivable from their observations particularly in the examination of witnesses" is Regulation VI of 1832 which was applicable only to Bengal. Act VII of 1843 extended that system to the Presidency of Madras, and it was provided by section 32 of that Act that Sessions Judges may, in the trial of criminal cases, avail themselves of the assistance of respectable natives or other persons by constituting two or more such persons assessors or members of the Court "with a view to the advantages derivable from their observations, particularly in examination of witnesses." It was further provided that the opinion of each of the assessors shall be given separately and discussed and, if so desired, recorded in writing. I may also observe that, under that Act, the opinion of assessors had a potentiality which it has ceased to have since the enactment of the Code of 1861. Thus it will be seen that provision was made by the Legislature for Europeans administering justice in a foreign land and therefore deficient in their knowledge of the customs and habits of the parties and witnesses appearing before them and also deficient in judging of their demeanour in the witness-box, having the benefit of the opinion of two or more respectable natives of the land as assessors

KING-
EMPEROR
v.
TIRUMAL
REDDI.

possessing such knowledge and judgment. Such being the principle underlying the institution of assessors in India, which is the same as that in England in the class of cases already referred to, the opinion of an assessor given upon the whole case tried before a Court of Session or any portion of such case is, in principle, on the same footing as the opinion evidence of a person specially skilled in foreign law, science or art.

On the ground, therefore, that assessors are not members of the Court of Session, that the trial in this case validly commenced with the aid of two assessors, that one of the assessors attended the trial throughout till its termination, that his status as an assessor has not been affected and his opinion recorded by the Judge at the conclusion of the trial has not been invalidated by the action of the Judge in allowing the first assessor to resume his seat as an assessor and inviting his opinion as one of the assessors at the conclusion of the trial, but that such action on the part of the Sessions Judge is only an error or irregularity in a proceeding during the trial, which, if it has not, in fact, prejudiced the accused, could be cured under section 537 of the Code of Criminal Procedure, I would overrule the preliminary objection and proceed to hear the case on the merits and affirm or set aside the conviction, according as, in the opinion of this Court, the evidence in the case without taking into consideration the opinion of the first assessor does or does not warrant the conviction of the prisoners.

The preliminary objection having been overruled, the case was heard on the merits.

The same counsel and vakils argued on the evidence.

The Public Prosecutor (*Mr. E. B. Powell*) appeared in support of the convictions.

In the result judgments were delivered on the merits in both the Referred Trials and in the connected Criminal Appeals, in which all their Lordships concurred in acquitting all the accused.

The question of conspiracy was dealt with by BHASHYAM AYYANGAR, J. as follows:—

BHASHYAM AYYANGAR, J.—The first count against the first and second accused in Sessions Case No. 53 of 1900, as finally amended, runs to the following effect:—"That you the accused Nos. 1 and 2 on or about the 19th March 1899 entered into a conspiracy with the ninth accused in the same case and one Subbi

KING-
EMPEROR
v.
TIRUMAL
REDDI.

Reddi the accused in Sessions Case No. 1 of 1901 to murder the deceased Ranga Reddi and that in pursuance of that conspiracy Ranga Reddi was murdered on 11th June 1900 and that you first and second accused have thereby committed an offence punishable under sections 302 and 109 of the Indian Penal Code." The first part of the third count against the ninth accused in Sessions Case No. 53 of 1900 runs to the following effect:—"That you the ninth accused on or about 19th March 1899 entered into a conspiracy with the first and second accused in the same case and one Subbi Reddi the accused in Sessions Case No. 1 of 1901 to murder Ranga Reddi in consequence of which the said Ranga Reddi was murdered on 11th June 1900." In Sessions Case No. 1 which was tried by a different Sessions Judge, the first count against Subbi Reddi the accused in that case ran as follows:—"That you the accused on or about 19th March 1899 entered into a conspiracy with the first, second, and ninth accused in Case No. 53 to murder Ranga Reddi in pursuance of which conspiracy Ranga Reddi was murdered on 11th June 1900 and thereby you the accused committed an offence punishable under sections 302 and 109, Indian Penal Code."

The first and second accused in the former case and the accused in the latter case were also respectively charged with the offence of murder itself and the ninth accused in the former with the offence of abetting that murder by giving information to the first accused in the same case of the movements of Ranga Reddi on the 11th June 1900. The second count in the former case was not drawn with sufficient precision so as to charge first and second accused also with murder along with the accused Nos. 3, 4, 5, 6, 7 and 8. But it is clear that first and second accused were not misled by this inaccuracy and the defect therefore is cured by section 535(1) of the Criminal Procedure Code. In case No. 53 the accused Nos. 1, 2, and 9 have been acquitted of the so-called charge of conspiracy and the Government has preferred Appeal No. 1028 of 1900 against such acquittal. In Sessions Case No. 1 of 1901 the accused has been convicted not only on the count of murder but also on the so-called count of conspiracy and he has appealed in No. 143 of 1901 against his conviction on both the counts.

The count of conspiracy in both the cases proceeds on a misapprehension of the law bearing on the question, as is evident not only from the wording of the count but also from the fact that the first and second accused in Sessions Case No. 53 and the accused

KING-
EMPEROR
v.
TIRUMAL
REDDI.

in Sessions Case No. 1 are also charged with the substantive offence of murder. The law bearing on the question of conspiracy under sections 107 and 109, Indian Penal Code, was considered by a Full Bench of this Court in the case of *Queen-Empress v. Subrahmanya Ayyar*(1) and I entirely concur with Davies, Benson and Moore, JJ., in their opinion that under the Indian Criminal Law conspiracy is a mere species of abetment when an act or an illegal omission takes place in pursuance of that conspiracy and amounts to a distinct offence for each distinct offence abetted by conspiracy.

Under the English law the agreement or combination to do an unlawful thing or to do a lawful thing by unlawful means amounts in itself to a criminal offence. The Indian Penal Code follows the English law of conspiracy only in a few exceptional cases which are made punishable under sections 311 (Thug), 400 (belonging to a gang of dacoits), 401 (belonging to a gang of thieves), 402 (being a member of an assembly of dacoits) and 121A (conspiring to wage war). In these cases whether any act is done or not or offence committed in furtherance of the conspiracy, the conspirator is punishable and he will also be punishable separately for every offence committed in furtherance of the conspiracy. In all other cases, conspiracy is only one species of "abetment of an offence" as that expression is defined and explained in section 108 and stands on the same footing as abetment "by intentional aiding." In regard to both these species of abetment, an act or illegal omission, in pursuance of the conspiracy or for the purpose of intentional aiding, is essential. If two or more persons conspire, the gist of the offence of abetment by conspiracy is not only the conspiracy but the taking place of an act or illegal omission in pursuance of the conspiracy and in order to the doing of the thing abetted. If a person at one and the same time instigates another to murder ten or more persons or to steal watches in the possession of ten or more persons, he will certainly have abetted ten or more murders and abetted ten or more thefts. It is perfectly immaterial whether the instigation was at one and the same moment of time or at different times. Similarly if two or more persons conspire to commit the murder of ten or more persons or to steal the watches belonging to ten or more persons, and one or more of them commits the murders or thefts in pursuance of that conspiracy, the others

(1) Criminal Miscellaneous Petition No. 41 of 1900 (unreported).

KING-
EMPEROR
v.
TIRUMAL
REDDI.

will be guilty of as many abetments of murders or abetments of thefts as have been committed. In my opinion the test is not whether the instigation or conspiracy constituted one act, but whether the act or acts abetted by instigation or conspiracy would, if committed by a person capable in law of committing an offence with the same intention or knowledge as that of the abettor, amount to one offence or more offences than one. In the former case there would be but one offence of abetment, but in the latter case as many offences of abetment as the number of substantive offences.

Section 10 of the Indian Evidence Act has, in my opinion, no bearing on the question as to how far conspiracy to commit an offence or actionable wrong is an offence under the Indian Penal Code.

It is a startling proposition to say that a man remains chargeable as an abettor by conspiracy or otherwise although he may also be chargeable, and that not in the alternative but cumulatively, as having committed the offence abetted. That is exactly what has been done in both the cases. The first and second accused in Sessions Case No. 53 and the accused in No. 1 have been charged both with the substantive offence of murder on the 11th June and the offence of conspiring to murder the deceased by murdering the deceased on the 11th in pursuance of such conspiracy. You can no more charge a man as an abettor as well as a perpetrator of the offence abetted, and that not in the alternative but cumulatively, than you can charge a man with an attempt to commit an offence and the commission of that very offence. In this connection it will be well to draw attention to section 114, Indian Penal Code, which provides that whenever any person, who if absent would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence. This section provides that he shall be deemed to have committed the offence itself and not simply that he shall be liable to the same punishment as if he had committed the offence.

In Sessions Cases No. 53 and No. 1, the first and second accused in the former and the accused in the latter are alleged to have been present when Ranga Reddi was alleged to have been murdered, and in fact to have taken the most active and leading part in the perpetration of the murder. Under these circumstances it is very strange that they should have been charged both with the murder of Ranga Reddi and with the abetment of such murder. The Public Prosecutor, when this was pointed out, said that he did not

KING-
EMPEROR
v.
TIRUMAL
REDDI.

press his appeal against the acquittal or seek to uphold the conviction of the accused in Sessions Case No. 1 of 1901 on the count of conspiracy, the accused Subbi Reddi in that case having been convicted of and punished for both the substantive offence of murder and of abetment of the same by conspiracy, but that he relied on the instances of conspiracy proved with reference to the said counts as material evidence in regard to the charge of murder in both the cases and also the charge of abetment of murder against the ninth accused in Sessions Case No. 53 by giving information of Ranga Reddi's movements on 11th June. It is unnecessary to consider the question of misjoinder of offences raised by the learned counsel for the respondents in Appeal No. 1028. In my opinion Appeal No. 1028 should be dismissed and the conviction of Subbi Reddi in Sessions Case No. 1 on the count of conspiracy quashed.

Note.—After delivery of judgment in this case, Mr. Justice Bhashyam Ayyangar addressed the Public Prosecutor and other members of the Bar appearing as counsel in the case, as follows:—"Now that judgment has been delivered in this case, I think it right that I should mention in public Court that, during the hearing of this appeal which extended over the greater portion of three weeks, I received by post three private communications addressed to me in connection with this case. They are all in the English language two bearing English signatures and one a Telugu signature. Whether these letters are genuine in the sense that the signatures are those of the authors or writers, or whether they are only pseudonymous, I am not now in a position to say. The first letter which I received and opened on the 2nd of April but which I read only this morning is a long one extending over four full pages of foolscap. It is a comment upon the evidence, or rather imaginary evidence, in the case and advances a number of arguments in favour of the conclusion which the writer wants to force upon me. The writers of the other two letters, each from his own standpoint, convey to me advice as to how I should deal with the case and in whose favour I should decide it both in the interests of justice and in my own interests. The authors of these three letters, whoever they may be, have committed a grave contempt of Court in sending by public post private communications to a Judge of this Court with the sole and deliberate object and set purpose of influencing his decision in a judicial matter of the highest importance to the public. These persons and others similarly disposed to tamper with justice ought to know that it is a high contempt of Court to communicate with or seek in any way to influence a Judge upon the subject of any judicial matter which he has to determine and that a Chartered High Court in India is a Superior Court of Record which can summarily deal with contempts of Court though the same be committed otherwise than *in facie curiae*, which has the power to punish the offender by commitment in a summary way, a power which no doubt will be sparingly used but will certainly be used when there is the 'pressure of public necessity' and even then not to vindicate the dignity of the Court but in the interests of justice and in view to 'repress tampering with justice.' I now hand these three letters with their envelopes to the Registrar of the Court."

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Boddam.

RAMAYYA (DEFENDANT), APPELLANT,

SIVAYYA (PLAINTIFF), RESPONDENT.*

1900.
September 6.

Malicious prosecution—Finding on reasonable and probable cause.

Plaintiff had been charged by defendant with the destruction of defendant's crop, and convicted, the conviction being upheld on appeal. A revision petition was then filed in the High Court when the case was remanded to the lower Appellate Court, which again upheld the conviction. The High Court, however, quashed the conviction, and plaintiff now sued for damages for malicious prosecution. The District Munsif dismissed the suit, holding that defendant had reasonable and probable cause for preferring the complaint. The Subordinate Judge reversed this decree and gave judgment for plaintiff. He said that the Munsif had considered that the existence of reasonable and probable cause should be presumed from the fact that plaintiff had been convicted and that his conviction had been upheld on appeal. The judgment of the High Court should, however, have been taken into consideration, and was in favour of plaintiff. He added:—"In the state of things the complaint and prosecution by defendant must be presumed to have been made maliciously; I accordingly find the issue for the plaintiff and against the defendant, and hold that the latter prosecuted the former falsely and maliciously and without reasonable and probable cause."

Held, that on this finding the plaintiff had failed to show affirmatively an absence of reasonable and probable cause. The Subordinate Judge had presumed malice from the fact that the conviction of the plaintiff had been ultimately quashed by the High Court; and, having presumed malice, he found the issue for the plaintiff. The absence of probable cause does not imply malice in law.

Mody v. Queen Insurance Co., (I.L.R., 25 Bom., 332), and *Hall v. Venkatakrishna*, (I.L.R., 13 Mad., 394), followed.

Suit to recover damages for malicious prosecution. The plaintiff alleged that defendant had falsely and maliciously and without reasonable or probable cause charged plaintiff with having committed mischief to defendant's crops. The Second-class Magistrate of Nandigama, who tried the case, convicted plaintiff, and the conviction was affirmed on appeal by the Head Assistant Magistrate of Bezvada. A criminal revision petition was then filed in the High Court, when the case was remanded to the Head Assistant

* Second Appeal No. 796 of 1899 against the decree of P. S. Gurumurti Ayya, Subordinate Judge of Kistna at Masulipatam, in Appeal Suit No. 539 of 1898, reversing the decree of K. S. Kothandarama Ayyar, Acting District Munsif of Bezvada, in Original Suit No. 785 of 1895.

RAMAYYA
v.
SIVAYYA.

Magistrate, who again upheld the conviction. The High Court, however, held that plaintiff was not guilty and the conviction quashed. Plaintiff now sued for damages. Defendant contended that the charge was not false, and that he had reasonable cause of probable cause for prosecuting the accused. He also said that the High Court had not found the charge to be false. The issues were:—“(i) Was the criminal case instituted maliciously and without reasonable and probable cause? (ii) To what damages, if any, is the plaintiff entitled?” The District Munsif found that there was reasonable and probable cause and dismissed the suit. He assessed the damages, however, at Rs. 100 in case his finding should be reversed.

Plaintiff appealed to the Subordinate Judge, who reversed the Munsif's decree. After reviewing the evidence he found the defendant's story as to his raising the alleged crop to be false, and unfounded, as also its alleged destruction by plaintiff. He continued:—“Relying on *Scami Nayudu v. Subramania Muduli*(1) and *Bapirazu v. Chinna Venkayya*(2), the lower Court thought that because the Sub-Magistrate had convicted the plaintiff and that conviction was upheld by the Head Assistant Magistrate of Bezwada, the existence of reasonable cause for the prosecution should be presumed and the plaintiff's suit for damages thrown out; but as observed by their Lordships of the High Court the ruling in *Bapirazu v. Chinna Venkayya*(2) is not really against the appellant. In considering *Bapirazu v. Chinna Venkayya*(2), their Lordships said, in *Viranna v. Nagayyah*(3), as follows:—‘The case referred to in 3 Madras High Court reports, page 238, is no authority for excluding the consideration of the judgment of the Appellate Court, but distinctly, the contrary.’ On page 240, the Judges say:—‘We do not mean to say that in every case the judgment of one competent tribunal against the plaintiff should be considered a conclusive answer to the suit, for it is manifest there may be circumstances which would necessarily deprive it of any such effect.’ Therefore the judgment of the Appellate Court must be duly considered in deciding the point, and it certainly is favourable to the appellant and against the respondent. 11. In the state of things, the complaint and prosecution by defendant must be presumed to have been made maliciously, as stated by

(1) 2 M.H.C.R., 158. (2) 3 M.H.C.R., 238. (3) I.L.R., 3 Mad., 6 at p. 8.

RAMAYYA
v.
SIVAYYA.

Mr. Alexander at page 31 of his work on Torts. 12. I accordingly find the issue for the appellant and against the respondent, and hold that the latter prosecuted the former falsely, maliciously and without reasonable and probable cause.”

The defendant preferred this second appeal.

Ramachandra Rao Saheb, for appellant, submitted that the suit ought to have been dismissed as unsustainable, because of the conviction of the plaintiff, by reason of which reasonable and probable cause for the prosecution must be taken to have been established. He referred to *Hall v. Venkatakrishna*(1) and *Abrath v. North Eastern Railway Co.*(2). He also submitted that the lower Appellate Court had failed to give a definite finding as to absence of reasonable and probable cause.

Mr. D. Chamier, for respondent, contended that the finding of the Subordinate Judge had been arrived at on a consideration of the evidence and was explicit: and was a finding of fact which could not now be challenged. Even if the finding was not clear, there was no necessity or room for any further inquiry as to reasonable and probable cause, since the Judge had disbelieved the very existence of defendant's crop, which plaintiff had been charged with destroying. If there was no crop, the charge of destroying it must necessarily have been false and no reasonable or probable cause was possible. [*Bapirazu v. Chinna Venkayya*(3) and *Viranna v. Nagayyah*(4) were referred to in the course of the case.]

Their Lordships delivered the following judgments:—

SIR ARNOLD WHITE, C.J.—In this case I think the decree of the Subordinate Judge ought to be set aside and that of the District Munsif restored.

The issue in the case was correctly framed but the Subordinate Judge does not seem to have appreciated the actual points which he had to consider. In his judgment he reviews the facts and states (paragraph 11)—“In the state of things the complaint and prosecution by defendant must be presumed to have been made maliciously,” and he goes on in paragraph 12—“I accordingly find the issue for the appellants.” If he had simply found the issue for the plaintiff his finding would have been one of fact and could not have been questioned on second appeal. See the

(1) I.L.R., 13 Mad., 391.

(2) L.R., 11 Q.B.D., 440.

(3) 3 M.H.C.R., 238.

(4) I.L.R., 3 Mad., 6 at p. 8.

RAMAYYA
v.
SIVAYYA.

judgment of the Privy Council, dated July 21st, 1900, in the case of *Mody v. Queen Insurance Co.*(1) where it is pointed out that the question of reasonable and probable cause, when the case is tried without a jury, is a question of fact to be determined by one and the same person. But reading paragraphs 11 and 12 of the judgment together, it seems to me that the Subordinate Judge presumed malice from the fact that the conviction of the accused was ultimately quashed by this Court. Having presumed malice the learned Judge "accordingly" finds the issue for the plaintiff. Now, the absence of probable cause does not imply malice in law. See *Mitchell v. Jenkins*(2) and the judgment of this Court (which is based on Lord Bowen's judgment in *Abrath v. North Eastern Railway Co.*(3)) in the case of *Hall v. Venkatakrishna*(4). In my judgment, the learned Judge erred in law in dealing with the question of the want of reasonable and probable cause.

In order to succeed the plaintiff must show affirmatively that the defendant acted without reasonable and probable cause. The District Munsif found that the defendant had sufficient and reasonable cause to prefer the complaint. It was not necessary for him to find this, but of course it involves the finding that the plaintiff had not shown that the defendant had not reasonable and probable cause. On the evidence it seems to me that the plaintiff failed to show affirmatively an absence of reasonable and probable cause on the part of the defendant and I think his suit was rightly dismissed.

I think this appeal should be allowed with costs in both Courts.

BODDAM, J.—The appellant is the defendant in an action for malicious prosecution in which the District Munsif dismissed the plaintiff's action holding that the defendant had reasonable and probable cause for the complaint he brought against the plaintiff, but on appeal the Subordinate Judge reversed his decree and gave judgment for the plaintiff with damages Rs. 100. From this decision the defendant brings this second appeal. If the Subordinate Judge had found the issue as he stated it in the commencement of his judgment in favour of the plaintiff, there would be no question for this Court to deal with as the question was one of fact alone when determined by one person sitting alone

(1) I.L.R., 25 Bom., 332.

(3) L.R., 11 Q.B.D., 440.

(2) 5 B. & Ad., 588.

(4) I.L.R., 13 Mad., 394.

RAMAYYA
v.
SIVAYYA.

and acting both as Judge of the law and of the facts (see *Mody v. Queen Insurance Co.*(1)). This course, however, the Subordinate Judge has not taken, and it is owing to the way in which he has expressed himself in his judgment that any difficulty arises in the case. The plaintiff was in June 1893 charged by the defendant with trespass, rioting, assault and mischief. He was convicted and upon appeal the conviction was affirmed. Afterwards a criminal revision petition was put in to the High Court and in September 1894 the High Court set aside the conviction.

It was argued before us that inasmuch as the order of the High Court setting aside the conviction had omitted to mention one of the sections under which the accused had been convicted, it must be taken that the conviction under that section still remained in force against him and therefore this action did not lie. I am of opinion that the omission was a mere clerical error and does not affect the case: for the High Court order concludes as follows:— "The conviction of the petitioners and the sentences passed on "them are quashed and the fines, if levied, will be refunded." It is obvious from this that it was intended that all the convictions under each and every section under which the petitioners had been convicted should be set aside.

The District Munsif found that there was reasonable and probable cause on the facts for the prosecution. In this finding he went further than was necessary, but on appeal to the Subordinate Judge the decree is reversed. In his judgment at the outset the Subordinate Judge states the question to be determined correctly, viz., "Was the criminal case instituted maliciously and without "reasonable and probable cause?" but as far as I can judge from his judgment his answer to this question is arrived at by a process of reasoning which is not legal or logical. He first considers a question of fact as to whether or not part of the charge made by the defendant against the plaintiff was true and comes to the conclusion that it was not. He then proceeds to consider whether or not the previous conclusions arrived at on the trial of the criminal charge against the plaintiff are to be considered but arrives at no conclusion, so far as I can see, as to the original conviction and its affirmation on appeal, though he does determine that the judgment of the High Court should be considered and

(1) I.L.R., 25 Bom., 332.

RAMAYYA
v.
SIVAYYA.

says, as I understand him, as that decision is in favour of the plaintiff, "the prosecution by the defendant must be presumed to "have been made maliciously" and proceeds as follows:—"I "accordingly find that issue for the appellants and against the "respondent and hold that the latter prosecuted the former falsely, "maliciously and without reasonable and probable cause." If, as he says, he finds this because he finds malice and has found malice because the decision of the High Court was against the defendant and in favour of the plaintiff, he was not legally justified in doing so and his decree should be set aside. It is suggested that what he means is that he has come to this conclusion on the facts, but if so he certainly does not say so and the words "I accordingly find," &c., would not have been written where they appear. Moreover, he has not considered all the facts or the charges. He has merely considered those relative to the charge of mischief and has not considered the question of trespass, assault or rioting, and it seems to me that he cannot be considered to have come to the conclusion to reverse the decree of the District Munsif upon facts which he has not referred to in his judgment. I think he has, in the course of his judgment, failed to keep before his mind's eye the legal position of the parties. He has inferred malice from the fact that the High Court reversed the conviction and has assumed want of reasonable and probable cause because he has found malice.

I would reverse his decree and restore that of the District Munsif with costs in this and in the lower Appellate Court. I am of opinion the plaintiff has not shown "want of reasonable and "probable cause for the prosecution of the defendant."

APPELLATE CIVIL.

*Before Sir Arnold White, Chief Justice, and Mr. Justice
Bhashyam Ayyangar.*

RAMACHANDRA PADAYACHI (DEFENDANT No. 2), APPELLANT, 1901.

v.

April 16, 1901.

KONDAYYA CHETTI (PLAINTIFF), RESPONDENT.*

Hindu Law - Contract by managing member of joint family, consisting of a father and two sons—Subsequent partition by which one son became divided—Liability of divided son (to extent of family property taken at the division), for loss arising under the contract.

Whilst a father and two sons were carrying on business as an undivided trading Hindu family, the father, as managing member, entered into a contract by which he undertook to pay to plaintiff any shortfalls that might take place in respect of consignments of indigo. Subsequently to this contract, one of the sons became divided from the family. Shortfalls having occurred the plaintiff sued to enforce the contract against the divided son as well as the two other members of the family:

Held, that the son was liable only to the extent of the family property which had come to him under the partition.

Krishnasami Konan v. Ramasami Ayyar, (I.L.R., 22 Mad., 519), distinguished.

SUIT for money. Plaintiff sued to recover the amount of certain losses that had been incurred in respect of sales of indigo. Defendants Nos. 2 and 3 were sons of first defendant, who, as the managing member of an undivided family, had carried on business for the benefit of himself and his sons as an undivided family. In this capacity first defendant had consigned indigo to plaintiff between January 1897 and August 1899, and had undertaken to pay any shortfalls that might occur in respect of such consignments. Plaintiff now alleged that a sum of Rs. 16,271-5-6 was due in respect of shortfalls. Second defendant traversed the claim and pleaded that he had become divided from his family in January 1898, and stated that first defendant had died in August 1899. He denied liability for the debt, which, he said, had been incurred by first defendant, on his own responsibility, and contended that, as a separated member, he was not liable to plaintiff. Third defendant put plaintiff to proof of his claim, and pleaded that at

* Original Side Appeal No. 17 of 1900 against the decree of Mr. Justice Boddam, in Civil Suit No. 177 of 1899.

RAMACHAN-
DRA PADA-
YACHI
v.
KONDAYYA
CHETTI.

any rate he was only liable to the extent of joint family assets (if any) that might be in his possession.

The Court found that first defendant had carried on business with plaintiff as manager of an undivided trading Hindu family, on behalf of, and for the benefit of, such undivided family, and that second defendant had by his acts, held himself out to the plaintiff as being jointly interested in, and an active partner in carrying on, such business; also, that second defendant had become separated from the joint family in January 1898, but that no notice of such separation had been given to or received by plaintiff. Second defendant was held liable upon all contracts and undertakings entered into prior to 28th January 1898, the amount, consisting of shortfalls, after making all deductions, being Rs. 13,571-9-8. Second defendant was held to be liable personally; third defendant's liability was confined to the joint family estate.

Defendant No. 2 preferred this appeal.

Sivasami Ayyar and *Ranga Ramanujachariar*, for appellant:—The appellant's father (first defendant) took advances for indigo consignments from the principals of the plaintiff, who was a commission agent, and undertook to indemnify the plaintiffs for any shortfalls that might occur in the sale of the goods. Subsequently to the consignments there was a partition between the appellant and his father; and a deed of release was executed by the appellant in favour of his father. The release is a fair one. There is no issue as to whether it was unfair, and there is no finding that it was. It is submitted that the appellant is not liable for these debts. The cause of action arose after the date of the partition; and even assuming that the contract was entered into prior to the partition, the son is not responsible inasmuch as by the terms of the release the family debts are to be discharged with the property in the hands of defendants Nos. 1 and 3. The date of the cause of action is that of the shortfall, and inasmuch as the shortfall arose after the partition, the appellant is not liable in respect of it. [BHASHYAM AYYANGAR, J.:—A debt arose on the date of every advance. By the sale of the goods a portion of the debt was realised and the balance remains unpaid. This shortfall is not a debt arising at the date of the sale but is a debt of the date on which the original advance was made.] A divided son is not liable

for the personal debts of the father, though incurred before partition. See *Krishnasami Konan v. Ramasami Ayyar*(1). [BHASHYAM AYYANGAR, J.:—That case is clearly distinguishable. There the suit was brought by the creditor against the father alone after partition; and in execution, property which fell to the son's share was attempted to be taken. If the son had been made a co-defendant, the property which had fallen to his share would have been liable.]

M. Krishnamachariar and *T. V. Vaidyanatha Ayyar*, for respondent, contended that the debt was incurred when the advance was made, and that the son was liable for the debts contracted by the father, even though the release might be a fair one. [They were only heard with reference to the memorandum of objections.]

JUDGMENT.—In this case the second defendant became divided from his family in January 1898. Prior to this date the first defendant (father of second defendant) entered into a contract as managing member of an undivided family by which he undertook that in the event of a shortfall taking place in respect of a consignment of indigo made by the first defendant through the plaintiff he (first defendant) would pay to the plaintiff the amount of the shortfall. The pecuniary liability which the plaintiff seeks to enforce in the present suit arises under a contract entered into before partition. The plaint does not allege a cause of action entitling the plaintiff to a personal decree against the second defendant in respect of such liability and Mr. Krishnamachari on behalf of the respondent concedes he is not entitled to a personal decree as against him. In our opinion the plaintiff is entitled to judgment as against the second defendant in respect of this liability, but the second defendant's liability is limited to the extent of the family property which came to him under the partition. The decree must be amended accordingly.

The case relied upon by the appellant (*Krishnasami Konan v. Ramasami Ayyar*(1)) is clearly distinguishable from the present case. In that case the suit was brought after partition against the father alone, and the point decided was that property taken by a son under a partition effected before the suit could not be seized in execution of a decree obtained against the father only in such suit. The case turned on the plaintiff's rights in execution not as here,

RAMACHAN-
DRA PADA-
YACHI
v.
KONDAYYA
CHETTI.

(1) I.L.R., 22 Mad., 519.

RAMACHAN-
DRA PADA-
YACHI
v.
KONDAYYA
CHETTI.

on the question whether the plaintiff is entitled to judgment as against the son. Appellant must pay the costs of this appeal.

As regards the memorandum of objections the plaintiff's case is that the amount claimed for interest, brokerage, &c., is in fact in respect of a pecuniary liability arising under a contract entered into before partition. The accounts support this view, and the appellant's pleader has been unable to show that the real facts are otherwise. The liability of the second defendant in respect of the amount claimed in the memorandum of objections will also be limited to the property which came to second defendant under partition.

The memorandum of objections is allowed with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Bhashyam Ayyangar.

BHUJANGA RAO (DEFENDANT), APPELLANT,

v.

VENKANNA AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

*Rent Recovery Act (Madras)—Act VIII of 1865, s. 69—Delay in presenting appeal—
Power of Court to excuse—Limitation.*

Under section 69 of the Rent Recovery Act, a Court has no power to excuse delay in presenting an appeal from a judgment from the Court of First Instance in a suit by a tenant to set aside a distraint made by a land-holder under the provisions of the Rent Recovery Act (Madras).

Suit by tenants to set aside a distraint made by a land-holder under the provisions of the Rent Recovery Act. The Acting Sub-Collector decreed in favour of plaintiffs. Defendant appealed to the Acting District Judge who dismissed the appeal with costs.

Defendant now preferred this second appeal.

K. Subrahmaniam Sastry, for respondents, took a preliminary objection that the appeal to the lower Appellate Court had been presented one day late, and that the Court had no power to excuse the delay. Section 69 of the Madras Rent Recovery Act (VIII

* Second Appeal No. 19 of 1900, against the decree of J. H. Munro, Acting District Judge of Godavari, in Appeal Suit No. 288 of 1899, affirming the decision of W. W. Phillips, Acting Sub-Collector of Godavari, in Summary Suit No. 3 of 1899.

of 1865) provides only thirty days for preferring an appeal. The judgment of the first Court was delivered on the 6th of March 1899, and the appeal to the District Court was presented on the 6th of April 1899, i.e., after the expiry of the thirty days allowed by law. The proviso to section 69 of the Rent Recovery Act says: "provided that the appeal be presented to the Zillah Court within thirty days from the date of the Collector's judgment." He argued that from the wording of this proviso, only a qualified right of appeal is given, and that if the appeal petition is not presented within thirty days the right of appeal is lost. The Act contains no provision empowering the Court to excuse delay, even if proper cause be shown. Such power is given only by the provisions of the Limitation Act, which, he contended, do not govern cases arising under the Registration and Rent Recovery Acts. The latter Acts had been held to be Codes of law complete in themselves, and the provisions of the Limitation Act do not extend the periods of limitation provided by them. [He referred to *Veeramma v. Abbiah*(1) and *Appa Rau Sanayi Aswa Rau v. Krishnamurthi*(2) decided on the Registration Act; and *Kumara Akkappa Nayanim Bahadur v. Sithala Naidu*(3) and *Sambasiva Chari v. Ramasami Reddi*(4) decided on the Rent Recovery Act.] Neither did sections 10 and 11 of the General Clauses Act apply to the present case, as that Act is not retrospective, and Act VIII of 1865 had been passed prior to it. Moreover it appeared from the authorities that the Court had no general powers to excuse delay apart from the provisions of the Limitation Act and General Clauses Act, even if sufficient cause were shown, and, so far, the Court had never exercised such a power, except where the last day had fallen on a holiday. (See *Sambasiva Chari v. Ramasami Reddi*(4) following *Shooshee Bhusan Rudro v. Gobind Chunder Roy*(5)).

Sundara Ayyar and *T. V. Vaidyanatha Ayyar*, for appellant, contended that there might have been some cause which had induced the Judge to excuse the delay. It was only a delay of one day. The Easter Holidays had intervened. The last day might have been a holiday. The Court had, they suggested, inherent power to excuse such a delay if proper cause were shown.

BHUJANGA
RAO
v.
VENKANNA.

(1) I.L.R., 18 Mad., 99. (2) I.L.R., 20 Mad., 249. (3) I.L.R., 20 Mad., 476.
(4) I.L.R., 22 Mad., 179. (5) I.L.R., 18 Calc., 231.

BHUVANGA
RAO
v.
VENKANNA.

In the result a report was called for with a view to ascertaining whether the last day on which the appeal could have been presented was a holiday, and to learn the ground on which the delay had been excused.

Upon a report being made to the effect that the last day was not a holiday, and that there seemed to have been a *bonâ fide* mistake as to the date on which the judgment was pronounced, their Lordships delivered the following

JUDGMENT.—Having regard to the express language of section 69 of the Rent Recovery Act, we cannot say that the Judge was at liberty to excuse the delay in presenting the appeal. If he could have done so, we should have difficulty in holding that the affidavit disclosed sufficient grounds.

We dismiss this appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Bhashyam Ayyangar.

IMBICHUNNI NAYAR (SURETY) PETITIONER,

v.

LALJI RAM DOSS SAIT AND ANOTHER (DECREE-HOLDER
AND JUDGMENT-DEBTOR), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 336—Surety undertaking that judgment-debtor should apply to be declared an insolvent—Application in insolvency by judgment-debtor—Subsequent failure to appear—Release of surety.

E became surety for a judgment-debtor, undertaking to produce the judgment-debtor in Court when called upon, and that he should apply to be declared an insolvent. The judgment-debtor, in due time, filed a petition in insolvency. Subsequently he failed to appear when called upon to do so and the petition was dismissed. On application being made for execution as against the surety:

Held, that the decree could not be executed against him.

APPLICATION for execution of a decree. The application was that one E. I. N., who had stood surety for the judgment-debtor, might be arrested. The surety filed a petition containing the

* Civil Revision Petition No. 291 of 1900, under section 622 of the Code of Civil Procedure, praying the High Court to revise the order of U. Babu Rao, Principal District Munsif of Calicut, in Civil Miscellaneous Petition No. 583 of 1900.

following statement, (which, however, was not verified):—"The petitioner stood surety for the defendant, binding himself to produce the defendant (in Court) when called upon, and to make the defendant file a petition for declaring him an insolvent; and no more. The defendant filed a petition for insolvency; and that was dismissed somehow or other. Subsequent to that the petitioner produced the defendant in Court, and presented a petition on 15th January 1900, praying that his surety bond might be cancelled. And thereupon it was ordered that the matter would be decided when the decree-holder applied for execution thereafter. Now the decree-holder has applied for execution against the petitioner also. There is no ground to justify the execution of the decree against the petitioner. The petitioner has produced the defendant in Court. And the Court has not at any time called upon the petitioner to produce the defendant in Court." He asked that the application might be disallowed as against him, and that the surety bond might be cancelled.

The Munsif passed the following order:—"Both parties' vakils heard. The question is what is the meaning of the expression 'when called upon the surety will produce the judgment-debtor in Court.' The surety's vakil contends that a mere verbal call on the date fixed for the hearing of the insolvency petition was not sufficient, but formal notice in writing ought to have been given to the surety to produce the judgment-debtor on a particular day, and as no such notice in writing was given the surety must not be held to have broken his surety bond. The bond does not say that the surety should be called upon by notice in writing to produce the judgment-debtor on a given day. The judgment-debtor was required to prove his allegations in his petition for insolvency on the 30th November 1899. On that it was the surety's duty to see that the judgment-debtor was present in Court. On that day the judgment-debtor was called and was found to be absent. The surety was next called and he too was absent. Hence the petition for insolvency came to be dismissed. The call was one within the meaning of the surety bond. As the surety failed to answer to that call, he has forfeited his bond. His petition is therefore rejected. Issue arrest warrant for 27th instant."

Against that order the surety filed this civil revision petition.

IMBICHUNNI
NAYAR
v.
LALJI RAM
DOSS SAIT.

IMBICHUNNI
NAYAR
v.
LALJI RAM
DOSS SAIT.

Govinda Menon for petitioner.

K. R. Subrahmania Sastri for respondent.

JUDGMENT.—This is a petition which ought to have been presented under the provisions of the Provincial Small Cause Courts Act and not under section 622 of the Code of Civil Procedure.

The facts are not clearly stated, but, apart from what is stated in the surety's petition which is not verified, it appears that the insolvency petition was filed in due time, and that it was on a subsequent occasion that the judgment-debtor failed to appear when called upon. On these facts, following *Koylash Chandra Shaha v. Christophoridi*(1) and *Dicarkadas Parshotamdas v. Isabhai Daudkhan*(2) we must hold that the surety could not be held liable. We must set aside the order of the lower Court. Costs of this petition must be paid by the first respondent.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Benson.

KACHI YUVA RANGAPPA KALAKKA THOLA
UDAYAR (DEFENDANT No. 1), APPELLANT,

v.

KACHI KALYANA RANGAPPA KALAKKA THOLA
UDAYAR AND ANOTHER (PLAINTIFF AND DEFENDANT No. 2),
RESPONDENTS.*

Hindu Law—Devolution of impartible property—Right of nearest co-parcener of senior line—Impartible estate—Original incidents of impartibility—Expulsion of occupants—Restoration under British rule after lapse of time during which enjoyment suspended—Continuance of incidents of impartibility.

Under the Law of Mitakshara, when impartible property passes by survivorship from one line to another, it devolves not necessarily on the co-parcener nearest in blood but on the nearest co-parcener of the senior line.

The holder of an impartible zamindari had three wives. By the first he left no issue; by the second he had issue M, R and P; by the third he had issue V. Upon the death of the zamindar he was succeeded first by M, then by M's son,

(1) I.L.R., 15 Cal., 171.

(2) I.L.R., 19 Bom., 210.

* Appeals Nos. 114, 161, 162, 163 and 176 of 1899 against the decree of L. C. Miller, Acting District Judge of Trichinopoly, in Original Suit No. 29 of 1897,

and then by R, who held the estate for many years. When R died, possession of the estate was taken by the grandson of his whole brother P, whereupon V's son claimed it, contending that he stood in a nearer class of heirs:

Held, that the grandson of P was the nearest co-parcener of the senior line, and was entitled in preference to V's son, who belonged to the junior line.

Naruganti Achammagaru v. Venkatachalapati Nayanivaru, (I.L.R., 4 Mad., 250), followed. *Subramanya Pandya Chokka Talavar v. Siva Subramanya Piligi* (I.L.R., 17 Mad., 316), referred to.

The question as to onus of proof of partibility considered.

An estate had been held, up till the year 1765, as an impartible palayam, by one member only, of a family, and not as subject to the ordinary rule of Hindu Law. In 1765, the palayagar, (being the ancestor of the present holder), was expelled from possession by the Nawab of the Karnatic and fled to Mysore, returning in 1780 and holding a precarious possession of the palayam until 1783, when he supported the East India Company. In 1785, he was replaced in possession as a "renter," but upon failure to pay kist the palayam was placed under the control of a manager, until the country was restored to the Nawab. In 1790, the East India Company again assumed control of the country, and the palayagar again held possession of the estate as a "renter" under the Company. In 1792, the palayagar died, he being the same palayagar who had been expelled in 1765. He was succeeded by his son, who died in 1801, the year in which the Company took possession of the country, leaving a younger brother of the half blood him surviving. The Government, in 1802, declared its intention of appointing the half-brother to succeed to the palayam on a zamindari tenure, and subsequently directed that the half-brother should be instated in the palayam as soon as a sanad of investiture could be prepared. The question of restoration was however kept under consideration, and, as a temporary measure, the palayagar was granted an allowance of ten per cent. on the net revenue of the palayam. This was paid until 1814, when the Board of Revenue, reiterating its intention to restore the palayagar to the management of his palayam under a new arrangement, proposed to grant him a jaghire bringing in an average of thirty-three per cent. of the gross collections, and subject to a nominal rental assessment. This proposal was consented to by the palayagar, but the arrangement was again varied, the palayagar receiving ten per cent. of the gross collections. In 1817, instructions were issued to the effect that villages should be given over to the palayagar of a value equal to the average gross amount of his then income, from whatever source derived. It was also declared that the villages were to be given on zamindari tenure. The approval of Government having been obtained, a conditional sanad was granted in December 1817, and the half-brother of the last palayagar was put in possession. The first defendant, in whose possession the zamindari was at the date of suit, was a descendant from the palayagar last referred to, tracing his descent from the family of the grantee of the sanad, by his second wife. Plaintiff and second defendant were descendants from the family of the grantee by his third wife. Plaintiff now sued for partition, when the plea was raised that the zamindari had been from its origin an impartible estate, and that the sanad granted in 1817 had not altered the incident of impartibility which had always attached to it:

held, that the estate was impartible.

THE UDAYAR-
PALAYAM
CASE.

THE UDAYAR-
PALAYAM
CASE.

Suit for partition of a zamindari, or, if held to be impartible, for the recovery of the whole. Plaintiff alleged that the zamindari of Udayarpalayam was partible according to the ordinary Hindu Law, and that he, as a member of a Hindu co-parcenary family, was entitled to a one-fourth share thereof. In the alternative he claimed that in the event of the zamindari being held to be impartible he was entitled to recover the whole of it in preference to the first defendant (the present holder of the property); as a further alternative he claimed maintenance. It was alleged in the plaint that certain villages, (sixty-five in number), comprised in an i-milkiat-istimirar sanad granted in the year 1817, were constituted into a zamindari under the name of Udayarpalayam in that year by the British Government and that one Kachi Rangappa, [hereinafter referred to as the istimirar zamindar], as its acquirer, enjoyed it until his death in 1835; that the deceased left four sons him surviving, namely, Muthu, Kalyana, Prasanna and Vijaya, all of whom constituted a Hindu co-parcenary family and lived as such; that Muthu, the eldest of these four sons, as the eldest son and senior member of the said co-parcenary family held the estate for about six months and then died, leaving his three brothers him surviving, namely, Kalyana, Prasanna and Vijaya, as also a minor son, Kachi; and that the estate had then been taken possession of and managed by the Court of Wards until the death of the minor in 1842, a period of about six years, presumably under the impression that it was governed by the rule of primogeniture and had therefore devolved on the said minor. Plaintiff asserted that this impression was incorrect and that the zamindari was common to all the members of the co-parcenary and partible family property according to the ordinary Hindu Law. The minor had died issueless in 1842 and while still in his minority, whereupon Kalyana, (already referred to), had taken possession of the estate (as plaintiff alleged) on behalf of the family, and held it till his death, which occurred in the year 1885. The following relatives survived Kalyana:—his grandnephew, (namely first defendant), and three nephews, (namely, (1) Periasami, (2) plaintiff, and (3) second defendant), who were minor sons of Kalyana's youngest brother, all the other members of the co-parcenary having pre-deceased him. Plaintiff claimed a partition of the 65 villages originally constituted into the zamindari and of certain other properties alleged to have been acquired from

THE UDAYAR-
PALAYAM
CASE.

the income of family property. Plaintiff charged that at the decease of Kalyana the first defendant, in collusion with Kalyana's widow, under colour of a will, the genuineness and validity of which plaintiff impeached, had taken wrongful possession of the zamindari and other properties (referred to in the schedules to the plaint) and that defendants Nos. 3 to 6 had, in like collusion with the widow, taken wrongful possession of certain other properties. Seventh defendant was made a party as he had purchased a portion of the estate. The plaint also alleged that plaintiff's brother Periasami (since deceased) had, during his minority, instituted Original Suit No. 22 of 1886, by his mother as next friend, in the same District Court against the present first defendant to recover the whole zamindari and had entered into a compromise which was prejudicial to himself and based upon a misapprehension of the nature of the property and of Hindu Law, and plaintiff submitted that the compromise was not binding either on plaintiff himself or on second defendant in the present suit, who were not parties to Original Suit No. 22 of 1886. Periasami died issueless in April 1897, shortly after attaining his majority, and plaintiff only attained his majority in June 1897. Plaintiff claimed, first, that inasmuch as the properties in question were partible common family properties governed by the ordinary Hindu Law he was entitled to a one-fourth share therein, on partition; second defendant being entitled to another one-fourth share: and secondly, that in case the Court should hold the property to be impartible and descendible to a single heir, plaintiff was entitled to claim the whole of it exclusively for himself with past and future profits: and thirdly, in case the Court should hold the properties to be impartible and that plaintiff was not, according to Hindu Law, a preferential heir, that he was entitled to be awarded a suitable maintenance. The cause of action was laid as having arisen in June 1897, the date when plaintiff attained his majority.

The first defendant, the present holder of the zamindari, pleaded that the sixty-five villages referred to in the plaint and comprised in the sanad of 1817, together with a number of other villages, formed the ancient palayam of Udayarpalayam, which had belonged to his ancestors from time immemorial, and had been held and enjoyed by them as an impartible estate by a single member of the family, of which the other members were entitled to, and had

THE UDAYAR.
PALAYAM
CASE.

received, maintenance. He claimed that the grant of the sanad by the British Government in 1817 under Regulation XXV of 1802, (the remaining villages belonging to the family having been already resumed), was not intended to and did not in law alter the incident of impartibility which had attached to the palayam, or the course of succession thereto. He denied that the zamindari was the self-acquired property of the istimidar zamindar as alleged in the plaint, and pleaded that even if, by the issue of the sanad, the zamindari became in law the self-acquisition of the istimidar zamindar, the incident of impartibility and its devolution according to the law of primogeniture and the custom of the family continued unaffected. He admitted that the istimidar zamindar had left four sons, but denied that they constituted an ordinary Hindu co-parcenary family or that they had lived as such. He said that the first three of the sons were sons of a second wife, the fourth being born of a third wife, and that on the death of the istimidar zamindar in 1835 the eldest son Muthu succeeded as zamindar to the exclusion of his younger brothers, and held and possessed the estate in his own right to the exclusion of the other members of the family and not as senior or managing member of a co-parcenary Hindu family as contended by the plaintiff. He claimed that the minor son of Muthu had as of right succeeded to the zamindari under the rule of primogeniture, and that the Court of Wards had properly assumed charge on his behalf, and that, on the death of the said minor without issue in 1842, Kalyana had succeeded according to the rule of primogeniture and had held the estate in his own right, and to the exclusion of other members of the family, and not on behalf of the family, till his death in 1885. Prasanna, the uterine brother of Kalyana, as well as two sons of Prasanna, viz., Kachi and Muthu, had pre-deceased Kalyana, as also had Vijaya, the half-brother of Kalyana, already referred to, so that at Kalyana's death in 1885 the surviving male members of the family were first defendant, (the son of Prasanna's son Muthu, a nephew of the full blood of Kalyana), and plaintiff, second defendant, and Periasami (since deceased). These last three were Kalyana's nephews of the half-blood, being sons of Kalyana's half-brother Vijaya. Defendant contended that the will was genuine and valid. He traversed the other allegations in the plaint and further contended that the third wife of the istimidar zamindar, (from whom plaintiff was descended)

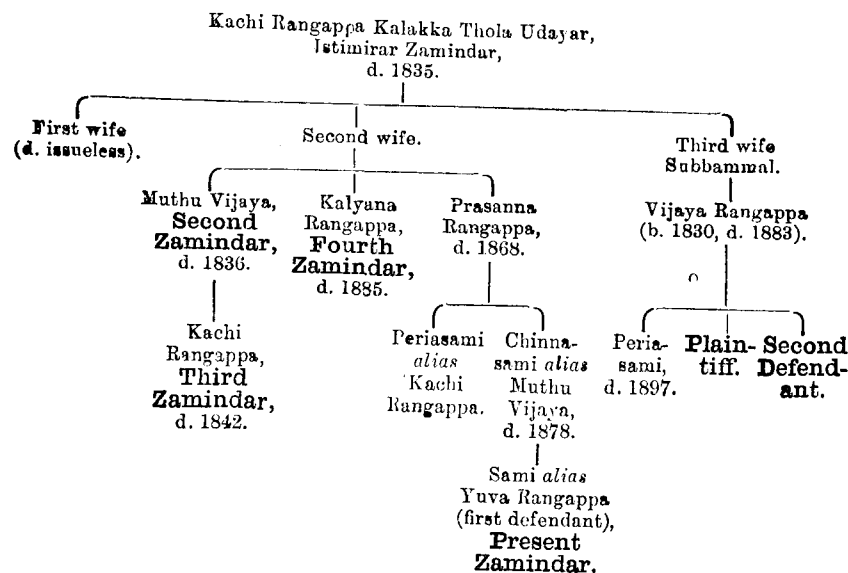
THE UDAYAR
PALAYAM
CASE.

status, and that by reason thereof her descendants were excluded from succession by the descendants of the second wife, (from whom first defendant traced his descent), who was of the same class and rank as her husband. First defendant also pleaded that, as the representative of his grandfather Prasanna, who was senior in age to Vijaya, (plaintiff's father), the first defendant, according to the law of primogeniture regulating succession in an undivided family to an impartible estate, was entitled to succeed, on the death of Kalyana, in preference to plaintiff and his brothers. He also contended that, by custom of the family, succession by primogeniture was regulated by priority of the marriage of the wives and that by reason of that custom, he, as the descendant by a senior wife, was entitled in preference to plaintiff. He relied in addition on the compromise which had been entered into by Periasami's guardian, with the leave of the Court, and in pursuance of which a decree, dated 24th August 1887, had been passed in Original Suit No. 22 of 1886, establishing the first defendant's right of succession to the zamindari and its appurtenances, as the representative of the senior branch of the family, and providing that maintenance should be paid by first defendant to plaintiff's elder brother Periasami, to plaintiff and to plaintiff's younger brother, the second defendant. He alleged that in pursuance of that decree maintenance had been paid up to March 1897 and that the present suit was *res judicata* by reason of it. He also set up and relied upon a deed of compromise and release, entered into between himself, of the first part and Periasami, plaintiff, and plaintiff's younger brother, (the second defendant), (represented by their mother and guardian) of the second part, dated 23rd August 1887, whereby first defendant's right to the zamindari and its appurtenances according to the law of primogeniture and the custom of the family was affirmed, the payment of maintenance to plaintiff and his brothers was secured, and the claim of plaintiff and his brothers against first defendant or the zamindari was relinquished. He also relied on another decree as a bar to the present suit, namely, that in Original Suit No. 7 of 1860, brought by plaintiff's father Vijaya against Kalyana, in which plaintiff's father had claimed and obtained a decree for maintenance on the footing of the zamindari being descendible to a single heir. That decree had been executed by plaintiff's father from time to time, and by plaintiff and his brothers, as represented by their mother and guardian. He also

THE UDAYAR-
PALAYAM
CASE.

raised the defence of limitation, whether the suit were for partition or for possession of an impartible zamindari; and also contended that plaintiff was estopped from claiming more than was decreed him in Original Suit No. 22 of 1886 and was provided in the release of August 1887. Further defences were raised on the grounds of misjoinder and that the reliefs claimed were founded on distinct and inconsistent causes of action.

The following pedigree shows the relationship of the parties and of the descendants of the istimihar zamindar, of whom mention has been made:—



Second defendant supported plaintiff's claim for partition and asked that a one-fourth share might also be awarded to him. He denied plaintiff's exclusive right on the footing that the zamindari was impartible.

Third defendant supported the contention that the zamindari was impartible. He set up his right to the properties of which the plaint charged him to have taken wrongful possession.

Defendants Nos. 4, 5 and 6 denied that plaintiff was entitled to claim as heir, and relied upon Kalyana's will, under which they had taken the properties severally in their possession.

Seventh defendant, who adopted the defences of the others, stated that he had purchased the properties in his possession from certain legatees under Kalyana's will, which he pleaded was valid.

Plaintiff filed a written statement in reply.

Issues, of which there were 25, were raised on the following among other questions:—(1) Whether plaintiff could unite, in the same suit, the alternative causes of action, and (2) a further alternative claim for maintenance; (3) whether plaintiff and his branch had been excluded from the family properties—, and, if so, whether the suit was barred by limitation; (4) another issue on limitation on the footing of impartibility; (5) and (6) whether Original Suit No. 7 of 1860 or 22 of 1886 operated as *res judicata*, or (7) whether the decree in the latter precluded plaintiff from claiming more maintenance than was therein provided; (8) whether there was a valid compromise and release on August 23rd, 1887, as set up by first defendant; and, if so, whether plaintiff could maintain this suit without first setting it aside; (11) whether all or any of the properties (other than those claimed by first defendant as separate property) were impartible and descendible to a single heir according to the law of primogeniture; (13) and, if so, whether, on the footing of impartibility, plaintiff's branch or that of first defendant was entitled to succeed thereto; (14) whether the third wife of the istimihar zamindar was of a class and status inferior to that of the second wife and, if so, whether first defendant had priority of succession in consequence; (16) whether, by family custom, succession by primogeniture was regulated by priority of marriage of the wives; and, if so, whether first defendant was entitled, as son of a senior wife, to succeed in preference to plaintiff; (17) whether Kalyana's will was genuine and valid, and binding on plaintiff in whole or in part; (20) what was the proper rate of maintenance awardable to plaintiff; (23) whether the suit was barred by section 373 of the Code of Civil Procedure by reason of Original Suit No. 22 of 1886 having been withdrawn without leave being obtained to bring a fresh suit.

The immoveable properties claimed had been acquired from two distinct sources. The zamindari proper consisted of the sixty-five villages comprised in the sanad of 1817. Other properties were detailed in schedules attached to the plaint and consisted of pannai lands and other lands with buildings situated within the limits of the zamindari: houses and lands situated beyond its limits but in the possession of the first defendant; moveables (principally jewels) in the possession of first defendant (with the exception of some which he claimed as his self-acquisition): charities in the management and possession of first

THE UDAYAR-
PALAYAM
CASE.

THE UDAYAR-
PALAYAM
CASE.

defendant; and certain immovable properties in the possession of defendants Nos. 3, 4, 5, 6 and 7.

The case was tried by the District Judge of Trichinopoly. First defendant admitted that the sanad for the zamindari was granted in 1817. His case was that it covered only a portion of the ancient palayam of his ancestors, and that the issue of the sanad did not alter the incident of impartibility which attached to the ancient palayam and was not intended to do so; and further, that even if the istimidar zamindar had become the acquirer of the zamindari, the fact that it became his self-acquired property would not affect the incidents of impartibility and devolution according to the law of primogeniture and the custom of the family. Plaintiff and second defendant denied that Udayarpalayam was ever impartible, and contended that even if it were, the old palayam had come to an end in the time of the Nawabs of the Karnatic, and had never been restored. In 1817 the Government had made a new grant of 65 villages to the istimidar zamindar, which villages were not impartible and would descend according to the ordinary rules of Hindu Law. The District Judge examined the history of Udayarpalayam so far as it could be gathered from the documentary evidence; he referred to *Naragunty Lutchmeedavamah v. Vengama Nailoo*(1), *Lakshmipathi v. Kandasami*(2), and *Pedda Amani v. Zamindar of Marungapuri*(3), and in the result held that the palayam of Udayarpalayam was in its origin impartible and that it had been held as an impartible estate up till the year 1765, when the palayagar was said to have been driven out. He then considered whether anything had occurred subsequently to alter it from an impartible to a partible estate. It appeared that in 1765 the palayagar was deposed by the Nawab of the Karnatic and fled to Mysore, returning to, and obtaining possession of, the palayam in 1780. On this part of the case the District Judge said:—

“27. The plaintiff's contention is that whatever the origin of the palayam, and whatever incidents attached to it before 1765, the expulsion of the palayagar in that year effectually did away with all that, and that the basis of the title to the estate as now held is the sanad of 1817 which did not grant an impartible estate. The first defendant, conceding that if that is so the estate may be

(1) 9 M.I.A., 66 at p. 85.

(2) I.L.R., 16 Mad., 51.

(3) L.R., 1 I.A., 287 at p. 294.

partible, contends that, in fact, all that was done in 1817 and the earlier years of the nineteenth century was to annul the forfeiture effected in 1765 and to confirm, in possession of his ancient estate or part of it, the palayagar who would have held it without any such confirmation but for the forfeiture.

“28. The question then amounts to this: Was the grant of 1817 a grant of a new estate out of the territories of the British Government, or merely a confirmation of the old estate held by the grantee ancestrally, with an interval of forfeiture?

“29. The defendant's case depends, to a great extent, on the contention that the palayagar, expelled in 1765, returned and obtained possession of the palayam about 1780, and held it thereafter under the Nawab until the final assignment of the Karnatic to the East India Company in 1801.

“30. Paragraphs 7-15 of exhibit LIII (Mr. Wallace's report) show that the palayagar, with the assistance of Hyder Ali, succeeded, in 1780, in turning out the Nawab's troops and establishing himself in possession of his palayam: in 1783, at which time the revenues of the Karnatic were assigned to the Company, he was made renter of his district, (he is so described in exhibit I dated in 1792), was imprisoned for failure to pay his kist, and was, after two years, allowed to reside in his palayam, which was rented to his dalavayi or chief servant: became renter again in 1790 till the restoration of the Karnatic to the Nawab: and after fruitless attempts to obtain the control of his palayam, ‘commenced those troubles in 1796 which raged with varying success and fury till 1798 when, by the arrangements made by Chinnaya Mudali with the contending parties, tranquillity was, at length, restored to the country.’ The arrangement was that the palayagar received an allowance as well as his kaval or police fees and the kumbattam lands.

“31. Now in 1781 was the first assignment of the Karnatic: at that time, the palayagar, if Mr. Wallace is correct, had gained ‘precarious possession’ of his palayam by Hyder's help. But the British Government, the assignees, had not the power to restore the palayagar at that time to his palayam, and there is nothing to show that the Nawab had done so or intended to do so.

“The sanad of assignment shows that the Nawab, and not the ‘Governor’ was to have the power of issuing new sanads to

THE UDAYAR-
PALAYAM
CASE.

THE UDAYAR-PALAYAM CASE. palayagars (Aitchison's 'Treaties, Engagements and Sanads,' volume VIII, third edition, page 35).

"On 1785, for reasons explained in page 3 of the same book, it became necessary to enter into fresh arrangements with the Nawab. In the preliminary treaty (No. V in the book) Worrioripollem (Udayarpalayam) is entered as one of the districts liable for the revenue—and articles 5 and 6 of the treaty show that the districts were under the Nawab's amildars and not under palayagars. In 1785, it may therefore be assumed, the Nawab did not recognize any palayagar of Udayarpalayam. So in 1792 when the Company is given power to collect the peishcush 'payable by the palayagars as more particularly mentioned in schedule No. I hereunto annexed' (article 5 of treaty No. VII), Udayarpalayam does not appear in the first schedule, but appears in schedule 2, as being included in the 'district' of Trichinopoly, one of those to which recourse was to be had under article 8 for the recovery, if necessary, of the balance over and above the palayagar's peishcush, due by the Nawab to the Company each year.

"32. There is nothing in any single document put before me to indicate any restoration by the Nawab's Government at any time, and if it be true, as Mr. Wallace says, that the palayagar was recognized at times as renter of his district, that will not make him a palayagar: he recovered his territory, if he ever did recover it, by force of arms, against his acknowledged sovereign, and he held it as a more or less successful rebel, acknowledged only so far that from time to time he was permitted to farm the revenues of what had formerly been his palayam.

"Nor, so far as I can see, does the evidence indicate any annulment of forfeiture, or restoration by the British Government: on the contrary, the Government of Madras most distinctly refused to recognize any right in the palayagar to claim reinstatement, affirmed the right of the Nawab to expel him, if he chose, as a right beyond question, and declared expressly that all he had to rely on was the lenity and moderation of the British Government. The language of exhibit U [Extract from Government order, July 27, 1802] (paragraph 22) is very clear, and shows that in 1802 the Government distinctly denied the existence of any claim to restoration. From that date (17th July 1802) to 1814 there is a break in the evidence, and no more is heard of the palayams till 1814 when the Board of Revenue addressed Government in the matter,

explaining that they considered the restoration of the palayagars to be impolitic (paragraph 22 of exhibit Z) and proposing instead to grant them a certain number of villages in the form of a jaghire which would make up to them the income they might have obtained, had their palayams been restored to them. The Government approved, in an order, dated 29th March 1816 (exhibit AA), of an arrangement by which the palayagars were to 'relinquish their lands' and receive a cusba equal to 10 per cent. of the gross collections of these palayams. A point has been made for the defendant out of the expression 'relinquish their lands;' but in the face of the fact that there is no particle of evidence to show that they were in possession of any lands as palayagars, it is evident that that expression is loosely used and means in effect 'give up any expectation they may have formed of recovering the lands which once formed their palayams.' The evidence shows beyond doubt, and it is unnecessary to refer to it in detail here, that the Government had possession of the lands and was making an allowance to the palayagars. I may point out as one piece of evidence the fact that in 1817 a suit was filed by a member of the palayagar's family, not for a share in the land, but for a share of the allowance of 10 per cent. of the revenues, and that for fifteen years, *i.e.*, from 1802 (exhibit XXXIV).

"33. Then comes the correspondence leading up to the grant of the sanad (exhibits AC, AD, AE, AF, AJ), and in that I find nothing to indicate that any restoration of the old estate was intended: or any intention to depart from the view so clearly expressed in exhibit U that no restoration of the palayam was in view, but merely the restoration of an ancient family 'to some degree of authority and respectability,' (exhibit LV, paragraph 4) by an act of pure grace. It seems to me futile, in the face of the clear statement of Government in exhibit U—and it cannot be contended and has not been contended that, if the palayam was forfeited, the Madras Government had not the power to deal with it as it pleased—it is futile to argue that the palayam was restored or remained a palayam in the possession of the palayagar, merely from words used in letters, by some Collectors to the deposed palayagar styling him 'palayagar' or 'zamindar' or speaking of 'your territory,' or from the fact that expressions such as 'restore' and 'reinstate' appear here and there in the communications of the Board of Revenue and Government.

THE UDAYAR-PALAYAM CASE.

THE UDAYAR-
PALAYAM
CASE.

"34. It is clear to me that what the British Government did was to grant to the person who would, but for the expulsion in 1765, have been in 1817 palayagar of Udayarpalayam, compensation for the loss of his palayam, in view, no doubt, of considerations of what Mr. Wallace styles 'justice and policy.' The Government conceded that the expulsion was, though legal, probably unjust (exhibit U), and felt that it was politic to satisfy, to some extent, the head of an old family.

"35. If further discussion of the question is necessary, we have only to consider what was granted: in the *Ramnad Case*(1), there was restoration of the palayam in 1780. Here it is clear there was none. The Government gave to the deposed palayagar's heir sixty-five villages, which, it is true, had once formed a portion of the palayam, and which, it may be taken (cf. exhibits AD, AD1), represented an income equal to the income of the old palayam; from this it is difficult, if not impossible, to argue that the palayam was restored, or even part of it, on its old conditions: it was not: had part of the palayam been 'restored,' that part would have paid a proportionate part of the tribute or peishcush formerly payable on the whole: but here the conditions were entirely changed: the villages handed over, 'allotted' or 'ceded,' as some of the letters put it, to the 'new zamindar' (exhibits AC, AD, AF) were not to pay the peishcush they bore in the past: the peishcush was fixed as a 'nominal' sum, and the object was clearly to compensate for the loss of the palayam by securing to the former palayagar an income approximately equal to that which he had lost.

"36. As in the *Nuzvid Case*(2), no consideration of public policy required in 1817 that an impartible estate should be granted to the Udayarpalayam palayagar. He had no longer to perform even those police duties which seem to have been exacted from him, even after he ceased to be recognized as palayagar (cf. exhibit II); all that policy dictated was that he should be compensated for his loss, and that was done, in the manner then customary, by a grant of land. Except that it was likely to be more acceptable to the grantee (cf. exhibit BP in which the former palayagar lays stress on his desire to occupy the ancient house), there is in the evidence nothing to show that any reason existed why the grant was made

THE UDAYAR-
PALAYAM
CASE.

out of the old palayam. It was natural that it should be so made, and the grantee would naturally prefer it; but the grant was none the less a grant in compensation and not a restoration. It was, in effect, a grant of the former income, but not of the former estate. Again no argument can be based on general proclamations of the Government as to its intentions, in 1801 or 1802; this case must be governed by the orders of Government relating to it in particular, and the order of Government to which I have so often referred (exhibit U) is extremely clear as to its intention. It would not restore: but, of its lenity, it would compensate.

"37. Nor does it seem to me to affect the question materially that the person to whom the grant was made was the person who would have been palayagar, had the tenure never been interrupted. That fact was relied upon as distinguishing this case from others in some respects similar to it, and if it were not so clear that the grant was not a restoration at all, it might carry some weight: but the grant being merely by way of compensation, was naturally made to the person who was the loser by the forfeiture. The fact that the grant was to a member of the old family is no doubt considered in the *Hunsapore Case*(1) to be evidence of the intention of Government to restore the zamindari: there it was held that the transaction was not the creation of a new tenure, but a change of tenant by the exercise of a *vis major*: and here too, as I have said just above, this fact would be evidence of a similar intention, if it were not that the Government had not only expressed a contrary intention, but did, in fact, not restore the zamindari at all. In the *Hunsapore Case*(1), the zamindari was restored: here it was not restored. It was indeed argued by Mr. Bhashyam Ayyangar that the Government, in consideration of reducing the peishcush on the zamindari, retained some of the villages for itself, restoring the remainder: but that is a view of the grant which a perusal of the correspondence will not support.

"38. My conclusion, then, is that there was no restoration of the zamindari, but a grant of some villages as a matter of favour to compensate the palayagar for his loss: it may be that the Government some time had it in view to restore the palayam (exhibits LII (a) transac. II (b), paragraph (4)): but that intention, if it existed, was dealt with out. It was considered impolitic to restore the old

been executed
mother) knew

(1) Appeal No. 89 of 1891 (unreported)—see post p. 613.

(2) I.R., 7 I.A., 38; I.L.R., 2 Mad., 128.

(1) 12 M.I.A., 1 at pp. 34, 36.

THE UDAYAR-
PALAYAM
CASE.

estate, and preferable to make a grant of the old income to compensate the deposed palayagar for the loss of his estate, and to satisfy the expectations which the expression of the original intention as conveyed in exhibit LII (b) might have led him to entertain. In fine, I find that the present zamindari of Udayarpalayam was granted as a new estate by the sanad of 1817 (exhibit AK). The words 'in lieu of all former privileges' contained in that sanad cannot mean 'in consideration of your relinquishing whatever privileges you now enjoy;' for exhibit U is very clear on that point. No privileges existed after the forfeiture in 1765. At most, they can only mean 'in compensation for the loss of your former privileges:' or, as surmised in a finding of one of my predecessors in this Court in regard to a similar sanad granted to the Ariyalur zamindar they may be intended to indicate that the Government had done all it intended to do for the zamindar and declined to consider any further representations based on former conditions.

" 39. Then it is urged that even if the zamindari is to date from the grant in 1817, yet the ancient custom of impartibility will still attach to it, because, that custom being a family custom, the family has elected to continue it, and there is nothing in the sanad, (exhibit AK), to abrogate old customs. There is not here, as in the *Nuzvid Case*(1), any condition in the sanad making the zamindari transferable at the zamindar's wish. The custom of impartibility, it is argued, does not attach to the zamindari as a territorial custom, but to the family and the family in this case having, on receipt of the new grant, elected to continue the old custom, it attaches to the new grant, at any rate until the family elects to change it.

" 40. It must be conceded that, until the date of this suit, the family has shown no decided inclination to depart from any custom of impartibility that may be found to attach to it or its palayam. Except for the suit in 1817 (exhibit XXXIV), and an application (exhibit AQ) which is very indefinite, there is no indication that the family or for that matter the Government of Madras or any of its officers has ever looked upon the estate as other than impartible. I say that exhibit AQ is indefinite, because it contains a prayer for any division of the estate, and does not clearly state as made

(1) L.R., 7 I.A., 38; I.L.R., 2 Mad., 128.

THE UDAYAR-
PALAYAM
CASE.

any right to a division, but merely asserts that those who fired the pyre of the deceased zamindar have the right to succeed him to the exclusion of one who did not do so. Evidently the object was to exclude the successor recognized by the Government, and to gain that object the petitioners put themselves forward as preferable heirs: but they nowhere say that each is entitled to a share of the inheritance. But if the custom is, as argued, one which the family can retain or change at its will, it is difficult to meet the argument that inasmuch as the plaintiff and second defendant, who form the majority of the members now interested, desire to change it, the Court will allow them to do so.

" 41. The argument is however unsound, because it attaches the custom to the family without qualification. The truth seems to be that it appertains to the palayagar or raja as such: if the raja parts with a portion of the raj, that portion may not be impartible in the hands of the alienee: but, on the other hand, it is clearly the law that if the raja purchases other property outside his raj, that does not, by the mere fact of the purchase, become impartible in his hands. If the custom attached to him without any limit, the inference is unavoidable that all his acquisitions would be impressed with it: the law is however that only those acquisitions which are found to be accretions to the raj are impressed with the custom, which seems to imply that he must acquire as raja: here there is no raj at all, that having vanished in 1765, and therefore no raja. It does not follow that, because property held by a palayagar as such is impartible, so also is property held by the same person, as a Government raiyat, for instance, or as an 'ordinary zamindar' (*Hunsapore Case*(1)), nor does it follow that property held as impartible by a palayagar would be equally impartible in the hands of his descendants who are not palayagars. The grantee of the estate in suit never was a palayagar and could have become one only by creation of the Government which might have been implied in a restoration to him of the lands forming the old palayam, but which was not implied in the grant made to him in 1817.

" 42. The conduct of the family is doubtless a factor in the such see worthy of consideration: but the *Belgam Case*(2) shows a transaction not be relied on as proving a custom, when it dates dealt with the, only to 1817. No doubt there is a difference in been executed o

mother) knew the p. 34.

(2) L.R., 24 I.A., 118; I.L.R., 20 Mad., 256, at p. 264.

THE UDAYAR-
PALAYAM
CASE.

final settlement of the dispute between her family and that of the zamindar. He, however, held that plaintiff was not precluded by it from suing to recover the zamindari; that the transaction was not one by which a guardian could bind a ward; that although the settlement was a reasonable one for Periasami to enter into, it was not reasonable and prudent for plaintiff to relinquish his rights for his brother's benefit; that plaintiff's maintenance was safe, whatever Periasami might have done, and would not necessarily have been increased by Periasami's success in the litigation. He further held that even if the release could have been construed as precluding plaintiff from suing for the zamindari as an impartible estate it did not preclude him from claiming a share in it on the footing that it was partible, inasmuch as the Original Suit No. 22 of 1886 had been fought on the footing that the zamindari was impartible, the compromise had been arranged on the same supposition, and the same view was set forth in the release, as the belief of the guardian, who, apparently, never supposed that her sons were entitled to shares on a partition. He referred to *Directors, &c., of London and South Western Railway Co. v. Blackmore*(1) and *Parvathi v. Thirumalai*(2), as showing that general words in a release are limited to the matters in contemplation of the parties at the time and are to be construed with reference to the object matter of the instrument; and held that there had been a mistake of fact on both sides and that the release did not contemplate the state of facts now shown to exist. He referred to *Sobramania Telaver v. Sokka Telaver*(3) and *Subbiem Pillay v. Arnachala Irungol Pillay*(4) and held that plaintiff was not precluded from suing for a share in the zamindari.

On the seventh issue he found that inasmuch as plaintiff had not been a party to the compromise, he was not debarred from suing for an increase of his maintenance, the decree not having awarded him any specific maintenance. On the fifth issue he found that the suit was not barred by reason that in Original Suit No. 5 of 1860, plaintiff's father had obtained a decree for maintenance. On issue No. 20, he found that Rs. 250 per mensem was all that plaintiff could reasonably claim in the event of his being entitled only to maintenance. On the first and second issues he

(1) L.R., 4 H.L., 610.
(3) 5 M.H.C.R., 437.

(2) I.L.R., 10 Mad., 334.
(4) 5 M.H.C.R., 444.

held that plaintiff could unite the alternative causes of action, and (with permission, which he gave) the alternative claim for maintenance. It was agreed at the hearing that no claim should be based on any superiority in caste and status of the wives; and the issue relating to that question was struck out.

On the question of limitation, raised in the third issue, on the footing of the properties being joint family properties, the District Judge said:—

“The first defendant contends that the plaintiff's father's right to sue for partition was barred by limitation before his death and has been extinguished, and consequently the plaintiff also is barred. Plaintiff's father was born in 1833 and died in 1883. During that period he received maintenance. The property was self-acquisition in the hands of the istimidar zamindar and he died in 1835, leaving four sons of whom plaintiff's father was then two years old. The eldest son Muthu succeeded to the zamindari and died in 1836: his son, the nephew of plaintiff's father, succeeded him under the guardianship of the Court of Wards and died a minor in 1842: he was succeeded by his uncle Kalyana, the plaintiff's father's elder brother, who died in 1885. The plaintiff's father died in 1883. In 1836 plaintiff's father's mother received Rs. 30 a month maintenance (exhibits XIV and LXb) and his brothers received Rs. 100 a month each: in 1842 an allowance of Rs. 20 a month was proposed for him (exhibit LVI) by the Collector: but in that year his brother Kalyana succeeded to the zamindari. The plaintiff's father was then nine years old. In 1845 his mother sued for maintenance and obtained a decree for Rs. 40. In 1860 the plaintiff's father being then 27 years old sued for maintenance and obtained a decree for Rs. 200 a month (exhibit AN) and this he drew till his death in 1883. Then maintenance was paid to his widow at Rs. 150 a month (exhibit XXVIII) until the suit No. 22 of 1886 which ended in the allotment of Rs. 750 for plaintiff and his two brothers. It does not appear that plaintiff's father lived with the family of the zamindar at any time. Exhibit AQ shows that the istimidar zamindar's successor Muthu was living separately in Srirangam before he succeeded to the zamindari. But this fact will not affect the question raised in the issue. The defendant contends on these facts that plaintiff's father was debarred from suing for partition in 1861. He takes the cause of action to be the assumption of the zamindari

THE UDAYAR-
PALAYAM
CASE.

by Muthu in succession to the istimidar zamindar in 1835—and taking 16 as the age of majority allows 12 years from that point under clause 4 of section 18 of Regulation II of 1802. The question is, when did the cause of action arise. The first defendant contends that because Muthu held the partible property as impartible he held adversely to the co-parceners and their cause of action arose when he first began so to hold. But the mere fact that the parties believed that the estate was impartible and the junior co-parceners having a right to share, accepted maintenance in lieu of it, does not, so far as I can see, put the head of the family in a position adverse to the other members, so as to force them to realize, so to speak, their right of partition or be barred (cf. *Sri Rajah Viravara Thodhramal Rajyalakshmi Devi Garu v. Sri Rajah Viravara Thodhramal Suryanarayana Dhattraju Bahadur Garu*(1)—and confirmed by the Privy Council in the *Belgam Case*(2). The cause of action would not arise unless the co-parcener were absolutely excluded (*Govindan Pillai v. Chidambaram Pillai*(3)) and he is not absolutely excluded if he is in receipt of maintenance from the family property. It is not correct to say, as was suggested, that receipt of maintenance proves exclusion from the right to a share: the remark in *Rai Ragunath Bali v. Rai Maharaj Bali*(4) does not seem to amount to this. The position here seems to be precisely that in the *Belgam Case*(2) where the junior members under a mistake accepted provision of maintenance and were held not excluded from possession as co-parceners. I think, therefore, that the plaintiff's father was not barred by Regulation II of 1802 in 1861. Then came Act XIV of 1859 which became effective on the 1st of January 1862: this Act allowed the plaintiff's father 12 years from the death of the person through whom the property descended or the date of last payment on account of his share (section I, clause 13). The person through whom the property descended would perhaps be held to be the plaintiff's grandfather, in spite of the remarks in *Govindan Pillai v. Chidambaram Pillai*(3); cf. *Hansji Chhibha v. Valabh Chhibha*(5) and then the plaintiff's father would certainly be barred unless he had participated in the income: but as I have said above, it seems to

(1) Appeal No. 94 of 1891 (unreported).

(2) L.R., 24 I.A., 118; I.L.R., 20 Mad., 256.

(3) 3 M.H.C.R., 99. (4) L.R., 12 I.A., 112; I.L.R., 11 Cal., 777 at p. 783.

(5) I.L.R., 7 Bom., 297 at p. 300.

THE UDAYAR-
PALAYAM
CASE.

me that drawing maintenance is a participation in the family income and the only question is whether the payments of maintenance made to him were made 'on account of' his share in the property. It is not, I think, denied that he regularly drew the maintenance awarded to him in Original Suit No. 7 of 1860; or at any rate it is not alleged that there was an interval of 12 years between any two payments. It is contended that the maintenance was paid, not on account of any alleged share, but because the payee was not entitled to a share: the reply made is that 'on account of' does not mean 'in recognition of' or in 'admission of' the right to share, but 'in consequence of the existence of' that right. It seems to me that the latter contention is correct—that is to say, that when the payment is made by the head of the family in recognition of a right of the junior member to the payment, though both parties may by mistake refer the payment to a right which does not exist, it can be referred to the right which does exist, and is therefore on account of that right, though not by way of admission of that right. I do not think that in the circumstances the existing right is denied: a right is admitted and the consequence of admitting it is the same as though the actual right were admitted: there being a legal right to which the payment can be referred, and there being no actual definite denial of that right, the payment may be referred to it, though not actually made with that intention. If that is so, the plaintiff's father was not barred by Act XIV of 1859. And he was not barred by Act IX of 1871; for, there was no claim and refusal after that Act came into effect: nor was he barred by Act XV of 1877; for, he drew his maintenance regularly and was not excluded. The suit for partition is therefore not barred."

On the sixteenth issue the District Judge gave no finding, in consequence of his having held the zamindari to be partible. On the seventeenth issue he found that the will was signed by the zamindar a few minutes before he died, that it had then been taken by the Deputy Collector in whose custody it had remained for some time, and that it had thereafter been in the custody of the Collector. It could not be seriously suggested, he thought, that it had been altered since it had been signed. He found also that the zamindar knew that he had to sign a will on the date which it bore and was aware and approved of the contents of it; and that he had not been unduly influenced in making it. The

THE UDAYAR-
PALAYAM
CASE.

District Judge, however, did not record a distinct finding as to whether the will was valid in law inasmuch as it, even if valid as a will, would not prevail as against a claimant for partition of ancestral estate. It might, he said, be valid as to self-acquisition, but it had not been shown that Kalyana had any self-acquired and separate property to dispose of.

In the result he passed a decree declaring the plaint property to be partible property, and plaintiff and second defendant to be each entitled to be placed in possession of one-fourth share of the immoveable and moveable property, respectively, and giving other relief.

Against this decree defendant No. 1 preferred this appeal.

Sir V. Bhashyam Ayyangar, Ramasubba Ayyar, Sankaran Nayar, Tiruvenkatachariar, Ayya Ayyar and S. Srinivasa Ayyangar for appellant. Sankaran Nayar:—The present palayam was, as the evidence shows, a military raj originally. Therefore the palayam was, prior to 1765, undoubtedly impartible. (*Naragunty Lutchmeedavamah v. Vengama Naidoo*(1); *Pedda Amani v. Zamindar of Marungapuri*(2); and *Lakshmiathi v. Kandasami*(3).) The expulsion of the palayagar in 1765 was not a confiscation or forfeiture of the palayam. The palayagar regained possession in 1780 and held the palayam practically till 1801. He was recognized by the British Government as palayagar during the assignments of the Karnatic. Under the Muhammadan Law the Nawab had no right to confiscate the property of the rebel. (*Baboo Beer Pertab Sahie v. Maharajah Rajender Pertab Sahie*(4); *Baboo Teluckdharee Sahie v. Maharajah Rajender Protanub Sahie*(5).) All the circumstances set out in Mr. Wallace's report of 30th May 1802, (exhibit LIII), at most only show temporary interferences on the part of the Nawab with the palayagar's management of the palayam. The treaties in Aitchison show practically nothing. If anything, they show that Udayarpalayam continued as a palayam. The palayam, as a palayam, was not destroyed or incorporated in the Nawab's dominions and there is nothing in the word "farmer" as then understood against that view. It simply denotes a settlement of assessment for a particular period. Assuming that there

THE UDAYAR-
PALAYAM
CASE.

was a confiscation or forfeiture, the transactions of the year 1801 and 1802, (exhibit T, Proclamation of the Madras Government, on 31st July 1801; and exhibit LII(a), Mr. Wallace's letter of 2nd January 1802), amounted to an annulment of that forfeiture, or at any rate to a restoration such as there was in the *Hunsapore Case*(1). In either case the estate continues impartible. See also the *Shivaganga Case*(2). The policy of the East India Company at that time is shown by exhibits T and LXV (Proclamations of the Madras Government, dated 31st July 1801, and 1st December 1801 respectively), which show clearly the intention of Government to confirm the palayams to the palayagars on permanent assessment. Mr. Wallace's letters of 2nd January and 19th February 1802 (exhibits LII(a) and LI(b)) and the reply thereto, dated 8th March 1802, (exhibit LII(b)), especially the last, indicate the clear intention of Government to instate the palayagar in the palayam. That, and the earlier Proceeding of Government on the 27th February 1802, (exhibit LXVI), whereby the istimizar zamindar was appointed to succeed his deceased half-brother, amount to a recognition of the fact that there had been no confiscation, or that at any rate if there had been it was followed by a restoration or annulment. The Government Order of 17th July 1802 (exhibit U) and Board's letter of 14th August 1802 (exhibit W), and the subsequent correspondence and proceedings from 1814 to 1817 did not affect the recognition or restoration and did not relate to a new grant on the footing of confiscation or forfeiture, but were concerned only with successive schemes for the revenue settlement of the palayam. The ten per cent. allowance represented the palayagar's proprietary right, while the Government took the management of the palayam on his behalf till a proper revenue settlement should be completed. (He referred to the Fifth Report, volume II, pages 327, 328, and to the definition of a "zamindar.") The intention of Government was to continue the estate with its old incidents on a zamindari tenure. There is nothing to show that the Government intended to alter the quality of the estate. The present case is like the *Rammad Case*(3), where the whole law is elaborately reviewed. See also *Chinnammal v. Akkulu Ammal*(4), where their Lordships, (Muttusami

(1) 9 M.I.A., 66 at p. 85.

(2) L.R., 1 I.A., 287 at pp. 294, 295.

(3) I.L.R., 16 Mad., 54.

(4) 12 M.I.A., 1 at p. 33.

(5) (1864) W.R., (F.B.), 98.

(1) 12 M.I.A., 1.

(2) L.R., 8 I.A., 99; I.L.R., 3 Mad., 290.

(3) Appeal No. 89 of 1891 (unreported)—see post p. 613.

(4) Appeal No. 103 of 1888 (unreported).

THE UDAYAR-
PALAYAM
CASE.

Ayyar and Shephard, JJ.), held as follows:—"We are therefore of opinion that the observation of the Subordinate Judge that the palayam was held on feudal or military tenure prior to the British rule and that it existed at least from before 1758 and that the tenure raised a presumption of impartibility is well founded." And again "Considering the evidence then as a whole the tenure on which the palayam was held prior to the British rule raises a presumption that it was originally impartible. Though it has existed for more than 130 years, there has been no partition and this strengthens the presumption. The tradition in the family as evidenced by statements made from 1822 when there was no controversy is strongly in favour of impartibility. The usage of many of the palayams in the neighbourhood belonging to the same caste is another circumstance in favour of impartibility."

Sir V. Bhashyam Ayyangar continued the argument:—First, on the footing that there was no confiscation, or, if there was, that there was a restoration, the estate is impartible. (*Mutta Vaduganadha Tevar v. Dorasinga Tevar*(1); *Hunsapore, Case*(2).) For cases of annulment, see *Prince Mirza Jehan Kuds Bahadur v. Nawab Afsur Bahu Begum*(3); *Prince Mirza Jehan Kadr Bahadoor v. Nawab Badshoo Bahoo Sahiba*(4); and *Narayana v. Chengalamma*(5). The property may be self-acquired in the grantee's hands, but it preserves its ancient incidents, as was laid down in the *Hunsapore Case*(2) and the *Shivaganga Case*(6). The present case is much stronger. The sanad here has been given to the man who was the heir. There was no diversion to another branch of the family as in the *Hunsapore Case*(2) and the *Shivaganga Case*(6). The case of *Rajah Venkata Narasimha Appa Row Bahadur v. Rajah Narayana Appa Row Bahadur*(7) was quite different. There, an estate was divided into two and a new zamindari was created in favour of Ramachandra who was not heir and did not hold an impartible estate. Further, there was no custom of impartibility in the family after 1802, and the members in the family had treated the estate as partible. The observations of the Privy Council as to the clauses in the sanad relating to the alienation and the limitation to the

(1) L.R., 8 I.A., 99; I.L.R., 3 Mad., 290.

(3) L.R., 6 I.A., 76; I.L.R., 4 Calc., 727.

(4) L.R., 12 I.A., 124; I.L.R., 12 Calc., 1.

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

(6) L.R., 8 I.A., 99; I.L.R., 3 Mad., 290.

(7) L.R., 7 I.A., 38; I.L.R., 2 Mad., 128.

(2) 12 M.I.A., 1.

heirs or after in *Rani Sartaj Kuari v. Rani Deoraj Kuari*(1) are not of much importance. It is only an ancestral impartible estate that is alienable. To say that an estate is partible because it is alienable is not correct. The clauses in the sanad permitting alienations are certainly not inconsistent with the impartible character. (He referred to the judgment of Sir Arthur Hobhouse in *Mutta Vaduganadha Tevar v. Dorasinga Tevar*(2) and *Sivasubramania Naicker v. Krishnammal*(3).) The *Nuzvid Case*(4) has been explained in the *Shivaganga Case*(2) as a case of a creation of an estate which could not be identified with any estate or title prior to the sanad granting it. That is the true distinction. In the present case, even assuming that the sanad is the root of title, the estate can be identified with the old palayam and the title-deed. Exhibit U simply repeats the preamble to Regulation XXV of 1802 and expresses views which were once held by Government as to the heritable character of the palayams. (He referred to the *Marungapuri case*(5).) The case of *Srimantu Raja Yarlagadda Mallikarjuna v. Srimantu Raja Yarlagadda Durga*(6) is in point. In *Zamindar of Merangi v. Sri Rajah Satrucharla Ramabhadra Rasu*(7) the facts were peculiar. A new grant of the zamindari was given to the son of the former zamindar, who was alive, in substitution for a pecuniary reward promised to certain retainers of the family. The sanad, no doubt, was apparently in the usual terms, but there was such a dealing with the estate and there was no proof of a usage or custom of succession by primogeniture throughout the operation of the grants of 1803 or 1835, and it was upon that the Privy Council laid particular stress. The estate, moreover, was in a new family which had no such custom. There is nothing in *Sri Raja Viravara Thodhramal Rajya Lakshmi Devi Garu v. Sri Raja Viravara Thodhramal Surya Narayana Dhatrasu Bahadur Garu*(8) against this view. In the present case the estate comprised in the sanad of 1817 represents the old palayam, and it was meant to represent the old palayam by Government.

(1) L.R., 15 I.A., 51; I.L.R., 10 All., 272.

(2) L.R., 8 I.A., 99; I.L.R., 3 Mad., 290.

(3) I.L.R., 18 Mad., 237.

(4) L.R., 7 I.A., 38; I.L.R., 2 Mad., 128.

(5) L.R., 1 I.A., 287.

(6) L.R., 17 I.A., 134; I.L.R., 13 Mad., 406.

(7) L.R., 18 I.A., 45; I.L.R., 11 Mad., 380; I.L.R., 14 Mad., 237.

(8) L.R., 24 I.A., 118; I.L.R., 20 Mad., 256.

THE UDAYAR-
PALAYAM
CASE.

THE UDAYAR-
PALAYAM
CASE.

The extent was diminished, but the assessment also was diminished in proportion. The istimidar zamindar was given the same income as the old palayam yielded. These physical arrangements were effected with the consent of the palayagar for his convenience and advantage. Secondly, even if there was a new grant the intention of Government was quite consistent with a continuation of its impartible character. As more or less contemporaneous evidence of such intention in the transactions of 1801 and 1802, see the exhibit LXVII series. Moreover, it is open to an ancient family like this to continue the custom in respect of newly-acquired or created estates. That is the basis of the law as to accretions to impartible estates. Given an ancient family which held an impartible estate; it can attach the custom, especially by continuing it in respect of an estate which represents wholly or in part the old one. (*Chowdhry Chintamun Singh v. Mussamut Noulukho Konwari* (1); *Devarakota Case* (2); *Thakur Nitpal Singh v. Thakur Jai Singh Pal* (3); *Lakshmipathi v. Kandasami* (4); *Tara Lal Singh v. Sarobur Singh* (5).) In the present case there has been a custom for about eighty years, and there have been four successions. The documentary evidence especially is overwhelming. In *Babaji v. Narayan* (6) it was held that an allowance in substitution for a saranjam is impartible.

Next, as to the question of limitation, even if the estate is partible, plaintiff's family are barred by limitation. (Regulation II of 1802, clause (iv), section 18; Act XIV of 1859, section 1, clause 13; and article 127 of Act XV of 1877.) Plaintiff's father was barred under Regulation II of 1802. If not, he was barred under Act XIV of 1859. Receipt of maintenance by him was not inconsistent with his being excluded from his share; on the contrary it negatives his joint rights and enjoyments. The maintenance was not received on account of his share. [He referred to *Govindan Pillai v. Chidambara Pillai* (7); *Gossain Doss Kocndoo v. Seroo Koomaree Debia* (8); *Subbaiya v. Rajesvara Sastrulu* (9); *Abbakku v.*

(1) L.R., 2 I.A., 263; I.L.R., 1 Calc., 153.

(2) L.R., 17 I.A., 134; I.L.R., 13 Mad., 406.

(3) L.R., 23 I.A., 147; I.L.R., 19 All., 1.

(4) I.L.R., 16 Mad., 54.

(5) L.R., 27 I.A., 33 at p. 37; I.L.R., 27 Calc., 407.

(6) I.L.R., 3 Bom., 340 at p. 346.

(8) 19 W.R., (C.R.), 192.

(7) 3 M.H.C.R., 99.

(9) 4 M.H.C.R., 354.

Ammu Shettati (1); *Jowala Buksh v. Dharum Singh* (2); *Hansji Ohhiba v. Valabh Chhiba* (3); *Appasamy Odayar v. Subramanya Odayar* (4); *Krishnadhun Chowdhry v. Sreenutty Hur Coomary Chowdhraim* (5); *Prosunno Coomar Mookerjee v. Shama Churn Mookerjee* (6); *Lakshman Dada Naik v. Ramchandra Dada Naik* (7); *Ramchandra Narayan v. Narayan Mahadev* (8); *Rai Ragunath Bali v. Ras Maharaj Bali* (9); also to exhibit N, (Board's Proceedings, No. 2745, dated 28th September 1885); exhibit XXVI, (deposition of Kachi Vijaya Rangappa given on 28th January 1870 in Original Suit No. 50 of 1869 on the file of the District Court of Trichinopoly); oral evidence of plaintiff's sixth and thirteenth witnesses; exhibit XXVIII (f), (Notice, dated 6th March 1884, of petition No. 80 by Oppayi Ammal to the zamindar); exhibit AQ, (Arzi to the Collector of Trichinopoly, dated 10th August 1835); exhibit XI, (Letter, dated 21st August 1835, from the Collector of Trichinopoly to the zamindar); exhibit LXII, (Extract from Board's Proceedings, dated 14th September 1835), &c., and the suits for maintenance.]

The plaintiff's father's suit for maintenance operates as *res judicata* in the claim for partition. (*Himmatsing Beeharsing v. Ganpatsing* (10) and *Babu Sheo Lochun Singh v. Babu Saheb Singh* (11).) The late zamindar Kalyana Rangappa acquired an impartible estate by prescription. (*Sri Rajah Viravara Thodhramal Rajyalakshmi Devi Garu v. Sri Rajah Viravara Thodhramal Suryanarayana Dhatrayu Bahadur Garu* (12); *Madhava v. Narayana* (13); *Sankaran v. Periasami* (14); *Narayan Jagannath Dikshit v. Vasudeo Vishnu Dikshit* (15); *Tekait Ram Chunder Singh v. Srimati Madho Kumari* (16); *Annasami Pillai v. Ramakrishna Mudaliar* (17); *Padapa bin Bhujangapa v. Swamirao Shrinivas* (18)).

(1) 4 M.H.C.R., 137.

(2) 10 M.I.A., 511.

(3) I.L.R., 7 Bom., 297 at p. 300.

(4) L.R., 15 I.A., 167; I.L.R., 12 Mad., 26.

(5) 25 W.R., (C.R.), 37.

(6) 17 W.R., (C.R.), 451.

(7) L.R., 7 I.A., 181; I.L.R., 5 Bom., 48.

(8) I.L.R., 11 Bom., 216 and to Notes (a) and (b) at pp. 220, 221.

(9) L.R., 12 I.A., 112; I.L.R., 11 Calc., 777 at p. 783.

(10) 12 Bom. H.C.R., 94 at p. 96.

(11) L.R., 14 I.A., 63; I.L.R., 14 Calc., 387 at p. 393.

(12) Appeal No. 94 of 1891 (unreported).

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

(14) I.L.R., 13 Mad., 467.

(15) I.L.R., 15 Bom., 247.

(16) L.R., 12 I.A., 188; I.L.R., 12 Calc., 485.

(17) I.L.R., 24 Mad., 219.

(18) L.R., 27 I.A., 86; I.L.R., 24 Bom., 556.

THE UDAYAR-
PALAYAM
CASE.

Plaintiff's alternative claim for the whole estate on the footing of impartibility is based on the ground that he is the preferable heir. This contention is based on a misconception of the case of *Neelkisto Deb Burmono v. Beerchunder Thakoor*(1), which was decided according to the Dayabhaga law, in which survivorship is unknown. (*Subramanya Pandya Chokka Talavar v. Siva Subramanya Pillai*(2).) *Naraganti Achammagaru v. Venkatachalapati Nayamivaru*(3) is exactly in point. It is unaffected by the law as to alienation laid down in *Rani Sartaj Kuari v. Rani Deoraj Kuari*(4) which case expressly recognizes the distinction between succession and alienation and was followed in *Muttuvaduganadha Tevar v. Periasami*(5); *Subramanya Pandya Chokka Talavar v. Siva Subramanya Pillai*(2); *Ramasami Kamaya Naik v. Sundaralingasami Kamaya Naik*(6); and *Rajajogendra Bhupati Hurri Chundun Mahapatra v. Nityanund Mansingh*(7). By the doctrine of representation the defendant is the nearer. (*Debi Parshad v. Thakur Diul*(8); *Bhimul Doss v. Choonee Lall*(9)). The *Tipperah Case*(1) was not recognized by the Privy Council in an early Madras case, which is an express authority. (*Stree Rajah Yanumula Venkayamah v. Stree Rajah Yanumula Boochia Vankondora*(10)). The cases referred to in Mayne's 'Hindu Law,' 6th edition, section 545, (*Achal Ram v. Udai Partab Addiya Dat Singh*(11) and *Narindar Bahadur Singh v. Achal Ram*(12)), are cases of collateral or reversionary succession after the widow, &c., where admittedly the principle of survivorship has no place.

Ramasubba Ayyar continued the argument:—The compromise decree and release in the former suit are binding upon the plaintiff and the second defendant on the footing of partibility or impartibility. Even if *Pattaravy Mudali v. Audimula Mudali*(13), is still good law, it does not apply. The District Judge really finds the will to be a validly executed will. On the footing of impar-

(1) 12 M.I.A., 523.

(2) I.L.R., 17 Mad., 316 at p. 330.

(3) I.L.R., 4 Mad., 250.

(4) L.R., 15 I.A., 51; I.L.R., 10 All., 272.

(5) L.R., 23 I.A., 128; I.L.R., 16 Mad., 11; I.L.R., 19, Mad., 451.

(6) I.L.R., 17 Mad., 422 at p. 434.

(7) L.R., 17 I.A., 128; I.L.R. 18 Calo., 151.

(8) I.L.R., 1 All., 105.

(9) I.L.R., 2 Calo., 379.

(10) 13 M.I.A., 333.

(11) L.R., 11 I.A., 51; I.L.R., 10 Calo., 511.

(12) L.R., 20 I.A., 77; I.L.R., 20 Calo., 649.

(13) 5 M.H.C.R., 422.

bility, the will excludes the plaintiff. (He referred to *Sri Raja Venkata Surya Mahipati Rama Krishna Rao Bahadur v. The Court of Wards*(1).)

Sundara Ayyar and *Balasubramania Ayyar* for respondent No. 1:—Exhibit LIII shows there was a confiscation in 1765. The palayam was gone. From that date the palayagar was only a renter or farmer, and even held that position with interruptions. His right to the palayam was never recognized. Exhibit U is conclusive that the old estate had been resumed and all that the palayagar could look to was the moderation and lenity of the Government. The treaties with the Nawab given in Aitohison conclusively show that the palayagar was not in existence. The appellant's reading of the treaties is not correct. Government no doubt intended in 1802 (exhibit LXVI) to restore the palayam, but it subsequently changed that intention. The change may not be shown in exhibit U, but it sufficiently appears from exhibits Y, BV, Z (extract from Board's Proceedings, dated 21st December 1815). From 1802 to 1814 there is a gap. The ten per cent. was but a compassionate allowance. The estate which was conferred by the sanad of 1817 was not that which had been previously held, nor did it amount to a restoration of the former estate. A new estate, consisting of a few villages, was given, just as in the *Nuzvid Case*(2), which, it is submitted, is exactly in point. The appellant's contention, which is based on the assumption that the income from the villages comprised in the sanad represented that of the old palayam, is unsound. Only a fraction of the old palayam was in fact given; and it is not clear that the income was the same. Even if it was the same, the position contended for does not follow. The sanad is the root of title. It conferred the villages and not the palayam. The former privileges referred to in exhibits AE and AK relate to kaval and kanivari. The appellants rely upon the word 'zamindar' in exhibit AK, but it is only a word of description. But it is exhibit AK, paragraph 2, that "confers the rights of a zamindar in certain villages." It is significant that a conditional sanad was necessary; (see exhibit AF). The *Merangi Case*(3) governs this. The fact that the family had all along treated the estate as impartible

(1) L.R., 26 I.A., 83; I.L.R., 22 Mad., 383.

(2) L.R., 7 I.A., 38; I.L.R., 2 Mad., 128.

(3) L.R., 18 I.A., 45; I.L.R., 11 Mad., 380; I.L.R., 14 Mad., 237.

THE UDAYAR-
PALAYAM
CASE.

THE UDAYAR-
PALAYAM
CASE. cannot alter its true nature; (see the *Belgam Case*(1)). In the *Shivaganga Case*(2) the estate was granted to the zamindar as a ruler. In the *Devarakota Case*(3), the istimidar zamindar was in possession at the date of the sanad. The principle running through the decisions is this:—If the grantee is in possession and a sanad is granted to him the sanad does not affect the nature of the estate, and it continues with the incidents which it formerly possessed. But if a sanad is given to one who is not in fact in possession of an impartible estate at the time of the grant the sanad becomes the root of title and confers only an ordinary partible estate according to Hindu Law. The Sadr Court held in the case of this very zamindari, that it was the self-acquired property of the istimidar zamindar under the sanad, so as to take away the rights of the members of the family prior to the sanad, not being the descendants of the grantee. In the *Hunsapore Case*(4) there was no sanad at all, and the estate was granted in its entirety. That is the other test. The arguments adduced by the appellants on the question of custom are untenable, since the custom, if any, came to an end with the confiscation of the old palayam. In the *Ramnad Case*(5) there was really no confiscation and Mangaleswari was in possession when the sanad was issued.

With regard to the question of limitation, the plaintiff's father was not barred under Regulation II of 1802 or Act XIV of 1859. He was in receipt of maintenance, and that is enough to take his claim out of the Statute. Maintenance was a mode of participation in the joint family property. See the *Belgam Case*(1). No doubt he lived apart, but that would not affect his right. The cases cited have no application because the whole question is whether there was exclusion. [He referred to *Govindan Pillai v. Chidambara Pillai*(6).] There was no exclusion so long as he continued to receive maintenance (*Ayyavu Muppanar v. Niladatchi Ammal*(7); *G. N. D. Maharajulungaru v. V. Rajah Row Pantulu*(8); *Umbika Churn Shet v. Bhuggobutty Churn Shet*(9); *Chunder Monee Debia v. Meharjan Bibee*(10); *Runjeet Singh v. Kooer*

(1) L.R., 24 I.A., 118; I.L.R., 20 Mad., 256.

(2) L.R., 8 I.A., 99; I.L.R., 3 Mad., 290.

(3) L.R., 17 I.A., 134; I.L.R., 13 Mad., 406.

(4) 12 M.I.A., 1.

(5) Appeal No. 89 of 1891 (unreported)—see post p. 613.

(6) 3 M.H.C.R., 99.

(7) 1 M.H.C.R., 45.

(8) 5 M.H.C.R., 31.

(9) 3 W.R., (C.R.), 173.

(10) 22 W.R., (C.R.), 185.

Gujraj Singh(1)). Maintenance is a receipt by a co-parcener in respect of his share in or right to a portion of the joint family property. A decree for maintenance cannot operate as *res judicata* on a claim for partition. It is submitted that *Himmatsing Bechar-sing v. Ganpatsingh*(2) is not sound law. A member of a joint family can sue for maintenance alone though he is entitled to partition (*Ayyavu Muppanar v. Niladatchi Ammal*(3)). The compromise and release in the former suit were entered into under the assumption that the estate was impartible. Their operation and effect must be considered only with reference to the questions which were in dispute and which were in contemplation of the parties at the time. See *Directors, &c., of London and South Western Railway Co., v. Blackmore*(4); *Soobramania Telaver v. Sokka Telaver*(5); *Subbiem Pillay v. Arnachalz Irungol Pillay*(6); *Pareyasami v. Saluckai Tevar*(7); *Parvathi v. Thirumalai*(8); *Ramanamma v. Sambayya*(9); *Leelanund Singh v. Hamidood-din*(10); and *Turner v. Turner*(11). The guardian, (the mother), had no power to bind the plaintiff and second defendant by her compromise.

The finding of the District Judge with regard to the will is unsatisfactory. There is really no trustworthy evidence that it was prepared under instructions from the testator and the mere reading of a will to a dying man does not sufficiently show that it was his and contained his wishes. On the question of Hindu Law, plaintiff is the preferable heir if the estate be partible. For the purpose of selecting the heir to impartible estates the same rules obtain. It is submitted that the case of *Naraganti Achammagaru v. Venkatachalapati Nayanicararu*(12) is no longer good law. The rules are given in *Subramanya Pandya Chokka Talavar v. Siva Subramanya Pillai*(13). No doubt those rules lay down that nearness of blood is no ground of preference and the estate should be treated as partible for the purposes of succession, but that does not help the first defendant. It is necessary to ascertain the nearest class of kindred in which the single heir is to be found. That is, the class of brothers, nephews, &c. Here,

(1) L.R., 1 I.A., 9.

(2) 12 Bom. H.C.R., 96.

(3) 1 M.H.C.R., 45.

(4) L.R., 4 H.L., 610.

(5) 5 M.H.C.R., 437.

(6) 5 M.H.C.R., 444.

(7) 8 M.H.C.R., 157.

(8) I.L.R., 10 Mad., 334 at p. 338.

(9) I.L.R., 12 Mad., 347.

(10) I.L.R., 8 Calc., 576.

(11) L.R., 14 Ch. D., 829.

(12) I.L.R., 4 Mad., 250.

(13) I.L.R., 17 Mad., 316.

THE UDAYAR-
PALAYAM
CASE.

the plaintiff and second defendant are nearest in class. The first defendant belongs to a remoter class. The doctrine of representation has no application to impartible estates, as they are not strictly joint family property, and the right by birth does not obtain as regards impartible estates. (*Rani Sartaj Kuari v. Rani Deo Raj Kuari*(1)). *Naraganti Achummagaru v. Venkatachalapati Nayanivaru*(2) proceeded upon that principle and it is really overruled by *Subramanya Pandya Chokka Talavar v. Siva Subramanya Pillai*(3), and the principle of it by the Privy Council in *Rani Sartaj Kuari v. Rani Deo Raj Kuari*(1.)

The Advocate-General (Hon. Mr. J. E. P. Wallis), and V. Krishnasami Ayyar, for respondent No. 2, argued, on the question of impartibility, that there had been an effective confiscation of the estate in 1765, as was proved by Mr. Wallace's report, and as appeared from Aitchison's treaties; there had been no restoration in 1802; the Government had apparently at one time entertained some intention to restore, but that intention was abandoned on receipt of the full information contained in Mr. Wallace's report, after which Government decided (exhibit U) that the palayagar had "no claim supported either by long possession or prescriptive right;" that the transactions of the years 1814 to 1817 and the words of the sanad themselves showed that a new estate had been created in 1817 consisting of a handful of villages—being but a small part of the old palayam; and that the grant was in the nature of compensation or compassionate allowance to the istimidar zamindar. Such new estate, as decided in the *Nuzvid Case*(4), was descendible according to the ordinary rules of the Hindu Law. [They dealt at length with the numerous documents and many of the cases which have already been referred to.]

[In the course of the arguments on both sides the following additional authorities were also referred to:—Gleik's 'Life of Sir T. Munro,' volume I, page 430; Wilk's 'Mysore,' volume I, page 21, footnote; 'Trichinopoly District Manual,' page 285 *et seq.*; Fifth Report, Madras Presidency, volume II, pages 93, 622; Mull's 'History of India'; and Caldwell's 'History of Tinnevely,' pages 143 to 180. References to Aitchison's treaties were to the third

(1) L.R., 15 I.A., 51; I.L.R., 10 All., 272.

(2) I.L.R., 4 Mad., 250.

(3) I.L.R., 17 Mad., 316.

(4) L.R., 7 I.A., 33; I.L.R., 2 Mad., 128.

edition, volume VIII, Treaty No. 5, articles 5 and 6; Treaty No. 7, articles 3, 5, 6, and 8, schedules 1 and 2; Treaty of 1781, page 40, articles 1, 5, 8, 9, 10, 18; Treaty of 1785, articles 7, 9, 12 and 13; and to the Transfer of 1801 at page 58.]

JUDGMENT.—The principal question in the case is whether the estate now known as the zamindari of Udayarpalayam is the partible property of the plaintiff's family or is held as an impartible estate. The District Judge has found that the original palayam as it stood until the expulsion of the first defendant's ancestor in 1765 was, like other palayams in the Karnatic, an impartible estate. Having read the evidence discussed by him and heard arguments upon it, we are of opinion that the conclusion at which he has arrived is right and that there can be no doubt that the palayam was up to 1765 held by one member of the family only, not being subject to the ordinary rule of Hindu Law.

The question regarding which there is the chief contest is whether, in view of the circumstances in which the sanad was granted in 1817, the estate comprised in that sanad came to be held by the family on terms different from those on which the original palayam was enjoyed. The plaintiff's case is that the estate comprised in the sanad was an entirely new estate, and that the quality of impartibility was never attached to it. The main grounds for this contention are that from 1765 till 1817 the zamindari was not, it is alleged, in the possession of the family at all and the estate granted in 1817 comprised only part of that which the former palayagars had held. It is urged that a new grant was made of free grace to the istimidar zamindar and that there was no intention that he should take it with the incident of impartibility which attached to the old palayam. What little is known of the palayam prior to July 1801, is contained in Mr. Wallace's report of 30th May 1802 (exhibit LIII). From this it appears that the palayagars of Aialore and Udayarpalayam had held uninterrupted possession of their respective palayams from very early times until after the siege of Madura in 1765, when they were expelled by the Nawab of the Karnatic and fled to Mysore. It further appears that with Hyder's aid, they returned in 1780 and drove out the Nawab's amildars and held "precarious possession" of their palayams until 1783 when they were won over to support the Company, and that during the first assignment of the revenues of the Karnatic to the Company in 1785, they were replaced in

THE UDAYAR-
PALAYAM
CASE.

THE UDAYAR-
PALAYAM
CASE.

possession of their palayams as renters but, having failed to pay their kist punctually, were imprisoned and the management of the palayams was entrusted to one of the chief servants of the palayagar of Udayarpalayam until the country was restored to the Nawab. In 1790 the Company again assumed the control of the country, and during this period, which is referred to by Mr. Wallace as the second assignment, the palayagars again held possession as renters under the Company. The palayagar during the period from 1765 to 1792 was the father of the istimidar zamindar. On his death in 1792 he was succeeded by the istimidar zamindar's elder brother of the half blood who died in 1801. In 1798 Mr. Wallace goes on to say that Chinnaya Mudali became the manager and that a monthly allowance of Rs. 1,000 was made to the palayagar who also retained his allowance as kavalgar and his cumbatum lands. In an earlier letter of August 1801 (exhibit BU) Mr. Wallace had spoken of this Chinnaya Mudali as a mortgagee. There is no further evidence as to the terms on which he held. In the same letter (dated 30th May 1802, exhibit LIII) Mr. Wallace points out that whatever was the reason for the expulsion of the palayagars by the Nawab in 1765, it was, in fact, disregarded by the Company's Government for, as he says "During the assignments of the country the palayagars were restored to every degree of power which our temporary authority over the Karnatic and southern provinces admitted of our conferring in acting thus." The fact that the palayagar retained his position as kavalgar appears from other documents, *e.g.*, exhibits I and II, dated respectively, 1792 and 1797, as also from later documents. That he was not in actual possession of the palayam lands but held his fort only when the Company took possession of the country in 1801 seems abundantly clear. But what precise cause led to his deprivation and whether a temporary dispossession or an absolute forfeiture was intended by the Nawab is matter for conjecture. What is clear is that on both occasions when the Company had the power to do so they reinstated him in possession as renter and when Chinnaya Mudali was in possession for a short time, the palayagar received an allowance and also retained throughout the office of kavalgar with its emoluments.

Some stress is laid on the way in which the palayam is dealt with in the treaties of 1787 and 1792. In the latter treaty it does not appear in the list of estates, the peishcush of which is by the

THE UDA-
PALAYAM
CASE.

fifth article assigned to the Company. It is mentioned in the second schedule containing a list of the districts, the management of which the Company was in certain events authorised to assume. Then it is associated with Trichinopoly, the phrase being "Trichinopoly including Worriorpollium and Arialore." It will be seen from the language of Mr. Wallace's letter of 10th August 1801 that at that time the palayam was not considered part of the district of Trichinopoly. It would have been a strong point in favour of the defendant if the palayam had been mentioned in the first schedule, and the omission of it, is certainly a point to be noted against him. But the point is of no great importance, because there is no certainty that the enumeration of the palayams given in the first schedule is an exhaustive enumeration. By the former treaty of 1787 palayams as well as other lands were pledged to the Company. That seems clear from article 5, yet the schedule mentions no palayam by name except Worriorpollium while it includes the provinces of Trichinopoly and Madura. If there were palayams in Trichinopoly and Madura other than those mentioned in the first schedule of the second treaty, then it would seem that those palayams must have been intended to be included in the second schedule. Otherwise it must be supposed that the Company gave up in 1792 some of the security which they had under the earlier treaty, which seems highly improbable. Altogether, we do not think that the treaties throw any new light on the question. We know from other sources that in 1787 and 1792 the palayagar was not in actual possession. On the 31st July 1801 the final treaty was concluded with the Nawab and a proclamation of even date announces to all zamindars, palayagars and kavalgars, &c., that the Government of the country and in particular the right of collecting revenue has passed to the Company (exhibit T). In December of the same year, a further proclamation is issued dealing with the matter of disarmament and also announcing the intention of introducing a system of permanent assessment (page 584). Meanwhile, Mr. Wallace had taken charge of the district of Trichinopoly (exhibit BM) and he writes several letters which are filed—the last dated in December refers to the fort occupied by the palayagar.

On the 2nd January 1802 Mr. Wallace announces the death of the palayagar and after describing the unsettled state of the country, he concludes by asking for orders as to the manner in which he is to regard the palayagar's brother "whether as successor to the claims

THE UDAYAR-
PALAYAM
CASE.

of the deceased or not" (page 329). The answer to this letter from the Government is contained in a letter of 27th February 1802 referring to the abovementioned proclamation of December, dealing particularly with the question of disarmament, and in conclusion declaring the intention of Government to "appoint the brother of the late palayagar of Udayarpalayam to succeed to that palayam on a zamindari tenure" and desiring that the usual sanad may be prepared and submitted. This, it is said, is in conformity with the principle of the Company's Government and agreeable to the recommendation of the Board (page 607). On the 8th March 1802 there is another letter from the Board, to Mr. Wallace direct, informing him that the palayagar's brother is to be instated in the palayam as "soon as a sanad of investiture can be prepared" (page 330).

From these letters it would appear that the intention at the time was to effect an immediate and complete reinstatement of the palayagar, the preparation of the sanad being regarded as little more than a formal condition. On 30th May 1802 Mr. Wallace writes the report which has already been mentioned at length. His opinion is in favour of restoration. That, in his view, is the policy which justice and expediency dictate, but he doubts the wisdom of immediate restoration, apprehending consequent want of security and protection to the people of the district. He proposes as a temporary measure a monthly allowance of Rs. 1,000 to the palayagar.

The proposal of Mr. Wallace is forwarded by the Board to Government with their approval (page 339). In July—in which month the Regulation XXV of 1802 was passed—the Government deal with the matter of the palayagars in a letter, dated the 17th (page 79). It begins by stating that any expectations entertained by palayagars must be founded on the presumed lenity and moderation of the Government and refers to the scheme of permanent settlement announced in the proclamation of the 1st December 1801 (page 584) and to the need for an inquiry into the value of the lands with a view to the commutation for military services formerly rendered. In the result it states that pending the necessary inquiry 10 per cent. on the net revenue of the palayam is to be paid to the palayagar. The purport of this order is communicated to the Collector in a letter of the 12th August 1802. The allowance of 10 per cent. with arrears from the date when the Karnatic was ceded to the Company was sanctioned; and from that time the

THE UDAYAR-
PALAYAM
CASE.

palayagar must have received the allowance remaining also in charge of his kaval duties. No change took place till 1814 when the question was re-opened by the Collector and the Board. The proposal then made is to grant to each palayagar a jaghire bringing in an average of 33 per cent. of the average gross collection and to be assessed in the sum of a hundred pagodas as a nominal rent. The Collector is instructed to ascertain the views of the palayagars. At the same time it is said that the Board does not mean to depart from the intention communicated to the palayagars, i.e., the intention to restore them to the management of their palayams under a new arrangement.

The Collector's report announcing the palayagar's consent is dated the 8th September 1814 (page 602). Before March 1816 another proposal seems to have been made, for, in that month the Government sanctions the plan by which each palayagar was to have a cusbah yielding 10 per cent. of the gross collections, and it is stated that the palayagars had assented to the plan (page 85). In December 1816 the Collector sends to the Board a report and asks for further instructions as to Udayarpalayam. In this report he mentions that the palayagar had been receiving star pagodas 8,117-33-32 of which 4,073-24-10 were received on account of kavali maniems and cannevery. On the 2nd January 1817 the Board give the required instructions, directing that the value of the villages to be given over to each palayagar is to be equal to the average gross amount of the palayagar's income from whatsoever source derived. In this letter it is expressly said that the villages were to be given on zamindari tenure, the idea of a jaghire having been abandoned. These instructions being approved by Government, a conditional sanad was at last granted on the 23rd December 1817 and the palayagar was put in possession.

Before dealing with the questions which arise on the proceedings of Government between 1802 and 1817, it may be convenient to narrate the events which happened after the granting of the sanad, taking, first, proceedings other than suits. For, reliance is placed on these facts as indicating the manner in which the estate was treated alike by the authorities and by the members of the zamindar's family.

In May 1823 the Board directs the Collector to send up a report giving a list of all the ancient zamindaris in his district not including those created in conformity with the principle of permanent

THE UDAYAR-
PALAYAM
CASE.

settlement, "but only such as are held by the representatives of ancient samasthanams whether now known by the name of "zamindars, palayagars," &c. (page 608) and in reply the Collector names Udayarpalayam and describes it according to a tabular form (page 610). It may have been a mistake on the Collector's part—though a mistake as to so recent an event is not likely—but it does not appear that the mistake was corrected, and we find (exhibit X) that in December 1821, the Collector had been asking for and presumably had not received grant, parvana or sanad relating to the zamindari which the zamindar was able to furnish (page 198). In August 1835 the istimidar zamindar dies. The Collector reports the fact to the Board and the recognition of his eldest son. He also informs the new zamindar that a day has been fixed for the installation, and that directions have been given with regard to the honours to be paid by the devastanams (page 199). The Collector's proceedings are confirmed by the Board. In the same month of August an arzi was sent to the Collector complaining of the order passed by the Collector and alleging that the petitioners, viz., the younger brother of the new zamindar, the plaintiff's father and his mother, were entitled to the zamindari inasmuch as they had set fire to the corpse of the istimidar zamindar. A custom to that effect is alleged, it is not stated in what manner the petitioners are entitled to enjoy the zamin, and nothing more is heard of the petition. The second zamindar died in January 1836 leaving an only son, an infant, on whom, in the Collector's opinion, the estate legally devolved. In June the Collector recommends that the estate be taken in charge of the Court of Wards, assigning as one reason the hostility of the two brothers above mentioned. These brothers, he says, are entitled to receive some support from the estate. These recommendations are approved by the Board and by Government. And accordingly, on the 28th June, the Collector informs the elder of the two brothers what sum will be allowed for them, for their mother Oppayi, and for plaintiff's grandmother. A further report on the matter was sent in August (page 355). In 1842 the third zamindar dies and his uncle, the elder of the two brothers, is recommended as his successor. He is accordingly put in possession of all the property (page 205).

Again an arrangement is made for the maintenance of the other members of the family including the younger of the two brothers

THE UDAYAR-
PALAYAM
CASE.

and the plaintiff's father (pages 360, 342). Before this was done there appear to have been petitions submitted by Oppayi and by Subbammal both of which were rejected (pages 359, 204, 588, 589). In 1843 after the fourth zamindar had come into possession he is adjured by the Collector to make a proper arrangement with Oppayi (page 207), and in 1850 and 1852 similar remonstrances are addressed to him with regard to his brother's maintenance.

The first litigation of which we have evidence arose from a claim made against the istimidar zamindar just before the sanad was issued. The plaintiff apparently was a member of a younger branch of the family and he had previously, in 1812, claimed maintenance out of the 10 per cent. allowance made to the defendant. The actual claim was for a moiety of the same allowance and it was rejected on the ground that the zamindari was one of those inheritances which, according to the usage and custom of the country, was not divisible into shares. This is the solitary instance in which such a claim has been made. In 1831 a suit was brought against the istimidar zamindar by Janaki, representing her son, for maintenance. The defence was the alleged illegitimacy of the plaintiff's father, but without trying this question the Sadr Adalat dismissed the suit on the ground that the zamindari was the self-acquired property of the defendant. In 1855 Subbammal, the third wife of the istimidar zamindar, sued for maintenance, the defendant being the fourth zamindar. One of the defences was that the plaintiff had not been legally married, but the Sadr Amin allowed the claim on the ground that other widowed ladies in the family received maintenance (page 151). There was an appeal to the Sadr Court which was dismissed. In 1860 the plaintiff's father brought a suit against the fourth zamindar; there was an appeal and a second appeal, the result of which was that the Civil Judge was directed to find what amount of maintenance was payable and the decree finally made was confirmed on appeal by the Judicial Committee (pages 169 and 214). The judgment in this appeal is put in by the plaintiff, apparently for the reason that it was assumed therein that the zamindari was the self-acquired property in the hands of the istimidar zamindar (page 112).

The last suit was brought in 1887 by Periasami, the plaintiff's elder brother (page 233). Being a minor, he sued by his mother as next friend. By the sanction of the Court the matter was

THE UDAYAR-
PALAYAM
CASE.

compromised on the terms that the defendant should pay for the support of the plaintiff and his two brothers the sum of Rs. 3,000, and for the future quarterly sums of Rs. 2,250 and a further sum of Rs. 30,000 for costs and past maintenance. The decree declares that the first defendant as belonging to the senior branch of the family and as heir according to usage shall possess the zamin and the property attached thereto. On the same day a release was executed by the mother on behalf of her three sons. This decree was executed and moneys due under it were received by the mother as long as Periasami was a minor and afterwards by Periasami himself till 1897. Periasami died in April 1897 and the present suit was filed in November. It will be observed that during this long period of 80 years, from 1817 to 1897, there is nothing in the action of the Government officers or of the members of the family to suggest that the estate was the partible property of an undivided Hindu family, while there is much to indicate that they regarded it as an impartible estate. There were during that time four successions to the zamindari and there were constant petitions, disputes and suits with regard to the amount of maintenance which the zamindar ought to allow to various members of the family, yet in no case was a partition claimed, though the sons of the istimidar zamindar were living apart from, and were hostile to, each other. The plaintiff's mother was advised in her suit (22 of 1886) by two of the most eminent Hindu lawyers in Southern India (now Sir Subrahmaniam Ayyar and Sir Bhashyam Ayyangar). It is difficult to believe that she would have agreed to the compromise and release effected in that suit on behalf of her sons, and that none of the other members of the family would have claimed a partition during so many years, except on the supposition of a general belief in the family that the estate was impartible.

The arguments on both sides turned mainly on the effect of the action of the authorities between 1801 and 1817, and two questions were discussed. What was the intention of Government in 1802 and was there any change of that intention in 1817? It is argued that if in 1802 it was intended to restore the palayam as it stood in former times, there was in later years a change of mind on the part of the Government, and the final resolution at any rate was to create a perfectly new estate. Whatever may have been the intention of Government in 1802 with regard to the question of impartibility, we can find nothing in the evidence to justify the

THE UDAYAR-
PALAYAM
CASE.

idea that there was any such change of intention as is suggested. The determination of Government had been communicated to the palayagar, probably in the course of the year when it was formed. From that determination the Board expressly declares that there was no intention to depart. It was only after consultation with the palayagar that the plan conceived in 1814 was to be worked out, and, as we have seen, the final arrangement was made with palayagar's assent (page 85). The professed object of the Board was to give the palayagar an "equivalent to the benefit expected to be derived under the zamindari tenure." Instead of being put in possession of a large tract of country which, as the Board feared, the palayagar would not be competent to manage and having to pay a proportionately large peishcush, he was to have a smaller territory charged with a nominal rent only. There was certainly a change in the mode in which the resolution of 1802 was to be carried into effect, but it was a change made with the palayagar's consent and otherwise the resolution was allowed to stand. The fact that some of the villages included in the old palayam were not included in the zamindari is, in this view of the case, immaterial. They were excluded because the palayagar agreed to give them up in consideration of easier terms in regard to peishcush. When it is objected that the palayagar was accepting the equivalent of only 10 per cent. in lieu of the 33 per cent. which, if the whole palayam had been restored on the ordinary terms he would have received, it must be remembered that out of the 33 per cent. the zamindar would have had to meet the expenses of management of the whole palayam and also take the risk of bad seasons, being at the same time always chargeable with the 66 per cent. payable to the Government, amounting to about a lakh of rupees. Evidently it was thought that when these things were taken into account the zamindar would not receive much more than 10 per cent. net (page 80), for, the Board on the 12th May 1814 say that a jaghire bringing in something more than their present allowance would be sufficient. It is clear that the Board, as far at least as their expressed intention went, did not mean that the zamindar should be worse off pecuniarily than he would have been if put in possession of the whole palayam. In the result the villages included in the sanad were estimated to yield a sum slightly exceeding the amount which the palayagar had been receiving on account of the 10 per cent. and in addition were

THE UDAYAR-
PALAYAM
CASE. included villages sufficient to bring in a sum equal to the average annual amount of the kaval collections.

There is nothing, as far as we can see, in the terms of the sanad to justify the idea that anything beyond a settlement was in contemplation. The reference to "former privileges" probably had regard to the kaval fees hitherto enjoyed by the zamindar and perhaps also to the lands "relinquished" by him in accordance with the Government Order of the 29th March 1816 (page 85). Except for this reference the instrument is not materially different from that which was given in the *Devarakota Case*(1). The operative part of the instrument beginning with the third paragraph merely declares the permanent annual jamma which has been fixed on the zamindari.

No evidence is adduced as to the reasons for the delay in effecting a settlement with the palayagar. It is not shown that anything occurred to make the Government alter its mind. It can only be inferred that, having regard to the condition of the country and perhaps the character of the palayagar, the authorities did not think it prudent to lay upon him such a large responsibility as the possession of the whole palayam assessed in the ordinary way would have involved. The inclusion of villages on account of the kaval fees theretofore enjoyed is not a fact which can be used against the zamindar. The functions of kavalgar had been attached to the office of palayagar and he had been remunerated by fees or lands. The Government might have resumed the lands or withheld the emoluments and dispensed with his services. Their recognition of the zamindar as kavalgar up to 1816 and the compensation made to him shows the desire of Government that the zamindar's pecuniary position should not be prejudicially affected.

Going back to the circumstances in which the resolution of 1802 came to be made, we have now to consider whether at that time the Government had it in mind to alter the incidents of the palayagar's tenure as between himself and the members of his family. The principles of the Company's Government in obedience to which the Government acted in regard to the palayagar included the cessation of the military service formerly required by

the palayagars, the assurance of immunity and of security of tenure to the palayagar and other inhabitants and the establishment of a system of permanent assessment. On those principles the Government asserts that it intends to act notwithstanding that in their opinion the palayagar could not claim such treatment as a matter of strict right. It must be remembered that according to the view then entertained the tenure of zamindaris generally was regarded as scarcely conveying any idea of property in the soil (see paragraph 4 of instruction to Collector, page 318, 5th Report, and also preamble to Regulation XXV of 1802; *Marungapuri Case*(1)).

We, however, find that the Company's Government consistently and continuously admitted the claims of the palayagar as a matter of justice, if not of strict legal right. When they had temporary authority during the two assignments they had restored the palayagar to all the power and authority in the palayam which, at the time, they could give. When Chinnaya Mudali was temporarily in possession (under circumstances which are not explained) they secured him an allowance of Rs. 1,000 per mensem and "from the day the Karnatic was ceded to the Company" he was paid "an allowance of 10 per cent. on the net revenue of his palayam" (exhibit Z).

The allowance of 10 per cent. on the net revenue is consistent with the view that the palayagar's right was acknowledged in fact, for that was the usual allowance made to palayagars or other ancient landholders during the pendency of an enquiry as to the amount of peishcush which should be charged on their estates permanently and entered in the sanads which were then being prepared for all estates in order to carry out the policy of the permanent settlement. This appears from paragraphs 41 and 42 of the instructions above mentioned (page 327, 5th Report). If immediately after the order of February 1802 the palayagar had been put in possession and a sanad issued under the Regulation of that year, and still more if, as in the *Hunsapore Case*(2), no sanad has been issued, it could hardly be suggested that there was any intention to alter the impartible character of the estate. The exemption from military service and the granting of a sanad certainly could not be deemed to indicate

(1) L.R., 1 I.A., 287.

(2) 12 M.I.A., 1.

(1) L.R., 17 I.A., 134; I.L.R., 12 Mad., 406.

THE UDAYAR-
PALAYAM
CASE.

such intention. What difference then can it make that the palayagar, not being put in actual possession, was for fifteen years after the intended restoration had been announced treated as a landholder with whom a settlement had yet to be made? The argument on the plaintiff's behalf must be that the withholding of possession justifies the inference that the Government intended to alter the character of the estate or make a new grant. With that argument we have already dealt. To us it appears more reasonable to hold that the Government, recognizing the claims of the palayagar, and intending ultimately to give full effect to them, never considered the question of impartibility, and therefore must be taken to have intended that, except so far as the tenure might be altered by the sanad, the prior state of things should continue. The *Nuzvid Case*(1), on which reliance was placed, is distinguishable from the present in more than one respect. There, for the period between 1793 and 1802, no member of the family was in possession, apparently their rights were altogether in abeyance; it is not stated that any allowance was received by any of Narayya's sons. In 1802 six pergannahs, being only a small part of the original zamindari, were granted to the second Ramachandra, while the larger part of the zamindari was granted to the eldest son in whose hands the whole zamindari had been in 1793. Obviously in this case Ramachandra took a new estate, though it might have been otherwise with the eldest son as to whose case the Judicial Committee refrained from expressing any opinion. In addition, there was evidence of conduct subsequent to 1802 indicating the opinion prevailing in the family, whereas in the present case all the evidence of that kind points to the opinion that impartibility is the rule. This latter observation also applies to the *Merangi Case*(2). There a complete break in the possession of the family had lasted from 1760 till 1795, when Gangaraz, a member of the elder branch of the family, was put in possession. Beyond that fact there was nothing on which to found the conclusion that the Government had in view the creation of an impartible zamindari (*Zamindar of Merangi v. Sri Rajah Satrucharla Ramabhadra Razu*(2)). And there was evidence relating to what happened in

(1) L.R., 7 I.A., 38; I.L.R., 2 Mad., 128.

(2) L.R., 18 I.A., 45; I.L.R., 11 Mad., 380 at p. 385; I.L.R., 14 Mad., 237 at p. 244.

1835 which, in the opinion of the Committee, clearly negated any such intention. Much the same arguments seem to have been used in the *Ramnad Case*(1) as were used before us. There also Mangaleswari, in whose favour a formal declaration was made in 1795, was not put in possession for some years and then only when she had executed a muchalka. There was not even any evidence that the Company had paid her the net profits of the estate for the period during which it continued in their management. Mr. Justice Muttusami Ayyar considered that these circumstances did not serve to show that the quality of impartibility was intended to be affected. There was in that case a change of tenant and the military character of the tenure was of course abolished; there was also from the first an intention to fix a permanent peishcush. But Mangaleswari was recognized as successor to the palayapat and no new estate was granted. Mr. Justice Muttusami Ayyar's observations hold equally good as applied to the present case—though no doubt there were other circumstances in the *Ramnad Case*(1) on which the judgment was rested.

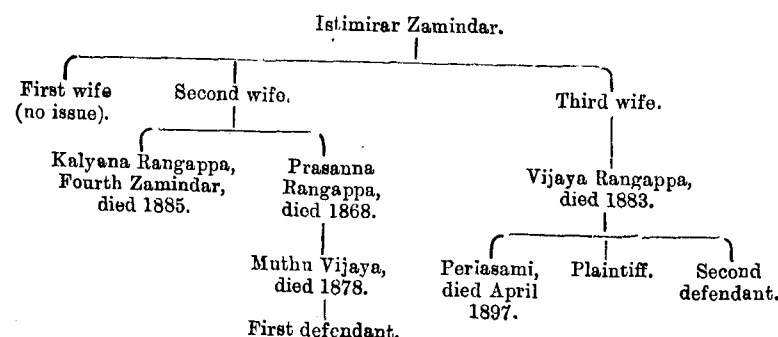
Taking all the evidence together up to the date of the issue of the sanad, we are unable to agree with the conclusions at which the District Judge arrived. Nor can we accede to the contention that the case must be treated on the footing that the palayam was wholly lost to the palayagar's family before 1801 and that accordingly an entirely new grant was made in 1802. There is no evidence of any definitive confiscation of the estate by the Nawab, and the conduct of the Company before 1801 shows that, so far from holding that a confiscation had taken place, they did their best to give effect to the palayagar's claims. In February 1802 the resolution of Government is explicit—the late palayagar is to be succeeded in the palayam by his brother—and from that time the latter received what was supposed to be the net income of the estate with arrears “from the day the Karnatic was ceded to the Company” (exhibit Z, paragraph 19). There was, in effect, a restoration of the estate, and unless it can be said that that act was cancelled by the subsequent proceedings of Government and a forfeiture was suffered, we fail to understand how the villages ultimately included in the sanad can be said to have been granted as a mere matter of grace

(1) Appeal No. 89 of 91 (unreported)—see post p. 613.

THE UDAYAR-
PALAYAM
CASE.

in 1817. We have already given our reasons for holding that the change of mind on the part of Government did not go the length of amounting to a cancellation of their resolution of February 1802 or to a confiscation of the estate. In our opinion the question of impartibility must be decided in no other way than it would have had to be decided if a sanad had been granted on the ordinary terms in 1802. Regarding the question in that way, considering the evidence as to enjoyment of the old palayam, and the evidence as to what has occurred with regard to the enjoyment of the zamindari since 1817, we think it is sufficiently proved that as the old palayam was impartible so it was intended that the zamindari should be impartible.

The plaintiff, however, contends that even if the zamindari is impartible he is entitled to succeed Kalyana Rangappa, the fourth zamindar, who died in 1885, in preference to the first defendant who, in fact, succeeded him. The relationship of the parties is shown below.



The plaintiff's contention is that he, being a son of the fourth zamindar's brother, is, notwithstanding that he is a brother of the half blood, in a nearer class of heirs than the first defendant, who is a grandson of the fourth zamindar's uterine brother; and that, being in the nearer class, he is to be preferred to the first defendant, who is in a more remote class.

In support of this contention he relies on the decision of the Privy Council in the *Tipperah Case*(1) and on the decision of this Court in *Subramanya Pandya Chokka Talavar v. Siva Subramanya*

(1) 12 M.I.A., 523.

Pillai(1). The short answer to this contention is that the *Tipperah Case*(2), as has been already pointed out by this Court (*Subramanya Pandya Chokka Talavar v. Siva Subramanya Pillai*(1)), was decided with reference to the law of the Dayabhaga, which does not recognise survivorship as determining the devolution of property, and is thus not applicable to this Presidency where the law of survivorship, as recognized by the Mitakshara, prevails, and is a determining factor in tracing the descent of impartible property in an undivided Hindu family. This was expressly laid down by Turner, C.J., and Muttusami Ayyar, J., in the case of *Naraganti Achammagaru v. Venkatachalapati Nayanivaru*(3) where they relied on an earlier decision of this Court in *Ramayya v. Ranganayakamma*(4) and on certain observations of the Privy Council in the case of *Katama Natchiar v. The Rajah of Shivagunga*(5). In the case of *Naraganti Achammagaru v. Venkatachalapati Nayanivaru*(3) the competition was between a junior uncle of the last zamindar and a grandson of a senior uncle, and the latter was held to have the superior right. The Court laid down this broad rule:—"When impartible property passes by survivorship from one line to another it devolves not necessarily on the co-parcener nearest in blood but on the nearest co-parcener of the senior line"(page 267).

Applying this rule to the present case it is clear that the first defendant is the nearest co-parcener of the senior line and therefore takes in preference to the plaintiff who belongs to the junior line. The plaintiff contends that a different principle was laid down by this Court in *Subramanya Pandya Chokka Talavar v. Siva Subramanya Pillai*(1), but it may be doubted whether under the principles there laid down the plaintiff would have a preferable title to the first defendant for, in an undivided family, like the present, nearness of blood is immaterial. The principle of representation places the first defendant and the plaintiff in the position respectively of their grandfather and father and therefore equally near to the deceased zamindar, (apart from any question of the half-blood) and that being so, the first defendant being senior in age to the plaintiff would take the impartible property in preference to the plaintiff. However that may be,

(1) I.L.R., 17 Mad., 316 at pp. 325 to 327, 330.

(2) 12 M.I.A., 523.

(4) Appeal No. 28 of 1877 (unreported).

(3) I.L.R., 4 Mad., 250 at p. 267.

(5) 9 M.I.A., 543 at p. 593.

THE UDAYAR-
PALAYAM
CASE.

THE UDAYAR-
PALAYAM
CASE.

this Court in deciding the case of *Subramanya Pandya Chokka Talavar v. Siva Subramanya Pillai*(1) did not overrule or dissent from the decision in *Naraganti Achammagaru v. Venkatachalapati Nayanivaru*(2) and we think that we are bound by the latter decision which is in accordance with a still earlier decision of this Court.

We hold therefore that the first defendant is entitled to succeed to the impartible estate in preference to the plaintiff.

The plaintiff, however, contends that certain portions of the property claimed in the plaint are not included in the impartible estate, but are partible property to a partition of which he is entitled notwithstanding our decision in regard to the impartible estate.

With regard to the lands in schedule A attached to the plaint the District Judge has held that they all form part of the zamindari, except the two villages (item No. 23) of Mavatiruppu and Vandayiruppu. These were originally acquired by the istimirar zamindar and the District Judge finds that two-thirds of these passed from zamindar to zamindar, and one-third was sold by order of the Court and passed from the family for a time but was re-purchased by the fourth zamindar in 1878. In all cases the purchases were presumably made from the zamindari funds. The District Judge thinks that the one-third re-purchased by the fourth zamindar was intended to be incorporated with the two-thirds which had passed from zamindar to zamindar, and he is of opinion that these two-thirds should be held to be partible property because the fourth zamindar in his suit to recover one-third from the purchaser in the Court sale treated the property as partible. We do not, however, think that this is a correct view. The zamindar first claimed the property as part of his zamindari and it was only when this claim was disallowed that he tried the other plea and treated them as partible. The original plea of the zamindar is certainly as likely as his later plea to be correct. The onus lies on the plaintiff to show that the property is partible. This we think he has failed to do. The manner in which the property was acquired and passed from zamindar to zamindar, leads us to the conclusion that it, as well as the other property in schedule A, was part of the zamindari and passed with it to the first defendant.

(1) I.L.R., 17 Mad., 316 at pp. 325 to 327, 330. (2) I.L.R., 4 Mad., 250 at p. 267.

Having found that the zamindari is impartible, and that there is no partible property, it is unnecessary to decide the questions—which are, in the main, questions of law—which would arise if the estate were partible.

In view, however, of the possible result of an appeal to the Privy Council and with a view to prevent possible future litigation, we think it is necessary to record our finding as to the validity of the will of the late zamindar. On that issue the District Judge has unfortunately omitted to record a definite finding. The Judge finds that “the zamindar knew what was in the draft and fair copy and approved them though he was not the first to originate the idea of disposing of the property in the way he has dealt with it” (paragraph 106); that on the 20th June he must have had sufficient consciousness to know what he was doing and did know that he was signing a will (paragraphs 90 and 93). He rejects the evidence of Bhujanga Rao in so far as it states that the fair copy was not finished till the morning of the 20th. He believes the Deputy Collector’s evidence and does not say he disbelieves Rangasami Ayyangar though he considers him not a very trustworthy witness. It is somewhat difficult to understand what doubt was left in the mind of the Judge, since it was not alleged and certainly not proved that the execution of the will, of which the testator is found to have known the contents, was obtained by undue influence. It need hardly be said that it is quite immaterial that the zamindar acted upon suggestions made to him by his friends and relations in framing the will, provided that he knew what he was doing and was not subjected to any improper influence. Apparently the Judge’s suspicions were aroused by the language used by the Deputy Collector and the witness Rangasami in their two letters (exhibits K and M). It is suggested that Rangasami, while on the 16th writing to the Deputy Collector about some rumoured plot to get a will executed, was afterwards gained over by the plotters and induced to assist in obtaining the execution of the will signed on the 20th. There is no evidence to support this suggestion, and it is quite inconsistent with the conduct of the witness Rangasami in taking the will to the Deputy Collector for his criticism. If Rangasami is to be believed as to what took place in the zamindar’s presence and elsewhere on the 18th and 19th June, it is perfectly clear that the will was approved by the zamindar. Indeed, the Judge finds that

THE UDAYAR-
PALAYAM
CASE.

THE UDAYAR-
PALAYAM
CASE.

to be the case, but he does not observe how Rangasami is corroborated by the Deputy Collector. We accept the evidence of Rangasami as to those events. It is not suggested that there is anything in the dispositions of the will to justify suspicion. On the whole we are of opinion that the issue as to the will must be found in the first defendant's favour.

The plaintiff can have no claim to the property acquired by the fourth zamindar. It was disposed of by will, and that will we have found to be valid.

Lastly, the plaintiff claims that if the estate is impartible, and if first defendant is entitled to hold it, he (the plaintiff) ought to get an allowance for maintenance of Rs. 2,000 per mensem and Rs. 10,000 for marriage expenses. No argument was addressed to us with regard to the claim for marriage expenses. The District Judge considered the claim for maintenance was exorbitant and allowed the plaintiff Rs. 250 per mensem, that being one-third of the sum allowed for the plaintiff and his two brothers under the compromise in Original Suit No. 22 of 1886. The first defendant objects to this sum as excessive. He wishes it to be reduced to Rs. 150, but we think that it is a reasonable sum to allow for the reasons stated by the District Judge in paragraph 74 of his judgment.

The result of these findings is that the appeals are all allowed and the suit is dismissed, except so far as regards maintenance payable to the plaintiff by the first defendant. Plaintiff will have a decree for this maintenance charged on the property in schedule AI including arrears from the date of the plaint payable according to the dates in exhibit XXXII(e). Plaintiff must pay all the costs of the litigation, except on the amount of maintenance recovered by him in Appeal No. 114 of 1899. He is entitled to costs on this amount from the first defendant. Subject to the above exception all the appeals are allowed with costs.

The appeals were posted again on the 2nd May 1901, to be spoken to.

S. Srinivasa Ayyangar, for appellant, contended that as a result of the judgment the memorandum of objections should have been dismissed with costs.

The Advocate-General, (Hon. Mr. *J. E. P. Wallis*), for respondent No. 2, argued that the defendant No. 2 was also

entitled to a decree for maintenance in the suit. He should not be driven to a separate suit. The rights of the family were adjudicated upon and the Court could award maintenance to the members of it. On the finding that the estate was impartible, the defendant No. 2 would be entitled to maintenance as well as the plaintiff.

S. Srinivasa Ayyangar, in reply, contended that as the suit for partition had been dismissed, no decree in favour of a defendant could be made. The plaintiff really united three suits,—for partition, ejectment and maintenance. The two former having been dismissed what remained was only a suit for maintenance by one member of a family to which defendant No. 2 not be a necessary or proper party. No decree for maintenance could be made in favour of a defendant, and the whole suit except the claim for maintenance was dismissed. Had the claim for partition been successful the rights of each member would have been ascertained and relief could then have been given to defendants as if they had been plaintiffs.

JUDGMENT.—The plaintiff's memorandum of objection is dismissed. Include as costs payable by the plaintiff the costs on Rs. 6,180-11-3, being the costs incident to the first and second grounds of the memorandum of objection.

The Advocate-General, on behalf of the second defendant, asks to have included in the decree a provision for the maintenance of his client.

Such provision can no doubt be made in a decree for partition, but in the present case the plaintiff has failed in his claim to recover the whole zamindari as against the first defendant and the case is not one in which a decree in favour of one defendant can be made against another. Of course, the second defendant is not precluded from making any claim for maintenance which he may have.

THE RAMNAD CASE.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

APPEAL No. 89 OF 1891.

SUIT for partition. Plaintiff was the younger, and defendant the elder, of the two sons of the late zamindar of Ramnad, who died in 1873. Plaintiff alleged that he and defendant were members of an undivided Hindu family governed

THE RAMNAD
CASE.

by the Mitakshara law; that plaintiff's father was undivided from his sons who were minors at the time of his death, plaintiff having been born in 1871 and defendant in 1868; that the Court of Wards had wrongly taken possession of the zamindari with its appurtenances and had continued in possession thereof until November 1889, when it had been delivered to defendant, upon his attaining his majority. Plaintiff had demanded and had been refused partition in November 1889, and now claimed a declaration that he and defendant were members of an undivided Hindu family, subject to the law of partition, together with half the entire estate, interest and mesne profits from the date of plaint, an injunction restraining defendant from alienating, wasting or encumbering the property, and the appointment of a receiver.

To this defendant pleaded that the zamindari of Ramnad was an ancient principality, which had been a raj till about the beginning of the present century; that it had always descended to a single heir and been held and enjoyed by such heir as an impartible estate, devolving, according to the rule and custom of primogeniture governing the descent of ancient estates that were impartible either by reason of their having been kingdoms, or in the nature of a raj, or principality by custom. He denied that the family was governed, as alleged, by the law of Mitakshara, or that the incident of partibility arising under that law was applicable to it. He claimed that the estate had devolved upon him to the exclusion of plaintiff according to the said rule of impartibility and primogeniture, and further relied on a will alleged to have been executed by the late zamindar, and stated that he had been rightly put into possession of it by the Court of Wards.

The first issue raised the question whether the zamindari and its appurtenances was impartible for any and which of the reasons set up by defendant, or partible, as alleged by plaintiff. The District Judge decided it against plaintiff. The second issue dealt with the validity and effect of the will. This document was only relied upon as evidence that the late zamindar had regarded the estate as impartible. The District Judge considered that it threw no light on that point, and expressed no opinion as to its genuineness.

The suit was dismissed. Against this decree plaintiff preferred this appeal.

Mr. H. G. Wedderburn, Ramachandra Rao Saheb, F. Rangachariar, Ranga Ramanujachariar, and T. Rangachariar for appellants.

S. Subrahmanyam, Hon. V. Bhashyam Ayyangar, V. C. Desikachariar, and Sivagnana Mudaliar for respondent.

The following are extracts from or summaries of some of the documents which were before the Court. Others are sufficiently set out in the judgment:—

A letter from the Collector of Tinnevely, dated 31st December 1791, to the Committee of Assumed Revenue (exhibit XXV), in which it is stated that the Raja of Ramnad was still compelling the Dutch at Keelkerry to pay him annual tribute and was exacting customs on all their exports and imports.

Two letters from the same to the same, dated March and May 1791, respectively, (exhibits XXVIII and XXIX), referring to the amount of peishcush payable by the Raja of Ramnad.

Articles of an agreement, dated 4th March 1795, entered into by Lord Hobart, Governor of Fort St. George, on the part of the East India Company, and His Highness the Nawab Walajah, &c., "for the better government of the districts called the Great Maravar or Ramnadpuram" (exhibit XLIVa), containing the following, among other provisions:—(1) that a succession to Muthuramalinga Setupati, the deposed palayagar, should be appointed as soon as the person entitled to succeed to him could be satisfactorily ascertained; (2) that the Nawab should place the Great Maravar or Ramnadpuram district under the entire control of the

Company for a period of three years, both with regard to collection of revenue and all acts of Government and authority whatsoever; (3) that the Nawab, in so doing, should be distinctly understood only to suspend, for the period in question, the rights which were acknowledged by the treaty of allegiance and submission of the Ramnad palayagar to His Highness in all customary ceremonies; (4) that at the expiration of the three years, the amount of peishcush to be paid to the Company on account of His Highness should be permanently settled; (5) that a sum not less than 10 per cent. of the revenue should be allowed for the support of the person in possession of the palayagarship, and that an allowance should also be made for the support of the deposed palayagar and his family; (6) and (7) that inasmuch as a certain number of sibbandi troops were to be maintained and paid out of the revenues of the Ramnad country, the successor of the palayagar should not be liable to be called upon to furnish peons on any occasion; (9) that after deducting the sum allotted for the maintenance of the deposed palayagar Muthuramalinga Setupati and his family, the allowance for the support of his successor, the payment of the sibbandi troops, the actual peishcush and the expense of collection, the residue should each year be paid to His Highness the Nawab; (12) that the situation of the person who might succeed to the deposed palayagar should not be affected by the expiration of the agreement.

Extract from Minutes of Consultation of the Board of Revenue, dated 3rd July 1795, (exhibit XLVIa), relating to the right of succession to the palayagarship of Ramnad, and nominating Mangaleswari Nachiar, sister of the deposed palayagar, as his successor.

A letter from the Collector of Madras to the Head Assistant Collector of Tinnevely and the Marawars, dated 5th February 1803, (exhibit LII), requesting him to place the rani in full possession of the Ramnad zamindari, upon the terms specified in his report to the Special Commission on the subject.

Extract from a sanad granted to Sathupathi Nachiar, Zamindarni of Ramnad, dated April 1803, (exhibit D), reciting that as the public assessment of lands redeemed had never been fixed, and as it had been usual for Government, for the purpose of obtaining increased assessments of revenue, to deprive the zamindars and to appoint persons on their own account for the management of the zamindaris, thereby reserving to the ruling power the implied right and the actual exercise of the proprietary possession of all lands whatever, and that such a mode of administration might be injurious to the permanent prosperity of the country, the British Government had resolved to grant to zamindars a permanent property in their land in all time to come. The assessment of the zamindari of Ramnad was then fixed.

Extract from a letter from the Special Commission, to Lord Clive, dated 5th April 1803, (exhibit LVI):—"The circumstances which led to the rebellion, and to the subsequent deposition of the Raja of Ramnad have been the subject of ample discussion on the records of Government, the agreement in consequence concluded with His Highness the late Nawab of Arcot for the administration of the affairs of Ramnad by means of the Company's officers having been submitted to the Honourable the Court of Directors, the Honourable Court have expressed their sentiments on the subject. The sister of the deposed Raja, Mangaleswari Nachiar having been formally acknowledged in conformity to the terms of the above-mentioned agreement, to be the proper successor to the zamindari, the district of Ramnad has, with the permission and approbation of your Lordship in Council, been transferred to the authority of the rani, under conditional terms for the permanent settlement of the revenue; and it now remains for us to submit to the consideration of your Lordship in Council the grounds on which we propose to fix the future revenue of Ramnad on a permanent zamindari tenure."

THE RAMNAD
CASE.

A letter from the Board of Revenue, to the Chief Secretary to Government, dated 16th April 1840, (exhibit LXI), stating that the minor rani, who had been married sometime previously, had died in child-bed and left no issue, and was succeeded by her sister Doraraja Nachiar, the sole remaining child of the late zamindar Ramasami Tevan; that during the life of the deceased the estate had been under the control, not of the Court of Wards, but of Muthuviroyi Nachiar, the widow of the former zamindar Annasami Setupati and her brother Muthuchella Tevan, agreeably to the request of the late zamindar Ramasami Tevan, and suggesting that no change in the management was requisite except the substitution of the mother of the minor Parvata Nachiar, as guardian in the room of Muthuviroyi Nachiar. It concluded as follows:—"I am directed to take this opportunity to correct an erroneous statement in the second paragraph of the letter from this office, dated the 20th February last, viz., that the eldest of the two daughters of the late zamindar was his heir by Hindu Law. According to that law his widow, now proposed for the office of guardian, was his heir, but the succession in the present case appears to have been governed by the custom of the family."

On 5th September 1893 their Lordships delivered judgment as follows:—

MUTTUSAMI AYYAR, J.—This was a suit for partition of the zamindari of Ramnad in the district of Madura. The last zamindar was one Muthuramalinga Setupati who died in February 1873, leaving him surviving two sons, three widows, and five daughters. Respondent Bhaskarasami Setupati, the present zamindar, is his eldest son by his wife Muttatta Nachiar, and appellant Dinakarasami is his second son by his fourth wife Doraraja Nachiar. The former was born on the 3rd November 1868 and the latter on the 26th April 1871. During Muthuramalinga's lifetime, the Court of Wards entered into management of the zamindari under an arrangement made for the liquidation of a loan advanced to him by the Government and upon his death, continued in possession during respondent's minority. In November 1889 respondent attained his majority and the Court of Wards placed him in possession of the estate. In April 1889, appellant completed his eighteenth year and instituted this suit on the 27th January 1890.

The plaint states that in November 1889 appellant demanded and was refused partition and that the cause of action arose on that date.

The ground of claim disclosed by the plaint is that the zamindari of Ramnad is ordinary co-parcenary property, and that the appellant is entitled to claim partition and possession of a moiety of the estate. On the other hand, respondent's case is that the zamindari is impartible property capable of being enjoyed but by one member of the family at a time, and that its devolution is governed by the rule of primogeniture. His defence rests on the usage of the family and on the nature of the estate prior to the permanent settlement and the British rule, as a raj or principality or a feudatory estate. The principal question, therefore, is whether the zamindari of Ramnad is or is not impartible. The Court of First Instance upheld respondent's contention, viz., that the estate was impartible. Hence this appeal. The main objection urged on appellant's behalf is that there is no adequate proof of impartibility, and that the evidence does not warrant the finding of the Subordinate Court. The political history of Ramnad prior to the introduction of the British rule supplies important historical evidence in this case.

The present zamindaris of Ramnad and Sivaganga form together what is known as the country of the Maravars, an ancient and a primitive tribe in Southern India. They have their peculiar social and marriage customs and their own sub-divisions of caste and in former times, they were a warlike and

turbulent race. It is stated in Mackenzie's 'Collection of Manuscripts' that they came originally from Ceylon; but however this may be, it is historically certain that they were settled in Southern India from a very early period of the Pandiyan dynasty and that the zamindar's ancestors were the tribal chiefs.

The zamindar's family is known as the Setupati family and from ancient times, it has had that title, the term 'Setupati' signifying Lord of the Setu or guardian of the sacred causeway at Ramesvaram. At this distance of time, it is not possible to say with confidence when, from whom, and under what circumstances, this family acquired the status and dignity of Setupati, but according to family and popular legend, it was the God Rama, the hero of Valmiki's Epic poem called 'Ramayana,' that installed the first Setupati. (See exhibit XL and Nelson's 'District Manual,' part III, page 110.) But whether it was the deified hero Rama or as stated in volume XXV of the 'Asiatic Journal,' some emperor of Hindustan to whom the family really owed the title and dignity of Setupati, it may safely be taken that the family is very ancient and has had the title for many centuries. The term 'Setupati' implies the status of a ruler and was always applied to the reigning Raja in the family as stated by the Board of Revenue in their Proceedings marked exhibit XXXVI. The appellant himself showed that his consciousness was to the same effect in his letter to respondent (exhibit XXXVII) wherein he said that it was a 'mockery' to call him 'Setupati.'

The political history of Ramnad may be considered so far as it relates to the status of the Setupati family and the nature of its estate with reference (1) to the legendary period, (2) to the early historical period, (3) to the later or modern historical period commencing with 1605. As regards the first period, it is stated in Taylor's 'Historical Manuscripts,' page 74, that antecedently to the Vijayanagaram period, the only information we can obtain is from the Stalapurana (legendary history of Madura) wherein it is said, "the Seturayan is the chief of the district named after the Setu or Isthmus of Ramesvaram, (for such it once was though now an island by the gradual rise of the sea)." Exhibit L states that in ancient times some emperor appointed seven Maravars to watch the holy bridge near Ramesvaram and gave them Pugalore and the villages adjacent to it for their residence.

Turning to the historic period prior to 1605, the Rajas of Ramnad were feudatories of the Pandiyan Kings at Madura. It is mentioned in Taylor's 'Oriental Historical Manuscripts,' page 74, that Setupatis once conquered their masters at Madura, reducing them to the state of feudatories for three reigns. The Subordinate Judge gives copious extracts from other books on the ancient history of Southern India indicating that the Rajas of Ramnad were generally feudatories under the Pandiyan dynasty of kings, though at times the former reduced the latter to submission and assumed regal power. In his 'District Manual,' part III, pages 113 and 114, Mr. Nelson names several Setupatis, such as Athivira Raghunatha Setupati, Jayatunga Raghunatha Setupati, Kulottunga Setupati and Samara Kolahala Setupati as having taken an active part in repelling the invasion of Pandiyan territory by Chola kings and kings of Canara and as having represented the Pandiyan king in the confederacy of Hindu sovereigns organised against Muhammadan invaders under the orders of the Rayar, the Hindu sovereign of Vijayanagaram. Adverting to the status of the Setupati family, the Government said in exhibit XL, dated the 13th June 1871, that "allusion has been made above to the antiquity and splendour of his (the late zamindar's) lineage. The Setupati family of which the zamindar of Ramnad is representative, is the head of the great tribe in Southern India known as the Maravars. They were the feudatories of the Pandiyan dynasty, upon whose ruins they rose for some

THE RAMNAD CASE. generations into regal power, extending their conquests into all the southern portion of the Peninsula and great part of Ceylon; but over and above all this, they are, as their name implies, the hereditary guardians of the sacred causeway of Ramesvaram. In this capacity they are known to thousands of pilgrims who annually visit the shrine of the God Rama at that place, and who all fondly believe that the first Setupati was installed in his office by the deified hero himself."

Before I pass on to the period subsequent to 1605, I may refer to two important events in the history of the Naik dynasty. The first is the introduction into the Pandiyan kingdom of a system of military organization on feudal basis. About 1560, Visvanatha Naik, the conqueror of Madura and the founder of the Naik dynasty, handed over each of the 72 bastions to the fort then at Madura to the charge of a particular chief whom he termed "palayagar" and declared it his duty to maintain and defend his post at all times. To each chief or palayagar he made over a specific tract of the country, and to each grant he attached three obligations, viz., (1) the obligation to preserve the king's peace within the palayapat; (2) the obligation to maintain, and when necessary to furnish, a fixed number of troops to serve with the king's army, and (3) the obligation to pay a tribute besides into the king's treasury every year. As will presently appear, the Setupatis were recognized as the chiefs of the 72 palayagars and played an important part in the history of the Naik sovereigns. This system of military organization continued until it was displaced by the permanent settlement of the Ramnad territory with the istimidar zamindar, Rani Mangaleswari Nachiar. It is noteworthy that as the preserver of the king's peace, each palayagar was the Chief Magistrate of his own palayapat; as a tributary chief, he collected his own taxes and, as a military chieftain, he was the commander of a provincial army and practically exercised sovereign powers in his own province subject to the three obligations mentioned above, and to such farther occasional and casual interference on the part of his suzerain as their mutual relation, relative strength and other circumstances permitted.

The second historical event to which I have to refer is the extinction of the ancient Maravar dynasty for a time until it was restored in 1605 by the Naik ruler, Muthukrishnappa Naik. Nelson states in his 'District Manual,' part III, page 112, that the Pandiyan king Kulabhushana, who preceded Visvanatha Naik, treacherously killed Jayatunga Raghunatha Setupati, grandfather of the Setupati of 1605, through fear and jealousy of his growing power, and thereby put an end for a time to the ancient Maravar dynasty. According to Sewell's 'Antiquities,' the dynasty was in abeyance for about 65 years. In 1602 Muthukrishna Naik, the grandson of Visvanatha Naik, became the ruler of the Pandiyan territory and the Ramnad country was then under the management of two Commissioners appointed by the Naik sovereign. It would seem that their management was anything but efficient, no order was preserved, jungles sprang into existence in every direction, robbers infested public roads, blackmail was levied from pilgrims to Ramesvaram, every village had its fort, the wild and turbulent race who cultivated the lands withheld payment of public revenue, and under these circumstances, the pilgrims clamoured for the restoration of the ancient Maravar dynasty. In order to remedy the abovementioned evils and to satisfy the pilgrims, Muthukrishnappa Naik re-established the dynasty, appointed Sadeika alias Udayan as Setupati of Ramnad and constituted him the chief of the seventy-two palayagars of Madura (see Nelson's 'District Manual,' part III, page 109).

This restoration marks the commencement of the modern political history of Ramnad, and the historical evidence since available is neither fragmentary nor imperfect, but more complete and connected than before. The writings of the

Jesuit Missionaries, who were endeavouring to propagate Christianity in the Pandiyan territory from the 16th century, furnish valuable material for testing the general accuracy of the modern history, and Mr. Nelson states in the 'Madura Manual,' part III, page 114, that, tested by the letters of the Madura Jesuits, the modern history of Madura is, on the whole, fairly correct.

During this period, viz., 1605 to 1795, eighteen Setupatis, as shown in the subjoined list, ruled over Ramnad as palayagars.

List of Setupatis of Ramnad from 1605 to 1795:—1. Sadeika alias Udayan Setupati ruled for seventeen years and died in 1623. 2. Kuttan Setupati, his son, ruled for twelve years. 3. Sadeika alias Dalavay Setupati,* his son or brother, ruled for ten years. 4. Three persons together, 1646-59. 5. Raghunatha alias Tirumalai Setupati, sister's son of No. 3, for twenty-six years and three months from 1659. 6. Raja Suriya Setupati, son or brother's son of No. 5, for six months. 7. Athanna Setupati, sister's son or brother of No. 6, for three months. 8. Raghunatha alias Kilavan Setupati, uncle's grandson of No. 7, for thirty-seven years from 1656. 9. Vijaya Raghunatha Setupati, sister's son of No. 8, for fifteen years. 10. Tanda or Rayappan Setupati, sister's son of No. 9, for four months. 11. Sundarabara alias Santeeswara Setupati, son-in-law of No. 9. 12. Bavani Sankara Setupati, illegitimate son of No. 8, for three years and eight months. 13. Katta alias Muthu Raghunatha Setupati, sister's son of No. 9, for six years. 14. Sivakumara alias Saithurai alias Muthukumara Setupati, son of No. 13, for thirteen years. 15. Rakka Tevar Setupati, sister's son of No. 13, for one year. 16. Chella Tevar alias Vijaya Raghunatha Setupati, sister's son of No. 13, for thirteen years and nine months. 17. Muttu Tiruvayi Nachiar, sister of No. 16. 18. Muthuramalinga Setupati, son of No. 17. Governed by the Nawab for seven years, by the Setupati for twenty-eight years.

Apart from the historical treatises already mentioned, we have also information as to the several Setupatis and their relationship from exhibits XLVI, LVIII and the pedigrees LVIIIa and exhibits K and L. Exhibit XLVI is the report made by the Collector, Mr. Powney, in May 1795 on the course of succession in the Setupati family according to its usage, after enquiry held under the orders of the Government. Exhibit LVIIIa is the pedigree filed in Original Suit No. 3 of 1813 by the plaintiff therein, Rani Sivagami Nachiar, daughter of the eighteenth Setupati, Muthuramalinga; and exhibit K is another pedigree filed in that suit. Exhibit LVIII is a list of several Setupatis prepared by the salt amildar, Narasinga Row, in January 1856 upon enquiry made under the orders of the Collector at that time. Exhibit L contains an account of the several Setupatis, their relationship to each other, and the number of years during which they reigned over Ramnad, and it is the translation of the book of authority which is referred to by Mr. Powney in his letter (exhibit XLVI) of 1795.

As regards the eleventh Setupati, his name is to be found only in the pedigree LVIIIa and in the 'Asiatic Journal,' whilst it does not appear in the other historical treatises or in Nelson's 'District Manual,' and his name is also not to be found in exhibit K or L. There is some reason to doubt if there was such a Setupati at all, but so far as the question of impartibility is concerned, either his inclusion in the list or exclusion from it makes no material difference.

As regards the three persons entered in the list as having ruled together, the territory of Ramnad was divided among them for a time by Tirumala Naik, the sovereign of Madura. I will refer to the circumstances under which this

* Note.—For three years when Dalavay Setupati was a prisoner, his illegitimate brother Tambu Naik ruled over Ramnad.

THE RAMNAD
CASE.

division took place and to its value as evidence of partibility later on. As for the relationship of the Setupatis entered in the list, it is taken from the several pedigrees, and though a comparison with each other and with historical treatises leaves it in doubt in some cases whether the Setupati was son or brother or sister's son of his predecessor, yet the discrepancy is not material, except so far as it relates to the number of instances in which there was a competition between brothers when the inheritance opened. But it is admitted that according to the family custom, the son always succeeded his father, and that only in default of son or other lineal male heirs, claims of other heirs required to be considered.

As regards the course of succession during this period, the raj devolved on heirs male in the male line, and in default of heirs male, on sister's sons. It appears also that if the Setupati had a daughter and she married, her husband was entitled to succeed in her right (exhibits LVIIIa, XLVI, L, and the enclosures to exhibit XLVI); and that on failure of these, the principal men of Ramnad met and named a successor from the relations of the family. In 1856, however, the amildar stated in exhibit LVIII that, as per previous custom, daughters' husbands do not get the zamin. Wives of Setupatis generally practised suttee during this period and died with their husbands, and no woman succeeded to the raj, the only lady mentioned among Setupatis prior to 1795 being Muttu Tiruvayi Nachiar who was rather Queen Regent during her son's minority than a Setupati in her own right. Exhibit L, which is a translation of what was considered to be a book of authority and good historical evidence in 1795, contains a summary of the succession. According to it, the first Setupati had four sons and one daughter. The second and third Setupatis are two of those sons, who succeeded one after the other. On the third Setupati dying without issue, the estate passed ultimately to his sister's son, the fifth Setupati, who had two sons, the sixth and seventh Setupatis, who succeeded one after the other. Then there was a failure of issue both in the male and female line. It is stated in exhibit L that the Maravars assembled together and after consulting the prime minister, Chandra Dalavay, selected a distant relation as the eighth Setupati. This Setupati was succeeded by his sister's son, the ninth Setupati, who had two sisters' sons that succeeded one after the other as the tenth and thirteenth Setupatis. Bhavani Sankar, the twelfth Setupati, was an illegitimate son of the eighth, and, disputing the succession of the tenth, killed him and usurped the palayapat for a time. The thirteenth Setupati was succeeded by his son, the fourteenth, who had two sisters' sons, the fifteenth and sixteenth Setupatis, that held the estate one after the other. The seventeenth Setupati was the sister of the sixteenth and the eighteenth was her son.

It is an undisputed fact that throughout this period extending from 1605 to 1795, the Ramnad territory was held but by one member at a time, save in two cases in neither of which the division that took place is referable to co-parcenary right. Thus there was absence of partition in the Setupati family for nearly two centuries and for eighteen generations prior to the British rule. Its value as evidence of impartibility is considerably enhanced by the absence of any trace of partition at any former period of the history of Ramnad.

As regards the two exceptions already mentioned, the first division which led in 1646 to three persons marked 4 in the list of Setupatis owning different portions of Ramnad, was the result of an Act of State and the facts set forth by Nelson in connection therewith in his 'Manual,' part III, chapter VI, pages 128, 129 and 130 are shortly these.

The third or Dalavay Setupati as he was called, became palayagar of Ramnad in 1635 and died in 1645, leaving him surviving three sons by his

sister Gangaya Nachiar. As he had no issue, he publicly announced his intention to appoint his eldest nephew as his successor; but in this he was opposed by one Tambi, an illegitimate son of the first Setupati. By some intrigue, it is said, Tambi prevailed on the Naik sovereign at Madura, Tirumala Naik, to espouse his cause and to appoint him as Setupati in place of Dalavay Setupati. However, Dalavay, supported as he was by the Maravar community, refused to abdicate his position, and thereupon Tirumala Naik sent his troops to Ramnad, captured Dalavay, and threw him into prison at Madura. Finding, however, that all his efforts failed to induce the Maravars to acknowledge Tambi as their chief, he re-traced his steps, reinstated Dalavay and strictly enjoined Tambi to keep the peace. But some years later, Tambi's party again created a disturbance and murdered the Setupati; Tambi, however, continued to be obnoxious to the Maravars who still refused to recognize him as their chief. Tirumala Naik then divided the Ramnad territory into three parts, placed Tambi in possession of one part which included Sivaganga, made over another part to Raghunatha, the eldest nephew of Dalavay, and then gave the remaining third to his two other nephews Tanakka Tevan and Narayana Tevan. But Tanakka Tevan died shortly after and Raghunatha incorporated his third share with his own. Tambi also did not long survive Tanakka and his third share passed likewise into the possession of Raghunatha who thus restored the territorial unity of Ramnad apparently without any interference on the part of Tirumala Naik. On these facts it is argued by the appellant's counsel that there was a division of territory among the three sons of a sister who were all brothers, and that it is, therefore, evidence of partibility of the zamindari. To this contention, however, I am not prepared to accede for several reasons. In the first place the division was not the spontaneous act of co-parceners in mutual recognition of their co-parcenary right, but one forced on Raghunatha Setupati, irrespective of his volition and contrary to the wishes of the Maravar community by an act of the paramount power over which he or they had no control. Again, the division made was not in accordance with the co-parcenary law. Tambi was not a co-parcener at all with Raghunatha and his brothers and yet he got a third share. Again, Raghunatha and his two brothers were each entitled to a third part of the remainder, and yet the eldest brother got a moiety. Moreover, the disturbance of the unity of the estate was but transient and its re-establishment was not prevented or opposed by the suzerain. Appellant's counsel here draws attention to the omission of Tambi's name in exhibit L, but this appears to be a mistake when it is tested by historical treatises and the detailed account given therein of Tambi's career. The second division was the one made between the thirteenth Setupati and Sasivarna Tevar into three-fifths and two-fifths, whereby the zamindari of Sivaganga was severed from Ramnad and constituted into one of its offshoots in 1744. Bhavani Sankar, the eleventh Setupati, was considered to be an illegitimate usurper and Sasivarna and the thirteenth Setupati secured the aid of the Raja of Tanjore and of the Tondiman of Pudukottah, and co-operating with them, defeated Bhavani Sankar and regained the Ramnad territory. Among the conquerors, the Raja of Tanjore got a portion ceded to him as the price of his aid, the Tondiman of Pudukottah was permitted to retain the Pudukottah territory as his reward and the remainder was divided into three-fifths and two-fifths between the thirteenth Setupati and Sasivarna who assisted him in conquering Ramnad. This was not a partition among co-parceners but a transaction in the nature of a division of conquered territory among four chiefs who contributed to the overthrow of a common enemy. The Subordinate Judge is right in considering neither of these two divisions to be evidence of partibility or an incident of co-parcenary right as contemplated in the first issue.

THE RAMNAD
CASE.

THE RAMNAD
CASE.

It is then urged on behalf of the appellant that mere absence of partition during this period is no proof of impartibility and that in many cases there was but a single heir in existence when the inheritance passed from one Setupati to another. In paragraph 20 of his judgment, the Subordinate Judge makes out that prior to 1795 there were five cases of competition between brothers, but it is contended for appellant that none of those cases is proved. It is not, however, denied that the eighth and sixteenth Setupatis had brothers, and that there were at least two cases of competition between 1605 and 1795. As regards the third Setupati, he is no doubt entered in pedigree (exhibit K) relied on by appellant as the son of the second, but according to exhibits LVIII and LVIIIa and according to the new exhibit L they were brothers. Among historical treatises, they were father and son according to Nelson's 'District Manual' and Tailor's 'Manuscripts,' while in Sewell's 'Sketch of Dynasties in Southern India,' in the article in the 'Asiatic Journal' and Pharoah's 'Gazetteer,' they are said to be brothers. Seeing that the list in LVIII and the majority of the historical treatises agree with pedigree LVIIIa and exhibit L, I see no reason to differ from the Subordinate Judge as to the real relationship of the second and third Setupatis to each other. As regards the sixth and seventh Setupatis, it is not stated in exhibit K how they were related to each other; but in the pedigree LVIIIa, and in exhibit L, they are referred to as brothers; whilst according to the list in exhibit LVIII, the seventh was the sister's son of the sixth Setupati. But in exhibit XLVI which is the list prepared in 1795 on enquiry by the then Collector, Adanna is entered among heirs in the male line. Three out of five historical treatises refer to them as brothers, and on this point also, I think that the weight of evidence supports the Subordinate Judge's opinion.

With reference to the eighth Setupati having left sons, the contention of the appellant's counsel appears to be entitled to weight. There is no doubt that the ninth Setupati who succeeded him was his sister's son, and as according to the custom of the Setupati family, the son succeeds his father in preference to all others [exhibit XLVI], it is likely that the eighth Setupati either had no sons or they had predeceased him. The Subordinate Judge relies on Nelson's 'District Manual' and on the letter of a Jesuit Missionary mentioned therein, but in part III, page 247, Nelson observes that "it seems probable that neither the ninth Setupati nor Vaduganatha was a natural son of the eighth Setupati as he would scarcely have nominated as his successor a bastard [Bavani Sankar Tevan] in preference to his own son and would hardly have passed over the eldest son in favour of the younger." Both pedigrees, (exhibits K and LVIIIa), and exhibits LVIII and L agree in stating that the ninth Setupati was the son of the sister of the eighth named Kantakkal Nachiar, and under these circumstances, I do not consider it safe to accept the case of the eighth Setupati's sons as one of competition between brothers. The result is that there were four cases of competition between brothers, between 1605 and 1795 instead of five, as considered, by the Subordinate Judge. But I observe that fifteenth and sixteenth Setupatis were sons of sisters who succeeded one after the other as if Ramnad was impartible.

As regards the status of Setupatis and the nature of their estate, the conclusion at which the Subordinate Judge has arrived, viz., that during this period the zamindari was a raj or principality, is irresistible. Muthukrishnappa Naik who restored the Maravar dynasty in 1605 appointed the Setupati as the chief of Madura and Tinnevely palayagars. As already observed, the powers conferred upon palayagars were those of Provincial Military Chieftains, Chief Magistrates and Collectors. Though in common with other palayagars, Setupatis were originally liable to pay a tribute, yet the fifth Setupati rendered such signal service to Tirumala Naik when the Mysore army invaded Madura and placed him

in imminent peril, that among the concessions made in appreciation of such service, the Naik sovereign included exemption from payment of a tribute (Nelson's 'District Manual,' part III, pages 136 and 137). The position of Setupatis was generally that of chief palayagar, but the eighth Setupati threw off his allegiance, defeated the Naik ruler in the battle that ensued, declared himself independent and assumed regal power. The Setupatis declared war, made peace, ceded territory, acquired new territory, often without any reference to the Naik sovereign. They also maintained the state and pomp of a sovereign prince, they were called Rajas and their residence was designated 'palace.' They had their Dalavays or prime ministers and they had their troops and coins of their own called Setupati coins. The Subordinate Judge fully sets out in paragraph 14 of his judgment the various sovereign powers and rights exercised by Setupatis between 1659 and 1715 according to the letters of Jesuit Missionaries and they leave no room for doubt that Ramnad was in the nature of a kingdom or raj.

Here again, apart from historical evidence, there are several exhibits which lead to the same conclusion. There are three copper-plate grants of land, (exhibits II, IIa, IIb), dated December 1599, August 1608, and October 1734, and in these the Setupatis who made the grants are described in terms which convey the impression that they were renowned sovereign princes. Three more grants of an interest in pearl-fishery at Tuticorin to certain temples are referred to in the Proceedings of Government marked as exhibit XXI, and they show that in 1260, 1697 and 1725, the Setupatis were sovereign princes, and in 1697 the Setupati was styled also the conqueror of Ceylon and Jaffna. Again, exhibit XXVII is a letter from Annasami Setupati to the Collector in March 1818, wherein he states that in 1757 Chella Tavar Setupati entered into a treaty with the Dutch and granted them permission to erect a factory and certain buildings at Ramnad.

Again, the Collector of Tinnevely, writing in December 1790, says that "the Raja of Ramnad, more attentive to his affairs than the Nawab's, compels the Dutch to this time to pay him an annual tribute and further exacts a custom for all their exports and imports." Moreover, exhibit XXX is a muchalka executed by the Dalavay or minister of Ramnad to the Raja in 1791 undertaking to discharge his duty with fidelity, and the duties therein specified imply that the Setupati even then exercised sovereign powers though he paid a tribute to the Nawab.

The foregoing is the historical and other evidence so far as it bears on the question of impartibility. It shows first, that as a feudatory estate, Ramnad was a military jaghire which is not partible, secondly, that as the principal of the southern palayapats of Madura and Tinnevely, it was a principality in the nature of a raj which is likewise impartible. It shows further, that at times it was a real kingdom which is not subject to the law of partition. In *Collector of Madura v. Mootoo Ramalinga Sathupathy*(1) a raj was held by the Judicial Committee to be impartible. In *Naraguntty Lutchmeedavamah v. Vengama Naidoo*(2) a palayapat was held by the Privy Council to be in the nature of a raj or principality. It appears, again, that throughout the history of Ramnad extending over many centuries, there was no case of partition in recognition of co-parcenary right. Although there are not many cases between 1605 and 1795, in which there was competition between brothers when the inheritance opened, yet the status of Setupatis as rulers or principal palayagars, the nature of their estate as a raj or principality or a palayapat and the absence of partition throughout its history constitute, together with such cases of competition as there are, cogent evidence

(1) 12 M.I.A., 397 at pp. 403, 425.

(2) 9 M.I.A., 66.

THE RAMNAD CASE. of impartibility. I may here refer to the case of *Thakur Durriao Singh v. Thakur Davi Singh* (1) on which appellant's counsel relies. In that case, there was no doubt an absence of partition during six or seven generations, but there was no evidence of enjoyment by a single member of the family at a time, and the Privy Council held that the former without the latter was not proof of impartibility. The Lords of the Judicial Committee distinguished it from the case in which not only there was no division during six or seven generations, but there was also proof that the estate descended to a single heir as impartible property during that period. In the case before us, there was not only no partition, but there was also descent to a single heir as an impartible estate for more than eighteen generations, and these facts are sufficient to raise a presumption of unbroken family custom in favour of impartibility. There is also the further presumption in favour of impartibility arising from the character of Ramnad as a raj or principality.

Before I pass on to the period subsequent to 1795, it is convenient to consider the arguments pressed upon us by appellant's counsel in favour of partibility. It is urged that assuming that Ramnad was a raj and an impartible estate until the time of Muthuramalinga, the eighteenth Setupati, he ceased to be a Raja in 1773, and since became a mere renter, and at all events, Ramnad was confiscated for his rebellion in 1795, and thereby ceased to be impartible. This brings under our consideration the events which transpired during the rule of the eighteenth Setupati, and in consequence of his rebellion. He was a child of two months when he succeeded his maternal uncle, Chella Tevar, in 1760, and his mother became Queen Regent. About this time one Vellayya Servaikaran, who had been a very powerful Dalavay or prime minister at Ramnad for several years and taken the side of Chanda Sahib in the wars of the Karnatic, also died. His successor Thamotharam Pillai continued the hostilities with the Nawab, joined in the siege of Madura in 1763 and defeated in 1770 the Raja of Tanjore who espoused the cause of Mahomed Ali. In 1773, the late East India Company who assisted the Nawab sent a force into the Ramnad country under the command of General Joseph Smith who reduced it to submission and made the minor Raja and his mother, the Queen Regent, State prisoners. The Ramnad country was then annexed to the Nawab's territory and since managed through renters for a period of seven years. In 1780, however, a rebellion broke out at Ramnad under the leadership of one Mappilla Tevan, a relative of the Setupati family, and on this occasion the entire population revolted against the Nawab. It was then deemed desirable at once to restore Muthuramalinga, then a prisoner at Trichinopoly, to the throne of his ancestors, and he was accordingly restored on his entering into a treaty of allegiance with the Nawab. The restored Setupati paid then a tribute of Rs. 1,75,000 to the Nawab, and in 1791 it was temporarily raised to Rs. 2,20,000 (exhibit XXIX). In 1792, the late East India Company entered into a treaty with the Nawab, whereby the administration of palayagar peishcush was transferred by the latter to the former. In 1795, Muthuramalinga was considered guilty of rebellion and it was found necessary to depose him (Nelson, parts III and IV, pages 296 and 154). Upon these facts it is not possible to attach weight to the appellant's contention. It is true that Ramnad was conquered in 1773, but it was restored in 1780. There is no evidence to show that what was restored was not the previous palayapat but a different estate. The imposition of a peishcush was not an incident incompatible with the palayam tenure which carried with it the obligation to pay a tribute as already explained. Until his deposition, Muthuramalinga was called Raja, he had his own troops, and there

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

is no trace of the curtailment of any of the sovereign powers which he had previously exercised. In this connection our attention is drawn to exhibit M which purports to be an inayatnama written by Nawab Wallaja to Muthuramalinga Setupati's sister, Mangaleswari Nachiar, on the 27th Zil Haj month, Hejira 1209, corresponding to 15th July 1795. Alluding to Muthuramalinga's restoration in 1780, it states "We pitied him whilst in captivity, took him into our favour under the impression that his confinement was a sufficient punishment, that he would no longer misbehave, but that he would act in conformity to our ordinances, delivered to him the Ramnad territory on lease and thereby raising his prestige, sent him (back) in happiness." After referring to his subsequent misbehaviour and removal from Ramnad, the Nawab goes on to state "as we had great regard for you (Mangaleswari) we sent you to Ramnad and made it over to you." It is argued that the terms "delivered on lease" imply that the status of Muthuramalinga Setupati subsequent to his restoration was nothing more than that "of a renter," but I do not consider this argument tenable. The expression has reference to the obligation to pay a varying tribute or peishcush. How are we otherwise to account for his estate continuing to be a palayapat, and his being treated as a Raja in exhibits XXV, XXVIII and XXIX and for his exercising the powers of a palayagar as set forth in exhibit XXXI? Again, in 1791, when the peishcush was raised to Rs. 2,20,000, and the Collector was directed to make a settlement, the peishcush was termed "Ramnad Raja's tribute" and the settlement contemplated was nothing more than the adjustment of the amount of the tribute which Muthuramalinga had to pay *qua* palayagar. The real relation between him and the Nawab from 1780 to 1795 was as shown conclusively by article 3, exhibit XLIVa, that of a palayagar, and his lord paramount as regulated by a treaty of allegiance between them.

Nor is there any foundation for the contention that Ramnad was confiscated on Muthuramalinga's deposition.

The Nawab and the East India Company then entered into a treaty regarding the mode in which Ramnad was to be dealt with and this document which bears date 4th March 1795 is marked as exhibit XLIVa. It shows distinctly that there was no confiscation at all and that none was intended either in 1795 or at any other time. Articles I to III are explicit on the point. The first article refers to Muthuramalinga's deposition and provides that "a successor shall be appointed as soon as the person entitled to succeed him can be satisfactorily ascertained." This contemplates continuance of succession to the estate in the Setupati family. The second article provides that the Ramnad district be placed under the entire control of the Governor of Madras on the part of the East India Company for a period of three years, both with regard to the collection of revenue and to all acts of Government and authority whatsoever. This again indicates that the penalty inflicted upon the Setupati's family for Muthuramalinga's rebellion was a suspension of its rights for three years and nothing more.

Article 3 runs in these terms: "His Highness the Nawab in so doing shall be distinctly understood only to suspend for the period in question the rights which are acknowledged by the treaty of allegiance and of submission of the Ramnad palayagar to His Highness in all customary ceremonies." This again disavows any intention to confiscate. Taking the three articles together it is clear that nothing more than a suspension of the rights of the family to the government of Ramnad for three years was intended.

Again, articles 4, 6, 7 and 12 contemplated certain changes in the nature of the estate as administrative improvements. By article 4, the peishcush was to be fixed in perpetuity; by article 6 the sibbandi troops were to be kept up and

THE RAMNAD CASE. paid out of the revenues for the purpose of preserving the peace of the country and assisting in the collection of revenue; and by article 7 the successor of the deposed palayagar was not to be called on to furnish peons on any occasion. These provisions, no doubt, disclose an intention to commute the military or palayam tenure into a liability to pay a permanent peishoush and to change the status of palayagar into that of landholder who is subject to payment of revenue. There is however no trace of an intention to create a new estate or to change any of the incidents which attached to the estate when it was as a raj such as impartibility or a special mode of succession. The construction to be put on articles 4 to 7 and 12 must be in subordination to the declared intention; nor was the recognition of Mangaleswari as her brother's successor subject to any condition precedent.

I now pass on to the last period in the history of Ramnad, viz., from 1795 to the date of this suit. The first Setupati during this period was Mangaleswari Nachiar, the sister of the eighteenth Setupati, and the leading events in her time are, first, her recognition by the Government as Muthuramalinga's successor under article 1 of agreement XLIVa; secondly, the delivery of Ramnad into her possession; and thirdly, the introduction of the permanent settlement and the issue of istimrar sanad in her name. For the appellant, it is contended that on the true construction of exhibit XLIVa, the estate granted to her was not the prior palayapat, but a new estate which is partible as ordinary Hindu property; but on the face of the document this contention must fail. There is a declaration in terms that notwithstanding Muthuramalinga's deposition, the succession to the palayapat was to be continued in the Setupati family according to its usage after a period of three years. There is the fact that both in 1795 when the Government declared the succession by exhibit XLVIa in favour of Mangaleswari and in 1803 when Ramnad was restored to her possession it was a palayapat, the permanent settlement not having then been introduced and the palayam or military tenure not having been commuted. It must also be borne in mind that the commutation of the military tenure then in contemplation cannot be taken to imply contrary to the expressed intention, any alteration of other incidents which custom had impressed upon it either in regard to its impartibility or to its devolution. Special reliance is placed on clause 11 of the agreement which forbids grant of land to any foreign nation without the consent of the Nawab and it is suggested that this restriction operates to create a new estate. The fallacy in the appellant's suggestion consists in ignoring the fact that the paramount power may impose, and the feudatory may accept, obligations in the interests of good government, especially in matters touching relations with foreign nations, and yet the estate of the latter may continue to be the same as before in all other respects. As pointed out in the *Nuzvid case*(1), the test is this:—Was it the intention of the Government to restore Ramnad to Mangaleswari as it existed prior to Muthuramalinga's deposition? or to create a new estate and not simply to change the tenant by the exercise of a *vis major*. The declaration that succession was to be continued, and that there was to be no confiscation of the estate but only suspension of the rights of the family for three years is conclusive on the question of intention.

The next contention is that the mode in which that intention was executed is proof that a new estate was created and granted. It must be pointed out here that from March 1795 when the treaty was made to April 1803 when the sanad D was issued, the East India Company never altered, nor thought of altering, its original intention. The mere selection of Mangaleswari Nachiar,

Muthuramalinga's sister, as his successor in preference to his daughter was intended not to create a new estate as alleged for appellant but only to change the tenant on considerations of policy. The facts relating to Mangaleswari's selection as Muthuramalinga's successor are these. On Muthuramalinga's deposition, Mangaleswari addressed a memorial to the Governor at Madras, in which she asserted that the succession to the zamindari was in the female line and vested in her in preference to Muthuramalinga on the demise of her elder sister (exhibit XLII). This was on the 18th February 1795, and thereupon, Government called upon her to make good her pretensions (exhibit XLV) and directed the Collector of the palayagar peishoush at Madura, Mr. Powney, to ascertain who was the next heir according to the usage of the Setupati family and whether succession to Ramnad was in the female line (exhibit XLII). Mangaleswari's case was that the Ramnad raj always vested in the senior female of the family for the time being, and that the several Setupatis who ruled over Ramnad were managers selected by their sisters for the administration of the country on their behalf (exhibit L). This statement on her part, which contradicts the previous history of the family, was probably due to a desire to make it appear that her claim was not under Muthuramalinga, the rebel, but that it was superior to his, and traceable to family usage [see her second memorial of 27th March 1795].

The Collector considered that the usage might best be ascertained from three principal Brahmans of Rameswaram, three head pandarams, and three of the oldest and most respectable inhabitants of Ramnad [exhibit XLIII]. At this time the deposed palayagar had several wives and a minor daughter named Sivagami who had already been married but to a minor. There was also an apprehension lest Muthuramalinga might influence the opinion which the Collector wished to obtain, through his late Dewan or Minister Muttiralapillai and impress others with an idea of the probability of his return or restoration. On the other hand, considerations of political expediency demanded that the selection of a successor should not tend to revive his influence in the Ramnad country, or to favour the idea of his probable return as palayagar. The nine persons whom the Collector consulted declared the usage of the Setupati family to be this:—(1) that the succession first vested in the male line, and not in the female line; (2) that even if the legitimate son were a mere infant, he ought to be installed, females having no manner of right to the Government; (3) that in case the Raja left no male issue and his elder or younger sister left a son, the succession vested in that son; (4) that if neither the Raja nor his sister left a son, the Raja's son-in-law married to his legitimate daughter succeeded; and (5) that on failure of the heirs mentioned above, the principal Maravars selected one of the nearest relations of the last Setupati from his family and declared him successor (exhibit XLVI and its enclosures). The result was that the nine persons to whom Mr. Powney referred the question of succession solved it in favour of Muthuramalinga's son-in-law who was a minor at that time. This opinion, Mangaleswari attacked in her second memorial as expressed under improper influences, and the Collector thereupon examined the nine referees who, however, justified their opinion, one of them producing a book of authority in its support, which Mr. Powney considered to be good historical evidence. The Collector then questioned some of the most enlightened inhabitants of Ramnad upon the subject, but their opinions were various; some of them, however, thought that succession was in the female line, but at the same time unanimously declared that if the Setupati had a son, he would have the right to succeed in preference to all; but that if he had only a daughter and his sister a son, her son would succeed. Hence the Collector thought that it was conclusive that the Government was not administered for the female as asserted by Mangaleswari (exhibit XLVI). It must also be noted here

(1) L.R., 7 I.A., 38 at p. 49 I.L.R., 2 Mad., 128,

THE RAMNAD CASE. that the selection of Muthuramalinga's minor son-in-law as his successor was likely to revive his authority in the country and the Collector, therefore, concluded his letter to Government in these terms: "From the best available data, I have ventured to give my opinion on the succession. At the same time, I hope your Lordship (Governor of Madras) will forgive me for offering my sentiments on it which from motives of policy and expediency ought, in my humble opinion, to be declared in favour of the palayagar's sister; for it has been an immemorial custom here that the sister should have been consulted and her consent obtained previous to the marriage of the palayagar's daughter; this was not done and the Maravars, I have learnt, would feel much repugnance in consequence to acknowledge the child's husband as Setupati,—the sister from her age will not probably have issue, the daughter and her husband are minors. According to the custom of this country the daughter ought to have been placed under the care of her aunt, and if this were now done, there would be no further dispute upon the point." The Board of Revenue observed that "they were desirous of preserving a due regard to the claims of those persons whose pretensions were the most prominent without divesting themselves entirely of motives of political expediency which seemed to require some attention in the final arrangement of the succession. That aware of the objections either to suffer the Nawab or the Collector of the palayagar peishcush to determine a question of this nature, their concurrence upon the present occasion, though perhaps upon different principles, entitled their opinion to the favourable consideration of the Board and as it would be extremely difficult, if not impossible, satisfactorily to justify a contrary opinion, acquiescence in their decision appeared to be the most eligible line to be pursued." With respect to political expediency, they said, "it is of importance to prevent the deposed palayagar from having any influence whatsoever in the country or from holding out an idea of the probability of his return to the Government and it is of great consequence that the other palayagars to the southward, whose refractory dispositions have so frequently disturbed the peace of their several districts, should be deterred from the commission of similar offences by an apprehension of the ruin in which they may be involved."

That "under the impression of all these circumstances, the Board came to the determination of nominating the sister of the deposed palayagar to the succession and also resolved to place his daughter under her charge without touching upon the question of her future expectations to succeed to the Government—expectations, however, which might reasonably be entertained from the little probability of her aunt's pregnancy" (exhibit XLVIa). The Government accordingly declared the succession in favour of Mangaleswari, and directed the Collector to place the infant daughter of the deposed palayagar under her charge. While communicating their decision to the Collector, the Government remarked as follows:—"This arrangement has been communicated to the sister (of the deposed palayagar) who has been directed to address herself to you on all future occasions. You will therefore take the necessary measures for putting the daughter of the deposed palayagar under the charge of her aunt, and as this measure is adopted chiefly upon your assurance that it will give satisfaction to all parties and is calculated to secure the tranquillity of the country, you will be vigilant to prevent abuse of the confidence which is thus placed in her; and in case of your apprehending danger or ill-usage to the child from her aunt, you will lose no time in taking the most effectual means for removing her from the power of her aunt" (exhibit XLVIII). The Government also communicated their decision to Mangaleswari and said that in compliance with the usage of Ramnad, they resolved to place the daughter of the late palayagari under her charge, that "the tenderness of her age had no less claim upon her humanity than her

nearness of kindred upon her natural affection; and as she employed the confidence which is now placed in her to the preservation of her (child's) person and the improvement of her mind, so she would merit approbation of Government or be liable to their severest displeasure" (exhibit XLVII). The Government also communicated their decision to the Nawab, and on the 23rd October 1795, Mangaleswari thanked the Government for "re-establishing her in the office of the palayagar of Ramnad and professing adequately to realize the solicitude of Government for the welfare of her niece, assured them that she would consider the child as 'her own child' and use her with infinite love" (exhibit L).

These are the materials upon which an opinion has to be formed on the question whether the recognition of Mangaleswari as the successor of Muthuramalinga operated as the grant of a new estate. It appears to me that the Subordinate Judge was perfectly right in answering the question in the negative. By the Mitakshara Law, Muthuramalinga's wives, and after them, his minor daughter, were his lawful heirs, and by the ascertained usage of the family, his minor daughter's minor husband was the lawful palayagar in her right. But the immediate recognition of her claim was deemed incompatible with considerations of policy which required that the late palayagar's influence should cease or ever at Ramnad, and that no impression should prevail that his restoration was probable. In the exercise of sovereign powers which go beyond the Municipal law and on considerations of policy, the Government diverted the succession from his minor daughter in favour of his sister and placed the former under the care of the latter in the hope that the daughter might in future probably succeed her aunt who was then without issue and who from her age was not likely thereafter to have a son. So far as the supersession of the minor daughter concerned, the act of Government was an act of State, but it was accompanied by an arrangement regarding the guardianship of the minor which, it was believed, might lead to her adoption by her aunt as her heir at a time when political exigencies which barred her immediate recognition as Muthuramalinga's successor might have passed away. I see no reason whatever to hold that there was either a re-grant or grant of a new estate or anything more than the change of the tenant. A re-grant implies previous extinction of the property which the Setupati family had in the subject of the grant, but in the case before us, there never was an intention to extinguish such property as contra-distinguished from that of Muthuramalinga. Nor was any new estate created and granted, for Mangaleswari was recognized to be the late palayagar's successor to the "palayat" and the permanent settlement was not introduced and the commutation of the palayam tenures did not take place till 1803. Though it was then no doubt in contemplation to commute the military tenure and to fix the peishcush in perpetuity, yet no other incident of the family custom was intended to be touched. There is no trace of an intention, as in the *Nurvid Case*(1), to put an end to the old estate and substitute new estates in its place. The appellant's counsel here draws our attention to exhibit M, copy of the inayatnama from the Nawab, to which reference has been made. There is no proof of its authenticity except that the original was produced by Annasami Setupati in Original Suit No. 3 of 1813 as appears from the endorsements on that document. It is not referred to by Mangaleswari in her memorial, but assuming that it is authentic, it cannot be said to constitute the foundation for Mangaleswari's title. The real foundation of her title is the declaration of the succession in her favour by the British Government acting under the agreement between it and the Nawab in 1795. If any such inayatnama existed, it must be construed not as a new grant, but as an

(1) L.R., 7 I.A., 38; I.L.R., 2 Mad., 128.

THE RAMNAD
CASE.

expression of a desire favourably to consider her claim in continuing the succession in the family. It is then said that although the succession was formally declared in favour of Mangaleswari in 1795, yet the estate was not placed in her possession for eight years and until she executed the undertaking or muchalka marked as exhibit LIV. I fail, however, to see how these circumstances disclose a change of the original intention. The East India Company only professed to manage Ramnad under article 2 of their treaty with the Nawab. It is then urged that the prolongation of the management to eight years was another material departure from it. What was the declared reason for such departure? This appears sufficiently from the Collector Mr. Lushington's letter of the 20th August 1799 (exhibit XLIX). In reporting upon a petition from Mangaleswari, he said that it was expedient to make choice of that time for restoring the rani to her acknowledged hereditary rights. He added "In your (Board of Revenue) address of the 27th March 1798, your Board observed, 'The Ramnad country being under the Company's management, such arrangements may be introduced for the future regulation of it and for commutating the service for a money payment when delivered over to the appointed successor as the general determination of Government on this subject may authorize.' That so great a proof of moderation and of attention to individual claims as her reinstatement would establish the confidence of the Sivaganga Servagar and of the Tinnevely western palayagars at a time when it is become necessary to adopt decisive measures against those to the eastward and to create a new system for the future government of the palayagar countries, will doubtless occur to your Board as well as that the condition of the restoration of this province might be made an example for the whole. The good understanding of the rani would cheerfully yield to whatever system of measures may be determined upon, particularly to the commutation of the military service for a money payment and to such further increase of peishensh as the revenues of the country can afford." In this letter the Collector also alluded to the two years of drought which scourged that sterile country. It is then clear that the delay in delivery of possession to Mangaleswari was owing to a desire to obtain a thorough insight into the resources of the Ramnad country in view to fixing the peishensh in perpetuity and to introduce measures conducive to good government such as the commutation of the military tenure for a money payment. There is, however, no ground for saying that the succession to the estate was not continued as intended with all its customary incidents, save as to the alteration in the line of heirs and in the nature of the estate as a raj or an estate of military tenure (exhibits LII, LIV, and LVI).

It is here noteworthy that Mangaleswari was placed in possession before the sanad was issued and that the muchalka referred to (exhibit LIV) evidences no change in the original intention of Government as embodied in the agreement of 1795. Exhibits LII, LV and LVI which explain the terms on which the rani was placed in possession lead to the same conclusion. In the *Nuzvid Case*(1), their Lordships of the Privy Council distinguished it from the *Hunsapore Case*(2). They said, in the *Hunsapore Case*(2), the estate whilst in the hands of the Government had never been broken up, and it was held to be the intention of the Government to restore the zamindari as it existed before the confiscation, and that the transaction was not so much the creation of a new tenure as the change of the tenant by the exercise of a *vis major*. There the estate was transferred in its entirety, but in the *Nuzvid case*(1), the estate was divided into two distinct zamindaris and a new sanad granted allowing the same to be

alienated in part or in whole and making it inheritable by a person, his heirs and assigns for ever, that person being one who had never held an estate descendible to his eldest male heir. The case now before us is wholly dissimilar to the *Nuzvid Case*(1), and much stronger than the *Hunsapore Case*(2). Ramnad was not broken up whilst in the hands of the British Government, nor were any new zamindaris carved out of it; it was restored in its entirety to Mangaleswari. In the *Hunsapore Case*(2) there was at least a confiscation and a re-grant, but in the case before us, there was continuance of the succession to the old estate with a distinct avowal that the interruption to the succession was not to last for more than three years. Again, Ramnad was an ancient and impartible raj, and it was not a new estate which as to its origin is referable to the istimidar sanad.

It is said that Ramnad ceased to be impartible because it was permanently settled and a sanad (exhibit D) was issued to Mangaleswari. I cannot accede to the proposition that all ancient, impartible zamindaris become partible when they are permanently settled, and a sanad is issued by reason of the permanent settlement and of the issue of a sanad notwithstanding the previous and the subsequent custom of the family in favour of impartibility. The proposition is at manifest variance with the course of decisions of all the Courts including the Privy Council on the subject. As pointed out by Mr. Mayne, two principles govern the question. The first is that when an impartible raj has been even confiscated and then granted out again to a member of the same family, the presumption is that it is granted with its customary incidents, of which the most prominent are impartibility and descent by primogeniture. The second is that the presumption may be rebutted by showing that the mode of dealing with the raj after its confiscation and the mode of its re-grant are consistent only with the intention that it should possess in future the ordinary incidents of partible property. The question is, therefore, one of the intention of the Government and that intention was, in the case of Ramnad, that there should be an unbroken succession to the old estate of Ramnad. The issue of an istimidar sanad as evidencing permanent settlement concluded with an already recognized palayagar and with her consent is immaterial as it recognized a pre-existing estate as in the *Sivaganga Case*(3). Two more arguments are addressed to us by the learned counsel for the appellant in connection with Mangaleswari's succession, and it is convenient to notice them here in passing. The first is, that there is no evidence to show when Mangaleswari's elder sister died, and the learned pleader for the respondent is unable to refer us to any evidence on that point. But the fact that Mangaleswari stated in her petition that she was entitled to the estate on the demise of her elder sister, and the absence of any claim on the part of that sister during the enquiry held by the Collector with reference to that petition raise a presumption that the elder sister was then dead. Again, it is clear that the selection of Mangaleswari as Muthuramalinga's successor was an act of State based in part on considerations of political expediency, and I do not see how this statement is material to the question now under consideration except, as observed by the Subordinate Judge, as evidence of consciousness on her part that the estate was impartible and that seniority of birth was a ground of preference. The other argument, viz., that there is no evidence to show that the East India Company paid Mangaleswari the net profits of the estate for the period it continued in management beyond three years from 1795 is not relevant to the question of partibility. Assuming that the late East India Company did not account to Mangaleswari for excess profits, this would only show that the suspension for

(1) L.R., 7 I.A., 38 at p. 49; I.L.R., 2 Mad., 128.

(2) 12 M.I.A., 1 at p. 35.

(1) L.R., 7 I.A., 38 at p. 49; I.L.R., 2 Mad., 128.

(3) 12 M.I.A., 1 at p. 35.

(3) L.R., 8 I.A., 99 I.L.R., 3 Mad., 290.

THE RAMNAD CASE. three years contemplated by the agreement of 1795 practically enured for eight years, and I fail to see how it discloses an intention to make the zamindari partible.

Passing on to the period subsequent to the permanent settlement, I observe that there have been six cases of succession as shown below, and there has been no instance of partition.

- Mangaleswari Nachiar,
- Istimirar zamindari.
- 2 |
- Adopted son,
- Annasami Setupati
- alias
- Vijaya Raghunatha Setupati.
- 3 |
- His adopted son,
- Ramaswami Setupati.
- 4 |
- His eldest daughter,
- Mangaleswari Nachiar.
- 5 |
- Her sister, Dora Raja Nachiar.
- 6 |
- Her mother, Parvata Vardhani Nachiar.
- 7 |
- Her adopted son,
- Muthuramalinga Setupati, the last zamindar.

The istimirar zamindar adopted in 1803 one Annasami, a distant dayadi of her deceased husband, and made a will in 1807 constituting him heir to the zamindari. By this act she excluded from succession her brother's daughter whom the Government had placed under her charge, while declaring the succession to Muthuramalinga, in her favour, in the hope that ultimately the niece might expect to succeed the aunt, who, from her age, was not likely to have male issue. The circumstances under which the niece was excluded are set forth in exhibit C (page 100) and the result was the institution of Original Suit No. 3 of 1813 on Mangaleswari's death in August 1812. In that suit, Sivagami Nachiar claimed the zamindari on the ground that her father, the hereditary palayagar, was deposed in 1793 by the British Government on considerations of political expediency, and that the zamindari was confided thereupon to the management of Mangaleswari and she herself was committed to her charge with an acknowledgment on the part of the British Government of her right to the succession and with strict injunctions that she, Sivagami, should be treated with kindness and educated in a manner suitable to her rank and expectations. Annasami, the adopted son, relied on his adoption and contended that, when Muthuramalinga was deposed and Mangaleswari was declared his successor, all his right was transferred to and vested in the latter. The Provincial Court decreed the claim and held that Sivagami Nachiar was Muthuramalinga's legal heir and that no act of Government consequent on his arrest and imprisonment had declared the succession in his issue forfeited. On appeal, however, both the Sadr Court and the Privy Council concurred in holding that the istimirar sanad was the foundation of title to the zamindari, that she, Mangaleswari, was competent to adopt and did adopt Annasami Setupati, and that the decision of the Provincial Court could not be supported. This litigation lasted from 1813 to 1828, and during its pendency, Annasami

THE RAMNAD CASE. Setupati died and his senior widow Muthuvirayi Nachiar continued the appeal. Here it is argued that the sanad being declared to be the basis of title to the zamindari, the grant to Mangaleswari must be treated to have been a fresh grant. The answer to it is that no doubt the line of succession in the Setupati family was diverted from Muthuramalinga to his sister from motives of policy but that for the reasons already mentioned, what was continued to her by an act of State was the hereditary right of succession which had vested in the Setupati family and which had never been forfeited. The ground of appellate decision was that in 1813 succession could be claimed only from Mangaleswari, the previous zamindari and not from her predecessor, the deposed palayagar. It was doubtless an act of State which raised Mangaleswari to the status of zamindari, but that act transferred the succession to her unconditionally as the representative of the Setupati family thereby constituting her into a fresh stock of descent. There is nothing to support the contention that the Appellate Courts held that the estate which Mangaleswari took was a new estate in the sense that it was partible and distinct from the impartible estate which her predecessors had owned. The appellant's counsel overlooks the fact that when a raj or principality belongs to a particular family and has, at the same time, a political character, the latter is liable to be detached from it without changing the incidents which appertain to the former by custom.

Another contention is that both the daughters of Ramaswami Setupati succeeded together and not one after the other, and in support of it our attention is drawn to exhibit B. This is inconsistent with exhibit LXI, wherein was suggested an arrangement for management in connection with Dora Raja Nachiar's succession, and with exhibit LXII, wherein the daughters are said to have enjoyed the estate one after the other. As regards exhibit B it is no legal evidence as it contains statements made by a rival claimant during a controversy in 1855 with regard to the succession. Seeing that Muthuchella Tevar himself acted as manager on behalf of the minor Mangaleswari in conjunction with his sister Muttu Tiruvayi Nachiar, his statements in exhibit B are entitled to no weight. It may be that, as both sisters were minors, they lived together with their mother and grandmother, but exhibit B does not show that the daughters were registered or recognized as joint zamindaris.

Although there was but one instance subsequent to 1803 of several co-heirs succeeding one after the other, yet as pointed out by the Subordinate Judge there has throughout been a general consciousness that the Setupati is the representative of what was once a ruling family, that succession in that family is governed by family custom, and that only one member holds the zamindari at a time. In 1818, Annasami Setupati referred to Setupatis having exercised sovereign powers, in order to account for the interest which he claimed in the pearl-fishery at Tuticorin (exhibit XXVII). Upon his death, there was an enquiry in 1820, as to the custom of succession in the family (see exhibits LIX series) and the replies to the enquiry premise a competition among several sons born of different wives and give the zamindari only to one of them. In 1840, the Board of Revenue represented to Government that Mangaleswari, the eldest daughter of Ramaswami Setupati, was his heir, not by Hindu Law, but by the special custom of the family (exhibit LXI).

Again, in 1856 an enquiry was made as to the custom of the family in regard to succession and the rights of sons-in-law in particular (exhibits LVIII and LVIIIa). In 1855, Muthuchella Tevar, brother of the senior widow of Annasami Setupati, claimed the zamindari terming it 'raj' (exhibit B). In 1857 the Board observed that it was the reigning raja that had the title of Setupati. In 1832, the various marks of insignia held by the relations of the raja, which are in all probability the relics of a time when the Setupati was a ruling prince and the

THE RAMNAD
CASE.

fountain of honour, are described in exhibits XXXV and XXXVa. In 1863 the Government referred to the Setupati family as one of the few reigning families in Southern India (exhibit XXXIX). Moreover, the istimrar zamindari herself claimed the zamindari only in succession to her elder sister (exhibit XLII). In Original Suits Nos. 14 and 188 of 1850, the late zamindar described the estate as being in the nature of a raj (*Collector of Madura v. Mootoo Ramalinga Sathupathy*(1)). Thus, the history of the family subsequent to 1893 discloses that the estate which was impartible as a raj or military jaghire prior to the permanent settlement has since continued to be an impartible zamindari.

I may here mention that the zamindari of Sivaganga and the estate of Padamattur which have been judicially determined to be impartible are offshoots of Ramnad. The raj at Pudukottai is likewise another offshoot. It is but reasonable to presume that when the offshoots are impartible the parent stock is likewise impartible.

As to the oral evidence for appellant on the subject of partibility, the Subordinate Judge has considered it not trustworthy, and his finding upon it is not questioned on appeal.

In conclusion, the evidence on the subject of impartibility may thus be summarized.

1. Throughout its history, prior to 1605 extending over many centuries, Ramnad was always a feudatory estate and at times a real kingdom.
2. From 1605 to 1803, it was always the principal of the seventy-two southern palayapats. The eighth Setupati threw off his allegiance and assumed regal power, and in his time it was a real kingdom.
3. Throughout its history, Ramnad was never the subject of a partition in recognition of coparcenary right.
4. Whenever there was a plurality of heirs, it is only one that owned the estate. There were six such instances since 1605.
5. The raj at Pudukkottai, the zamindari of Sivaganga, and the estate of Padamattur are all the offshoots of Ramnad, and they are impartible.
6. From the date of the permanent settlement, as before it, there is general consciousness that Ramnad is impartible.

What is urged against the foregoing evidence is as follows :—

- I. On the death of the third Setupati there was a partition. The answer is that it is not referable to coparcenary right.
- II. In 1773, Ramnad was conquered by the Nawab of the Karnatic and became part of his territory. The answer is that he restored it to the eighteenth Setupati in 1780.
- III. Since 1780 and at all events from 1792, the status of the Setupati was mere that of a renter. The answer is, that the imposition of a peishcush in 1780 and the raising of it under the East India Company's management are not incidents incompatible with the palayam tenure which, in the case of Ramnad, was finally commuted only in 1803.
- IV. In the inayatnama, exhibit M, the Nawab spoke of having delivered Ramnad to Muthuramalinga on lease, and this shows, that what was restored in 1780 was not the raj. The answer is, that the Nawab used the term loosely to indicate the obligation to pay a peishcush which he was at liberty to raise, and that the real relation as formally stated by the Nawab in exhibit XLIVa was that of a palayagar subject to the payment of a tribute to him.

(1) 12 M.I.A., 397 at p. 422.

V. When the eighteenth Setupati was deposed Ramnad was confiscated. The answer is that there was no confiscation in fact or in law, and that an intention to confiscate was expressly disavowed in exhibit XLIVa.

VI. The estate granted to Mangaleswari Nachiar was a new estate. The answer is that her succession was acknowledged to the palayapat before it ceased to be such.

VII. The mere issue of istimrar sanad rendered Ramnad partible. The answer is that this is not sound, and where impartibility has been impressed upon the estate by antecedent family custom, the presumption is that the estate was granted with the customary incidents.

VIII. The continuance of the management of the East India Company for eight years and the absence of evidence to show that Government accounted to Mangaleswari for five years' profits imply a change of intention. The explanation is that the inference is incorrect, and that it is contradicted by the Collector Mr. Lushington's letter and the subsequent delivery of Ramnad into Mangaleswari Nachiar's possession.

IX. The taking of murchalka (exhibit XLIV), shows that the grant was conditional and not absolute as before. The explanation is that Mangaleswari's right of succession to the palayapat was recognized in 1795, and that the imposing of certain obligations in the interests of good government and public tranquillity by the paramount power upon the palayagar with his or her consent, does not destroy the original incidents of the estate in other respects.

X. The decision in the suit of 1813 that the sanad is the foundation of title to the zamindari is proof that a new estate was granted. The answer is, that Mangaleswari's right to succeed to the palayapat was recognized in 1795, while the sanad was issued only in 1803, and that the real effect of the decision is that a new claimant in 1813 must trace his or her title from the istimrar zamindar and not from her predecessor, the deposed palayagar.

XI. The number of instances in which there was competition between brothers and yet there was no partition is small.

The answer is that there are no instances to the contrary and that the absence of partition from ancient times, the character of the estate as a raj or principality constitute together with the general consciousness of impartibility, cogent evidence in its favour.

After carefully considering the whole evidence and all that can be urged against it, I have no hesitation in adopting the conclusion of the Subordinate Judge that the zamindari of Ramnad is an impartible estate.

Taking the zamindari then to be impartible, the next question is whether succession is regulated by the rule of primogeniture. In the absence of proof any special custom, the presumption is that the seniority of birth is the ground of preference. In paragraph 44 of his judgment, the Subordinate Judge observes that it was not denied before him that if only one person can hold the estate at a time, the rule of primogeniture applies. No other ground of preference is either disclosed by the evidence or suggested on behalf of the appellant. As regards the right of managing the plaint devasthanams and the right to the surplus balance of two lacs of rupees mentioned in schedule D, the decision of the Subordinate Judge that they pass with the zamindari is not contested in appeal.

I now proceed to deal with the other issues in the case. As regards the second issue the Subordinate Judge is right in holding that if the zamindari is partible, the late zamindar's will cannot affect the appellant's right to a share therein. Nor does it show that the late zamindar contemplated the case of a

THE RAMNAD CASE. competition between two sons and indicate a customary rule applicable to such a case. No objection is further taken in the memorandum of appeal to the Subordinate Judge's decision on the second issue.

The third issue relates to sirathetta, pannai and kolkrayam properties. The appellant did not specify them though he was directed to do so by the Subordinate Judge at the instance of the respondent.

Nor did he produce any evidence on the subject. It is not possible to grant him any relief save as to items which are mentioned in paragraph 7 of the written statements to have been acquired by the late zamindar. But it is not denied that items Nos. 1 to 13 were sold for arrears of peishcush which accrued due during the lifetime of the late palayagar and bought for the respondent with the zamin funds. The appellant has not set aside the revenue sales; nor has he shown that it was his father's wish or there was a special custom that this description of property should not pass with the zamindari. As acquirer the late zamindar was at liberty to alienate the pannais and kolkrayams at his pleasure but as their acquisition is in the nature of an enlargement of the zamindar's interest in zamin lands, the presumption is in the absence of any disposition on his part or of special custom, that on his death they were intended to be incorporated with the zamindari, I think the Subordinate Judge has properly decided the third issue against the appellant.

As for the fourth issue which relates to moveable properties in existence at the date of the late zamindar's death, it is not denied that respondent purchased them with zamin funds at revenue sales held for the arrears of peishcush which appellant did not seek to set aside. They were liable to be sold for these arrears which constituted a debt due by the father. The only question is whether the selection for sale of moveable property in which the respondent was entitled to a share whilst the father's debt was payable both out of it and the zamindari should operate to deprive him of his share therein. The father's debts are payable as between his sons out of his whole property and it is therefore only just that the impartible zamindari and the moveable property not being *regalia* which is partible should contribute in proportion to their value to the discharge of those debts but the appellant has not set aside the revenue sales or sued to do so within six months from the date on which he attained his majority.

The result is that the appeal fails on all points and is dismissed with costs.

BEST, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Davies.

KRISHNAN NAYAR (PETITIONER-SURETY), PETITIONER,

1901.
April 16.

v.

KRISHNAN NAYAR (COUNTER-PETITIONER-DEGREE-HOLDER),
RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, ss. 336, 349—Release of judgment-debtor on finding a surety for his production at a specified time—Death of judgment-debtor before the expiration of that time—Release of surety—Execution of decree as against surety—Illegality.

A judgment-debtor was released from custody on finding a surety for his production at a specified time. Before the expiration of that time the judgment-debtor died. The decree-holder thereupon obtained an order enforcing the decree as against the surety:

Held, that the order was illegal. The Court had no jurisdiction to enforce the obligation as a decree against the surety. Moreover the obligation of the surety was discharged by the death of the judgment-debtor.

Appeal by the surety to the High Court treated as a revision petition.

A JUDGMENT-DEBTOR having been arrested in execution of the decree, petitioner became surety, as he alleged, under section 349 of the Code of Civil Procedure, and the judgment-debtor was accordingly released for a specified time. Before the expiration of that time, the judgment-debtor died, and petitioner applied for cancellation of his bond, but the application was rejected. The decree-holder then applied for execution of the decree against petitioner, as surety, and an order was made for the issue of a warrant. Petitioner opposed the application on the ground that the amount due under the decree could not be realised under the surety-bond by means of summary execution against him. By the bond, petitioner undertook to produce the judgment-debtor within a month and a-half and in default of so producing him, bound himself to pay the decree-debt. The Munsif passed the following order:—"In this case, on production of the debtor, the debtor

* Civil Miscellaneous Second Appeal No. 51 of 1900, against the order of W. H. Welsh, District Judge of South Malabar, in Appeal Suit No. 210 of 1900, affirming the order of M. G. Krishna Rao, District Munsif of Temalprom, in Civil Miscellaneous Petition No. 456 of 1900.

KRISHNAN
NAYAR
v.
ITTINAN
NAYAR.

wanted a respite for 1½ months for the purpose of making a pilgrimage to Palni Hills and the surety promised to produce the debtor after that time and in default to pay a sum not exceeding Rs. 340 and he agreed for realisation of that sum by execution of the decree against him. Thus the arrangement between the parties was evidently under section 257A, Civil Procedure Code, though the mode of realising voluntarily prescribed by the surety himself is that under sections 336 and 253, Civil Procedure Code. The surety now alleges that he gave security under section 349, Civil Procedure Code, and his vakil quotes *Moidin v. Chandu*(1) and *Mingale Antone Kane v. Ramachandra Baje*(2). But none of them is applicable. The petition is dismissed with costs."

The District Judge, on appeal, said:—"Petitioner appeals against an order dismissing his petition praying that the application by the counter petitioner to execute the decree in Original Suit No. 327 of 1898 against him, who was a surety, may be dismissed. It is first contended that the death of the judgment-debtor before the date fixed for his production absolved the surety from liability to produce him. I do not think the surety is absolved. There was no condition in the bond that liability should cease if the judgment-debtor died, the condition was that liability ceased if the debtor was produced on 23rd January. The judgment-creditor gave consideration by allowing liberty to the debtor. It is next contended that the Court has no jurisdiction to treat a surety as a judgment-debtor because there is no section in the law expressly fitting this procedure. I do not think this view is right, and I have not been referred to any decision to that effect. It would be very hard on judgment debtors if the Courts had not power to allow them liberty in certain instances unless the law expressly provided for the particular method proposed. There is no law that I am aware of which says that the Court is not to treat a surety as a judgment-debtor, or that the decree-holder must be referred to a fresh suit on the bond. I am unable to say that the procedure of the Court is illegal. The appeal is therefore dismissed with costs."

The surety preferred this second appeal.

J. L. Rosario, for respondent, took the preliminary objection that no appeal lay. The surety was not a party to the suit and

(1) I.L.R., 7 Mad., 273.

(2) I.L.R., 19 Bom., 694.

consequently questions between him and decree-holder could not be dealt with under section 244, Civil Procedure Code, nor was an appeal, against an order of this kind, provided for by section 588.

Bhaskara Menon, for appellant, asked the Court to treat the appeal as a petition under section 622.

JUDGMENT.—It is impossible to support the order. Either the order was wholly illegal for want of jurisdiction in the Court, or, if the security was legally taken, the obligation was discharged by the death of the judgment-debtor. In our opinion the Courts had no jurisdiction to enforce the obligation as a decree, and therefore, treating the appeal as a petition under section 622 of the Code of Civil Procedure, we set aside the orders of the Courts below. The respondent must pay the petitioner's costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Bhashyam Ayyangar.

KADIR BACHA SAHEB AND OTHERS (DEFENDANTS NOS. 1, 4 AND
5—COUNTER-PETITIONERS AND JUDGMENT-DEBTORS),
APPELLANTS,

1901.
1 April 23.

v.

ABDUL BAHIMAN SAHEB (PLAINTIFF—PETITIONER AND
DECREE-HOLDER), RESPONDENT.*

Partition Act—Act IV of 1893, s. 2—Order for delivery of share in house to decree-holder—Application in execution—Order for sale under Partition Act.

Section 2 of the Partition Act of 1893, which empowers a Court to order a sale of property instead of a division, in partition suits, may be applied though a preliminary order defining the share of a plaintiff and directing partition has been passed.

APPLICATION by a decree-holder under section 235 of the Code of Civil Procedure, in execution of his decree. By a deed executed in December 1895, second defendant and his wife, (now joined as

* Civil Miscellaneous Second Appeal No. 48 of 1900 against the order of H. Moberly, District Judge of Madura, in Appeal Suit No. 143 of 1900, affirming the order of A. Narayanan Nambiar, District Munsif of Madura, on Execution Petition No. 987 of 1899, in Original Suit No. 162 of 1899.

ABDUL
RAHIMAN
SAHEB.

eight defendant, second defendant having died after suit), sold to the present applicant twelve parts, which had fallen to them as their shares, of a certain house of seventy-two such parts. The present applicant had sued and obtained a decree for possession of these twelve shares, and now sought to obtain an order directing the house to be divided, according to the decree, into seventy-two shares and that twelve of these should be placed in his possession. First defendant was entitled to forty-five of the shares, and the remaining fifteen were the property of either defendants Nos. 3 to 5, or defendants Nos. 6 to 8. The house measured 600 square feet, and defendants contended that a division of it could not conveniently be made, and asked that it might be sold under the Partition Act. The District Munsif said:—"This is an application by the decree-holder to deliver to him his $\frac{1}{2}$ share by a fair division as directed by the decree. The defendants object that the house in question is not capable of convenient division and that therefore it should be sold under Partition Act. I do not think that this is a case in which the property should be sold. No doubt, if the house is allowed to stand as it is, it will be more inconvenient than if it is divided, but by partitioning plaintiff's share the house does not become unfit for occupation. Probably when the remaining portion of the house comes to be divided between the other sharers if it is found inconvenient by them, they may sell it. Even between those sharers, it is not impossible or highly inconvenient to make a fair division, although no doubt their convenience will be a little lessened by the division. Considering the state of other houses occupied by people of the class to which the parties belong, I cannot say that this house is incapable of fair division. I myself inspected the house and found that it can be fairly divided. By dividing plaintiff's share alone, no inconvenience is caused." He ordered delivery to plaintiff of a specified portion as share. Defendants Nos. 1, 4 and 5 appealed to the District Judge who dismissed the appeal.

Against the order of the District Court, defendants Nos. 1, 4 and 5 preferred this appeal.

Sivasami Ayyar for appellants.

V. Krishnasami Ayyar for respondent.

JUDGMENT.—It is argued that it is not competent to the Court to apply the provision of section 2 of the Partition Act, because a preliminary order defining the share of the plaintiff and directing

partition has been passed. We are unable to accept this view of the Act. There is nothing in section 2 to limit its operation to cases in which no order has been passed; and section 10 makes it quite clear that the Act can be applied until the scheme of partition has been finally approved, i.e., until a final decree has been passed under section 2 of the Act. It is for those who object to partition representing at least a moiety of the interests in the property to show that partition cannot, by reason of the circumstances there stated, be reasonably or conveniently effected, and that a sale of the property will be more beneficial for all the shareholders. Having regard to the nature of the property, namely, a dwelling house, the size of the house, and the number of shares, we cannot doubt that a partition must be inconvenient and unreasonable, and that a sale will be more beneficial for all parties. Section 4, moreover, gives the defendants the right to purchase the plaintiff's share, since he, being a stranger, has bought a part of the family house. If the defendants exercise their option the provision of section 2 need not be applied.

We must reverse the orders of both Courts and remand the case for disposal according to law by the District Munsif. Costs in this and in the lower Appellate Court will abide the result.

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Davies.

KING-EMPEROR

v.

KRISHNA AYYAR.*

Criminal Procedure Code—Act V of 1898, s. 403 (4)—Previous acquittal—Acquittal by assessors on charge of abetment of dacoity with murder—Subsequent conviction by jury of receiving stolen property—"Court competent to try the offence subsequently charged."

Five persons were charged before a Sessions Judge, sitting with assessors, with having committed dacoity with murder, under section 396, Indian Penal

* Criminal Appeal No. 33 of 1901 against the sentence of H. Moberly, Sessions Judge of Madura, in Sessions Case No. 109 of 1900.

KADUR
RAGHAVA
SAHEB
v.
ABDUL
RAHIMAN
SAHEB.

1901.
April 24.

KING-
EMPEROR
v.
KRISHNA
Ayyar.

Code, and a sixth, with abetting them. The abettor was acquitted. He was, however, subsequently charged before the Sessions Judge, sitting with a jury, with receiving stolen property knowing that it had been obtained by dacoity, under section 412 of the Indian Penal Code. The jury returned a verdict of guilty, and the accused was convicted and sentenced. The facts on which the accused was convicted of receiving stolen property were the same as those upon which he had been acquitted of abetment of dacoity with murder, the dacoity by which the stolen property was alleged to have been received being the same as that which had formed the subject of the previous charge. On its being contended that the Court had power to try the accused a second time under sub-section 4 of section 403 of the Criminal Procedure Code, inasmuch as a charge of receiving stolen property must be tried by a jury; and that in consequence the Court by which the accused had first been tried was not a Court competent to try the present charge:

Held, that the conviction was bad.

APPEAL against a conviction and sentence on a charge of dishonestly receiving stolen property knowing that it was obtained by dacoity, under section 412, Indian Penal Code. Accused had previously been tried, together with five others, before a Judge and assessors, in Sessions Case No. 67 of 1900, on the file of the Sessions Court of Madura, with abetment of dacoity with murder, under sections 396 and 109 of the Indian Penal Code. The other five accused in that case were charged with dacoity with murder. The evidence was that on the morning of 1st April 1901, a dacoity had taken place to the east of a tank at Sengulam; and that in the course of that dacoity one Venkatachalam Pillai had been killed. The only question was whether the six accused then before the Court were the persons who had committed or abetted the dacoity. The evidence was that money had been found in a niche in the house of appellant, and also in the house of one Ranga Ayyangar, which had been placed there by the appellant. The result of the trial was that all the other five prisoners were found guilty and sentenced to transportation for life. The present appellant was however acquitted, the Sessions Judge, agreeing with the assessors, finding that there was no evidence that he had taken part in the dacoity or that he had aided or abetted it. Appellant was subsequently charged and tried before a jury, in Sessions Case No. 109 of 1900, on the file of the same Court, with the offence of receiving stolen property, as already stated. In the latter case, the property was alleged to have been obtained at the same dacoity, namely, that committed on 1st April 1901, near Sengulam tank, and in the course of which Venkatachalam had been killed. The jury returned

KING-
EMPEROR
v.
KRISHNA
Ayyar.

a verdict of guilty and the Sessions Judge delivered the following judgment:—"I fully agree with the verdict of the jury. I have no doubt that the accused was concerned in the conspiracy that culminated in the Sengulam dacoity and the murder of Venkatachalam. He must have known that the money he hid in Ranga Ayyangar's terraced house was stolen property, and his friendship with Somasundaram Pillai must have made him know that the money was part of the proceeds of the dacoity. I see no reason to make any distinction between those who took part in the dacoity and him who remained in the back-ground and wanted to take a big share of the proceeds of the dacoity. I therefore sentence him to transportation for life."

Against this conviction and sentence, the accused preferred this appeal.

Sundara Ayyar for the accused.

The Public Prosecutor (Mr. E. B. Powell) in support of the conviction.

JUDGMENT.—The ground of this appeal is that the accused has already been acquitted on the same facts, and that by virtue of section 403 of the Criminal Procedure Code he cannot be tried for the offence for which he has now been convicted.

The accused was first charged with abetment of dacoity with murder. He was tried by the Sessions Court with the aid of assessors and was acquitted. He was afterwards charged with the offence of receiving stolen property, and was tried before the Sessions Judge and a jury, and the jury returned a verdict of guilty. The Judge accepted the verdict and convicted the accused of the offence of receiving stolen property. The Public Prosecutor concedes that he is unable to show that the facts on which the accused was convicted of the offence of receiving stolen property differ from the facts on which he was acquitted of the offence of abetment of dacoity with murder. But he relies on sub-section (4) of section 403 of the Criminal Procedure Code which is in the following terms:—

"A person acquitted or convicted of any offence constituted by any act may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try

KING.
EMPEROR
v.
KRISHNA
AYYAR.

"the offence with which he is subsequently charged." Under the rule made under the powers conferred by section 269 of the Code of Criminal Procedure a charge of receiving stolen property must be tried by a jury.

We are of opinion that "the Court by which he was first tried," i.e., the Court of Session, was competent as a Court of Session to try the offence of receiving stolen property. The illustrations (f) and (g) show that the words "was not competent to try" mean "had not jurisdiction to try." The charge of receiving stolen property not being a charge triable with the aid of assessors, it was open to the Judge to empanel a jury to try it. Even if he had proceeded to try the case with the aid of assessors and no objection had been taken before the Court had recorded its finding the trial would not have been invalid on that ground only, and if the Judge had convicted, the conviction could not have been impeached; see section 536 (2) of the Code of Criminal Procedure. These provisions of the law are quite inconsistent with the contention put forward by the prosecution that the Court by which the accused was first tried was not "competent to try" the charge of receiving stolen property. The appeal must be allowed and the conviction set aside. The accused must be set at liberty.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Bhashyam Ayyangar.

1901.
April 24.

MUNICIPAL COUNCIL OF CHIDAMBARAM (DEFENDANT),
PETITIONER,

v.

VENKATANARAYANA PILLAI (PLAINTIFF), RESPONDENT.*

*District Municipalities Act (Madras)—Act IV of 1884, s. 53, sched. A, proviso 4—
Person carrying on business as a money-lender—Liability to pay profession tax.*

A person, who carries on the business of a money-lender and whose income is less than Rs. 30 per mensem, is not chargeable with a tax under section 53 of the District Municipalities Act, (Madras), 1884.

* Civil Revision Petition No. 388 of 1900 under section 25 of Act IX of 1887, praying the High Court to revise the decree of M. Deva Rao, District Munsif of Chidambaram, in Small Cause Suit No. 364 of 1900.

SUIT to recover Rs. 4, alleged to have been unlawfully levied from plaintiff as profession tax. Plaintiff was a money-lender whose income was accepted by the defendant council as being under Rs. 30 per mensem, and a tax of Rs. 2 in respect of two succeeding half-years had been levied from him. Defendants relied on proviso 4 to schedule A of the District Municipalities Act (Madras Act IV of 1884, as amended by Madras Act III of 1897) as justifying the levy of the tax, and contended that under that proviso a money-lender was liable to pay the tax prescribed for Class VII, (namely Rs. 4 per annum), even though his income did not justify his being placed under the lowest of the Classes of schedule A. Plaintiff's contention was that the minimum income upon which any tax could be levied was fixed by Class IX as Rs. 30 per mensem or upwards, and that the Act contemplated exemption from taxation of persons whose incomes were less than Rs. 30 per mensem.

The District Munsif held that plaintiff was not bound to pay the tax, and ordered that he should recover the amount from defendants.

Against this order the defendant-council preferred this civil revision petition.

The Advocate-General (Hon'ble Mr. J. P. Wallis), for petitioner, contended that the effect of section 53 of the Act was to render all persons carrying on the trades and professions specified in the schedule liable to the payment of a tax. The object of the classification in the schedule was to determine the class in which a person should be placed and not to determine whether he was taxable at all. Inasmuch as a money-lender was liable to be taxed, the proviso placed him at least in Clause VII.

Sivasami Ayyar, for respondent, submitted that, apart from the proviso, persons with incomes less than Rs. 30 per mensem were not liable to be taxed. The effect of section 53, read with the schedule, was not that all persons carrying on certain trades are taxable, but that persons enjoying certain incomes are liable to pay a proportionate tax. The effect of the proviso was to raise the Class from a lower to a higher one, provided that the person was liable to pay a tax at all. It did not impose a liability to pay a tax where none existed.

The Advocate-General in reply.

JUDGMENT.—The question is whether a money-lender whose income is below Rs. 30 a month is chargeable with any tax under

MUNICIPAL
COUNCIL OF
CHIDAM-
BARAM
v.
VENKATA-
NARAYANA
PILLAI.

MUNICIPAL
COUNCIL OF
CHIDAM-
BARAM
v.
VENKATA-
NARAYANA
PILLAI.

section 53 of the District Municipalities Act. There is no doubt that he exercises one of the trades specified in schedule A. Apart from the proviso, that schedule does not include persons whose income is under Rs. 30. It is said that the proviso has the effect of bringing such persons within the schedule, because, as it is argued, every money-lender shall be placed at least in Class VII irrespectively of his income.

If the income was not under Rs. 30 no doubt that would be the effect of the proviso, and that is all we think that the Legislature intended, but not to bring within one of the classes persons who, apart from the proviso, would be in no class at all. This is indicated by the words immediately preceding the proviso, viz., every person described in Class 1 whose pay, salary or pension amounts, or whose income is estimated to amount to Rs. 30 a month or upwards—Re. 1.

The result would probably have been otherwise if those words had been omitted, and the phrase "Provided that" substituted.

The petition is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Bhashyam Ayyangar.

1901.
April 24.

VISVANATHAN CHETTI (DEFENDANT NO. 2), PETITIONER,

v.

RAMANATHAN CHETTI AND OTHERS (PLAINTIFF AND
DEFENDANTS NOS. 1 AND 3), RESPONDENTS.*

*Civil Procedure Code—Act XIV of 1882, ss. 206, 622—Omission in judgment—
Decree in conformity with judgment—Amendment of decree under section 206—
Remedy by appeal—Inadmissibility of revision petition—Limitation Act—Act
XV of 1877, s. 5.*

Defendants in a suit held certain land on lease from plaintiff, who alleged that they had encroached upon his land and by that means held more than the area to which they were entitled. He sued for possession of the excess and also

* Civil Revision Petition No. 130 of 1900, under section 622 of the Civil Procedure Code, praying the High Court to revise the order of P. S. Seshayya, District Munsif of Sivaganga, in Miscellaneous Petition No. 1293 of 1899 in Original Suit No. 174 of 1898.

claimed arrears of rent. Defendants denied the alleged encroachment, and pleaded that if it should be proved they were willing to pay increased rent. They also admitted liability in respect of the arrears of rent. The encroachment was proved, and the District Munsif gave judgment declaring defendants liable for increased rent in proportion, a decree being drawn up in similar terms. Both judgment and decree omitted to award the amount admittedly due as arrears of rent. Plaintiff thereupon presented a petition to the District Munsif, who ordered the decree to be amended so as to render defendants liable for the said arrears. This order was passed more than one month from the date of the decree. Upon a petition being preferred by defendants in the High Court against the District Munsif's order of amendment:

Held, that the petition was not admissible, inasmuch as it was open to the petitioner, under section 5 of the Limitation Act, to appeal against the decree as amended, notwithstanding that a month had expired from the date of the decree.

Nanda Rai v. Raghunandan Singh, (I.L.R., 7 All., 282), considered.

REVISION petition against the order of a Munsif, dated 22nd December 1899, amending the decree in Original Suit No. 174 of 1898. The petitioner was the second defendant in Original Suit No. 174 of 1898 on the file of the District Munsif of Sivaganga. The suit was instituted by the plaintiff (counter-petitioner) for possession of land (cheis 2-3-12), which, he alleged, defendants had taken by an encroachment on his land in excess of the area specified in their cowle, and also for arrears of rent due in respect of the cowle lands for faslis 1304 to 1306. The defendants denied the encroachment and expressed their willingness to pay rent for the excess so taken, if any, and admitted liability for the arrears of rent claimed in the plaint for faslis 1304 to 1306 for the land specified in the cowle. A Commissioner was deputed to measure the lands in the possession of defendants and found that there had been an encroachment, and the Munsif's judgment concluded as follows:—"Both parties admit the extent as shown in the Commissioner's account. The plaintiff does not press his claim for the recovery of the excess land. It then remains only to pass judgment in favour of the plaintiff for rent for the excess land as appearing from the Commissioner's report at the rate agreed on by the cowle and the muchalka." A decree was drawn up, whereby it was "ordered and decreed that for the excess cheis 1-13-1½, the defendants do pay plaintiff rent every year at the rate of Rs. 8 per chei." Thereupon plaintiff presented a petition to the Munsif under section 206 of the Code of Civil Procedure, paragraphs 2 and 3 of which were as follows:—"The suit was instituted for the recovery of the excess

VISVANATH,
CHETTI
v.
RAMANATHA
CHETTI.

VISVANATHAN
CHETTI
v.
RAMANATHAN
CHETTI.

land, or for directing payment of rent due therefor year after year, and for the recovery of arrears of rent for faslis 1304 to 1306 in respect of the cowle lands. The defendants admitted the arrears and denied there was excess land. Thereupon it was stated in the decree that there was excess land and that payment should be made therefor at Rs. 8 per chei. But the total arrears of rent in respect of cowle lands for faslis 1304 to 1306 admitted to be due to plaintiff, as well as the costs due to plaintiff, are not mentioned in the decree. I therefore pray that the Court be pleased to direct the said two items omitted by mistake to be incorporated in the decree." The defendant opposed the petition on the ground that section 206 did not apply and that the proper remedy was by review under section 623. The Munsif passed the following order:—"I consider the amendment prayed must be allowed. It was a mistake in drawing up the decree that the admitted claim was not incorporated in it. The amendment is allowed." In pursuance of this order the decree was amended, the following words being added to it:—"and that the defendants do pay plaintiff Rs. 182-1-0, arrears of rent due to plaintiff from faslis 1304 to 1306, as well as the costs as given below." The amendment was made more than one month from the date upon which the decree had been passed.

Defendant preferred this revision petition, under section 622 of the Civil Procedure Code, against the order of the Munsif ordering the amendment of the decree under section 206, Civil Procedure Code.

K. Srinivasa Ayyangar for the petitioner.—The Munsif had no jurisdiction to amend the decree under section 206. There was no clerical or arithmetical error, nor was there any variance between the judgment and the decree. Such an amendment could only be properly made by a review of judgment, and consequently the procedure adopted by the Munsif was erroneous. [BHASHYAM AYYANGAR, J.—Your remedy is by way of appeal from the amended decree. If the time for preferring an appeal has already expired, the delay will be excused under section 5 of the Limitation Act.] But it has been held in *Nanda Rai v. Raghunandan Singh*(1)

(1) I.L.R., 7 All., 282.

that no appeal lies against an order amending a decree. (He also referred to *Muthaayyan Chetti v. Narasunayyar*(1); *Lakho Bibi v. Salamat Ali*(2).)

VISVANATHAN
CHETTI
v.
RAMANATHAN
CHETTI.

Sundara Ayyar and *Anantakrishna Ayyar* for counter-petitioner (respondent).—The lower Court had jurisdiction to make the order complained of. It is admitted that the lower Court could have made the order under section 623. The fact that the order purported to be made under another section 206 does not make it *ultra vires*. Consequently the High Court cannot interfere under section 622. Again, the defendant's proper remedy was to appeal against the amended decree. An appeal lies from all decrees under section 540, (*Nanda Rai v. Raghunandan Singh*(3) per Oldfield, J.). The only Madras case which at first sight might appear to be against this contention is that of *Narayanasami v. Natesa*(4), where Best, J. says, there is no appeal against the order amending the decree. But the question whether the appropriate remedy was not by way of appeal from the amended decree, was not considered by Best, J. The other learned Judge, Mr. Justice Muttusami Ayyar, does not consider this question of appeal at all, and bases his decision upon other grounds. The present question was not raised in the unreported case which have been cited. *Parameshwara v. Seshagiriappa*(5) also shows that the High Court will not interfere in revision under section 622, if the party had other remedies open to him. Here the defendant could have appealed against the amended decree and got the relief if he was really entitled to it. Lastly the order was right on the merits as it only incorporated into the decree the arrears of rent admitted to be due by the defendant and about which there was no dispute. In such cases the High Court will not interfere in revision under section 622. Vide *In the matter of Bhasharat Ali Chowdhry*(6); *Abdul Sadiq v. Abdul Aziz*(7).

K. Srinivasa Ayyangar in reply.

JUDGMENT.—It was open to the petitioner, relying on the second paragraph of section 5 of the Limitation Act, to appeal under section 540 of the Code of Civil Procedure against the decree as amended, notwithstanding the expiration of one month

(1) Civil Revision Petition No. 50 of 1889 (unreported).

(2) I.L.R., 20 All., 237.

(3) I.L.R., 7 All., 282.

(4) I.L.R., 16 Mad., 424.

(5) I.L.R., 23 Mad., 366.

(6) I.L.R., 24 Cal., 132.

(7) I.L.R., 31 All., 142.

VIJAYANATHAN
CHETTI
v.
RAMANATHAN
CHETTI.

from the date when the decree was passed. This being so, we are of opinion that a petition under section 622 of the Code of Civil Procedure complaining of the variance of the decree is not admissible. Mr. Justice Mahmood in discussing the question in *Nanda Rai v. Raghunandan Singh*(1) overlooks the possibility of an appeal against the decree as amended, and for that reason comes to the conclusion that section 622 of the Code of Civil Procedure must be applied. It must be admitted that Mr. Justice Mahmood's view has been followed in one or two cases in this Court, but no reported case is cited in which a Bench of Judges has held that an appeal against the amended decree will not lie.

We dismiss the petition with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Bhashyam Ayyangar.

1901.
April 25.

MAILATHI ANNI (PETITIONER), APPELLANT,

v.

SUBBARAYA MUDALIAR (COUNTER-PETITIONER), RESPONDENT.*

Hindu Law—Migration by widow of a subject of French India to British India—Acquisition of domicile in British India—Character of her widow's estate.

Migration by the widow of a Hindu subject of French India to British India, and acquisition of a British Indian domicile, does not change the character of the estate held by the widow, and, if she does not adopt the system of law prevalent among Hindus in British India, the property inherited by her from her husband will be held by her according to the customary law of French India.

APPLICATION under section 6 of the Succession Certificate Act (VII of 1889), praying that a certificate of heirship might be granted to petitioner authorizing her to collect the debts due to her step-mother Valliammal. The facts, as found by the District Judge, were that a French subject, Kandasami Mudali by name, had owned property in Karikal. He died about fifty years ago, divided from his co-parceners, and leaving a daughter by a deceased wife

(1) I.L.R., 7 All., 282.

* Appeal No. 136 of 1900, against the order of D. Broadfoot, District Judge of South Arcot, in Civil Miscellaneous Petition No. 5 of 1900.

and a widow, the aforesaid Valliammal, him surviving. It was proved by an expert witness that, by the custom of French India, the widow of a divided Hindu, who has no male descendants, takes all his property absolutely as if it were stridhanam. The widow retained the French property in Karikal, and purchased lands and entered into money dealings in Chidambaram, situated in British territory, where she also founded a choultry some forty years ago. During that period she had resided at Chidambaram, visiting her property in French territory from time to time. When executing documents in Karikal she described herself as of that place, and when executing documents in British India she described herself as of Chidambaram. The District Judge found that she had acquired a British domicile. In 1894, during one of her visits to Karikal, she executed a will in favour of her brother, Subbaraya Mudaliar, the counter-petitioner in this application. She returned to Chidambaram, lived there till 1899, and then died. The District Judge considered that the will had been legally executed. The step-daughter now applied for a certificate of heirship. Counter-petitioner, being the brother of Valliammal, and beneficiary under her will, claimed to be entitled to the property, relying on the will, and applied for a succession certificate. The District Judge upheld the brother's claim. He held that, as the property vested absolutely in Valliammal, by the custom of French India, at the death of her husband, it remained vested in her though she had acquired a new domicile and carried some of the property across the frontier. He followed the statement of law in Mayne's 'Hindu Law,' paragraph 45, to the effect that, though a Hindu changes his domicile, his customary law or custom adheres to him, and held that the customary law of French India had adhered to Valliammal though she had become a British subject. He directed a certificate to issue to the brother.

The step-daughter (petitioner) proffered this appeal.

Sivasami Ayyar for appellant.

V. Krishnasami Ayyar for respondent.

JUDGMENT.—The evidence of the expert witness must be accepted as putting it beyond doubt that, according to the French law prevailing in French territory, the testatrix, on the death of her husband, became by inheritance absolute owner of his property. But it is said that by her migration to British territory and acquisition of a British Indian domicile, the character of her estate

MAILATHI
ANNI
v.
SUBBARAYA
MUDALIAR.

MAILATHI
ANNI
v.
SUNDARAYA
MUDALIAR.

was changed and that her rights were henceforth no other than that of a widow according to the Hindu law administered by our Court.

It is impossible, in our opinion, to hold that the change of domicile, assuming that there was any change, which is disputed, could have any such effect. It is not suggested that she adopted the system of law prevalent in this part of British India.

We dismiss this appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Bhashyam Ayyangar.

1901.
April 25.

HAKIM MUHAMMAD ASHRUFF HUSSAIN SAHEB
AND OTHERS (PLAINTIFF AND HIS REPRESENTATIVES), APPELLANTS,

v.

SYED MUHAMMAD ALI SAHEB (DEFENDANT), RESPONDENT.*

Madras City Civil Court Act—Act VII of 1892, s. 3—Jurisdiction—Suit for “breach of promise of marriage”—Contract of marriage between intended bridegroom and parent of intended bride—Cognisable by Small Cause Court—Presidency Small Cause Courts Act—Act XV of 1882, s. 19 (q).

The phrase “breach of promise of marriage” which occurs in article (q) of section 19 of the Presidency Small Cause Courts Act, has reference to the action as understood in English law, that is, between the parties who contemplate contracting the marriage, and not between an intended bridegroom and the parent of the intended bride.

By section 3 of the Madras City Civil Court Act, 1892, jurisdiction is conferred upon the City Civil Court to try all suits of a civil nature except, *inter alia*, suits cognisable by the Small Cause Court. By section 19 (article (q)) of the Presidency Small Cause Courts Act, the Small Cause Court has no jurisdiction to entertain suits for compensation for breach of promise of marriage. A suit was filed in the City Civil Court for compensation for breach of promise of marriage; but the contract alleged to have been broken had been entered into between the parent of the intended bride and the intended bridegroom:

Held, that the Court had no jurisdiction inasmuch as such a suit was not exempted from the jurisdiction of the Small Cause Court.

Suit for compensation for breach of promise of marriage. Plaintiff sued on a contract alleged to have been entered into between

* City Civil Court Appeal No. 4 of 1900 against the decree of O. B. Pattabhinna Ayyar, City Civil Judge, Madras, in Original Suit No. 114 of 1899.

himself and defendant and defendant's father, for the marriage of plaintiff's daughter to defendant. He stated that, in consideration of that contract, he had advanced moneys to defendant; but that defendant had, after a lapse of about eight months, repudiated the contract. He sued to recover the sums alleged to have been advanced, together with damages. The defence was, *inter alia*, that the contract had been entered into between plaintiff and the father of defendant; and that, owing to differences between plaintiff and defendant's father, the match had been broken off, and that, acting under the orders of his father, defendant had refused to marry plaintiff's daughter. Issues were framed on the merits, and the Judge, after hearing ten witnesses for plaintiff and three for the defence, held that defendant had entered into an agreement to marry plaintiff's daughter; that the contract had been entered into by plaintiff's daughter, who was a minor, plaintiff acting on her behalf, and defendant; and that defendant had broken the contract. On the question of damages he held that as plaintiff had sued, not on behalf of his daughter but on his own account, he could not claim them; and that, even if he could, he had not made out his claim. He dismissed the suit, but having regard to defendant's conduct without costs.

Plaintiff preferred this appeal.

Sivasami Ayyar for appellants.

V. Krishnasami Ayyar for respondent.

The question of jurisdiction was taken by the Court.

JUDGMENT.—Of the several causes of action alleged in the plaint the only one which could possibly be excluded from the jurisdiction of the Small Cause Court would be the claim in respect of damages for breach of promise of marriage.

But the contract here alleged is a contract between the parent of the girl intended to be married and the intended bridegroom. The suit is not a suit for breach of promise of marriage within the meaning of article (q) of section 19 of the Presidency Small Cause Courts Act, for the phrase there used must clearly have referred to the action for breach of promise of marriage as understood in English law. Seeing that the City Civil Court had no jurisdiction, we must set aside the decree and direct the return of the plaint.

We make no order as to costs.

HAKIM
MUHAMMAD
ASHRUFF
HUSSAIN
SAHEB
v.
SYED
MUHAMMAD
ALI SAHEB.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Bhashyam Ayyangar.

MUHAMMAD KHUMARALI (PLAINTIFF)

v.

RANGA RAO (DEFENDANT).*

Negotiable Instruments Act—Act XXVI of 1881, s. 51—Promissory note in favour of two payees—Endorsement by one in favour of the other—Suit by endorsee as such—Maintainability—Suit by endorsee as assignee of chose in action—Endorsement evidence of assignment.

Where a promissory note has been made in favour of two payees, one of whom endorses it to the other, the endorsee cannot sue on the note as endorsee or as one of two joint payees. He may, however, maintain a suit in respect of the amount due under the note as assignee of the chose in action. Though such an endorsement cannot operate as an endorsement under the law merchant, it may be relied on as evidence of an assignment by way of release in favour of the endorsee.

Rule 428 of the Rules of Procedure of the Presidency Small Cause Court is not *ultra vires*.

CASE stated by the Second Judge of the Court of Small Causes, Madras, for the opinion of the High Court, under Rule 428 of the Rules of Procedure of the Presidency Small Cause Court, as follows:—"The plaintiff sues to recover Rs. 261-7-0 due on a promissory note executed to him and to one Miligiri Rao by the defendant. Miligiri Rao is alleged to have endorsed the note to the plaintiff. The defendant raises the preliminary objection that the plaintiff has no cause of action. I am of opinion that the objection is well founded. As one of two payees it is clear that the plaintiff has no right to demand payment from the defendant. The alleged endorsement to the plaintiff by Miligiri Rao is invalid, as one of two payees cannot alone endorse (section 51 of the Negotiable Instruments Act). It is contended that the rule applies to endorsement to third parties and not, as in the present case, where the endorsement is to one of the payees. But the

* Referred Case No. 5 of 1901, stated under Rule 428 of the Rules of Procedure of the Presidency Small Cause Court, Madras, in Suit No. 18162 of 1900.

section makes no such exception, and we are not at liberty to imply it. I am of opinion that the suit is not maintainable and dismiss it with costs and attorney's fee Rs. 15. At the request of the plaintiff's vakil I make my decision contingent upon the opinion of the High Court on the question, not free from doubt,—Whether, on the facts stated, the plaintiff's suit is maintainable."

Rule 428 of the Rules of Procedure of the Presidency Small Cause Court is as follows:—"If before or on the hearing of a suit, or if in the execution of any decree, any question of law or the construction of a document, which construction may affect the merits, arises, on which the Court entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which the doubt is entertained, and refer such statement with its own opinion on the point for the decision of the High Court."

Mr. C. Krishnam for plaintiff.

Seshagiri Ayyar for defendant.

Their Lordships expressed the following opinions:—

SHEPARD, J.—It is objected that Rule 428 is *ultra vires* for the reason that it is in conflict with section 69 of the Presidency Small Cause Courts Act. But this is not so. The rule and the section proceed on different lines, the rule providing for cases in which the Judge is in doubt and not for cases covered by the section.

I am of opinion that as endorsee the plaintiff cannot sue on the note, but that as assignee of the actionable claim he may sue to enforce it. Accordingly I answer the question referred in the affirmative.

BHASHYAM AYYANGAR, J.—I concur with my learned colleague that the rule is not *ultra vires*. The plaintiff, one of the two joint payees of a negotiable promissory note payable on demand made by the defendant on 11th July 1899, sues the defendant for the recovery of the sum of Rs. 261-7-0, being the principal and interest due on the note. The plaintiff sues alone on the strength of the other joint payee V. Miligiri Rao having endorsed the note in his favour on the 5th January 1900. The defendant takes the preliminary objection that the suit is not maintainable, as one of

MUHAMMAD
KHUMARALI
v.
RANGA RAO.

two joint payees cannot endorse the note, notwithstanding that the endorsee is the other joint payee. This objection is, in my opinion, well founded under section 51 of the Negotiable Instruments Act, which in this respect is in accordance with the English law. The plaintiff therefore cannot sue upon the note as endorsee nor can he sue upon it as one of two joint payees. Every endorsement of a negotiable promissory note operating in contemplation of law between the parties thereto as the drawing of a bill of exchange by the endorser in favour of the endorsee, such endorsement being only a request of the endorser that the maker of the promissory note (who stands in this respect very much in the position of an acceptor) would pay the amount to the endorsee or to any other holder in due course (*vide* Story on 'Promissory Notes,' 7th edition, section 129, and Byles on 'Bills,' 16th edition, page 180), there is nothing to preclude a payee endorsing it in his own favour or two joint payees endorsing it in favour of one of themselves just as a drawer of a bill of exchange may draw it payable to himself. If, in the present case, the plaintiff also had signed the endorsement in his favour at the time of the endorsement or even prior to the institution of the suit, the action would have been maintainable by him as endorsee. But, though the action may not be maintainable by him as endorsee, he can recover the amount due under the note, if there be no other defence to the suit, as assignee of the chose in action, by reason of the other joint payee having transferred his interest therein to him. Though the endorsement cannot operate as such under the law merchant, it can be relied upon as evidence of an assignment by way of release (*vide* *Chester v. Willan*(1) and *Eustace v. Scawan*(2)) of Miligiri Rao's interest in the promissory note in favour of the plaintiff without a valid endorsement. The important difference between transfer by endorsement and transfer otherwise than by endorsement of a negotiable instrument is that, in the latter case, the assignee will acquire in the bill or note as a chattel no more than the right, title and interest of his assignor, whereas in the former case the assignee by endorsement will have all the rights and advantages of a holder in due course of a negotiable instrument (*vide* *Whistler v. Forster*(3), *Harrop v. Fisher*(4) per Byles, J., at page 286, and *Ramachandra*

(1) 2 Saund., 96.

(3) 32 L.J., (C.P.), 161.

(2) Cro. Jac., 696.

(4) 30 L.J., (C.P.), 283, at p. 286.

Rao v. Abee Rowthan(1) decided by Shephard and Moore, JJ., on the 26th September 1898, and Chalmer's 'Bills of Exchange,' 3rd edition, page 129). In the present case the actionable claim under the promissory note was transferred before the 2nd February 1900 on which date Act II of 1900 amending the Transfer of Property Act, 1882, came into force. It is therefore unnecessary to consider whether the transfer otherwise than by endorsement of an actionable claim under a negotiable instrument can, having regard to the saving section 137, be effected, otherwise than by an instrument in writing as required by section 130 and, if so, whether an endorsement in the shape of an order or request to the maker to pay the amount of the note to the endorsee can, subject to the payment of the duty and penalty leviable under the General Stamp Act, be regarded and treated as a transfer by the endorser to the endorsee of the actionable claim "by an instrument in writing" within the meaning of section 130.

(1) Appeal No. 175 of 1897 (unreported). The judgment in this case was delivered by SHEPHARD, OFFG. C.J., and MOORE, J., as follows:—"In *Patta Ambadi Marar v. Krishnan*, (I.L.R., 11 Mad., 290), it was held that without endorsement there could not be negotiation of a promissory note payable to order. Here the point taken is that there was a valid transfer or assignment of the chose in action and it is not contended that there was any negotiation of the note. According to English law it is clear that a promissory note may be assigned by the holder just like any other chose in action, the assignee taking the rights which his assignor has to convey and no more (*Whistler v. Forster*, [32 L.J., (C.P.), 163]). He does not obtain the title according to law merchant which an endorsement would give him, nor could he, before the Judicature Act, sue in his own name, but the transfer is nevertheless valid as an equitable assignment. There is no reason why in this country an assignee of this particular sort of chose in action should not enjoy the rights which attach to the assignee of a debt and be allowed to sue in his own name. It is argued that, by the Negotiable Instruments Act, any other mode of transfer than by endorsement is excluded. We can see nothing in the Act to justify this contention."

MUHAMMAD
KHUMARALI
v.
RANGA RAO.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Benson.

1901.
May 2.

KAMAL KUTTI (PLAINTIFF), APPELLANT,

v.

IBRAYI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Malabar Law—Suit against karnavan as manager of tarwad—Attachment of tarwad property under decree—Subsequent order of release—Suit to cancel order of release—Barred by section 244 of Civil Procedure Code—Civil Procedure Code—Act XIV of 1882, s. 244.

Plaintiff in a suit obtained a decree against the karnavan of defendants, as senior member and manager of (the tarwad, and attached tarwad property in execution thereof. Objection was then raised by defendants that the property was not liable under the decree, and the property was ordered to be released. Upon a suit being brought by plaintiff against the defendants for the cancellation of the last-mentioned order :

Held, that the suit was not maintainable by reason of section 244 of the Code of Civil Procedure.

Suit for cancellation of an order releasing property from attachment. Plaintiff had obtained a decree against the karnavan of defendants, as senior member and manager of the tarwad, and had attached tarwad property in execution thereof. Defendants then objected that the property was not liable under the decree, and the District Court, in 1898, ordered the property to be released. Plaintiff now sued for the cancellation of that order and a declaration that the properties were liable to be sold for the amount of the decree. The District Judge framed the two following issues:—
(i) Is the suit barred by Code of Civil Procedure, section 244?
(ii) Is the debt one binding on the tarwad?

Dealing with the first issue he said:—"Plaintiff presented a petition No. 421 of 1898 to the High Court for revision of this Court's order of October 26th, 1898. The High Court, on July 25th, 1899, dismissed this petition for revision on the ground that the order of this Court must be held to have been passed under section 244, Code of Civil Procedure, and that the remedy was by appeal and not by revision. The High Court having decided that the order was passed under section 244, no separate suit lies to set it

* Appeal No. 53 of 1900, against the decree of A. Thompson, District Judge of North Malabar, in Original Suit No. 21 of 1899.

aside under that section. I find on issue (i) that the suit is not maintainable by reason of section 244, Code of Civil Procedure."

He dismissed the suit with costs.

Plaintiff preferred this appeal.

Mr. C. Krishnan and Sankaran Nayar for appellant.

Mr. John Adam and Ryru Nambiar for respondents.

BENSON, J.—The defendants were, in the absence of proof of fraud, bound by the decree obtained against their karnavan who was sued as senior member and manager of the tarwad as found by this Court in *Kamalakutti v. Bipathumma*(1), (*Vasudevan v. Sankaran*(2)). If they are bound by the decree it is difficult to see on what principle they can be treated as strangers to the decree for the purposes of execution. If the decree can be executed against them does not this imply that they are parties or representatives of parties? I can see no reason why their claim should not be considered to have been dealt with under section 244 of the Code of Civil Procedure as held by this Court in *Kamalakutti v. Ibrayi*(3). To allow them to make a claim as strangers under section 278 of the Code of Civil Procedure seems to be inconsistent with their being bound by the decree and with the policy of section 244 and of the decision in *Vasudevan v. Sankaran*(2). I, therefore, think that the decree of the District Judge was right, and that this appeal should be dismissed with costs.

If the plaintiff suffers any hardship by this result it is because he has erroneously asked for the revision of the District Judge's order of the 26th October 1898 instead of appealing against it, within the time allowed by law, as he ought to, and no doubt would, have done, if he had not failed to see that the order was passed under section 244 instead of under section 278 of the Code of Civil Procedure.

When the mistake was pointed out in the High Court, I should suppose that the plaintiff might have asked the Court to treat his revision petition (No. 421 of 1898) as an appeal, paying any stamp duty necessary. As he did not do this, I fear he must take the consequences of having mistaken his remedy.

SHEPARD, J.—I concur, though I must say that I have had considerable doubt about the question.

(1) Appeal against Order No. 107 of 1898 (unreported).

(2) I.L.R., 20 Mad., 129.

(3) Civil Revision Petition No. 421 of 1898 (unreported).

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Davies.

KING-EMPEROR

v.

TAKASI NUKAYYA.*

Workman's Breach of Contract Act—Act XIII of 1859, ss. 1, 2—Failure to comply with order of Court—Criminal Procedure Code—Act V of 1898, s. 4 (c)—“Offence.”

The offence created by the Workman's Breach of Contract Act (XIII of 1859) is not the neglect or refusal of the workman to perform his contract, but the failure on his part to comply with an order made by the Magistrate directing the workman to repay the money advanced or perform the contract.

COMPLAINT under the Workman's Breach of Contract Act, (XIII of 1859), section 1. A complaint was lodged by a Mr. Chapman as agent of a Mr. Putman, charging defendant, a workman, with having taken Rs. 500 from complainant's master for work to be performed, and with having failed to perform the work. When complainant's deposition was taken, it appeared that the contract had been entered into, not by him, but by Mr. Putman, and the objection was raised that, under section 1 of the Act, the complaint had been wrongly brought. Mr. Chapman, thereupon, withdrew the complaint, with permission of the Court. The Magistrate, however, recorded that the accused was “acquitted under section 248 of the Code of Criminal Procedure.” A fresh complaint was subsequently lodged against the same defendant by Mr. Putman, in respect of the same default. The Magistrate then delivered the following judgment:—“Mr. Putman of Ellore complains against the accused under section 1 of the Contract Act. A complaint for the same breach was filed by Mr. Putman's agent (Mr. Chapman) and it having been withdrawn, the accused was acquitted under section 248, Code of Criminal Procedure—*vide* judgment in Calendar Case No. 72 of 1900. The accused now objects that, under section 403, Code of Criminal Procedure, he is not liable to be tried again for the same offence. The complainant urges that the trial under the first part of section 2 of the Contract

* Criminal Appeals Nos. 22 and 23 of 1901, under section 417 of the Code of Criminal Procedure, against the judgment of acquittal passed on the accused by K. Rajagopal Rao, Stationary Sub-Magistrate of Ellore, in Calendar Cases Nos. 72 and 525 of 1900, respectively

Act is not a criminal proceeding and as such the Code of Criminal Procedure does not apply to such trials. But he does not point out what the procedure should be for such trials. He relies on *Averam Das Mochi v. Abdul Rahim*(1) This ruling is quite a recent one having been issued in February 1900. But it is quite opposed to the local High Court's proceedings No. 436, dated 14th March 1879 (Weir's 'Code,' pages 458 to 460), in which it has been clearly laid down that ‘a breach of contract to which Act XIII of 1859 relates is an offence other than an offence for which a Police officer may arrest without a warrant.’ If, as held by the Madras High Court, a breach of contract is a criminal offence, the Code of Criminal Procedure applies to such offences and such cases being summons cases, the procedure laid down for summons cases should be observed under section 5 of the Criminal Procedure Code. If this view be correct, a person acquitted under section 248, Code of Criminal Procedure, cannot be re-tried for the same offence on the same facts. In the present case the facts are the same and the only change is in the complainant. The first complaint was withdrawn as it was found out that the contract was not entered into with the complainant or that he was the employer or master or acted as an agent as specified in section 1 of the Act. The present complainant alleges himself to be the employer and that the contract has been entered into with him. In the previous case accused was acquitted after trial had been commenced. Consequently under section 403, Code of Criminal Procedure, the accused cannot be re-tried for the same breach. Following the local High Court's ruling quoted above, which is quite clear, I stop all further proceedings and acquit the accused under section 245, Code of Criminal Procedure.

Against that order of acquittal the Public Prosecutor preferred these appeals.

Mr. D. Chamier, for the Public Prosecutor, contended that the first order which purported to acquit the defendant was no bar, as it was, in fact, not an acquittal at all. It was impossible for the Magistrate to have acquitted on the first charge, because no offence had at that time been committed. The mere failure to perform a contract is not an offence under Act XIII of 1859. An offence, in respect of which punishment may be inflicted, is only committed when a workman against whom an order has been

KING-
EMPEROR
v.
TAKASI
NUKAYYA.

(1) I.L.R., 27 Calc., 181 at pp., 132 and 133.

KING-
EMPEROR
v.
TAKASI
NURAYYA.

already made under the Act, disobeys that order. His disobedience to the order constitutes the offence under section 2 of the Act.

The accused was not represented.

JUDGMENT.—*In Criminal Appeal No. 22.*—The offence created by the Workman's Breach of Contract Act (XIII of 1859) is not the neglect or refusal of the workman to perform his contract, but the failure by the workman to comply with an order made by the Magistrate that the workman repay the money advanced, or perform the contract. In the present case, the complainant withdrew the case before the Magistrate had made any order. Consequently, there had been no offence under the Act and there was nothing to acquit him of. It is not necessary for us to consider whether the Code of Criminal Procedure applies to offences under the Act. Here there was no offence and the Magistrate was quite wrong in proceeding upon the assumption that the Code of Criminal Procedure applied and that it was his duty to "acquit" under section 248 of the Code. The order of the Magistrate in so far as it allows the complainant to withdraw the case will stand. In so far as it purports to acquit the defendant it must be set aside.

In Criminal Appeal No. 23.—It follows from what has been said above that the Magistrate's order based on the view that the defendant had already been "acquitted" in the same matter must also be set aside. We direct the Magistrate to restore the case to his file and deal with it according to law.

APPELLATE CRIMINAL.

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

KING-EMPEROR

v.

ANTAKKE. *

Penal Code—Act XLV of 1860, s. 317—Exposure of child with intention to abandon—Ingredients of offence.

Upon a charge being preferred against a mother of exposure and abandonment of her child, under section 317, Indian Penal Code, the Sessions Judge

* Criminal Appeal No. 276 of 1901, under section 417 of the Code of Criminal Procedure, against the judgment of acquittal passed on the accused by Sessions Judge of South Canara in Calendar Case No. 56 of 1900.

KING-
EMPEROR
v.
ANTAKKE.

believed that the accused had left the child at a particular spot with the intention that it should be found and cared for by the owner of a neighbouring house. He acquitted her, holding that the offence charged had not been committed, inasmuch as the child had been deliberately placed where it would be, (as in fact it was), found and looked after:

Held, that the acquittal was wrong. The gist of the offence under section 317 is the exposure or leaving with intention to wholly abandon, and the manner of exposing or leaving, and the consequences likely to ensue are not essential ingredients, though they may be taken into consideration in passing sentence.

APPEAL preferred by the Public Prosecutor under section 417 of the Code of Criminal Procedure against an acquittal.

The facts are set out in the following judgment.

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

JUDGMENT.—The accused, who is a beggar woman and a widow, deposited her illegitimate child about three months old close by a channel some 200 yards from the house of one Kartha, and went away to another village without informing any one of her movements, and evidently without any intention of returning to the child. The child was found by Kartha and was taken care of by him, but it was a sickly child previously and died after a few days. The evidence does not show whether the exposure caused, or contributed to, the death of the child.

The Sessions Judge came to the conclusion that the accused intended that the child should be found and cared for by Kartha, as she left it near the spot whence his household draw their water from the channel. The Sessions Judge therefore acquitted the accused of the offence with which she was charged under section 317, Indian Penal Code, observing that that section "must be interpreted on the principle expressed in the English Statute, and that, in order to be criminal, the exposure and abandonment must be under such circumstances as endanger the safety of the child. Here the child was deliberately placed, where it would be, as it was, found and looked after. Hence the offence with which the prisoner is charged was not committed (*Queen-Empress v. Felani Hariani*(1))."

The Public Prosecutor now, on behalf of the Government, appeals against the acquittal. The case cited by the learned Sessions Judge is not an authority for the view taken by him and the same

(1) 16 W. R., (Cr. R.), 12.

KING-
EMPEROR
v.
ANTAKKE.

observation applies to the case of *Queen-Empress v. Mirchie*(1) referred to by the Public Prosecutor.

We have no doubt but that the view taken by the learned Sessions Judge is incorrect. The language of section 317 of the Indian Penal Code is altogether different from the language of the English Statute 24 and 25 Vict., chapter 100, section 27. The words of the latter are "whosoever shall unlawfully abandon or expose any child being under the age of two years whereby the life of such child shall be endangered, or the health of such child shall have been or shall be likely to be permanently injured shall be guilty of a misdemeanour." The words of the Indian Penal Code are "whoever being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child shall be punished, &c." Under the English Statute, it is necessary to prove that the life of the child was endangered, or that its health was permanently injured or was likely to be so injured by the exposure. Under the Indian law there is no such limitation. The gist of the offence under the Indian law is the exposure or leaving of the child in any place with the intention of wholly abandoning it. Here, as in many other places in the Penal Code, the Legislature looks mainly to the intention of the accused person rather than to the consequences of the act done, which form an essential element of the offence under the English law. The language used in section 317, Indian Penal Code, is perfectly clear and unambiguous, and where this is so, it is contrary to correct canons of interpretation to go outside that language and to read into the section words which do not find any place in it and which altogether alter its scope and effect. Had the Legislature desired to re-produce the English law, it would have found no difficulty in doing so in appropriate words.

The manner of the exposure or leaving and the consequences likely to ensue from it are not essential ingredients of the offence under the Indian law, though they may often be properly taken into consideration in estimating its gravity and in apportioning the sentence.

We must set aside the acquittal and convict the accused Antakke of an offence under section 317, Indian Penal Code.

(1) I.L.R., 18 All., 364.

Looking to the destitute condition of the accused and to the finding that the child was left where it would probably be found and cared for, we think that the ends of justice will be satisfied by a comparatively light sentence.

We direct that the prisoner Antakke be punished with six months' rigorous imprisonment.

KING-
EMPEROR
v.
ANTAKKE.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Moore.

VENKATACHALA REDDI AND OTHERS (COUNTER-PETITIONERS
Nos. 2 TO 5 —REPRESENTATIVES OF DECEASED PLAINTIFF), APPELLANTS,

1901.
July 25.

v.

VENKATARAMA REDDI AND ANOTHER (PETITIONER No. 2 AND
COUNTER-PETITIONER No. 1), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 244—Addition by appellant of parties to record as representatives of deceased respondent—Dismissal of appeal—Application by some representatives in execution—Dispute among representatives as to whether some of them had been wrongly brought on—Question determinable in execution.

A plaintiff having obtained a decree in a suit, the defendant appealed, and while that appeal was pending plaintiff died. Defendant thereupon brought several persons on the record by an application to the Court under section 388 of the Code of Civil Procedure, alleging them to be the representatives of the plaintiff. The appeal was unsuccessful, and some of the persons who had been brought on the record by defendant, as representatives of plaintiff, made an application in execution, in which the other representatives, similarly brought on, were not joined, on the ground that they were not, in fact, representatives. Those other representatives however claimed to be entitled to join in the execution proceedings. The Munsif stayed the application under the last clause of section 244 of the Code of Civil Procedure, and directed the parties to decide their rights by separate suit. This order was appealed against, when the District Judge set it aside and directed the Munsif to determine the question and then proceed with the execution :

* Civil Miscellaneous Second Appeal No. 41 of 1900, against the decree of K. C. Manavedan Raja, District Judge of North Arcot, in Appeal Suit No. 141 of 1899, reversing the order of T. S. Krishnayya, Acting District Munsif of Sholinghur, in Execution Application No. 684 of 1899 in Original Suit No. 1363 of 1896.

VENKATA-
CHALA
REDDI
v.
VENKATA-
RAMA REDDI.

Held, that the order was wrong. The Munsif had no jurisdiction in execution to re-open the question as to whether certain persons brought on the record as representatives of the deceased plaintiff, and as such made respondents in the appeal, had been properly joined as parties or not.

APPLICATION for execution of a decree. The suit had been instituted by a single plaintiff, namely, Perumal Reddi, against a single defendant, namely, Venkatarama Reddi. Plaintiff obtained a decree, against which defendant preferred an appeal. While that appeal was still pending, plaintiff died, whereupon defendant brought certain persons on the record as plaintiff's representatives, by an application to the Court under section 368 of the Code of Civil Procedure. In that application he represented that all those persons were undivided members of plaintiff's family and they were added as heirs and legal representatives.

The appeal came on for hearing in due course, and the original decree was confirmed. Some of the persons whom defendant had brought on the record as representatives of plaintiff now applied for execution of the decree. These applicants had excluded the others whom defendant had brought on the record, on the ground that (as these applicants alleged) those others were not in fact representatives of the original plaintiff and that these applicants alone were his representatives. The other alleged representatives contended that they were also jointly entitled to the decree amount, and claimed that they had a right to join in the execution. The present applicants contended that the question who the representatives really were was one that should be decided in the execution proceedings. The District Munsif stayed execution and referred the parties to a regular suit, under the last clause of section 244, and rejected the application.

Against this order the second petitioner appealed. Before the District Judge, the preliminary objection was raised that no appeal lay, but this was overruled on strength of *Chinnathal v. Virudhunakala Pillai*(1). The Judge referred to *Lakshmi Bai v. Balkrishna*(2); *Krishnappa Hella v. Savitri*(3); and *Athiappa v. Ayanna*(4) and said:—"The only point that calls for a decision in the execution proceedings is whether the respondents are also

(1) Appeal against Appellate Order No. 58 of 1897 (unreported).

(2) I.L.R., 4 Bom., 654.

(3) Appeal against Appellate Order No. 88 of 1897 (unreported).

(4) I.L.R., 8 Mad., 306.

VENKATA-
CHALA
REDDI
v.
VENKATA-
RAMA REDDI.

representatives of deceased decree-holder, and the question is whether the appellant, having once taken all the trouble to obtain a decree at his expense, should virtually be driven to spend more and obtain a fresh decree before executing it. It appears that the respondents' contention is that appellant and themselves form an undivided family. It is clear that appellant had no voice when the present respondents were brought on the record. That was done on the application of the judgment-debtor in his appeal. It is also admitted that the respondents took no steps in contesting the appeal, and it is more than probable they would take no steps at their expense to bring a fresh suit. Any such suit is again likely to raise all kinds of side issues, having no direct bearing on the only point to be determined in these proceedings. Moreover their contention is not that appellant is not a representative but that they are also representatives of the deceased decree-holder. Appellant is the son of the latter and is *primâ facie* the legal representative. On the other hand, the Court is not in a position to pass orders in execution without prejudicing the interests of the respondents in any manner. Section 232 enables the Court to make special provision for the protection of the interests of the respondents or of any other parties. And appellant expresses his readiness to give security in any form that is desired. I think therefore the point in dispute is one which must be determined in execution."

He set aside the order of the Munsif and directed him to proceed with the execution after determining the question raised.

Against this order plaintiffs Nos. 2 to 5 preferred this appeal.

Sundara Ayyar, for appellants, contended that the Munsif's order was wrong, and that the District Judge had also passed a wrong order in directing the Munsif to decide who the representatives really were, in an application under section 244 of the Civil Procedure Code. The petition should, properly, have been dismissed, the parties being left to decide their respective claims by suit. Under section 368 of the Code of Civil Procedure, when a respondent dies, the appellant may bring on to the record any person whom he deems to be necessary for the final adjudication of the suit; and under the same section a person so brought on the record may raise the objection that he himself is not, in fact, a representative. But he has no power to raise a similar objection with regard to some one else, though an order passed under

VENKATA-
CHALA
REDDI
v.
VENKATA-
RAMA REDDI.

section 368 is appealable. In *Chinnathal v. Virudhachala Pillai*(1) referred to by the District Judge, it was held by the District Court that an appeal lay to it, but that decision was reversed on second appeal to the High Court. He submitted that no appeal lay from the Munsif's order.

Sivasami Ayyar, for respondents, submitted that the question who really were parties, was a matter properly determinable in execution. *Lakshmibai v. Balkrishna*(2) showed that, even if that question were raised on appeal, the Court could not decide it, and it must be dealt with in execution. The respondents for whom he appeared were only representatives, not parties. Even if they had desired to object to others being brought on the record section 368 gave them no power to do so. By section 368 the initiative is left entirely to the plaintiff, and rival defendants cannot raise questions, *inter se*, though plaintiffs may do so under section 367. In *Muhammad Husain v. Khushalo*(3), where it was decided that the Court must determine it, Mahmood, J., dissented from the other Judge and his judgment followed *Atkiappa v. Ayanna*(4), which also followed *Lakshmibai v. Balkrishna*(2). [MOORE, J., pointed out that *Lakshmibai v. Balkrishna*(2) was decided before the Act of 1882, in which the last clause referring to "legal representatives" appears for the first time.] The present section permits the Court to add a defendant, but gives it no power to remove one. He submitted that an appeal lay, under clause (c) of section 244, the Munsif's order being a determination. He referred to *Sivasami Naickar v. Ratnasami Naickar*(5).

JUDGMENT.—We are unable to accept the contention of the appellants' vakil that no appeal lay to the District Judge inasmuch as the District Munsif had not determined any question arising under section 244 of the Code of Civil Procedure, for we find that the Munsif passed a definite order rejecting the application to execute the decree until it had been decided in a separate suit as to who were the legal representatives of the original plaintiff. The order of the District Judge in appeal directing such enquiry

(1) Appeal against Appellate Order No. 58 of 1897 (unreported).

(2) I.L.R., 4 Bom., 654.

(4) I.L.R., 8 Mad., 300.

(3) I.L.R., 10 All., 223.

(5) I.L.R., 23 Mad., 568.

to be made in execution cannot however be upheld. The Munsif had no jurisdiction in execution to re-open the question as to whether certain persons brought on the record of the suit as representatives of the deceased plaintiff and as such made respondents in the appeal had been properly joined as parties or not. The matter was settled by the Appellate Court before passing its decree and therefore could not be questioned in execution.

The order of the District Judge is therefore set aside, as is also that of the District Munsif referring the parties to a suit. The District Munsif is directed to replace the application on his file and dispose of it according to law. Costs will abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Moore.

LAKSHMANAN CHETTI (PLAINTIFF No. 2), APPELLANT,

v.

KUTTAYAN CHETTI (DEFENDANT), RESPONDENT.*

Limitation Act—Act XV of 1877, sched. II, art. 179—Application in execution more than three years after previous application—Omission on part of judgment-debtor to set up bar by limitation—Adjudication on application—Subsequent application in execution—Objection on ground that previous application was barred—Res judicata.

A decree was obtained on 16th March 1893, and a petition in execution was presented on 8th February 1894. The next petition in execution was presented on 2nd July 1897, when the judgment-debtor, though he had notice of it, did not raise the defence of limitation. An order was passed on the petition for the issue of a warrant for the arrest of the defendant, and the warrant was duly issued. Within three years of that petition the present application in execution was made, when it was objected that as the application in 1897 had been presented more than three years from the previous application in 1894 it was barred, and that in consequence the present application must also be barred:

* Civil Miscellaneous Second Appeal No. 57 of 1900, against the order of Moberly, District Judge of Madura, in Appeal Suit No. 181 of 1900, reversing order of D. Virasami Ayya, District Munsif of Paramagudi, in Execution tion No. 43 of 1900 in Original Suit No. 635 of 1892.

VENKATA-
CHALA
REDDI
v.
VENKATA-
RAMA REDDI.

1901.
July 26.

LAKSHMANAN
CHETTI
v.
KUTTAYAN
CHETTI.

Held, that it was not open to the judgment-debtor now to raise the objection that the application of 1897 was barred. He had had notice of that application and had raised no objection to it. Execution had been ordered in pursuance of it, which was an adjudication on the application; that order was acted on and no appeal was preferred against it. The question whether the application of 1897 was barred was therefore *res judicata*. As the Court which had ordered the execution had jurisdiction to determine whether the decree was barred and had made an order in execution of the decree, it must be considered to have determined that it was not barred.

Mungul Pershad Dichit v. Grija Kant Lahiri Chowdhry, (L.R., 8 I.A., 123; I.L.R., 8 Cal., 51), followed.

APPLICATION in execution. A decree was passed in favour of the applicant for Rs. 475 on 16th March 1893. Execution petitions were presented on 8th February 1894, and 2nd July 1897 (Execution Petition No. 524 of 1897). The present application was presented on 15th January 1900. The judgment-debtor now objected that the application No. 524 of 1897 was barred, inasmuch as more than three years had elapsed between it and the previous application of 8th February 1894. Petitioner answered that the judgment-debtor was estopped from raising that objection, inasmuch as he had not raised it when Execution Petition No. 524 of 1897 was before the Court, though he had notice of it. It appeared that execution had been ordered on that petition, a warrant for the arrest of the judgment-debtor having issued, against which no appeal had been preferred. The Munsif, following *Mungul Pershad Dichit v. Grija Kant Lahiri Chowdhry*(1), held that that question must be taken to have been decided when the petition was before the Court, and that it could not be re-opened. He held that the application was not barred by limitation. The judgment-debtor appealed to the District Judge who allowed the appeal.

Against that order petitioner preferred this appeal.

Venkatarama Sastri, for appellant, contended that the Munsif's order was right, and that the judgment-debtor was estopped from raising the objection that the petition of 1897 was barred, as he had not done so at the time. He relied on *Mungul Pershad Dichit v. Grija Kant Lahiri Chowdhry*(1), as showing that the question was *res judicata*. He also cited *Sheik Budan v. Ram-chandra Bhunjgaya*(2), in which *Mungul Pershad Dichit v. Grija*

(1) L.R., 8 I.A., 123; I.L.R., 8 Cal., 51.

(2) I.L.R., 11 Bom., 537.

Kant Lahiri Chowdhry(1) is referred to; *Manjunath Badrabhat* v. *Venkatesh Govind Shanbhog*(2); and *Ram Kirpal Shukul v. Mussunat Rup Kuari*(3).

LAKSHMANAN
CHETTI
v.
KUTTAYAN
CHETTI.

K. Srinivasa Ayyangar, for respondent, urged that the order relied on as rendering the matter *res judicata* was passed without actual notice to his client. [DAVIES, J.:—Notice was issued to your client, and we must hold that there was sufficient service of the notice.]

JUDGMENT.—We consider it is not open to the defendant now to raise the objection that the application No. 524 of the 2nd July 1897 was barred. He had notice of that application and did not raise any objection to it. The Munsif thereupon ordered execution by ordering a warrant for the arrest of the defendant, which warrant was duly issued. That was an adjudication upon the application and it was, moreover, acted on, and no appeal has been made in regard to it. It must therefore be held that the question whether the application No. 524 was barred is *res judicata*. To put the case in the language of their Lordships of the Privy Council, the Subordinate Judge had jurisdiction upon the petition of the 8th October 1874 to determine whether the decree was barred on the 8th October 1871, and he made an order that an attachment should issue. He, whether right or wrong, must be considered to have determined that it was not barred (*Mungul Pershad Dichit v. Grija Kant Lahiri Chowdhry*(1)).

We accordingly reverse the order of the District Judge and direct execution to issue as prayed. The appellant's costs must be paid throughout by the respondent.

(1) L.R., 8 I.A., 123; I.L.R., 8 Cal., 51.

(2) I.L.R., 6 Bom., 54.

(3) L.R., 11 I.A., 37; I.L.R., 6 All., 269.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Moore.

1901.
July 26.

APPU RAO (COUNTER-PETITIONER-DEFENDANT),
APPELLANT,

v.

RAMAKRISHNA CHETTIAR (PETITIONER-PLAINTIFF),
RESPONDENT.*

*Limitation Act—Act XV of 1877, sched. II, art. 179—Step in aid of execution—
Decree directing execution of muchalka and costs—Recovery of costs in execution
—Application to enforce execution of muchalka more than three years previously
—Subsequent applications for costs incidental to execution proceedings—
Limitation.*

A decree was passed in 1882 directing a defendant to execute a muchalka, no order being made as to costs. The Appellate Court affirmed the decree and also awarded costs. These costs were recovered by plaintiff in execution proceedings in 1883. Plaintiff now, (namely, in September 1899), sought, in an application in execution, to enforce the decree for the execution of the muchalka, claiming that the application was not barred by limitation because previous applications in execution had been made in 1885, 1886, 1887, 1889, 1894, 1895 and 1897. The last two applications had been for the recovery of costs incidental to previous execution proceedings, and not to enforce the execution of the muchalka, the last application for that relief having been made in 1894:

Held, that the application was barred by limitation. The applications in 1895 and 1897 for costs incidental to the execution proceedings were not applications for the execution of the original decree or any part of it.

APPLICATION in execution. The applicant sought under section 260 of the Code of Civil Procedure to enforce a decree which he had obtained in a suit to compel acceptance of a permanent patta and execution of a corresponding muchalka. First defendant was a minor at the date of suit, second defendant being his guardian. The decree, which was passed in 1882,

* Civil Miscellaneous Second Appeal No. 55 of 1900, against the decree of L. C. Miller, Acting District Judge of Salem, in Appeal Suit No. 82 of 1900, affirming the decree of A. Srinivasa Ayyangar, District Munsif of Krishnagiri in Execution Petition No. 549 of 1899 (Original Suit No. 140 of 1882) on the file of the late Dharmapuri District Munsif's Court.

declared that second defendant should accept the patta and execute the muchalka, but made no order as to costs. Costs were, however, granted by the Appellate Court. When first defendant came of age he sought to set aside the decree on the ground of fraud, but did not succeed. Plaintiff now sought to execute the decree against first defendant. Defendant contended that the application was barred by limitation under article 179 of schedule II of the Limitation Act. The costs ordered by the Appellate Court were recovered in execution in 1883. Subsequent applications were made as follows:—in 1885, for the recovery of costs incurred in the application of 1883; in 1886, for the execution of the muchalka and for arrest warrant and for the costs of the previous application; in 1887 for similar relief; in 1889 for costs; in September 1894 for costs and for execution of the muchalka; in December 1894, also for costs and for execution of the muchalka; in 1895 and in 1897, for recovery of costs incidental to the execution proceedings alone, and not for execution of the muchalka. The present application was made in September 1899. The District Munsif held that the application was not barred because the decree was not of the description mentioned in section 230 of the Code of Civil Procedure; and because previous applications for execution had been made in 1894, 1895 and 1897. It was further contended that the application was barred by *res judicata*, but this also was not upheld by the Munsif, as the previous application relied upon was for the realisation of costs, which remedy had nothing to do with the relief now sought. On another ground, however, the Munsif dismissed the application. Plaintiff appealed to the District Judge, who held that the application was not barred by limitation. He allowed the appeal, and ordered the execution to proceed.

Against that order the judgment-debtor preferred this appeal.

Ramachandra Rao Saheb, for appellant, contended that the application was barred by limitation. The last application which was relied on as saving limitation was an application for costs alone, and was not a step in aid of execution, such costs being merely incidental expenses and not the substantive relief granted by the decree. Those costs were recovered; but the remedy now sought was the execution of the muchalka, limitation in respect of which was not saved by the application for costs.

APPU R.
v.
RAMAKRISHNA
CHETTIAR.

APPU RAO
v.
RAMAKRISHNA
CHETTIAR.

Sivasami Ayyar, for respondent, argued that the application for costs in 1897 saved limitation. It was not necessary that every application in execution should be for the whole of the relief awarded by the decree. An executing creditor might apply for different relief each time and still keep his decree alive within the meaning of article 179. Though the costs which had been recovered since 1894 were costs incidental to the execution proceedings, such costs were only recoverable under the original decree, and therefore their recovery was a recovery in execution of the original decree and was a step in aid of the execution of the original decree.

JUDGMENT.—The original decree directed the execution of a muchalka by defendant, but gave plaintiff no costs. The Appellate Court decreed plaintiff's costs as well. That decree for costs was fully executed in 1883. All that was left for execution of the decree was the execution of the muchalka by the appellant. The last application for that was made on the 21st December 1894 and this application, made on the 4th September 1899, nearly five years afterwards, was clearly barred. The applications made in 1895 and 1897 were for incidental costs in execution and were not applications for execution of the decree, or any part of it. The appeal is allowed and the petition for execution is dismissed with appellant's costs throughout.

APPELLATE CRIMINAL.

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

KING-EMPEROR

1901.
July 22, 1901.

v.
AYYAN (ACCUSED IN CRIMINAL REVISION CASE No. 127 OF 1901),

AND

VELLAYAPPA UDAYAN (ACCUSED IN CRIMINAL REVISION
CASE No. 128 OF 1901.)*

Criminal Procedure Code—Act V of 1898, s. 530—Trial of an accused by Magistrate not empowered by law—Charge of giving false evidence under s. 193, Indian Penal Code—Trial by First-class Magistrate though facts disclosed offence under s. 194 as well—Jurisdiction.

Certain witnesses made statements in a preliminary enquiry before a Magistrate, in a case of alleged murder, and contradicted those statements at the trial before the Court of Session. The latter then sanctioned their prosecution for giving false evidence in a judicial proceeding, an offence punishable under section 193 of the Indian Penal Code, and triable by a Magistrate of the first class. The Deputy Magistrate, by whom they were tried, convicted them, and the accused appealed, the appeals being transferred to another Sessions Court for hearing. The Sessions Judge held that inasmuch as the false statements had been made in connection with a charge of murder, the offence for which the accused should have been tried fell under section 194, Indian Penal Code, and that, in consequence, they could be tried only by a Court of Session and not by a Magistrate of the first class. He considered their trial by a First-class Magistrate to be void under section 530 of the Code of Criminal Procedure, and set aside their conviction, committing one of them for trial by a Court of Session on a charge under section 194 of the Indian Penal Code, and making no order in respect of the other accused as he considered the imprisonment already undergone was sufficient:

Held, that the order was wrong as the proceedings of the First-class Magistrate were not void within the meaning of section 530 of the Code of Criminal Procedure.

Queen-Empress v. Gundaya, (I.L.R., 13 Bom., 502) referred to.

The facts of this case appear in the head-note, and, more fully, in the judgment.

* Criminal Revision Cases Nos. 127 and 128 of 1901 (taken up by the High Court as cases Nos. 6 and 7 of 1901 and calling for the records in Calendar Cases Nos. 9 and 11 of 1900 on the file of the Deputy Magistrate of South Arcot and in Criminal Appeals Nos. 20 and 21 of 1901, on the file of the Sessions Court of Chingleput, respectively).

KING-
EMPEROR
v.
AYYAN.

A. T. Ambrose for accused in Criminal Revision Case No. 127 of 1901.

T. Ranga Ramanujachariar for accused in Criminal Revision Case No. 128 of 1901.

JUDGMENT.—Certain witnesses made statements in a preliminary enquiry into a murder case before a Magistrate and contradicted those statements at the trial before the Sessions Court of South Arcot. The Sessions Court then sanctioned their prosecution for offences punishable under section 193, Indian Penal Code, in that they had made contradictory statements, both on oath, one or other of which must necessarily be false. They were accordingly convicted by the Deputy Magistrate of an offence punishable under that section for having given false evidence by making statements, one or other of which must have been false. The Deputy Magistrate took no evidence to show which of the two statements was false and recorded no finding on that point. The accused appealed to the Sessions Court of South Arcot, and their appeals were transferred to the Sessions Judge of Chingleput who, on hearing the appeals, came to the conclusion that the statements made by the appellants at the preliminary enquiry were probably false, and as the case was one of murder, he held that the offence committed by the appellants was probably one punishable under section 194, Indian Penal Code, and was therefore triable exclusively by the Court of Session and not by a Magistrate of the first class. He held that as the facts indicated an offence under section 194, Indian Penal Code, the Magistrate had no jurisdiction to try the appellants for an offence punishable under section 193, Indian Penal Code. He accordingly set aside the conviction under that section. In one case (Appeal No. 20) he did not direct any further proceedings, as he considered the imprisonment already undergone sufficient punishment. In the other case (Appeal No. 21) he ordered the appellant to be committed for trial by the Sessions Court on a charge under section 194, Indian Penal Code. On a perusal of the calendars, this Court called for the records with a view to revise the orders of the Sessions Judge, and in sending up the records the learned Sessions Judge has submitted a note, setting forth in much detail his view of the law and arguments in support thereof.

When he wrote this note we presume the learned Sessions Judge had received the judgment of this Court in *King-Emperor*

KING-
EMPEROR
v.
AYYAN.

v. *Virasami Goundan*(1) in which, dealing with a precisely similar case from his Court a divisional bench of this Court held that the Sessions Judge had taken an incorrect view of the law. The accused was not charged with an offence punishable under section 195, Indian Penal Code. The Deputy Magistrate tried him for an offence punishable under section 193, Indian Penal Code, and he had jurisdiction over that offence. Under the rulings of this Court, it cannot be said that the Deputy Magistrate acted without jurisdiction, even though the offence actually amounted to one punishable under section 195. We think that the learned Sessions Judge might well have accepted that decision. As, however, he still thinks that the decisions of this Court support his view it seems necessary to briefly reiterate the correct view of the law. The Sessions Judge relies on section 530 (p) of the Criminal Procedure Code. It runs: "If any Magistrate not being empowered by law "in this behalf . . . tries an offender his proceedings shall "be void." The meaning of this is that if a Magistrate tries an offender for an offence beyond his jurisdiction his proceedings shall be void. In the present case the Deputy Magistrate did not try accused for an offence beyond his jurisdiction. He tried him for an offence punishable under section 193, Indian Penal Code, i.e., for an offence triable by a First-class Magistrate and therefore within his jurisdiction. His proceedings therefore were not void and the Sessions Judge was wrong in treating them as void. Where the facts disclose an offence within the jurisdiction of the Magistrate it seems to us a complete fallacy to say he is not empowered by law to try the person charged for the offence which is within his jurisdiction because the same facts disclose a more serious offence which is beyond his jurisdiction. He is expressly so empowered. Whether in so doing he adopts a proper course is another question. No doubt it is improper on the part of a Magistrate to intentionally ignore circumstances of aggravation which show that an offence beyond his jurisdiction was in fact committed as well as an offence within his jurisdiction, as, for instance, if a Second-class Magistrate should ignore the violence used in committing theft and should deal with the case himself as one of theft (section 379), instead of sending the accused before a First-class Magistrate to be tried for robbery (section 392). Here the action of the Second-class

(1) Criminal Revision Case No. 78 of 1901 (unreported).

KING-
EMPEROR
v.
ATTYAN.

Magistrate would be improper but his proceedings would not be void. If the improper action of the Second-class Magistrate had led to a failure of justice as, for instance, by causing the punishment to be inadequate, it would be open to the proper authorities to apply a remedy by instituting a second prosecution on the same facts for the more aggravated offence (section 403, Criminal Procedure Code). It would also, in our opinion, be open to the revising and appellate authorities to set aside the Magistrate's proceedings and order a fresh trial, if such a course was required in the interests of justice but not otherwise; and the reason for setting them aside would be, not that they were void *ab initio*, but because they were improper and the interests of justice required them to be set aside. The Sessions Judge has failed to appreciate the difference between proceedings which are without jurisdiction and therefore void, and proceedings which are improper and therefore liable to be set aside, though not void. It is this failure which, we think, has led the Sessions Judge to misunderstand the various judgments of this Court to which he refers. Whether the High Court as a Court of Revision or the Appellate Court ought to interfere in any particular case depends entirely on the facts of the case and whether such interference is called for in the interests of justice.

The view that we have stated is, we think, in accordance with that taken by the Bombay High Court in *Queen-Empress v. Gundy*(1) as to the construction of section 530 (p), Criminal Procedure Code, and with the whole tenor of the decisions of this Court both before and since that provision of the Code was enacted in 1882. For present purposes it is sufficient to refer to the cases quoted by the Sessions Judge from Weir's 'Law of Offences,' 3rd edition, at pages 259, 701, 965, 967 and 1060. If the learned Sessions Judge will re-read these cases and bear in mind the distinction which we have pointed out between proceedings which are without jurisdiction and therefore void, and proceedings which are improper and therefore liable to be set aside though not void, he will, we think, find that they lend no countenance to his views as to the proper construction to be placed on section 530 (p), but are in accordance with the law as stated by us. The language of these cases is so explicit that it is unnecessary to refer to them in detail. The learned Sessions Judge has, however, so completely misunderstood

(1) I.L.R., 13 Bom., 502.

KING-
EMPEROR
v.
ATTYAN.

and (no doubt unintentionally) misquoted the case at page 259 that it is necessary to refer briefly to it. In that case a First-class Magistrate had tried and convicted two offenders for offences punishable under section 392, Indian Penal Code. The Sessions Judge referred the cases on the ground that the offences were punishable respectively under sections 394 and 397, Indian Penal Code, and that the Magistrate therefore had no jurisdiction to try the offenders for an offence punishable under section 392. The High Court pointed out that under the law then in force the Magistrate had no jurisdiction to try an offence under section 394, and the High Court went on to observe that it was for the Magistrate, in his discretion, to decide whether he would dispose of the case himself (*i.e.*, as one under section 392) or commit the accused to the Court of Session (*i.e.*, as one under section 394). It further observed that as the case was of a trivial nature "the Magistrate exercised a sound discretion in disposing of it under section 392." It would be difficult to imagine a decision more directly opposed to the present Sessions Judge's view. We observe, however, that he supposed that an offence under section 394 was then, as it is now, triable either by a First-class Magistrate or by a Court of Session and this has, no doubt, misled him. The Criminal Procedure Code of 1861 was then in force and under it an offence under section 394, Indian Penal Code, was triable exclusively by a Court of Session, as indicated by the High Court in its judgment. It was not until the Criminal Procedure Code of 1872 was passed that an offence under section 394 became triable by a First-class Magistrate or a Court of Session.

In the second of the two cases dealt with by the High Court the accused had committed an offence punishable under section 397, Indian Penal Code (robbery armed with a deadly weapon). The Magistrate tried him for an offence under section 392 and convicted him. The High Court set aside the conviction and ordered a commitment to the Court of Session, not, as the present Sessions Judge supposes, because an offence under section 397 is triable exclusively by the Court of Session, but because an offence under that section must be punished with a minimum of seven years' rigorous imprisonment, and it was therefore impossible for a Magistrate, whose powers are limited to two years' imprisonment, to impose a sentence such as the law required. The High Court, no doubt, speaks of the provision as to the minimum sentence taking

KING-
EMPEROR
v.
AYYAN.

the case "out of the jurisdiction of the Magistrate," but we do not understand that the High Court meant that the trial by the Magistrate for an offence under section 392 was void. What the High Court said was, "The sentence . . . is illegal and "must be quashed. The prisoner should be committed to the "Sessions Court." That order was no doubt the most appropriate order that could be made in the case, but having regard to the manner in which this High Court in the same proceedings disposed of the case under section 394, we do not understand that the High Court considered the trial under section 392 as held without jurisdiction and therefore void. The view rather seems to have been that as the sentence required by law had not been and could not be passed by the Magistrate, the case must go before a Court competent to pass such sentence, and it was therefore expedient to quash the minor sentence of the Magistrate and order a commitment to the Sessions Court where a legal sentence could be passed. The Sessions Judge has set aside the convictions in the two cases before us on the sole ground that the Deputy Magistrate had no jurisdiction to deal with the cases, and that his proceedings were therefore void under section 530 (p), Criminal Procedure Code. As the view of the law taken by the Sessions Judge is incorrect, and as on the merits he was of opinion that both the accused had given false evidence we set aside his orders in both cases. We think that the sentences imposed by the Magistrate were adequate and that there is no need to order further proceedings in regard to the offences which the Sessions Judge considers may have been committed under sections 194 and 195, Indian Penal Code. The sentences imposed by the Magistrate must be given effect to.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Moore.

NITYANANDA GANTAYET (DEFENDANT No. 1), APPELLANT,

1901.
July 29, 3

v.

GAJAPATI VASUDEVA DEVU (PLAINTIFF), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, s. 13, expl. III—Res judicata—Application in execution for two reliefs—Order passed granting one relief and making no reference to the other—Subsequent application for the other relief—Power of Court to grant.

A decree awarded a plaintiff possession of land together with mesne profits. Plaintiff subsequently applied, in execution, for delivery of the land and for the mesne profits. The Court passed an order on this application directing plaintiff to be put into possession of the land, but making no reference whatever to the mesne profits. Plaintiff subsequently made another application for mesne profits, when it was contended that inasmuch as the prayer for mesne profits had not been granted when the previous application was dealt with, it must be taken that the application for mesne profits had been refused, and that the matter was consequently *res judicata*:

Held, that the application was not barred: and that the law of *res judicata* as laid down in explanation III to section 13 of the Code of Civil Procedure had no application to the case.

APPLICATION in execution. The suit was for the recovery of 61 acres 90 cents of land which plaintiff contended was held by defendant in excess of 80 acres granted under his patta, and for mesne profits. The decree, which was passed in 1893, directed delivery of the 61 acres 90 cents claimed, or of so much of it as should be found, on measurement, to be in defendant's possession over and above the 80 acres; it also awarded plaintiff mesne profits. In 1895, plaintiff applied in execution for delivery of the 61 acres 90 cents and for mesne profits. Thereupon two succeeding commissions were issued for the measurement of the land, the result of which was that defendant was found to be in possession of only 1 acre 31 cents in excess, and the Court passed an order on the petition on 31st March 1896, directing plaintiff to be put in

* Civil Miscellaneous Second Appeal No. 44 of 1900, against the decree of F. Murray, District Judge of Ganjam, in Appeal Suit No. 137 of 1899, affirming the order of G. Ranga Rao Pantulu, Acting District Munsif of Sompeta, in Execution Petition No. 363 of 1899 in Original Suit No. 550 of 1892.

NITYANANDA
GANTAYET
v.
GAJAPATI
VASUDEVA
DEVU.

possession of the 1 acre and 31 cents. The order was silent as to the mesne profits, and no appeal was preferred against it. Plaintiff now applied for mesne profits. Defendant contended that as the order of March 1896 made no reference to profits, the latter should be deemed to have been disallowed. The District Munsif ordered defendant to deliver up the 1 acre 31 cents and to pay the profits and costs as claimed. Defendant appealed to the District Judge who dismissed the appeal.

Against that order defendant now preferred this appeal.

Sundara Ayyar, for appellant, contended that the application now made for mesne profits was barred as *res judicata*, by reason of the order of March 1896. The decree-holder had, in that application, asked both for possession of the property and for mesne profits. The Court had ordered delivery of possession of the property, but had not passed any order as to mesne profits. It must therefore be taken that the application, so far as it concerned mesne profits, was refused. The principle of *res judicata* under section 13, explanation III, of the Code of Civil Procedure, applied, he contended, to proceedings in execution, and the present application was, in consequence, barred.

C. R. Tirurenkatachariar, for respondent, referred to *Maktum v. Imam*(1) as showing that the general principle of *res judicata* only applied to matters actually decided. [He was stopped.]

JUDGMENT.—The order of the District Munsif of the 31st March 1896 neither granted nor refused the application for mesne profits which had been adjudged the plaintiff in the decree. The order is silent on the point. It is urged that, as the prayer for mesne profits was not granted, while the other prayer regarding the delivery of the land was dealt with and granted, it must be taken that the application for mesne profits was refused and so the matter is *res judicata*. We cannot accept this contention as the decree granting the mesne profits is still in full force and effect, and the plaintiff is entitled to execute that decree so long as it is kept alive, and the decree cannot be superseded by the mere omission of the Court executing the decree to pass orders on a claim made under it. If such orders are not passed there is nothing to prevent the petitioner applying for them again in due course. The law of

(1) 10 Bom, H.C.R., 293.

res judicata as laid down in explanation III of section 13 of the Code of Civil Procedure can have no application to a case like this.

The point that mesne profits have been allowed for time in excess of that permitted by section 211 of the Code of Civil Procedure was not raised in either of the lower Courts nor in this Court until to-day. We refuse to hear the objection now.

The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Moore.

SUBBARAMA AYYAR AND OTHERS (COUNTER-PETITIONERS),
APPELLANTS,

1901.
August 1.

v.

NAGAMMAL (PETITIONER), RESPONDENT.*

Practice—Execution of decree—Declaratory decree erroneously construed as a decree capable of execution—Orders in execution after notice to judgment-debtor and without contest by him—Subsequent objection that the decree was not capable of execution—Judgment-debtor bound by previous orders.

A decree, which was in form declaratory, was construed as being capable of execution and on several occasions execution of it was ordered, (after notice to the judgment-debtor, and without contest by him), attachments of the judgment-debtor's property were made and amounts alleged to be due were paid. Upon a subsequent application for execution being made, it was objected that the previous orders had been erroneously passed under the decree and that no further order could be made:

Held, that the judgment-debtor was bound by the previous orders, as the Court which had passed them must be held, rightly or wrongly, to have determined that the decree was capable of execution.

Venkatanarasimha Naidu v. Papammah, (I.L.R., 19 Mad., 54) and *Mungul Pershad Dichit v. Gria Kant Lahiri Chowdhry*, (L.R., 8 I.A., 123; I.L.R., 8 Cal., 51), followed.

APPLICATION for execution of a decree. The date of the decree in second appeal was 26th April 1891. The Subordinate Judge

* Civil Miscellaneous Second Appeal No. 69 of 1900, against the order of G. F. T. Power, District Judge of Tanjore, in Civil Miscellaneous Appeal No. 541 of 1900, affirming the order of P. S. Gurumurthi Ayya, Subordinate Judge of Kumbakonam, in Execution Petition No. 53 of 1900 in Original Suit No. 42 of 1868.

NITYANANDA
GANTAYET
v.
GAJAPATI
VASUDEVA
DEVU.

SUBBARAMA
AYYAR
v.
NAGAMMAL.

set out the facts in the following Order:—"The decretal portion of the judgment runs thus;—"The defendants must be declared to be bound to pay to the plaintiff Rs. 240 per annum in two instalments, namely, Rs. 120 on the 1st January in each year, and Rs. 120 on the 1st of July in each year; and in addition they must pay her Rs. 100 in cash at once, and the whole costs of the suit;" and on appeal, only the amount ordered was reduced. Subsequently, execution was applied for on three occasions in Execution Petitions Nos. 83 of 1891, 68 of 1893, and 3 of 1896 and orders for attachment were passed on 1st August 1891, 10th July 1893, and 16th January 1896, respectively. Before processes were issued thereunder from Court, the judgment-debtors paid up the moneys due. The last application was made in March 1898, i.e., within three years before this application. In *Ashutosh Bannerjee v. Lukhmoni Debye*(1) it was held that 'future maintenance awarded by a decree when falling due can be recovered in execution of that decree without further suit,' and the Madras High Court held in *Venkatanarasimha Naidu v. Papammah*(2) that 'although a decree does not in terms give a certain relief, yet if it is construed in orders passed upon it as having given that relief, it is not competent to the Court on subsequent applications to treat those orders as erroneous and put another construction on the decree'".

He held that the decree could be executed. Defendants appealed to the District Judge, who said that though the decree was intended to be a declaratory decree when it was passed, it had since been construed as a decree capable of execution, and that on several occasions execution had been ordered and amounts alleged to be due under the decree had been paid. He relied on *Venkatanarasimha Naidu v. Papammah*(2) and held that it could not now be said that all these proceedings were erroneous and that nothing could be recovered. He dismissed the appeal.

Against that order of dismissal, defendant preferred this appeal.

V. C. Desikachariar for appellants.

V. Krishnasami Ayyar for respondent.

JUDGMENT.—We agree with the Lower Courts in thinking this to be a case governed by the ruling in *Venkatanarasimha Naidu v. Papammah*(2) the only difference (if any) being that the

(1) I.L.R., 19 Cal., 139.

(2) I.L.R., 19 Mad., 54.

judgment-debtor in this case appears never to have contested any of the applications for execution. In our opinion, as the judgment-debtor had notice of those applications he is bound by the orders passed thereon, as the Subordinate Judge who passed those orders must be held, whether rightly or wrongly, to have determined that the decree was executable (*Mungul Pershad Dicit v. Grija Kant Lahiri Chowdhry*(1)).

As observed by their Lordships in a similar case, *Ram Kirpal Shukul v. Mussumat Rup Kuari*(2), it would be a reproach upon the administration of justice if the plaintiff were now to be told that her decree that has been executed for the last 20 years was not executable.

The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

AMDOO MIYAN AND ANOTHER (DEFENDANTS), PETITIONERS,

v.

MUHAMMAD DAVUD KHAN BAHADUR (PLAINTIFF),
RESPONDENT.*

Religious Endowments Act—Act XX of 1863, s. 18—Leave to sue granted on application made by unverified letter, and not presented to Court by applicant or pleader—Validity—Civil Procedure Code—Act XIV of 1882, ss. 622, 647—Maintainability of civil revision petition against order granting leave passed with material irregularity.

Applications to District Courts under section 18 of the Religious Endowments Act for leave to sue should be duly verified and presented either by the applicant in person or by his pleader.

A grant of such leave on an unverified application not presented in Court is a material irregularity within the meaning of section 622 of the Code of Civil Procedure, and a civil revision petition lies from the order granting it.

Omission to give notice of such an application to the person whom it is intended to sue does not of itself render the leave, if granted, irregular.

(1) I.L.R., 8 I.A., 123 at p. 131; I.L.R., 8 Cal., 51.

(2) L.R., 11 I.A., 37 at p. 42; I.L.R., 6 All., 269.

* Civil Revision Petition No. 330 of 1900, under section 622 of the Civil Procedure Code, praying the High Court to revise the order of W. M. Thorburn, District Judge of Kurnool, in Civil Miscellaneous Petition No. 204 of 1900.

SUBBARAMA
AYYAR
v.
NAGAMMAL.

1901.
August 2.

AMDOO
MIYAN
v.
MUHAMMAD
DAVUD KHAN
BAHADUR.

Venkatappayya v. Venkatapathi, (Appeal No. 230 of 1895 (*infra* p. 687)), approved.

PETITION to revise an order passed by a District Judge granting leave to sue under section 18 of the Religious Endowments Act, 1863. A letter had been addressed to the District Judge stating that the writer enclosed a mahazar presented by the respectable Mussalman inhabitants of Kurnool to the effect that the managers of certain dargahs or tombs had neglected to perform the duties imposed on them by their sanad. The letter stated that what was set out in the mahazar was true; and that trust funds amounting to nearly Rs. 2,000 per annum were being misappropriated by the managers. The writer asked that permission might be granted, under the Religious Endowments Act, for a suit to be filed against the managers. On this the Judge endorsed the following order:—"Leave granted." Notice was not issued to the managers, nor was the letter of application verified.

Against this order the managers preferred this civil revision petition.

The case first came on before Mr. Justice Davies.

Mr. D. Chamier, for petitioners, contended that the granting of leave under section 18 of the Religious Endowments Act was a judicial act and that notice of the application should have been served on the managers. [He was stopped.]

Seshagiri Ayyar, for respondent (plaintiff), in support of the order, relied on *Venkatappayya v. Venkatapathi*(1).

His Lordship referred the case for the consideration of a Bench, under Rule No. 1 of the Madras High Court Rules of Practice, Appellate Side.

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

Mr. D. Chamier, for petitioners, contended that there had been material irregularity in passing the order. Section 18 of the Religious Endowments Act requires that there should be a perusal of an affidavit, a determination as to whether there are *prima facie* grounds, a judgment, arrived at on proper materials, a finding as to the existence of grounds, and an order granting the leave; such leave being a condition precedent to the right to entertain the suit. Leave could not be granted on a mere letter, the statements

(1) Appeal No. 230 of 1895 (*infra* p. 687).

in which were unverified, and without notice to the managers whom it was intended to sue. *Venkatappayya v. Venkatapathi*(1) was a decision on very special facts, as the record showed that leave had there been granted after accounts which had been presented by the trustees themselves had been considered by the Court. [He referred to section 647 of the Code of Civil Procedure and to *Krishnasami Pannikondar v. Muthukrishna Pannikondar*(2).] [He was stopped.]

(1) Appeal No. 230 of 1895. This case was decided on 4th December 1896 by SUBRAHMANYA AYYAR and DAVIES, JJ. It was a suit for the removal of the defendants from the management of certain temples. The plaintiff, which was presented under section 14 of the Religious Endowments Act, charged that an enquiry had been held by the authorities of the Revenue Department, and that it had been found from the abstract account furnished by the defendants themselves that they had kept false accounts and had misappropriated the funds. Leave to bring the suit had been given under section 18 of the Religious Endowments Act, but without notice of the application being served on the defendants. The suit came on for hearing before the successor of the District Judge who had granted the sanction, when an issue was raised as to whether the sanction was a valid and legal one. The District Judge said:—"Issue 2 has been argued before me by the vakils on both sides, the point raised being whether a sanction given under section 18 of the Religious Endowments Act without notice to the opposite side, is a legal sanction. It is perfectly clear to me that an order granting sanction under section 18 of the Act is a judicial proceeding. The principle of law that no judicial proceeding is regular or valid without notice being given to the person charged or complained against, is laid down in numerous rulings. Such rulings are referred to in *Queen-Empress v. Sheikh Beari*, (I.L.R., 10 Mad., 232), and *Gompertz v. Goldingham*, (I.L.R., 9 Mad., 319). The fact that granting sanction is a judicial proceeding which the High Court has power of revising is clear from *Gandavathara v. Devanayaga*, (I.L.R., 7 Mad., 222) and *Srinivasa v. Venkata*, (I.L.R., 11 Mad., 148 at pp. 150, 151). I hold therefore that the sanction given for institution of this suit under section 18 of the Religious Endowments Act, is illegal as it was granted without notice to the opposite side. In the absence of a legal sanction to institute the suit, the suit cannot be entertained and is dismissed under section 18 of the Religious Endowments Act with costs."

Plaintiff preferred this appeal, and both parties were represented.

The Court delivered the following judgment:—"We do not think that the general principles of justice as to hearing the other side is applicable to this case, since the words in the section 'on the perusal of the application' clearly indicate that at this stage nothing else than that perusal is required of the Judge before giving his sanction. These words render untenable the position that the Judge is bound to do more, that is, in the way of giving notice, hearing parties and so on, if the application itself satisfies him. If any such regular preliminary enquiry had been intended, the language of the section must have been very different. We therefore hold that the Judge was wrong in considering the sanction void for want of notice prior to its being granted. We reverse his decree and remand the suit for disposal according to law. Costs to abide and follow the event."

(2) I.L.R., 24 Mad., 364.

AMDOO
MIYAN
v.
MUHAMMAD
DAYUD KHAN
BAHADUR.

Seshagiri Ayyar, for respondent.—It is submitted that no civil revision petition lies against an order granting leave under the Religious Endowments Act. Section 622 does not apply, as there was (a) no "Court," (b) no "case" and (c) no "decision." *Parthasaradhi Ayyangar v. Ramanuja Jeer Swami*(1) shows that section 647 has no application to such a petition. The granting of leave under this Statute is a purely ministerial Act,—see *Meenakshi Naidoo v. Subramaniya Sastri*(2). [BHASHYAM AYYANGAR, J., referred to section 647 of the Code of Civil Procedure and to *Krishnasami Pannikondar v. Muthukrishna Pannikondar*(3).] In *Parthasaradhi Ayyangar v. Ramanuja Jeer Swami*(1) a Full Bench of this Court held that section 647 had no application to a similar petition. Leave granted under section 18 is analogous to sanction under section 539 of the Code of Civil Procedure, which is granted either by the Advocate-General or by the Collector, and the authorities show there is no appeal or revision against such sanction. [BHASHYAM AYYANGAR, J.—The leave is more like that granted under article 12 of the Letters Patent, from which an appeal does lie.] It is submitted that there is no analogy between leave so granted and that granted under the Religious Endowments Act, because if leave is refused under the Letters Patent the whole suit is disposed of and a second application cannot be made. Moreover, appeal against the leave granted under the Letters Patent is allowed because of the construction which the Courts have placed upon the word "judgment" in article 15 of the Letters Patent.

JUDGMENT.—We concur in the decision of this Court in *Venkatappayya v. Venkatapathi*(4) and must therefore hold that the fact that no notice of the petition was given to the defendants (the present petitioners) by the District Judge does not render his order granting leave to sue liable to be set aside if the order was in accordance with law in other respects. We, however, find that leave was granted on an unverified letter, apparently not presented in Court, enclosing a mahazarnamah, purporting to be from certain persons of the Mussalman community of Kurnool. We

(1) Civil Revision Petition No. 101 of 1892, reported as a footnote in I.L.R., 10 Mad., 98.

(2) I.L.R., 14 I.A., 160; I.L.R., 11 Mad., 26.

(3) I.L.R., 24 Mad., 364.

(4) Appeal No. 230 of 1895 (*supra* p. 687).

think that the District Judge acted with material irregularity within the meaning of section 622 of the Code of Civil Procedure in treating such a letter as an application under section 18 of Act XX of 1863. Section 647 of the Code of Civil Procedure contemplates that certain formalities of procedure be observed even in miscellaneous applications like the present, which are not suits. We think that an application under section 18 of the Act XX of 1863 should be duly verified and presented either in person or by pleader, as in the case of plaints.

We must therefore set aside the order of the District Judge with costs in this Court.

AMDOO
MIYAN
v.
MUHAMMAD
DAYUD KHAN
BAHADUR.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

MINAKSHI ACHI (COUNTER-PETITIONER—PLAINTIFF), APPELLANT,

v.

CHINNAPPA UDAYAN (CLAIM-PETITIONER), RESPONDENT.

1901.
January 1:
August 2

MINAKSHI ACHI (COUNTER-PETITIONER—PLAINTIFF), APPELLANT,

v.

SADASIIVA UDAYAN (PETITIONER—DEFENDANT No. 5),
RESPONDENT.*

Hindu Law—Decree against representative of family creating charge on family property—Right to execute against sons of defendants though not actually made parties—Civil Procedure Code—Act XIX of 1882, s. 244.

Where it is clear from the terms of a decree for maintenance that it was intended to create a charge on property, and the property to be charged can be otherwise identified, it is immaterial that the decree does not specify the property by metes and bounds.

A widow sued three undivided brothers for maintenance and obtained a decree which created a charge on certain family property in respect of the maintenance

* Civil Miscellaneous Second Appeals Nos. 19 and 20 of 1900 against the orders of G. F. T. Power, District Judge of Tanjore, in Civil Miscellaneous Appeals Nos. 617 and 618 of 1899, affirming the decree of C. Venkata Rao Sahib, District Munsif of Mayavaram, in Miscellaneous Petitions Nos. 441 and 442 of 1899, respectively, in Original Suit No. 132 of 1878.

MINAKSHI
ACHI
v.
CHINNAPPA
UDAYAN.

sued for. The son of the first defendant was a minor at the date of the decree and was not a party to it. The widow attached the property. Upon the death of first defendant, subsequent to the decree, his son was added as legal representative and claimed the property by right of survivorship, and sought to have it released from attachment on the ground that it was not liable for the widow's maintenance:

Held, that as the property was charged by the decree with maintenance it could be sold in execution of the decree even though the son had not been made a party to the decree, there being no contention that the debt was either illegal or immoral and the decree being not merely a personal one against the father alone but against the representatives of the family.

Muttia v. Virammal, (I.L.R., 10 Mad., 283), followed.

CLAIM petition under section 278 of the Code of Civil Procedure praying that certain property might be released from attachment on the ground that it had been sold to petitioner. The suit in which the attachment had been made (namely, Original Suit No. 132 of 1878), had been instituted by one Minakshi Achi, a widow, against Ponnambala Udayan and two others, (being her late husband's undivided brothers), for maintenance. A decree was passed containing the following directions:—"This Court doth decree and order that 18 kalams of samba paddy measured with the markal of 10½ measures free from dampness and chaff and cash Rs. 18 be paid, for her [plaintiff's] maintenance, on 20th March 1879, that, from that time forwards, the defendants do pay to plaintiff, on the 20th March of every year, paddy and cash as aforesaid, to the end of her lifetime, through the Court, that, in respect thereof, the plaintiff mentioned moveables and immoveables do stand liable, that plaintiff do live in the whole of the koodam (hall) on the northern portion of the inner compartment of the defendants' house at Palayoor mentioned in the plaint, and make use of the front threshold, back threshold and backyard of the said house, that the defendants themselves do bear the cost of repairs to the said house, that, at the time when the house is demolished and rebuilt, the plaintiff do live in the hall and the room on the northern portion of the defendants' house in the village of Thiruchithambalam and make use of the kollai, backyard, &c., attached thereto, that as soon as the said Palayoor house is built and completed she do live in and make use of the room in the southern verandah of the said Palayoor house, its kollai, and entrance passage, &c., and that she do enjoy, to the end of her lifetime, one fruit bearing cocoanut tree out of the cocoanut trees standing on the northern side of the western bank of

MINAKSHI
ACHI
v.
CHINNAPPA
UDAYAN

the Alakkaraikulam of the said village of Thiruchithambalam. Description of the plaintiff mentioned moveables and immoveables to be liable for the maintenance of the plaintiff:—"The four velis and odd of nanjai, punjai, &c., lands worth Rs. 6,000, and the tiled house, house-site, tope, &c., worth Rs. 2,000, in the said village of Thiruchithambalam belonging ancestrally to the family of the defendants. The three velis and odd of nanjai, punjai, &c., lands worth Rs. 6,000 and the house, house-site, tope, &c., worth Rs. 1,000, which have been acquired ancestrally, and which have been purchased out of ancestral funds, in Palayoor village of said taluk. The half veli of nanjai, punjai, &c., lands worth Rs. 1,000, and the house-sites, tope, &c., worth Rs. 300, in the village of Sethoor of said taluk. About 250 penning cattle worth Rs. 2,000, and milch she-buffaloes, cows, bullocks, &c., worth Rs. 400. Money dealings in the neighbourhood to the extent of Rs. 2,000. And jewels, vessels, &c., worth Rs. 500."

Under that decree plaintiff had caused the family houses at Palayoor and Thiruchithambalam to be attached. Petitioner in Civil Miscellaneous Second Appeal No. 19 of 1900 sought, in March 1899, to release the Palayoor house from attachment, alleging that it had been sold to him for due consideration. The District Munsif passed the following order:—"Petitioner is a purchaser of a portion of the family estate belonging to the judgment-debtors. The decree charges the maintenance indefinitely on the estate. Petitioner's vakil cites *Bheri Dorayya v. Maddipatu Kamayya* (1) and contends that, in such cases, the decree creates no charge on the specific property such as will bind it in the hands of the purchaser. Petition allowed. Release the property from attachment."

Plaintiff appealed to the District Judge, when the preliminary objection was taken that no appeal lay. The District Judge passed the following order:—"The respondent raises the preliminary objection that no appeal lies. I think this objection must prevail. The respondent was not a party to the decree or the representative of a party. He claimed, under section 278 of the Civil Procedure Code, that a portion of the attached property belonged to him; and the District Munsif, thereupon, by the order appealed against, ordered this portion of the property to be released

(1) I.L.R., 3 Mad., 35.

MINAKSHI
ACHI
v.
CHINNAPPA
UDAYAN.

from attachment. This order is not appealable. The appeal is dismissed with costs."

Against this order plaintiff preferred the appeal filed as appeal against Appellate Order No. 19 of 1900.

Sivasami Ayyar for appellant.

K. Ramachandra Ayyar for respondent.

The Court (SUBRAHMANIA AYYAR and BENSON, JJ.) delivered the following

JUDGMENT.—We are unable to agree with the District Munsif that the maintenance was not made a charge upon the house in dispute. It is admittedly the Palayoor house referred to in the schedule to the decree and there is no other house answering to that description. It is scarcely necessary to say that the fact that the decree does not specify the property by metes and bounds does not affect the question as to the creation of a charge, if the intention to create the charge is clear and the property can be otherwise identified.

It was, however, contended that the decree should not be construed as a decree for sale, but merely as declaratory of the existence of a charge. The date of the decree, however, was prior to the Transfer of Property Act and having regard to the language then commonly used in mortgage decrees we must hold that the objection is not well founded.

The respondent as the purchaser of the plaintiff's interest in the property was clearly her representative to the extent of her interest within the meaning of section 244 of the Civil Procedure Code (*Paramananda Das v. Mahabeer Dossji*(1); *Ishan Chunder Sirkar v. Beni Madhub Sirkar*(2)).

An appeal therefore lay.

We must set aside the orders of the Courts below and direct that the execution petition be proceeded with by the District Munsif according to law. Costs in this and in the lower Appellate Court will abide and follow the event.

First defendant in the suit having died, his son, the respondent in Civil Miscellaneous Second Appeal No. 20 of 1900, who was a minor at the date of the decree and who had been added as

(1) I.L.R., 20 Mad., 378.

(2) I.L.R., 24 Cal., 62.

MINAKSHI
ACHI
v.
CHINNAPPA
UDAYAN.

fifth defendant since his father's death, applied, in April 1899, that the house at Thiruchithambalam might be released from attachment, on the ground that he had acquired it by right of survivorship and held possession of it as his own. He contended that he was not answerable for the decree which plaintiff had obtained against his father and uncles, having been added merely as his father's legal representative. He said no assets from his father's estate had come to his hands and contended that the house was his own and not liable to plaintiff's maintenance or to attachment under her decree. He asked that it might be released. Plaintiff opposed this application, alleging that her suit had been against fifth defendant's father as the head and managing member of the family. She relied on her decree as charging the house with her maintenance and contended that it should not be released from attachment. The Munsif passed the following order:—"Petitioner's Vakil cites *Muttia v. Virammal*(1) and contends that maintenance decreed to plaintiff against the petitioner's deceased father cannot be regarded as a charge upon the joint estate or the decree be treated as a decree against the petitioner, the son and heir of the judgment-debtor. The decree is not expressed to be a decree against the head or representative of the joint family. In the circumstances the family estate cannot be held liable. Plaintiff's remedy lies in a regular suit against the petitioner. Petition allowed. The property will be released from attachment."

Plaintiff appealed to the District Judge who held as follows:—"I think the order appealed against is right. It is not clear that the house, which was attached and the release of which from attachment has been ordered by the District Munsif, is the house referred to in the decree. The family has, it is said, more than one thatched house in the village. The decision of the Madras High Court quoted by the District Munsif and also those in *Bheri Dorayya v. Maddipatu Ramayya*(2) and *Venkatarama v. Senthivelu*(3) seem to show that the decree against the father cannot be executed against the son and the property in his hands."

He dismissed the appeal.

Against that order of dismissal, plaintiff preferred the appeal filed as appeal against Appellate Order No. 20 of 1900.

(1) I.L.R., 10 Mad., 283.

(2) I.L.R., 3 Mad., 35.

(3) I.L.R., 13 Mad., 265.

MINAKSHI
ACHI
v.
CHINNAPPA
UDAYAN.

Sivasami Ayyar for appellant.

T. S. Krishna Ayyar for respondent (defendant No. 5).

The case first came on for hearing before SUBRAHMANIA AYYAR and BENSON, JJ., who passed the following

ORDER.—If the house sought to be sold is property charged by the decree with maintenance, the property can be sold in execution of the decree even though the respondent was not made a party to the decree, since there can be no contention that the debt was either illegal or immoral, and the decree is not merely a personal decree against the father alone as in *Muttia v. Virammal*(1), but a decree against the representatives of the family directly creating a charge. The concluding part of the judgment in *Muttia v. Virammal*(1) is an authority for holding that such a decree can be executed against the sons of the defendants, though not actually made parties.

If, however, the property was not charged by the decree, the son, under the same authority, may be entitled to object to property taken by him by right of survivorship being proceeded against in execution.

The District Judge has not definitely found whether the property attached was property comprised in the decree. We must therefore ask for a finding on this point. Evidence may be taken on both sides.

In compliance with the above order, the District Judge submitted the following

FINDING.—The decree charges (besides other property) “the tiled house in the village of Thiruchithambalam which is the ancestral property of the defendants’ family.” A tiled house in Thiruchithambalam was attached by the decree-holder (appellant) in execution of her decree; and two witnesses have been called by her who say that this house was in existence when the decree was passed, and that the defendants’ family had then, and have now only this one house in Thiruchithambalam. There is no evidence the other way; and the respondent’s pleader says that he has not received any instructions from his client. I find on this evidence that the house which the appellant attached and which the District Munsif released from attachment, is property comprised in the decree.

(1) I.L.R., 10 Mad., 283 at p. 287.

The appeal came on for final hearing, after the return of the above finding, before the Court constituted as above, when their Lordships delivered the following

JUDGMENT.—No objection is taken to the finding. We accept it and reverse the orders of the Courts below and direct the execution petition to be disposed of according to law. The appellant will have her costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Moore.

VENKATARAZU AND ANOTHER (DEFENDANTS AND JUDGMENT-DEBTORS),
APPELLANTS,

v.

CHINNA RAMAYYA (TRANSFER-PLAINTIFF AND DECREE-HOLDER),
RESPONDENT.*

Transfer of Property Act—Act IV of 1882, ss. 88, 89—Decree for sale under s. 88—No order absolute under s. 89—Application by decree-holder for sale under Civil Procedure Code—Order as asked—No further applications in execution for more than three years—Then, application for order absolute, under s. 89—Bar by previous order—Limitation Act—Act XV of 1877, sched. II, art. 179.

A decree for sale of mortgaged property was passed on 30th August 1895 under section 88 of the Transfer of Property Act. No order absolute for sale was asked for or made under section 89 of the Transfer of Property Act. On 30th September 1896, the decree-holder applied to the Court under sections 286 and 287 of the Code of Civil Procedure for an order directing the sale of the mortgaged property and an order was passed accordingly. This application was subsequently dismissed for failure to pay the expenses. On 10th October 1896, another application for execution was made but no further step in execution was taken for more than three years, namely, till 20th November 1899, when the decree-holder applied for an order absolute under section 89 of the Transfer of Property Act. He contended that as such an order had never been made he was entitled to ask for it, and that inasmuch as his application was not one for execution it was not barred by limitation under article 179 of schedule II to the Limitation Act:

* Civil Miscellaneous Second Appeal No. 4 of 1901, against the order of J. H. Munro, Acting District Judge of Godavari, in Appeal Suit No. 58 of 1900; reversing the order of P. N. Sadagopa Naidu, District Munsif of Bhimavaram, in Execution Petition No. 1213 of 1899 in Original Suit No. 344 of 1895.

MINAKSHI
ACHI
v.
CHINNAPPA
UDAYAN.

1901.
July 29, 30.
August 13.

VENKATARAZU
v.
CHINNA
RAMAYYA.

Held, that the order passed on the application of 30th September 1896 must be taken to be an order absolute for sale, as well as an order directing certain further steps in execution, and it was in consequence not open to the decree-holder to apply now for an order under section 89 of the Transfer of Property Act. His present application must accordingly be regarded as an application for execution, and as such it was barred under article 179 of schedule II of the Limitation Act.

APPLICATION for execution of a decree. The decree, which was passed in Original Suit No. 344 of 1895, against two defendants, and bore date 30th of August, 1895, was as follows:—"Suit for the recovery out of the mortgage property, &c., the sum of Rs. 1,135-8-0 being the amount of instalments from the 1st to the end of the 5th, principal and interest, due in respect of the registered mortgage deed executed by the defendants in favour of the plaintiff on 11th February 1890, together with costs and subsequent interest. This suit coming on for final disposal, &c., [plaintiff being represented by pleader, first defendant being *ex parte*, and second defendant appearing in person] it is ordered that the defendants do pay to the plaintiff on or before the 30th April 1896 the sum of Rs. 1,135-8-0 and costs, together with subsequent interest at 6 per cent. per annum till date of payment; that, in default, the mortgaged property or any adequate portion thereof be sold, that the balance remaining after deducting the expenses of the sale from the proceeds thereof be deposited in Court, and paid towards the amount due to the plaintiff, that the balance, if any, remaining thereafter be paid to the defendants or to persons entitled to receive the said amount and that the decree debt or any portion thereof remaining unpaid be recovered from the first and second defendants personally."

No appeal was preferred. On 15th June 1896 an application for execution was made, which was subsequently struck off the file. Plaintiff in the suit subsequently transferred the decree to one Erra Chinna Ramayya, the present applicant. On 30th September 1896, the transferee-plaintiff applied to the District Munsif for an order that a proclamation might issue under sections 286 and 287 of the Code of Civil Procedure for the sale of the mortgaged property. The prayer in the petition was as follows:—"The (transferee) plaintiff prays that the Court may peruse the copy of the decree which was filed along with the previous application for execution and which is on record, and the transfer deed filed herewith, that notice may be issued to the original plaintiff and the

defendants, and that the transfer may be confirmed. He also prays that a proclamation may be issued in accordance with sections 286 and 287, Civil Procedure Code, in respect of the mortgaged immoveable property mentioned in the decree and in the list filed herewith, that the sale may be held proclaiming that it will be subject to the registered hypothecation made by the defendants in favour of the transferee-plaintiff on 2nd September 1896, and that the amount realized may be paid to the transferee-plaintiff." On 16th October 1896 the Munsif ordered that notice should issue and on 30th October 1896 the Munsif passed the following order:—"No opposition; petition granted. Batta for proclamation." Batta not having been paid the application was on 19th December 1896 dismissed.

On 10th October 1896 another application in execution was made, but no further step was taken by the transferee-plaintiff until the present application, which was made on 20th November 1899, and contained the following prayer:—"Plaintiff prays that the Court will be pleased to peruse the copy of the decree which is in the execution record, and issue notice, under section 248 of the Code of Civil Procedure, to the defendants; that as the defendants failed to pay the mortgage amount within the time fixed, the sale (decree)? may be made absolute; that proclamation of sale of the property may be issued under sections 286 and 287 of the Civil Procedure Code and the balance due may be recovered and paid; and that, in default, the property may be sold in auction and the proceeds of the sale may be paid towards this debt."

It was considered by the District Court and by the High Court that the object of this petition was to obtain an order absolute for the sale of the mortgaged property under section 89 of the Transfer of Property Act.

The District Munsif said:—"This is an application for execution by sale of mortgage property which the decree directs to sell for the realization of the debt. The decree is dated 30th August 1895. The last application for execution was made on the 10th October 1896. The present application is dated 20th November 1899. The decree directs the sale of the mortgage property, if the decree amount be not paid on or before the 30th April 1896. This plaintiff admittedly has not obtained an order under section 89 of the Transfer of Property Act declaring that the decree is absolute. The counter-petitioners, *i.e.*, defendants, oppose this

VENKATARAZU
v.
CHINNA
RAMAYYA.

VENKATABAZU
v.
CHINNA
RAMAYYA.

application on the ground that the same is barred by limitation as having been made three years after the last application or the notice issued on that application." (He dealt with an argument which had been raised under section 19 of the Limitation Act, and concluded:—) "Further, the decree not having been made absolute, the plaintiff is not entitled to any order for sale. The application for execution is also, as pointed out above, barred by limitation." He dismissed the application. Plaintiff appealed to the District Judge who said:—"In his application for execution appellant prayed that the 'sale' might be made absolute and the property proclaimed for sale. Up to the date of the application no order had been obtained under section 89 of the Transfer of Property Act and appellant in his application clearly asks for such an order. This is evidently what he means by making the 'sale' absolute. No authority to the effect that an application for an order under section 89 cannot be made at the same time as the application for sale is quoted. I can see no reason why such application should not be so made, and the remarks in *Mahabir Prasad v. Sital Singh*(1) support this view." The question then for decision in this appeal is whether there is any limitation for an application under section 89 of the Transfer of Property Act. Following *Tiluck Singh v. Parsotein Proshad*(2), I hold that there is no limitation prescribed for such applications. The decree in the present case was passed only in 1895 and there has been no unreasonable delay in applying for the order absolute."

He reversed the Munsif's decision.

Against that order, the judgment-debtors preferred this appeal.

Ramachandra Rao Sahab, for appellants.—The application is barred by limitation, as more than three years have elapsed between it and the last previous application of 10th October 1896. It is an application for the execution of a decree and was erroneously treated by the District Court as one under section 89 of the Transfer of Property Act. It must be taken that an order absolute for sale had been made when the Court adjudicated on the application of 30th September 1896. In *Phul Chand Ram v. Nursingh Pershad Misser*(3) the Court held that an order absolute for sale under section 89 of the Transfer of Property Act is not indispens-

(1) I.L.R., 19 All., 520.

(2) I.L.R., 22 Cal., 924.

(3) I.L.R., 28 Cal., 73.

ably necessary as a condition precedent for sale of mortgaged property, in execution of a mortgage decree, and that it is sufficient that there is an order for sale passed on the application of the decree-holder. The effect of *Rayalu Pattar v. Narayana Pattar*(1) is somewhat similar. On 30th September 1896, the decree-holder applied for sale and the application was granted. It will be taken, therefore, that an order absolute was made. In *Bhagwan v. Ganu*(2) it was held that applications under section 89 of the Transfer of Property Act are applications for the execution of decrees. *Tara Prasad Roy v. Bhobodeb Roy*(3) and *Kedar Nath Raut v. Kali Churn Ram*(4) are based on *Poresh Nath Mojumdar v. Ramjodu Mojumdar*(5). Whether the order passed on 30th October 1896 was right or wrong, the parties are bound by it now; *Mungul Pershad Dichit v. Grija Kant Lahiri Chowdhry*(6). [He referred to *Narayana Reddi v. Papayya*(7); *Chunni Lal v. Harnam Das*(8); and *Ram Kirpal Shukul v. Mussumat Rup Kuari*(9) and contended that under article 179 of schedule II to the Limitation Act, the application was barred.]

V. Krishnasami Ayyar, for respondent.—This is not an application for execution, and is consequently not governed by article 179. It is an application under section 89 of the Transfer of Property Act, for an order absolute, and there is no limitation for such an application. The Transfer of Property Act provides for its being made, and there is therefore no ground for the contention that it is an application for execution under the Code of Civil Procedure to which article 179 applies. The Transfer of Property Act has a scheme of its own, by which

(1) Appeal against Appellate Order No. 39 of 1899 (unreported). On 14th November 1893, the Court, (SHEPHERD and BENSON, JJ.) delivered the following judgment:—"No doubt there ought, in strictness, to be an order absolute for sale before the order for sale is passed, and if the objection had been taken before the sale took place it might have prevailed and the decree-holder might have remedied the defect. Here, however, the judgment-debtor waited although he had notice of the intended sale and actually applied for an adjournment of it. Under these circumstances we do not think he ought to be allowed to object to a defect by reason of which he does not allege that he has suffered. We must reverse the order of the Subordinate Judge and restore that of the District Munsif with costs here and in the lower Appellate Court."

(2) I.L.R., 23 Bom., 644.

(3) I.L.R., 22 Cal., 931.

(4) I.L.R., 25 Cal., 703.

(5) I.L.R., 16 Cal., 246.

(6) L.R., 8 I.A., 123 at p. 133; I.L.R., 8 Cal., 51.

(7) I.L.R., 22 Mad., 133.

(8) I.L.R., 20 All., 302.

(9) L.R., 11 I.A., 37; I.L.R., 6 All., 269.

VENKATARAZU it regards the first decree in a mortgage suit as a merely preliminary decree, and the decree absolute as the final decree. Form 129 of the Code of Civil Procedure also shows this. The ground of the decision in *Ajudhia Pershad v. Baldeo Singh*(1) is that the party who might have objected to the sale did not do so. In *Subrahmaniam Pillai v. Narayana Ayyangar*(2) in which no order absolute for sale had been passed, this Court held, under section 89 of the Transfer of Property Act, that the decree was incapable of execution and that all proceedings purporting to have been taken in execution of it were null and void, —following *Tara Prosad Roy v. Bhobodeb Roy*(3). [MOORE, J., remarked that the authority of *Tara Prosad Roy v. Bhobodeb Roy*(3) had since been lessened by the decision in *Phul Chand Ram v. Nursingh Pershad Misser*(4).] In the later case of *Rayalu Pattar v. Narayana Pattar*(5) the Court recognizes that in strictness there should be an order absolute for sale before the order for sale is passed, and that if objection be made by a judgment-debtor at the proper time it may prevail. In *Ramunni v. Brahma Dattan*(6) the question was whether the right to redeem continued or had become extinguished by lapse of time; and Muttusami Ayyar, J. described the scheme of the Transfer of Property Act and considered it to have been based on English law. Application for an order absolute is necessary because, though the decree provides that the party shall be absolutely barred if he does not redeem by the date therein specified, until the Court by its final decree declares that the mortgagor has failed to pay, the right to redeem is not finally lost. For example, time for payment could be enlarged or a second suit for redemption could be brought, as has been held. The decree to be passed under section 92 is merely a conditional one, and must be made absolute. [DAVIES, J., remarked that there are cases of conditional decrees which are enforced on failure to perform the condition without a final order being passed on them.] That view is contemplated in *Kashi Prasad v. Sheo Sahai*(7), but it is submitted that there can be no “execution” until after the final order. [DAVIES, J.—The decree under section 92 is complete in itself. On failure to pay the

(1) I.L.R., 21 Cal., 818.

(2) Appeal against Appellate Order No. 35 of 1898 (unreported).

(3) I.L.R., 22 Cal., 931.

(4) I.L.R., 28 Cal., 73.

(5) Appeal against Appellate Order No. 39 of 1899 (*supra* p. 699).

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

(7) I.L.R., 19 AM., 186.

Court is applied to and an order is passed accordingly. That is purely an order in execution.] The words “decree absolute” in section 92 suggest that a “decree nisi” is contemplated by the Transfer of Property Act, and that phrase has been used both in Madras and Calcutta with reference to the earlier decree. But a decree nisi cannot be executed, and therefore the application to the Court cannot correctly be said to be in execution. Even if there were no Code of Civil Procedure the Transfer of Property Act has sufficient provisions for such applications being made. Preliminary decrees are passed in partition suits and final decrees afterwards, as for instance, see *Krishnasami Ayyangar v. Rajagopala Ayyangar*(1). The decision in *Phul Chand Ram v. Nursingh Pershad Misser*(2) is intelligible on the ground that a sale may be set aside by reason of its irregularity. There is no period of limitation during which an order absolute must be applied for; any more than there is for taking out probate.

JUDGMENT.—The decree in Original Suit No. 344 of 1895 on the file of the District Munsif of Narsapur, passed on the 30th August 1895, was a decree under section 88 of the Transfer of Property Act. On the 30th September 1896 Erra Chinna Ramayya (present respondent) the transferee of the original decree-holder (plaintiff) applied to the District Munsif for an order that a proclamation should be issued in accordance with sections 286 and 287 of the Civil Procedure Code in respect of the mortgaged immoveable property mentioned in the decree, and the same brought to sale. On the 16th October it was directed that a notice should be issued and on the 30th of the same month the following order was passed:—“No opposition; petition granted. Batta proclamation.” On the 19th December the application for execution was dismissed as nobatta had been paid. On the 10th October 1896 another application for execution was presented, but from that date no further step in execution was taken till the present application was made on the 20th November 1899. Although it is not so stated in the petition, there appears to be no doubt that the present application is intended to be put in under section 89 of the Transfer of Property Act asking for an order absolute for the sale of the mortgaged property. The District Munsif held that the present application was barred by limitation

(1) I.L.R., 18 Mad., 73.

(2) I.L.R., 28 Cal., 73.

VENKATABAZU on the ground that over three years had elapsed between the application of the 10th October 1896 and the present petition; but the District Judge has reversed his order, holding that no limitation is prescribed for applications under section 89 of the Transfer of Property Act.

We are of opinion that the order of the District Judge can be upheld. As it is in our opinion not now open to the respondent (the decree-holder's assignee) to make an application under section 89 of the Transfer of Property Act, the question as to whether there is any limitation with respect to the period within which applications must be brought does not arise. In this application of the 30th September 1896 the respondent asked for the sale of the mortgaged property, and an order was passed in accordance with his request. It may be that this order was irregular and that the District Munsif should have directed the respondent before he attempted to proceed further to apply under section 89 of the Transfer of Property Act for an order absolute for sale. Execution, however, having been ordered by the District Munsif without a formal order under section 89 of the Transfer of Property Act having been previously made, the respondent, who was a party to that order and is bound by it, is now precluded from contending that it should not have been passed. The order of the 30th October 1896 passed on the petition of the 30th September must be held to be an order absolute for sale as well as an order directing certain further steps in execution and such being the case, it is not open to the respondent now to apply for an order under section 89 of the Transfer of Property Act. His present petition must accordingly be looked on as nothing more than an ordinary application for execution, and as such it is barred as having been presented more than three years from the date of the last similar application.

We reverse the order of the District Judge and restore that of the District Munsif dismissing the present application with costs throughout.

