THE INDIAN LAW REPORTS.

MADRAS SERIES,

CONTAINING

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

REPORTED BY

Privy Council .. .. J. V. WOODMAN, *Middle Temple.*
High Court ... .. D. CHAMIER, *Inner Temple.*

VOL. XXVI.—1903.
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.

MADRAS:

PRINTED BY THE SUPERINTENDENT, GOVERNMENT PRESS.

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Plaintiff, being the holder of a license issued under section 24 (*e*) of the (Madras) Abkári Act of 1886, entered into an agreement with the defendants that the latter should sell arrack in plaintiff's licensed shop and that plaintiff should supply the liquor to be sold. Rule 21 of plaintiff's license imposed a duty on plaintiff to obtain the sanction of the Collector in case he should sub-let. Neither plaintiff nor defendants obtained such sanction. On a suit being filed by plaintiff for a sum of money due under the agreement:—*Held*, that the agreement was illegal and that plaintiff could not sue on it.

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The period of ninety days prescribed by section 7 of Act I of 1876, during which an appeal may be preferred to the Board of Revenue from an order by a Collector apportioning the assessment on land, runs from the date when the Collector declares the apportionment of assessment, after the apportionment proposed by him to the Board of Revenue has been sanctioned. It does not commence to run, under the Act of 1876, from the date when the Collector himself fixes the amount and submits his proposal to the Board of Revenue for sanction. Under section 18 of Regulation II of 1803, the Collector was bound, when transmitting for the consideration of the Board a statement of the assessment to be apportioned on the subdivision, to furnish a copy of such statement to the proprietor of the estate, who was directed to appeal if he objected to the assessment. Under that Regulation the appeal was against the proposal for apportionment, and time ran from the date of the proposal. But the effect of Act I of 1876 has been to supersede the procedure prescribed under section 18 of Regulation II of 1803, and the right of appeal given by the later Act is against the apportionment made under section 2 after it has acquired validity by being sanctioned by the Board of Revenue.

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Oula v. *Beepathee*, (I.L.R., 17 Mad., 209), distinguished 225

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Rewa Mahton v *Ram Kishen Singh*, (L.R., 13 I.A., 106), explained 428

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Srinivasa Ayyar v. *Muthusami Pillai*, (I.L.R., 24 Mad., 246), followed ... 488

Strinivasa Ayyangar v. *Strinivasa Swami*, (I.L.R., 16 Mad., 31), distinguished 450

Subbayya v. *Saminadayyar*, (I.L.R., 18 Mad., 496), distinguished 225

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Wufadar Khan v. *Queen-Empress*, (I.L.R., 21 Calc., 955), commented on ... 2

CIVIL PROCEDURE CODE—ACT XIV OF 1882, s. 13—*Res judicata :*

D and R were divided brothers. R in conjunction with the senior of his two wives, and to the exclusion of the junior wife, adopted a son of D on 27th October 1879. On the same day, R settled some properties on his junior wife for life, with remainder to his daughter by her. In 1885, R died; his senior wife died shortly after; and in 1886, his adopted son also died, unmarried. D in 1890, sued the surviving widow and daughter, for a declaration that he, as the reversionary heir of the deceased adopted son, was entitled to succeed to the properties left by R (including those settled on the widow and daughter), after the lifetime of the widow. The claim was dismissed in so far as it related to the settled property, but D was declared to be entitled, as reversioner, to the other properties left by R after the lifetime of the widow. In 1891, D died. In 1897, the surviving sons of D brought the present suit, in which they claimed to be entitled to immediate possession of the properties to which D had been declared, in the former suit, entitled subject to a life interest in the widow. They contended that the decree in the former suit had been obtained under a mistake of law, and that it was no bar to the present suit:—*Held*, that the matter was *res judicata*.

Kaveri Ammall v. *Sastri Ramier* 104

2. ——————————————, Res judicata—*Previous suit in which same matter was in issue between plaintiff and the respective defendants, but not as between the defendants themselves—Suit by one of the then defendants to establish his priority over one of the other defendants—Maintainability :*

In a former suit, the question whether each of the defendants had mortgages upon certain property was a matter which was in issue between the plaintiff and the respective defendants therein, but not as between the defendants themselves, no question of priority being gone into, and the rights of the parties not being dealt with further than by making a decree for sale subject to certain encumbrances, of which that of the fifth defendant therein was one. The fifth defendant in that suit now sued as plaintiff in the present suit, for a declaration that a sale of the same mortgaged property was invalid. His present claim was based on the allegation that his mortgage had priority over the mortgage on which the decree had been obtained, in execution of which the property had been sold; and that mortgage was held by one of his co-defendants in the previous suit:—*Held*, that the claim was not *res judicata*.

Muhammad Kuni Rowthan v. *Visvanathaiyar* 337

3. ——————————————, **expl. II**—*Matter which might and ought to have been made ground of attack in former suit ;*

On a sale of land by plaintiff to defendant, part of the purchase money was paid and a mortgage was given by the defendant in plaintiff's favour for the balance of the purchase money, which balance amounted to Rs. 100. Plaintiff sued on his mortgage, but that suit was dismissed by reason of its being unregistered. Plaintiff now brought the present suit for the amount, framing his claim as for the enforcement of a lien for unpaid purchase money:—*Held*, that the suit was barred by explanation II of section 13 of

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the Code of Civil Procedure. Plaintiff might have sued, in his former suit, on the basis of his lien for balance of unpaid purchase money, and he ought to have done so to avoid the necessity for a second suit in the event of the mortgage being held invalid for want of registration. *Kameswar Pershad* v. *Rajkumari Ruttan Koer*, (I.L.R., 20 Calc., 85), followed.

Akayi Kunhi v. *Ayissa Bi* 645

4. ——————————————, **expl. II, 42, 43**—Res judicata—*"Subjects in dispute" :*

The phrase "the subjects in dispute" in section 42 of the Code of Civil Procedure signifies the jural relation between the parties to the suit, for the determination of which the suit is brought. The object of the section is to require the plaintiff to bring forward his whole case as to the matter of litigation on the question of right involved in the suit, and not to require him to unite all the causes of action which he may have against the defendant in respect of the *corpus* or object-matter of the suit. Though the subject of *res judicata* is dealt with more comprehensively in the present Code than in the former Code, yet sections 42 and 43 are not exhaustive of the law of *res judicata*. That law has been the same under both the old and the new Codes, and it is substantially the same as the English law. The decision of the Privy Council in *Kameswar Pershad* v. *Rajkumari Ruttan*, (I.L.R., 20 Calc., 79), explained. Neither of the decisions of the Privy Council in *Woomatara Debia* v. *Unnopoorna Dassee*, (11 B.L.R., 158) and *Kameswar Pershad* v. *Rajakumari Ruttan*, (I.L.R., 20 Calc., 79), supports the proposition that a plaintiff who seeks to redeem a specific mortgage or to eject on a specific lease, and fails in such suit because the mortgage or lease is not proved, is thereby precluded from seeking to redeem the same property or a portion thereof from another specific mortgage or to eject on the strength of his title the person in possession. The real test is whether the cause of action, or transaction on which the two suits are based is the same, and not whether the transaction is sought to be established in different modes or by different means. In a previous suit the present plaintiff, claiming as the legal representative of a deceased mortgagor, sued substantially the same defendants to redeem a usufructuary mortgage alleged to have been executed in 1856 over about 50 cawnies of land. The defendants denied the genuineness of the mortgage and pleaded that 14 out of the 50 cawnies had been usufructuarily mortgaged to them in 1853, and they claimed that these 14 cawnies as well as the remaining 36 had been sold to them subsequently. That suit was dismissed on the ground that the mortgage sued on had not been proved (the question of plaintiff's position as legal representative, which was challenged, not being decided). In 1897, plaintiff brought the present suit to redeem the 14 cawnies on the footing of the mortgage of 1853 which had been pleaded by the defendants in the previous suit:—*Held*, that the suit was not barred by section 43 or section 13, expl, II, of the Code of Civil Procedure. *Arunachalam Chetty* v. *Meyyappa Chetty*, (I.L.R., 21 Mad., 91), and *Rangasami Pillai* v. *Krishna Pillai*, (I.L.R., 22 Mad., 259,) discussed. *Guddappa* v. *Tirkappa*, (I.L.R., 25 Bom., 189), dissented from.

Ramaswami Ayyar v. *Vythinatha Ayyar* 760

5. ——————————————, **ss. 25, 191 (2)**—*Suit commenced in a District Court—Issues settled by District Judge—Case transferred to Sub-Court by High Court—Decision by Sub-Judge—Appeal to and decision of District Judge—Validity of decision in appeal and of transfer by High Court :*

A suit was instituted in a District Court, and issues were settled by the District Judge. The suit was then transferred by the High Court to the Court of the Subordinate Judge, who decided the case; an appeal was then preferred to and was heard by the District Court, though the Judge who heard the appeal was not the Judge who had settled the issues. On a second appeal being preferred to the High Court:—*Held*, (1) that the District Court had jurisdiction to hear the appeal, section 17 of the Madras

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Civil Courts Act having no application; (2) that the High Court had jurisdiction under sections 25 and 191 (2) of the Code of Civil Procedure to make the transfer to the Subordinate Judge, though the case was in part heard.

Palanisami Cowndan v. *Thondama Cowndan* 595

8. ——————————————————, s. 26—*Joinder of plaintiffs—Right claimed in the alternative:*

The widow and the adopted son of a deceased person joined as plaintiffs in a suit to recover money payable by the defendants to the deceased. The money was undoubtedly due to one or other of them and they were agreed that either should take it. The widow joined as plaintiff because the right of the other plaintiff to sue as adopted son was questioned:—*Held*, that the suit was not bad for misjoinder of plaintiffs. *Fakirapa* v. *Rudrapa*, (I.L.R., 16 Bom., 119), followed; *Lingammal* v. *Chinna Venkatammal*, (I.L.R., 6 Mad., 239), explained.

Pinapati Mrutyumjaya v. *Pinapati Janakamma* 647

7. ——————————————————, ss. 103, 108, and 558—*Application to restore—Prevented by sufficient cause from appearing—Power of Court to restore where sufficient cause not shown:*

The affirmative provisions in sections 103, 108 and 558 of the Code of Civil Procedure that a plaintiff or appellant (as the case may be) may prove that he was "prevented by sufficient cause" from appearing or attending when his suit or appeal was called on and dismissed, do not imply the negative, namely, that an application for restoration cannot be granted unless sufficient cause is shown. The effect of the enactments is that if sufficient cause is shown, restoration is made obligatory on the Courts, there being no discretion in the matter; whereas, in other cases the merits of the applicant's case will form an important element for consideration when the Court is asked to exercise its discretion.

Somayya v. *Subbamma* 599

8. ——————————————————, s. 148—Ex parte *decree against two defendants—Application by one defendant only to set aside the decree—Defence peculiar to that defendant—Order of Court setting aside entire decree as against both—Validity:*

First defendant had executed a promissory note in plaintiff's favour. Plaintiff now sued first defendant on the note, as the maker, and he joined the first defendant's nephew as second defendant on the ground that the note was for a debt binding on the family, including second defendant. Neither defendant appeared and the District Munsif passed a decree *ex parte* against both. Later, the second defendant alone applied under section 108 of the Code of Civil Procedure that the *ex parte* decree might be set aside. The Munsif accordingly set it aside *in toto* as against both defendants. When appealing against the final decree, plaintiff took the objection that the order was contrary to law, and claimed that the decree should not have been set aside as against first defendant and asked to have it restored:—*Held*, that the decree should be restored as against first defendant; whatever doubt might exist in a case in which the decree sought to be set aside under section 108 proceeds on a ground common to the applicant and another defendant who has not applied under that section, the decree should not have been set aside *in toto* in a case like this where the defence of the second defendant was peculiar to him. *Mahomed Hamidula* v. *Tohurennissa Bibi*, (I.L.R., 25 Calc., 155), commented on.

Gopala Chetti v. *Subbier* 604

9. ——————————————————, ss. 223, 336—*Surety for presentation of insolvency petition by judgment-debtor—Failure to apply—Transfer of decree—Application by transferee for decree to be sent to another Court for execution against judgment-debtor and surety:*

A transferee decree-holder is entitled to apply under section 223 of the Code of Civil Procedure, to the Court which passed the decree, to send it for execution to another Court; and where a person has become surety for

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the judgment-debtor, under section 336, and the judgment-debtor has failed to apply to be declared an insolvent, the transferee decree-holder is entitled to have his decree sent for execution as against the surety as well as against the judgment-debtor, if his transfer has been recognized.

Chathoth Kunhi Pakki v. *Saidindavide Kunhmmad* 258

10. ——————————————————, ss. 233, 246—*Cross-decrees on same day against same parties in different suits—Subsequent transfer of one decree to third party—Petition for execution by transferee decree-holder—Right of transferee subject to equity of cross decree-holder:*

On 3rd February 1900 cross-decrees were passed between A and B in different suits. A's decree against B was for a larger amount than B's decree against A. On 25th January 1900 B transferred his decree to C, but A only received notice of the assignment in October 1900:—*Held*, that C was not entitled to execute the decree against A. The transfer from B to C could take effect against A in respect of his cross-decree only after A received notice of it. That being so, the decree so transferred, being for a smaller amount than A's, became incapable of execution under the equitable principle enunciated in section 246 of the Code of Civil Procedure. At the date of the completion of transfer by notice, B's decree was subject to the equity, and, consequently, the right of C, as the transferee of it was also subject to that equity, under section 233 of the Code. Section 246 of the Code of Civil Procedure is not inapplicable to a case where cross-decrees are passed by the Court whose duty it is to execute them, and neither decree has been transferred for execution to another Court. *Rewa Mahton* v. *Ram Kishen Singh*, (L.R., 13 I.A., 106), explained.

Sinnu Pandaram v. *Santhoji Row* 428

11. ——————————————————, s. 244—*Execution proceedings—Question raised as to whether improvements attached in execution were property of deceased judgment-debtor or of his representatives in their own right:*

A question as to whether improvements on land attached in execution of a decree are property of a deceased judgment-debtor which has come to the hands of his representatives as such or belong to the representatives in their own right, can be and ought to be decided under section 244 (*c*), and not by separate suit.

Vengapayyan v. *Karimpanakal Parvati* 501

12. ——————————————————, s. 244—*Order by High Court directing District Court to take account of amount due under mortgage—Order by District Court declaring amount due—Appeal:*

The High Court, by its decree, directed a District Court to take an account of the amount due to a decree-holder under a mortgage. The District Court accordingly took the account and passed an order declaring, in Court, under section 88 of the Transfer of Property Act, the amount so due. Against that order the decree-holder appealed to the High Court, when the objection was raised that no appeal lay:—*Held*, that the order appealed against was one falling under section 244 (*c*) of the Code of Civil Procedure and an appeal lay.

Aryan Bank of Vizagapatam v. *Kamma Venkata Narasayyamma* 237

13. ——————————————————, s. 244.—*Proceedings taken by a purchaser under s.* 318—*Relating to the discharge or satisfaction of decree—Subsequent proceedings to recover same land from same judgment-debtor—Maintainability:*

The decree-holder in a previous suit became the purchaser of certain property which was sold in execution of his decree. He applied, under section 318 of the Code of Civil Procedure, for delivery of the property purchased, but his application was rejected as being barred by limitation.

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He now brought the present suit to recover possession of the land from the present defendant, who was the judgment-debtor in the previous suit. On the objection being taken that the suit was barred by section 244:—*Held*, that proceedings taken by the purchaser to obtain possession of the property purchased related to the execution discharge or satisfaction of the decree, within the meaning of section 244, and that the suit must be dismissed.

Kattayat Pathumayi v. *Raman Menon* 740

14. ——————————————————, s. 244—*Suit by assignee of decree for declaration of validity of assignment—Maintainability:*

A suit lies at the instance of the assignee of a decree for a declaration as to the validity of his assignment. The amendment of section 244 by section 26 of Act VII of 1888 has not taken away this right. *Raman* v. *Muppil Nayar*, (I.L.R., 14 Mad., 478), referred to.

Bommanapati Veerappa v. *Chintakunta Srinivasa Rau* 264

15. ——————————————————, s. 257-A—*Agreement to give time for the satisfaction of a judgment-debt:*

The test as to whether section 257-A of the Code of Civil Procedure operates to render an agreement void is whether the parties agree that the judgment-debt, *qua* judgment-debt, shall be put an end to. If so, the section does not render the agreement void. If not, it does. After a decree had been passed in favour of a plaintiff in a suit, the defendant gave plaintiff a bond by which he undertook to pay plaintiff, by instalments, the amount still due to him under the decree, after giving credit for a payment which had already been made on account. The bond gave plaintiff a twofold remedy in case of default,—first, a right to sue for the balance, secondly, a right to recover the balance by executing the decree. The sanction of the Court was not obtained. Plaintiff received instalments in pursuance of the terms of the bond for some time, but defendant subsequently ceased to make any further payments. Plaintiff thereupon brought this suit on the bond to recover the balance which still remained unpaid, when it was pleaded in defence that the bond was void under section 257-A of the Code of Civil Procedure:—*Held*, that the effect of the bond was to keep alive the relation of judgment-creditor and judgment-debtor by the express agreement of the parties, the debt being enforceable as a judgment debt. And that, on its true construction, the bond was an agreement to give time for the satisfaction of a judgment-debt, and, as the sanction of the Court had not been obtained, was void. *Also*, that the agreement was none the less void because one of the parties to it (the legal representative of one of the judgment-debtors), had not been one of the parties to the suit in which the decree was obtained. *Juji Kamti* v. *Annai Bhatta*, (I.L.R., 17 Mad., 382), and *Hukum Chand Oswal* v. *Taharunessa Bibi*, (I.L.R., 16 Calc., 504), commented on.

Venkata Subramania Ayyar v. *Koran Kannan Ahmod* 19

16. ——————————————————, s. 266 (*g*)—*Fund representing political pension due at date of pensioner's death, but unpaid—Liability to attachment:*

A person to whom a political pension was being paid died; and at the date of his decease a sum of money was due to him in this respect, but remained, unpaid, in the hands of the Collector of the District. On an attempt being made to attach the fund, in execution proceedings:—*Held*, that the character of the fund remained unchanged so long as it remained unpaid in the hands of the Government, irrespective of whether the intended beneficiary were alive or dead, and that the fund was not liable to attachment.

Vulia Thamburatti v. *Anujani Kunhunni* 69

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17. ——————————————————, s. 266 (*g*).—*Pensions Act—XXIII of 1871, s. 11—Attachment of pensions payable to descendants of reigning family in Ceylon—Pensions payable in British India—Validity of attachment:*

Certain descendants of the family which formerly reigned in Ceylon, resided in British India, where the Collector of the district, on behalf of the Government of India, paid them pensions. Apparently, though this was not proved, the cost of these pensions was ultimately defrayed by the Government of Ceylon. These pensions were attached in execution of certain decrees. Upon application being made by the pensioners to have the attachments set aside:—*Held*, that the pensions were exempt from attachment as being "political pensions" within the meaning of section 266 (*g*). *Per* Sir ARNOLD WHITE, C.J.—If the Government of India were to be regarded as merely the agent of the Ceylon Government for the purpose of paying the pensions, the Courts of British India would have no jurisdiction to proceed by way of attachment since the rights of the pensioners (assuming them to be enforceable at law) would only be enforceable in Ceylon. *Ghamsham Lal* v. *Bhansali*, (I.L.R., 5 Bom., 249), and *Bishambar Nath* v. *Imdad Ali Khan*, (I.L.R., 18 Calc., 216), referred to.

Muthusami Naidu v. *Prince Alagia Manavala Simmala Raja* 423

18. ——————————————————, ss. 268, 483—*Attachment of money before judgment—Decree—Subsequent insolvency of judgment-debtor—Claim of Official Assignee—Priority of Official Assignee:*

The effect of an attachment under the Code of Civil Procedure is to prevent alienation. It does not confer title. An order of attachment under section 268 only operates so as to give the judgment-creditor certain rights in execution. It does not operate when those rights are not exercised before the presentation of a petition in insolvency, so as to create in favour of the judgment-creditor a title which prevails against that of the Official Assignee, under the vesting order in insolvency made after the order of attachment. The plaintiff in a suit obtained an order for attachment before judgment of a sum of money belonging to the defendant. In due course a decree was obtained for a larger amount, and subsequently to the decree the judgment-debtor was declared an insolvent. The Official Assignee then preferred a claim to the money under attachment, contending that the attachment was of no effect as against him, and asking that it might be set aside:—*Held*, that the Official Assignee was entitled to the order asked for.

Kristnasawmy Mudaliar v. *Official Assignee of Madras* 673

19. ——————————————————, s. 295—*Rateable distribution of proceeds of execution sale—"Prior to the realization"—"Same judgment-debtor":*

The properties of a judgment-debtor were brought to sale, at the instance of one judgment-creditor, in two parcels. After the proceeds of sale of the first parcel had been paid into Court and before the proceeds of sale of the second parcel had been so paid in, the petitioner (also an execution-creditor) applied under section 295 of the Code of Civil Procedure for a rateable distribution:—*Held*, that he was entitled to participate in a rateable distribution in the proceeds of sale of both parcels, the assets having been realized, within the meaning of the section, when the whole of the proceeds of the property sold in execution of the decree were paid into Court, and his application having been filed prior to such realization. *Tiruchittambala Chetti* v. *Seshayyangar*, (I.L.R., 4 Mad., 384), referred to. The decree of one of the judgment-creditors above referred to was against a father, whilst the decree of the other judgment-creditor was against the father and his son, but the properties from which the assets had been realized by sale were the ancestral properties of the family of which the father and son were undivided members. *Held*, that the decrees were "against the same judgment-debtor" for the purposes of section 295.

Ramanathan Chettiar v. *Subramania Sastrial* 179

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20. ———————————————————, s. 310-A—*Application by second mortgagee to set aside sale of mortgaged property under decree obtained by first mortgagee in suit to which second mortgagee had not been made a party—"Person whose immoveable property has been sold"—Transfer of Property Act—Act IV of 1882, s. 75:*

Land, which was subject to two mortgages, was sold under a decree obtained by the first mortgagee, in a suit in which the second mortgagee was not made a party. The second mortgagee then applied to have the sale set aside, and paid into Court the amount due to the first mortgagee:—*Held*, that the second mortgagee was not entitled to have the sale set aside. Inasmuch as he had not been made a party to the suit in which the decree was obtained, his interest had not passed under the sale, and his right to redeem the prior mortgage continued. He was, therefore, not a person whose immoveable property had been sold within the meaning of section 310-A of the Civil Procedure, and had no *locus standi* to apply under that section.

Mallikarjunadu Setti v. *Linga Murti Pantulu* 322

21. ———————————————————, s. 310-A—*Application to set aside a sale—Gift of the land prior to attachment—Effect of sale—Applicability of the section:*

Certain land was attached under a decree and sold. Application was thereupon made by a person, who claimed as donee of the land from the judgment-debtor, to have the sale set aside under section 310-A of the Code of Civil Procedure. It was alleged that the gift had been made prior to the date of attachment:—*Held*, that the interest of the donee (assuming his gift to be valid) could not be affected by the subsequent attachment and sale, and that, in consequence, he could not seek to set the sale aside under section 310-A. If the gift had been made while the property was under attachment, the sale would have been binding on the donee, who in consequence, could have applied under section 310-A. Any one whose interest in immoveable property is bound by a sale may apply under section 310-A, though he be no party to the suit or to the decree under which the sale took place.

Erode Manikkoth Krishnan Nair v. *Puthiedeth Chembakkoseri Krishnan Nair* 365

22. ———————————————————, s. 336—*Surety that judgment-debtor will apply to be declared insolvent—Due application by judgment-debtor—Liability of surety:*

Where a surety enters into a bond, under section 336 of the Code of Civil Procedure, undertaking to produce a judgment-debtor when ordered to do so within a month, in order to render the surety liable for the non-production of the judgment-debtor, the order to produce the judgment-debtor should be made on the surety. A bond providing that the surety will produce the judgment-debtor does not mean that the surety will produce him when the judgment-debtor is directed to appear. Where a surety entered into a bond that a judgment-debtor would, within a certain time, file a petition in insolvency, and the judgment-debtor, within that time, filed his petition, but subsequently withdrew it:—*Held*, that the surety was discharged.

Krishnaiyar v. *Krishnasamy Ayyar* 366

23. ———————————————————, s. 365—*Application to be brought on record in place of deceased plaintiff—Order—Continuance of suit—Objection by defendant at late stage of case—Procedure:*

L instituted a suit to recover a debt, and died while the suit was pending, leaving no issue. Within two and-a-half months of his decease his widow applied, under section 365 of the Code of Civil Procedure, as the legal representative of the deceased plaintiff, to have her name entered on the record in his place. She was brought on the record, accordingly, and adjournments took place and during several weeks thereafter the suit was

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partially heard. A defendant then, after a number of witnesses had been examined, presented a petition, purporting to be under sections 365 and 367 of the Code, stating that it had become evident from the deposition of plaintiff's second witness that plaintiff's husband had left an undivided brother. The petitioner asked the Court to decide the question, under section 367, as to who was the legal representative of the deceased plaintiff. The District Munsif heard the parties, and (without making an elaborate enquiry), held that the widow was the proper heir (and should produce a succession certificate before judgment should be delivered), but he also directed, in order to prevent future disputes, that the alleged undivided brother should be joined as a party. A petition signifying his consent to be so joined was filed by the last-mentioned person:—*Held*, that the order was right. Under section 365 of the Code, the Court was bound to proceed with the suit after the name of the applicant had been entered on the record in place of the deceased. The right, if any, of the defendant to object to the widow being added as legal representative in place of her deceased husband arose on the death of the plaintiff, and the defendant was bound to have used all reasonable diligence in acquainting himself with the state of the family of the deceased with a view to ascertaining whether his widow was entitled to prosecute the suit as his legal representative. Objection, if raised at all, should have been raised at the earliest opportunity, and failure to object then precluded the defendant from raising it, as he had done, at a late stage of the suit. *Oula* v. *Beepathee*, (I.L.R., 17 Mad., 209), and *Subbayya* v. *Saminadayyar*, (I.L.R., 18 Mad., 496), distinguished.

Meenatchi Achi v. *Ananthanarayana Ayyar* 224

24. ———————————————————, s. 368—*Bringing one out of several legal representatives of a defendant on record—Effect of decree on the estate:—See* "INCOME TAX ACT—II OF 1886."

25. ———————————————————, ss. 404, 592—*Presentation of application for leave to appeal* in formâ pauperis—*Necessity for personal application—Application of Rules in Chapter XXVI after presentation of application:*

The provision in section 404 of the Code of Civil Procedure, which requires an application for permission to sue *in formâ pauperis* to be presented (except in certain circumstances) by the applicant in person, does not apply to an application under section 592 to be allowed to appeal as a pauper. After an application has been presented under section 592, all action taken subsequent to such presentation is, by the terms of section 592, to be subject to the rules contained in Chapter XXVI of the Code, but the presentation of the application itself is not subject to those rules. *In re Narisi*, (I.L.R., 8 Mad., 504), not followed.

Mailthi v. *Somappa Banta* 360

26. ———————————————————, s. 491 — *Applicability Small Cause Courts:*

A Court of Small Causes has jurisdiction to award damages, under section 491 of the Civil Procedure Code, to a defendant whose property has been attached on insufficient grounds.

Ibrahi Rowthen v. *Sangaram Shetty* 504

27. ———————————————————, s. 493—*Disobedience to injunction issued by District Court—Powers of District Court—Contempt of Court—Court of Record:*

A District Court is not a Court of Record, and, as such, has no inherent power to commit for contempt. The jurisdiction which a District Court has to commit in case of disobedience to an injunction is conferred by section 493 of the Code of Civil Procedure, but the powers conferred by that section are only exercisable when the Court is set in motion by a party who deems himself aggrieved.

Kochappa v. *Sachi Devi* 494

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28. ——————————————————————, s. 493—*Temporary injunction—Specific Relief Act—I of* 1877, *ss.* 54, 56, 57—*Breach of negative covenant—Injunction :*

Plaintiffs advanced money to the defendants for the purpose of carrying on work in certain mica mines, in pursuance of an agreement by which defendants undertook, in consideration of the advance, to send all the mica produced from the mines to plaintiffs and bound themselves not to send any of it to any firm other than plaintiffs, or keep any in stock. Plaintiffs now complained that defendants had, in breach of their agreement, arranged to consign and had already made consignments of mica to another firm and were keeping mica in stock. Plaintiffs filed this suit for specific performance and for an injunction restraining defendants from acting in violation of the terms of the agreement; a temporary injunction was subsequently applied for and obtained, Upon an appeal being preferred by defendants against the order granting the temporary injunction :—***Held***, that the injunction was rightly granted. The granting of such an injunction under section 493 of the Code of Civil Procedure, is a matter of judicial discretion. Whether the principles which govern the grant of a temporary injunction under the Code of Civil Procedure are the same as those which are laid down in the Specific Relief Act relating to the grant of a perpetual injunction—*Quære. Nusserwanji Merwanji Panday* v. *Gordon*, (I.L.R., 6 Bom., 266), referred to.

Subba Naidu v. *Haji Badsha Sahib* 168

29. ——————————————————————, s. 501—*Payment by one of several co-sharers owning estate subject to revenue to save sale—Limitation Act—XV of* 1877, *sched. II, arts.* 132, 99, 61 :

Where one of two or more co-sharers owning an estate subject to the payment of revenue to Government pays the whole revenue in order to save, and so does save the estate from liability to be sold by Government for realizing the arrears of revenue he is by operation of law entitled to a charge upon the share of each of his co-sharers for the realization of the latter's share of the revenue, as between the co-sharers. *Seshagiri* v. *Pichu*, (I.L.R., 11 Mad., 452), followed; *Achut Ramchandra Pai* v. *Hari Kamti*, (I.L.R., 11 Bom., 318); *Kinu Ram Das* v. *Mozaffer Hosain Shaha*, (I.L.R., 14 Calc., 809); and *Seth Chitor Mal* v. *Shiplal*, (I.L.R., 14 All., 273), dissented from. *Per* BHASHYAM AYYANGAR, J. (at the first hearing).—That the suit was governed by article 132 of schedule II to the Limitation Act in so far as it related to the enforcement of a charge. Assuming that the plaintiff had no charge on the defendant's share of the estate, the article applicable would be article 61 or article 99, bnt not article 120. Though a claim for contribution generally arises in cases where the party seeking contribution has himself paid the amount in respect of which contribution is sought, and though, in the present case, the arrear of revenue had not been paid to Government by the plaintiff, but had been realized by the Collector under the Revenue Recovery Act from the income of the plaintiff's share after it had been registered as a separate estate, plaintiff's right to claim contribution was not affected. Nor did that fact affect the application of article 99 or article 61 of schedule II of the Limitation Act, in both of which the person bringing the suit is referred to as having 'paid' the amount sought to be recovered. In such a case, it is but just that all should contribute in proportion towards a benefit obtained by all. It is immaterial whether the party seeking contribution made the payment voluntarily or involuntarily, namely, by payment to avert coercive process against his property or by the seizure of his property under process of law for realization of the amount. In either case he has been damnified and the parties against whom he seeks contribution have been benefited to that extent.

Rajah of Vizianagram v. *Rajah Setrucherla Somasekhararaz* 686

30. ——————————————————————, ss. 506, 522—*Reference to arbitration—Petition not joined in by all the parties to the suit—Legality of reference—Appeal :*

In a suit for partnership accounts two out of three defendants petitioned the Court under section 506 of the Code of Civil Procedure to refer the

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matters in dispute to arbitration. The representatives of the third defendant (who was then deceased) were not parties to the application, which was, however, granted. An award was made and a decree was passed in terms of it :—***Held***, that as the reference was illegal, and the award, in consequence, was void, an appeal lay against the decree notwithstanding that it was in conformity with what purported to be an award.

Indur Subbarami Reddy v. *Kandadai Rajamannar Ayyangar* 47

31. ——————————————————————, s. 521—*Petition by both parties requesting the District Munsif to examine site and peruse documents and agreeing to abide by his decision—Award—Appeal :*

In the course of a suit, in which plaintiff claimed an order directing defendant to close a doorway and an injunction, plaintiff and defendant jointly presented a petition requesting the District Munsif to inspect the site and peruse the documents filed in the suit and agreeing to abide by the decision which the Court might be pleased to pass, as the final decision. The District Munsif passed an order in terms of the petition and inspected the site and considered the documents, and ultimately passed a decree in plaintiff's favour. Against that decree, defendant appealed :—***Held***, that the District Munsif had acted as an arbitrator by consent of the parties, and no appeal lay from his decision, which must be looked upon as an award. And as no reasons had been shown for setting aside the award under section 521 of the Code, the decree must be taken to have been passed in accordance with the award, and, as such, upheld.

Nidamarthi Mukkanti v. *Thammana Ramayya* 76

32. ——————————————————————, s. 539—*Suit for declaration that the defendants were not dharmakartas of certain temples and for the appointment of trustees—No claim for temple property—Specific Relief Act—I of* 1877, *s.* 42—*Maintainability :*

A suit for the appointment of new trustees to a temple on the ground that the defendants are not the lawful trustees and that the trusteeships are therefore vacant, is a suit under section 539 (*a*) of the Code of Civil Procedure, being comprised in the words "whenever the direction of the Court is deemed necessary for the administration of such trust." *Bishen Chand Esawut* v. *Syed Nadir Hossein*, (L.R., 15 I.A., 10), relied on. Such a suit is not invalid under section 42 of the Specific Relief Act, by reason of the fact that no consequential relief is claimed, even if there be temple properties in the possession of the defendants as dharmakartas. Where a suit is maintainable under section 539 of the Code of Civil Procedure and the plaint seeks the relief specified in that section, section 42 of the Specific Relief Act does not apply. *Strinivasa Ayyangar* v. *Strinivasa Swami*, (I.L.R., 16 Mad., 31), distinguished. New trustees appointed under clause (*a*) of section 539 will be entitled to demand possession of the temple properties from the defendants in the suit whose title to administer the trust has been negatived by the decree, and, if such possession be not given, will be entitled to bring a suit to eject them from the temple and its endowments.

Keti Rama Jogiah v. *Venkatacharulu* 450

33. ——————————————————————, s. 556—*Counsel—Pleader—Dismissal of appeal for default—Appearance of appellants by pleader—Application for adjournment on ground of absence of counsel—Dismissal of appeal—No written judgment—Invalidity of order :*

On an appeal being called on for hearing in a District Court, the pleader for the appellants duly appeared, but asked for an adjournment. He did not withdraw from the case, but urged that, as the records were in possession of counsel retained to lead him and who was absent, he was unable to argue the appeal. The District Judge refused to grant an adjournment and dismissed the appeal :—***Held***, on appeal to the High Court,

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that though it was, no doubt, open to the Judge to refuse the adjournment, he was bound to write a judgment and dispose of the appeal. He could not dismiss it for default. The appeal was accordingly remanded to him to be heard. *Jamnadas Chhabildas* v. *Sorabji Kharsedji*, (I.L.R., 16 Bom., 27), followed.

Patinhare Tarkatt Rama Mannadi v. *Vellur Krishnan Menon* 267

34. ——————————————————, **s. 588 (28)**—*Appeal against order remanding case for disposal—Decision by Sub-Collector in summary suit under Rent Recovery Act—Remand by District Court—Appeal—Rent Recovery Act—VIII of* 1865, *s.* 69—"*Judgment*":

In a summary suit under the Rent Recovery Act, the Sub-Collector held a pattah to be improper and released certain property from attachment. On an appeal being preferred, the District Judge reversed the finding of the Sub-Collector and remanded the case, under section 562 of the Code of Civil Procedure, for disposal according to law. Plaintiff appealed to the High Court against the order of remand, when it was objected that no appeal lay:—*Held*, that an appeal lay. It was competent to the District Judge to make the order of remand under section 562 of the Code of Civil Procedure. The adjudication by the Collector was a formal expression of an adjudication on a right claimed, within the meaning of the definition of a decree contained in section 2 of the Code of Civil Procedure. It was also a formal expression of a right claimed in a Civil Court.

Veeraswamy v. *Manager, Pittapur Estate* 518

35. ——————————————————, **s. 622**—*Jurisdiction of High Court to entertain petition to revise order appointing manager—Religious Endowments Act—Act XX of* 1863, *s.* 5—*Vacancy in office of manager—Appointment by Civil Court:*

An order made by a Civil Court under the powers conferred by section 5 of the Religious Endowments Act is a Judicial adjudication in the matter before it, and it is competent to the High Court to entertain a civil revision petition against such an order. Before the jurisdiction which is conferred by section 5 of the Religious Endowments Act can be exercised by a Civil Court, there must be a vacancy in the office, there must have been a transfer to the former trustee and a dispute must have arisen respecting the right of succession to the office. The words in section 5, "any dispute shall arise respecting the right of succession," apply to a case in which a question has arisen with reference to the person who is to succeed to the office, and the jurisdiction of the Civil Court under the section is not confined to cases in which a dispute has arisen respecting the right to succeed to the office.

Gopala Ayyar v. *Arunachallam Chetty* 85

36. ——————————————————, **s. 622**—*Suit brought on the ordinary side of Court though maintainable on the Small Cause side—Revision by High Court—Jurisdiction:*

By an agreement between a landlord and his tenants, it was recited that the landlord had authorised his tenants to enjoy all his rights, and the tenants covenanted not to cut trees growing on the estate. The landlord's rights included the right to cut certain green trees for his own use and certain other green trees for agricultural purposes, as well as all trees planted by himself, at his option, and he was further entitled to take and use all decayed and fallen trees. The landlord sued the tenants to recover Rs. 20, being the value of trees which, it was alleged, the tenants had cut and taken away. The suit was instituted on the ordinary side of the Court of First Instance, and no objection was raised either there or on appeal, as to the competency of that Court to entertain it. The District Munsif passed a decree in plaintiffs' favour for a portion of the amount claimed, which was increased by Rs. 1-8-0 by the Subordinate Judge, on appeal. Upon a civil revision petition being filed in the High Court:—*Held*, that

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the suit was one for damages for breach of covenant and as such was cognizable by a Court of Small Causes, and that the Court in which it had been instituted had no jurisdiction to entertain it. *Held also*, that where it appears that the Court of First Instance, or of appeal, has exercised a jurisdiction not vested in it by law the High Court is bound to interfere under its revisional powers.

Ramasamy Chettiar v. *R. G. Orr* 176

CIVIL RULES OF PRACTICE—*Rule* 282—*Rules framed under Legal Practitioners Act—XVIII of* 1879—*Rule* 35—*Vakil's fee in suit for declaration:*

A suit for a declaration of right in respect of immoveable property is not a suit in which "the subject-matter of the claim does not admit of valuation" within the meaning of Rule 35 of the rules framed under the Legal Practitioners Act. Such a suit falls within Rule 31, and the fee to be allowed to a vakil engaged therein is limited to a sum not exceeding the maximum fee allowable in a suit for the possession of the same property.

Achuta Bhatta v. *Manjunathayya* 654

CONTRACT—TRANSFER OF LICENSE TO COLLECT FERRY CHARGES—*Validity as between renter and transferee where transfer is contrary to terms of license:*

Where, by the terms of a lease of a ferry, the renter should not transfer or sub-rent the ferry, but such a transfer or sub-lease is not prohibited by Statute, or by a Rule framed under a Statute, a transfer of it will be valid as between the renter and his transferee, though it may be invalid as against Government.

Abdula v. *Mammod* 156

CONTRACT ACT—IX OF 1872, s. 23—*Unlawful consideration—Void agreement—Maintainability of suit:*

Plaintiff, being the holder of a license issued under section 24 (*e*) of the (Madras) Abkári Act of 1886, entered into an agreement with the defendants that the latter should sell arrack in plaintiff's licensed shop and that plaintiff should supply the liquor to be sold. Rule 21 of plaintiff's license imposed a duty on plaintiff to obtain the sanction of the Collector in case he should sub-let. Neither plaintiff nor defendants obtained such sanction. On a suit being filed by plaintiff for a sum of money due under the agreement:—*Held*, that the agreement was illegal and that plaintiff could not sue on it.

Thithi Pakurudasu v. *Bheemudu* 430

2. ——————————————————, **s. 69**—*Person interested in making payment—Cost of daughter's marriage expenses defrayed by widowed mother—Claim against brother of the widow's late husband:*

The ceremonies of "Griha Pravesam" and "Ruthusanti" are essentially connected with the disposal in marriage of a girl of the Brahmin caste and form a part of the marriage ceremonies. A Hindu widow performed these ceremonies for her daughter and sued to recover their cost from her late husband's undivided brother:—*Held*, that she was entitled to recover. The expenses were legitimate marriage expenses, and plaintiff had the right to sue as she was the person who was interested in making the payment which the defendant was bound to make.

Vaikuntam Ammangar v. *Kallipiram Ayyangar* 497

3. ——————————————————, **s. 74**—*Penalty—Stipulation that interest shall be chargeable if instalments in repayment of principal be not paid at due dates—Applicability of Act VI of* 1899 *to suits filed prior to its coming into force:*

A stipulation in a bond that the principal sum shall be repaid by instalments on specified dates (no provision being made for interest) and that, on default of such payments of principal being made, interest shall be

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chargeable as from the date of the bond, is not in the nature of a penalty. *Semble*, that the Contract Act Amendment Act of 1899 does not apply to a suit filed prior to the date upon which it came into force.

Chinna Venkatasami v. *Pedda Kondiah* 445

4. ——————————, **s. 74—ACT VI OF 1899, s. 4**—*Stipulation for enhanced interest and for compound interest in case of default—Penalty :*

A bond stipulated for the payment, on a specified date, of half the principal sum advanced, together with interest at the rate of 15 per cent. per annum, and for the payment, on another date, of the balance of the principal, together with interest at the same rate. In case of default in the payment of either instalment it was provided that the whole amount of principal then due was to become payable, together with interest at the rate agreed, and compound interest on the whole amount at the rate of 24 per cent. per annum. Default was made, but the Subordinate Court awarded no compensation :—*Held*, that inasmuch as by section 74 of the Contract Act (as amended) the Court is to award reasonable compensation not exceeding the amount named in the contract, the Subordinate Court should find whether an addition of 9 per cent. was an unreasonable sum to allow as compensation, and, if so, what compensation should be allowed as reasonable for the non-payment of principal in the manner agreed upon; the stipulation for payment of compound interest being regarded as compensation for non-payment of interest alone and not for non-payment of principal.

Annamalai Chetty v. *Veerabadram Chetty* 111

5. ——————————, **s. 145**—*Implied promise by principal debtor to indemnify surety—Joint decree against two judgment-debtors—Satisfaction by one of them by execution of promissory note—Suit by him for contribution—Maintainability—"Sum paid under the guarantee" :*

Two persons jointly executed a negotiable promissory note payable to S for Rs. 1,000, each receiving Rs. 500 out of the consideration. S subsequently sued them on the note and obtained a decree against them jointly for Rs. 1,480, being the amount due under the note, costs, etc. That decree was executed as against one of them, namely, the present plaintiff, who gave S another promissory note (in which a third party joined), for the whole amount due under the decree, namely, Rs. 1,480, and obtained a receipt which showed that the last-mentioned promissory note was accepted by S as payment of the amount due under the decree. This note had not, at the date of the suit, been paid. Plaintiff now sued the other joint maker of the original promissory note for contribution :—*Held*, that he had no cause of action at the date of suit.

Putti Narayanamurthi Ayyar v. *Marimuthu Pillai* 322

CONTRIBUTION—*Suit against three defendants—Decree against all for payment of plaintiff's costs—Payment of entire costs by one defendant—Suit by him against his co-defendants for contribution—Maintainability :*

A, B and C, being defendants in a partition suit, were ordered to pay the costs of the plaintiff therein. A was impleaded because he held a mortgage which had been executed in his favour by B over a portion of the property. Upon a warrant of attachment being issued against A, he paid the whole amount due in respect of the costs, and now sued B and C for contribution :—*Held*, that he was entitled to contribution. *Fakire* v. *Tasadduq Husain*, (I.L.R., 19 All., 462), distinguished. *Merryweather* v. *Nixon*, (8 T.R., 186), commented on.

Shakul Kameed Alim Sahib v. *Syed Ebrahim Sahib* 373

2. ——————————*See* "CONTRACT ACT."

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CRIMINAL PROCEDURE CODE—ACT V OF 1898, s. 103 (1)—*Party called upon to attend and witness a search :*

A person was called upon by an Abkári Inspector to attend a search held under section 103 of the Code of Criminal Procedure, and did so. He, however, refused to sign the search list when it was prepared. On a charge being preferred against him under section 187 of the Indian Penal Code of intentionally omitting to assist a public servant in the execution of his duty :—*Held*, that the accused was not guilty of an offence under section 187. Assuming that a person called upon to attend and witness a search, under section 103 of the Code of Criminal Procedure, is under a legal obligation to attend the search and sign the search list, the "assistance" which a person is bound, by the earlier part of section 187 of the Penal Code, to render is *ejusdem generis* with the various forms of assistance referred to in the latter part of the section. It must have some direct personal relation to the execution of the duty by the public officer. The signing of the search list required by section 103, is an independent duty which is imposed on the witness, whereas the word "assistance," as used in the section, implies that the party who assists is doing something which, in ordinary circumstances, the party assisted could do for himself.

In the matter of Ramayya Naika 419

——————————, **s. 106**—*Order for security to keep the peace on convictions for offences not necessarily involving a breach of the peace—Validity :*

Certain accused were convicted of theft, of mischief and of being members of an unlawful assembly. They were sentenced to imprisonment and were further required to give security to keep the peace. There was no finding that a breach of the peace had been committed by them :—*Held*, on revision, that the order requiring them to give security for keeping the peace must be set aside, as none of the offences for which they had been convicted necessarily involved a breach of the peace. Whether such an order might be made in a case in which a person is not accused of an offence involving a breach of the peace, but there is nevertheless an express finding that a breach has been committed.—*Quære.*

Kannookaran Kunhamad v. *Emperor* 469

——————————, **ss. 112, 118, 144, 145**—*Notice to give security for three months—Order to give security for 12 months—Validity—Discretion to proceed under s. 107 or ss. 144 and 145 :*

Where a notice is issued under section 112 of the Code of Criminal Procedure to a defendant to show cause why he should not give security to be of good behaviour for three months, the Magistrate has no power to order security to be given for a longer period. Where a defendant is found by the Magistrate to be in possession of land about which a dispute occurs, the Magistrate is not bound to act under sections 144 and 145, but has a discretion to proceed either under section 107 or under sections 144 and 145 of the Code. *Dolegobind Chowdhry* v. *Dhanu Khan*, (I.L.R., 25 Calc., 559), distinguished.

Belagal Ramacharlu v. *Emperor* 471

——————————, **ss. 145, 526**—*Jurisdiction of High Court to transfer a case pending disposal under s. 145 :*

A case under section 145 of the Code of Criminal Procedure is a "criminal case," and the High Court has jurisdiction to transfer it, both under section 526 of the Code of Criminal Procedure and article 29 of the Letters Patent. Re *Pandurang Govind Pujari*, (I.L.R., 25 Bom., 179), not followed.

Arumuga Tegundan 881 178

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5. ——————————————————, s. 195—*Grant of sanction to prosecute—Failure to decide that a* primâ facie *case has been made out—Legality of sanction :*

Application was made to a Second-class Magistrate for sanction to prosecute a person on a charge of abetment of giving false evidence in a judicial proceeding. The Magistrate held an enquiry and examined three witnesses, and then refused to accord sanction. Application was then made to the Sub-Divisional Magistrate, who granted sanction. In doing so, he did not hold that a *primâ facie* case had been made out, or that there was a probability of securing a conviction. He expressed the view that it was essential that the truth of the matter should be threshed out and, for that reason, sanctioned the prosecution as that appeared to be the only course by which it could be decided whether or no the very serious offence charged had been committed :—*Held*, that this was no ground for granting sanction, or for setting aside the order of the Second-class Magistrate refusing sanction.

In re Venkatesa Ayyangar 193

6. ——————————————————, s. 195—*Petition to revoke sanction :*

A person whose prosecution had been sanctioned by a Sub-Magistrate petitioned the Special Assistant Magistrate for its revocation. The Special Assistant Magistrate declined to interfere, on the ground that as the Sub-Magistrate had had judicial evidence before him and had also held the necessary enquiry before granting sanction, the necessary conditions had been fulfilled and it was not for him, at that stage, to usurp the functions of a Court trying the petitioner for the offence :—*Held*, that it is the duty of the authority giving sanction, or upholding it, under section 195, to go into the merits of the application for sanction, with reference to the evidence before it, which is relied on as justifying the according of sanction. Unless there is sufficient *primâ facie* evidence and a reasonable probability of conviction, the Court giving the sanction or upholding it will not be properly exercising the discretion vested in it by law.

In re Paree Kunhammed 116

7. ——————————————————, s. 195—*Prosecution sanctioned by competent authority—Trial by another Magistrate in pursuance of sanction—Competency of Court to question propriety of sanction :*

Where sanction has been accorded under section 195 of the Criminal Procedure Code by a competent Court and a prosecution is instituted in pursuance thereof, it is not competent to the Court which is trying the case to question the propriety or legality of the sanction in respect of an offence of the kind mentioned in section 195, which is alleged to have been committed in any proceeding in the Court by which the sanction was granted.

In re Pachai Ammal 189

8. ——————————————————, s. 195—*Sanction to prosecute—Computation of the period of six months—Starting point—Date of original sanction and not of appellate order :*

The period of six months during which sanction to prosecute remains in force under section 195 (6) of the Code of Criminal Procedure is to be computed from the date of the original order granting sanction and not from that of a final order of an Appellate Court declining to revoke it.

In re Muthukudam Pillai 190

9. ——————————————————, s. 195 (*b*)—*Sanction for prosecution—Appeal against order according sanction—Disposal of appeal after expiration of six months from order according sanction—Application for extension of time "Good cause" :*

Sanction was accorded for a prosecution, and an appeal was preferred against the order, which was not disposed of until after the expiration of six months from the date of the order. Upon an application being made for an extension of time for the prosecution of the accused :—*Held*, that good cause had been shown for the extension.

Karuppana Servagaran v. *Sinna Gounden* 480

10. ——————————————————, ss. 195, 233 to 195—*Joinder of offences and accused—Preliminary enquiry—Power of Sessions Court to try offenders separately where jointly committed for trial—s. 195—Sanction to prosecute—Notice to accused—Necessity :*

The sections of the Code of Criminal Procedure which relate to joinder of charges (including section 239) refer to the trial of the accused. The ruling in *Subrahmania Ayyar* v. *Emperor*, (I.L.R., 25 Mad., 61), cannot be extended to a preliminary enquiry held by the Magistrate committing a case to a Sessions Court, so as to render the commitment itself illegal, because there was misjoinder of offences or of offenders. In such a case, the Sessions Judge, if he considers it necessary, can frame charges against and try the accused separately. There is no hard and fast rule that notice must be given in all cases to an accused person before sanction is accorded for his prosecution.

In the matter of Govindu 592

11. ——————————————————, ss. 195, 435—*Order by Sessions Judge staying proceedings pending reference to High Court for orders on proceeding relating to grant of sanction—Prosecution proceeding in Court outside jurisdiction of Sessions Judge—Legality :*

Sanction was accorded by a Second-class Magistrate in the Sessions Division of South Arcot, for the prosecution of A on various charges. A then applied to the Deputy Magistrate of Cuddalore (in the same Sessions Division) who confirmed the sanction. A charge was laid against A in the Court of a Second-class Magistrate in the Sessions Division of Chingleput. A, however, petitioned the Sessions Judge of South Arcot to revise the sanction and stay proceedings until its petition should be disposed of, and the Sessions Judge passed an order staying proceedings pending the disposal of the petition. On a criminal revision petition being presented to the High Court :—*Held*, that the order was *ultra vires*.

Shanmugam Chetty v. *Pennappa Mudaly* 137

12. ——————————————————, ss. 195 (7), 407 (2)—*Court to which appeals ordinarily lie—Refusal to accord sanction—Appeal to Magistrate who has been directed and empowered to hear appeals under section 407 (2) :*

A Magistrate who has been directed and empowered to hear appeals under the provisions of section 407 (2) of the Code of Criminal Procedure is not the "Court to which appeals ordinarily lie" within the meaning and for the purposes of section 195 (7) of the Code.

Eroma Variar v. *Emperor* 656

13. ——————————————————, ss. 233, 235—*Misjoinder of charges—Objection first taken on appeal—Same transaction :*

A person was convicted on three charges, namely :—(1) of abetting the falsification of a document (an account book), (2) of fraudulently destroying and secreting documents, and (3) abetting criminal breach of trust, no objection on the ground of misjoinder being taken before the Sessions Judge. The only manner in which the alleged falsification and destruction were connected was that the account book and the document were both in the custody of the accused, who thus had opportunity to falsify the one and to destroy the other. It was not suggested that the account book was falsified in order to conceal the fact that documents had been destroyed, or that documents had been destroyed in order to prevent the

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particular falsification from being detected:—*Held*, that the offences charged did not constitute one series of acts so connected together as to form the same transaction within the meaning of section 235 of the Code of Criminal Procedure. Also that the misjoinder could not be treated as an irregularity curable under the section 537, and that the conviction must be set aside. *Subramania Ayyar* v. *Emperor*, (I.L.R., 25 Mad., 61), followed.

Krishnasami Pillai v. *Emperor* 126

14. ——————————————————, s. 235—"*Same transaction*"—*Kidnapping of child and assault, at a later date, on mother—Conviction—Validity:*

An accused was charged and tried at one trial with the offences of kidnapping, wrongful confinement and assault, and convicted. The case for the prosecution was that the accused had kidnapped and wrongfully confined a boy, and that when the boy's mother, a day or two afterwards, went to the house of the accused and asked that the boy might be allowed to return to her, the accused assaulted the mother. The conviction was upheld by the Sessions Court. On a revision petition being preferred in the High Court:—*Held*, that the charge of assault ought to have been brought separately and tried separately. The kidnapping and the assault were not committed in one series of acts so connected together as to form one transaction. The offence of kidnapping is complete when the minor is actually taken from lawful guardianship, and it is not an offence continuing as long as the minor is kept out of such guardianship. Even assuming that on the facts of this case the process of "taking" or "enticing" was going on at the time of the alleged assault on the mother, it was doubtful whether the assault was one of a series of acts so connected together as to form the same transaction, and the charge of assault should have been brought and tried separately.

Chekutty v. *Emperor* 454

15. ——————————————————, ss. 250, 388 (2)—*Compensation in respect of vexatious complaint—Sentence of imprisonment on non-production of sureties and on complainant's plea of inability to pay—Legality:*

A Deputy Magistrate, having held that a complaint was vexatious, ordered the complainant to pay compensation under section 250 of the Code of Criminal Procedure. He recorded the following order:—"The complainant is unable to produce any sureties and pleads inability to pay the compensation. He is awarded 30 days' simple imprisonment." No attempt was made to levy the amount of the compensation:—*Held*, that the order was invalid whether it were passed under section 250 (2) or section 388 (2) of the Code of Criminal Procedure. Where an order to pay compensation has been made under section 250, the Magistrate cannot make an order for imprisonment on the mere intimation by the person who is directed to pay the compensation that he is unable to do so. Under section 388 (2), the issue of a warrant for the levy by distress of the amount awarded as compensation is a condition precedent to the carrying out of the sentence of imprisonment.

In the matter of Byravalu Naidu 127

16. ——————————————————, ss. 269, (3), 309—*Sessions Judge sitting with jury—Charges of theft and administering drug—Opinion of only two jurors taken as assessors on second charge—Validity:*

At the trial of an accused, before a Sessions Judge and a jury, for theft in a building (an offence triable by a jury) and for administering a noxious substance (an offence triable by assessors), the Judge took the verdict of the jury on the former charge, and took the opinion of only two of them (as assessors) on the latter:—*Held*, that, under sections 269 (3) and 309 of the Code of Criminal Procedure, the Judge should have taken the opinion of all the jury as assessors, on the latter charge, and that his failure to do so was not an "omission" or "irregularity" to which section 537 applied.

Ramakrishna Reddi v. *Emperor* 598

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17. ——————————————————, ss. 391, 407—*Sentence of whipping by Second-class Magistrate—Appeal—Application for postponement of sentence till hearing of appeal—Refusal—Validity:*

When a Second-class Magistrate passes a sentence of whipping only, without imprisonment, he has no power to postpone the execution of the sentence pending an appeal by the accused. It is only when whipping is added to imprisonment in an appealable case that the whipping may, and ought to be postponed under section 391 of the Criminal Procedure Code.

Meyyan v. *Emperor* 465

18. ——————————————————, ss. 418, 536—*Trial by jury for offence triable by jury—Verdict of acquittal—Opinion of jury of guilty in respect of offence not triable by jury—Conviction—Appeal on facts:*

Two persons were charged, as first and second accused, before a Court of Session, with robbery (under section 392 of the Indian Penal Code) and first accused was also charged with having caused grievous hurt in the course of the robbery (under section 397). Both offences are triable, and the accused were, in fact, tried by a jury, who, by their verdict, acquitted both of the accused of the charges framed under the sections referred to, but found first accused guilty of voluntarily causing grievous hurt—an offence which is triable, not by a jury but by assessors. The Sessions Judge acquitted both accused in respect of the charges under section 392 and section 397, but convicted first accused of having voluntarily caused grievous hurt, under section 325. Against that conviction first accused preferred this appeal, when it was objected that inasmuch as the trial had been held before a jury, the appeal lay on matter of Law only, and not on questions of fact:—*Held*, *per* BENSON, J., that the conviction of the first accused for causing grievous hurt was not one by a jury but by the Judge, who treated the finding of the jury in regard to the grievous hurt as the opinion of assessors. An appeal therefore lay on the facts, as in the case of *Muthusami Pillai* v. *Queen-Empress*, Criminal Appeal No. 215 of 1895, (unreported), and in *Empress* v. *Mohim Chunder, Rai*, (I.L.R., 3 Calc., 765). Per BHASHYAM AYYANGAR, J.—That the effect of section 238 of the Criminal Procedure Code is to invest a jury trying an offence triable by a jury with authority to find, as an incident to such trial, that certain facts only are proved in the trial, which facts constitute a minor offence, and return a verdict of guilty of such offence though such minor offence be not triable by a jury. And that a Sessions Judge may thereupon record judgment convicting the accused of such minor offence although he is not charged with it and tried on such a charge by the Sessions Judge with the aid of the jurors as assessors. The jury having found first accused guilty of causing grievous hurt and the Judge having given judgment convicting him of the same, an appeal lay only on a point of law, as the accused had been convicted in a trial by jury.

Pattikadan Ummaru v. *Emperor* 243

19. ——————————————————, s. 423—*Power to "reverse the finding and sentence"—Reversal by Deputy Magistrate of an order acquitting accused on a charge of theft—Validity:*

A Deputy Magistrate has no power, under section 423 of the Code of Criminal Procedure, to reverse an order acquitting an accused person of a charge of theft. The words "reverse the finding and sentence" in clause 1 (*b*) of that section mean reverse the finding upon which a conviction is based, and do not empower the appellate tribunal (or at any rate an appellate tribunal other than the High Court) to reverse or set aside an acquittal. *Queen-Empress* v. *Jahanulla*, (I.L.R., 23 Calc., 975), explained.

Sami Ayyar v. *Emperor* 478

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interfere, under section 439. The reasons for the decision in *Queen-Empress* v. *Srinivasulu Naidu*, (I.L.R., 21 Mad., 124), are not applicable to the amended Code.

Eranholi Athan v. *King-Emperor* 98

26. ——————————, s. 528—*Order by Sub-Divisional Magistrate transferring case from one Sub-Magistrate to another—Order by District Magistrate cancelling that order and re-transferring the case—Legality :*

A District Magistrate has no power to cancel an order made by a Sub-Divisional Magistrate directing the transfer, under section 528 of the Criminal Procedure Code, of a case from the file of one Sub-Magistrate to that of another Sub-Magistrate, and to direct the re-transfer of the case to the file of the Sub-Magistrate from whom it was transferred.

Raghunatha Pandaram v. *Emperor* 130

27. ——————————, s. 528—*Power of District or Sub-Divisional Magistrate to transfer a criminal case from the file of a Village Magistrate—Extent of power—Petty thefts triable under Regulation IV of* 1821 :

The jurisdiction which a District or Sub-Divisional Magistrate has, under section 528 of the Code of Criminal Procedure, to transfer a criminal case from the file of a Village Magistrate is limited to the cases (namely those relating to petty thefts) which a Village Magistrate is empowered by Regulation IV of 1821 to try and punish.

Sevakolandai v. *Ammayan* 394

28. ——————————, s. 531—*Proceedings in wrong place :*

Section 531 of the Code of Criminal Procedure applies to a case where a Magistrate who has authority to commit a case for trial, does so, but has not territorial jurisdiction in the place where the offence to be tried is alleged to have been committed.

Rayan Kutti v. *Emperor* 640

29. ——————————, s. 552—*Order for restoration of possession of immoveable property—Conviction of accused on charge of criminal trespass—No finding of use of criminal force—Legality of order for restoration :*

Certain persons were convicted of having committed criminal trespass on a piece of land, under section 447 of the Indian Penal Code. There was no finding that they had used criminal force, or that the complainant had been dispossessed of the land by such force. An order was subsequently made, which purported to be under section 522 of the Code of Criminal Procedure, directing the accused to restore possession of the land. On a revision petition being preferred against this order :—*Held*, that as there was no finding that criminal force had in fact been used, or that complainant had been dispossessed of the land by it, and as criminal force was not an ingredient of the offence for which the accused had been convicted, the order was made without jurisdiction.

In re Batakala Pottiavadu 49

DARKHAST RULES—*Grants of house-sites—Grant by Tahsildar—Appeal to Divisional officer—Failure to reverse grant—Validity of grant :*

By the Darkhast rules, as amended in 1894, an appeal is provided to a Divisional officer from the orders of a Tahsildar in respect of grants of building-sites. A Tahsildar passed an order granting an application for a building-site, and an appeal was preferred therefrom to the Sub-Collector

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(the Divisional officer). This officer apparently referred the appeal to the Collector, who passed an order annulling the grant. The Collector's order was sent to the Divisional officer, who communicated it to the Tahsildar. On a suit being instituted by the applicant for a declaration of his title to the land :—*Held*, that he had acquired a good title. The appeal lay to the Sub-Collector, who had exercised no discretion with reference to the question which came before him on appeal. He had not dealt with the appeal, or made any order thereon. No authority had been cited to show that in matters not dealt with by the regulations, the Collector has a revisional power similar to that given to him by the regulations in matters dealt with therein ; and that the Collector's order on appeal to the Sub-Collector ought to be regarded as an order made by the Collector in the legal exercise of his revisional powers. The result was that the order of the Tahsildar granting the title had not been legally set aside, and the plaintiff had acquired a good title by virtue of the grant duly made by the Tahsildar.

Sappani Asari v. *The Collector of Coimbatore* 742

2. ——————————21 & 22 VICT., CAP. 106 ; 22 & 23 VICT., CAP. 41—32 & 33 VICT., CAP. 29—33 & 34 VICT., CAP. 59—*Crown Grants Act (India)* 1895, *s.* 2 :—*See* "SETTLEMENT REGISTER."

DISTRICT MUNICIPALITIES ACT—(MADRAS) ACT IV OF 1884 AS AMENDED BY (MADRAS) ACT III OF 1897, s. 269—*Money due as tax, fee, toll or other payment—Money due on toll-contract—Applicability of section :*

Money due under a contract entered into with a Municipality for the right to collect tolls in consideration of a money payment does not fall within any of the provisions of section 269 of the District Municipalities Act, 1884, and a contractor who fails to pay what is due under such a contract cannot be convicted and fined under that section.

Abdul Azeez Sahib v. *Cuddapah Municipality* 475

EASEMENTS ACT—V OF 1882, s. 13—*Purchase of land by Government at sale for arrears of revenue—Right of irrigation by way of easement—Assessment of ryots in occupation :*

In 1846, certain villages, forming part of a zemindari, were brought to sale by Government for arrears of revenue, and bought by Government. The wet lands in these villages were irrigated by a tank in another village, which also formed part of the zemindari, but was not included in the sale. The Zemindar had himself occupied the wet lands prior to the sale, and continued his occupation thereafter, as a ryot under Government. At a date prior to 1866, the Zemindar sold his interest in the land, and at the settlement which took place in that year, his vendee was assessed with a consolidated wet rate on it. In 1869, the Head Assistant Collector directed that the Zemindar should be credited, yearly, with the difference between the consolidated wet rate and the dry rate. In doing this he acted without the authority of Government. In 1894, the Board of Revenue directed that no portion of the assessment should be credited to the Zemindar, who now sued for a declaration of his right, and for the amount since collected :—*Held*, that the melvaram right in the villages passed, by the sale, to the Government, who were entitled, by way of easement, to have the lands irrigated from the then existing source of irrigation, and to levy wet assessment on them. That the action of the Settlement department in assessing the consolidated wet rate was right, and that plaintiff was not entitled to the difference between the wet and dry assessment :—*Held also*, that the action of the Head Assistant Collector was beyond the scope of his authority, and not binding on the Government, who had neither authorized nor ratified it.

Raja Suraneni Venkata Papayya Rau v. *The Secretary of State for India in Council* 51

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2. ————————————, s. 13 (*c*)—*Grant of village as inam—Right to water for irrigation—Area under wet cultivation at time of grant subsequently increased—Claim by inamdar for proportionate increase of water for irrigation :*

In 1859 a village with land comprising 339 acres was granted by Government, as inam, to plaintiff. At the time of the grant, 106·09 acres were under wet cultivation, the remainder being poramboke, prior minor inams and land under dry cultivation. The area of land under wet cultivation was subsequently increased, and plaintiff claimed to be entitled to water for the irrigation of this increased area without paying assesment thereon, and in 1870, the Collector of the district permitted that increase. Plaintiff had now been assessed in respect of the increased area, and brought this suit for a declaration of his right and for a refund of the money paid by him under protest :—*Held*, that plaintiff was entitled, under section 13 (*c*) of the Easements Act, to irrigate 106·09 acres, and no more. *Also*, that the action of the Collector in 1870 was unauthorised and had not been subsequently ratified by Government, and was not binding on Government.

Chidambara Rao v. *The Secretary of State for India in Council* 66

ENFRANCHISEMENT OF INAM SERVICE LAND IN NAME OF OFFICE-HOLDER—*Hindu Law—Effect of enfranchisement—Liability to partition :*

Three items of land, numbered 5, 6 and 7, were originally village service inams having been annexed by the State as emoluments to the office of karnam in a ryotwari village. R, the father of plaintiff and first defendant and grand-father of second defendant, in March 1889, established his right, as the heir to the late encumbent, to this office of karnam, and the lands were, in November 1889, ordered to be delivered to R, and were actually deliverd to him in December 1889. Before the actual delivery, R applied that the lands might be registered and a title-deed be issued in his name, as the Government were taking steps to enfranchise service inams in the district, and the Inam Commissioner, in November 1889, notified to R, that his name was included in the register. In January 1890, second defendant's father, the eldest son of R, died and in February 1890, R resigned the office of karnam in favour of his grandson, second defendant, who was duly appointed by the Collector. Item No. 5 was enfranchised and a title-deed issued to and in the name of R. The Inam Commissioner, in 1891, passed an order that items 6 and 7 had been "resumed and fully assessed." R had died at a date prior to this, and second defendant was holding the office. On a suit being instituted by plaintiff for partition :—*Held*, *per* BHASHYAM AYYANGAR, J.—That when a personal inam is enfranchised by the imposition of a quit-rent, the resumption by Government simply consists of so much of the assessment or melvaram as is equal to the quit-rent, neither the land nor the assessment in excess of the quit-rent being resumed. Similarly, the enfranchisement of a service inam does not operate as a resumption and fresh grant by Government subject to the payment of a quit-rent, any more than it is so in the case of the enfranchisement of a personal inam. It stands on the same footing so far as the family in which the village office is hereditary is concerned. The enfranchisement only converts the inam into ordinary property. *Narayana* v. *Chengalammal*, (I.L.R., 10 Mad., 1), followed; *Venkata* v. *Rama*, (I.L.R., 8 Mad., 249), explained; *Dharnipragada* v *Kadamabari*, (I.L.R., 21 Mad., 47); and *Venkatarayadu* v. *Venkata Ramayya*, (I.L.R., 15 Mad., 284), dissented from. *Per* MOORE, J.—Even assuming item No. 5 to be the self-acquisition of R, according to *Dharnipragada* v. *Kadambari*, (I.L.R., 21 Mad., 47), and *Venkatarayudu* v. *Venkata Ramayya*, (I.L.R., 15 Mad., 284), the plaintiff was entitled as his son to his share. As to items 6 and 7, there was no enfranchisement and no fresh grant or title-deed in favour of second defendant. They were liable to partition and it was unnecessary, therefore, to decide whether *Narayana* v. *Chengalammal*, (I.L.R., 10 Mad., 1), or *Dharnipragada* v. *Kadambari*, (I.L.R., 21 Mad., 47), and *Venkatarayadu* v. *Venkata Ramayya*, (I.L.R., 15 Mad., 284), were correctly decided. *Venkata* v. *Rama*, (I.L.R., 8 Mad., 249), explained. *Per curiam*, that items 5, 6 and 7 were liable to partition.

Gunnaiyan v. *Kamakchi Ayyar* 339

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EVIDENCE ACT—I OF 1872, s. 24—*Confession caused by promise—Village Magistrate—Person in authority—Appeal from conviction by Jury—Misdirection :*

Two days after a dacoity had been committed in a certain village, T went to the Village Magistrate of that village, who was enquiring into the dacoity and requested him to report that T had not been concerned in the dacoity. The Village Magistrate replied that there was already a hue and cry against T. but that if T spoke the truth he would consult the Head constable and arrange that T should be taken as a witness. T at first denied all knowledge of the dacoity, but ultimately made a confession. T was charged, with others, with having committed the dacoity, and this confession was deposed to by the Village Magistrate. The Sessions Judge, in his charge to the Jury, made no reference to the relevancy or otherwise of the confession under section 24 of the Evidence Act, and he said that if the confession was true it was enough to warrant the conviction of the accused. The Jury returned a verdict of guilty, and the accused was sentenced. On an appeal being preferred on the ground of misdirection :—*Held*, that the Village Magistrate was a person in authority within the meaning of section 24 of the Evidence Act, and that as the arrangement promised by him before the confession was made was obviously intended to be one that would save the accused from prosecution if he would confess, the confession was irrelevant under that section. *Also*, that the misdirection was a material and important one, likely to lead to an erroneous verdict, and that a new trial must take place.

Thandraya Mudaly v. *Emperor* 38

2. ————————————, s. 92, proviso 4—*Registered document—Subsequent oral agreement—Contract Act—IX of 1872, s. 63—Remission of portion of promise—Discharge in full on receipt of portion of amount due—Evidence of oral agreement :*

In a suit for two years' rent, due under a registered lease, defendant pleaded a subsequent oral agreement by plaintiff to remit a portion of the rent each year, and filed a receipt by which plaintiff accepted payment at the reduced rate in full discharge in respect of one of the years :—*Held*, that though under proviso 4 to section 92 of the Evidence Act, evidence of such an agreement was inadmissible and plaintiff was entitled to claim rent at the rate stipulated in the registered lease, the discharge for one of the years was valid, under section 63 of the Contract Act, and took effect. It was immaterial that the discharge had been given in pursuance of the alleged oral agreement, which, though not admissible in evidence, was not illegal.

Karampalli Unni Kurup v. *Thekku Vitlil Muthoraikutt* 195

3. ————————————, s. 155 (3)—*Statements previously made by witnesses—Inadmissibility as substantive evidence :*

Two persons made statements to the effect that C and another had robbed them and caused hurt while doing so. One statement was made to their employer, and the other to the Head Constable. C was subsequently charged and these two persons were called as witnesses for the prosecution, but they then denied that C was one of the men who had assaulted them. Their previous statements were filed, but neither the employer nor the Head Constable was called to depose to the terms of the statements which the witnesses were said to have made :—*Held*, that the former statements referred to, and which implicated the accused, could be used only under section 155 (3) of the Evidence Act for discrediting their evidence and not as substantive evidence against the accused.

Emperor v. *Cherath Choyi Kutti* 191

EXTRADITION ACT—XXI OF 1879, ss. 4 and 6—*Criminal Procedure Code, s. 4—Indian Penal Code, s. 40—Offence—Jurisdiction of Magistrate in Mysore to try and convict an European British subject for an act amounting to an offence under the Mysore law, but not an offence under the Indian Penal Code :*

An European British subject was charged and tried before, and convicted by, a First-class Magistrate and Justice of the Peace appointed, under

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the Extradition Act, 1879, in and for the territories of Mysore. The act for which he was so tried and convicted (namely being in possession of mining materials) constituted an offence under the Mysore Mines Regulation, but was not an offence under the Indian Penal Code. It was contended, in revision, in the Madras High Court that the conviction was wrong on the ground that a Justice of the Peace appointed under the Extradition Act has no authority to deal with an offence committed by an European British subject against a law of the Mysore State:—*Held*, that the Magistrate had power to try the accused, or to commit him for trial in the Madras High Court. *Per* Sir ARNOLD WHITE, C.J.—Section 8 of the Act of 1879 extending to European British subjects in States in India in alliance with His Majesty the law relating to offences and to criminal procedure for the time being in force in British India ought not to be read so as to restrict the powers of the Governor-General which are declared by section 4 and which may be delegated to his officers under section 6. The word "offences" as used in section 6 of the Act of 1879 is not restricted to offences as defined by section 40 of the Indian Penal Code. Nor is it restricted to any definition of "offence" to be found in the Code of Criminal Procedure, although, as a matter of fact, the present definition of "offence" in the Code of Procedure [section 4 (o)], which is the same as that contained in the General Clauses Act, is sufficiently wide to include the wrongful act with which the accused in the present case was charged.

Adams v. *Emperor* 607

FEES:—*See* "CIVIL RULES OF PRACTICE."

FOREST ACT—(MADRAS) ACT V OF 1882, s. 21 (*a*)—"*Clearing*"—*Removal of trees or shrubs—Conviction where no evidence of such removal—Validity:*

The word "clearing" as it is used in section 21 (*a*) of the Madras Forest Act of 1882, means something in the nature of the removal of trees or shrubs. Certain accused were convicted of an offence under the section, but there was no evidence on the part of the prosecution to show that there had been any removal of trees or shrubs by the accused, or that cultivation of the land in question could not have been carried on without such removal:—*Held*, that there was no evidence that the accused had committed an act prohibited by section 21.

Emperor v. *Venkanna Prabhu* 470

GRANT—*Construction of grant—Grant, whether for maintenance only or for an estate of inheritance—Intention as shown by documents—Partition by grantees on assumption that grant conferred an hereditary estate:*

On a question as to whether a grant of lands made in 1844 out of the zamindari of Nidadavolu to collateral members of his family was a maintenance grant only and therefore resumable, or whether it conferred an estate of inheritance, it appeared that the grantees held other lands on what was admittedly a permanent tenure, and that of the latter lands and the lands granted in 1844 they had in 1846 made a partition "through and in the presence of the zamindar," and on the assumption that all the lands were held on an absolute and permanent tenure. The Judicial Committee (reversing the decision of the High Court) held, on the construction of the documents evidencing the grant, and under the circumstances of the case, that it conferred an hereditary estate and that the title was completed by the partition.

Rajah Bahadur Garu v. *Parthasaradhi Appa Rau* 202

HINDU LAW—*Adoption—Authority of husband to his wife to adopt—Adoption in pursuance of it—Death of son so adopted—Subsequent adoption by widow with assent of some sapindas—Validity:*

A husband authorized his wife to adopt a son and died. The widow adopted a son in pursuance of that authority but the son also died. The widow adopted a second time. Both adoptions were made with the assent

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of some sapindas; but the assent to the second adoption was of questionable validity:—*Held*, that the husband's authority was not exhausted by the first adoption, and held good for the second adoption also, which was valid for that reason independently of the assent of the sapindas. *Semble*, that where some sapindas signed a document assenting to an adoption by a widow of "any boy at any time" which was not acted on for nine years, during which period circumstances materially changed, the assent so given would not be valid.

Suryanarayana v. *Venkataramana* 681

———*Adoption by widow—Consent of sapinda—Exercise of discretion—Effect of representation by widow that her husband had given authority when none had in fact been given—Effect of asking consent of one of two sapindas of equal degree:*

Where a widow obtains the assent of a sapinda to an adoption by representing that her late husband had authorized it when in fact he had not, such assent is inefficacious in law. The assent of a sapinda to an adoption to be made by the widow of a deceased kinsman should be given by him in the exercise of his discretion as to whether the adoption ought or ought not to be made by a widow who has not received her husband's authority to make the adoption. A widow whose late husband had died without giving her authority to adopt a son, applied for such authority to one of two sapindas of equal degree, who were divided as between themselves and who were both divided from the deceased. This sapinda (who was the senior) gave his assent to the adoption. The other was not asked. On a suit being brought for a declaration that the adoption was invalid, it was argued that though the assent of the other sapinda had not been asked for at or about the time of the adoption, it must be taken that his assent had been applied for and refused, inasmuch as the circumstances and the attitude he had assumed showed that he would have refused to give it:—*Held*, that the adoption was invalid. If it was the widow's duty to seek the assent of both sapindas, she could not be regarded as having discharged her duty, because, in her opinion, such an application would have been made in vain. The object of enjoining a widow to seek and act under the guidance of her husband's sapindas would be defeated if she should omit to give an opportunity to the sapindas concerned to advise her against making an adoption or against adopting a particular boy. If such an assent had been applied for and had been refused, and the adoption had then been made on the assent of one sapinda, the Court would have been in a position to decide whether consent had been withheld properly or improperly and capriciously. But it was clear that in this case the widow had been determined to ignore the other sapinda, and not to care for his advice or even to give him an opportunity to advise her. There is nothing improper in a sapinda proposing to give his assent to a widow adopting his own son, if such son be the nearest sapinda, and refusing to give his assent to her adopting a stranger or a distant sapinda if there be no reasonable objection to the adoption of his own son. In the case of an undivided family, it may be that the assent of the senior sapinda, having the status of managing member, will be equivalent to the assent of the family and will be sufficient. But this consideration has no application to cases where the assent has to be sought from divided kinsmen, especially when they are divided as between themselves.

Subrahmanyam v. *Venkamma* 627

———*Alienation by one of two co-widows—Effect on the inheritance and on the interest of the alienor:*

Though one of two co-widows, who is not the managing member on behalf of both, cannot charge the inheritance, even where the transaction is for the benefit of the estate, an alienation by her will bind her own interest in the property during her life-time.

Vadali Mamidigadu v. *Kotipalli Ramayya* 334

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4. ———*Contract for sale of land by one of three brothers—Allegation in plaint that vendor was managing member—No allegation of authority or ratification by others—Suit for specific performance against all—Cause of action :*

A plaint alleged that first defendant, as managing member of an undivided family consisting of the three defendants, had entered into a contract to convey certain land to plaintiff and had placed him in possession thereof after receiving a sum of money in part payment. There was no allegation that the other defendants were parties to the contract, or that they had authorized the first defendant to enter into it or that they had ratified it. The plaint claimed specific performance of the contract as against all the defendants :—*Held*, that it disclosed no cause of action as against the second and third defendants and that (the allegations in the plaint having been proved as against first defendant) plaintiff was entitled to a decree for specific performance against first defendant, without determining whether the sale by him would or would not bind the interests of the other defendants in the property.

Kosuri Ramaraju v. *Ivalury Ramalingam* 74

5. ———*Degradation of daughter on account of incontinence—Effect on her right to inherit the stridhanam property of her mother :*

Under the Hindu Law, the degradation of a daughter on account of incontinence does not put an end to her right to inherit the stridhanam property of her mother :—*Semble*, that the same rule is applicable when the question involved is the right of inheritance to the property of the father.

Angammal v. *Venkata Reddy* 509

6. ———*Exclusion from inheritance—Lameness of a member of an undivided family—Effect on right of inheritance :*

Lameness which is not congenital, is no bar to the right of inheritance which a member of an undivided Hindu family ordinarily possesses. Whether lameness which is congenital would be a bar—*Quære*.

Venkata Subba Rao v. *Purushottam* 133

7. ———*Legitimate marriage expenses—Ceremonies of Griha Pravesam and Ruthusanti—Contract Act—IX of* 1872, *s.* 69—*Person interested in making payment—Cost of daughter's marriage expenses defrayed by widowed mother—Claim against brother of the widow's late husband :*

The ceremonies of "Griha Pravesam" and "Ruthusanti" are essentially connected with the disposal in marriage of a girl of the Brahmin caste and form a part of the marriage ceremonies. A Hindu widow performed these ceremonies for her daughter and sued to recover their cost from her late husband's undivided brother. In a previous case between the same parties it had been decided that the defendant was liable to be charged with the expenses of the marriage of the plaintiff's daughter :—*Held*, that plaintiff was entitled to recover the cost of these two ceremonies. The expenses were legitimate marriage expenses, and plaintiff had the right to sue as she was the person who was interested in making the payment which the defendant (under the decision referred to) was bound to make.

Vaikuntam Ammangar v. *Kallipiram Ayyangar* 497

8. ———*Liability of enfranchised inam service lands to partition* :—*See* "ENFRANCHISEMENT."

9. ———*Liability of father to get his daughter married :*

Under the Hindu Law, a father is under no legal obligation to get his daughter married. *Vaikuntam Ammangar* v. *Kallipiram Ayyangar*, (I.L.R., 23 Mad., 512), explained. Where a wife expended money on her daughter's marriage and then sued her husband for the amount so expended :—*Held*, that she was not entitled to recover.

Sundari Ammal v. *Subramania Ayyar* 505

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10. ———*Mirasi rights attached to Devastanams—Suit against office-holder—Compromise consenting to sale of office and its emoluments—Decree in terms of compromise—Execution proceedings—Invalidity of compromise opposed to public policy—Right of Court to refuse to execute :*

The sale of an office attached to a temple, involving services of a personal nature and entitling the holder of it to receive emoluments, is against public policy and will not be recognised or enforced by the Courts. The holder of such an office was sued by a person to whom he had mortgaged his right to the office, together with other property, and a compromise was arrived at, by the terms of which the office-holder agreed that his right to the office and to its emoluments should be sold in satisfaction of the mortgage debt. A decree was passed in terms of the compromise and the decree-holder sought to have the right to the office sold in execution of that decree and contended, (on objection being raised), that inasmuch as a decree had been passed directing the sale of the office, the Court executing the decree was not at liberty to consider its validity but must execute it according to its terms :—*Held*, that as the decree was based on an agreement of compromise, and the Court had merely adopted the contract, the Court must be taken to have adopted it with all its incidents. By section 375 of the Code of Civil Procedure the Court had no jurisdiction to pass a decree on a compromise unless it was a lawful compromise. Any terms of a contract which are opposed to public policy are invalid and will, therefore, not be enforced by the Courts, and so far as a decree embodies unlawful terms of a compromise it is inoperative and will not be enforced. *Nagappa* v. *Vencata Rau*, (I.L.R., 24 Mad., 265), referred to.

Lakshmanaswami Naidu v. *Rangamma* 31

11. ———*Mortgage of family property by senior member—Decree against mortgagor—Purchase under that decree—Suit for partition of property among the co-parceners—Recognition of debt as binding on co-parceners—Suit by purchaser for possession—Evidence of award in partition insufficient as showing necessity for original mortgage :*

An undivided Hindu family consisted of A, his three sons and his nephew. A mortgaged family land while the nephew was a minor. The mortgagee filed a suit and obtained a decree on the mortgage, in execution of which the land was put up for sale and purchased by plaintiff. The nephew was not made a party to that suit. A died, whereupon the nephew instituted a suit for partition against A's sons ; plaintiff was not a party to that suit. The matters in dispute therein were referred to arbitrators, who held that the mortgage which A had executed was binding on the nephew and charged his share with a half of it. They also awarded the nephew certain land, being part of the land which had been purchased by plaintiff. Plaintiff now sued to recover the land so awarded to the nephew, but adduced no evidence to show that the mortgage executed by A was binding on the nephew, beyond proving the award by the arbitrators :—*Held*, that though the decree which had been passed in accordance with the award of the arbitrators in the partition suit was binding as between the nephew and the other members of the family, it could not be used in the present suit as evidence that the debt was for a family purpose binding on the nephew. And that, there being no other evidence, the suit failed.

Krishna Reddi v. *Thambu Reddi* 28

12. ———*Payment by one of several co-sharers owning estate subject to revenue to save sale—Charge on share of co-sharers—Contribution—Transfer of Property Act—IV of* 1882, *ss.* 82, 100—*Revenue Recovery Act—II of* 1864, *ss.* 2, 82, 42—*Civil Procedure Code—Act XIV of* 1882, *s.* 501—*Statutory application of general principle of equity to particular cases—Limitation Act—XV of* 1877, *sched. II, arts.* 132, 99, 61 *:*

Where one of two or more co-sharers owning an estate subject to the payment of revenue to Government pays the whole revenue in order to save, and so does save, the estate from liability to be sold by Government for realising the arrears of revenue, he is by operation of law entitled to a

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charge upon the share of each of his co-sharers for the realization of the latter's share of the revenue, as between the co-sharers. *Seshagiri* v. *Pichu*, (I.L.R., 11 Mad., 452), followed; *Achut Ramachandra Pai* v. *Hari Kamti*, (I.L.R., 11 Bom., 318); *Kinu Ram Das* v. *Mozaffer Hosain Shaha*, (I.L.R., 14 Calc., 809); and *Seth Chitor Mal* v. *Shib Lal*, (I.L.R., 14 All., 273), dissented from. Per BHASHYAM AYYANGAR, J.,(at the first hearing).—That the suit was governed by article 132 of schedule II to the Limitation Act in so far as it related to the enforcement of a charge. Assuming that the plaintiff had no charge on the defendant's share of the estate, the article applicable would be article 61 or article 99, but not article 120. Though a claim for contribution generally arises in cases where the party seeking contribution has himself paid the amount in respect of which contribution is sought, and though, in the present case, the arrear of revenue had not been paid to Government by the plaintiff, but had been realized by the Collector under the Revenue Recovery Act from the income of the plaintiff's share after it had been registered as a separate estate, plaintiff's right to claim contribution was not affected. Nor did that fact affect the application of article 99 or article 61 of schedule II of the Limitation Act, in both of which the person bringing the suit is referred to as having "paid" the amount sought to be recovered. In such a case, it is but just that all should contribute in proportion towards a benefit obtained by all. It is immaterial whether the party seeking contribution made the payment voluntarily or involuntarily, namely, by payment to avert coercive process against his property or by the seizure of his property under process of law for realization of the amount. In either case he has been damnified and the parties against whom he seeks contribution have been benefited to that extent.

Rajah of Vizianagram v. *Rajah Setrucherla Somasekhararaz* 686

13. ———*Rights of unsecured creditors by way of charge or lien on the inheritance—Position of legal representative—Distribution of assets:*

The unsecured creditors of a deceased Hindu have no charge or lien on the inheritance. If payments are not made by the heir rateably, it does not follow that he has failed to apply the assets duly. Every payment on account of a debt is perfectly lawful irrespective of its effect upon the other creditors, and is a due application of the assets within the meaning of section 252 of the Code of Civil Procedure. There is no analogy between the case of an executor who is governed by the special provisions of the Succession Act and that of a legal representative under the Hindu Law with reference to the question of the distribution of the assets among creditors. Where property of a deceased remains in the hands of the legal representative, it does not necessarily follow that a creditor is entitled to proceed against it as assets in the hands of the legal representatives. The question to be considered is the real effect of what has been done, and where payments have been made by the legal representative to the extent of the full value of the property of the deceased which has come into his hands, a decree cannot be executed even although he may still have in his possession property which originally belonged to the deceased.

Veerasokkaraju v. *Papiah* 79

14. ———*Suit for partition—Evidence that the joint property had been leased—Available for partition—Maintainability of suit:*

In the course of the hearing of a suit for partition brought by one of several joint shrotriemdars against the rest, it transpired that the lands of which partition was sought had, a few years before suit, been let on lease for a period of twenty-four years:—*Held*, that this was no ground for rejecting the suit. Delivery of the lands which might be found to be in the possession of tenants could be given under section 264 of the Code of Civil Procedure.

Uppala Raghava Charlu v. *Uppala Ramanuja Charlu* 78

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15. ———*Suit on promissory note executed by mother of a minor as his guardian in respect of a debt for which the minor's share in the ancestral estate was liable—Liability of minor to the extent of his share in the ancestral estate:*

The mother of a minor executed, as his guardian, a promissory note in respect of a debt for which the son's share in the ancestral estate was liable at the time. On a suit being brought against the minor on the note:—*Held*, that the defendant was liable on the note to the extent of his share in the ancestral estates. *Bachubai* v. *Shamji Jadowji*, (I.L.R., 9 Bom., 551), and *Indur Chunder Singh* v. *Radhakrishore Ghose*, (I.L.R., 19 Calc., 507), distinguished.

Subramania Ayyar v. *Arumuga Chetty* 380

16. ———*Widow's estate—Alienation by widow—Subsequent adoption—Right of adopted son to claim property alienated—Limitation—Act XV of* 1877, *sched. II, art.* 144:

Where a Hindu widow alienates part of the immoveable property belonging to her husband's estate and then adopts a son, the son cannot sue to recover possession of the property until the termination of her widowhood. Where such a suit is brought during the widowhood it is governed by article 144 of schedule II to the Limitation Act, and the starting point for the period of limitation is the date of the adoption. If the alienation is for a necessary purpose, the adoption does not divest the alienee, and the adopted son succeeds only to the remaining portion of his adoptive father's property. If the alienation is not for a necessary purpose, the subject of the alienation is severed from the inheritance only during the widowhood, and the remainder therein vests, at the moment of adoption, in the adopted son, as a vested remainder to fall into possession at the termination of the widowhood. Observations by BHASHYAM AYYANGAR, J., on the effect of an alienation by a Hindu widow.

Sreeramulu v. *Kristamma* 143

INCOME TAX ACT—II OF 1886, s. 30—*Sale of property for arrears of tax—*Lispendens*—Purchase at sale for arrears of income tax—Subsequent sale in execution of prior mortgage decree—Duty of purchaser at revenue sale to pay amount due under mortgage and prevent sale in execution—Civil Procedure Code—Act XIV of* 1882, *s.* 368.

Plaintiff, as the assignee of a mortgage executed by the father of first defendant, sued the mortgagor, in 1894, on the mortgage. During the pendency of the suit, and before the decree in it was passed, the mortgagor died. Plaintiff thereupon brought the first defendant on the record as legal representative under section 368 of the Code of Civil Procedure. In December 1894 a decree for sale was passed, which was never impeached as being fraudulent or collusive. As a fact, first defendant was not the sole legal representative of the mortgagor, who left two other sons and three daughters. The second son was, at a date subsequent to the decree, assessed to pay income tax, for arrears of which the mortgaged property was sold (under the Revenue Recovery Act), and purchased by second defendant in 1896. In 1897 the mortgaged property was sold in execution of the decree in plaintiff's suit on the mortgage, and plaintiff became the purchaser, the sale being confirmed soon after, and plaintiff obtaining a sale certificate which purported to convey the whole of the mortgaged property to him, and obtaining delivery of the property under section 318 of the Code of Civil Procedure in 1898. Plaintiff was subsequently dispossessed by defendants Nos. 2 to 5, and brought the present suit to recover possession of the property:—*Held*, that the sale of the property for arrears of income tax affected only the share of the second son and not the shares of the other co-heirs, and that, in consequence, the whole of the mortgaged property had not passed to the second defendant under that sale. *Held also*, that the second defendant, by his purchase, had acquired only the equity of redemption in respect of the second son's share in the mortgaged property. The effect of section 30 of the Income Tax Act is not to convert income tax into an arrear of land revenue, due in respect

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of the land which may be brought to sale for the realization of the income tax, but merely to extend the procedure prescribed by the Revenue Recovery Act to the recovery of arrears of income tax. *Held further*, that the share of the second son was bound by the decree in the mortgage suit, notwithstanding that the second son was not joined in that suit as one of the legal representatives of the deceased mortgagor. Where a defendant in a suit dies and the plaintiff, under section 368 of the Code of Civil Procedure, brings a person on the record, whom he alleges to be the legal representative of the deceased defendant, such person sufficiently represents the estate of the deceased for the purposes of the suit, and, in the absence of fraud or collusion, the decree passed in the suit will bind the estate. *Held lastly*, that the sale in execution of plaintiff's decree subsequently to the second defendant's purchase in the revenue sale extinguished second defendant's equity of redemption.

Kadir Mohideen Marakkayar v. *Muthukrishna Ayyar* 230

INDIAN COMPANIES ACT—VI OF 1882, s. 58—*Application for rectification of register—Evidence Act—I of* 1872, *s.* 115—*Estoppel—Hindu Law—Property held by head of Mutt—Presumption as to its being property of Mutt :*

The head of a Mutt applied for and was allotted shares in a company in his own name. Payments were made by him by way of calls on the shares, and by his successor in office, and the company credited the amounts paid by the successor towards the amount due as calls on the shares. Subsequently, plaintiff, another successor in the office, applied to have the company's share register altered, so that the shares should stand in the name of the Mutt. This, the directors refused to do unless plaintiff provided them with a transfer from the original allottee (who was still alive) or an indemnity by the Mutt. Plaintiff did neither, and the shares were ultimately declared by the company to be forfeited. Plaintiff now sued the company, claiming that the shares were not the private property of the original allottee, but belonged to the Mutt, and that the forfeiture should be declared to be invalid, and that the company's register should be rectified. He adduced no evidence to show that the original applicant had utilised the funds of the Mutt in payment of calls:—*Held*, that no presumption arose that the money paid belonged to the Mutt. Nor was the company estopped, by section 115 of the Evidence Act, from denying that the shares were the property of the Mutt. On the refusal by the directors to transfer the shares to the name of the plaintiff he should have applied for rectification of the company's register, under section 58 of the Indian Company's Act, though such an application could not have been successful, as, in the circumstances, he could not have shown that the directors had acted capriciously and unreasonably in refusing to enter plaintiff's name on the register without a transfer from the original holder or an indemnity.

Sree Mahant Kishora Dossjee v. *The Coimbatore Spinning and Weaving Company* 79

INDIAN HIGH COURTS ACT—24 & 25 VICT., CAP. 104 of 1861, s. 11—*Letters Patent* 1865, *art.* 11—*Letters Patent* 1800, *arts.* 15 *and* 21—*Jurisdiction of High Court to issue warrant against judgment-debtor and appoint special bailiff for its execution :*

A Judge, in the exercise of the ordinary original civil jurisdiction of the High Court at Madras, directed a warrant to issue against the person of a judgment-debtor and appointed a special bailiff to execute the warrant of arrest against the judgment-debtor, wherever he might be found in the Presidency of Madras:—*Held*, that the order was made without jurisdiction. *Sagore Dutt* v. *Ramachander Mitter*, (1 Hyde, 136), *Monomothonath Day* v. *Greender Chunder Ghose*, (24 W.R., 366), and *Jamuna Bhai* v. *Sadagopa*, (I.L.R., 7 Mad., 56), referred to.

Rajah of Ramnad v. *Seetharam Chetty* 120

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INSOLVENT DEBTORS' ACT—11 & 12 VICT., CAP. 21, ss. 7, 30—*Ancestral trade carried on by brothers in undivided family—Insolvency and discharge of all the adult members—Minor son of one brother not a party to insolvency proceedings—Order vesting family property in Official Assignee—Sale by Official Assignee of land so vested—Subsequent suit against minor—Sale of his interest in the land—Validity :*

Seven brothers who carried on a business (which had previously been conducted by their family for very many years) applied to be adjudged insolvents in the Court for the relief of insolvent debtors in Madras. They comprised all the adult members of the family at the time when the application was made, and all the debts included in their schedule had been incurred in connection with the family business. A, being a son of one of them and a minor at the time, was not a party to the insolvency proceedings. The applicants in due course obtained their discharge and an order was passed vesting their property (which included land) in the Official Assignee at Madras. At a date subsequent to that of the vesting order, plaintiffs purchased from the Official Assignee part of the lands so vested; and, later still, B brought a suit against A for money due on a bond, and obtained a decree. In the execution of that decree, A's share in the said land was brought to sale and purchased by B. Upon a suit being brought by plaintiffs for a declaration that the purchase by B was inoperative and void by reason of the prior sale to plaintiffs by the Official Assignee:—*Held*, that plaintiffs were entitled to the declaration. *Also*, that inasmuch as the trade was an ancestral one (and not one commenced by the managing members during the minority of A), and as the scheduled debts were incurred in the course of such trade, and all the adult members had applied for the benefit of the Insolvency Act, the debts were, at least *primâ facie* binding on the whole family, including the minor. It was not, therefore, necessary for plaintiff to prove the character of each debt or the existence of family necessity. In cases in which section 7 of the Indian Insolvency Act applies, the vesting order vests in the Official Assignee only the real and personal estate and effects of the insolvent. And where the insolvent is a member of an undivided Hindu family his undivided interest in the joint family property, and it alone, vests in the Official Assignee, whether he be the managing member or a junior member of the family. The proprietary interest of the members other than the insolvent (even though they be his sons), will continue vested in them. The effect of section 30 of the insolvent Debtors Act, and the analogous provision contained in section 266 of the Code of Civil Procedure, considered.

Nunna Brahmayya Setti v. *Chidaraboina Venkitaswamy* 214

2. ——————————————————————*Vesting order—*

Sum due to an insolvent from a Provident Institution—Right of Official Assignee to claim—Construction of statutes—Distinction between enactments affecting vested rights and those regulating procedure :

A member of a Railway Provident Institution who had made compulsory deposits therein became insolvent, and the usual vesting order was made under section 7 of the Act for the relief of insolvent debtors. By the rules of that Institution a member is to be paid, on his retirement from service, the sum of money standing to his credit. At the date of the vesting order, the insolvent had not yet retired from service. Subsequently to the date of the vesting order, but before the retirement of the insolvent, the Provident Funds Act, 1897, came into force, section 4 of which provides that after the commencement of that Act the Official Assignee shall not be entitled to or claim any such compulsory deposits in any Railway Provident Fund. On a claim being made by the Official Assignee to the amount, on the ground that when the Act came into force the interest of the insolvent in the Fund had become vested in the Official Assignee:—*Held*, that by section 4 of the Provident Funds Act, all the right and title of the Official Assignee was determined as from the coming into operation of the Act, and that its operation was not limited to cases where the vesting order had been made after its commencement. The distinction between the construction of enactments affecting vested

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rights and those which merely affect procedure recognised. *Javanmal Jitmal* v. *Muktabai*, (I.L.R., 14 Bom., 516), referred to. Under section 7 of the Insolvent Debtors' Act the right of the insolvent to be paid the sum standing to his credit in the Fund, on his retirement from service, vested in the Official Assignee.

Official Assignee of Madras v. *Mary Dalgairns* 440

INSOLVENCY—*Attachment of money before judgment—Decree—Subsequent insolvency of judgment-debtor—Claim of Official Assignee:*

The effect of an attachment under the Code of Civil Procedure is to prevent alienation. It does not confer title. An order of attachment under section 268 only operates so as to give the judgment-creditor certain rights in execution. It does not operate when those rights are not exercised before the presentation of a petition in insolvency, so as to create in favour of the judgment-creditor a title which prevails against that of the Official Assignee, under the vesting order in insolvency made after the order of attachment. The plaintiff in a suit obtained an order for attachment before judgment of a sum of money belonging to the defendant. In due course a decree was obtained for a larger amount, and subsequently to the decree the judgment-debtor was declared an insolvent. The Official Assignee then preferred a claim to the money under attachment, contending that the attachment was of no effect as against him, and asking that it might be set aside:—*Held*, that the Official Assignee was entitled to the order asked for.

Kristnasawmy Mudaliar v. *Official Assignee of Madras* 673

JURISDICTION—*Civil Procedure Code (Act XIV of 1882), s. 17—Suit in Court in British India on judgment of French Court—Effect of order in insolvency of French Court—Business carried on by managing member of joint family:*

Quære, whether a non-resident foreigner can, by carrying on business within the jurisdiction of a British Court in India by an agent, subject himself to the jurisdiction of the Court under section 17 of the Code of Civil Procedure (Act XVI of 1882). *Girdhar Damodar* v. *Kassigar Hiragar*, (I.L.R., 17 Bom., 662), distinguished. In this case it was found by the Judicial Committee on the evidence that the agency was not proved, the alleged agent being merely the manager of joint family property, of which the defendant owned a share; and they held that such a person is not the agent of the members of the family so as to make them liable to be sued as if they were the principals of the manager. The relation of such persons resembles that of trustee and *cestui que trust*, rather than that of principal and agent, or of partners. The defendant was a French subject and had been adjudicated an insolvent by the Court at Pondicherry. *Quære*, whether a suit brought against him in a British Court in India on a judgment of the Pondicherry Court, obtained after the order of adjudication in insolvency took effect, was barred by the proceedings in insolvency, as held in *Quelin* v. *Moisson* ([1827], 1 Knapp, P.C., 265). The High Court held that the suit was so barred; but in the view of the case taken by the Judicial Committee, it was not necessary to decide the point.

Annamalai Chetty v. *Murugasa Chetty* 544

2. ——————————*Jurisdiction of Magistrate in Mysore to try and convict an European British subject for an act amounting to an offence under the Mysore law, but not an offence under the Indian Penal Code:*

An European British subject was charged and tried before, and convicted by, a First-class Magistrate and Justice of the Peace appointed, under the Extradition Act, 1879, in and for the territories of Mysore. The act for which he was so tried and convicted (namely being in possession of mining materials) constituted an offence under the Mysore Mines Regulation, but was not an offence under the Indian Penal Code.

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It was contended, in revision, in the Madras High Court that the conviction was wrong on the ground that a Justice of the Peace appointed under the Extradition Act has no authority to deal with an offence committed by an European British subject against a law of the Mysore State:—*Held*, that the Magistrate had power to try the accused, or to commit him for trial in the Madras High Court. *Per* Sir ARNOLD WHITE, C.J.—Section 8 of the Act of 1879 extending to European British subjects in States in India in alliance with His Majesty the law relating to offences and to criminal procedure for the time being in force in British India ought not to be read so as to restrict the powers of the Governor-General which are declared by section 4 and which may be delegated to his officers under section 6. The word "offences" as used in section 6 of the Act of 1879 is not restricted to offences as defined by section 40 of the Indian Penal Code. Nor is it restricted to any definition of "offence" to be found in the Code of Criminal Procedure, although, as a matter of fact, the present definition of "offence" in the Code of Procedure [section 4 (o)], which is the same as that contained in the General Clauses Act, is sufficiently wide to include the wrongful act with which the accused in the present case was charged.

Adams v. *Emperor* 607

3. ——————————*Suit commenced in a District Court—Issue settled by District Judge—Case transferred to Sub-Court by High Court—Decision by Subordinate Judge—Appeal to and decision of District Judge—Validity of decision in appeal and of transfer by High Court:*

A suit was instituted in a District Court, and issues were settled by the District Judge. The suit was then transferred by the High Court to the Court of the Subordinate Judge, who decided the case; an appeal was then preferred to and was heard by the District Court, though the Judge who heard the appeal was not the Judge who had settled the issues. On a second appeal being preferred to the High Court:—*Held*, (1) that the District Court had jurisdiction to hear the appeal, section 17 of the Madras Civil Courts Act having no application; (2) that the High Court had jurisdiction under sections 25 and 191 (2) of the Code of Civil Procedure to make the transfer to the Subordinate Judge, though the case was in part heard.

Palanisami Cowndan v. *Thondama Cowndan* 595

LAND ACQUISITION ACT—I OF 1894, s. 30—*Lands waste from time immemorial taken up—Compensation awarded—Amount claimed by Mirasidars and Shrotriemdars—Persons entitled:*

Certain lands which had been waste from time immemorial were taken up by Government, and compensation was awarded. Claims were made by the Mirasidars for the amount so awarded. The rights of the Government in the lands had been alienated by Government to certain Shrotriemdars, who also claimed to be entitled to the amount awarded as compensation:—*Held*, that the Shrotriemdars were entitled.

Sivanatha Naicken v. *Nattu Ranga Chari* 371

2. ——————————, s. 32—*Person having "no power to alienate"—Money awarded as compensation—Claim by karnavan of tarwad:*

The Government acquired, under the Land Acquisition Act, property belonging to a Mahomedan family in North Malabar governed by the Marumakatayam law, and the money awarded as compensation was deposited in Court under clause 2 of section 31 of the Act. On claims being made to this amount:—*Held*, that inasmuch as the tarwad had power to alienate the land in respect of which the compensation had been awarded, section 32 of the Land Acquisition Act did not apply, and an order directing it to be dealt with in accordance with the provisions of that section was wrong.

Mahammad Ali Raja Avergal v. *Ahammed Ali Raja Avergal* 267

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LANDLORD AND TENANT—*Lease by tenant-for-life—Rent payable during month—Death of tenant-for-life prior to end of month—Claim by assignee of tenant-for-life for rent—Apportionment:*

A tenant-for-life leased immoveable property to tenants at a rent which was payable in half-yearly instalments. Four days before an instalment was due, the tenant-for-life died, and the assignee of his interest sued the tenants for the rent:—*Held*, that he was entitled to recover. *Per* SUBRAHMANIA AYYAR, J.—In the absence of a specific rule applicable to cases like this, in India, the Courts are entitled to follow the broad and just principle underlying the English Statute law, which culminated in the Apportionment Act of 1870, and hold that, as a matter of equity and good conscience, the assignee of the tenant-for-life was entitled to an apportionment of the rent due up to the date of the death of the tenant-for-life. *Per* DAVIES, J.—The assignee of the tenant-for-life was entitled to recover on the ground that the half-yearly instalment had fallen due prior to the death of the tenant-for-life, though the right to sue for it might not have accrued until four days after.

Lakshminaranappa v. *Melothraman Nair* 540

2. ———————*Permanent lease with covenant against alienation—Subsequent alienations—Suit to evict alienees—Maintainability—Transfer of Property Act—IV of* 1882, *ss.* 10, 111 (*g*)—*Applicability of principles of the Act to lease executed prior to its enactment:*

In 1862, V leased certain land on permanent lease to Y, the instrument reciting that Y had no right to alienate the property. In 1890, Y sold the holding to S. In 1892, plaintiff acquired the rights of the original lessor V, by purchase; in 1894, S sold the holding to the defendants. Plaintiff now sued to evict the defendants, claiming that the alienation to them operated as a forfeiture of the lease. The lease contained no express condition to that effect, nor did it provide that, on breach of the stipulation against alienation, the lessor might re-enter:—*Held*, that the alienation did not entitle the plaintiff to terminate the permanent lease and re-enter upon the land.

Parameshri v. *Vittappa Shanbaga* 157

3. ———————*Tenants holding kudivaram rights in perpetuity—Right to trees growing on the lands—Claim by Zamindar:*

Plaintiffs, as lessees of a Zamindari in the district of Madura, sued their tenants to recover the value of trees cut by the tenants on their holdings and carried away therefrom. The tenants admittedly held the *kudivaram* right in perpetuity, and it was not shown that they derived their title from the Zamindar, or that the ordinary *kudivaram* right was limited, in their case, by any contract or special or local usage:—*Held*, that plaintiffs were not entitled to recover.

Narayana Ayyangar v. *Orr* 252

LAND REVENUE—*Assignment of—Direction by Government to holder on ryotwari tenure to pay crop assessment to charity in lieu of direct payment by Government—Effect—Rights of trustees of charity—Limitation Act—XV of* 1877, *arts.* 110, 120*:*

Prior to 1863, Government had been paying from the public treasury Rs. 233-5-3 to the trustees of a charity (of which the plaintiffs in this suit were the present trustees). In that year, Government, in lieu of this payment in cash, directed the predecessor of defendants Nos. 1 to 4, who was the holder, on ryotwari tenure, of over 5 velis of land, to pay the first crop assessment payable on the land, amounting to Rs. 233-5-3, to the trustees of the mutt, instead of to the Government, and obtained from him an agreement that he would do so, and the promise appeared to have been performed. In 1893, the assessment for the first crop was raised, the net increase being payable to Government direct. In 1898, the trustees

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brought the present suit to recover the sums due for faslis 1303 to 1306 inclusive personally from defendants Nos. 1 to 4 and as a charge on the land in question:—*Held*, that Government had not assigned the revenue in question to the plaintiffs as inam and *semble* had not ever parted with its rights to such revenue. Assuming the plaintiffs were assignees of Government, they could not proceed under sections 2 and 42 of the Revenue Recovery Act, but had only a personal claim against the persons who, but for the assignment, would have been liable to pay the revenue to Government. This claim was not a claim for rent under the Rent Recovery Act falling within article 110 of the Limitation Act and consequently it fell within article 120.

Kasturi Gopala Ayyangar v. *Anantaram Thivari* 730

LAND TENURE—*"Mokhassadars"—Distinction between outright grant subject to performance of services and grant of an office with remuneration from use of lands*—Primâ facie *ownership—Burden of proof of right to eject or resist ejectment:*

The tenure known as "mokhassa" is one which is created by an assignment of a village or land to an individual either rent free or at a low quit-rent on condition of service. Where the grantor of land on mokhassa tenure has made the grant as payment for services in lieu of money, *semble*, that he may discontinue the employment and, with it, the remuneration, and resume the subject-matter of the grant. But where the grant was outright, subject only to the performance of certain services, the grantor is only entitled to insist upon the performance of the services, and is not entitled to eject the grantees until such performance is refused. Where the lands granted were the lands of the zamindar and the grant was on the condition that services should be rendered, and that a certain sum should be payable to the zamindar in recognition of his ownership, *primâ facie* the ownership would remain with the zamindar; *Sanniyasi* v. *Salur Zamindar*, (I.L.R., 7 Mad., 268); and the burden of proving the plea that the plaintiff was not entitled to eject would lie on the person resisting ejectment; *Mahadevi* v. *Vikrama*, (I.L.R., 14 Mad., 365), referred to. A village was granted on a quit-rent of Rs. 144 per annum, and on condition that the grantees would provide the services of certain persons to act as custodians of the zamindar's property and to give personal attendance on the zamindar. These services were rendered intermittently and not continuously, and batta was paid to the grantees when on duty. The quit-rent had never been varied throughout a period of 120 years, and the land descended hereditarily from father to son, there having been no instance of resumption during that period. Moreover, the present holder of the zamindari had taken leases from the mokhassadars as if they were the owners of the land, and had purchased other lands from them:—*Held*, that the village had been granted in perpetuity to the mokhassadars and that the present holder of the zamindari was not entitled to dispense with the services and resume the lands. *Forbes* v. *Meer Mahomed Tuquee*, (13 M.I.A., 438 at p. 464) and *Kooldeep Narain Singh* v. *The Government*, (14 M.I.A., 247), followed.

Sri Rajah Sobhanadri Appa Rao Bahadur v. *Sri Rajah Venkatanarasimha Appa Rao Bahadur* 408

LEGAL PRACTITIONERS ACT—XVIII OF 1879, s. 13—*"Other reasonable cause" for suspending a pleader—Writing an anonymous letter to influence:*

A pleader wrote a letter, which he did not sign, to an officer who was conducting an enquiry into a charge of bribery against a Revenue Inspector, the letter containing allegations which were intended to prejudice the mind of the officer in connection with the matter which he was investigating. On a charge being preferred against the pleader under the Legal Practitioners Act:—*Held*, that these facts showed "other reasonable cause" for suspending the pleader, within the meaning of section 13 (clause *f*) of the Act. *In the matter of Purna Chundur Pal Mukhtar*, (I.L.R., 27 Calc., 1023), followed.

In the matter of a Pleader 448

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2. ——————————————as amended by ACT XI OF 1896, s. 36—*Application to have persons declared as touts—Hearing on affidavits—Validity—Operation of order limited to Sessions District:*

Where application is made to a Court to declare persons to be touts, under section 36 of the Legal Practitioners Act, it is desirable that the Court should hear oral evidence, though it is open to the Court to act on affidavits. The operation of such an order is limited to the Judge's own Court and Courts subordinate to him.

Bavu Sahib v. *The District Judge of Madura* 596

LETTERS PATENT—Art. 15—"*Judgment*"—*Order refusing leave to appeal* in formâ pauperis—*Appeal:*

There is no appeal under article 15 of the Letters Patent, against an order, passed by a single Judge, under section 592 of the Code of Civil Procedure, refusing leave to appeal *in formâ pauperis*. By section 592 a discretion is vested in the Judge to allow or disallow the application, and an order passed in the exercise of such a discretion is not a "judgment" within the meaning of article 15 of the Letters Patent. *Sriramulu* v. *Ramasam*, (I.L.R., 22 Mad., 109), *Venkatarama Ayyar* v. *Madalai Ammal*, (I.L.R., 23 Mad., 169), and *Srimantu Raja Durga Naidu* v. *Srimantu Raja Mallikarjuna Naidu*, (I.L.R., 24 Mad., 358), followed.

Appasami Pillai v. *Somasundra Mudaliar* 437

2. ——————————*Order on a plaintiff to give security for defendant's costs—Judgment—Appeal:*

An order, passed on the Original Side of the Madras High Court, on a plaintiff to give security for the costs of a suit, under section 380 of the Code of Civil Procedure, is a judgment, within the meaning of article 15 of the Letters Patent, and an appeal lies therefrom. The term "judgment," in that article, includes any order which determines some right or liability of the parties before the Court.

Seshagiri Row v. *Nawab Askar Jung Aftab Dowla* 502

3. ——————1865, art. 11:—*See* "INDIAN HIGH COURTS ACT."

LIMITATION—*Expiration of period for presenting execution petition while Court closed—Presentation of defective petition on day of re-opening—Return for amendment—Re-presentation:*

The period of twelve years from the date of a decree expired when the Court was closed. The decree-holder presented a petition for execution of the decree on the first day on which the Court re-opened, but the petition was found to be defective, as it was not verified and was otherwise defective. The Court returned the petition, under section 245 of the Code of Civil Procedure, so that it might be amended. The petition was amended and again presented after the period of limitation had elapsed:—*Held*, that no valid application for execution had been made before the expiration of the period of limitation, and that the application was barred. The decree-holder referred to above died after the hearing of the appeal in the lower Appellate Court, but before that Court delivered judgment. *Held*, that the judgment should be read as from the date when the Court reserved judgment, and that it was not incompetent to the son of the decree-holder to prefer an appeal to the High Court by reason of the fact that he had not been brought on the record before the judgment of the lower Appellate Court was delivered. *Held also*, that it was not incumbent on the appellant to apply for execution to the Court which passed the decree. He had adopted the proper procedure in applying to the High Court to be brought on the record and, an order having been passed bringing him on the record, he was competent to present the appeal.

Raghunatha Thatha Chariar v. *Venkatesa Tawker* 101

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LIMITATION ACT—XV OF 1877, s. 19—*Acknowledgment in writing—Existing liability—Proof:*

Though, under section 19 of the Limitation Act, the exact nature of the right or liability need not be disclosed by the acknowledgment, and its exact nature may be established by evidence *dehors* the written acknowledgment, yet the acknowledgment in itself should import that the person making it is under an existing liability at the time. Such liability cannot be read into it by proof *aliunde* or by an admission subsequently made by a party to a suit in which the acknowledgment is relied on as saving the bar of limitation.

Ittappan Kuthiravattat Nayer v. *Nanu Sastri* 34

2. ——————————, **ss. 23, 28, sched. II, arts. 120, 142, 144**—*Attachment by Magistrate under section* 146, *Criminal Procedure Code—Cross-suits for declaration of right to possession—"Continuing wrong"—Limitation:*

Certain lands were attached by a Magistrate, in 1886, under section 146 of the Code of Criminal Procedure, in consequence of disputes relating to their possession. The Magistrate continued in possession of the lands, and realised some income from them. Both claimants instituted, in 1897, suits in which each claimed the lands as his own, and sought to obtain a declaration of title to them, as well as to the accumulated income, with a view to obtaining possession of the lands and money from the Magistrate. On the question of limitation being raised:—*Held*, that in so far as the suits were for declaration of title to immoveable property and the profits therefrom, they were governed by article 120 of schedule II to the Limitation Act. Articles 142 and 144 were not applicable, the suits not being for the recovery of immoveable property, within the meaning of either. The actual or physical possession was with the Magistrate, who was not and could not be made a party to the suits. With regard to article 142 the Magistrate could not be regarded as having dispossessed either party nor could either party be regarded as having discontinued possession. The attachment by the Magistrate operated, in law, for purposes of limitation, simply as a detention or custody, pending the decision by a Civil Court, on behalf of the party entitled. For the purposes of limitation the seizin or legal possession was, during the attachment, in the true owner. *Goswami Ranchor Lalji* v. *Sri Girdhariji*, (I.L.R., 20 All., 120), commented on. With regard to article 144, it was still less applicable, as each plaintiff claimed as the true owner and as being in legal possession (by the possession of the Magistrate), and the legal possession for purposes of limitation was constructively in the person who had the title at the date of the attachment, and such title could not be extinguished by the operation of section 28, however long the attachment might continue. The right to sue accrued on the date of the attachment. The cause of action for the declaratory suit was the alleged wrongful denial by the defendant in each case of the plaintiff's title and possession, and the procuring by such denial the attachment by the Magistrate. There was no continuing wrong, within the meaning of section 23 of the Limitation Act, so as to give a fresh starting point for limitation at every moment of the time during which the attachment continued. *Chukkun Lal Roy* v. *Lolit Mohan Roy*, (I.L.R., 20 Calc., 906 at p. 925), commented on. Though the suits were barred in so far as they were for a declaration of right to the lands, that bar affected only the remedy or relief by way of declaration and did not extinguish the right and title of the true owner to the property. The operation of section 28 of the Limitation Act, is limited to cases in which the bar of limitation applies to suits for possession of property. The right of the true owner to lands cannot be extinguished, however long such an attachment may continue; nor can lands attached under section 146 of the Code of Criminal Procedure be ever forfeited to Government.

Rajah of Venkatagiri v. *Isakapalli Subbiah* 410

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3. ——————————, s. 120—*Suit by Dharmakarta to recover possession of a temple and of the properties belonging to it—Claim based on prescription and not on hereditary right—Right to the properties secondary to, and dependent on, the right to the office:*

Plaintiff, who was found to have been in adverse possession of a temple and its properties for at least six years (after which he was dispossessed by certain magisterial proceedings) sued to recover possession, as Dharmakarta, basing his claim on prescription and not on an hereditary title. On the defence being raised that plaintiff's possession had been adverse for a period less than twelve years and that, in consequence, his title was not complete under article 144 of schedule II to the Limitation Act:—*Held*, that the suit for the possession of the office was governed by article 120, and that plaintiff, by his adverse possession of more than six years, had obtained a title to it by prescription. *Jagan Nath Das* v. *Birbhadra Das*, (I.L.R., 19 Calc., 776), followed. *Held also*, that the suit was not for possession of immoveable property, within the meaning of article 144, the right to the land being only secondary to, and dependent on, the right to the office, *Tammirazu Ramazogi* v. *Pantina Narsiah*, (6 M.H.C.R., 301), followed.

Kidambi Raghava Chariar v. *Tirumalai Asari Nallur Ragavachariar* 113

4. ——————————, sched. II, art. 64—*Account stated—Acknowledgment of indebtedness without reciprocal demands:*

The defendant in a suit had, within three years of the date on which the plaint was filed, signed a written acknowledgment that a sum of money was due by himself and his partner to plaintiff. Upon this being relied on as saving the suit from being barred by limitation, it was pleaded that the document was not an account stated as there were no reciprocal demands between plaintiff and defendants:—*Held*, that the document was an account stated, within the meaning of article 64 of schedule II to the Limitation Act, and that the suit was not barred. It is not nesessary, in order to bring a case under that article, that there should be reciprocal demands between the parties. *Ganga Prasad* v. *Ram Dayal*, (I.L.R., 23 All., 502), and *Shankar* v. *Mukta*, (I.L.R., 22 Bom., 513), commented on.

Manjunatha Kamti v. *Devamma* alias *Gomathiamma* 186

5. ——————————, sched. II, arts. 110, 120:

Prior to 1863, Government had been paying from the public treasury Rs. 233-5-3 to the trustees of a charity (of which the plaintiffs in this suit were the present trustees). In that year, Government, in lieu of this payment in cash, directed the predecessor of defendants Nos. 1 to 4, who was the holder, on ryotwari tenure, of over 5 velis of land, to pay the first crop assessment payable on the land, amounting to Rs. 233-5-3, to the trustees of the mutt, instead of to the Government, and obtained from him an agreement that he would do so, and the promise appeared to have been performed. In 1893, the assessment for the first crop was raised, the net increase being payable to Government direct. In 1898, the trustees brought the present suit to recover the sums due for faslis 1303 to 1306 inclusive personally from defendants Nos. 1 to 4 and as a charge on the land in question:—*Held*, that Government had not assigned the revenue in question to the plaintiffs as inam and *semble* had not ever parted with its rights to such revenue. Assuming the plaintiffs were assignees of Government, they could not proceed under sections 2 and 42 of the Revenue Recovery Act, but had only a personal claim against the persons who, but for the assignment, would have been liable to pay the revenue to Government. This claim was not a claim for rent under the Rent Recovery Act falling within article 110 of the Limitation Act and consequently it fell within article 120.

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6. ——————————, sched. II, art. 119—*Suit by an adopted son more than six years after interference with plaintiff's rights—Claim for declaration as to adoption and to recover possession of property due to plaintiff as adopted son—Maintainability:*

Plaintiff's rights, as the adopted son of A, were interfered with, in connection with certain immoveable property, in 1889. In 1897 plaintiff sued for a declaration that he was the adopted son of A, and sought to recover the property:—*Held* (BHASHYAM AYYANGAR, J., dissenting), that the suit was barred under article 119 of schedule II to the Limitation Act. *Jagadamba Chaodhrani* v. *Dakhina Mohun*, (L.R., 13 I.A., 84; I.L.R., 13 Calc., 308), followed; *Parvathi Ammal* v. *Saminatha Gurukal*, (I.L.R., 20 Mad., 40), and *Shrinivas* v. *Hanmant*, (I.L.R., 24 Bom., 260), approved. *Per* MOORE, J.—Where a plaintiff cannot obtain a decree for possession without a decision that an adoption is invalid or never in fact took place, or that an adoption is valid, the question whether his claim is barred by limitation must be decided with reference to the provisions of articles 118 and 119 of schedule II to the Limitation Act. *Per* BHASHYAM AYYANGAR, J.—The suit was governed by article 144. Article 119 is applicable only to a suit of the character defined by section 42 of the Specific Relief Act, for a declaration that the plaintiff is entitled to a status or legal character as adopted son. In the present case, the plaintiff having been out of, and the defendant having been in, possession since 1889, plaintiff could not maintain a suit for a mere declaration of title, and the only suit he could maintain was the present, which was governed by article 144 and was, in consequence, not barred.

Ratnamasari v. *Akilandammal* 291

7. ——————————, sched. II, art. 120:

Assuming that a presumptive reversionary heir may be given a decree declaring that he is entitled to succeed, on the death of a widow, to property alleged to form part of her husband's estate, which property is in the possession of persons who claim it as their own, adversely to the widow, the suit praying for such a declaration must be brought within the period prescribed by article 120 of schedule II to the Limitation Act. Article 125 does not apply to such a suit.

Ramaswami Naik v. *Thayammal* 488

8. ——————————, sched. II, arts. 132, 99, 61:

Where one of two or more co-sharers owning an estate subject to the payment of revenue to Government pays the whole revenue in order to save, and so does save the estate from liability to be sold by Government for realizing the arrears of revenue, he is by operation of law entitled to a charge upon the share of each of his co-sharers for the realization of the latter's share of the revenue, as between the co-sharers. *Seshagiri* v. *Pichu*, (I.L.R., 11 Mad., 452), followed; *Achut Ramachandra Pai* v. *Hari Kamti*, (I.L.R., 11 Bom., 318); *Kinu Ram Das* v. *Mozaffer Hosein Shaha*, (I.L.R., 14 Calc., 809); and *Seth Chitor Mal* v. *Shib Lal*, (I.L.R., 14 All., 173), dissented from. *Per* BHASHYAM AYYANGAR, J. (at the first hearing).—That the suit was governed by article 132 of schedule II to the Limitation Act in so far as it related to the enforcement of a charge. Assuming that the plaintiff had no charge on the defendant's share of the estate, the article applicable would be article 61 or article 99, but not article 120. Though a claim for contribution generally arises in cases where the party seeking contribution has himself paid the amount in respect of which contribution is sought, and though, in the present case, the arrear of revenue had not been paid to Government by the plaintiff, but had been realized by the Collector under the Revenue Recovery Act from the income of the plaintiff's share after it had been registered as a separate estate, plaintiff's right to claim contribution was not affected. Nor did that fact affect the application of article 99 or article 61 of schedule II of the Limitation Act, in both

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of which the person bringing the suit is referred to as having 'paid' the amount sought to be recovered. In such a case, it is but just that all should contribute in proportion towards a benefit obtained by all. It is immaterial whether the party seeking contribution made the payment voluntarily or involuntarily, namely, by payment to avert coercive process against his property or by the seizure of his property under process of law for realization of the amount. In either case he has been damnified and the parties against whom he seeks contribution have been benefited to that extent.

Rajah of Vizianagram v. *Rajah Setrucherla Somasekhararaz* 686

9. ——————————————, **sched. II, art. 144**—*Suit to recover land—Claim that defendants were holding over as yearly tenants on expiration of lease—Previous suit on another lease—Claim by tenants as permanent lessees—Dismissal of suit except as to rent—Payment of rent since—Limitation—Prescriptive right as permanent lessee:*

Plaintiffs sued on behalf of their devasom for land, basing their claim on a lease of 1862, for four years, and alleging that the defendants had been holding over as tenants and paying rent as such, since the expiration of that term in 1866. In 1881, plaintiffs' devasom had sued to eject the defendants from the same land, basing their suit on an alleged lease of 1865. The defence was set up by the predecessor of the present defendants Nos. 4 to 7 that he was a permanent tenant at a fixed rent. That suit was dismissed on the ground that the alleged lease of 1865 had not been proved, but the plaintiffs obtained a decree for the rent which the then defendant admitted to be due by him as a permanent tenant:—*Held*, that even assuming that the defendants had held over as yearly tenants, after the expiration of the alleged lease of 1862, such tenancy must have been determined prior to plaintiffs' suit in 1881. The possession of the defendants, subsequently to that suit was therefore, according to the plaintiffs' case, that of trespassers claiming a permanent right of tenancy. The payment of rent under the decree in the suit of 1881, and subsequently at the same rate, could be construed only, so far as the defendants were concerned, as payment by them of the rent admitted by them to be due as permanent tenants, and not as a renewal of the alleged lease of 1862, with a variation of the amount of rent. Inasmuch as the defendants had set up their adverse possession at a time when, according to plaintiffs' case their yearly tenancy had been determined, and such adverse possession had continued down to the date of the present suit, namely, for a period of more than twelve years, the defendants had acquired, by prescription, a right to hold possession as permanent tenants at that rent. *Seshamma Shetati* v. *Chickaya Hegade*, (I.L.R., 25 Mad., 507 at p. 513), referred to.

Parameswaram Mumbannoo v. *Krishnam Tengal* 535

10. ——————————————, **sched. II, art. 144:**

Where a Hindu widow alienates part of the immoveable property belonging to her husband's estate and then adopts a son, the son cannot sue to recover possession of the property until the termination of her widowhood. Where such a suit is brought during the widowhood it is governed by article 144 of schedule II to the Limitation Act, and the starting point for the period of limitation is the date of the adoption. If the alienation is for a necessary purpose, the adoption does not divest the alienee, and the adopted son succeeds only to the remaining portion of his adoptive father's property. If the alienation is not for a necessary purpose, the subject of the alienation is severed from the inheritance only during the widowhood, and the remainder therein vests, at the moment of adoption, in the adopted son, as a vested remainder to fall into possession at the termination of the widowhood. Observations by Bhashyam Ayyangar, J., on the effect of an alienation by a Hindu widow.

Sreeramulu v. *Kristamma* 143

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11. ——————————————, **sched. II, arts. 178, 179**—*Decree for sale of hypothecated property on a certain date in default of payment—Order for stay of execution passed before date fixed for sale—Subsequent application for execution more than three years from date of decree:*

By a decree, dated 10th November 1897, it was provided that, in default of the defendants in the suit paying the sum decreed on or before the 10th May 1898, the hypothecated property should be sold. At the date of the decree another suit was pending in the same Court, in which the decree-holders were defendants and the judgment-debtors plaintiffs. On 27th November 1897, the judgment-debtors applied under section 243 of the Code of Civil Procedure for stay of execution of the decree pending the disposal of the suit in which they were the plaintiffs. On the 31st January 1898, an order was passed staying execution of that decree until the disposal of the other suit. The last-mentioned suit was disposed of on 23rd December 1901, and on 20th March 1902 the decree-holder in the earlier suit applied that the hypothecated properties might be sold:—*Held*, that the application was not barred by limitation, it being governed by article 178 and not by article 179, inasmuch as no prior application for execution of the decree or to take some step in aid of execution of the decree had been made. Article 179 is not exhaustive of applications for execution of decrees. There are cases to which article 178 may apply. A decree which directs the sale of mortgaged property in default of payment of the mortgage money declared due on or before the date fixed in the decree is not, within the meaning of paragraph 6, column 3 of article 179, a decree directing the payment of the amount to be made at a certain date. If, however, there is also a personal decree against the mortgagor and the application is to execute the decree as such, limitation will run from the date of the decree under paragraph 1, if payment is enforceable under the decree from the date thereof or from a future date under paragraph 6 if payment can be enforced under the decree only on or after such future date fixed in the decree. Neither paragraph 1 nor paragraph 6 can apply to the execution of a mortgage decree, as such, namely, to an application for sale of the mortgaged property which the decree directs to be sold in default of payment of the ascertained amount on or before the day fixed in the decree. Principles laid down by which the article applicable should be ascertained. The decision of the Full Bench in *Mallikarjunadu Setti* v. *Lingamurti*, (I.L.R., 25 Mad., 244), in connection with questions relating to limitation, explained. *Muhammad Suleman Khan* v. *Muhammad Yar Khan*, (I.L.R., 17 All., 39); *Muhammad Islam* v. *Muhammad Ahsan*, (I.L.R., 16 All., 237); *Thakur Das* v. *Shadi Lal*, (I.L.R., 8 All., 56); *Ali Ahmad* v. *Naziran Bibi*, (I.L.R., 24 All., 542); and *Ashrafuddin Ahmed* v. *Bepin Behari Mullick*, (I.L.R., 30 Calc, 407), approved and followed. All applications for the execution of a decree for sale of mortgaged property are not governed by article 178. Observations as to when article 179 will be applicable. The true criterion in determining whether article 179 or article 178 applies to a particular application is to ascertain whether any one of the six points of time specified in column 3 of article 179 is applicable to it, and if none of them is applicable it is only then that article 178 will apply. Under the Limitation Act of 1877, an application cannot be made merely for the purpose of signifying the decree-holder's intention to keep the decree in force.

Rungiah Gounden v. *Nanjappa Row* 780

12. ——————————————, **sched. II, art. 179**—*Commencement of period of limitation for application to execute portion of decree not appealed against where portion has been appealed against—Commencement of period of limitation under section 230 (a), Civil Procedure Code, for application to execute portion of decree not appealed against:*

Under article 179 of schedule II to the Limitation Act, when a portion of a decree has been appealed against and a portion has not, the period of limitation for an application to execute the portion not appealed against runs from the date of the original decree. In the case of a decree for the payment of money or the delivery of property, the period of limitation for an application to execute a portion of the decree which has not been

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appealed against runs, under section 230 (*a*) of the Code of Civil Procedure, from the date of the decree on appeal. *Muthu* v. *Chellappa*, (I.L.R., 12 Mad., 479), dissented from.

Kristnama Chariar v. *Mangammal* 91

13. ——————————, sched. II, art. 179—*Execution of decree—Application in accordance with law :*

A petition in execution presented by the vakil of the decree-holder, duly authorized, is an application "in accordance with law" within the meaning of article 179 of schedule II to the Limitation Act, though the vakalat be not dated.

Subramania Chettiar v. *Ramachandra Ayyar* 197

MALABAR LAW—*Suit by one of two co-urulans for redemption of mortgage without allegation or proof that the other had been asked to join plaintiff in the suit —Maintainability of suit :*

One of two co-urulans may bring a suit to redeem a mortgage without averring or proving that the other urulan had been asked to join as a plaintiff in the suit. *Savitri Antarjanam* v. *Raman Nambudri*, (I.L.R., 24 Mad., 296), distinguished.

Karattole Edamana v. *Unni Kannan* 649

2. ——————————*Suit by one of two urulans to recover property demised on kanom—Non-joinder of the only other urulan as co-plaintiff—Joinder as defendant—Evidence of adverse acts—Maintainability of suit :*

One of two urulans sued to redeem property which had been demised to the defendants on kanom. He did not join the other urulan as a co-plaintiff, but impleaded him as a defendant. The other urulan had granted a renewal of the kanom, and plaintiff in his suit ignored that renewal and contended that it was invalid. On objection being raised that the suit was not maintainable by reason of the non-joinder of the other urulan as a co-plaintiff :—*Held*, that the suit was maintainable. In the circumstances the plaintiff could not have joined the other urulan, nor could it be held that he was bound to have consulted him before the suit was filed, or asked him to join in bringing it. *Savitri Antarjanam* v. *Raman Nambudri*, (I.L.R., 24 Mad., 296), distinguished and doubted.

Mariyil Raman Nair v. *Narayanan Nambudiripad* 461

3. ——————————*Suit to redeem kanom—Failure to prove "special exigency" less than twelve years having expired—Maintainability of suit—"Avasyamayi Chodikambole"—"Avasyamayi Varumbole" :*

By the custom of Malabar, a kanom enures for twelve years unless the parties to it have by express contract provided for its redemption at an earlier date. A kanom deed contained the vernacular words "Avasyamayi Chodikambole," "Avasyamayi Varumbole." On the question being referred to a Full Bench whether these words meant "on demand," or whether they meant "on demand based on some special exigency" :—*Held*, that the words did not impose on a jenmi the obligation of proving "some special exigency" as a condition precedent to his right to recover "on demand" before twelve years have elapsed. *Mahomed* v. *Ali Koya*, (I.L.R., 14 Mad., 76), dissented from.

Kelu Nedungadi v. *Krishnan Nair* 727

MALICIOUS PROSECUTION—*Information given to police—Prosecution by police after investigation—Acquittal of accused—Suit for malicious prosecution against informant of police—Maintainability :*

A gave certain information to the police regarding B. The police, after holding an investigation, instituted a prosecution against B, who was tried

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and acquitted. B now sued A for damages for malicious prosecution :—*Held*, that the suit was not maintainable, as A had not instituted the prosecution.

Narasinga Row v. *Muthaya Pillai* 362

2. ——————————*Final judgment delivered in life-time of defendant—Subsequent death of defendant—Right of defendant's legal representative to prosecute appeal against decree :*

In a suit for damages for malicious prosecution, the District Munsif decreed in plaintiff's favour, and gave damages. Defendant appealed to the District Judge, who confirmed the decree and dismissed the appeal. Defendant preferred a second appeal, but died before it was heard. The appeal was prosecuted by defendant's legal representative, when it was objected that inasmuch as the cause of action for damages for malicious prosecution could not survive after the death of the defendant, his legal representative was not entitled to prosecute the appeal :—*Held*, that the legal representative was entitled to prosecute the appeal.

Paramen Chetti v. *Sundararaja Naick* 499

3. ——————————*Reasonable and probable cause—Conviction of plaintiff by Court of First Instance and acquittal on appeal—Maintainability of suit for malicious prosecution :*

In a claim for compensation for malicious prosecution, it does not follow that the suit will not lie, where the plaintiff has been convicted by a competent Court, and has been acquitted on appeal. The true principle is that the suit will lie if the plaintiff was ultimately acquitted on appeal by reason of the original conviction having proceeded on evidence which was known by the complainant to be false or on the wilful suppression by him of material information.

Boja Reddi v. *Perumal Reddi* 506

MORTGAGE—*Bond and rental agreement executed on same date and identical in many terms—Effect—One and the same transaction—Obligations to be gathered from both—"Damdupat" Rule—Inapplicability to cases governed by Transfer of Property Act :*

By an instrument described as a "possessory mortgage debt bond" which recited that the house described in it was put in the possession of the mortgagee, the mortgagors undertook to clear the mortgage debt by paying Rs. 65-10-0 before the 25th of each month, namely, Rs. 35 for principal and Rs. 30-10-0 for interest, and authorized the mortgagee to let the house, and credit the rent towards the aforesaid principal and interest. The bond further provided that in case the rent derivable from the house should fall short of the amounts payable every month, the mortgagors would themselves pay them on the due dates, and that, in default, they would pay compound interest. In case the amounts payable should not be paid for five months, the mortgagees were to recover the debt from the mortgagors. On the same day the mortgagors, by a separate agreement, rented the house from the mortgagees at a rental of Rs. 30-10-0 per mensem, payable by the 25th of each month with compound interest on the amount of rent ; in default at the same rate as that payable under the mortgage bond in case of interest being in default. The lessees also agreed to vacate and deliver up the house to the lessors, or to those who obtained an order from the lessors, within thirty days of being required so to do. Default having been made, the mortgagees sued for the amount due, and, in default, for sale of the mortgaged property :—*Held*, that the two instruments were executed as parts of one and the same transaction and that the intention was that the rights and obligations of the parties were to be gathered from the provisions of both. Taking the two together, it was clear that the transaction was one entirely of mortgage, with an express covenant to pay the principal and interest in instalments and conferring a power on the mortgagee to take possession

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of the property mortgaged and apply the usufruct in the discharge of the interest and principal. *Juggeewundas* v. *Ramdas*, (2 M.I.A., 487), followed. Also that the clause in the rental agreement as to delivery of the house when required, left no room for doubt that the arrangement was one not binding the mortgagee to enter into possession and liquidate his debt by the usufruct; and the express covenant to pay precluded the mortgage from being taken as a purely usufructuary mortgage as defined by the Transfer of Property Act. *Held*, further, that the "Damdupat Rule" is inapplicable to cases of mortgage governed by the Transfer of Property Act. *Ram Kanye* v. *Cally Churn*, (I.L.R., 21 Calc., 841), referred to.

Madhwa Sidhanta Onahini Nidhi v. *Venkataramanjulu Naidu* 662

2. ———— *Priority according to date of possession by two purchasers of the mortgaged property:*

On 7th October 1890, the proprietor of certain land mortgaged it to plaintiff; and on 30th October 1893, he also mortgaged it to first defendant. In 1895, first defendant sued on his mortgage, obtained a decree, got the property sold and purchased it himself, obtaining possession in July 1897. Plaintiff also sued, in 1897, on his mortgage and also obtained a decree and purchased the property at public auction, and obtained possession in November 1898. On the present suit being brought by plaintiff to recover possession:—*Held*, that as between the two purchasers the question of priority must be determined, not by reference to the date of the mortgage documents, but according to the dates of the sales and recovery of possession under them; and that, in consequence, plaintiff's suit, which was one to oust the second defendant from possession, must be dismissed. Any rights which plaintiff might have on the strength of his mortgage must be enforced in another suit.

Akatti Moidin Kutty v. *Chirayil Ambu* 486

3. ———— *Suit by first mortgagee on mortgage—Failure to join subsequent mortgagee—Decree—Sale in execution of decree—Purchase by first mortgagee of mortgagor's undivided interest in mortgaged property—Subsequent suit for partition and possession—Right of second mortgagee to redeem:*

In 1886, two defendants mortgaged certain property to plaintiff. In 1891 the same defendants executed a second mortgage over the same property in favour of the present third defendant. In 1894, plaintiff brought a suit on his mortgage document against the mortgagors, but he omitted to make the present third defendant a party, though the latter was in possession, at the time, as mortgagee under his document of 1891. Plaintiff obtained a decree and the undivided share of first defendant in the mortgaged property was sold at a Court auction, and was purchased by plaintiff, who now brought the present suit for partition and for the recovery of first defendant's share. Third defendant contended that he was entitled to redeem plaintiff:—*Held*, that plaintiff was not entitled to obtain possession without paying off the third defendant (second mortgagee), and it was immaterial whether plaintiff's failure to join the second mortgagee as a party to the previous suit was wilful or due to ignorance of the fact that a second mortgage existed.

Rangasawmy Naiken v. *Jelli Bodi Naiken* 484

MUHAMMADAN LAW—*Alienations by widow—Validity:*

According to the Muhammadan law, the widowed mother is not the legal guardian of the property of her minor children and cannot do any act relating to their property so as to bind them, and a sale or mortgage by her cannot, as such, bind the minor children. Though she may be a co-heir with her minor children, in respect of the property dealt with by her, the Muhammadan law (unlike the Hindu law) does not constitute the senior co-heir the managing co-parcener, entitled to administer and manage the estate until partition. Alienations by such a widow cannot, therefore, be upheld by extending to Muhammadans the principle of Hindu law applicable to the acts of a guardian or managing member of a family. Under the

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Muhammadan law the estate of a deceased person must be applied to the payment of his funeral expenses and debts before the heirs can make partition of it. In this respect it is analogous to and even stricter than the Hindu law. The creditors have the right to sue such of the heirs as have taken the estate, but they are entitled to have recourse to a single heir only in a case where all the effects are in the hands of that heir.

Pathummabi v. *Vittal Ummachabi* 734

NEGOTIABLE INSTRUMENT—*Implied promise by principal-debtor to indemnify surety—Joint decree against two judgment-debtors—Satisfaction by one of them by execution of promissory note—Suit by him for contribution—Maintainability—"Sum paid under the guarantee"—Contract Act—IX of 1872, s. 145:*

Two persons jointly executed a negotiable promissory note payable to S for Rs. 1,000, each receiving Rs. 500 out of the consideration. S subsequently sued them on the note and obtained a decree against them, jointly for Rs. 1,480, being the amount due under the note, costs, etc. That decree was executed as against one of them, namely, the present plaintiff, who gave S another promissory note (in which a third party joined), for the whole amount due under the decree, namely, Rs. 1,480, and obtained a receipt which showed that the last-mentioned promissory note was accepted by S as payment of the amount due under the decree. This note had not, at the date of the suit, been paid. Plaintiff now sued the other joint maker of the original promissory note for contribution:—*Held*, that he had no cause of action at the date of suit.

Putti Narayanamurthi Ayyar v. *Marimuthu Pillai* 322

NEGOTIABLE INSTRUMENTS ACT—XXVI OF 1881, ss. 1, 94—*Local usage—Applicability of Act to Natives of India—Notice of dishonour to drawer where drawee has failed to accept—Acceptance of hundi as conditional or absolute payment:*

In a suit for the amount due on account of goods sold and delivered and money lent, the defence was that plaintiff had accepted hundis in discharge of the debt and was, in consequence, debarred from suing on the original consideration and that his remedy, if he had one, was on the hundis. It was also contended that the hundis had been accepted as cash payment, in consideration of a discount of 2½ per cent. and that, in consequence, plaintiff had no cause of action either on the original debt or upon the hundis, as he had taken the risk of the latter being dishonoured by the drawee:—*Held*, that it is a question of fact, with regard to promissory notes, or bills or hundis, whether the parties intended them to operate as absolute or conditional payment, and the presumption is that the effect of giving and taking a note or bill is that the debt is conditionally paid:—*Held also*, on the evidence, that plaintiff had accepted the hundis unconditionally, and was, in consequence, precluded from suing on the original debt. Section 94 of the Negotiable Instruments Act recognises that the person to whom notice of dishonour is given should be informed, not only that the instrument has been dishonoured and in what way, but also that he will be held liable thereon. So, where a drawee of a bill of exchange does not accept it, though the drawer is primarily liable, the payee should give notice of dishonour to the drawer. The provisions of the Negotiable Instruments Act are strictly applicable to natives. Where any local usage is relied on under section 1 of the Act, it should be alleged and established by the party who relies upon it.

Jambu Chetty v. *Palaniappa Chettiar* 526

2. ————————————————, s. 98 (*c*)—*Damage suffered by drawer by omission to give notice of dishonour—Onus of proof—Partnership between drawer and acceptor—Acceptor also drawer—Discharge of acceptor by limitation—Effect on liability of drawer:*

When the endorsee of a bill sues the drawer to recover the amount due under the bill, and relies upon section 98 (*c*), of the Negotiable Instruments Act to excuse the omission to give notice of dishonour, the onus lies on

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the endorsee to establish that the drawer could not have suffered damage by the omission. The mere fact that the drawer and acceptor of a bill are partners, does not give rise to the presumption that they are partners in respect of the drawing of the bill, or that the bill was drawn by one of them on behalf of both. In such a case the acceptor is not also a drawer, so as to render notice of dishonour unnecessary, under section 98 (*e*). The fact that the acceptor of a bill is not liable (because he was joined as a party to the suit after the period of limitation had expired), does not discharge the drawer from his liability, where the suit has been instituted as against him in time.

Jambu Ramaswamy Bhagavathar v. *Sundararaja Chetti* 239

PENAL CODE—ACT XLV OF 1860, ss. 97, 101, 104—*Private defence—"Protect a right"—Unlawful assembly:*

The villagers belonging to C walked in a religious procession, through a part of the village of K, carrying with them a vessel containing water which purported to be consecrated. The villagers of K, objecting, obstructed the procession, whereupon the members of it resisted the obstruction, and used some violence, causing grievous hurt to one of the obstructors and hurt to others of them. The members of the procession were charged with and convicted of being members of an unlawful assembly, possessing deadly weapons, and causing grievous hurt, and their convictions were upheld on appeal. On revision:—*Held*, that the convictions were wrong. The accused were justified, in the circumstances, in exercising their right of private defence; and the harm inflicted was not more than appeared to have been necessary for the purpose of self-defence.

Regula Bheemappa v. *Emperor* 249

2. ——————————, **ss. 153, 296**—*Wantonly giving provocation with intent to cause riot—Disturbing a religious assembly—Religious procession on highway—Legality—Chanting hymns by ordinary worshippers:*

By a decree in a civil suit, the Tengalai sect in a certain district were declared entitled to hold certain offices connected with a temple, and as such office-holders it was their duty to recite certain hymns in processions. The rights of the Vadagalai sect as ordinary worshippers were not affected by the decree, but the Vadagalais were ordered not to interfere with the Tengalais in the recital of the hymns otherwise than as ordinary worshippers. Subsequently to this decree, a religious procession was being conducted along a public highway. The Tengalais walked in front, chanting the hymns. In the rear, at such a distance that the Tengalais were not likely to hear them, the Vadagalais followed, also chanting hymns. A complaint was in consequence laid by a member of the Tengalai sect, charging the Vadagalais (1) with wantonly giving provocation with intent to cause riot and (2) with voluntarily disturbing an assembly lawfully engaged in religious worship:—*Held*, that neither offence had been committed. *Per* DAVIES, J. (without deciding whether religious processions in public streets in India are "lawful" or not).—The Vadagalais had not exceeded their rights as ordinary worshippers and had not intended to provoke a breach of the peace, and were consequently not guilty of an offence under section 153. Moreover, no "disturbance" had been proved within the meaning of section 296. *Per* SUBRAHMANIA AYYAR, J.—The object of section 296 of the Indian Penal Code presumably is to secure freedom from molestation when people meet for the performance of acts in a quiet spot vested for the time in the assembly exclusively; and not when they engage in worship in an unquiet place open to all the public as a thoroughfare. The user of a highway for religious worship is altogether wanting in lawfulness. There is no peculiar right known to the law as a right of procession. Though the law accords to members of a procession no recognition in their collective capacity, yet the fact that a number of persons use a highway together for some common purpose does not detract in any way from such use being lawful; but as the circumstances attending a procession may, in consequence of their being inconsistent with the paramount idea of passage, be of such a character as to render the user by the processionists otherwise than

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lawful and as carrying on worship on a highway is of that character, it cannot be affirmed that the Tengalais on the occasion in question constituted an assembly engaged in worship lawfully within the meaning of section 296 of the Indian Penal Code. *Per* BENSON, J.—The contention that the Tengalais were not "lawfully" engaged in religious worship because they were engaged in it on a highway, could not be accepted. There is nothing illegal, in India (where highways have from time immemorial been used for the passing of religious processions), in a procession or assembly engaging in worship while passing along a highway. If it were necessary to refer the origin of the use of highways for religious processions to a dedication of the highway to such use, such a dedication could reasonably be presumed, history, literature and tradition showing that such processions have formed a feature of the national life from the earliest times, and it being unreasonable to suppose that a dedicator would make a reservation against religious processions, which would be wholly opposed to the sentiment of the community. A religious procession is entitled to the special protection given by the Penal Code to assemblies engaged in religious worship. In the present case, however, no "disturbance" had been proved, and consequently no offence had been committed. *Per* BHASHYAM AYYANGAR, J. (at the first hearing, the Chief Justice dissenting).—Inasmuch as the Vadagalais had acted as ordinary worshippers, which they were not prohibited from doing under the decree, the act complained of was not illegal within the meaning of sections 153 and 43 of the Indian Penal Code. With regard to the charge under section 296, the accused had not been shown, on the facts as found, to have voluntarily caused disturbance to an assembly lawfully engaged in the performance of religious worship. No assembly can be so "lawfully engaged" (within the meaning of that section), on a highway, unless it be established or can be reasonably presumed that the dedication of the highway was subject to such user. User of a highway as a place of worship is not the legitimate user of it as a highway. The conviction was wrong on this ground and on the ground that in fact no disturbance had been proved.

Vijiaraghava Chariar v. *Emperor* 554

3. ——————————, **s. 187**—*Rendering assistance to a public servant—Refusal to sign search list by person who attended search under Abkari law—Liability—Criminal Procedure Code—Act V of 1898, s. 103 (1)—Party called upon to attend and witness a search:*

A person was called upon by an Abkári Inspector to attend a search held under section 103 of the Code of Criminal Procedure, and did so. He, however, refused to sign the search list when it was prepared. On a charge being preferred against him under section 187 of the Indian Penal Code of intentionally omitting to assist a public servant in the execution of his duty:—*Held*, that the accused was not guilty of an offence under section 187. Assuming that a person called upon to attend and witness a search, under section 103 of the Code of Criminal Procedure, is under a legal obligation to attend the search and sign the search list, the "assistance" which a person is bound, by the earlier part of section 187 of the Penal Code, to render is *ejusdem generis* with the various forms of assistance referred to in the latter part of the section. It must have some direct personal relation to the execution of the duty by the public officer. The signing of the search list required by section 103, is an independent duty which is imposed on the witness, whereas the word, "assistance," as used in the section, implies that the party who assists is doing something which, in ordinary circumstances, the party assisted could do for himself.

In the matter of Ramayi Naika 419

4. ——————————, **s. 193**—*Charge of giving false evidence—Contradictory statements by witness before the same Magistrate in the course of one and the same trial, on two different days—Conviction—Legality:*

On 18th January 1900, the accused deposed before a Magistrate that he had seen P and others gambling in a certain place. The deposition was

read over to the accused, and acknowledged by him to be correct. On 1st February, he was cross-examined, in the same case, before the same Magistrate, and he then deposed that he did not know P and had never seen him gambling. He was charged and convicted under section 193 of the Penal Code of having intentionally given false evidence, in that he made two contradictory statements, one of which he either knew or believed to be false or did not believe to be true. On the question being raised, on revision, whether the conviction was legal, or whether it was illegal, by reason of the fact that the contradictory statements were made before the same Magistrate and in the course of one and the same trial:—*Held, per* BENSON, J. (to whom the case was referred).—That the conviction was legal. *Per* MOORE, J.—As no rule can be laid down to the effect that the contradictory statements must have been made at different inquiries or trials (to render a person liable to conviction), the conviction could not be held to be illegal and should, consequently, not be interfered with in revision. *Per* BHASHYAM AYYANGAR, J.—The conviction was bad in law. No statement made by a witness in a deposition can be regarded as a completed statement until the deposition is finished, and corrected if necessary; for till then, every statement is liable to be retracted, corrected, varied or qualified, and until his *viva voce* examination is finished, neither the whole nor any portion of his deposition becomes evidence. The whole deposition must be read and construed as one, and if a later statement in it is contradictory to or at variance with a prior statement, the statement made by the witness must be taken to be the earlier statement as subsequently modified, or the subsequent statement itself, if it intentionally contradicts and thus retracts the earlier. *Habibullah* v. *Queen-Empress*, (I.L.R., 10 Calc., 937), considered.

In the matter of Palani Palagan 55

5. ——————————, **ss. 211, 182**—*Instituting false complaint—Giving false information—Criminal Procedure Code—Act V of* 1898, *s.* 531—*Proceedings in wrong place:*

The word "charges" as it is used in section 211 of the Indian Penal Code, means something different from "gives information." The words "false charge," as there used, must be construed with reference to the words which speak of the institution of proceedings:—*Semble*, the true test is;—Does the person who makes the statement which is alleged to constitute the charge, do so with the intention and object of setting the criminal law in motion against the person against whom the statement is directed? Such object and intention may be inferred from the language of the statement and the circumstances in which it is made. A petition was presented with the object (as the High Court held from its terms) of bringing to the knowledge of the authorities certain matters regarding which the petitioner had received information, in order that there might not be a repetition of an alleged tutoring of witnesses, and not with the object that the authorities should institute criminal proceedings:—*Held*, that the petition did not amount to a "charge" within the meaning of section 211 of the Indian Penal Code. To constitute an offence under section 182, it must be shown that the person giving the information knew or believed it to be false, or that the circumstances in which the information was given were such that the only reasonable inference is that the person giving the information knew or believed it to be false. The fact that an information is shown to be false does not cast upon the party who is charged with an offence under the section the burden of showing that, when he made it, he believed it to be true. The prosecution must make out that the only reasonable inference was that he must have known or believed it to be false. Section 531 of the Code of Criminal Procedure applies to a case where a Magistrate who has authority to commit a case for trial, does so, but has not territorial jurisdiction in the place where the offence to be tried is alleged to have been committed.

Rayan Kutti v. *Emperor* 640

6. ——————————, **ss. 395, 411**—*Charges of dacoity and receiving stolen property—Charge to jury—Possession of stolen property—Misdirection:*

On the trial of an accused, before a Judge and jury at a Court of Session, for dacoity and receiving stolen property, the Judge, in his charge to the jury, directed them that the fact of a stolen shirt having been found in possession of the accused two months after the dacoity, was sufficient to justify them in convicting the accused of the dacoity:—*Held*, on appeal, that this was a misdirection. Whether the possession of the stolen property was recent enough to warrant a conviction for the substantive offence was a matter entirely for the jury and should not have been put to them in the positive way which the Judge adopted.

Gussala Hanuman v. *Emperor* 467

7. ——————————, **s. 424**—*Dishonest removal by tenants of crops—Ryots holding on varam tenure—Crops in possession of ryots—No taking out of possession—Offence:*

If ryots holding land on varam tenure remove crops for the purpose of protecting them from injury or damage owing to delay or refusal on the part of the Zamindar to perform his part in the harvesting or division, such a removal would not be dishonest within the meaning of section 424 of the Indian Penal Code. But where it is proved that the crops have been removed dishonestly, or fraudulently an offence is committed under section 424, even though the Zamindar, under the terms of the tenancy, acquires no property in the share due to him until the ryots have delivered it to him.

Subudhi Rantho v. *Balarama Pudi* 481

8. ——————————, **s. 498**—"*Enticing away*" *a woman—Charge of abetment against the woman enticed—Validity:*

Where a man has been convicted of enticing away a woman, under section 498 of the Indian Penal Code, the woman who was enticed away by him cannot be guilty as an abettor. Whether a woman could be convicted of abetting the taking away of herself within the meaning of section 498. —*Quære.*

In re Balambal 468

9. ——————————, **s. 500**—*Defamation—Criminal Procedure Code—Act V of* 1898, *s.* 198—*Person aggrieved—Defamation of subordinate officers of Municipality—Complaint by President—Maintainability:*

A newspaper published articles which, for the purposes of the point of law to be determined, were assumed to be defamatory. These related to the conduct of certain subordinate officers of the Madras Municipal Commission. A complaint was lodged by the President of the Commission in respect of the alleged defamation, it being contended on behalf of the complainant that, inasmuch as by the Madras Municipal Act the President is responsible for the efficient discharge of their duties by his subordinate officers, his conduct and administration had been impugned by the articles:—*Held*, that assuming for the purposes of the question under consideration that the statements complained of were defamatory of the subordinate officers of the Municipal Health Department, they were not defamatory of the complainant; and that the complainant was not a "person aggrieved" within the meaning of section 198 of the Code of Criminal Procedure.

Beauchamp v. *Moore* 43

10. ——————————, **s. 500**—*Defamation—True statement that complainant had been convicted of theft and sent to jail—Conviction—Validity:*

An accused, who was the trustee of a temple, was convicted of defamation, the alleged defamatory statement being that the complainant, who

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performed the worship in a temple, had been convicted and sent to jail for the theft of idols belonging to the temple. At the time when the statement was made, an appointment was in question in connection with the temple:—*Held*, on revision, that the accused was justified in making the statement, either in the interest of the temple, or because the statement was no more than a publication of the result of proceedings in a Court of Justice.

Singaraju v. Nagabhushanam 464

PENSIONS ACT—XXIII OF 1871, s. 11—*Attachment of pension payable to descendants of reigning family in Ceylon—Pensions payable in British India—Validity of attachment:*

Certain descendants of the family which formerly reigned in Ceylon, resided in British India, where the Collector of the district, on behalf of the Government of India, paid them pensions. Apparently, though this was not proved, the cost of these pensions was ultimately defrayed by the Government of Ceylon. These pensions were attached in execution of certain decrees. Upon application being made by the pensioners to have the attachments set aside:—*Held*, that the pensions were exempt from attachment as being "political pensions" within the meaning of section 266 (*g*). *Per* Sir ARNOLD WHITE, C.J.—If the Government of India were to be regarded as merely the agent of the Ceylon Government for the purpose of paying the pensions, the Courts of British India would have no jurisdiction to proceed by way of attachment since the rights of the pensioners (assuming them to be enforceable at law) would only be enforceable in Ceylon. *Ghamsham Lal* v. *Bhansali*, (I.L.R., 5 Bom., 249), and *Bishambar Nath* v. *Imdad Ali Khan*, (I.L.R., 18 Calc., 216), referred to.

Muthusami Naidu v. *Prince Alagia Manavala Simmala Raja* 423

PRESIDENCY SMALL CAUSE COURTS ACT—I OF 1895, s. 38—*New trial of contested cases—Application to set aside order restoring suit dismissed for default of appearance:*

An application does not lie, under section 38 of the Presidency Small Cause Courts Act, to set aside an order of a Judge of the Court setting aside his previous order dismissing a suit for default of the plaintiff's appearance.

Chinnathambi Mudaliar v. *Veerabadriah Naidoo* 163

PROCESSIONS—*Right to conduct through public streets:*

The right to conduct religious processions through the public streets is a right inherent in every person, provided he does not, thereby, invade the rights of property enjoyed by others, or cause a public nuisance or interfere with the ordinary use of the streets by the public, and subject to directions or prohibitions for the prevention of obstructions to thoroughfares or breaches of the peace. Every member of the public and every sect, has a right to use the streets in a lawful manner, and it lies on those who would restrain him in its exercise to show some law or custom having the force of law depriving him of the privilege.

Sadagopachariar v. *Rama Rao* 376

PROVIDENT FUNDS ACT—IX OF 1897, s. 4—*Insolvent Debtors' Act*, 11 & 12 *Vict., cap.* 21, *s.* 7—*Vesting order—Sum due to an insolvent from a Provident Institution—Right of Official Assignee to claim—Construction of statutes—Distinction between enactments affecting vested rights and those regulating procedure:*

A member of a Railway Provident Institution who had made compulsory deposits therein became insolvent and the usual vesting order was made under section 7 of the Act for the relief of insolvent debtors. By the rules of that Institution a member is to be paid, on his retirement from service, the sum of money standing to his credit. At the date of the vesting order, the insolvent had not yet retired from service. Subsequently to the date of the vesting order, but before the retirement of the insolvent, the Provident Funds Act, 1897, came into force, section 4 of which provides that after the commencement of that Act the Official Assignee shall not be entitled to or claim any such compulsory deposits in any Railway Provident Fund. On a claim being made by the Official Assignee to the amount, on the ground that when the Act came into force the interest of the insolvent in the Fund had become vested in the Official Assignee:—*Held*, that by section 4 of the Provident Funds Act, all the right and title of the Official Assignee was determined as from the coming into operation of the Act, and that its operation was not limited to cases where the vesting order had been made after its commencement. The distinction between the construction of enactments affecting vested rights and those which merely affect procedure recognized. *Javanmal Jitmal* v. *Muktabai*, (I.L.R., 14 Bom., 516), referred to. Under section 7 of the Insolvent Debtors' Act the right of the insolvent to be paid the sum standing to his credit in the fund, on his retirement from service, vested in the Official Assignee.

Official Assignee of Madras v. *Mary Dalgairns* 440

PROVINCIAL SMALL CAUSE COURTS ACT—IX OF 1887, ss. 6, 32 (2)—*Munsif invested with Small Cause jurisdiction—Extension of jurisdiction—Transfer of cases on file on regular side to small cause side—Cases disposed of as small cause suits—Legality:*

A District Munsif, who had small cause jurisdiction up to Rs. 100, had, on his file, on the regular side of his Court, suits of a small cause nature for amounts between Rs. 100 and 200, some of which were partly tried. His small cause jurisdiction was then extended to Rs. 200, whereupon he transferred the cases in question to his small cause file and tried and disposed of them as small causes:—*Held*, that the transfer and trial were not in accordance with law.

Hari Kamayya v. *Hari Venkayya* 212

2. ———————————————————, art. 18—*Suit relating to a trust—Appointment of plaintiff under trust deed on a salary—Suit for unpaid salary—Jurisdiction of Small Cause Court:*

By a deed of trust, the settlor vested a press in trustees with the object of conducting a newspaper and appointed plaintiff as editor and manager on a fixed salary. Plaintiff acted but subsequently resigned. On a suit being brought by plaintiff, on the Small Cause side of the Subordinate Judge's Court, to recover the amount due to him by way of salary between the date of the trust deed and that of his resignation:—*Held*, that the Small Cause Court had no jurisdiction to try the suit. If the plaintiff had a cause of action it was to enforce the performance of the trust in so far as it related to him, and the suit was barred, under article 18 of schedule II to the Provincial Small Cause Courts Act.

Subramania Ayyar v. *Pandi Doraisami Taver* 202

3. ———————————————————, sched. II, art. 18—*Suit for money borrowed by a trustee from his co-trustees out of the moneys belonging to the trust estate—"Suit relating to a trust"—Jurisdiction of Small Cause Court:*

One of several trustees of a charity personally borrowed from other trustees some moneys belonging to the estate of the charity, and gave a promissory note therefor. The other trustees subsequently instituted a suit in the small Cause Court to recover the amount:—*Held*, that the suit was not one "relating to a trust," within the meaning of article 18 of schedule II to the Provincial Small Cause Courts Act, and that the Small Cause Court had jurisdiction to try it.

Sundaralingam Chetti v. *Mariyappa Chetti* 200

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4. ——————————————————, sched. 2, cl. 35 (*k*)—*Jurisdiction to award defendant damages for attachment on sufficient grounds—Civil Procedure Code—Act XIV of* 1882, *s.* 491—*Applicability to Small Cause Courts :*

A Court of Small Causes has jurisdiction to award damages, under section 491 of the Civil Procedure Code, to a defendant whose property has been attached on insufficient grounds.

Ibrahi Bourthea v. *Sangaram Chetty* 504

5. ——————————————————, sched. II—*Suit for damages for breach of covenant not to cut and carry away trees—Jurisdiction of Small Cause Court—Civil Procedure Code—Act XIV of* 1882, *s.* 622—*Suit brought on the ordinary side of Court though maintainable on the Small Cause side—Revision by High Court—Jurisdiction :*

By an agreement between a landlord and his tenants, it was recited that the landlord had authorised his tenants to enjoy all his rights, and the tenants covenanted not to cut trees growing on the estate. The landlord's rights included the right to cut certain green trees for his own use and certain other green trees for agricultural purposes, as well as all trees planted by himself, at his option, and he was further entitled to take and use all decayed and fallen trees. The landlord sued the tenants to recover Rs. 20, being the value of trees which, it was alleged, the tenants had cut and taken away. The suit was instituted on the ordinary side of the Court of First Instance, and no objection was raised either there or on appeal, as to the competency of that Court to entertain it. The District Munsif passed a decree in plaintiffs' favour for a portion of the amount claimed, which was increased by Rs. 1-8-0 by the Subordinate Judge, on appeal. Upon a civil revision petition being filed in the High Court :—*Held*, that the suit was one for damages for breach of covenant and as such was cognizable by a Court of Small Causes, and that the Court in which it had been instituted had no jurisdiction to entertain it. *Held also*, that where it appears that the Court of First Instance, or of appeal, has exercised a jurisdiction not vested in it by law the High Court is bound to interfere under its revisional powers.

Ramasamy Chettiar v. *R. G. Orr* 176

RECEIVER—*Suit against Receiver to recover amount not recovered by Receiver owing to alleged negligence—Necessity for leave of the Court :*

When a party feels aggrieved at the conduct of a Receiver, he should seek redress against the Receiver in the proceeding in which he was appointed. If separate proceedings be taken against him, either in that Court or elsewhere, they should be with the leave of the Court under whose authority the Receiver was acting.

Kamatchi Ammal v. *Sundaram Ayyar* 492

REGISTRATION ACT—III OF 1877, s. 50—*Conflict between registered and unregistered documents—Long possession by usufructuary mortgagee under an unregistered instrument Title :*

Defendant and his father had taken possession of certain land as usufructuary mortgagees in 1877, and had held possession of it ever since. The document witnessing the mortgage was never registered. The land was subsequently purchased by them. At a date later than the purchase, plaintiff obtained a mortgage over the land, which was duly registered. Plaintiff now sued to recover possession of the land :—*Held*, that he was not entitled to recover. Defendant had been in possession as usufructuary mortgagee, though under an unregistered document, since 1877, and section 50 of the Registration Act does not affect the operation of the law of limitation in favour of a person who claims under an unregistered document. *Nallamuthu Pillai* v. *Betha Naicken*, (I.L.R., 23 Mad., 37), referred to.

Budankayala Bala Krishnamma Subudhi v. *Vinayaka Rava Singi Bisoyi* ... 72

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REGULATION II OF 1803.—s. 9—*See* "RENT RECOVERY ACT."

2. ——————VII OF 1826 :—s. 3—*See* "RENT RECOVERY ACT."

3. ——————XXVI OF 1802 :—s. 3—*See* "REVENUE RECOVERY ACT."

4. ——————XXV OF 1802
5. ——————IV OF 1822 } :—*See* "LANDLORD AND TENANT."

RELIGIOUS ENDOWMENTS ACT—XX OF 1863, s. 5—*Vacancy in office of manager—Appointment by Civil Court—Civil Procedure Code—Act XIV of* 1882, *s.* 622—*Jurisdiction of High Court to entertain petition to revise order appointing manager :*

An order made by a Civil Court under the powers conferred by section 5 of the Religious Endowments Act is a Judicial adjudication in the matter before it, and it is competent to the High Court to entertain a civil revision petition against such an order. Before the jurisdiction which is conferred by section 5 of the Religious Endowments Act can be exercised by a Civil Court, there must be a vacancy in the office, there must have been a transfer to the former trustee and a dispute must have arisen respecting the right of succession to the office. The words in section 5, "any dispute shall arise respecting the right of succession," apply to a case in which a question has arisen with reference to the person who is to succeed to the office, and the jurisdiction of the Civil Court under the section is not confined to cases in which a dispute has arisen respecting the right to succeed to the office.

Gopala Aiyar v. *Arunachellam Chetty* 85

2. ——————————————————, s. 16—*Suit for the removal of trustee—Reference of entire suit to arbitrator—Legality :*

Under section 16 of the Religious Endowments Act, a Court may refer any matter in difference in the suit for decision by an arbitrator, but it is not open to the Court to refer the whole suit.

Karedla Vijayaraghava Perumalayya Naidu v. *Vemavarapu Sitaramayya* ... 361

3. ——————————————————, s. 18—*Leave to institute suit—Necessity for showing exercise of control by Board of Revenue :*

For a Court to have jurisdiction to grant sanction, under section 18 of the Religious Endowments Act, to institute a suit, it is not necessary for it to be shown that the Board of Revenue has actually exercised control over the temple in question. *Muthu* v. *Gangathara*, (I.L.R., 17 Mad. 95), explained.

Saturluri Seetaramanuja Charyulu v. *Nanduri Seetapati* 168

RENT RECOVERY ACT (MADRAS)—ACT VIII OF 1865, ss. 3, 80—*Tender of patta and process to recover rent by holder of jaghir before registration as jaghirdar—Validity—"Proceedings :"*

The holder of a jaghir is entitled to tender a patta under the Rent Recovery Act and to proceed under that Act for the recovery of rent before he is registered as jaghirdar under Regulation XXVI of 1802. The word "proceedings" in section 80 of the Rent Recovery Act does not include tender of patta. The "proceedings" referred to in that section are limited to summary proceedings for arrears of rent. *Subbu* v. *Vasanthappan*, (I.L.R., 8 Mad., 351), approved.

Dharmakarta of Tinnanore Temple v. *Luchimi Doss* 589

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2. ———————————————————, s. 4—*Pattah containing name of tenant's father and not mentioning tenant—Death of the father before tender of pattah—Tender of pattah without alteration—Validity—Practice—Point not taken in plaint or at settlement of issues—Right to raise it on appeal:*

Pattah for land was tendered to *A*, but stood in the name of *A*'s father. It appeared that *A*'s father was really the tenant for the fasli in respect of which the pattah had been tendered, but had died after the pattah had been prepared and signed by the landholder:—*Held*, that the tender was legal. Where a plaintiff in a suit to set aside a sale of land fails to take the objection, either in his plaint or at settlement of issues, that the notice of sale prescribed by section 39 of the Rent Recovery Act had not been served upon him, he should not be allowed to raise it on appeal.

Subbien v. *Ramasami Chetty* 362

3. ———————————————————, s. 11, cl. 4—*Sanction by Deputy Collector of enhanced rent—Cancellation of sanction by Collector—Validity—Regulation II of 1803, s. 9—Regulation VII of 1828, s. 3—Powers of supervision vested in Collector—Tender of patta within fasli—Order sanctioning enhanced rent passed after termination of fasli—Effect on patta:*

The general powers of supervision given to a Collector by section 9 of Regulation II of 1803, and section 3 of Regulation VII of 1828, include the power to set aside an order of a Deputy Collector passed under section 11, clause 4, of the Rent Recovery Act, sanctioning an increase in the consolidated rent payable by tenants. A landholder must tender patta to his tenant within the fasli to which it relates. Pattas were tendered to tenants prior to 1st July 1898 in respect of fasli 1307, which ends on 30th June 1898. In those pattas the landholder claimed a rent which was enhanced at the rate of one rupee per acre. The enhancement was justified on the ground (among others) that the Government had added a corresponding increase to the water-rate and that the Deputy Collector had, under section 11, clause 4, of the Rent Recovery Act, sanctioned the enhanced rent. Such an order had, in fact, been passed, but it had been cancelled by the Collector, who remanded the matter to the Deputy Collector to make enquiry and to pass a fresh order, without retrospective effect. The Deputy Collector passed a fresh order on 29th August 1898—nearly two months after the close of the fasli 1307, for which the pattas had been tendered. That order sanctioned an enhancement of 2 annas 3 pies per acre. On suits being filed to enforce acceptance of pattas containing enhanced rent at the rate of one rupee per acre:—*Held*, that the Collector had power to cancel the order sanctioning the enhancement at the rate of one rupee per acre, which, in consequence, could not be enforced; and that an enhancement of even 2 annas 3 pies could not be claimed, as the pattas were bound to be and had been tendered prior to 30th June 1898, in respect of fasli 1307, which ended on that date, and the tenants were not bound to accept pattas in which an enhanced rate not sanctioned by the Deputy Collector till 29th August was charged.

Zemindarni of Nidadavole v. *Sagirazu Krishnam Razu* 456

4. ———————————————————, s. 14—*Demand by landholder of an amount in excess of rent actually due by tenant—Non-compliance with demand—Attachment and sale in consequence of non-compliance—Legality:*

A landholder made a demand on his tenant for payment of a sum in excess of what was in fact due in respect of rent. The demand was not complied with, and, as a consequence of such non-compliance, the holding was attached and sold:—*Held*, that inasmuch as the sale had been held by reason of a demand which was not shown to be correct, it must be set aside.

Pichuvayengar v. *Oliver* 260

5. ———————————————————, s. 20:

A landlord distrained cattle, belonging to his tenant, for arrears of rent. The distraint was held, in a suit, to be illegal, the judgment being delivered on 7th September 1898. Out of 17 animals which were distrained, only 11 were restored to plaintiff, the date of their restoration being 28th November 1898. Of those which were not restored, four died more than thirty days prior to the institution of the suit; one died within thirty days of suit, and one died after the suit had been filed. Upon a summary suit being filed by the tenant to recover the value of the cattle illegally distrained:—*Held*, that the cause of action arose on the date of the death of the cattle, and that plaintiff was only entitled to recover the value of one animal. *Also*, that he would have been entitled to recover the loss sustained by being deprived of the services of the cattle, had he so framed his suit.

Jagannadha Rao Pantulu Garu v. *Nidamarti Ummaayya* 18

6. ———————————————————, s. 69—"*Judgment*":

In a summary suit under the Rent Recovery Act, the Sub-Collector held a pattah to be improper and released certain property from attachment. On an appeal being preferred, the District Judge reversed the finding of the Sub-Collector and remanded the case under section 562 of the Code of Civil Procedure, for disposal according to law. Plaintiff appealed to the High Court against the order of remand, when it was objected that no appeal lay:—*Held*, that an appeal lay. It was competent to the District Judge to make the order of remand under section 562 of the Code of Civil Procedure. The adjudication by the Collector was a formal expression of an adjudication on a right claimed, within the meaning of the definition of a decree contained in section 2 of the Code of Civil Procedure. It was also a formal expression of a right claimed in a Civil Court.

Veeraswamy v. *Manager, Pittapur Estate* 518

RES JUDICATA:—*See* "CIVIL PROCEDURE CODE."

REVENUE RECOVERY ACT, MADRAS—II OF 1864, ss. 2, 32, 42—*Civil Procedure Code—Act XIV of 1882, s. 501—Payment by one of several co-sharers owning estate subject to revenue to save sale:*

Where one of two or more co-sharers owning an estate subject to the payment of revenue to Government pays the whole revenue in order to save, and so does save the estate from liability to be sold by Government for realizing the arrears of revenue he is by operation of law entitled to a charge upon the share of each of his co-sharers for the realization of the latter's share of the revenue, as between the co-sharers. *Seshagiri* v. *Pichu*, (I.L.R., 11 Mad., 452), followed; *Achut Ramchandra Pai* v. *Hari Kamti*, (I.L.R., 11 Bom., 318), *Kinu Ram Das* v. *Mozaffer Hosain Shaha*, (I.L.R., 14 Calc., 809); and *Seth Chitor Mal* v. *Shib Lal*, (I.L.R., 14 All., 273), dissented from. *Per* BHASHYAM AYYANGAR, J. (at the first hearing).—That the suit was governed by article 132 of schedule II to the Limitation Act in so far as it related to the enforcement of a charge. Assuming that the plaintiff had no charge on the defendant's share of the estate, the article applicable would be article 61 or article 99, but not article 120. Though a claim for contribution generally arises in cases where the party seeking contribution has himself paid the amount in respect of which contribution is sought, and though, in the present case, the arrear of revenue had not been paid to Government by the plaintiff, but had been realized by the Collector under the Revenue Recovery Act from the income of the plaintiff's share after it had been registered as a separate estate, plaintiff's right to claim contribution was not affected. Nor did that affect the application of article 99 or article 61 of schedule II of the Limitation Act, in both of which the person bringing the suit is referred to as having 'paid' the amount sought to be recovered. In such a case, it is but just that all should contribute in proportion towards a benefit obtained by all. It is immaterial whether the party seeking contribution made the payment voluntarily or involuntarily, namely, by payment to avert coercive process against his property or by the seizure of his property under process of law for realization of the amount. In either case he has been damnified and the parties against whom he seeks contribution have been benefited to that extent.

Rajah of Vizianagram v. *Rajah Setrucherla Somasekhararaz* 68

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2. ——————————————————————————, ss. 5, 25, 44—*Sale of property of a defaulter for arrears of revenue—Regulation XXVI of* 1802, *s.* 3—*Register of transfer—Act I of* 1890, *s.* 6 (3) (4)—"*Entire estate*" *of defaulter—Lands held under different pattahs—Sale of land comprised in one pattah—No arrears of revenue due—Subsequent sale of same land for arrears of revenue due on another land held under different pattah—Validity:*

First defendant held lands under two separate pattahs, in two different villages. The land situated in one of the villages was, in 1897, sold at a court sale in execution of a decree, and was purchased by plaintiff. At the date of this sale no arrears of revenue were due in respect of any of first defendant's lands situate in either village. At a date subsequent to plaintiff's purchase at the court sale, the same land was again sold to second defendant, for arrears of revenue. These arrears were not due in respect of the land which was sold, but had accrued due on the other land belonging to first defendant, which was situated in the other village and comprised in the other pattah. Plaintiff had not applied to the Collector of the district for a transfer of the pattah of the lands which he had purchased at the court sale. Plaintiff now sued for a declaration that the sale to second defendant for arrears of revenue was invalid:—*Held*, that plaintiff was entitled to the declaration. *Per* MOORE, J.—Inasmuch as plaintiff had failed to obtain a transfer of pattah into his own name after his purchase, the transfer by court sale from first defendant to plaintiff would not under section 3 of Regulation XXVI of 1802, have relieved first defendant or the land from liability for land revenue due by first defendant in respect of those particular lands. But these lands were not liable for revenue due by first defendant in respect of land situated in the other village. Having regard to section 6 (3) (4) of Act I of 1890, the "moveable and immoveable property of a defaulter" referred to in section 5 of Act II of 1865, must be taken to mean the interest of the defaulter in the land. Inasmuch as the interest of the first defendant in the lands in question had already been sold to plaintiff, practically nothing remained to be sold to the second defendant at the subsequent revenue sale. *Per* DAVIES, J.—The land which plaintiff had bought at the court sale was not liable to be sold under the Revenue Recovery Act, because, at the time of sale, there were no arrears of revenue due upon it, and it then ceased to form part of the defaulter's property. The land which, under sections 3, 4, 5 and 25 of the Revenue Recovery Act, is liable to be sold for arrears of revenue, must either be the land upon which the revenue is due, or land which is the property of the defaulter. The land in question was of neither description. The term "entire estates" as used in section 3 of Regulation XXVI of 1802, when used with reference to a single person, must be read as meaning "entire estate" and, before section 3 of the Regulation can apply, the "estate" must be such as had "revenue due to Government" upon it. A pattah represents an entire estate, and land held under another pattah forms another estate.

Narayana Raja v. *Ramachandra Raja* 521

3. ——————————————————————————, s. 45—*Regulation II of* 1803, *s.* 18—*Effect of Act I of* 1876 *on the procedure prescribed by s.* 18 *of Regulation II of* 1803—*Act I of* 1876, *s.* 7—*Appeal to Board of Revenue from assessment fixed by Collector—Limitation:*

The period of ninety days prescribed by section 7 of Act I of 1876, during which an appeal may be preferred to the Board of Revenue from an order by a Collector apportioning the assessment on land, runs from the date when the Collector declares the apportionment of assessment, after the apportionment proposed by him to the Board of Revenue has been sanctioned. It does not commence to run, under the Act of 1876, from the date when the Collector himself fixes the amount and submits his proposal to the Board of Revenue for sanction. Under section 18 of Regulation II of 1803, the Collector was bound, when transmitting for the consideration of the Board a statement of the assessment to be apportioned on the sub-division, to furnish a copy of such statement to the proprietor of the estate, who was directed to appeal if he objected to the assessment. Under that Regulation the appeal was against the proposal for apportionment, and time ran from the date of the proposal. But the effect of Act I of 1876 has been to supersede the procedure prescribed under section 18 of Regulation II of 1803, and the right of appeal given by the latter Act is against the apportionment made under section 2 after it has acquired validity by being sanctioned by the Board of Revenue.

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Secretary of State for India in Council v. *Fischer* 389

4. ——————————————————————————, s. 59—*Suit by person aggrieved by proceedings under the Act—Limitation—Wrongful sale by Revenue officer of property—Application of section:*

Section 56 of the Revenue Recovery Act, which provides that nothing in that Act shall prevent parties deeming themselves aggrieved by any proceedings under the Act from applying to the Civil Court for redress, applies to a suit to cancel a revenue sale on the ground that a Revenue officer wrongfully sold the property in collusion with the purchaser. Such a suit must, therefore, be brought within the period of limitation specially provided by that section.

Raman Naidu v. *Bhassoori Sanyasi* 638

5. ——————————————————————————, s. 60—*Illegal detention of property by village officer—Detention under orders of his superiors—Liability of village officer:*

A village officer who had attached plaintiff's crops for arrears of cist refused to deliver the crops to plaintiff after receiving payment of the arrears. On a suit being brought by plaintiff for the illegal detention by the village officer of plaintiff's property, the village officer pleaded that he had acted under the orders of a Tahsildar and that the suit should have been brought against the Secretary of State and not against the village officer:—*Held*, that the suit was maintainable against the village officer.

Subbaraya Reddi v. *Jagannatha Reddi* 263

6. ——————————————————————————, *Person aggrieved by sale—Date of cause of action—Confirmation of sale and not sale-proceedings:*

Until a sale, held under the provisions of the Revenue Recovery Act, is confirmed, the rights of persons whose interests may be affected by the sale cannot be injured so as to give them a right of action as aggrieved persons, within the meaning of section 59 of the Act. Such a cause of action arises only when the sale has been confirmed. *Venkata* v. *Chengadu*, (I.L.R., 12 Mad., 168), distinguished.

Sabapathy Chetty v. *Rengappa Naickan* 495

SETTLEMENT REGISTER—*Alienation of Crown lands—22 & 23 Vict., cap.* 41, *&c.—Power of Governor in Council to alienate through authorized agent under dharkast rules—Alienation so made binding and irrevocable—Jurisdiction of Civil Court to determine validity of grant under dharkast rules—Assignment of waste duly made in accordance with dharkast rules not liable to revision by any one:*

The Civil Courts have jurisdiction to determine whether a grant of land, alleged to have been made by an officer on behalf of the Crown, is binding on the Crown or persons claiming under it subsequent to the grant; and the mere fact that the alleged grant purports to have been made under the dharkast rules does not affect that jurisdiction. A grant which purports to have been made under the dharkast rules by an officer empowered by them to make it is a grant made by a person authorized in that behalf and has the validity of a grant made by the Governor in Council. Such an officer is an agent generally or specially appointed by the Governor in Council in that behalf and his acts, if within the scope of his authority, are as binding on the Crown as if they had been done by the Governor in Council. Where such a grant has been made, the action of

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the officer to whom an appeal lies with reference to it is final and binding on Government, if his act was within the scope of his authority. His action is not subject to any other control. And when the proposal of an applicant is accepted by an officer duly authorized in that behalf by the dharkast rules, and the acceptance is communicated to the applicant, there is a valid contract and disposal of the land (unless the grant was procured by fraud, misrepresentation or mutual mistake as to any matter of fact essential to the agreement). Such a grant cannot, therefore, be annulled or revoked by the officer who made the grant, his successor in office, or even by the Governor in Council. Such a grant is subject, under the rules, only to one condition, namely, it may be revoked or annulled by an officer of a higher grade, on an appeal being preferred to him. Observations by BHASHYAM AYYANGAR, J., on alienations by the Crown under Statutes 21 & 22 Vict., cap. 106; 22 & 23 Vict., cap. 41; 32 & 33 Vict., cap. 29; 33 & 34 Vict., cap. 59; Act XV of 1895 (India) and under the dharkast rules.

Secretary of State for India in Council v. *Kasturi Reddi* 268

SPECIFIC RELIEF ACT—I OF 1877, s. 9—*Decree for possession—Order in execution proceedings—Appeal:*

Where a decree for possession of land has been passed in a suit brought under section 9 of the Specific Relief Act, and an order is passed in proceedings in execution of that decree, no appeal lies against that order. For section 9 provides that "no appeal shall lie from any order or decree passed in any suit" under that section, and, by the explanation to section 647 of the Code of Civil Procedure, applications for the execution of decrees are proceedings in suits.

Thomas Souza v. *Gulam Moidin Beari* 438

2. ———————————— *Amendment Act—XII of* 1891, *s.* 9—*Possession as title against all but true owner—Effect of Specific Relief Act even where suit is brought more than six months after dispossession:*

Possession is, under the Indian, as under the English law, good title against all but the true owner. Section 9 of the Specific Relief Act is in no way inconsistent with the position that as against a wrong-doer, prior possession of the plaintiff, in an action of ejectment, is sufficient title, even if the suit be brought more than six months after the act of dispossession complained of and that the wrong-doer cannot successfully resist the suit by showing that the title and right to possession are in a third person. The only effect of section 9 of the Specific Relief Act is that a person who has been dispossessed otherwise than in due course of law and who brings a summary suit within the time prescribed by that section, is entitled to be re-instated even if the defendant by whom he was dispossessed be the true owner or a person authorized by or claiming under him. But a decree passed in such a suit will not have the force of *res judicata* on the question of title. *Nisa Chand Gaita* v. *Kanchiram Bagani*, (I.L.R., 26 Calc., 579), dissented from.

Narayana Row v. *Dharmachar* 514

3. ————————————, s. 42—*Suit for declaration that the defendants were not dharmakartas of certain temples and for the appointment of trustees—No claim for temple property—Maintainability:*

A suit for the appointment of new trustees to a temple on the ground that the defendants are not the lawful trustees and that the trusteeships are therefore vacant, is a suit under section 539 (*a*) of the Code of Civil Procedure, being comprised in the words "whenever the direction of the Court is deemed necessary for the administration of such trust." *Bishen Chand Esawut* v. *Syed Nadir Hossein*, (L.R., 15 I.A., 10), relied on. Such a suit is not invalid under section 42 of the Specific Relief Act, by reason of the fact that no consequential relief is claimed, even if there be temple properties in the possession of the defendants as dharmakartas. Where a suit is maintainable under section 539 of the Code of Civil Procedure and the plaint seeks the relief specified in that section, section 42 of the Specific Relief Act does not apply. *Strinivasa Ayyangar* v. *Strinivasa Swami*, (I.L.R., 16 Mad., 31), distinguished. New trustees appointed under clause (*a*) of section 539 will be entitled to demand possession of the temple properties from the defendants in the suit whose title to administer the trust has been negatived by the decree, and, if such possession be not given, will be entitled to bring a suit to eject them from the temple and its endowments.

Neti Rama Jogiah v. *Venkatacharulu* 450

4. ————————————, ss. 54, 56, 57—*Breach of negative covenant—Injunction:*

Plaintiffs advanced money to the defendants for the purpose of carrying on work in certain mica-mines, in pursuance of an agreement by which defendants undertook, in consideration of the advance, to send all the mica produced from the mines to plaintiffs and bound themselves not to send any of it to any firm other than plaintiffs', or keep any in stock. Plaintiffs now complained that defendants had, in breach of their agreement, arranged to consign and had already made consignments of mica to another firm and were keeping mica in stock. Plaintiffs filed this suit for specific performance and for an injunction restraining defendants from acting in violation of the terms of the agreement; a temporary injunction was subsequently applied for and obtained. Upon an appeal being preferred by defendants against the order granting the temporary injunction:—*Held*, that the injunction was rightly granted. The granting of such an injunction, under section 493 of the Code of Civil Procedure, is a matter of judicial discretion. Whether the principles which govern the grant of a temporary injunction under the Code of Civil Procedure are the same as those which are laid down in the Specific Relief Act relating to the grant of a perpetual injunction.—*Quære.* *Nusserwanji Merwanji Panday* v. *Gordon*, (I.L.R., 6 Bom., 266), referred to.

Subba Naidu v. *Hagi Badsha Sahib* 168

STAMP ACT—I OF 1879, s. 7—*Instrument relating to "several distinct matters" — Consideration for lease being rent payable each month and one month's rent payable in advance to be repaid at end of term:*

Where the consideration for a lease consists partly of rent to be paid each month and partly of a sum equal to a month's rent paid in advance and repayable at the end of the lease, the instrument relates to only one matter, namely, the lease, and is not chargeable with duty as an instrument "dealing with two distinct matters."

Reference under Stamp Act 473

STATUTES—CONSTRUCTION OF, AFFECTING PROCEDURE AND VESTED RIGHTS—*See* "PROVIDENT FUNDS ACT."

SUCCESSION ACT—X OF 1865, ss. 90, 94—*Bequest to three children "or the survivors or survivor of them"—Incapacity of one to take by his attestation of the will—Residuary bequest to widow—Construction—Doctrine of acceleration:*

By his will, a testator, after giving a life interest in certain property to his wife, directed that after her death the property should be divided into equal shares between his "three children James, Cornelius and Florence, or the survivors or survivor of them," and the will contained a residuary bequest in favour of the wife. James (who was appointed a trustee) was an attesting witness to the will. The widow having died, Florence brought this suit, seeking to have it declared that James was incapacitated from taking under the will (by reason of his having attested it) and that she was entitled to a moiety of the property bequeathed:—*Held*, that the share of the legacy to James, which had lapsed, fell into the residue. The effect of the bequest to the three children "or the survivors or the survivor of them" would, in case James had predeceased

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the testator, have been to take the case out of the ordinary rule that a legacy lapses where the legatee dies during the life-time of the testator. But as the two children had not survived James, the contingency on the happening of which they were to take had not happened. The testator having made a testamentary disposition which was incapable of taking effect, the share of James fell into the residue. The doctrine of acceleration could not be applied to such a case.

Camani v. *Barefoot* 433

2. ——————————, s. 105—*Bequest to charitable uses by a testator leaving a widow him surviving—Validity—"Nearer relative" than a nephew or niece:*

By section 105 of the Indian Succession Act, no man having a nephew or niece or any "nearer relative" shall have power to bequeath any property to charitable uses, except by will executed not less than twelve months before his death and deposited as by the section is provided. A testator by his will bequeathed property to charitable uses, and died two days thereafter leaving a widow him surviving. On a question being raised as to the validity of the bequest:—*Held*, that the bequest was valid. The term "relative" in section 105 of the Succession Act refers to kindred only, as set fourth in the table of consanguinity annexed to section 24 of the Act, and has no application to any relationship by marriage.

Administrator-General of Madras v. *Simpson* 532

TRANSFER OF PROPERTY ACT—IV OF 1882, ss. 10, 111 (g)—*Applicability of principles of the Act to lease executed prior to its enactment:*

In 1862, V leased certain land on permanent lease to Y, the instrument reciting that Y had no right to alienate the property. In 1890, Y sold the holding to S. In 1892, plaintiff acquired the rights of the original lessor V, by purchase; in 1894, S sold the holding to the defendants. Plaintiff now sued to evict the defendants, claiming that the alienation to them operated as a forfeiture of the lease. The lease contained no express condition to that effect, nor did it provide that, on breach of the stipulation against alienation, the lessor might re-enter:—*Held*, that the alienation did not entitle the plaintiff to terminate the permanent lease and re-enter upon the land.

Parameshri v. *Vittappa Shanbaga* 157

2. ——————————, s. 65 (*c*)—*Duty of mortgagor to pay public revenue on mortgaged land—Default in payment—Sale for arrears of revenue—Subsequent sale by purchaser at revenue sale to original mortgagor—Right of mortgagee under original mortgage:*

It is the duty of a mortgagor, under section 65 (*c*) of the Transfer of Property Act, to pay the public revenue accruing due on the mortgaged property when it continues in his possession. If he fails to perform that duty, and the land is sold for arrears of revenue and the purchaser at the revenue sale sells the land to the original mortgagor, the mortgage is not extinguished. A man cannot be allowed to take advantage of his own wrong, and notwithstanding that the land might have vested in the purchaser at the revenue sale free of the mortgage, the original mortgagor (or his son), on his purchase from the auction purchaser, cannot plead, for his own benefit, that by reason of such wrong there has been a statutory extinction of the original mortgage. *Nawab Sidhee Nuzur Ally Khan* v. *Rajah Ojoodhyaram Khan*, (10 M.I.A., 540 at p. 557), followed.

Sanagapally Lakshmayya v. *Intoory Bolla Reddy* 385

3. ——————————, s. 74—*Mortgage of property—Subsequent mortgage to same mortgagee—Third mortgage with possession—Decree obtained by first mortgagee—Usufructuary mortgagee not a party—Subsequent suit by first mortgagee against usufructuary mortgagee for amount of decree:*

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The owner of land mortgaged it to plaintiffs, and, at a subsequent date, gave plaintiffs a second mortgage over it. At a still later date, the mortgagor gave a further usufructuary mortgage over it to the predecessor in title of the third defendant. Plaintiffs then sued the mortgagors on their two mortgages, obtained a decree and brought the property to sale, when it was purchased by the second plaintiff, the undivided brother of the first plaintiff. The third defendant was not made a party to this suit. Plaintiffs now sued the mortgagors as well as the third defendant, and prayed that the third defendant might be decreed to pay them the amount of their decree, and that, in default, it be declared that the third defendant be absolutely debarred of his right to redeem the prior mortgage, and that he be ordered to surrender possession of the property to plaintiffs:—*Held*, that the right of the third defendant was not affected by either the decree or the sale; the only effect of the sale being to transfer to the purchaser (the first mortgagee) the equity of redemption of the mortgagor. *Also*, that the only right that the third defendant had now was that which he could have claimed to exercise if he had been a party to the suit on the prior mortgage, namely, a right to redeem that mortgage with the view of enforcing his own mortgage. *Muhammad Usan Rowthan* v. *Abdula*, (I.L.R., 24 Mad., 71 at pp. 174, 175), followed.

Goverdhana Doss v. *Veerasawmi Chetti* 537

4. ——————————, s. 75—*See* "CIVIL PROCEDURE CODE—ACT XIV OF 1882, s. 310-A."

5. ——————————, ss. 82, 100—*Civil Procedure Code—Act XIV of* 1882, *s.* 501—*Payment by one of several co-sharers owning estate subject to revenue to save sale—Limitation Act—XV of* 1877, *sched. II, arts.* 132, 99, 61:

Where one of two or more co-sharers owning an estate subject to the payment of revenue to Government pays the whole revenue in order to save, and so does save the estate from liability to be sold by Government for realising the arrears of revenue he is by operation of law entitled to a charge upon the share of each of his co-sharers for the realization of the latter's share of the revenue, as between the co-sharers. *Seshagiri* v. *Pichu*, (I.L.R., 11 Mad., 452), followed; *Achut Ramchandra Pai* v. *Hari Kamti*, (I.L.R., 11 Bom., 318; *Kinu Ram Das* v. *Mozaffer Hosain Shaha*, (I.L.R., 14 Calc., 809); and *Seth Chitor Mal* v. *Shib Lal*, (I.L.R., 14 All., 273), dissented from. *Per* BHASHYAM AYYANGAR, J. (at the first hearing).—That the suit was governed by article 132 of schedule II to the Limitation Act in so far as it related to the enforcement of a charge. Assuming that the plaintiff had no charge on the defendant's share of the estate, the article applicable would be article 61 or article 99, but not article 120. Though a claim for contribution generally arises in cases where the party seeking contribution has himself paid the amount in respect of which contribution is sought, and though, in the present case, the arrear of revenue had not been paid to Government by the plaintiff, but had been realized by the Collector under the Revenue Recovery Act from the income of the plaintiff's share after it had been registered as a separate estate, plaintiff's right to claim contribution was not affected. Nor did that fact affect the application of article 99 or article 61 of schedule II of the Limitation Act, in both of which the person bringing the suit is referred to as having 'paid' the amount sought to be recovered. In such a case, it is but just that all should contribute in proportion towards a benefit obtained by all. It is immaterial whether the party seeking contribution made the payment voluntarily or involuntarily, namely, by payment to avert coercive process against his property or by the seizure of his property under process of law for realization of the amount. In either case he has been damnified and the parties against whom he seeks contribution have been benefited to that extent.

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6. ——————————————————, s. 111—*Landlord and tenant—Determination of tenancy—Commencement of occupation of dwelling house—Profession by tenant to hold adversely to landlord—No determination of tenancy—Hindu Law—Suit by presumptive reversionary heirs for decree declaring alienations by Hindu widow not binding except for life interest—Maintainability—Limitation Act XV of* 1877, *sched. II, art.* 120 :

Where a tenant enters into occupation of a dwelling house as a tenant, the tenancy, in the absence of evidence to the contrary, will be presumed to be one from month to month; and until it has been legally determined in one of the modes specified in section 111 of the Transfer of Property Act, limitation does not run against the landlord though the tenant may, in fact, profess to hold the property adversely to the landlord. *Srinivasa Ayyar* v. *Muthusawmi Pillai*, (I.L.R., 24 Mad., 246), and *Seshamma Shettati* v. *Chickaya Heyade*, (I.L.R., 25 Mad., 507), followed. Assuming that a presumptive reversionary heir may be given a decree declaring that he is entitled to succeed, on the death of a widow, to property alleged to form part of her husband's estate, which property is in the possession of persons who claim it as their own, adversely to the widow, the suit praying for such a declaration must be brought within the period prescribed by article 120 of schedule II to the Limitation Act. Article 125 does not apply to such a suit.

Ramasawmi Naik v. *Thayammal* 488

VILLAGE OFFICERS—*Madras Hereditary Village Offices Act—III of* 1895, *s.* 3, *cl.* 3 *—Suit for lands forming emoluments of the office of Ambalam—"Head of the village"—Office in a "Proprietary estate"—Office in Inam village—Grant confirmed by Government—Jurisdiction of Civil Court to entertain suit :*

A suit was brought to recover lands which formed the emoluments of the office of Ambalam in a certain village. It was found on the evidence that the holding of the office of Ambalagar in that village did not constitute the holder the head of the village. On the question being raised as to whether the suit was cognizable by a Civil Court:—*Held*, that the office fell within the meaning of clause 3 of section 3 of Madras Act III of 1895, inasmuch as it was not one of the offices therein exempted, and was an office in a "Proprietary Estate," namely, an Inam village the grant of which had been confirmed by Government. The suit was, therefore, not cognizable by a Civil Court.

Soundara Pandia Theven v. *Velathippa Thevan* 490

THE

INDIAN LAW REPORTS,

Madras Series.

APPELLATE CRIMINAL.

Before Mr. Justice Davies and Mr. Justice Benson.

EMPEROR, APPELLANT,

v.

EDWARD WILLIAM SMITHER (FIRST ACCUSED), RESPONDENT.*

1902. February 10, 26.

Criminal Procedure Code—Act V of 1898, *ss.* 423 (2), 537—*Trial by jury—Misdirection—Verdict and order of acquittal—Appeal against acquittal—Jurisdiction of High Court to consider the evidence—Evidence of accomplices.*

In a charge against an Inspector of Salt and Abkári of extortion and bribery, in a Court of Session, the first witness for the prosecution deposed that when he complained to the accused of delays which were taking place in weighing salt, the accused told him he ought to make the customary present of Rs. 100 or Rs. 50, according to the amount of salt to be weighed. The witness stated that he had refused to pay the bribe at that time, but that on the following day, when the accused stated that the weighing would only be properly proceeded with if the present were made, he consented, and the accused agreed to send his peon (who was charged with abetment) for the money. According to the witness, the peon came to his shop and was paid Rs. 50 by his accountant by his order and in his presence, and in the presence of two other persons who were in the employment of the witness. The prosecution evidence, if true, only showed that these two other persons had witnessed the transaction without taking any part in it. The accountant and the other two persons were called and gave evidence as second, third and fourth witnesses respectively, for the prosecution. Some entries in account books were relied on in support of the oral evidence of the witnesses, but they were challenged by the accused as false entries, and they were, in fact,

* Appeal No. 106 of 1902 by the Public Prosecutor, under section 417 of the Code of Criminal Procedure, against the order of acquittal passed by J. Hewetson, Sessions Judge at Tinnevelly, in accordance with the verdict of a jury, in Calendar Case No. 71 of 1901. Criminal Revision Case 11 of 1902. Taken up Case 2 of 1902.

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discredited by the High Court. The writer of them was called as the fifth prosecution witness, and they had been made after the alleged transaction was over. The Sessions Judge, in his charge to the jury, warned them against accepting the evidence of accomplices without corroboration in material particulars. He said that the first and second witnesses were certainly accomplices, and that the third, fourth and fifth witnesses had put themselves practically in the same position as accomplices and that their evidence also required corroboration before the jury could act on it. The jury returned a verdict of not guilty, and the Sessions Judge acquitted the accused. Upon an appeal being preferred by the Public Prosecutor against the acquittal, on the ground of misdirection:

Held, that as regards the first and second witnesses, the charge was accurate; but that the description of the third, fourth and fifth witnesses was a misdirection.

Held further, that it was not obligatory on the High Court, in such circumstances, to order further enquiry or a retrial and that the High Court could consider the evidence and if, after so doing, it formed the opinion that the evidence could not, in any proper view of the case, support a conviction, it would not alter or reverse the order of acquittal.

Queen-Empress v. *Magan Lal*, (I.L.R., 14 Bom., 115), approved. *Elahee Buksh's Case*, [5 Suth. W.R., (Cr.), 80], followed. *Wafadar Khan* v. *Queen-Empress*, (I.L.R., 21 Calc., 955), and *Ali Fakir* v. *Queen-Empress*, (I.L.R., 25 Calc., 230), commented on.

CHARGE of extortion and abetment of bribery. The charge against first accused, Edward W. Smither, was that on or about 1st December 1898, at Tuticorin, he being a public servant, to wit, Inspector in the Salt and Abkári Department, Tuticorin Circle, did accept or obtain from one Shanmugam Pillai, of Tuticorin, a sum of Rs. 50, a gratification other than legal remuneration, as a motive for forbearing to show, in the exercise of his official functions, disfavour to the said Shanmugam Pillai, and thereby committed an offence punishable under section 161 of the Indian Penal Code; also that he did intentionally on 30th November 1898 put the said Pillai in fear of injury to him and thereby dishonestly induced him to pay first accused Rs. 50, an offence punishable under section 384 of the Indian Penal Code; also that on or about 4th November and 14th December 1898, he attempted to commit the said offences and thereby committed an offence punishable under sections 511 and 161 of the Indian Penal Code. The charge against second accused Senthinayagam Pillai, was that he being a peon under first accused, and being thus a public servant, abetted these offences by receiving the said sum of Rs. 50 from the said Pillai and by giving it to first accused, an offence punishable under sections 161, 384 and 109 of the Indian Penal Code.

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The accused pleaded not guilty, and the case came before the Sessions Judge at Tinnevelly, and a jury.

The following statement of the case is taken from the judgment of Mr. Justice Benson:—

"One Shanmugam Pillai (first prosecution witness) was engaged in the export of salt to Penang, and had to get 26,000 bags of salt weighed out from the Tuticorin factories which were in charge of Inspector Smither at the end of November and early in December 1898. He complained one morning to Smither of delays in the weighment of the salt and Smither told him that he ought to pay the customary present of Rs. 100 for a large, or Rs. 50 for a small, ship-load. Shanmugam at first refused to pay the bribe, but next day consented on Smither again telling him that weighment 'would be properly made only if rupees were paid.' Smither then agreed to send his peon for the money. The second accused came to Shanmugam's shop the same evening (1st December 1898) at 8 P M., and received Rs. 50 from Chellam Pillai (second prosecution witness) by order of Shanmugam, and in his presence, and in that of the third and fourth prosecution witnesses, who were, respectively, a servant and a tailor in the employ of Shanmugam. Smither next day told Shanmugam that he had received the money. After that the salt was weighed out in much larger quantities. In support of the oral evidence of the witnesses to the above effect the prosecution especially relied on the day-book and ledger (exhibits A and B) kept by Shanmugam. The day-book is written on cadjan leaves, and contains an entry in Chellam Pillai's handwriting under date 1st December 1898, of a payment of Rs. 50 'to Inspector in the matter of export to Penang.' The ledger is a bound book, and it contains an entry under the same date of a payment of Rs. 50 'on account of P.S.A.A.' In the same space as the letters 'P.S.A.A.' and either under or over them is the word 'Inspector.' The letters 'P S.A.A.' denote the firm of the first prosecution witness, Shanmugam. According to the case for the prosecution the word 'Inspector' was written originally by Shanmugam's son-in-law (fifth prosecution witness) when he wrote up the ledger from the day-book, in which it will be remembered the word 'Inspector' is found, and that Shanmugam on looking over the ledger a few days afterwards noticed the word 'Inspector' and thought it unwise to leave so compromising an entry in the book, and made his son-in-law alter it to 'P.S.A.A.' (which would give no information

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as to the purpose for which the money was paid), but that by oversight a corresponding correction was not made in the day-book. The contention of the accused is that originally there was a blank space (as we find in the same book eight days later, where 'P.S.A.A.' is written in pencil in the blank space) or else that the original entry was 'P.S.A.A.', and that 'Inspector' was written when the present case was concocted by Shanmugam and his witnesses, at the instigation of one Venkatesa Iyer, a dismissed salt officer, who had been badly reported on by Smither and owed him a grudge in consequence, and who, as manager of a firm in partnership with Shanmugam, had opportunities of influencing him. It is admitted by the prosecution that Venkatesa Iyer has been acting as a detective for the Salt Department, and has been assisting it in the present, and in other cases, and was the first person to make charges against Smither so long ago as June last. The accused contend that the day-book, being written on cadjan leaves, could easily be tampered with, and suggest that the original entry was 'P.S.A.A.', as in the ledger, and that when the latter was altered a new leaf was substituted in the cadjan account showing the payment to the 'Inspector'. The accused strongly rely on the improbability of Shanmugam making the correction in the ledger in order to hide the bribe, without making a corresponding correction in the day-book, which is the more important account, and where it would only be necessary to substitute a new leaf in order to avoid all possible suspicion, and also on the fact that the alteration in the ledger is utterly ineffectual to conceal the bribe, since the word 'Inspector' is still plainly visible. The prosecution points out that the accounts came into the possession of the Salt Department not voluntarily on a complaint by Shanmugam, but when they were seized by order of the Magistrate along with the accounts of several other salt merchants, and contends that the circumstances negative conspiracy and concoction. On the other hand, the accused point to the fact that the accounts were in the hands of the salt officers for several days before they were handed to the Magistrate, and that they might have been tampered with, then or previously."

In the course of his charge to the jury, the Sessions Judge made the following remarks:—

"7. The law is quite clear that though it is perfectly legal for you to act on the uncorroborated evidence of accomplices, it is the

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duty of the Judge to warn you that, as a matter of common experience, it is unsafe to accept such evidence unless it is corroborated in material particulars. Accomplices have various motives for giving false evidence; and it is common experience that it is not safe to accept their evidence unless it is corroborated. The first witness, Shanmugam Pillai, is admitted by the Public Prosecutor to be an accomplice. It seems to me that Chellam Pillai is also an accomplice, for he admits that he counted the money and that he made an entry in the day-book as regards the payment; and, according to the evidence of at least one witness, he actually paid the money to the second accused. The other witnesses are not technically accomplices, for, an accomplice may be defined as a person who is liable to a criminal charge in respect of the transaction about which he gives evidence; but various rulings have laid down that 'witnesses who admit that they were cognizant of a crime, that they made no attempt to prevent it and that they did not disclose its commission are not necessarily accomplices, but their evidence should be treated with suspicion and only relied on to the same extent as that of accomplices'. (Mayne, page 979 of 'Criminal Law of India, 2nd edition,' and cases there cited.) The third, fourth and fifth witnesses were admittedly present at the time of payment and for nearly 2½ years they never told anybody what had happened.

"8. In this case, as in most similar cases, a charge of extortion is made, because witnesses think it takes away their guilt if they say they paid under compulsion. This view of the matter is a mistake. If Mr. Smither had a revolver in his hand and threatened to shoot first prosecution witness dead on the spot unless he paid the money, that would be a justification for the witness to pay the money, and his payment would not be a punishable offence (section 94, Indian Penal Code). It is no doubt true that bribery is not a serious offence in the eyes of natives, but 'one cannot help suspecting that men so pliable as to be willing to bribe may be induced to tell lies under some other motive or pressure.' It is a matter of experience that 'the two offences often go together' (*Queen-Empress* v. *Magan Lal*(1)). Of course bribe-givers have a strong motive to give false evidence. They hope, by pleasing those who conduct the prosecution, to avoid

(1) I.L.R., 14 Bom., 115 at pp. 136, 137.

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the consequences of their action and to escape punishment. No exception can be made in favour of bribers because they are not people of good character and because, if such exception were allowed, men of previously good character would be exposed to charges of receiving bribes without sufficient protection' (same case, page 138). So that, the first and second witnesses are certainly accomplices, and the third, fourth and fifth witnesses have put themselves in the same position, practically, as accomplices, and their evidence requires corroboration before you can act upon it."

The jury returned a verdict of not guilty, and both of the accused were acquitted.

Against that order of acquittal the Public Prosecutor preferred this appeal, on the ground that the Judge had misdirected the jury on points of law and that the verdict was erroneous owing to that misdirection.

The Advocate-General (Hon. Mr. *J. P. Wallis*) and the Public Prosecutor in support of the appeal.

Mr. *Robert Grant* for the accused.

DAVIES, J.—The principal objection taken to the Sessions Judge's charge to the jury is his having treated the first prosecution witness as an accomplice requiring corroboration in regard to the charge of extortion under section 384, Indian Penal Code, as well as in regard to the charge of abetting bribery under section $\frac{161}{109}$, Indian Penal Code. But the Sessions Judge had very good authority for his direction in the ruling in the case referred to by him (*Queen-Empress* v. *Magan Lal* and *Moti Lal*(1)). There three learned Judges of the Bombay High Court unanimously held, to quote the head-note in the report of that case, which is accurate, that "the limits of the application of the doctrine of necessity as an excuse for an act otherwise criminal are those prescribed in section 94 of the Indian Penal Code. Therefore, witnesses who in order to avoid pecuniary injury or personal molestation had offered or given bribes to a public servant were abettors of the offence of taking an illegal gratification, and their evidence should be treated as that of accomplices." In that case the inducement to bribe was said to have been a fear that the officials concerned would

(1) I.L.R., 14 Bom., 115.

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unfairly get the assessment of the villagers raised or put them to expense in erecting boundary marks, and it was held that that pressure, supposing it existed, was not the kind of compulsion which the law allows to be an excuse for the offence of abetting the acceptance by a public servant of an illegal gratification. In the case before us the fear which the first prosecution witness says induced him to give the bribe was that without it he would not get due deliveries of the salt he was purchasing from Government inasmuch as the first accused had told him that his weighments would only be done properly if rupees were paid. Following the decision of the learned Judges of the Bombay High Court, this, if true, was not such a threat as would excuse the first prosecution witness from the offence he was committing in giving a bribe to a public servant. If the law allowed the bribers to escape criminal liability when they bribed a public servant by complaining that they were put in fear of some pecuniary injury that would be, as Mr. Justice Jardine observes, "tantamount to encouraging the corruption as the corrupt Judge or officer would then be able by politic use of threats to give an indemnity to all who paid him money." So it was held in *Reg* v. *Parshram Keshav*(1) that receipts of bribes by public servants differ from extortions by private persons, and ought to be tried under section 161 rather than under section 383 of the Indian Penal Code. Though in the present case the charge of extortion as well as of bribery was laid against the accused, the first prosecution witness was nevertheless, under the ruling of the Bombay High Court, with which I entirely concur, an accomplice and required corroboration as the Sessions Judge ruled.

The second objection to the Judge's charge to the jury is in his telling them that second prosecution witness, Sellam Pillai, who speaks to actually having paid the bribe to the second accused, was certainly an accomplice; and that the third and fourth prosecution witnesses, Narayana Pillai and Vyravan Maistri, who speak to having witnessed the payment of the bribe and the fifth prosecution witness, Ambalavan Pillai, who speaks to altering the original entry in the ledger in regard to the person to whom the Rs. 50 was paid, were practically accomplices, and therefore also required corroboration. In my opinion the Judge was right in treating the second witness, who actually paid the bribe, albeit

(1) 7 Bom. H.C.R., 61, C.C.

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under the orders of his master, the first prosecution witness, as also an accomplice, because the witness says he knew it was a bribe, but I think the Judge was wrong in treating the other three witnesses as practically accomplices. The third and fourth prosecution witnesses took no part in the transaction but merely witnessed it and the fifth prosecution witness merely cooked the account after the transaction was over. The Judge might well have told the jury that they were tainted witnesses, or at all events not independent witnesses as they are all dependents of the first prosecution witness, and their evidence should therefore be received with caution.

The other objection taken to the Judge's charge to the jury is that he ought to have laid stress upon this fact or that fact as supporting the case of the prosecution, but there is no fault whatever to be found in the Judge in this respect, for a fuller or fairer charge upon the facts could not have been delivered.

Coming back to the one error which the Judge has committed, the question is whether that misdirection has "in fact" occasioned a failure of justice, in which case only have we authority to interfere either on appeal or in revision [section 537 (*d*), Criminal Procedure Code]. Now, it is impossible for us to decide whether there has been a failure of justice in fact without looking to see what the facts are. Again, this is an appeal by Government from an acquittal by a verdict of jury, and, under section 423, clause 2 of the Code of Criminal Procedure, we cannot alter or reverse a verdict of the jury unless we are of opinion that such "verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury as to the law laid down by him." If, on that ground, we are to alter or reverse the verdict of acquittal by the jury our powers under the same section [423 (A)] are to "reverse such order and direct that further enquiry be made or that the accused be retried or committed for trial as the case may be or find him guilty and pass sentence on him according to law." Now, in order to determine if the verdict is erroneous, and, if so, which of these powers we should exercise, it is absolutely necessary for us to go into the facts. On these two grounds I am clearly of opinion that we are bound to consider the evidence in the case before passing orders in it, and if we "are of opinion that the evidence could not, in any proper view of the case, support a conviction it will be worse than

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useless to send the case back for a new trial" (per Sir BARNES PEACOCK, C.J., in the case of *Elahee Buksh*(1)).

On going through the evidence, then, as we have done, I have no hesitation in agreeing with the rider to the jury's verdict, namely, that the evidence for the prosecution is unreliable. The evidence against the first accused Smither is that of the first prosecution witness alone. That evidence is that Smither asked for or hinted that he wanted a bribe, that Rs. 50 was subsequently paid to Smither's peon, the second accused, and that Smither admitted the next day that he had received the Rs. 50. This is not only the evidence of an accomplice, but it is evidence that was procured under pressure from Smither's superior officers. It was only forced from the first prosecution witness 5 or 6 days after he had been expelled from the salt pans on the suspicion that he had been giving bribes, and it is significant that after his evidence against Smither was given the first prosecution witness was again allowed access to the salt pans. There is absolutely no corroboration of the story. The entry in the first prosecution witness' ledger account which is put in as corroborative evidence bears on its own face its worthlessness, for it is one entry cancelled by another, and neither may be true. A similar entry of Rs. 50 made a few days afterwards in the same book of what is said to have been a bribe is left blank as to the person to whom it was paid; and the probability therefore is there was a blank in that respect in this case also. There was ample opportunity for the prosecution, in whose hands this account book with others was most improperly left for two or three days after it was seized from the complainant's shop, to have filled up the blank and concocted the entry as it now stands, and it was an opportunity that the chief person assisting the prosecution all along—in other words the detective in the case, one Venkatesa Iyer,—would gladly have seized as he is an arch enemy of Mr. Smither. If, however, the word Inspector was originally written in the book at the time, as the prosecution allege, the entry according to the evidence as now given was a false entry, because the money was paid to the second accused, the Inspector's peon, and not to the first accused, the Inspector himself. There is, therefore, no case against Mr. Smither and the verdict of acquittal in his case must be upheld.

(1) 5 Suth. W.R., (Cr.), 80 at p. 89.

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As regards the second accused the evidence as I have just stated is that he was the man who actually received the bribe. But he is not himself charged with the substantive offence but only with the abetment thereof, the prosecution having chosen to treat him as a go-between on behalf of the first accused. There is no evidence whatever except that of the first prosecution witness that the second accused was such go-between, and as he denies it, there is no case against him.

The acquittal in his case must therefore also be upheld.

The appeal petition is accordingly dismissed and with it the case in revision also goes.

BENSON, J.—In this case the first accused, E. W. Smither, is an Inspector in the Salt Department: second accused was his peon.

They were tried by a jury, the first for bribery and extortion (sections 161 and 384, Indian Penal Code), and the second for abetment of the same, and were acquitted.

Against that acquittal the Public Prosecutor, on behalf of Government, now appeals, on the ground that the Sessions Judge misdirected the jury on points of law, and that the verdict was erroneous owing to such misdirection. The case for the prosecution may be briefly stated as follows: [His Lordship's statement of the case has already been set out.]

Such being the main facts and contentions on both sides, we have to see whether there is any misdirection in the Sessions Judge's charge to the jury. The law as to how far the prosecution witnesses are accomplices and how far their evidence requires corroboration and can be acted on by the jury, is laid down in paragraphs 7 and 8 of his charge to the jury in these words: [His Lordship referred to the portion of the charge already set out.]

Now, I think that the learned Sessions Judge laid down the law with substantial accuracy in the first sentence of paragraph 7, though in order to be quite accurate he ought to have added the words "as a general rule" after the word "unsafe," for there are special circumstances in which it would not be unsafe to accept the evidence of an accomplice even when uncorroborated. But I think that he was not correct in law in going on to say that "the third, fourth and fifth witnesses have put themselves practically in the same position as accomplices and their evidence requires

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corroboration before you can act on it," nor was he right in quoting to the jury as a correct statement of the law the passage to the same effect from Mr. Mayne's 'Criminal Law of India.' Two cases, *Queen* v. *Chando Chandalinee*(1) and *Ishan Chandra* v. *Queen-Empress*(2) are referred to by Mr. Mayne in support of the proposition.

The former was a case of murder. One of the witnesses, Shasti, said she was present in the house at the time and witnessed the alleged murder. She was related to the accused, and said nothing about the murder for four months. In regard to her the Court observed: "The statement of this witness, Shasti, is, in fact, an admission that she was cognizant of the crime which she took no means to prevent or disclose and her evidence must be considered as no better than that of an accomplice." That was a dictum in regard to a particular witness, and it by no means justifies a general proposition that every witness, in all classes of cases, who acts as Shasti did, must be treated as practically an accomplice. The case of *Ishan Chandra* v. *Queen-Empress*(2) has still less application to the present case. The remarks of the Judges in these cases must be read in reference to the particular facts then under discussion, and, when so read they do not at all support the broad proposition laid down. When the principles, or rules of law, on any matter have been laid down in general terms by the Legislature, a Judge will, in most cases, be wise to refer to the exact terms of the law, and then instruct the jury with regard to its application to the facts before them, instead of adopting as principles passages from text-books (however eminent the writer may be) which briefly refer to what is laid down (or is supposed to be laid down) in reported cases or even to passages from the judgments of reported cases themselves, which may mislead by not being correctly understood in relation to the facts of the particular case, or possibly even by not containing an accurate exposition of the law. Now the law as to the evidence of accomplices is laid down in sections 133 and 114 of the Indian Evidence Act.

Section 133 enacts that "An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."

(1) 24 Suth. W.R., (Cr.), 55. (2) I.L.R., 21 Calc., 328.

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Section 114 says that "The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case," and as illustrations it adds that "the Court may presume (*b*) that an accomplice is unworthy of credit unless he is corroborated in material particulars. But the Court shall have regard to such facts as the following in considering whether such maxims do or do not apply to the particular case before it.

As to illustration (*b*) "A, a person of the highest character is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself.

As to illustration (*b*) "A crime is committed by several persons. A, B and C three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D and the accounts corroborate each other in such a manner as to render previous concert highly improbable."

There is nothing in the law, as laid down in these sections, to justify the broad proposition quoted by the Judge that the evidence of witnesses, who admit that they were cognizant of a crime, that they made no attempt to prevent it and that they did not disclose its commission should "only be relied on to the same extent as that of accomplices." The degree of credit to be attached to the evidence of such witnesses depends on all the facts and circumstances of the particular case. For instance, if a busy man sees a person strike another a trifling blow in the street, and if the witness proceeds on his way without interfering or calling for the Police, and is summoned next day to give evidence as to what he saw, can it be supposed for a moment that he is to be regarded as "practically an accomplice" and that his evidence is to be treated with suspicion, because, though cognizant of the assault, he made no attempt to prevent it and gave no information to the authorities. There would, in such a case, be no obligation on the witness to interfere or to give information to the Police. He might have thought the person assailed well able to take care of himself, or he might have thought the assault unimportant compared with his own important business. On the other hand, if a Policeman should

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see a thief pick a lady's pocket in the street and not interfere or report the matter for months, and should then give evidence of it, without explaining his inaction, the Court will be right in treating his evidence with suspicion, not on the ground that he must necessarily have been an accomplice, but on the principal which is the foundation of the rule as to the credit to be usually attached to accomplices, and which is laid down in section 114 of the Evidence Act, viz., that the Court might presume his evidence to be untrue because he did not act in accordance with the common course of human conduct and his public duty in relation to the facts of the particular case. In the present case there are, no doubt, good reasons for not placing much reliance on the evidence of the third, fourth and fifth witnesses, but they were in no sense accomplices, and it only leads to confusion of thought to treat them as "practically accomplices", and then apply a mechanical rule as to their credibility, instead of judging of their credibility by a careful consideration of all the particular facts of the case affecting it. Natives do not generally regard bribery as a very serious offence. There was no legal obligation on the witnesses to give information of it, and all our experience of natives of that class leads us to conclude that they would be unlikely to do so unless actuated by enmity or the desire for gain. On the other hand, the events happened nearly three years before the witnesses gave their evidence; it is not likely that a transaction of the kind would take place in the presence of so many persons, and these witnesses are all subject to the influence of the first witness, and are of such a position in life as not to entitle them to any special degree of credibility; and there are the inconsistencies in their evidence to which the Judge has drawn attention in paragraph 9 of his charge. For these reasons the Judge might well have advised the jury to treat their evidence with caution. Exception is also taken by the learned Advocate-General to the Sessions Judge's reference to section 94 of the Indian Penal Code, and to his omission to leave it to the jury to say whether on the evidence the case was one of extortion or bribery. I do not think it necessary to go into these questions, because as regards the third, fourth and fifth witnesses I think there was a clear misdirection. It is obviously one of such a character as may have led to a failure of justice; and it is necessary to decide as to the procedure to be adopted when such a misdirection is established.

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It is contended for the accused that we must now weigh the truth of the evidence against the accused, and that we may then convict or acquit the accused according to the view we take of the evidence, or may, if we see fit, direct a retrial. On the other hand, the learned Advocate-General contends that an important misdirection having been established, we are bound to order a new trial and have no power to assume the functions of a jury, and decide as to whether the evidence, when rightly considered does or does not establish the guilt of the accused. The law on the subject must be gathered from the Criminal Procedure Code. Section 417 gives Government the right to appeal against an acquittal, and section 418 declares that such an appeal may lie on a matter of fact as well as a matter of law, except where the trial was by jury, in which case the appeal shall lie on a matter of law only. Then section 423 gives the Court power to reverse the order of acquittal and direct further enquiry, or a retrial, or to find the accused guilty and pass sentence on him, but adds "nothing herein contained shall authorize the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him."

Then section 537 enacts that "subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal on account of (*d*) any misdirection in any charge to a jury, unless such misdirection has, in fact, occasioned a failure of justice."

Now, reading these sections together, and construing the words in their plain, ordinary sense, the contention of the accused seems to be justified. Section 418 says that an appeal against an acquittal by a jury shall lie, that is, shall be based and supported, on a matter of law only. If an erroneous verdict on a matter of fact is alleged that will not support such an appeal; but if there is an error in law the appeal will lie. That is, I think, all that section 418 means. It does not, I think, prohibit the Court, in a case where an appeal lies on a question of law, from deciding questions of fact which other sections of the Code require the Court to decide in order to do justice in the case. Section 423, clause (1), requires the Court to then peruse the record, and hear the parties, and lays down what are the ordinary powers of the Court in dealing with his appeals against acquittals generally, but clause (2) in should

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power of the Court to reverse or alter the verdict of the jury "unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge." The manifest implication in these words seems to be that if the verdict is erroneous owing to a misdirection, the verdict may be reversed or altered. Clause (2) contains no provision as to what the Court is to do, or has power to do, when it reverses or alters the verdict of a jury. To ascertain that it is necessary to revert to clause (1) of the section, and in it no distinction is made between the powers of a Court in a case tried by a jury and in any other case. The inference seems to be that as soon as the verdict of the jury is reversed, the Court has the same power to deal with the case that it has to deal with a case triable by assessors as soon as the order of acquittal by the Judge is set aside; that is, the Court may order a retrial, or may find the accused guilty and pass sentence on him according to law.

It is to be observed that clause 2 of section 423 speaks of the power to "reverse or alter" the verdict. "Reverse" evidently means "to set aside," to "make null," but it is difficult to see what further action the word "alter" is intended to indicate unless it be the substitution of a finding of "guilty" for "not guilty" or *vice versâ*. The only verdict a jury can give is one of "guilty" or "not guilty." That verdict may be "reversed," *i.e.*, set aside, or it may be "altered," *i.e.*, another finding may be substituted for that of the jury. As already observed, if the verdict is "reversed" the Court may, as an alternative, take the action indicated in clause (*a*) of the section and order further enquiry or a retrial instead of itself "altering" the finding.

In many cases, no doubt, the Court would prefer to take this course, but I cannot hold that it is obligatory on the Court to do so whatever may be its view as to the weight to be attached to the evidence.

To do so would be an intolerable hardship on an accused person in a case where the Court was satisfied of his innocence, and that the acquittal was, in fact, right, or that the conviction (in the case of an appeal against a conviction) was not justified by the evidence. Section 537 expressly enacts that "no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal on account of any misdirection in any charge to a jury unless such misdirection has, in fact, occasioned a failure of justice." The words "in fact" were introduced into

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the Code in 1898, apparently in order to emphasise the duty of the Court to go into the merits before interfering in consequence of a misdirection or other error, but I think the duty existed just the same before those words were added.

We cannot say that there has, in fact, been a failure of justice without considering the credibility of the evidence, and I think it would be unreasonable, and contrary to the express direction of section 537, to hold that once a misdirection, even though it be an important one—is established we are bound mechanically to order a retrial, even though in our judgment the evidence for the prosecution is untrustworthy.

If it is said that the Court, not having an opportunity of observing the demeanour of the witness, is at a disadvantage in weighing the evidence, that is true, but it is the same in all cases where an Appellate Court deals with the facts, and is no worse in a case triable by a jury than in one triable by a Judge with assessors.

If it is said that in weighing the truth of the evidence we are assuming the functions of the jury, the answer is that this is a duty so frequently cast on Judges of High Courts in India that no adverse argument can be drawn from it.

Trial by jury is a comparatively recent innovation in India, and even now comparatively few offences are so tried, and the classes of cases to be so tried may be varied from time to time by order of Government. A jury in the mofussil of this part of India consists of only five men, and the verdict of a bare majority ordinarily prevails.

In section 307 the Legislature expressly imposes on the High Court the duty of itself trying jury cases. There is therefore nothing opposed to the fundamental principles of the law in a Judge of this Court trying on the written record and without examining witnesses questions of fact even in a case ordinarily triable by a jury. The only question in each case is whether or not the Legislature has imposed on the Court such duty.

In the present case I think that it has imposed this duty and that we ought not to order a retrial unless we are satisfied that the misdirection has, in fact, occasioned a failure of justice [section 537] and that the verdict is erroneous [section 423 (2)]. In this view of the law of India I am supported by the high authority of Sir Barnes Peacock, C.J., and the Full Bench of the Calcutta

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High Court in the case of *Elahee Buksh*(1). In that case the appeal was against a conviction, but the reasoning of the learned Chief Justice appears to apply even more strongly in the case of an appeal against an acquittal. He says: "It would tend to defeat, and not to promote, justice, if a verdict of guilty were set aside, and a new trial granted, for a defective summing up with reference to the weight of evidence in a case in which the High Court would, upon the evidence given on the trial, have affirmed a conviction, if, instead of a trial by jury, the trial had been before a Judge and assessors. In determining whether the verdict ought to be set aside and a new trial granted for a defective summing up of the evidence, it appears to me that the question to be considered is not whether upon a proper summing up of the whole evidence, a jury might possibly give a different verdict, but whether the legitimate effect of the evidence would require a different verdict. If the evidence is such that the High Court would have affirmed the conviction if the trial had been before a Judge and assessors, I think that they ought not to set aside a verdict of guilty found by a jury merely because the Judge has not, in summing up, given proper caution or advice to the jury as to the weight which they might properly give to the evidence. If the verdict is set aside for such a cause upon the ground that the error of the Judge has caused a failure of justice and that the prisoner has been prejudiced, thereby, it may be necessary in some cases to grant a new trial. But if the Court is satisfied that a failure of justice has been caused, and that the evidence is wholly insufficient to support any conviction against the prisoner, and would upon the same evidence have reversed a conviction if the case had been tried without the intervention of a jury, there is no necessity, and I think it would be improper, to grant a new trial. In such a case, the Court, having set aside the verdict, may order the prisoner to be discharged," and again "the case should be returned to the Division Bench with an expression of the opinion of the Full Bench . . . . that the verdict and conviction ought not to be set aside if the Court be of opinion that the verdict was warranted by the evidence, and that upon that evidence they would have upheld the conviction on appeal if the trial had been by the Judge with the aid of assessors instead of by jury."

(1) 5 Suth. W.R., (Cr.), 80.

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These views were accepted by the Full Bench, Jackson, J., adding "In regard to the proposed rule that we should not interfere in case of misdirection where the facts are such that if the trial had been held before a Judge and assessors, we should have affirmed the sentence, I have only one misgiving. It is not always safe,—I might say it is rarely safe—for an Appellate Court, with papers before it, to put itself in the place of the Court below which has heard the witnesses; and it might be that, in affirming the conviction on the faith of some unnoticed circumstance of corroboration found in the evidence, we might be using that which the Judge and Jury would not have relied upon. But this perhaps only suggests caution in the application of the rule, rather than an objection to the rule itself."

The view of the law taken by the Full Bench in the case of *Elahee Buksh*(1) is, I think, that embodied in the present Code of Criminal Procedure, and I am unable to adopt the contrary view taken by a Division Bench of that Court in the cases reported in *Wafadar Khan* v. *Queen-Empress*(2) and *Ali Fakir* v. *Queen-Empress*(3). I may add that the dicta cited in the former case from the judgment of the Privy Council in the case of *Makin* v. *Attorney-General for N.S. Wales*(4) had reference to the law in a country where the history and essential characteristics of the law of trial by jury are very different from what they are in India.

The question, then, is whether in the present case we are satisfied that the verdict is erroneous in the sense indicated by Sir Barnes Peacock. Are we of opinion that the acquittal was not warranted by the evidence or would we uphold the acquittal, on appeal if the trial had been by the Judge with assessors instead of by a jury? I must answer this last question in the affirmative. I have already indicated that there are good reasons for not attaching weight to the evidence of the third, fourth and fifth witnesses. Even if their evidence and the evidence of the second witness is true, it only establishes the payment of Rs. 50 to the second accused. It does not implicate the first accused. His guilt must rest on the evidence of the first witness, Shanmugam. The alleged demand for money and the admission of its receipt by the first accused, rest solely on the uncorroborated evidence of Shanmugam, and

(1) 5 Suth. W.R., (Cr.), 80.
(2) I.L.R., 21 Calc., 955.
(3) I.L.R., 25 Calc., 230.
(4) L.R., [1894], A.C., 57.

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the terms of his prior statement to the Deputy Commissioner indicate that the first accused never, in fact, made any admission of the receipt of the money. The entries in the accounts I regard as fraught with suspicion, and as damaging, rather than assisting, the prosecution. It is unlikely that if Shanmugam took the precaution of altering the entry in the ledger, he would have failed to alter the day-book; especially as it could be done so easily and effectually by rewriting one-half of a cadjan, and it is incredible that if he thought it necessary to obliterate the word "Inspector" in the ledger, he would have done it in such a way as to still leave it perfectly legible. It is impossible on the evidence to say that Venkatesa Iyer, or other enemies of the accused, had no opportunity of making such an alteration after the books were seized. If that entry is a forgery, as I strongly suspect that it is, it becomes impossible to rely on the evidence of Shanmugam or the other witnesses who are his dependents.

The inference sought to be drawn from the increase of salt weighed out after the first December is not, by itself, important, as it may easily have been due to other causes altogether. There is no independent evidence to show that Shanmugam was at the time pressing to be allowed larger deliveries.

I would refuse to set aside the verdict of the jury, and would dismiss the appeal.

APPELLATE CIVIL.

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

VENKATA SUBRAMANIA AYYAR (PLAINTIFF), APPELLANT,

v.

KORAN KANNAN AHMOD AND OTHERS (DEFENDANTS), RESPONDENTS.*

1902. February 21.

Civil Procedure Code—Act XVI of 1882, *s.* 257-*A—Agreement to give time for the satisfaction of a judgment-debt.*

The test as to whether section 257-A of the Code of Civil Procedure operates to render an agreement void is whether the parties agree that the judgment-debt,

* Second Appeal No. 910 of 1900, against the decree of E. L. Vaughan, District Judge of North Malabar, in Appeal Suit No. 26 of 1900, preferred against the decree of J. F. Pereira, District Munsif of Vayitri, in Original Suit No. 56 of 1899.

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qua judgment-debt, shall be put an end to. If so, the section does not render the agreement void. If not, it does.

After a decree had been passed in favour of a plaintiff in a suit, the defendant gave plaintiff a bond by which he undertook to pay plaintiff, by instalments, the amount still due to him under the decree, after giving credit for a payment which had already been made on account. The bond gave plaintiff a twofold remedy in case of default,— first, a right to sue for the balance, secondly, a right to recover the balance by executing the decree. The sanction of the Court was not obtained. Plaintiff received instalments in pursuance of the terms of the bond for some time, but defendant subsequently ceased to make any further payments. Plaintiff thereupon brought this suit on the bond to recover the balance which still remained unpaid, when it was pleaded in defence that the bond was void under section 257-A of the Code of Civil Procedure :

Held, that the effect of the bond was to keep alive the relation of judgment-creditor and judgment-debtor by the express agreement of the parties, the debt being enforceable as a judgment-debt. And that, on its true construction, the bond was an agreement to give time for the satisfaction of a judgment-debt, and, as the sanction of the Court had not been obtained, was void.

Also, that the agreement was none the less void because one of the parties to it, (the legal representative of one of the judgment-debtors), had not been one of the parties to the suit in which the decree was obtained.

Juji Kamti v. *Annai Bhatta*, (I.L.R., 17 Mad., 382), and *Hukum Chand Oswal* v. *Taharunnessa Bibi*, (I.L.R., 16 Calc., 504), commented on.

SUIT to recover Rs. 2,500 (by sale of certain hypothecated properties, and of other properties of the defendants, and personally from defendants Nos. 1 and 2) being balance of principal due under a registered hypothecation bond executed by defendants Nos. 1 and 2 and their father Amotti Hadzi (since deceased) to plaintiff's paternal grandfather Subben Patter (since deceased) on 14th March 1887. Plaintiff's grandfather obtained decrees against the father of defendants Nos. 1 and 2 in Original Suit No. 16 of 1885 and (on appeal) in Appeal Suit No. 47 of 1886, whereupon a settlement of account took place, a sum of Rs. 7,500 being found to be due by the father of defendants Nos. 1 and 2, to the plaintiff's grandfather. A bond (filed as Exhibit A in the present suit) was thereupon executed as follows :—

"Agreement executed by 1. Amotti Haji—occupation, cultivation and trade, son of Mussalman Mappila Koran Kunnen Kuttiali, residing in Changatam Tharayil Mechilatt Nadakal, Porannanoor Amsom, Wynad taluk, and sons 2. Ahmud 3. Kuttiali, to pensioner Subben Patter, son of Parakum Mecthal Venkata Subben Patter —Hindu Brahman—of Payingatteri gramom (village), Nalloornad Amsom of the said taluk on 14th March 1887 ;— Rs. 7,500 have been found to be due to you after deducting the payment made

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to-day out of the total amount found this day to be payable to you by three of us jointly, being the decree amount and Court costs with interest under the decrees passed against us, the first and second defendants, in Original Suit No. 16 of 1885 on the file of the North Malabar Subordinate Court and in its Appeal No. 47 of 1886 on the file of the High Court, Madras. It has been agreed that this sum of seven thousand five hundred rupees, without interest, should be paid up by fifteen instalments of Rs. 500 each from the year 1063 (1887–1888) to the year 1077 (1901–1902), each instalment being payable annually on the 1st Minom (13th March) and that receipts should be obtained and registered at our cost. Our properties moveable and immoveable, given in the following schedule including the mortgage property of the decree and other property, are hypothecated in respect of this. In default of payment of the amount by instalments stipulated as above, it has been agreed to pay with interest, all sums in a lump irrespective of the instalment time. In default of this, it has been agreed that you do recover it by duly executing the decree of the Court against our persons or our properties consisting of those mortgaged and not mortgaged as given below. If receipt registered be not granted in respect of the amount paid within the stipulated time, it has been agreed that he should bring it to the notice of the Court. It has also been agreed that the fact of the settlement of the matter of this decree, agreed to as above, be brought to the notice of the Subordinate Court by a petition to be presented to it now by both parties . . . . Besides the encumbrance upon the mortgaged properties herein, no one has any pecuniary right in them, and no encumbrance will be created pending the liquidation of this debt. If any be created, it will be invalid and we shall be in fault. List of documents pledged as security in respect of the mortgaged properties :—As the documents in respect of properties are not, after mortgage, now in possession but given in the Revenue Settlement Cutcherry, they cannot be given now. When this debt shall have been liquidated, this document with the pledged documents will be received back and the decree will have to be cancelled then. This debt will be liquidated by one or all of us. Witnesses hereof are Sankara Subben Subbarayan Patter of the said gramom and Panukkaran Kuttiali, residing in Mechilatt Nadakal. Written to the knowledge of these, by Pollayott Venkiteswara Patter of Payingatteri gramom.

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1. (Signed) Amotti. 2. (Signed) Ahmod. 3. (Signed) Kuttiali. *Witnesses.*—1. (Signed) Subbarayan Patter. 2. (Signed) Kuttiali."

The plaint recited the terms of this bond, and alleged that after ten instalments, amounting to Rs. 5,000, had been paid, defendants fell into arrears and failed to pay the further instalments. Defendants Nos. 3 to 10 were joined, as members of the family of defendants Nos. 1 and 2, the debt having, as plaintiff alleged, been contracted for family purposes. Plaintiff claimed as heir to his late father, contending that the debt had fallen to his share at a division between his father and his father's brother.

First defendant admitted the bond (exhibit A), but pleaded that as it was an agreement to give time for the satisfaction of the decree and had been entered into without leave of the Court, it was void. He also challenged plaintiff's right to sue, there being other heirs of the late Subben Patter. Second defendant supported first in his defence, defendants Nos. 3 and 4 remained *ex parte*, defendants Nos. 5 and 8 filed defences which are not material to the point decided, and defendants Nos. 6, 7 and 9 were also *ex parte*.

The second issue raised the question whether the bond (exhibit A) was void under section 257-A of the Code of Civil Procedure, and whether it was not binding on defendants Nos. 3 to 10; and the fourth issue raised the question of non-joinder of parties. The District Munsif held that the bond was such as was contemplated by section 257-A and was void and unenforceable by suit. He also said that it was admitted that plaintiff's younger brother had an equal right to the debt with plaintiff, who was the head of a joint Hindu family, and held that the suit was bad for non-joinder of parties. He dismissed the suit.

Plaintiff appealed to the District Judge, who said:—"Plaintiff appeals against the decision of the lower Court deciding issues II and IV against him. Upon the former issue he contends that the plaint Karar (exhibit A) is not void under Civil Procedure Code, section 257-A. He argues that the introduction of a new party and new lands in exhibit A show it to have superseded the original decree. He quotes a number of decisions which only go to show that the plaint bond is void for want of consideration. Exhibit A is admittedly an agreement to give time for the satisfaction of the original decree, executed without consideration and expressly stipulating that it shall remain in force. It provides for the execution of the decree in case of non-fulfilment of its (exhibits A's)

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terms. I agree with the lower Court upon issue II. It is consequently unnecessary to discuss issue IV." He dismissed the appeal, but without costs. Plaintiff preferred this second appeal.

Sundara Ayyar, for appellant.—The bond exhibit A is not void by reason of section 257-A. One of these present defendants was not a defendant in the suit of 1885, though he was liable under the decree passed in that suit. Though exhibit A gives plaintiff the right to execute the former decree, that is not the only remedy which exhibit A gives. It gives him a new right to execute as against other property which was not liable under the decree; and it also gives him a personal right as against another party. The remedies open to plaintiff are twofold and he may adopt the one or the other. Moreover, the document should be construed against the persons who executed it. The High Courts of Calcutta and Madras take the same view of section 257-A. In *Juji Kamti* v. *Annai Bhatta*(1), it was held to relate only to proceedings in execution, and would not bar a fresh suit. Consideration moves from plaintiff by the extension of time; and from the defendants by the giving of further security. Sanction need only be obtained when execution proceedings are taken (*Yella Chetti* v. *Munisami Reddi*(2) and *Mallamma* v. *Venkappa*(3)). [He also referred to *Jhabar Mahomed* v. *Modan Sonaker*(4) and *Hukum Chand Oswal* v. *Taharunnessa Bibi*(5).] Section 257-A is not an obstacle to a suit against a person who is not a party to the decree, but only applies to parties to (it *Yella Chetti* v. *Munisami Reddi*(2)). [On the question of non-joinder he contended that plaintiff was entitled to sue as manager, but a petition had been filed in the Appellate Court asking that plaintiff's brother might be added. On this point he cited *Nilmony Dassy* v. *Sonatun Doshayi*(6) as showing that a decree is binding on other members of the family even if not parties to the suit if the debt in respect of which it was passed was binding on them; *Arunachala Pillai* v. *Vythialinga Mudaliyar*(7) as showing that the managing member may maintain the suit; *Angamuthu Pillai* v. *Kolandavelu Pillai*(8), where the

(1) I.L.R., 17 Mad., 382.
(2) I.L.R., 6 Mad., 101.
(3) I.L.R., 8 Mad., 277.
(4) I.L.R., 11 Calc., 671.
(5) I.L.R., 16 Calc., 504.
(6) I.L.R., 15 Calc., 17.
(7) I.L.R., 6 Mad., 27.
(8) I.L.R., 23 Mad., 190.

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Court allowed a brother of the managing member to be subsequently added as co-plaintiff; *Ramayya* v. *Venkataratnam*(1), where an omission to join was treated as a formal defect. He also pointed out that the original decree had become barred by limitation.]

Subrahmania Sastri, for respondents.—The objection is based on section 257-A. If the bond, exhibit A, is enforceable, no proceedings can be taken in execution. Therefore all the cases in which a suit on the bond was permitted, proceed upon the assumption that the decree had ceased to exist. But this decree is only suspended, for exhibit A gives the plaintiff the right to execute it as an alternative. So it is within the mischief contemplated by the section, the object of which is to prevent a judgment-creditor from holding his decree for an indefinite length of time over his judgment-debtor's head. *Tukaram* v. *Anantbhat*(2) shows that such a bond suspends, and does not destroy the right under the decree. The agreement is therefore void as being directly within the section. There is no new party: he is only the son of one who was a party to the decree. Nor would it affect the question if there were a new party. The policy of section 257-A is dealt with in *Heera Nema* v. *Pestonji*(3). [He referred to the following as cases in which a suit was permitted:—*Hukum Chand Oswal* v. *Taharunnessa Bibi*(4) where the bond sued on had been executed by others: *Ramjipandu* v. *Mahomed Walli*(5), *Shripatrar* v. *Govind Narayan*(6). On the question of non-joinder he referred to *Angamuthu Pillai* v. *Kolandavelu Pillai*(7).]

Sir ARNOLD WHITE, C.J.—As regards the question of the construction of the bond (exhibit A) the District Munsif held that the only remedy open to the plaintiff, on default by the defendants, was to apply for the execution of the decree mentioned in the bond. The District Judge, apparently, took the same view. It seems to me clear that on the true construction of the bond the document purports to give a twofold remedy to the plaintiff on failure by the defendants to pay the instalments mentioned in the bond,—first, a right to sue for the balance of the Rs. 7,500, secondly,

(1) I.L.R., 17 Mad., 122.
(2) I.L.R., 25 Bom., 252.
(3) I.L.R., 22 Bom., 693.
(4) I.L.R., 16 Calc., 504.
(5) I.L.R., 13 Bom., 671.
(6) I.L.R., 14 Bom., 390.
(7) I.L.R., 23 Mad., 190.

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a right to recover the balance by executing the decree. This appears to be the true construction of the document whether the words "in default of this" are read as meaning in default of payment of the instalments or in default of payment of the lump sum. There is an express agreement to pay the instalments, an express agreement to pay the lump sum, on failure to pay the instalments, and an express agreement that the decree shall be kept alive and the rights of the plaintiff in execution of the decree preserved.

It has been contended on behalf of the defendants that inas much as under the terms of the bond the relation of judgment-creditor and judgment-debtor still subsists the bond is an agreement to give time for the satisfaction of a judgment-debt and the sanction of the Court not having been obtained, section 257-A of the Code of Civil Procedure renders the agreement void.

Section 257-A might no doubt be construed as having the effect of rendering the agreement void only in so far as it purported to give time, so that, notwithstanding the agreement the judgment-debtor would not be entitled to set up the agreement as a bar to the judgment-creditor's rights in execution, whilst the judgment-creditor on the other hand would be entitled to enforce an independent contract to pay the judgment-debtor which was supported by consideration. But it seems to me that so to construe the section would be to defeat the object of the Legislature, viz., the protection of judgment-debtors. I assume in the present case that the contract to pay is supported by a real consideration. Still it is a contract to pay the amount of the judgment-debt with a stipulation that it shall not be payable at the time when, under the decree, it became payable. The relation of judgment-creditor and judgment-debtor still exists by the express agreement of the parties. The debt is still enforceable as a judgment-debt. This being so, I feel it impossible to construe the bond in question otherwise than as an agreement to give time for the satisfaction of a judgment-debt. The sanction of the Court not having been obtained, I think the bond is void. If, as in the case of *Tukaram* v. *Anantbhat*(1), the effect of the mortgage bond had been to extinguish the rights of the judgment-creditor under the decree and to substitute therefor the rights given him by the mortgage bond, the agreement clearly

(1) I.L.R., 25 Bom., 252.

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would not be an agreement to give time for the satisfaction of a judgment-debt because the effect of the agreement would be to put an end to the judgment-debt. In the present case there is an express agreement to preserve the judgment-creditor's rights in execution and thus keep the judgment-debt alive. With all respect to the learned Judges who decided the case of *Juji Kamti* v. *Annai Bhatta*(1), although I think it was rightly held in that case that the contract to pay by instalments was not void, I confess I cannot follow the reasoning on which the conclusion appears to be based. The Judges observe that the scheme of the Code of Civil Procedure suggests that the intention of section 257-A was to render an agreement to pay the amount of the judgment-debt by instalments void only in so far as it affects the right to execute the decree. But in that case the consideration for the new promise to pay was the surrender by the judgment-creditor of his rights in execution of the decree. The decree was extinguished by agreement between the parties and that being so, I fail to see how any question as to how the section affected the rights of the execution-creditor in execution of the decree was material.

If a judgment-creditor is willing that his judgment-debt should be extinguished and that his rights as judgment-creditor should be given up and the judgment-debtor is willing to give and the judgment-creditor to accept other rights in substitution, I do not see how an agreement which carries out this intention is contrary to public policy or to the express words of section 257-A. The parties are dealing at arm's length, which would not be the case if the new contract was entered into upon the footing that the creditor's rights under the decree were to be kept alive and held *in terrorem* over the head of his debtor.

If a judgment-creditor wants to keep his judgment-debt alive and at the same time is willing to give time for the satisfaction thereof to the judgment-debtor, the law says that an agreement carrying out such intention shall be void unless sanctioned by the Court. In the case of *Hukum Chand Oswal* v. *Taharunnessa Bibi*(2), there was no agreement by the judgment-creditor to surrender his rights under his decree, and, that being so, I cannot help thinking the case was wrongly decided. The Judges there observe: "It

(1) I.L.R., 17 Mad., 382.

(2) I.L.R., 16 Calc., 504.

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seems to us that it is only in the event of an application being made to enforce the agreement entered into between the parties under the bond in the course of the execution of the decree that an objection like that now raised (*i.e.*, that the agreement was void under section 257-A) could have been successfully made." This means that, if the judgment-creditor applies to execute his decree and the judgment-debtor sets up the agreement to give time, the judgment-creditor can successfully object that the agreement is void under section 257-A, whilst there is nothing to prevent him enforcing the fresh contract the effect of which is to give the judgment-debtor time for the satisfaction of the judgment-debt. This, as I have said, seems to me to defeat the object of the Legislature.

I think the real test is that adopted by the Bombay High Court in the case of *Tukaram* v. *Anantbhat*(1). If the parties agree that the judgment-debt *qua* judgment-debt shall be put an end to, section 257-A does not render void the new contract. The new contract does not give time for the satisfaction of a judgment-debt since this judgment-debt no longer exists. If the judgment-debt is still alive, a new contract like that contained in the bond in the present case to pay the judgment-debt appears to me, although it may be supported by fresh consideration, to be an agreement to give time for the satisfaction of the judgment-debt and therefore void under section 257-A. I need only add that in my opinion the agreement in the present case is none the less void because a party who appears to be the legal representative of one of the judgment-debtors became a party to the mortgage bond, though he was not a party to the suit in which the decree was obtained.

I think this appeal should be dismissed and I think the respondents are entitled to their costs throughout.

BENSON, J.—I concur.

(1) I.L.R., 25 Bom., 252.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

1902. February 3.

KRISHNA REDDI (DEFENDANT No. 1), APPELLANT,

v.

THAMBU REDDI AND OTHERS (PLAINTIFF, DEFENDANTS NOS. 1 TO 3, AND LEGAL REPRESENTATIVES OF PLAINTIFF AND DEFENDANT No. 1), RESPONDENTS.*

Hindu Law—Mortgage of family property by senior member—Decree against mortgagor—Purchase under that decree—Suit for partition of property among the co-parceners—Recognition of debt as binding on co-parceners—Suit by purchaser for possession—Evidence of award in partition insufficient as showing necessity for original mortgage.

An undivided Hindu family consisted of A, his three sons and his nephew. A mortgaged family land while the nephew was a minor. The mortgagee filed a suit and obtained a decree on the mortgage, in execution of which the land was put up for sale and purchased by plaintiff. The nephew was not made a party to that suit. A died, whereupon the nephew instituted a suit for partition against A's sons; plaintiff was not a party to that suit. The matters in dispute therein were referred to arbitrators, who held that the mortgage which A had executed was binding on the nephew and charged his share with a half of it. They also awarded the nephew certain land, being part of the land which had been purchased by plaintiff. Plaintiff now sued to recover the land so awarded to the nephew, but adduced no evidence to shew that the mortgage executed by A was binding on the nephew, beyond proving the award by the arbitrators:

Held, that though the decree which had been passed in accordance with the award of the arbitrators in the partition suit was binding as between the nephew and the other members of the family, it could not be used in the present suit as evidence that the debt was for a family purpose binding on the nephew. And that, there being no other evidence, the suit failed.

SUIT to recover possession of land or its value. Jagannadha Reddi, the father of defendants Nos. 1 to 3 and paternal uncle of defendant No. 4, executed a mortgage in favour of defendant No. 5, the Reddi being the senior member of the family of defendants Nos. 1 to 4, which was undivided. Defendant No. 5 obtained a decree on his mortgage in Original Suit No. 36 of 1889, in execution of which a plot including the land now in question was

* Second Appeal No. 1199 of 1899, against the decree of D. Broadfoot, District Judge of South Arcot, in Appeal Suit No. 26 of 1899 against the decree of K. Rangamannar Ayyangar, District Munsif of Cuddalore, in Original Suit No. 582 of 1897.

put up for sale and bought on 18th November 1890 by plaintiff, who obtained a sale certificate and took possession through the Court on 4th December 1893. Defendant No. 4, who was then a minor, was not a party to that suit. On attaining his majority, defendant No. 4 filed Original Suit No. 15 of 1889, in which he claimed partition of his half share of all the family property, making the present defendants Nos. 1 to 3 and their father Jagannadha Reddi (since deceased) parties to it. That suit was referred to arbitration, and, in pursuance of the award of the arbitrators, defendant No. 4 was decreed to be entitled to one half of the family property. The arbitrators also decided that Jagannadha Reddi's mortgage was a debt binding on defendant No. 4, and they debited him with one half of it. Defendant No. 4 took possession of one half of the land now sued for in June 1894 in pursuance of the award. No evidence was adduced in the present suit to show that Jagannadha Reddi's mortgage was binding on defendant No. 4 except the fact of this award. Plaintiff complained that defendant No. 4 was not entitled to possession of a moiety of the land, but that the whole of it should go to plaintiff by virtue of his sale certificate and he claimed that he was entitled to recover either the land from defendant No. 4 or its proportionate value from the family. Defendants Nos. 1, 2, 3 and 5 set up pleas exonerating themselves and referring plaintiff to defendant No. 4, who had the land. Defendant No. 4 pleaded that he was not a party to Original Suit No. 36 of 1889; that the decree passed in it, and in execution of which plaintiff had purchased, was not binding on him, and that the land in question had fallen to his share prior to the date of plaintiff's purchase. The District Munsif passed a decree directing the defendants to place plaintiff in possession of the land, but ordered plaintiff to pay the costs of defendants Nos. 1 to 3.

Defendant No. 4 appealed to the District Judge, who remarked that the original mortgage had not been produced or accounted for, and that no witnesses had been examined to show whether the money had really been borrowed for a family purpose, but he upheld the finding of the lower Court on the ground that it had been proved that a mortgage had been executed by the senior member of the family, defendant No. 4 being a minor at the time, under his protection, and that subsequently, when he was of full age, the arbitrators had decided that he was bound by the debt, their order

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being perfected into a decree and proceedings on that decree having followed. He dismissed the appeal.

Defendant No. 4 preferred this second appeal.

V. Krishnaswami Ayyar for appellant.

Sundara Ayyar for respondents Nos. 3 and 4.

K. Narayana Rau for respondent No. 5.

JUDGMENT.—According to the decision of the Judicial Committee of the Privy Council (in *Danlap Ram* v. *Mehar Chand*(1)) the sale in execution of the decree in Original Suit No. 36 of 1889 which was brought only against the managing member of the family, the executant of the mortgage bond, on which the suit was brought, would, if the sale purported to convey the entire property, be efficacious to pass the share in such property of defendant No. 4, an undivided junior member of the family, if it be proved that the mortgage debt was incurred for a family purpose binding on defendant No. 4, the undivided nephew of the managing member. The only evidence pointed out and on which alone the Courts below have come to the conclusion that the debt was incurred for a family purpose is the award of arbitrators in a partition suit between defendant No. 4 on the one hand and defendants Nos. 1, 2 and 3 and others on the other, to which suit the plaintiff was no party, in which the arbritrators dealt with the mortgage debt in question as a family debt. The decree passed in accordance with that award and the award would no doubt be binding between defendant No. 4 and the other members of the family but as between the plaintiff in this suit and defendant No. 4, the opinion or decision of the arbitrators and the decree passed in accordance therewith cannot be used as evidence that the debt was for a family purpose binding on defendant No. 4. The decrees of both the lower Courts are therefore reversed and the suit dismissed with costs throughout.

(1) I.L.R., 15 Calc., 70.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Benson.

1902. February 6.

LAKSHMANASWAMI NAIDU (MINOR BY HIS GUARDIAN RAMASWAMI NAIDU), (DEFENDANT No. 2), APPELLANT,

v.

RANGAMMA AND OTHERS (PLAINTIFF—DECREE-HOLDERS AND DEFENDANT No. 1), RESPONDENTS.*

Hindu Law—Mirasi rights attached to Devastanams—Suit against office-holder—Compromise consenting to sale of office and its emoluments—Decree in terms of compromise—Execution proceedings—Invalidity of compromise opposed to public policy—Right of Court to refuse to execute.

The sale of an office attached to a temple, involving services of a personal nature and entitling the holder of it to receive emoluments, is against public policy and will not be recognised or enforced by the Courts.

The holder of such an office was sued by a person to whom he had mortgaged his right to the office, together with other property, and a compromise was arrived at, by the terms of which the office-holder agreed that his right to the office and to its emoluments should be sold in satisfaction of the mortgage debt. A decree was passed in terms of the compromise and the decree-holder sought to have the right to the office sold in execution of that decree and contended, (on objection being raised), that inasmuch as a decree had been passed directing the sale of the office, the Court executing the decree was not at liberty to consider its validity but must execute it according to its terms:

Held, that as the decree was based on an agreement of compromise, and the Court had merely adopted the contract, the Court must be taken to have adopted it with all its incidents. By section 375 of the Code of Civil Procedure the Court had no jurisdiction to pass a decree on a compromise unless it was a lawful compromise. Any terms of a contract which are opposed to public policy are invalid and will, therefore, not be enforced by the Courts, and so far as a decree embodies unlawful terms of a compromise it is inoperative and will not be enforced.

Nagappa v. *Venkata Rau*, (I.L.R., 24 Mad., 265), referred to.

PETITION, in execution proceedings. First defendant had mortgaged his office, a mirasi right, attached to the Devastanams of Sree Govindarajasamy and Sree Kothandaramasamy of Tirupaty, together with other property, to plaintiff, who sued first defendant and his son for the amount of the mortgage debt. A compromise

* Appeal against Order No. 79 of 1901, against the order of the District Judge of North Arcot, on Execution Petition No. 9 of 1901 in Original Suit No. 45 of 1893.

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was arrived at, by the terms of which first defendant agreed that his office and his right to its emoluments should be sold in satisfaction of the mortgage debt, and the sale took place. The second defendant, who was the son of first defendant, then petitioned the District Court under section 311 of the Code of Civil Procedure, to set aside the sale. The petition set out that plaintiffs had purchased, at a Court auction, the immoveable properties and the temple marasi right attached to the Devastanams referred to, which was a personal service inam granted to the forefathers of the petitioner, and that the purchase price was only Rs. 150. It further stated that the said service inam was intended for "golla mirasi" service in these temples and in other minor temples of Tirupaty, and that emoluments were attached to the office. These emoluments and the duties performable by the holder of the office were—to collect the offerings daily given to Govindarajasamy by pilgrims who resorted to the temple and to hand them over to the manager; to secure the necessary articles required for Deeparathana, with an annual payment of Rs. 42 in cash, besides Prasadum and Panniarums given daily for the service; to have the custody of the locks and keys of the temple and to preserve the necessary articles for the Deeparathana, the office-holder being entitled to one-third of the daily income. The petition stated that the service, being a personal one, could not be done by proxy and was inalienable and could not be sold by Court auction: and that the mirasi right had been originally granted to the ancestors of petitioner, the grant having been subsequently confirmed by Nabobs and continued by the British Government, so that it had been enjoyed by the ancestors of the petitioner from time immemorial. Irregularities were also alleged. The District Judge considered that, as the decree was based on the compromise, the defendant was precluded from setting up the main objection. He, however, considered that the price which had been obtained was too low and set aside the sale on the ground of irregularity. Plaintiffs now petitioned the Court to order another sale, and the Judge ordered a sale proclamation to issue.

Second defendant, by his guardian, preferred this appeal.

T. Rangacharior for appellant.

T. V. Seshagiri Ayyar for respondent.

JUDGMENT.—The decree in this case was passed in accordance with the terms of a compromise entered into between the

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parties. By one of the terms of the decree the judgment-debtor (defendant) agreed that his office in a certain temple and his right to the emoluments of the office, which had been mortgaged with other property to the plaintiff, should be sold in satisfaction of the mortgage debt. In execution of that decree the lower Court advertised the office and its emoluments for sale by public auction, and dismissed the judgment-debtor's objection on the ground that he was bound by his agreement to the terms of the compromise. Against this order the judgment-debtor now appeals.

We think the appeal is well founded. There is no contention but that the sale of such an office as that now in question is opposed to public policy and ought not to be recognized or enforced by the Courts. (See *Rajaram* v. *Ganesh*(1).)

It is, however, contended that, as a decree has been passed directing the sale of the office, the Court executing the decree is not at liberty to consider its validity, but must execute it according to its terms. We cannot admit the soundness of such a contention. In the case of *Nagappa* v. *Venkat Rau*(2) it was pointed out that when a decree is based on an agreement of compromise and when there is nothing more on the part of the Court than a mere adoption of the contract the Court must be taken to adopt the contract with all its incidents. Under section 375 of the Civil Procedure Code the Court had no jurisdiction to pass a decree on a compromise unless it was a "lawful" compromise.

Any terms of a contract which are opposed to public policy are invalid and will not be enforced by the Courts. So far as the decree embodied unlawful terms of a compromise it is inoperative and will not be enforced.

On this ground we must set aside the order of the District Judge and direct that the sale of the office in question and its emoluments be cancelled.

We make no order as to costs.

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(1) I.L.R., 23 Bom., 131. (2) I.L.R., 24 Mad., 265.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

1902. February 13.

ITTAPPAN KUTHIRAVATTAT NAYER AVERGAL (PLAINTIFF), APPELLANT,

v.

NANU SASTRI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act—XV of 1877, s. 19—Acknowledgment in writing—Existing liability—Proof.

Though, under section 19 of the Limitation Act, the exact nature of the right or liability need not be disclosed by the acknowledgment, and its exact nature may be established by evidence *dehors* the written acknowledgment, yet the acknowledgment in itself should import that the person making it is under an existing liability at the time. Such liability cannot be read into it by proof *aliunde* or by an admission subsequently made by a party to a suit in which the acknowledgment is relied on as saving the bar of limitation.

SUIT for redemption. Plaintiff sued to redeem a kanom which, he alleged, had been granted by his ancestor to the predecessor of defendants Nos. 1 and 2, in 1001 (corresponding to the year 1825–26). First defendant denied that the properties referred to in the plaint were the jenm of the plaintiff or that they had ever been mortgaged by plaintiff's ancestor to his. He also pleaded that the suit was barred by limitation. In exhibit A, the counterpart of the kanom deed executed by the ancestor of first and second defendants, the year 1001 appeared, but that portion of the document in which the month and date had presumably been written had been destroyed by age; nor was any secondary evidence adduced to prove on what day and in what month in the Malayalam year 1001 the document had been executed. The suit had been filed on 28th July 1898. Exhibit G, a certified copy of a kychit, executed by first defendant's father, on 15th January 1859, contained the following recitals :—" Writing by Ananda Sastri's son Suppu of Perumb Gramam in Palghat taluk for the information of Ozhukil Komu Menon. As I am given a renewed

* Second Appeal No. 1002 of 1900, against the decree of A. Venkataramana Poi Avergal, Subordinate Judge of South Malabar at Palghat, in Appeal Suit No. 813 of 1899 against the decree of P. T. Itteyerah, District Munsif at Palghat, in Original Suit No. 337 of 1898.

Thiruvezhuthu deed bearing Asthanam No. 261, dated 3rd Makaram 1034, sealed and signed by His Highness the Zamorin whereby the following properties which are included in those (properties) of Kuthiravattath Nair, one half of which belongs to the Pandaram of the Zamorin's Kovilakam, which belong to Chanthiruthi Cherikal and which are situated in Peruvambur Desam, namely [here followed a description of the properties], extending on the east westward from the Paramba held by Chozhankath people, on the west eastwards from the land held by Eazhuvan Mavakat Chamu, on the north southward from the land and Paramba of Marimittath Namboodripad and on the south northward from the land of Murkanat and Chetti Ankannan and from the land leased to Cherikal Chetti Kumaran, and of land [described] have been demised to me on a rent . . . . I shall from the year 1034 annually pay to the person appointed by His Highness for the management of the affairs of Chanthiruthi Cherikal . . . . of paddy and Government Revenue from the balance of . . . of paddy, and take a receipt. In witness hereof are Kesavan Patter of Perumb Gramam and Seshan Patter of the said Gramam. Written in the handwriting of Puthumana Raman."

The District Munsif held the kanom proved, but dismissed the suit as barred by limitation. Referring to exhibit G he said:—" Plaintiff, however, contends that limitation has been saved by the admission of plaintiff's father in the kychit on which suit No. 492 is based, and which is filed in that suit as exhibit A. The two suits were tried together and the evidence recorded in each was agreed to be referred to in the other. In that document the plaint property is described as belonging to plaintiff and ninth defendant jointly in equal shares. This does not amount to an acknowledgment of liability in respect of the plaint property under section 19 of the Limitation Act, for the executant did not admit that he was liable to be turned out of possession in respect of plaint property, or that any one had a right of possession as against him, nor did he make any admission at all to the plaintiff or to any one through whom he claims (see the decision of the Privy Council in *Mylapore Iyasawmy Moodliar* v. *Yeo Kay*(1)."

The Subordinate Judge said:—" Plaintiff sued to redeem a kanom granted in 1001 (1825–26). First defendant denied the

(1) I.L.R., 14 Calc., 801.

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plaintiff's claim in toto and pleaded that the suit is barred and that his improvements on the property were worth Rs. 2,000. The kychit A is of the year 1001 (1825-26). It contains no date or month of its execution. Plaintiff must prove that the mortgage was executed within 60+12 = 72 years of the filing of the suit, 28th July 1898, that is, not later than 28th July 1826. It is not a case of presumption as to date. Plaintiff has no evidence on the point. The acknowledgment in exhibit G (1859) is to the effect that the land belongs to plaintiff. It is no acknowledgment of the liability to surrender the land on payment of the mortgage money. There is nothing in exhibit G to show that the executant admitted that he held the land under plaintiff. In regard to the District Munsif's remark that it is not addressed to plaintiff, it must be pointed out that section 19 of the Limitation Act, 1877, expressly declares that the acknowledgment need not be addressed to the person entitled to the property."

He confirmed the finding that the suit was barred and dismissed the appeal.

Plaintiff preferred this second appeal.

K. Srinivasa Ayyangar for appellant.

P. S. Sivaswami Ayyar for respondent.

JUDGMENT.—In a suit for redemption the onus is on the plaintiff not only to prove that the defendant's ancestor obtained the lands on mortgage from the plaintiff's ancestor, but also that he has a subsisting title. In exhibit A, the counterpart executed by the first and second defendant's ancestor, the year alone appears, but the portion in which, presumably, the month and date were inserted has been destroyed by age and no secondary evidence has been adduced to prove that the date of the document was some day in Malayalam year 1001 (which alone is now visible) prior to 28th July in which case alone the suit would be within time irrespective of the acknowledgment relied upon in exhibit G. There is no proof that a mortgage deed was executed and delivered by plaintiff's ancestor to first and second defendant's ancestor and that the defendants being in possession thereof withhold its production. Even if it were so proved it cannot be presumed simply from that circumstance that its date was some day prior to 28th July in 1001, especially in a case like the present in which the defendant does not admit the mortgage sued upon, but pleads that he was never mortgagee but has all along been the proprietor. If, as

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contended on behalf of the appellant, there is in exhibit G, dated 15th January 1859, under which the first and second defendant's ancestor obtained a grant from the Zamorin of a moiety of lands described in the schedule to the plaint, an acknowledgment of liability within the meaning of section 19 of the Indian Limitation Act in respect of the other moiety which is the subject of this suit, the suit will be saved from the operation of the Law of Limitation. Even assuming that the Courts below rightly construed exhibit G in holding that therein the first and second defendant's ancestor referred to the Plaintiff's ancestor as the owner at the date of the document of the moiety of the lands now in question, it is impossible to hold in the absence of any statement in exhibit G that its executant was then in possession of such moiety that there is in exhibit G any acknowledgment of liability in respect of the right of plaintiff's ancestor to such moiety. Though, under section 19, the exact nature of the right or liability need not be disclosed by the acknowledgment (*Quincey* v. *Sharpe*(1)) and its exact nature may be established by evidence *dehors* the written acknowledgment, yet the acknowledgment in itself should import that the person making the acknowledgment is then under an existing liability (*vide* judgment in *Narayana Ayyar* v. *Venkataramana Ayyar*(2)), and such liability cannot be read into it by proof *aliunde* or by the plaintiff's present admission that, as a matter of fact, the executant was then in possession of the moiety in question, which, in exhibit G, is referred to as belonging to plaintiff's ancestor.

The second appeal therefore fails and is dismissed with costs.

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(1) L.R., 1 Exch. D., 72. (2) I.L.R., 25 Mad., 220.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Moore.

1902. February 28.

THANDRAYA MUDALY (ACCUSED No. 1), APPELLANT,

v.

EMPEROR, RESPONDENT.*

Evidence Act—I of 1872, s. 24—Confession caused by promise—Village Magistrate—Person in authority—Appeal from conviction by Jury—Misdirection.

Two days after a dacoity had been committed in a certain village, T. went to the Village Magistrate of that village, who was enquiring into the dacoity and requested him to report that T. had not been concerned in the dacoity. The Village Magistrate replied that there was already a hue and cry against T., but that if T. spoke the truth he would consult the Head constable and arrange that T. should be taken as a witness. T. at first denied all knowledge of the dacoity, but ultimately made a confession. T. was charged, with others, with having committed the dacoity, and this confession was deposed to by the Village Magistrate. The Sessions Judge, in his charge to the Jury, made no reference to the relevancy or otherwise of the confession under section 24 of the Evidence Act, and he said that if the confession was true it was enough to warrant the conviction of the accused. The Jury returned a verdict of guilty, and the accused was sentenced. On an appeal being preferred on the ground of misdirection:

Held, that the Village Magistrate was a person in authority within the meaning of section 24 of the Evidence Act, and that as the arrangement promised by him before the confession was made was obviously intended to be one that would save the accused from prosecution if he would confess, the confession was irrelevant under that section. *Also*, that the misdirection was a material and important one, likely to lead to an erroneous verdict, and that a new trial must take place.

CHARGE of dacoity, under section 395 of the Indian Penal Code, against thirteen persons. The tenth witness for the prosecution, the Village Magistrate of Kalavai (where the dacoity was alleged to have been committed) deposed that on the second day after the dacoity the first accused had come and asked him to write a report to the effect that first accused had not been concerned in the dacoity. The witness replied that there was a hue and cry against the first accused, and that the report should have been written on the preceding day, and he added: "If you speak the truth we would consult the Head constable and arrange." The witness added that

* Appeal No. 36 of 1902, against a conviction by the Court of Session at North Arcot in Calendar Case No. 68 of 1901.

first accused then, after considering a little while, made the following confession:—"I, some jogies and others, together committed the dacoity and I should be saved anyhow." The first accused then informed the witness where the stolen property was. No objection was taken to the admissibility of this evidence, with reference to section 24 of the Evidence Act. The eleventh prosecution witness deposed that first accused first denied all knowledge of the dacoity and then the Monigar said: "If you speak the truth, you might be taken as a witness." The Sessions Judge, in his charge to the Jury, made no reference to the relevancy or otherwise of the evidence, with regard to section 24 of the Evidence Act, and he said, with reference to the case against first accused: "If the confession is true, it is enough to warrant the conviction of the accused." The Jury found the first and six other accused guilty, and the Judge, agreeing with that finding, sentenced them to imprisonment.

First accused preferred this appeal, on the ground of misdirection.

Mr. *J. G. Smith* and *T. Venkatasubbier* and *Narayana Sastri* for appellant.

The Public Prosecutor in support of the conviction.

JUDGMENT.—On behalf of the first accused, it is urged that there is a misdirection in the Judge's charge to the Jury, and we think that this is so. The tenth witness is the Monigar-Magistrate of the village of Kalavai. He says that on the 26th, that is on the second day after the dacoity, the first accused came and asked him to write a report saying that he (first accused) was not concerned in it; to which the witness replied, "it should have been written yesterday; there is a hue and cry against you; if you speak the truth we would consult the Head constable and arrange," and the witness adds that first accused then, after considering a little, made the following confession:—"I, some jogies and some others together committed the dacoity and I should be saved anyhow," and then proceeded to say where the stolen property was. Now, this witness, no doubt, says that when he spoke of arranging with the Head constable, he only meant to arrange to have a report written, but we do not think that this is true. We have no doubt that he meant to make some arrangement to save the first accused from prosecution if he would confess. This is made clear from the evidence of the eleventh prosecution witness. His account is that the first

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accused denied all knowledge of the dacoity, and then the Monigar (tenth witness) said: "If you speak the truth you might be taken as a witness."

Now, we think that, in these circumstances the confession of the first accused was irrelevant under section 24 of the Indian Evidence Act, inasmuch as it was caused by an inducement or promise having reference to the charge against him and proceeding from a person in authority, viz., the Monigar, and sufficient to give the accused grounds which would appear to him reasonable for supposing that by making it he would gain an advantage in regard to the proceedings by being taken as a witness instead of an accused person. There can, we think, be no doubt that the Monigar who was acting as such in regard to the enquiry into the dacoity was a "person in authority" within the meaning of the section and in the circumstances the Judge ought not to have allowed evidence of the confession to be recorded, or, if it was inadvertently recorded, he ought to have told the jury that the confession was irrelevant and should not be considered by them. It is true no objection was taken by the accused or his pleader to the confession under section 24 of the Evidence Act, but that does not render it any the more relevant or admissible. The Judge, in paragraphs 17 and 18 of his charge, dealt with another objection to the confession but made no reference to its irrelevancy under section 24 of the Evidence Act and told the Jury that if the confession was true it was enough to warrant the conviction of the accused. We think that the misdirection was a material and important misdirection likely to lead to an erroneous verdict. We do not wish to say more on the merits as we think the case is one peculiarly fit for a jury to decide and we wish not to embarrass them by any expression of opinion on other parts of the evidence. We may add that what we have said as to the irrelevancy of the confession under section 24 does not apply to any statement of the accused relating to the discovery of any fact which is relevant under section 27 of the Evidence Act.

With these remarks we set aside the conviction of the first accused and direct that he be retried according to law.

APPELLATE CRIMINAL.

Before Sir Charles Arnold White, Mr. Justice Benson and Mr. Justice Moore.

ALAGIRISAMY NAIDU (ACCUSED), PETITIONER,

1902. February 25.

v.

BALAKRISHNASAMI MUDALIAR (COMPLAINANT), RESPONDENT.*

Criminal Procedure Code—Act V of 1898, ss. 435, 437—Petition by complainant for retrial of accused after discharge—No notice to accused—Order by Sessions Judge directing further enquiry—Revision petition to High Court—Jurisdiction—Necessity for notice before order passed to prejudice of accused.

A person charged with having committed criminal breach of trust was discharged, whereupon the complainant petitioned the Sessions Judge, under section 435 of the Code of Criminal Procedure, to direct a retrial of the case. Notice of the application was not given to the accused. The Sessions Judge, acting under section 437, ordered a further enquiry to be made. On a criminal revision petition being preferred by the accused in the High Court against that order:

Held, that it was competent to the High Court to revise the order; and that, without laying down a general rule that the omission to give notice of such an application renders an order under the section bad, the order must be set aside as it had not been shown that in this case there was any difficulty in giving notice, or that there was any reason why the general rule should not be followed that an order should not be made to a man's prejudice without giving him an opportunity for being heard.

CHARGE of criminal breach of trust by an agent under section 409 of the Indian Penal Code. Accused was discharged by the Head-quarter Deputy Magistrate, whereupon the complainant presented a petition to the Sessions Judge, under section 435 of the Code of Criminal Procedure, asking him to call for the records of the lower Court and direct a retrial of the case under section 437 of the Code. Numerous grounds were set forth in the petition. Notice of the application was not given to the accused. The Sessions Judge, after perusing the petition and records and hearing

* Criminal Revision Petition No. 519 of 1901 presented under sections 435 and 439 of the Code of Criminal Procedure against the order of W. M. Thorburn, Sessions Judge at Kurnool, in Criminal Revision Petition No. 24 of 1901, against the judgment of C. Seshadri Row Pantulu, Head-quarter Deputy Magistrate at Kurnool, in Calendar Case No. 20 of 1901.

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counsel for the complainant, passed the following order:—"It seems to me that the finding is inconsistent with the statements of fact in paragraph 6 of the judgment. I, therefore, under section 437, direct the District Magistrate to make further enquiry by himself or any Magistrate subordinate to him except the Magistrate whose judgment is now dealt with in revision."

Against that order the accused preferred this criminal revision petition.

T. V. Seshagiri Ayyar for petitioner.

Mr. *J. G. Smith* for complainant.

JUDGMENT.—It cannot be said that the order of the Sessions Judge made, under section 437 of the Code of Criminal Procedure, is an illegal order since it does not in any way contravene the provisions of the section. But it may be said it was an improper order by reason of the fact that it was made without notice to the accused so as to give him an opportunity of showing cause why an order to his prejudice should not be made, and it is clearly competent to us to revise it.

We do not want to lay it down as a general proposition that the omission to give notice in itself renders an order under the section bad. In the case now before us, however, there is nothing to show that there was any difficulty in connection with giving notice, or that there is any reason why the general rule that an order should not be made to a man's prejudice without giving him an opportunity of being heard, should not be followed.

We set aside the order, and direct the Sessions Judge to re-hear the petition after giving notice to the accused.

APPELLATE CRIMINAL.

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

H. K. BEAUCHAMP (ACCUSED No. 1), APPELLANT,

v.

G. M. J. MOORE (COMPLAINANT), RESPONDENT.*

1902. February 24.

Indian Penal Code—Act XLV of 1860, section 500—Defamation—Criminal Procedure Code—Act V of 1898, section 198—Person aggrieved—Defamation of subordinate officers of Municipality—Complaint by President—Maintainability.

A newspaper published articles which, for the purposes of the point of law to be determined, were assumed to be defamatory. These related to the conduct of certain subordinate officers of the Madras Municipal Commission. A complaint was lodged by the President of the Commission in respect of the alleged defamation, it being contended on behalf of the complainant that, inasmuch as by the Madras Municipal Act, the President is responsible for the efficient discharge of their duties by his subordinate officers, his conduct and administration had been impugned by the articles:

Held, that assuming for the purposes of the question under consideration that the statements complained of were defamatory of the subordinate officers of the Municipal Health Department, they were not defamatory of the complainant; and that the complainant was not a "person aggrieved" within the meaning of section 198 of the Code of Criminal Procedure.

CHARGE of defamation. The matter complained of was contained in certain letters which were published in the *Madras Mail*, and which were thus set out in the charge:—

"That on Friday night (meaning the night of Friday, August 23, 1901) there were three attacks in two native houses in Chintadripet in Singana Chetty Street. In one of the houses both the cases proved fatal . . . . There was one more attack in that very house and a Eurasian resident reported the case to the Police who in turn brought the Sanitary Overseer to the houses but strange to say absolutely nothing was done in the way of disinfection, cleaning the cloths, etc. Naturally the contagion spread to the neighbouring Eurasian houses, and the Medical attendant at once reported the cases to the Health Officer but would you believe it, that only at 10 o'clock at night did the same Overseer come to

* Appeal No. 864 of 1901, against the sentence of W. E. Clarke, Acting Chief Presidency Magistrate, Madras, in Calendar Case No. 34409 of 1901.

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disinfect the houses . . . . It was pointed out to the Health Officer that the people had locked up the cloths of the patients in an adjoining house, and the cloths were found locked up. But beyond ordering the peons or the Overseer to see them burned nothing was done to destroy them. The corpse was allowed to be kept till at 7 last night . . . . it was removed. When death occurs in a respectable Eurasian house the Municipal Health department insist on the body being removed at once, but the body of the woman was allowed to remain for one full day. This is not all. There was one death in the Barracks and there are one or two cases of "diarrhœa" there. But the Municipality has done nothing to disinfect the house, and there are not fewer than a dozen families in the Barracks. There are not fewer than three cases to-day, but of course we see not a single peon anywhere. These are facts which speak for themselves. I have now to appeal from Dr. Mathews to Colonel Moore to adopt more rigorous measures to put an end to the scourge . . . . now carrying off men like sheep." Further that on the 5th day of September 1901 at Madras aforesaid in another number of the same paper the *Madras Mail* the said defamatory and untrue imputations and matter or portions thereof were repeated and confirmed in the following words, that is to say, "with reference to the above I have to state that the best evidence of the facts furnished by me is the above letter itself so far as the disinfection of the native house in Singanna Chetty Street is concerned. Let me again restate my facts of the case . . . . On Friday the 23rd ultimo there were three attacks in two native houses in Singanna Chetty Street, in Chintadripet. It is also absolutely true that the Sanitary Overseer of the division visited the house on Saturday morning, but nothing was done as to disinfection till 10 P.M. on Saturday night. As to the removal of the corpse there is nothing in what I said to imply that I accused the Health Department of not carrying out the law in the matter. What I meant and what my words clearly indicate was that the Eurasians, the better class, were amenable to moral persuasions in this respect and removed their corpses without much delay. With regard to the disinfection of the cloths of the deceased, I regret to have to add . . . . I have evidence to show they were not disinfected in the presence of the Acting Health officer, but only on his instructions . . . . after he left the spot."

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The Acting Chief Presidency Magistrate, finding the defendants guilty of the offence of defamation, sentenced first defendant to pay a fine of Rs. 205, so that an appeal might be preferred, if desired, and second defendant to a nominal fine of 8 annas.

First defendant preferred this appeal.

The Advocate-General (Hon. Mr. *J. P. Wallis*), for appellant, raised the preliminary point that the complainant had not been defamed, and was not a person aggrieved, within the meaning of section 198 of the Code of Criminal Procedure. Even assuming that the matter complained of was in fact defamatory, it could only be defamatory of the officials whose conduct formed the subject of comment, and not of the complainant, whose personal conduct had in no way been impugned by the articles.

Hon. Mr. *Eardley Norton*, for complainant (called on to reply on the preliminary point), contended that inasmuch as by the terms of section 34 of the Madras Municipal Act, the President of the Municipality was responsible for the efficient discharge of duty by the subordinate officers of the Municipal Health Department, his conduct had been impugned. He referred to *Riding* v. *Smith*(1).

JUDGMENT.—This is an appeal from a conviction of the Editor of the *Madras Mail* on a charge of defamation.

The complainant is the President of the Madras Municipality. The charge alleges that the defendant published certain untrue and defamatory statements concerning the Acting Health officer of the Municipality and the subordinate officers of the Municipal Health Department for whose efficient working the complainant is directly responsible, intending thereby, or knowing, or having reason to believe, the publication of such untrue and defamatory imputations would injure the reputation of the complainant.

The charge then proceeds to set out the alleged untrue and defamatory imputations. They are as follows:—[This portion of the charge has already been set out.]

The question we have to determine, before it becomes necessary to go into the evidence, is this;—assuming the statements of which the complainant complains are untrue and assuming for the purposes of the question now before us those statements are defamatory of the Acting Health officer and of the subordinate

(1) L.R., Ex. D., 91; 45 L.J., Ex., 281.

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officers of the Municipal Health Department, are the statements, in law, defamatory of the complainant ?

None of the statements contains any express allegation that the complainant has been negligent in the discharge of his public duties. In our judgment the statements set out in the charge are not of such a nature as to suggest that the complainant has been guilty of negligence in the discharge of his public duties. The statements complained of are in the main allegations of specific acts of negligence by the Acting Health officer and the subordinate officers of the Health Department. It seems to us that none of the statements are capable of being construed as containing any imputation against the complainant.

Besides the specific allegations there are two statements which may be described as general; one is: "When death occurs in a respectable Eurasian house, the Municipal Health Department insist on the body being removed at once, but the body of the woman (the woman being a native) was allowed to remain for one full day."

It was contended on behalf of the prosecution that these words are defamatory inasmuch as they suggest that the Health Department are in the habit of bringing more pressure to bear in connection with the removal of corpses when the corpse is that of an Eurasian than when it is that of a native. It seems difficult to extract any defamatory meaning from this statement; but assuming as, for the purposes of the question of law, we do assume, that these words are defamatory of the Health officer, it seems clear to us that they are incapable of bearing an interpretation which makes them defamatory of the complainant. The other general statement is: "There are not fewer than three cases to-day, but of course we see not a single peon anywhere." It is very difficult to see that these words involve any imputation on the complainant, but if there is any imputation it is of so remote and slight a character that we have no hesitation in holding that the imputation was not made with intention of harming the reputation of the complainant or with the knowledge that it would do so.

This is clear from the concluding words of the letter complained of,—"I have now to appeal from Dr. Mathews to Colonel Moore to adopt more rigorous measures." This clearly indicates that the writer believed that the fault lay with the Health officer and his subordinates, and that it was only necessary to bring the

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matter to the notice of the complainant in order to have more rigorous measures adopted. These words suggest confidence in the complainant rather than any negligence or inefficiency on his part.

In our judgment the complainant is not a person aggrieved by the defamation of his subordinate officers (if they were defamed) within the meaning of those words as used in section 198 of the Code of Criminal Procedure. The statements set forth in the charge which are relied upon by the complainant as constituting the alleged defamation are, in our judgment, clearly not defamatory of the complainant.

The conviction is bad and must be set aside. The fine if levied must be refunded.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

INDUR SUBBARAMI REDDY (DEFENDANT No. 1), APPELLANT,

1902. February 6.

v.

KANDADAI RAJAMANNAR AYYANGAR (RESPONDENT), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, ss. 506, 522—Reference to arbitration—Petition not joined in by all the parties to the suit—Legality of reference—Appeal.

In a suit for partnership accounts two out of three defendants petitioned the Court under section 506 of the Code of Civil Procedure to refer the matters in dispute to arbitration. The representatives of the third defendant (who was then deceased) were not parties to the application, which was, however, granted. An award was made and a decree was passed in terms of it:

Held, that as the reference was illegal, and the award, *in consequence*, was void, an appeal lay against the decree notwithstanding that it was in conformity with what purported to be an award.

SUIT for an account of a partnership business and for a share in the profits. The right to sell arrack in certain places had been

* Second Appeal No. 433 of 1900, against the decree of T. M. Swaminadha Ayyar, Acting District Judge at Nellore, in Appeal Suit No. 533 of 1898, against the decree of T. M. R[illegible] Munsif of Nellore, in Original Suit No. 114 of 1893.

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purchased by first defendant's uncle and third defendant, and plaintiff and second defendant had entered into partnership with them for carrying on that business. Defendants admitted the partnership but, among other defences, pleaded limitation. The District Munsif upheld that plea, and dismissed the suit. The District Court, on appeal, reversed that decision and remanded the suit to be heard and disposed of on the merits. The District Munsif then referred it to arbitration, being requested to do so by a petition presented, on 11th September 1897 on behalf of defendants Nos. 1 and 2. The third defendant died but his representatives were not made parties to that petition. The arbitrator gave his award and a decree was passed in terms of it. An appeal was preferred to the District Judge on the ground that the lower Court was not justified in acting on the award inasmuch as the representatives of the third defendant had not been parties to the petition. The District Judge dismissed the appeal. First defendant preferred this second appeal.

T. V. Seshagiri Ayyar and *J. Sundara Nana Rao* for appellant.

C. Ramachandra Rau Sahib for respondent.

JUDGMENT.—The petition requesting the Court to refer the matter to arbitration in a case for winding up of a partnership should not have been granted except on the application or with the consent of all the parties. The third defendant or his representatives were not parties to the petition of the 11th September 1897. The reference to arbitration was illegal, and therefore the award being void there is an appeal against the decree notwithstanding that it is in conformity with what purports to be an award. The decrees of the Courts of the District Munsif and District Judge are set aside and the suit is sent back to the District Munsif for trial on the merits, everything done subsequent to the order of remand by the District Court being set aside as irregular. Costs will abide the result.

APPELLATE CRIMINAL.

Before Sir Charles Arnold White, Chief Justice.

BATAKALA POTTIAVADU AND ANOTHER, PETITIONERS.*

1902. February 19.

Code of Criminal Procedure—Act V of 1898, s. 552—Order for restoration of possession of immoveable property—Conviction of accused on charge of criminal trespass—No finding of use of criminal force—Legality of order for restoration.

Certain persons were convicted of having committed criminal trespass on a piece of land, under section 447 of the Indian Penal Code. There was no finding that they had used criminal force, or that the complainant had been dispossessed of the land by such force. An order was subsequently made, which purported to be under section 522 of the Code of Criminal Procedure, directing the accused to restore possession of the land. On a revision petition being preferred against this order:

Held, That as there was no finding that criminal force had in fact been used, or that complainant had been dispossessed of the land by it, and as criminal force was not an ingredient of the offence for which the accused had been convicted, the order was made without jurisdiction.

ORDER for restoration of immoveable property, under section 522 of the Code of Criminal Procedure. Petitioners had been convicted, by the second-class Magistrate of Tekkali, on a charge of criminal trespass, under section 447 of the Indian Penal Code. The case for the prosecution was that those petitioners, with others (who were charged with them but acquitted), had unlawfully entered upon land which was in the possession of the complainant and ploughed it up. Complainant stated that the land had been delivered to him by the Court amin a month before the accused trespassed on it. The accused stated that the land in dispute had been in their possession, and they denied the alleged delivery to the complainant by the Court amin. The Magistrate inflicted nominal fines. An order was subsequently made, which purported to be under section 522 of the Code of Criminal Procedure, by which the accused were to restore possession of the land. A revision petition was presented to the Sessions Judge, who rejected it on the ground that no substantial injustice had been done,

* Criminal Revision Petition No. 489 of 1901, preferred under sections 435 and 439 of the Code of Criminal Procedure against the proceedings of the Second-class Magistrate of Kasilinga in Proceedings No. 138 of 1901 in Calendar Case No. 354 of 1900.

BATAKALA POTTIAVADU.

though the order was irregular inasmuch as no criminal force had been used in the course of the trespass. Petitioners now filed this criminal revision against the order of the second-class Magistrate.

V. Ramesam for petitioners.

JUDGMENT.—In this case the petitioners were convicted of an offence under section 447 of the Indian Penal Code (criminal trespass), and an order was subsequently made which purported to be under section 522 of the Code of Criminal Procedure. The question is, was this order under section 522 a legal order or is it bad as having been made without jurisdiction? The conditions precedent that must exist before an order can be made under section 522 are (1) some person must have been convicted of an offence "attended by criminal force and (2) some person must have been dispossessed of immoveable property by such force."

It is clear that the use of the criminal force is not a necessary ingredient of an offence under section 447 of the Indian Penal Code. The Calcutta High Court have held that an offence attended by criminal force "means an offence of which criminal force is an ingredient (*Ram Chandra Boral* v. *Jityandria*(1)). I am inclined to think that this is too narrow a construction to place on the very general words "attended by criminal force." In the present case, however, there is no finding by the Court which convicted the petitioners that any criminal force was in fact used by the petitioners or that the complainant was dispossessed of the land by such force. This being so, and criminal force not being an ingredient of the offence for which the petitioners were convicted, I think the order which purported to be made under section 522 of the Code of Criminal Procedure was made without jurisdiction and must be set aside. I order that petitioners be restored to possession.

(1) I.L.R., 25 Calc., 434.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

1902. March 6.

RAJA SURANENI VENKATA PAPAYYA RAU (PLAINTIFF), APPELLANT,

v.

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

Easements Act—V of 1882, *s.* 13—*Purchase of land by Government at sale for arrears of revenue—Right of irrigation by way of easement—Assessment of ryots in occupation.*

In 1846, certain villages, forming part of a Zemindari, were brought to sale by Government for arrears of revenue, and bought by Government. The wet lands in these villages were irrigated by a tank in another village, which also formed part of the Zemindari, but was not included in the sale. The Zemindar had himself occupied the wet lands prior to the sale, and continued his occupation thereafter, as a ryot under Government. At a date prior to 1866, the Zemindar sold his interest in the land, and at the settlement which took place in that year, his vendee was assessed with a consolidated wet rate on it. In 1869, the Head Assistant Collector directed that the Zemindar should be credited, yearly, with the difference between the consolidated wet rate and the dry rate. In doing this he acted without the authority of Government. In 1894, the Board of Revenue directed that no portion of the assessment should be credited to the Zemindar, who now sued for a declaration of his right, and for the amount since collected:

Held, that the melvaram right in the villages passed, by the sale, to the Government, who were entitled, by way of easement, to have the lands irrigated from the then existing source of irrigation, and to levy wet assessment on them. That the action of the Settlement department in assessing the consolidated wet rate was right, and that plaintiff was not entitled to the difference between the wet and dry assessment.

Held also, that the action of the Head Assistant Collector was beyond the scope of his authority, and not binding on the Government, who had neither authorized nor ratified it.

SUIT for a declaration that defendant had no right to the wet assessment on land in the village of Vellathur, in the taluk of Bezwada, and for a refund of an amount alleged to have been improperly collected as wet rate on that land since 1892, and

* Second Appeal No. 884 of 1900, against the decree of S. Gopalachari, Subordinate Judge of Kistna, at Masulipatam, in Appeal Suit No. 162 of 1899 against the decree of T. Kristnaswami Naidu, District Munsif of Bezwada, in Original Suit No. 255 of 1897.

appropriated by him. The village of Vellathur, together with other villages, originally formed part of the Zemindari of Mailavaram. In 1846, these villages were brought to sale for arrears of revenue due to Government, and were bought by Government. The wet lands included in them were, prior to 1846, and continued thereafter, to be irrigated by means of water which flowed from a tank in the village of Kuntamukkala, which also formed part of the Zemindari of Mailavaram, and which was not included in the sale for arrears of revenue. The wet lands were occupied by the Zemindar, both prior to and after the sale, as home-farm, or pannai-land. By the purchase, the melvaram right in the villages passed to Government, the Zemindar continuing his occupation as a ryot under Government. At a date prior to 1866, the Zemindar sold his rights in the lands to one K. Seshayya, in whose name patta was issued at the Settlement in 1866. A consolidated wet rate was thereafter collected from Seshayya by Government. In 1869, the Head Assistant Collector of the Division, acting without authority from Government, issued instructions to the Subordinate Revenue officers to credit the Zemindar with the difference between the dry rate on the lands and the wet rate, as fixed in the Settlement of 1866. In 1892, the action of the Head Assistant Collector was disapproved of by the Board of Revenue, to whom a reference was made on the matter. The Board, in 1894, directed that no portion of the assessment should be paid over to the Zemindar.

The Zemindar now filed this suit, claiming the reliefs already set out. The District Munsif declared that plaintiff was entitled to collect the wet assessment on the land, and gave him a decree for the amount which had been collected by defendant.

Against this decree, defendant appealed to the Subordinate Judge, who reversed it and dismissed the suit.

Plaintiff preferred this second appeal.

P. S. Sivaswami Ayyar for appellant.

The Government Pleader for respondent.

JUDGMENT.—Prior to and in the year 1846, when the v ge of Vellathur and certain other villages forming part o he Zemindari of Mailavaram were brought to sale for arre of revenue due to Government and purchased by Government, the wet lands in question in that village used to be irrigated from a tank belonging to the Zemindar of Mailavaram situate in the Zemindari village of Kuntamukkala which was not included in the

sale. At that time the wet lands in question were the home farm lands of the Zemindar and he continued in occupation of the same after the purchase by Government of that and other villages. In consequence of the villages having been purchased by Government, they became ryotwari villages and the persons in occupation of the lands therein including the Zemindar became ryots under Government. By the sale the melwaram right in the villages brought to sale passed to Government, and the Government became entitled to levy wet assessment on the lands in question which were then in the occupancy of the Zemindar as a ryot and consequently to have the same irrigated from the then existing source of irrigation, viz., the Zemindar's tank in Kuntamukkala village—*vide* section 13, clause (*b*), Indian Easements Act. The Government as melvaramdar of the village of Vellathur in question was thus entitled only by way of easement to the use of the water of the tank in Kuntamukkala village for the irrigation of the wet lands in question, and the Government therefore could not under Madras Act VII of 1865 levy a cess for supply of water to the lands in question from the Kuntamukkala tank which did not belong to it. Its right was only to levy wet assessment and supply water by way of easement over the Kuntamukkala tank to its ryot in occupancy of the lands in question. The action of the Settlement department in 1866 in assessing the lands in question with a consolidated wet rate was right; but in 1869 the Head Assistant Collector in charge of the Division without any authority whatever virtually upset the settlement made in 1866 and issued instructions to the Subordinate Revenue officers to hand over to the Zemindar the difference between the dry rate on the lands and the settlement consolidated wet rate fixed in 1866, sometime before which the Zemindar sold the lands in question to one K. Seshayya with whom the settlement was made in 1866, and from whom the consolidated wet rate has since been collected by Government. The instructions issued by the Head Assistant Collector in 1869 were carried out till 1892 and on a reference made to the Board of Revenue that authority disapproved of the action of the Head Assistant Collector in crediting the Zemindar yearly with the difference between the consolidated wet rate and the dry rate and, upholding the settlement made in 1866, directed in 1894 that no portion of the assessment should be paid over or credited to the Zemindar. If the plaintiff had not transferred the holding in question to

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K. Seshayya but continued in occupancy thereof, it would be difficult to suggest any principle on which it could be contended that he would be liable to pay only dry rate to Government and claim exemption from payment of wet rates though by the sale to Government in 1846 the melvaram right in these lands as wet lands became vested in Government. By merely transferring the holding to a third party the melvaram right of the Government cannot be prejudiced, and the Zemindar cannot become entitled to the difference between the melvaram in respect of these lands as dry lands and the melvaram in respect of the same as wet lands. The plaintiff's claim therefore to a declaration that he is entitled to compensation for the use of the water of his tank for the irrigation of the lands in question is entirely unsustainable, and his claim for payment to him of the difference between the dry and wet rates since and subsequent to 1892 from which year the payment was discontinued is equally unsustainable. The learned pleader for the appellant also contends that the plaintiff is entitled to the relief claimed on the ground that a contract should be implied from the action of the Head Assistant Collector in 1869 and the payment to him of the difference between the dry and wet rates up to the year 1892. It is not pretended that the action of the Head Assistant Collector was authorised by Government or that the same was subsequently ratified. Even if from the fact of yearly payments having been made to the Zemindar since 1869, or even prior thereto, an agreement could be implied to continue such payments for ever it is clear that it cannot be binding on the Government for the simple reason that it is not within the scope of the authority of Divisional officers or of the Collector to bind the Government by any such agreement which sacrifices the legitimate interests of Government and has neither been authorized nor ratified by it.

The second appeal therefore fails and is dismissed with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Benson (on reference from Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore).

IN THE MATTER OF PALANI PALAGAN.*

1902. August 26, 29. September 9, 17.

Indian Penal Code—Act XLV of 1860, s. 193—Charge of giving false evidence—Contradictory statements by witness before same Magistrate in the course of one and the same trial, on two different days—Conviction—Legality.

On 18th January 1900, the accused deposed before a Magistrate that he had seen P and others gambling in a certain place. The deposition was read over to the accused, and acknowledged by him to be correct. On 1st February, he was cross-examined, in the same case, before the same Magistrate, and he then deposed that he did not know P and had never seen him gambling. He was charged and convicted under section 193 of the Penal Code of having intentionally given false evidence, in that he made two contradictory statements, one of which he either knew or believed to be false or did not believe to be true. On the question being raised, on revision, whether the conviction was legal, or whether it was illegal, by reason of the fact that the contradictory statements were made before the same Magistrate and in the course of one and the same trial:

Held, Per BENSON, J. (to whom the case was referred).—That the conviction was legal.

Per MOORE, J.—As no rule can be laid down to the effect that the contradictory statements must have been made at different inquiries or trials, (to render a person liable to conviction) the conviction could not be held to be illegal and should, consequently, not be interfered with in revision.

Per BHASHYAM AYYANGAR, J.—The conviction was bad in law. No statement made by a witness in a deposition can be regarded as a completed statement until the deposition is finished, and corrected if necessary; for till then, every statement is liable to be retracted, corrected, varied or qualified, and until his *viva voce* examination is finished, neither the whole nor any portion of his deposition becomes evidence. The whole deposition must be read and construed as one, and if a later statement in it is contradictory to or at variance with a prior statement, the statement made by the witness must be taken to be the earlier statement as subsequently modified, or the subsequent statement itself, if it intentionally contradicts and thus retracts the earlier.

Habibullah v. *Queen-Empress*, (I.L.R., 10 Calc., 937), considered.

CHARGE of having intentionally given false evidence. V. Ponnusami and others were charged before the third-class Magistrate at Sendamangalam, with gambling. The second witness for the

* Criminal Revision Case No. 177 of 1902. Taken up Case No. 20 of 1902. Records called for by the High Court in the matter of the conviction of Palani Palagan, by the Deputy Magistrate of Namakkal, in Calendar Case No. 85 of 1900, which conviction was upheld by the Sessions Judge at Salem in Criminal Appeal No. 14 of 1902.

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prosecution was the present accused Palani Palagan. On 18th January 1900, after he had been solemnly affirmed, he made the following statement in the course of his examination-in-chief:—"At about 9 A.M. on 16th January 1900, Vania Ponnusami, Palli Ramaswamy, Kavarai Rangan and Andi Bodi were gambling, keeping with them money and stones under the ichi tree, by the side of Yettikulam road. . . . As soon as the gamblers saw [the constable] they left the stones and money and ran away. . . ." At the end of the deposition, which bore the witness' mark, the usual statement was made and signed by the Magistrate that the evidence had been taken down by him and read over to the witness and acknowledged by him to be correct. On 1st February 1900 the same witness was cross-examined, after having again been solemnly affirmed. In the course of his cross-examination he said:—"I do not know this Ponnusami. I have not seen him. I know the Police Constable . . . . I have never seen Ponnusami gambling . . . ." Palani Palagan was charged under section 193 of the Indian Penal Code with having given false evidence in a judicial proceeding. The Magistrate who recorded the statements deposed that accused had stated what was recorded, and that both depositions had been read to him, and that he had admitted the correctness of them both and had touched the pen when the mark was added. The Deputy Magistrate, who tried the present case considered that the record of evidence showed that accused had been tampered with in the interval between examination-in-chief and cross-examination. Accused admitted that he had made the later statement, but he denied having made the earlier one. The Deputy Magistrate found accused guilty and sentenced him to a short term of imprisonment in consideration of the time that had elapsed. The accused appealed, without success, to the Sessions Judge.

The records were called for by the High Court.

The case first came on for hearing before Bhashyam Ayyangar and Moore, JJ.

The Acting Public Prosecutor appeared in support of the conviction.

Their Lordships delivered the following judgments:—

BHASHYAM AYYANGAR, J.—In my opinion a witness who has intentionally made contradictory statements in one and the same deposition cannot be charged in the alternative and convicted

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under section 193, Indian Penal Code, by reason of his having made such statements one or other of which must, if the two are construed as independent and separate statements, be false. No statement made by a witness in a deposition can be regarded as a completed statement until the deposition is finished and corrected if necessary; for, till then, every statement is liable to be retracted, corrected, varied or qualified and until his examination *viva voce* is finished, neither the whole nor any portion of his deposition becomes evidence. If a later statement in the deposition be contradictory to or at variance with a prior statement, the whole deposition must be read and construed as one, and the statement made by the witness must be taken to be the earlier statement as subsequently modified or the subsequent statement itself if it intentionally contradicts and thus retracts the earlier, and the statement so modified or the later statement intentionally retracting the earlier is the statement or evidence made or given by him, and if that be proved to be false he can of course be convicted of perjury or giving false evidence on that count. Suppose the deponent instead of giving evidence *viva voce* was allowed to give evidence by swearing to an affidavit which is given in evidence, can he be indicted and convicted of giving false evidence by reason merely of the affidavit containing two contradictory statements one or the other of which must be false to the knowledge of the deponent? They cannot be regarded as two independent separate statements which are contradictory to each other and the witness cannot be convicted on the footing that he intentionally made two contradictory statements one or other of which must be false to his knowledge, any more than a plaintiff or defendant can be indicted and convicted in the alternative for verifying a plaint or written statement containing contradictory or inconsistent statements, one or other of which must be false. The fact that in the present case there was an interval of about a week between the close of the examination-in-chief—in which the earlier statement was made—and the commencement of the cross-examination—in which the later statement was made contradicting the earlier—cannot affect the question, and if, as appears to be the case, the two instalments of the deposition have been separately signed, even that can make no difference any more than the construction of a document will depend upon whether the document is signed once for all at the end or each sheet thereof is signed separately.

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The question arising in this case was considered and decided under Act X of 1882, in *Habibullah* v. *Queen-Empress*(1). In that case Tottenham, J., and Wilson, J., to the latter of whom the case was referred as third Judge under section 429, Criminal Procedure Code, held that the conviction was legal; Norris, J., having dissented from the view of Tottenham, J., holding that a witness cannot be convicted by reason of having intentionally made contradictory statements in one and the same deposition. I concur with the dissenting Judge, Norris, J., in his opinion. I am also inclined to think that the Legislature in enacting illustration (*b*) to section 236 of Act V of 1898—which illustration did not exist in Act X of 1882—was aware of the above decision of the Calcutta High Court and adopted the view of Norris, J. This seems to be also the view on which the decisions of this Court in Criminal Miscellaneous Petitions Nos. 25 and 23 of 1902 proceed, the sanction in the former case having been upheld on the ground that the contradictory statements were made not in one and the same deposition, but in different depositions made on different occasions and in different proceedings though in one and the same case. In my opinion, therefore, the conviction of the accused in the present case in the alternative ought to be set aside on the ground that it is bad in law and the accused acquitted and set at liberty.

I am glad to be able to come to this conclusion as a pure question of law, for I feel convinced that as a matter of policy the contrary doctrine, that a witness can be indicted and convicted of giving false evidence by reason merely that one or other of two contradictory statements intentionally made in one and the same deposition must be false, will have a most unwholesome and deterrent effect upon witnesses, by compelling them to adhere to statements which they have originally made in the course of their examination—however incautiously or inaccurately they might have been made—and unwary and comparatively ignorant witnesses may be made, in the hands of cross-examining counsel who are allowed full latitude in 'leading' a witness in cross-examination, to commit themselves to hopeless contradictions of what they have stated in the examination-in-chief. During the course of examination, a witness often discovers that previous statements made by him are incorrect, either owing to forgetfulness

(1) I.L.R., 10 Calc., 937.

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or confusion or because the question was misunderstood, and he should be at perfect freedom to retract or qualify such statements until the deposition is finished and read out. No doubt it will be said that in such cases he will not be prosecuted for having made contradictory statements and I dare say it will be so when the matter rests in the discretion of experienced Magistrates and Judges. But, as a general rule, it is but natural that a witness would rather adhere to his original statement than expose himself to the risk of the party against whom he gives evidence obtaining sanction to prosecute him for having made contradictory statements though in one and the same deposition.

The doctrine that a witness can be convicted of perjury simply on the ground that one or other of two contradictory statements intentionally made by him must be false, without proving which of them is false, is one that has long been exploded in English law (*R.* v. *Harris*(1), *Reg.* v. *Wheatland*(2), *Reg.* v. *Jackson*(3), *Queen-Empress* v. *Ghulet*(4), *Palany Chetty*(5)), and in India it rests upon the decision of the majority in two Full Bench cases (*Queen* v. *Musst. Zamiran*(6) and *Queen* v. *Mahomed Hoomayoon Shaw*(7)), which has been dissented from by eminent Judges who took part in those cases and by others in *Queen-Empress* v. *Mugapa Bin Ningappan*(8), and the Legislature itself has given sanction to such doctrine, not directly by any substantive enactment, but only indirectly, by illustration (*b*) to section 236 of the Criminal Procedure Code of 1898. In *Habibullah* v. *Queen-Empress*(9) already referred to, Wilson, J. (who concurred with Tottenham, J.) in adverting to the above two Full Bench decisions of the Calcutta High Court, stated as follows:— "I think I am bound to accept this view of the law though if it were not framed (sic 'concluded') by authority, it is not a view that I should myself have taken."

Apart from the reasons already given by me for holding that the doctrine cannot logically or on legal principles apply to a case in which the so-called contradictory statements are contained in and form parts of one and the same deposition, I am not prepared to extend the doctrine beyond the authority of the Full Bench decisions and illustration (*b*) to section 236 of Act V of 1898 and

(1) 5 B. and Ald., 926.
(2) 8 C. and P., 238.
(3) 1 Lewis C.C., 270.
(4) I.L.R., 7 All., 44.
(5) 4 M.H.C.R., 51 at p. 52.
(6) B.L.R.F.B., 521.
(7) 13 B.L.R., 324.
(8) I.L.R., 18 Bom., 377.
(9) I.L.R., 10 Calc., 937.

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the forms of alternative charges appended to that Act and the former Codes of Criminal Procedure, in all of which the contradictory statements referred to are in different depositions—each of which became complete in itself—and was made by the witness on different occasions and in different proceedings.

MOORE, J.—Palani Palagan when examined before a Magistrate on the 18th January 1900 deposed that he saw one Ponnuswami and others gambling in a certain place. After he had given his deposition it was read over to him and acknowledged by him to be correct. On the 1st February he was cross-examined in the same case before the same Magistrate and he then deposed that he did not know Ponnuswami and had never seen him gambling. Palani Palagan has been convicted on an alternative charge of giving false evidence under section 193, Indian Penal Code. There is no finding by the Deputy Magistrate as to which of the contradictory statements is false. A question has been raised as to whether the conviction can be upheld inasmuch as the two statements were made in the same trial although on different days and not in two separate and distinct enquiries. The only reported decision that I can find in which this question, as to whether it is absolutely necessary that the contradictory statements should have been made in different inquiries or trials, has been discussed is that of *Habibullah* v. *Queen-Empress*(1), and as I agree with the view taken by the majority of the Judges (Wilson and Tottenham, JJ.) who heard that case to the effect that no such rule can be laid down I am not prepared to hold that the conviction of Palani Palagan is illegal and I would therefore decline to interfere in revision.

In consequence of the difference of opinion the case was referred to and again came on for hearing before Benson, J., under sections 429 and 439 (1) of the Code of Criminal Procedure who delivered the following:—

JUDGMENT.—The facts of the case are not in dispute. They are briefly as follows:—The accused when examined on solemn affirmation before the Magistrate on the 18th January 1900 deposed that he saw one Ponnusami and others gambling in a certain place. The deposition was read over to the witness and acknowledged by him to be correct. A fortnight afterwards he was cross-examined in the same case, before the same Magistrate, and he then deposed that he did not know Ponnuswami, and had never

(1) I.L.R., 10 Calc., 937.

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seen him gambling. He was convicted of having intentionally given false evidence, an offence punishable under section 193, Indian Penal Code, in that he made two contradictory statements one of which he either knew or believed to be false or did not believe to be true. The question for decision is whether the conviction is legal, or whether it is illegal by reason of the fact that the contradictory statements were made before the same Magistrate and in the course of one and the same trial.

In my judgment the conviction is legal. It is unnecessary to consider what would be the law of England in such a case, inasmuch as the Indian Legislature has deliberately departed from the English law of perjury in more than one particular, and has defined the offence and laid down the procedure to be followed by the Indian Courts in dealing with it. It is admitted on all hands that under section 236, Code of Criminal Procedure, a witness who intentionally makes two contradictory statements in two separate trials, or in an inquiry before a Magistrate and in the trial of the same offence before a Sessions Judge, may be tried on a charge which alleges that one or other of the statements was known by the witness to be false, though without alleging which was, in fact, false. The only question for decision is whether a witness may be similarly charged when the contradictory statements have been made, as in this case, before the same Court and in the same trial. I can find nothing in the law, or in the history of the law, or in the principles on which it is founded to justify the distinction suggested. The law which sanctions the framing of an alternative charge in such a case is section 236, Code of Criminal Procedure, and its terms are perfectly general. They are: "If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences." There are two illustrations added to the section as examples of how its terms may be applied. The second of these illustrations is as follows:—"*A* states on oath before the Magistrate that he saw *B* hit *C* with a club. Before the Sessions Court *A* states on oath that *B* never hit *C*. *A* may be charged in the alternative and convicted of intentionally giving false evidence although it cannot be proved

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which of these contradictory statements was false." This illustration, no doubt, deals only with a case of a witness making contradictory statements before the Committing Magistrate and the Sessions Judge, but it is obvious that the general scope of the provisions of a section cannot be cut down by the terms of an illustration, and the same is true of the forms in the schedule attached to the Code. As observed by Scotland, C.J., and Collett, J., in reference to this same question "the statements of particular offences given in the forms are obviously given only as examples (*Ramanuja Chariyar* v. *Venkatavaradhaiyangar*(1))." There is no suggestion that a charge in the alternative would not be warranted by the section if the two contradictory statements were made in two separate trials, though the illustration does not cover such a case. So far as the terms of the law are concerned, I find nothing to indicate that a conviction such as we are dealing with is illegal: nor do I find anything to that effect in the history of the law, or in the principles on which the law is based. The history of this part of the criminal law has been set forth with admirable fulness by Duthoit, J., in *Queen-Empress* v. *Ghulet*(2). The learned Judge there showed that the *ratio decidendi* of the leading English case, *R.* v. *Harris*(3) was inapplicable in India and that the rule of English law there laid down was never adopted in India. In fact it was almost at once dissented from by express Legislation Madras Regulation 3 of 1826, which was enacted soon after *R.* v. *Harris*(3) was decided settled the law in Madras and provided that "if a witness shall wilfully and deliberately give two contradictory depositions on oath . . . . such witness shall be liable to be committed for trial before the Court of Circuit for wilful and corrupt perjury; provided that the contradiction between the two depositions be direct and positive, and that upon the whole circumstances of the case, there be strong grounds to presume the corrupt intention of the witness." In Bengal and the North-Western Provinces the law was laid down in 1831 "where there exists a contradiction in the evidence of a witness before one or more Courts, and the difference be such that the two statements can in no way be reconciled with each other; for instance, if a witness depose that he saw *A* kill *B* mentioning the time and place in which the murder was committed and

(1) 4 M.H.C.R., 51 at p. 54. (2) I.L.R., 7 All., 44.
(3) 5 B. and Ald., 926.

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afterwards in the same Court or some other, shall state that he did not witness the transaction, this is a direct retractation of his evidence," and he is liable to be convicted (Constructions S.D.A. and N.A., ed. 1839, Vol. II, p. 19).

In 1847 the Indian Law Commissioners, in dealing with this question, stated: "We are strongly of opinion that whoever in any stage of a judicial proceeding, been bound by an oath or by a sanction tantamount to an oath, to state the truth, gives a statement touching any point material to the result of such proceeding which directly and positively contradicts a statement touching the same point, given by him on oath, or under a sanction tantamount to an oath, in any stage of a judicial proceeding, at another time "should (failing any satisfactory explanation of the contradiction to negative the inference of a corrupt intention) be liable to punishment. Under such circumstances, it is morally certain that the party has given a false statement on one or other of the two occasions, though it may be impossible to show positively which of the contradictory statements is false. Both statements may perhaps be false, but one only can be true. It is possible, indeed, that the first statement may have been false, through an error or mistake, which has been corrected by subsequent information, and that the second contradicts the first because it contains the truth which had come to the knowledge of the party in the meantime. But when there is no such allegation nor any explanation of the contradiction to negative the inference that the party at one time or the other has been guilty of stating on oath (or as it may be) as true what he knew to be false in order to deceive a Court of justice, on a point material to the question to be decided by the Court, we think the law should be so framed that he should not be able to escape from the punishment he would well deserve." Now, the reasoning of the Law Commissioners, which, I take it, correctly explains the policy and principles on which the law is founded, is equally applicable whether the two statements are made as in the case before us, at different times in one and the same trial, or at different stages (the inquiry and trial) of one judicial proceeding. The Indian Penal and Criminal Procedure Codes came into force on the 1st January 1862 and laid down the law applicable thenceforward throughout India. The Criminal Procedure Code was re-enacted in 1872 and again in 1882 and 1898, but in each enactment the

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law on this matter was substantially the same as it now is. The validity of a conviction on an alternative charge has been affirmed in reported cases under each of the Codes (referred to in detail in *Queen-Empress* v. *Ghulet*, already cited), but in only one of these has the exact question now before us been decided. That is the case of *Habibullah* v. *Queen-Empress*(1). In it the witness was under cross-examination on one day and under re-examination on the next day, and made two statements which were directly contradictory. His conviction on a charge in the alternative was upheld by a majority of the Judges,—Norris, J., dissenting. The learned Judge who dissented did not quote any authority for making a distinction in favour of the witness who makes contradictory statements at different stages of his examination by the same Court. He based his dissent on the supposed inexpediency of allowing a prosecution in such a case "as it would render it unsafe for a witness to correct the deposition." I do not think that much weight can be given to this argument, for precisely the same argument can be used, and I think with no less force, when the contradictory statements are made at the enquiry and at the trial respectively. Yet this latter is the case expressly given in illustration (*b*) to section 236 as within the scope of the section. It is just as desirable that a witness who has honestly made an incorrect statement at the enquiry before the Magistrate should be free to correct it at the trial before the Judge, as it is that a witness, who has honestly made an incorrect statement at one stage of his examination by the Magistrate should be free to correct it at a later stage of his examination by the same Magistrate, and in my judgment it is no less desirable that a witness who has dishonestly and intentionally made a false statement should not be allowed to escape with impunity in the one case more than in the other. If a witness is honest he has nothing to fear. He cannot be prosecuted without the sanction of the Court before which he deposed (or some Court to which it is subordinate) after such enquiry as the nature of the case demands, and no Court would give sanction unless satisfied that the witness had deliberately and intentionally made the contradictory statements not merely to correct a *bonâ fide* error, but intending in one or the other instance to mislead the Court by stating what he knew to be false or did not believe to be

(1) I.L.R., 10 Calc., 937.

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true. The essence of the offence lies in the intention to give false evidence, and that intention may, I think, just as well exist where the contradiction is in various stages of the same deposition as where it is in different stages of the same proceedings. In both cases every possible presumption should be made in favour of a reconciliation of the two statements and every means should be taken to ascertain the true intention of the witness, but when that intention is shown to be deliberately dishonest, I can see no principle on which the witness should be protected from punishment in the one case more than in the other. To consider whether the false statement was made in the course of one deposition or in the course of two separate depositions seems to be irrelevant, and calculated to obscure the real question. The offence is defined in the Indian Penal Code, and consists in intentionally making a false statement. The Criminal Procedure Code does not create or define the offence. It rather relates to the mode in which it may legitimately be proved that the offence has been committed. It says, in effect, you may prove that a false statement has been made by showing that two contradictory statements have been made one or other of which must necessarily be false, and it is not necessary for you to show which of the two is, in fact, the false one. This mode of proof is just as applicable in the case of contradictory statements made at different stages of a witness' examination by a Magistrate, as in the case of contradictory statements made by the same witness at the enquiry by a Magistrate and at the trial by the Judge. It often happens that a witness is not cross-examined at all at the enquiry by the Magistrate, the cross-examination being reserved until the witness has been examined in the Sessions Court. In what essential does such a case differ from that now before us? In both cases it is merely a question of words as to whether the statement in cross-examination is to be regarded as a separate deposition or as a continuation of the original deposition. The evil to be guarded against seems to be precisely the same in both cases, and ought to be equally liable to the sanction of punishment.

In the case before us the witness deposed in examination-in-chief that he saw Ponnuswami committing an offence and stated the exact time and place and other particulars. The deposition, after it was recorded, was read over to the witness and acknowledged to be correct. When cross-examined a fortnight afterwards the

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witness denied that he knew Ponnuswami or had ever seen him commit the offence. He did not plead that his former statement was made under any misapprehension. He made no attempt to reconcile the two statements or to explain them in any way consistent with an honest intention on his own part. He simply denied having made the former statement attributed to him. It would, I think, be difficult to find a more flagrant case of intentional giving of false evidence, and it would, in my judgment, have a most unfortunate effect on the morality of witnesses and the administration of justice if a witness, however corrupt, who behaves in this way, cannot be punished. In the words of Sir Barnes Peacock, used with reference to two contradictory statements made before the Magistrate and the Sessions Judge in one and the same case: "It is clear that unless the law is very defective, or we are to trifle with the administration of justice, the witness ought to be punished. It appears to me that the law is not deficient, and that the case is provided for by the Code of Criminal Procedure whether it be read according to the strict letter or according to its spirit" (*R.* v. *Zumeerun*(1)).

I must hold that the conviction in the present case was legal and that there is no ground for our interference as a Court of Revision.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

1902. March 5.

K. CHIDAMBARA RAO AND ANOTHER (PLAINTIFF), APPELLANTS,

v.

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

Indian Easements Act—V of 1882, *s.* 13 (*c*)—*Grant of village as inam—Right to water for irrigation—Area under wet cultivation at time of grant subsequently increased—Claim by inamdar for proportionate increase of water for irrigation.*

In 1859 a village with land comprising 339 acres was granted by Government, as inam, to plaintiff. At the time of the grant, 106·09 acres were under wet cultivation, the remainder being poramboke, prior minor inams and land under dry cultivation. The area of land under wet cultivation was subsequently increased, and plaintiff claimed to be entitled to water for the irrigation of this increased area without paying assessment thereon, and in 1870, the Collector of the District permitted that increase. Plaintiff had now been assessed in respect of the increased area, and brought this suit for a declaration of his right and for a refund of the money paid by him under protest:

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Held, that plaintiff was entitled, under section 13 (*c*) of the Easements Act, to irrigate 106·09 acres, and no more. *Also*, that the action of the Collector in 1870 was unauthorised and had not been subsequently ratified by Government, and was not binding on Government.

SUIT by the Dharmakarta of the temple of Sitaramaswamivaru, in Buttayyapet, Bandar, for a declaration that plaintiff was not bound to pay water-tax in respect of certain land, provided that he did not cultivate more than 225 acres, and for the refund of the amount of tax paid under protest. The facts of the case are sufficiently set out in the judgment of the High Court. The District Munsif made the declaration and ordered the refund as prayed. The District Judge, on appeal, reversed that decree and dismissed the suit.

Plaintiff preferred this second appeal.

V. Krishnaswami Ayyar and *K. Subramania Sastri* for appellant.

The Government Pleader for first respondent.

JUDGMENT.—The plaintiff as inamdar of the village mentioned in the plaint sues for a declaration that, by virtue of an engagement with the Government, he is entitled to irrigate free of charge from the Kistna anicut water 225 acres of wet land in that village and for refund of Rs. 123-12-0 which he says was unlawfully collected from him under protest, as water cess under Madras Act VII of 1865 on the difference between 225 acres and 106·09 acres, which is the extent to which alone his right to irrigation free of charge is admitted by Government. We are clearly of opinion that the decision of the District Judge that the plaintiff is entitled to irrigation free of charge only to the extent of 106·09 acres is correct and that the plaintiff is liable to pay water cess for any excess beyond the said extent if he uses the anicut water for irrigating such excess. It appears from exhibits I and II to which our attention was drawn by the appellant's pleader that, when the village was granted as inam, the ayakat or total area of the inam village was 339 acres, and that out of that extent, deducting poramboke (114·56 acres) and prior minor

(1) 6 Suth. W.R., (Cr.), 65.

* Second Appeal No. 963 of 1900, against the decree of W. C. Holmes, District Judge of Kistna, at Masulipatam, in Appeal Suit No. 575 of 1899 against the decree of S. A. Swaminadha Sastri, District Munsif of Gudivada, in Original Suit No. 153 of 1897.

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inams (21·21 acres) and lands under dry cultivation (97·59 acres), the land under wet cultivation was 106·09 acres. According to the principle of law which will be found enunciated in section 13, clause (*c*) of the Indian Easements Act, the inamdar would be entitled to irrigate the said extent of wet land, free of separate charge, from the same source from which the land was irrigated at the time of the grant though such source of irrigation was outside the inam village, and, unless subsequent thereto there was any contract between him and Government—the onus of establishing which will be on the inamdar—that the Government was to supply him free of charge with water for the irrigation of any additional extent of land in the inam village, he cannot claim exemption from payment of water cess under Madras Act VII of 1865 in respect of any additional extent of land which he may have brought under wet cultivation. The fact that in lieu of the old sources of irrigation a supply of water from the Kistna anicut was substituted by Government would not add to the obligation of Government and entitle the inamdar to claim irrigation free of charge from the Kistna anicut water for any additional extent of land, in the absence of any contract to that effect. As a matter of fact it appears from exhibits I and II that the area of wet cultivation in the village was subsequently extended beyond 106·09 acres by converting from time to time portions of poramboke land into lands under wet cultivation. It does not appear clearly whether water rate was or was not in fact levied for this excess. But judging from exhibit C, which was an order issued by the Collector of the district in 1870, it is highly probable that no water cess was levied in respect of this additional extent and it is certain that from 1870 until recently no water cess was levied. In the inam title-deed which appears to have been issued in 1859, the extent of wet land is given as 106·09 acres, which tallies with the extent, as recorded in exhibits I and II, of lands originally under wet cultivation. It is not contended that the figures as given in exhibits I and II are erroneous and the appellant has not established that there has subsequently been any engagement between him and Government to supply him with water from the Kistna anicut free of charge for any extent beyond the original 106·09 acres. The appellants rely solely upon the proceedings of the Collector in 1870, according to which they were allowed to irrigate free of charge, the extent now claimed by them. But this action of the Collector was

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entirely unauthorised and it was not subsequently ratified by Government. It cannot therefore bind Government. It was the duty of the Inam Commissioner to ascertain and record in the title-deed, not the extent of land which was actually under wet cultivation at the time of the inam settlement, but only the extent to which the inamdar was entitled to supply of water free of charge, and in the present case the extent recorded in the title-deed is not shown to be erroneous, but tallies with the extent as recorded in exhibits I and II. No right of easement by prescription under section 15 of the Easements Act has been set up as against Government in this case and it is therefore unnecessary to consider whether, if such right can be established as against Government by enjoyment for a period of 60 years, that will operate as a bar to the imposition of the water cess under Madras Act VII of 1865. The second appeal, therefore, fails and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

VALIA THAMBURATTI (DEFENDANT NO. 1), APPELLANT,

1902. March 5.

v.

ANUJANI KUNHUNNI AND OTHERS (PLAINTIFFS NOS. 4, 5 AND 7 TO 12), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 266 (g)—Fund representing political pension due at date of pensioner's death, but unpaid—Liability to attachment.

A person to whom a political pension was being paid died; and at the date of his decease a sum of money was due to him in this respect, but remained, unpaid, in the hands of the Collector of the District. On an attempt being made to attach the fund, in execution proceedings:

Held, that the character of the fund remained unchanged so long as it remained unpaid in the hands of the Government, irrespective of whether the intended beneficiary were alive or dead, and that the fund was not liable to attachment.

EXECUTION petition. The prayer was as follows:—"It is prayed that the amounts shown in columns 7 and 8 with future interest

* Appeal against order No. 139 of 1901, against the order of K. Krishna Row, Subordinate Judge of Calicut, in Execution Petition No. 59 of 1901, in Original Suit No. 8 of 1900.

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and costs may be realised and given (to the petitioners) by attachment and sale of the property belonging to the defendant's Pudiya Kovilagam and described below Particulars of property :— The amount which is due as arrears of Malikhana to the Zamorin deceased on 24th Meenom 1075 from the Government, which has lapsed to Andia Kovilagam as common property subsequent to the death of the Zamorin, and which is kept in the office of the Malabar Collector is Rs. 14,120-9-0."

The Subordinate Judge, to whom the application was made, said :—"This is an application praying for the attachment of the Malikhana due to the defendant from the Collector of Malabar. A sum of Rs. 14,120, due as Malikhana or a political pension to the late Zamorin until the date of his death, is sought to be attached. The Valia Tamburatti, who is entitled to recover the money as the head of Pudiya Kovilagam to which the Malikhana has lapsed, contends that the amount cannot be attached both under section 266, Civil Procedure Code, and under section 11 of Act XXIII of 1871. Plaintiffs, who pray for attachment, state that as the person who was entitled to the pension is dead, the money has lost its character as pension and has become the property of the Valia Tamburatti, and that therefore there is no legal bar to the attachment. Section 266 (*g*) of the Code of Civil Procedure provides that 'political pensions' shall not be liable to attachment. The section is however silent as to whether after the death of the pensioner, the pension amount may or may not be attached as the property of his heir. Section 11 of Act XXIII of 1871 provides as follows:— 'No pension granted or continued by Government on Political considerations . . . . and no money due . . . . on account of any such pension . . . . shall be liable to seizure or attachment or sequestration by process of any Court in British India . . . . or in satisfaction of a decree or order of any such Court.' This section however applies only to money which can be strictly called pensions, which term implies that there is a pensioner alive, who can receive it. After his death, there is no reason for any provision for maintaining his dignity and consequently no reason for continuing the prohibition against attachment. In *Referred Case No.* 33 *of* 1870(1), where arrears of Yeomiah pension due to the estate of a deceased

(1) 5 M.H.C.R., 371.

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Yeomiahdar accidently accumulated, it was held that they were *not* subject to attachment because the fund was 'assets of the deceased pensioner.' That case was decided under Act IV of 1831 as amended by Act XXIII of 1838. The High Court observed that 'it is by no means necessary to decide that the fund is indelibly impressed with the privilege so that after its descent to one not a pensioner it would in his hands be exempt from the payment of debt to which it would otherwise be liable.' This is the exact point raised in this case, although Act XXIII of 1871 applies to it. I hold that the money may be attached. It is not 'indelibly impressed with the privilege' contemplated by Act XXIII after its descent to the heirs of the prisoner. Upon the death of the late Zamorin, the money became the property of the Tarward represented by the Valia Tamburatti, and it can therefore be attached as such. There is no reason to think that the Government is going to assert any right to the money as against the Valia Tamburatti."

He ordered the fund to be attached.

First defendant preferred this appeal.

Sundara Ayyar for appellant.

JUDGMENT.—We are of opinion that the character of the fund remains unchanged as long as it remains unpaid in the hands of the Government irrespective of whether the intended beneficiary is alive or dead. This appears to be the principle upon which all the cases have gone. (See *Referred Case No.* 33 *of* 1870(1), *Babajihari* v. *Rajaram Ballal*(2), *Bishambhar Nath* v. *Nawab Imdad Ali Khan*(3), and *Andi Achen* v. *Kombi Achen*(4).

We set aside the order of the Subordinate Judge with costs in this and in the lower Court.

(1) 5 M.H.C.R., 371. (2) I.L.R., 1 Bom., 75.
(3) L.R., 17 I.A., 181. (4) I.L.R., 18 Mad., 187.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

1902
March 3.

BUDANKAYALA BALAKRISHNAMMA SUBUDHI (PLAINTIFF), APPELLANT,

v.

VINAYAKA RAVA SINGI BISOYI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Registration Act—III of 1877, s. 50—Conflict between registered and unregistered documents—Long possession by usufructuary mortgagee under an unregistered instrument—Title.

Defendant and his father had taken possession of certain land as usufructuary mortgagees in 1877, and had held possession of it ever since. The document witnessing the mortgage was never registered. The land was subsequently purchased by them. At a date later than the purchase, plaintiff obtained a mortgage over the land, which was duly registered. Plaintiff now sued to recover possession of the land:

Held, that he was not entitled to recover. Defendant had been in possession as usufructuary mortgagee, though under an unregistered document, since 1877, and section 50 of the Registration Act does not affect the operation of the law of limitation in favour of a person who claims under an unregistered document.

Nallamuttu Pillai v. *Betha Naickan*, (I.L.R., 23 Mad., 37), referred to.

SUIT to recover possession of land. Plaintiff alleged that first defendant and the members of his family had mortgaged their lands to plaintiff in August 1887: that plaintiff had sued on the mortgage and obtained a decree in March 1895; and that he had purchased the lands at a sale held in execution of that decree in December 1895. He charged that defendants Nos. 1 and 2 had, in July 1896, trespassed on a portion of the lands in question. He now sued to recover the portion so trespassed upon. First defendant remained *ex parte*. Second defendant pleaded that at the date of the mortgage to plaintiff, namely, in August 1887, first defendant had no right in the property; that first defendant had, in 1877, executed a mortgage over the land in question in favour of second defendant's father for Rs. 99, and had put second defendant's father in possession; that being unable to pay the debt,

* Second Appeal No. 1153 of 1900, against the decree of V. Venugopal Chetty, Acting District Judge of Ganjám, in Appeal Suit No. 65 of 1900, against the decree of N. R. Narasimmiah, District Munsif of Berhampore, in Original Suit No. 149 of 1898.

first defendant and his brother, prior to the date of the mortgage to plaintiff, had transferred the land to second defendant's father, and caused the patta to be in his name; and that second defendant's father, and, since his death, second defendant, had been in possession of the land. Defendants Nos. 3 and 4 were impleaded as they held possession as usufructuary mortgagees from second defendant. The mortgage of 1877, in favour of second defendant's father had never been registered. Plaintiff's mortgage of 1887 was registered, and plaintiff, before the District Munsif, claimed preference. Second defendant contended that he had acquired an indefeasible title by his possession since 1877. The District Munsif believed the evidence which was adduced to show that second defendant's father had been in possession since 1877, and, in the result, dismissed the suit.

The Acting District Judge said:—"The Munsif has found that the mortgage to the second defendant and the sale to him subsequently were previous to the mortgage with the plaintiff. I have no reason to differ from him. It is argued for the plaintiff, (1) that the sale to the second defendant is not valid as there is no registered document and (2) that the registered mortgage of the plaintiff must have precedence over the unregistered mortgage of the second defendant according to section 50 of the Registration Act. For the second defendant it is urged that here there is no conflict between registered and unregistered documents but between an oral alienation and a registered document as provided for in section 48 of the Registration Act. I am of opinion that section 48 is applicable here. The second defendant's possession as mortgagee coupled with the oral transaction as to sale constitutes delivery of possession. His title according to section 48 must take precedence over that of the plaintiff." He dismissed the appeal.

Plaintiff preferred this second appeal.

V. Krishnasawmy Ayyar for appellant.

Sundara Ayyar for respondent.

JUDGMENT.—It is not necessary to consider the effect of section 50 of the Registration Act in this case as we find that the second defendant had been in possession as usufructuary mortgagee, although under an unregistered instrument, since 1877, and there is nothing in section 50 of the Registration Act to affect the operation of the Law of Limitation in favour of a person who claims under an unregistered document (vide *Nallamuttu Pillai* v.

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Betha Naickan(1). The fact that the second defendant has been latterly for some years claiming under an invalid sale does not make his possession the less adverse to the plaintiff. This second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

1902. March 7.

KOSURI RAMARAJU (PLAINTIFF), APPELLANT,

v.

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

Hindu Law—Contract for sale of land by one of three brothers—Allegation in plaint that vendor was managing member—No allegation of authority or ratification by others—Suit for specific performance against all—Cause of action.

A plaint alleged that first defendant, as managing member of an undivided family consisting of the three defendants, had entered into a contract to convey certain land to plaintiff and had placed him in possession thereof after receiving a sum of money in part payment. There was no allegation that the other defendants were parties to the contract, or that they had authorized the first defendant to enter into it or that they had ratified it. The plaint claimed specific performance of the contract as against all the defendants.

Held, that it disclosed no cause of action as against the second and third defendants and that (the allegations in the plaint having been proved as against first defendant) plaintiff was entitled to a decree for specific performance against first defendant, without determining whether the sale by him would or would not bind the interests of the other defendants in the property.

SUIT for specific performance of a contract for the sale of land. The plaint alleged that the three defendants were undivided brothers, of whose family the first defendant was the manager; that first defendant had agreed to sell the land in question to plaintiff for Rs. 429, in order to discharge family debts, and had received Rs. 50 from plaintiff on account of the purchase money, and, on 25th May 1896, executed the contract of sale now sued on, and

(1) I.L.R., 23 Mad., 37.

* Second Appeal No. 60 of 1901, against the decree of C. G. Kuppuswami Ayyar, Subordinate Judge at Cocanada, in Referred Appeal Suit No. 63 of 1900, preferred against the decree of O. Sivarama Krishnamma Garu, District Munsif at Narasapur, in Original Suit No. 377 of 1899.

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placed plaintiff in possession of the land. Plaintiff charged that the defendants had failed to execute a registered sale-deed in accordance with the terms of the contract though he had offered to pay the balance of consideration. First defendant admitted the contract and consented to a decree being passed in plaintiff's favour on certain terms, but pleaded that he had not undertaken to obtain the signatures of the other defendants to the sale-deed. The other two defendants pleaded that the suit was not maintainable as against them, that first defendant was not the managing member of the family, and that he had not obtained their consent to the contract sued on. The District Munsif found that first defendant was the manager of the family and that his contract with plaintiff appeared to be for the benefit of all the defendants and passed a decree directing the defendants to execute and register a sale-deed in terms of the contract. Second and third defendants appealed to the Subordinate Judge, who held that there was nothing in the contract to show that first defendant was the managing member and that if first defendant had agreed to obtain the consent of his brothers to the sale and to induce them to join in the execution of a deed of conveyance he had exceeded his powers and had undertaken to do a thing of which he could not be sure. He reversed the decree and, as he considered it impossible, in this suit, to apportion the consideration for the sale and the property agreed to be conveyed, dismissed the suit as against all the defendants.

Plaintiff preferred this second appeal.

K. Subrahmania Sastri and *V. Ramasam* for appellant.

T. V. Seshagiri Ayyar for respondents.

JUDGMENT.—The plaint alleges that the first defendant as managing member of the undivided family consisting of the three defendants entered into a contract to convey the lands mentioned in the plaint to the plaintiff and placed him in possession of the same after receiving Rs. 50 in part payment of the price agreed. There is no allegation in the plaint that second and third defendants were parties to the contract or that they authorised the first defendant to enter into the contract or that they ratified the same. The plaint, therefore, discloses no cause of action against second and third defendants for specific performance of the first defendant's contract. The suit against them should have been dismissed at the first hearing. But upon the findings the plaintiff is clearly entitled to a decree for specific performance against the first defendant

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without determining whether the sale by him would or would not bind the interests of the second and third defendants in the property agreed to be sold. The Subordinate Judge's decree is modified to this extent and confirmed in other respects. The appellant will be entitled to recover his costs throughout from the first defendant and will pay the costs of second and third defendants throughout.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

1902. March 3.

NIDAMARTHI MUKKANTI (PLAINTIFF), APPELLANT,

v.

THAMMANA RAMAYYA (DEFENDANT), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *s.* 521—*Petition by both parties requesting the Distict Munsif to examine site and peruse documents and agreeing to abide by his decision—Award—Appeal.*

In the course of a suit, in which plaintiff claimed an order directing defendant to close a doorway and an injunction, plaintiff and defendant jointly presented a petition requesting the District Munsif to inspect the site and peruse the documents filed in the suit and agreeing to abide by the decision which the Court might be pleased to pass, as the final decision. The District Munsif passed an order in terms of the petition and inspected the site and considered the documents, and ultimately passed a decree in plaintiff's favour. Against that decree, defendant appealed:

Held, that the District Munsif had acted as an arbitrator by consent of the parties, and no appeal lay from his decision, which must be looked upon as an award. And as no reasons had been shown for setting aside the award under section 521 of the Code, the decree must be taken to have been passed in accordance with the award, and, as such, upheld.

SUIT for an order directing a doorway constructed by defendant to be blocked up and for a perpetual injunction restraining him from again constructing a doorway in that place. Defendant claimed the right to use the doorway, and issues were framed, and a commissioner was appointed to measure the sites belonging to both

* Second Appeal No. 1152 of 1900, against the decree of S. Gopalachari, Subordinate Judge of Kistna, at Masulipatam, in Appeal Suit No. 675 of 1889, against the decree of A. Ramaswami Sastri Avergal, District Munsif of Masulipatam, in Original Suit No. 374 of 1897.

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parties. He made his report, and plaintiff filed an objection to it. Eventually, the parties jointly presented a petition, in the Court of the District Munsif, in the following terms:—

"Petition presented by plaintiff and defendant under section 394 of Civil Procedure Code.

"This suit is in respect of dispute of land.

"Both parties will abide by the decision of the Court that may be passed, as it thinks just, after perusing the documents filed by both parties and all the records in the said suit, and after measuring the sites and inspecting the marks, etc., which are thereon. Therefore, both parties will abide by the decision which the Court may be pleased to pass, as the final decision." (Signed) NIDUMARTI MUKKANTI, *plaintiff;* THAMMANA RAMAYYA, *defendant;* K. VIRACHARYULU, *pleader for plaintiff;* and K. LAKSHMINARASU, *pleader for defendant.*

The District Munsif "ordered accordingly," and inspected the site, in company with the parties and their pleaders. He then found in favour of plaintiff and pronounced judgment and gave him the order claimed, and granted the injunction. Defendant appealed to the Subordinate Judge, who considered, in the first place, whether, having regard to the petition to the District Munsif, the defendant was entitled to appeal. He held that he was, and, on the merits, modified the decree.

Plaintiff preferred this second appeal.

P. Nagabhushanam for appellant.

P. S. Sivaswami Ayyar for respondent.

JUDGMENT.—It must be held that the District Munsif acted as an arbitrator by consent of parties and that consequently no appeal lay from his decision, which must be looked on as an award (vide *In re Durham, &c., Building Society*(1)). As no attempt has been made to attack that award on any of the grounds specified in section 521 of the Civil Procedure Code, we must look on the decree of the District Munsif as one passed in accordance with the award and uphold it as such. There was consequently, under section 522 of the Civil Procedure Code, no appeal to the lower Appellate Court. We set aside the decree of the Subordinate Judge and restore that of the District Munsif. The respondent must pay the costs of the appellant in this Court and the lower Appellate Court.

(1) L.R., 7 Ch., 45.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

1902. March 12.

UPPALA RAGHAVA CHARLU (PLAINTIFF No. 1), APPELLANT,

v.

UPPALA RAMANUJA CHARLU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Law—Suit for partition—Evidence that the joint property had been leased —Available for partition—Maintainability of suit.

In the course of the hearing of a suit for partition brought by one of several joint shrotriemdars against the rest, it transpired that the lands of which partition was sought had, a few years before suit, been let on lease for a period of twenty-four years:

Held, that this was no ground for rejecting the suit. Delivery of the lands which might be found to be in the possession of tenants could be given under section 264 of the Code of Civil Procedure.

SUIT to recover land by partition. According to the plaint, the land in question was attached to the shrotriem holding in the village of Maddiralapaud, and first plaintiff together with defendants Nos. 1 to 9 were entitled to it in shares which varied in extent. First plaintiff sued for partition of the land among the shrotriemdars and for delivery to him of his share. The claim was supported by some of the defendants Nos. 1 to 9, others objecting to the extent of the shares to which plaintiff alleged them to be entitled, and some being *ex parte*. Tenth defendant pleaded that some of the land was in use for common purposes, and some was in his own possession. At the trial before the District Munsif it appeared from the plaintiffs' evidence that the land had been leased by plaintiffs and the other inamdars for a period of twenty-four years from 1894. The District Munsif considered that the suit was not maintainable, as the property was not available for partition. He dismissed the suit, and the District Judge, on appeal, upheld that order.

Plaintiff preferred this second appeal.

V. C. Seshachariar for appellant.

* Second Appeal No. 972 of 1900, against the decree of T. M. Swaminadha Ayyar, Acting District Judge of Nellore, in Appeal Suit No. 370 of 1897, against the decree of T. Swami Ayyar, District Munsif of Ongole, in Original Suit No. 750 of 1895.

S. Srinivasa Ayyangar for tenth respondent.

UPPALA RAGHAVA CHARLU *v.* UPPALA RAMANUJA CHARLU.

JUDGMENT.—The District Judge has dismissed the appeal on the ground that it was alleged that in 1894 certain lands belonging to the joint shrotriemdars were leased out for twenty-four years and that consequently such lands were not available for partition or restoration to the plaintiffs. This decision cannot be upheld. Even if it be shown that certain of the shrotriem lands have been leased out under a subsisting lease, that is no ground for rejecting a suit for partition. If there is a decree for partition and the lands are in possession of tenants, delivery can be given under section 264, Civil Procedure Code. The question as to the ownership of the tenth and other defendants of the lands claimed by them as their own must of course be decided before a decree is passed for partition and such lands as they establish their right to must be excluded from the partition. This second appeal is allowed, the decree of the District Judge is reversed and the appeal will be sent back to him for decision on the merits.

The costs hitherto incurred will be costs in the cause.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Moore.

1902. February 21.

SREE MAHANT KISHORA DOSSJEE (PLAINTIFF), APPELLANT,

v.

THE COIMBATORE SPINNING AND WEAVING COMPANY (LIMITED), (DEFENDANTS), RESPONDENTS.*

Indian Companies Act—VI of 1882, *s.* 58—*Application for rectification of register —Evidence Act—I of* 1872, *s.* 115—*Estoppel—Hindu Law—Property held by head of Mutt—Presumption as to its being property of Mutt.*

The head of a Mutt applied for and was allotted shares in a company in his own name. Payments were made by him by way of calls on the shares, and by his successor in office, and the company credited the amounts paid by the successor towards the amount due as calls on the shares. Subsequently, plaintiff, another successor in the office, applied to have the company's share register altered, so that the shares should stand in the name of the Mutt. This, the directors refused to do unless plaintiff provided them with a transfer from the

* Appeal No. 125 of 1899, against the decree of G. T. Mackenzie, District Judge of Coimbatore, in Original Suit No. 22 of 1898.

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original allottee (who was still alive) or an indemnity by the Mutt. Plaintiff did neither, and the shares were ultimately declared by the company to be forfeited. Plaintiff now sued the company, claiming that the shares were not the private property of the original allottee, but belonged to the Mutt, and that the forfeiture should be declared to be invalid, and that the company's register should be rectified. He adduced no evidence to show that the original applicant had utilised the funds of the Mutt in payment of calls:

Held, that no presumption arose that the money paid belonged to the Mutt. Nor was the company estopped, by section 115 of the Evidence Act, from denying that the shares were the property of the Mutt. On the refusal by the directors to transfer the shares to the name of the plaintiff he should have applied for rectification of the company's register, under section 58 of the Indian Company's Act, though such an application could not have been successful, as, in the circumstances, he could not have shown that the directors had acted capriciously and unreasonably in refusing to enter plaintiff's name on the register without a transfer from the original holder or an indemnity.

SUIT for rectification of the share-register of the defendant company. The plaint alleged that plaintiff was at present the head and Mahant of the Hathiramjee Mutt, at Tirupati; that Sree Bagavan Dosjee, who was Mahant in 1889, had subscribed for a thousand shares in the defendant company and paid calls amounting to Rs. 56,000 in respect of those shares; that Bagavan had renounced his right title and interest in his office in 1890, to Sree Mahabier Dossjee, who paid a further Rs. 6,000 in calls in respect of the said shares, and died in 1894; that the defendant company had refused to register Mahabier's name in place of Bagavan's; that plaintiff had succeeded Mahabier; that the company had declared the shares forfeited, which forfeiture, as plaintiff contended was void and illegal and not binding on plaintiff's predecessor, or on plaintiff as representing the Mutt. Plaintiff claimed that the Mutt was the holder of the shares, and sought to have his name, as head of the Mutt, registered as a shareholder, and the company's register rectified, and asked for a declaration that the forfeiture was *ultra vires* and void.

The defendant company admitted that Bagavan had applied for the shares, and that they had been allotted to him, his name being entered in the register, and that Rs. 51,000 had been paid by him, as calls, and a further Rs. 5,000 in 1890. They pleaded that he had made default in respect of further calls, that due notice had been given him, that the company had never received notice that Bagavan had renounced his interest in the shares, that Mahabier had paid Rs. 6,000, but had then made default, refusing to

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pay more until the shares should be transferred to his name; that the company had offered to make the transfer on receiving either a transfer from Bagavan, or an indemnity by plaintiff in the name of the Mutt, and had further offered to give plaintiff share certificates in Bagavan's name if the arrears of calls were paid. In 1891, Bagavan had asked for and had been given time for payment of the arrears, but again defaulted, and the shares were declared to be forfeited on May 18th 1892, such forfeiture being duly notified to Bagavan and to Mahabier. They added that the shares had been sold to other parties, and all the remaining shares in the company had been taken up. They filed a certificate of forfeiture under Act 46 of their articles of Association, as well as the articles of Association, and claimed that plaintiff had no cause of action against them, and that, under their articles, no notice of any trust on behalf of the Mutt could affect the company, and that the shares had been validly forfeited.

The application for the shares (which was filed as exhibit 23) was signed by "Streeman Bagavan Dosjee," and the address given was, "Mahant of Atheeram Bavajee Mutt, Tirupati;" and it requested the directors of the company "to allot me" the shares, and added, "I request that my name may be placed on the register of members in respect of the shares so allotted." In the register of shareholders, Bagavan Dosjee was described as the holder of the shares. When the case came on for hearing, plaintiff adduced no evidence to show the source from which Bagavan had obtained the money which he paid as calls, or that such money was part of the funds of the Mutt. The exhibits which had a material bearing on the case are set out or summarised in the judgment of the High Court. The District Judge held that plaintiff had failed to prove that the shares were the property of the Mutt; that the acceptance of sums of money as calls from Mahabier did not bind the company to admit him as the holder of the shares: and that the forfeiture was valid. He dismissed the suit.

Plaintiff preferred this appeal.

Hon. Mr. *Eardley Norton* and *S. Gopalaswami Ayyangar* for appellant.

Mr. *K. Brown* for respondents.

JUDGMENT.—The main argument advanced in support of this appeal is that the application made by Mahant Bagavan Dosjee for shares in the Coimbatore Spinning and Weaving Company was

made by him in his capacity as Mahant of the Mutt at Tirupati, that the money paid by him for these shares was a portion of the funds of the Mutt, that the Mahant being a Byragi had not and could not have had any funds of his own, out of which he could have purchased those shares; that the directors of the company must have been well aware that such was the case and that consequently on Bagavan Dosjee vacating the post of Mahant the company was bound to transfer the shares standing in his name to the name of the plaintiff his successor in the office of Mahant. The evidence on the record does not bear out these contentions. It cannot be held that exhibit XXIII shows that Bagavan Dosjee applied for the shares in his capacity of Mahant on behalf of the Mutt. The applicant there applies for certain shares, states that he had paid Messrs. Arbuthnot and Co. a deposit on account of such shares, asks that the shares may be allotted to him, agrees to accept them and requests that his name may be entered on the register of shareholders. He signs his name as Sreeman Bagavan Dosjee and gives as his address "Mahant of Atheeram Bavajee Mutt, Tirupati." There is nothing in this application to show that it was made on behalf of the Mutt, or that the money paid for the shares consisted of Mutt funds. In exhibit XXIV, an extract from the share register, the shareholder is given as Sreeman Bagavan Dosjee. Nothing is said as to the Mutt having any concern in the transaction. The plaintiff examined no witnesses before the District Court and made no attempt to prove by evidence as to where Bagavan Dosjee got the money that he paid for the shares, or that that money was a portion of the funds of the Mutt. The learned counsel for the appellant has, at the hearing of this appeal, referred to certain texts in the Hindu sacred Law Books to show that a Byragi is condemned to a life of perpetual poverty and is incapable of acquiring property for his own use and benefit. Such precepts cannot be looked on as anything more than counsels of perfection and cannot be held to carry much weight in the absence of clear and satisfactory proof that as a matter of fact Bagavan Dosjee had no private funds at his disposal. Exhibit NN, the deed under which Bagavan Dosjee, after he had been convicted of a criminal offence and committed to jail, appointed the plaintiff as his successor in the office of Mahant and transferred to him the management of all the Mutt property, does not support the contention now put forward that the executant was not and could not have been possessed of any private funds, for in that document he

is described as living by lands and acquisition from disciples. It will further be remarked that in this document, in which the various descriptions of property held by the Mutt are set out in considerable detail, no mention is made of the shares in this company. It is only reasonable to assume that if these shares, which are of considerable pecuniary value, had been looked upon by the executant as mutt property, they would have been mentioned in this document. It must be held that there is no presumption that the money paid by Bagavan Dosjee belonged to the Mutt and that the plaintiff has completely failed to prove such to be the case.

It appears that shortly after Bagavan Dosjee had been sent to jail, the plaintiff as his successor in the post of Mahant paid from time to time certain sums as a portion of what was due to the company on account of the shares allotted to Bagavan Dosjee. It is further in evidence that the company received these moneys from the plaintiff, credited them towards what was due on account of these shares, and also that Mr. Stanes, on behalf of the company, in certain correspondence which has been filed as evidence, alluded to these shares as being the plaintiff's shares and also as belonging to the Mahant. The learned counsel who has appeared here in support of this appeal urges that in consequence of these acts the company is estopped from denying that the shares are the property of the Mutt and that on Bagavan Dosjee ceasing to be Mahant, the plaintiff by virtue of his succession to the post of Mahant became the owner of these shares. It is impossible to hold that this contention is a valid one. Section 115 of the Evidence Act provides that when a person has by his declaration act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative can be allowed in any suit between himself and such person to deny the truth of that thing. It cannot possibly be held that the Spinning Company by its action led the plaintiff to believe anything. The plaintiff was presumably aware of the facts relating to the purchase of the shares, the source from which the money paid for them was derived, and the capacity in which Bagavan Dosjee acted when he bought them. The company had no special information as to such matters and could not by its action have caused the plaintiff to believe anything respecting them. It is next urged that when the plaintiff applied to the company to have the shares in the name of Bagavan Dosjee transferred to his name the

company was bound to comply with his request. It is contended that if the company had transferred the shares the plaintiff would have satisfied all calls made in respect of them, and that the default charged against the plaintiff in consequence of which the shares were eventually declared to have been forfeited was due to the failure of the company to comply with the plaintiff's reasonable request that the shares should be transferred to his name. The correspondence shows that the plaintiff applied to have the shares transferred to his name. The directors of the company replied that they were willing to make the transfer if Bagavan Dosjee would execute the necessary documents, or, in case this could not be arranged, if the plaintiff would give them an indemnity bond in the name of the Mutt (exhibit R). No application for transfer was ever made by Bagavan Dosjee and the plaintiff refused to execute an indemnity bond. The result was that after the necessary formalities had been gone through the shares were declared to have been forfeited. There can be no doubt that the company was from first to last justified in the course of action that it followed. Article 25 of the company's articles of association provides for the action that it is necessary should be taken to get shares registered in the name of a person claiming to be entitled to such shares where no form of transfer signed by the transferor, such as is provided for in Act 20, has been submitted to the company. Article 25 provides that when any person becomes interested in a share in consequence of the death, bankruptcy, &c., of any shareholder or by any lawful means other than by a transfer in accordance with article 20, he may, upon producing such evidence as the Board thinks sufficient, be registered as the holder of the share. It is for the applicant for registration to produce evidence such as to satisfy the Board that the transfer can be made. In the present case the plaintiff produced nothing that could be called evidence to show that he was entitled to have the shares standing in Bagavan Dosjee's name transferred to his name, and when the directors under these circumstances declined to make the transfer without a bond of indemnity the plaintiff refused to execute such a bond. On such refusal the plaintiff's proper remedy, as the person aggrieved by the order of the directors, was to apply under section 58 of the Indian Companies Act to a Civil Court for an order to have the register rectified (*Ex parte Gilbert*(1)). He did not so apply; but even if he had taken such

(1) I.L.R., 16 Bom., 398.

action his application must have been refused unless he had been able to show that the directors had acted capriciously and not honestly and reasonably. (Reference may be made to *In re Gresham Life Assurance Society ex parte Penney*(1)) and *In re Coulfort China Company*(2).

It is clear that the plaintiff in the present case could not have proved to the satisfaction of a Court that the directors acted capriciously and unreasonably as it is shown that the holder of the shares never applied to have them transferred and that the plaintiff never made any attempt to produce such evidence as the directors were clearly entitled to insist on to substantiate his claim to have them transferred to his name. The directors in refusing to do anything in the absence of such evidence without an indemnity bond from the plaintiff must be held to have acted reasonably and with a proper regard for the interests of the company. The decision of the District Judge is, in our opinion, right, and this appeal must be dismissed with costs.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Chief Justice.

A. L. V. GOPALA AYYAR, PETITIONER,

v.

A. ARUNACHALLAM CHETTY, RESPONDENT.*

1902. February 27.

Religious Endowments Act—XX of 1863, s. 5—Vacancy in office of manager—Appointment by Civil Court—Civil Procedure Code—Act XIV of 1882, s. 622—Jurisdiction of High Court to entertain petition to revise order appointing manager.

An order made by a Civil Court under the powers conferred by section 5 of the Religious Endowments Act is a Judicial adjudication in the matter before it, and it is competent to the High Court to entertain a civil revision petition against such an order.

Before the jurisdiction which is conferred by section 5 of the Religious Endowments Act can be exercised by a Civil Court, there must be a vacancy in the office, there must have been a transfer to the former trustee and a dispute must have arisen respecting the right of succession to the office. The words in section 5, "any dispute shall arise respecting the right of succession," apply to a case in which a question has arisen with reference to the person who is to succeed to the office, and the jurisdiction of the Civil Court under the section is

(1) L.R., 8 Ch., 446. (2) L.R., [1895], 2 Ch., 404.

* Civil Revision Petition No. 194 of 1901 presented against the order of H. Moberly, District Judge of Madura, dated 2nd May 1901.

not confined to cases in which a dispute has arisen respecting the right to succeed to the office.

APPLICATION, under section 5 of the Religious Endowments Act, for the appointment of a trustee-manager of the Rameswaram Devasthanam at Madura. The last hereditary manager or Dharmakarta of the Devasthanam was dismissed from office in execution of the decree in Original Suit No. 5 of 1852 on the file of the District Court of Madura, and a manager was appointed by the District Judge. This manager resigned in 1893, when the Rajah of Ramnad was appointed, by the District Court, until some other person should establish by suit his right of succession to the office. The Rajah having resigned, Mr. Arunachalam Chetty was, on 21st December 1900, appointed by the District Court to act temporarily, applications being invited from persons willing to accept the post. Sixteen candidates in due course presented applications, after considering which, the District Judge, acting under section 5 of the Religious Endowments Act, appointed Mr. Arunachalam Chetty to act as manager until some other person should by suit establish his right of succession to the office.

Against that order, one of the applicants presented this civil revision petition.

V. Krishnasawmy Ayyar, for respondent, took the preliminary objection that the petition could not be entertained. He based the objection on the ground that the petitioner had been an applicant for the office in the District Court, and also that the order which it was sought to revise had not been passed by a judicial tribunal, and that, in consequence, there was no "case," within the meaning of section 622 of the Code of Civil Procedure. He referred to *Minakshi Naidu* v. *Subramanya Sastri*(1).

The Court overruled the objection.

P. S. Sivasamy Ayyar for petitioner.

JUDGMENT.—This is a revision petition against an order made by the District Judge of Madura under section 5 of the Religious Endowments Act (Act XX of 1863). The party who asks for the interference of this Court was an applicant for the office, but he was not appointed. Mr. Krishnasawmy Ayyar appears to support the order on behalf of the party who was appointed to the office by the District Judge, and has raised a preliminary objection to the competence of this Court to entertain the petition. For the moment it will be sufficient if I say that

(1) I.L.R., 11 Mad., 26.

section 5 of Act XX of 1863 empowers the Civil Court to appoint a manager of a temple to act until some other person has by suit established his right of succession to the office of manager. The preliminary objection is based upon two grounds. The first is that the person asking for the interference of this Court has no *locus standi* in the matter, because he was himself an applicant for the office in the proceedings before the District Judge. It seems to me clear that, if the present petitioner was entitled to apply to the District Judge for appointment to this office, assuming it is competent for this Court to entertain the revision petition, it follows that he is entitled to apply to this Court to exercise its revisional jurisdiction. Therefore the question, as far as this point is concerned, is "was the present petitioner entitled to apply to the Civil Court for the appointment of a manager?" Now, the words of section 5 are "it shall be lawful for any person interested in the mosque, etc., to apply to the Civil Court to appoint a manager." The words are designedly of a wide and general character, and having regard to the definition of interest contained in section 15 and the very general language which is used in section 5, I have no hesitation in holding that the petitioner was a person interested so as to give him a right to apply to be appointed as manager. So much for the first ground of the preliminary objection. The second ground is that under section 5, the Civil Court means nothing more than the District Judge for the time being, a *persona designata*, and not the Civil Court as a judicial tribunal, and it has been argued that any order made by the Civil Court under the powers conferred by section 5 is merely the order of a *persona designata* and not an adjudication by a judicial tribunal, and that being so, proceedings under section 5 in which an order is made cannot be said to constitute a case, and that an order made in such proceedings is not a decision in a case, and that the matter, therefore, does not come within the words of section 622 of the Code of Civil Procedure. In support of this contention Mr. Krishnasawmy Ayyar relied on the decision of the Privy Council in *Minakshi Naidu* v. *Subramanya Sastri*(1). In that case their Lordships were dealing with section 10 of the Act, but, for the purpose of the point now before me, no distinction can be drawn, and this is conceded, between the two sections. In the Privy Council case the actual point for decision was, whether an order made under section 10 of Act XX of 1863 was appealable. But in

(1) I.L.R., 11 Mad., 26.

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the course of their judgment their Lordships made certain general observations upon which Mr. Krishnasawmy Ayyar strongly relies in support of his contention. The passage on which he relies is at page 34. It is this:—"In the opinion of their Lordships the tenth section places the right of appointing a member of the committee in the Civil Court not as a matter of ordinary civil jurisdiction, but because the officer who constitutes the Civil Court is sure to be one of weight and authority and with the best means of knowing the movements of local opinion and feeling and one can hardly imagine a case in which it would be more desirable that the discretion should be exercised by a person acquainted with the district and with all the surroundings. The exercise of the discretion being so placed in the District Judge their Lordships are unable to find anything in the tenth section which confers a right of appeal." No doubt that passage contains very convincing reasons for holding that there is no right of appeal from an order made under section 10. The right of appeal is the creature of statute. The question I have to consider here is,—what did the Legislature mean when they used the expression "Civil Court" in section 5 of Act XX of 1863, and it does not seem to me that the reason which induced their Lordships to hold that no appeal lies, because they could not extract any right of appeal from the section, should lead me to hold that, where the Legislature has expressly delegated certain powers to a Civil Court by name, that Civil Court, when it exercises those powers, is not exercising them as a Court, but as an individual who for the time being happens to constitute the Court. I think that if the Legislature intended that an order under section 5 should be made by an officer in his executive capacity, they would not have used the expression "the Civil Court." I hold that an order made by the Civil Court under the powers conferred by the section is a judicial adjudication in the matter before the Court. That being so, I should, apart from authority, be prepared to hold that it is competent to this Court to entertain a revision petition against the order in question. There is apparently little authority on the subject, but such authority as there is supports the view which I have expressed. In the case of *Somasundara Mudaliar* v. *Vythilinga Mudaliar*(1), a preliminary objection was taken that, an order under that section being appealable by the express words of section 622 of the Code, an application for revision could not be

(1) I.L.R., 19 Mad., 258.

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entertained. That point was argued and it was held, following the decision of the Privy Council, that no appeal lay. Thereupon, the revision petition was heard and disposed of. Now, it is quite true that the objection which has been raised in the present case was not raised there, but the case at any rate shows it never occurred to any one engaged in that case to take the point now raised by Mr. Krishnasawmy Ayyar. Apart from the authorities, I should have been prepared to decide against him on the preliminary point. My opinion as to that is fortified rather than shaken by the decision referred to. As regards the preliminary objection, therefore, I overrule it.

With regard to what I suppose I must call the merits of the case, Mr. Sivasamy Ayyar's first contention is that the order of the District Judge was made without jurisdiction. Now, before the jurisdiction which is conferred by that section can be exercised certain conditions precedent must exist. The first condition, of course, is that there should be a vacancy in the office. If there is no vacancy there is no occasion to appoint a temporary manager. The second condition is that there should have been a transfer to the former trustee. The third condition is that a dispute should have arisen respecting the right of succession to the office. I agree with Mr. Sivasamy Ayyar that the dispute must be antecedent to the proceedings in which the order is made appointing the temporary manager, and that a contest between rival applicants for appointment as temporary manager is not such a dispute as will satisfy the condition precedent which the section requires shall be shown to exist. Mr. Sivasamy Ayyar relies upon a passage in paragraph 3 of the learned Judge's order. That is "the line of lawful pandarams being extinct nobody can establish his right to succeed to the office." That being the finding of the learned Judge, Mr. Sivasamy Ayyar contends that it has not been shown, and it is not a fact, that a dispute has arisen respecting the right to succeed to the office. The Judge finds that nobody can establish his right. I do not think that that can be regarded as a finding of fact. It is merely the statement of the Judge's view of the law in the matter. But even regarding it as a finding of fact, it does not follow because nobody can establish his right a dispute regarding the right could not have arisen. Mr. Krishnasawmy Ayyar, on the other hand, says that this case falls within the words of the section, and he refers to another passage in the order of the learned Judge, which

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is as follows:—"The Rajah of Ramnad still claims the right to appoint, or to confirm the election of a pandaram, but that he ha no such right is clear from the judgment of their Lordships of the Privy Council, etc." He says that that is sufficient to show that there has been an outstanding dispute with regard to the question of the right of succession to the office. I am not satisfied as to this. I would prefer to decide this case upon the question of construction. What I have to ask myself is,—am I bound to place the extremely narrow construction upon those words which Mr. Sivasamy Ayyar has contended I ought to adopt, or can I, for the purpose of giving effect to what seems to be the obvious intention of the Legislature, place a more generous construction upon the words? Now, nobody can dispute in this case that there is a vacancy in the office Nobody can dispute, I imagine, in the events which have happened, until the question is decided as to who is to succeed to the office, that it is eminently desirable that a temporary manager should be appointed. I am prepared to construe those words "any dispute shall arise respecting the right of succession" as applying to a case in which a question has arisen with reference to the person who is to succeed to the office. Mr. Sivasamy Ayyar's second contention was that there had been an illegality or a material irregularity and he asks me to interfere upon that ground. The suggested illegality or material irregularity was that the District Judge had not made any enquiry into the fitness of Mr. Arunachalam Chetty, the gentleman whom he had appointed and had not made an enquiry into the allegations made by the rival applicants to the office against Mr. Arunachalam Chetty. I find in his order this statement with reference to Mr. Arunachalam Chetty: "During the four months he has been in charge, he has introduced several useful reforms and has shown a most intelligent interest in the welfare of the Devastanam." That is a statement of fact, and I must assume that it is a true statement. The learned Judge has shown an excellent reason why he should exercise the discretion which the section gives him, in the way he did. It seems to me idle to suggest that if from practical experience the learned Judge came to the conclusion that Mr. Arunachalam Chetty was the most suitable person to be appointed temporary manager, he acted with material irregularity in the exercise of his jurisdiction, because he did not enquire into certain allegations made by certain rival candidates.

For the reasons I have stated I think this petition must be dismissed with costs.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

KRISTNAMA CHARIAR (DECREE-HOLDER), APPELLANT,

v.

MANGAMMAL AND OTHERS (JUDGMENT-DEBTORS), RESPONDENTS.*

1902. July 31. August 1, 18.

Limitation Act—XV of 1877, sched. II, art. 179—Commencement of period of limitation for application to execute portion of decree not appealed against where portion has been appealed against—Commencement of period of limitation under s. 230 (a), Civil Procedure Code, for application to execute portion of decree not appealed against.

Under article 179 of schedule II to the Limitation Act, when a portion of a decree has been appealed against and a portion has not, the period of limitation for an application to execute the portion not appealed against runs from the date of the decree on appeal.

In the case of a decree for the payment of money or the delivery of property, the period of limitation for an application to execute a portion of the decree which has not been appealed against runs, under section 230 (*a*) of the Code of Civil Procedure, from the date of the decree on appeal.

Muthu v. *Chellappa*, (I.L.R., 12 Mad., 479), dissented from.

QUESTIONS referred to a Full Bench. The appeal first came on for hearing before the Chief Justice and Mr. Justice Benson, who made the following

ORDER OF REFERENCE TO A FULL BENCH.—Two questions have been raised in this appeal.

1. Whether, under article 179, schedule II of the Limitation Act, when a portion of a decree has been appealed against, and a portion has not, the period of limitation for an application to execute the portion not appealed against runs from the date of the original decree or the date of the decree on appeal?

2. In the case of a decree for the payment of money or the delivery of property, whether under section 230 (*a*) of the Code the period of limitation for an application to execute a portion of the decree which has not been appealed against runs from the date of the original decree or the date of the decree on appeal.

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* Appeal against Order No. 19 of 1901, against the order of A. C. Tate, Acting District Judge of Chingleput, dated 26th October 1900, in Execution Petition No. 13 of 1900, in Original Suit No. 6 of 1886.

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As regards the first question there is considerable conflict of authority—see *Muthu* v. *Chellappa*(1) and *Viraraghava Ayyangar* v. *Ponnammal*(2) and the authorities referred to in the latter case We refer both the questions to a Full Bench.

The case came on in due course before the Full Bench constituted as above.

S. Kasturiranga Ayyangar for appellant.

V. Kishnaswami Ayyar, *T. V. Seshagiri Ayyar* and *T. Pattabhirama Ayyar* for respondents.

The Court expressed the following opinions:—

Sir ARNOLD WHITE, C.J.—As regards the first question which has been submitted to us, I think the words of clause 2 in the third column of article 179 of the Limitation Act should be read as meaning what they say. We are asked to read into the plain words "where there has been an appeal" some such words as "and all the parties to the suit are parties to the appeal and the subject-matter of the appeal includes the whole subject-matter of the suit." I can see no good reason for doing so. It seems to me that the proper inference to be drawn from the fact that the Legislature has expressly limited the operation of Explanation I to clause 4 of the article, is that the Legislature did not intend that the plain words of clause 1 should be read as subject to the qualification or modification which, it has been argued, should be imposed upon them.

A rule of law that in any case in which there has been an appeal from a decree, limitation shall begin to run from the date of the decree on appeal, irrespective of whether the decree was appealed from in whole or in part, may not be altogether scientific; but it is simple, certain and intelligible and I think it is the rule which the Legislature intended to lay down. The Calcutta cases on which the learned Judges who decided the case of *Muthu* v. *Chellappa*(1) relied as laying down the sounder principle have not been followed in the recent Full Bench decision of the Calcutta High Court in *Gopal Chunder Manna* v. *Gosain Das Kalay*(3).

With all respect I cannot follow the reasoning of the learned Judges in the case of *Muthu* v. *Chellappa*(1).

(1) I.L.R., 12 Mad., 479. (2) I.L.R., 23 Mad., 60.
(3) I.L.R., 25 Calc., 594.

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I entirely agree with the observations made by the learned Judges who decided the case of *Viraraghava Ayyangar* v. *Ponnammal*(1) in their discussion of the question now under consideration. The Bombay decisions are in conformity with the view of the law indicated in the Madras case above referred to (see *Sakhalchand Rirkhawdas* v. *Velchand Gujar*(2), *Abdul Rahiman* v. *Maidin Saiba*(3)) and this was also the view of two of the five Judges who constituted the Full Bench in the Allahabad case of *Mashiat-un-Nissa* v. *Rani*(4).

I am of opinion that our answer to the first question which has been referred to us should be that the period of limitation runs from the date of the decree on appeal.

The question of construction which is raised by the second question which has been referred to us seems to me to be more open to doubt. In my opinion, however, when a portion of a decree is appealed from, and a portion is not appealed from, the Appellate Court in adjudicating on the appeal affirms that portion of the decree to which no exception has been taken, and though the decree does not in terms affirm that portion, it must be read and construed as so doing.

I think our answer to the second question should be that the period of limitation runs from the date of decree on appeal.

BENSON, J.—I am of opinion that in both the cases referred to us the period of limitation begins to run from the date of the decree on appeal. There is only one decree that can be executed and that is the decree of the Appellate Court.

This appears to be the plain rule of law as laid down in article 179, schedule 2 of the Limitation Act. There is no indication in that article that the Legislature intended the Courts to consider how far each part of an original decree was "imperilled" by an appeal, and to vary the period of limitation accordingly. The view taken by this Court in the case of *Muthu* v. *Chellappa*(5) followed two early Calcutta cases, but the view taken in those cases has now been overruled by the unanimous decision of a Full Bench of the Calcutta High Court (*Gopal Chunder Manna* v. *Gosain Das Kalay*(6)). So far, therefore, as *Muthu* v. *Chellappa*(5) rests on the authority cited in it, it has now little or no force and

(1) I.L.R., 23 Mad., 60. (2) I.L.R., 18 Bom., 203.
(3) I.L.R., 22 Bom., 500. (4) I.L.R., 13 All., 1.
(5) I.L.R., 12 Mad., 479. (6) I.L.R., 25 Calc., 594.

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it does not purport to be based on an independent consideration of the language used by the Legislature. In the recent case of *Viraraghava Ayyangar* v. *Ponnammal*(1) a Division Bench of this Court dissented from the view taken in *Muthu* v. *Chellappa*(2) and agreed with the view of the Full Bench of the Calcutta High Court, but it did not refer the matter to a Full Bench as it was unnecessary for the decision of the case before them. The view of the Calcutta Full Bench was approved and followed by this Court in *Sri Rajah Venkata Chinayya* v. *Sri Perumboodori Krishnamacharyalu Garu*(3) and it is also the view that has been taken by the Bombay High Court in *Sakhalchand Rirkhawdas* v. *Velchand Gujar*(4) and *Abdul Rahiman* v. *Maidin Saiba*(5). It appears to me to be the correct view. Article 179, clauses 1 and 2, enact that the period of limitation for execution of a decree like the present is "three years from the date of the decree, or where there has been an appeal, the date of the *final* decree of the Appellate Court."

The article makes no distinction between those cases in which the whole decree is appealed against and those in which only a part of the decree is appealed against. If the Legislature thought such a distinction desirable it would not have been difficult to find apt language in which to give effect to the distinction but for the Courts to do what the Legislature has refrained from doing would be to alter the law and would, in my opinion, introduce an unnecessary element of uncertainty into the execution of decrees. The grammatical meaning of the words is simple enough and should be given effect to.

All periods of limitation are more or less arbitrary, and it is of the highest importance that they should be laid down with clearness and certainty, and that subtle distinctions not warranted by the language of the Legislature should not be introduced by the Courts.

In the cases referred to in section 230 (*a*) the period of limitation is 12 years "from the date of the decree sought to be enforced, or of the decree, if any, on appeal affirming the same." Here also no distinction is made by the Legislature in the case of

(1) I.L.R., 23 Mad., 60.
(2) I.L.R., 12 Mad., 479.
(3) A.A.A.O., No. 7 of 1898 (unreported).
(4) I.L.R., 18 Bom., 203.
(5) I.L.R., 22 Bom., 500.

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a decree against a part only of which an appeal is preferred, and for the reasons above stated I do not think that any should be made.

In my opinion the period of limitation in both the cases referred to us begins to run from the date of the decree on appeal.

BHASHYAM AYYANGAR, J.—I am also of the same opinion. I see no reason whatever to depart from the strictly grammatical interpretation of the third column of article 179 of the second schedule to Act XV of 1877. An appeal may lie from a decree as a whole or from any part thereof and clause (2) of the third column of article 179 distinctly provides that where there has been an appeal—without making any distinction as to whether the appeal is against the whole decree or only against a part thereof—the period of limitation for execution of the decree begins to run from the date of the final decree of the Appellate Court. Under section 577, Civil Procedure Code, the decree of the Appellate Court will be one confirming, varying or reversing the decree appealed against. If the appeal, therefore, terminates in a final decree—whether that decree confirms, varies or reverses the decree appealed against and whether the appeal be against the whole decree or only a part thereof—the date of such final decree is the starting point of limitation for the execution of the decree. I see no anomaly whatever in this, nor any hardship to either party. It is of course open to the decree-holder to execute the decree appealed against while the appeal is pending and it is equally open to the judgment-debtor to satisfy the decree by payment or otherwise as the case may be, notwithstanding that an appeal is pending either against the whole or a portion of the decree. All that clause (2) of the third column of article 179 provides is that if a question of limitation should arise as to the execution of a decree which has been appealed against, limitation is to be computed not from the date of the original decree but from that of the appellate decree. And as it will generally lead to confusion—and in certain classes of cases even to anomalies—if limitation is to be reckoned from different starting points in respect of the execution of different parts of the same decree, the Legislature has fixed, without causing any hardship to either party, one and the same starting point.

In my opinion this is sound from a juridical point of view. When an appeal is preferred from a decree of a Court of First Instance, the suit is continued in the Court of Appeal and re-heard

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either in whole or in part, according as the whole suit is litigated again in the Court of Appeal or only a part of it. The final decree in the appeal will thus be the final decree in the suit, whether that be one confirming, varying or reversing the decree of the Court of First Instance. The mere fact that a matter is litigated both in the Court of First Instance and again, though only in part, in the Court of Appeal, cannot convert or split the suit into two and there can be only one final decree in that suit, viz., the decree of the Court of Appeal. There cannot be two final decrees in such a suit, one by the Court of First Instance and the other by the Court of Appeal. Section 577, Civil Procedure Code, therefore provides that the appellate judgment may be for confirming, varying or reversing the decree appealed against. If the appeal be against a portion of the decree only and the appeal be dismissed the decree will be one confirming as a whole the decree appealed against, including the portion not appealed against and the confirmation is not limited to the portion appealed against. If such appeal be allowed, the decree appealed against will not be reversed by the appellate decree but only varied or modified and confirmed as to the rest, *i.e.*, the portion not appealed against. The portion appealed against and litigated in the Court of Appeal is varied or confirmed according as the objection taken, in the Court of Appeal, to such part of the decree prevails or fails. The rest of the decree is confirmed because no objection is raised thereto by the party concerned and it is not the function of a Court of Appeal, as distinguished from a Court of Revision, to give relief to any party who has not applied to it in the form and within the time prescribed for appeal.

When an appeal is preferred, the Court of Appeal is really seized of the whole suit though the relief given by it will be limited to the portion of the decree appealed against or objected to under section 561, Civil Procedure Code. This is very forcibly illustrated by section 13 of the Madras Civil Courts Act and the decisions thereon. Section 13 provides that from decrees of Subordinate Judges, appeals shall lie to the District Court except when the amount or value of the subject-matter of the suit exceeds Rs. 5,000, in which case the appeal shall lie to the High Court. It has been held, with reference to this, that even when the subject-matter of the appeal is far below Rs. 5,000, yet the appeal will lie to the High Court and not to the District Court, if the subject-matter of

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the suit in the Court of First Instance exceeds Rs. 5,000 in value. This shows that in a case in which the Court of First Instance is subject to the appellate jurisdiction of two Courts according to certain pecuniary limits it is not the pecuniary value of the portion of the decree appealed against that determines the appellate forum, but the pecuniary value of the subject-matter of the suit in the Court of First Instance.

It was argued on behalf of the respondent that the grammatical interpretation must be departed from inasmuch as the decree may be severally appealed against in parts by different parties and the different appeals may be heard and disposed of on different dates, in which case there will be two or more decrees of the Court of Appeal bearing different dates. In my opinion, when there are different appeals from one and the same suit, they should all be finally disposed of together—which, as far as I know, is the practice—and only one decree passed in appeal. If the contingency referred to, which ought to be avoided, does happen, there will be no insuperable difficulty in adhering to the grammatical interpretation and holding that the date of the final decree referred to in clause (2) of the third column of article 179 is the date of the last of such decrees and if a question of limitation should arise in respect of the execution of any portion, time will have to be reckoned only from the date of such last decree of the Court of Appeal.

CRIMINAL APPELLATE—FULL BENCH.

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

1902. September 17, 19, 29.

ERANHOLI ATHAN (ACCUSED), PETITIONER,

v.

KING-EMPEROR, RESPONDENT.*

Criminal Procedure Code—Act V of 1898, ss. 439, 476—"Jurisdiction of High Court to interfere when a Court has taken action under s. 476 of the Criminal Procedure Code."

Where a Court has taken action under section 476 of the Code of Criminal Procedure, the High Court, as a Court of Revision, has no power to interfere, under section 439.

The reasons for the decision in *Queen-Empress* v. *Srinivasulu Naidu*, (I.L.R., 21 Mad., 124), are not applicable to the amended Code.

QUESTION referred to a Full Bench;—"Whether the High Court, as a Court of Revision, has power, under section 439 of the Code of Criminal Procedure, 1898, to interfere when a Court has taken action under section 476 of the Code of Criminal Procedure."

Three Moplahs were charged in the Court of the Special Assistant Magistrate of Malabar with having kidnapped a boy in order to convert him. Petitioner was called as a witness for the prosecution. After hearing his evidence and giving him an opportunity to make a statement, the Special Assistant Magistrate (for reasons which are not material to the question considered by the Full Bench) passed an order under section 476 of the Code of Criminal Procedure forwarding the records to the Head Assistant Magistrate at Palghat for enquiry, in the meanwhile releasing the petitioner on bail.

Against that order, petitioner preferred this criminal revision petition.

The case first came on for hearing before Sir Arnold White, Chief Justice, and Mr. Justice Moore, who made the order of reference to a Full Bench which has already been set out.

The case came on in due course before a Full Bench constituted as above.

* Criminal Revision Petition No. 146 of 1902, presented under sections 435 and 439 of the Code o Criminal Procedure against the order of A. R. L. Tottenham, Acting Special Assistant Magistrate of Malabar, dated 27th March 1902, in Miscellaneous Case No. 13 of 1902.

Dr. *Swaminadhan* for petitioner.—The High Court has jurisdiction to interfere. Assuming, in the first instance, that *Queen-Empress* v. *Srinivasulu Naidu*(1), which was decided under the Code of 1882, was rightly decided, no such change has been made in the Code of 1898 as would deprive the High Court of the revisional powers which it was held to possess in that case. The only change in the new Code is the introduction of the words "as if upon complaint made and recorded under section 200." These were introduced to meet the requirements of section 190, under which there are only three ways in which a Magistrate can take cognizance of a case. By the amendment, the Magistrate is to treat the proceeding under section 476 as if it were a complaint, and in this way the requirements of section 190 are satisfied. The use of the words "as if" show that a proceeding under section 476 is not really a complaint. Magistrates always had power, under section 195(*b*), to lay complaints like ordinary complainants, so that if a proceeding under section 476 is a mere complaint, the amendment of 1898 is unnecessary. Such a proceeding is, consequently, an order, and, as such, is subject to the revisional powers of the High Court. Moreover, section 435 (3) expressly exempts certain orders from the revisional powers of the High Court, but does not refer to proceedings under section 476. The maxim "expressio unius est exclusio alterius" should be held to apply. If the Legislature intended to effect such an important innovation as the curtailment of the revisional powers of the High Court it would not have expressed its intention in so uncertain a manner. Moreover (if the proceedings of the Legislature could be looked to for guidance), the draft bill contained an express exemption of proceedings under section 476 from revision, but the clause was not incorporated in the Act as passed. The obvious intention was to retain jurisdiction to check the proceedings of Magistrates. Lastly, if called upon, I am prepared to argue that the decision in *Queen-Empress* v. *Srinivasulu Naidu*(1) was correctly decided.

The Acting Public Prosecutor (Hon. Mr. *C. Sankaran Nair*) contended that, under the section as amended, the High Court had no power to interfere, as a Court of Revision, with the Magistrate's order. By section 190 of the Code of Criminal Procedure there are only three ways in which a Magistrate is empowered to take cognizance

(1) I.L.R., 21 Mad., 124.

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of an offe[illegible]ly, on complaint, on a police report, or on information re[illegible] to enable the Magistrate to take cognizance of a case se[illegible] by a Court under section 276, the proceeding must come within the meaning of one of these three; and so the Legislature provided that such a proceeding is to be treated as a complaint. That means that it is a complaint, and, being a complaint, it is not an order, and not being an order, the High Court has no power to revise it.

Dr. *Swaminadhan* in reply.

JUDGMENT.—In the case of *Queen-Empress* v. *Srinivasulu Naidu* (1), it was held by a Full Bench of this Court that a High Court as a Court of Revision has power under section 439 to revoke an order under section 476 of the Code of Criminal Procedure. This decision was based upon the ground that where action is taken under section 476 (1) such action is not to be regarded merely as the lodging of a complaint by a public servant, but is to be treated as a proceeding which is tantamount to an order of a Court. In the Code of 1898 the Legislature introduced in sub-section (2) of the section, after the words "such Magistrate should thereupon proceed according to law," the words "and as if upon complaint made and recorded under section 200."

It seems to us that, by the introduction of these words, the Legislature intended to make it clear that when action is taken under sub-section (1) such action is not to be regarded as an order but as the lodging of a complaint. Consequently the reasons for the decision in *Queen-Empress* v. *Srinivasulu Naidu*(1) are not applicable to the amended section.

We think the answer to the question which has been referred to us ought to be in the negative.

On the case again coming on before the Division Bench, the petition was dismissed.

(1) I.L.R., 21 Mad., 124.

APPELLATE CIVIL.

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

RAGHUNATHA THATHA CHARIAR, APPELLANT, 1902. March

v.

VENKATESA TAWKER AND ANOTHER, RESPONDENTS.*

Limitation—Expiration of period for presenting execution petition while Court closed—Presentation of defective petition on day of re-opening—Return for amendment—Re-presentation.

The period of twelve years from the date of a decree expired when the Court was closed. The decree-holder presented a petition for execution of the decree on the first day on which the Court re-opened, but the petition was found to be defective, as it was not verified and was otherwise defective. The Court returned the petition, under section 245 of the Code of Civil Procedure, so that it might be amended. The petition was amended and again presented after the period of limitation had elapsed:

Held, that no valid application for execution had been made before the expiration of the period of limitation, and that the application was barred.

The decree-holder referred to above died after the hearing of the appeal in the lower Appellate Court, but before that Court delivered judgment:

Held, that the judgment should be read as from the date when the Court reserved judgment, and that it was not incompetent to the son of the decree-holder to prefer an appeal to the High Court by reason of the fact that he had not been brought on the record before the judgment of the lower Appellate Court was delivered.

Held also, that it was not incumbent on the appellant to apply for execution to the Court which passed the decree. He had adopted the proper procedure in applying to the High Court to be brought on the record and, an order having been passed bringing him on the record, he was competent to present the appeal.

EXECUTION petition. The date of the decree of which execution was sought was 13th April 1888. A petition for its execution was presented on 10th April 1900, but was returned by the District Munsif as not being in the form or giving the particulars required by section 235 of the Code of Civil Procedure. On 13th April 1900 the Court was closed. It re-opened on 16th April, and on that day the present petition was presented. The District Munsif treated it as being in time, but as it was found to be

* Appeal against Appellate Order No. 44 of 1901 presented against the order of G. F. T. Power, District Judge of Tanjore, in Civil Miscellaneous Appeal No. 939 of 1900, presented against the order of the District Munsif of Tanjore in E.P. No. 404 of 1900 (Original Suit No. 9 of 1888 on the file of the Court of the District Munsif of Trichinopoly).

defective (inasmuch as it was not verified and not signed by the plaintiff, but only by his pleader), the petition was returned for amendment. The amendment was made and the petition was re-presented, but by this time more than the period of 12 years from the date of the decree had elapsed. The District Munsif held that the petition, in the form in which it was presented on 16th April, not verified or signed by the plaintiff, could not be taken into account as saving the bar of limitation, and that it must be taken to have been presented to the Court only when it was re-presented in proper form. He held that the application was barred by limitation and dismissed it. The District Judge on appeal upheld that decision, on the ground that the period of limitation cannot be extended by an order under section 245 of the Code of Civil Procedure, returning a petition in order that it may be amended.

Against that order, petitioner preferred this appeal.

P. S. Sivaswami Ayyar and *Visvanadha Sastri* for appellant.

V. Krishnaswami Ayyar and *Seshagiri Ayyar* for respondent.

JUDGMENT.—A preliminary objection has been taken to the hearing of this appeal. The first ground on which the objection was based was that the decree-holder having died after the hearing of the appeal before the lower Appellate Court, but before the delivery of the judgment by that Court, the appellant, who is the son of the decree-holder, ought to have applied to be brought on the record before the judgment of the lower Appellate Court was delivered. So far as this ground of objection is concerned we think the judgment should be read as from the date when the Court reserved judgment. As regards this question the authorities appear to be uniform (see *Chetan Charan Das* v. *Balbhadra Das*(1), *Surendro Keshub Roy* v. *Doorgasoondery Dossee*(2) and *Rama Charya* v. *Ananta Charya*(3), and we are of opinion that the appellant is not incompetent to prefer this appeal by reason of the fact that he had not been brought on the record before the judgment of the lower Appellate Court was delivered.

The second ground on which the preliminary objection was based was that the decree having been transferred from the decree-holder to the appellant by operation of law, the appellant, under section 232 of the Code of Civil Procedure, ought to have applied

(1) I.L.R., 21 All., 315. (2) I.L.R., 19 Calc., 513.
(3) I.L.R., 21 Bom., 314.

for execution to the Court which passed the decree. It was not incumbent on the appellant to make such an application. He adopted the proper procedure in applying to this Court to be brought on the record and, an order having been made by this Court bringing him on the record, he is competent to present this appeal. The preliminary objection is overruled.

As regards the merits, the twelve years period of limitation expired when the Court was closed. The appellant presented his petition for execution on the first day on which the Court opened and the Court made an order under section 245 allowing it to be amended. The petition was amended within the time ordered and the appellant contends that this having been done he is not time-barred. The appellant applied for execution on an unverified petition without producing any evidence to show he held a power of attorney entitling him to apply and without producing his power of attorney. In the circumstances we think the Court ought to have rejected the application and not to have made an order allowing it to be amended. Such an order would have left it open to the appellant to make an effective application if he had not postponed taking action till the last day of the 12 years period of limitation.

We think the petition presented to the Court on the last day before the period of limitation expired cannot be said to have been an application which has the effect of preventing the operation of the Statute.

Section 245 no doubt contemplates that an unverified petition may be returned for amendment, but it does not follow that a petition which is not verified is an application which will prevent the operation of the statute of limitation. On the facts of this case we are of opinion that there was no application for execution such as the law contemplates made before the expiration of the period of limitation.

The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1902. August 1, 5.

KAVERI AMMALL AND OTHERS (DEFENDANTS), APPELLANTS,

v.

SASTRI RAMIER AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *s.* 13—Res judicata.

D and R were divided brothers. R in conjunction with the senior of his two wives, and to the exclusion of the junior wife, adopted a son of D on 27th October 1879. On the same day, R settled some properties on his junior wife for life, with remainder to his daughter by her. In 1885, R died; his senior wife died shortly after; and in 1886, his adopted son also died, unmarried. D in 1890, sued the surviving widow and daughter, for a declaration that he, as the reversionary heir of the deceased adopted son, was entitled to succeed to the properties left by R (including those settled on the widow and daughter), after the lifetime of the widow. The claim was dismissed in so far as it related to the settled property, but D was declared to be entitled, as reversioner, to the other properties left by R after the lifetime of the widow. In 1892, D died. In 1897, the surviving sons of D brought the present suit, in which they claimed to be entitled to immediate possession of the properties to which D had been declared, in the former suit, entitled subject to a life interest in the widow. They contended that the decree in the former suit had been obtained under a mistake of law, and that it was no bar to the present suit:

Held, that the matter was *res judicata*.

SUIT to recover possession of immoveable property. The facts, the nature of the claim, and the contentions, are fully set out in the judgment of the High Court.

T. V. Seshagiri Ayyar for appellants.

P. S. Sivaswami Ayyar for respondents.

JUDGMENT.—One Subba Dikshitar, father of the plaintiffs, and another Yagna Ramien, the husband of one Krishnammal and of the first defendant, were divided brothers. Yagna Ramien, in conjunction with his wife Krishnammal and to the exclusion of

* Appeal No. 17 of 1901, preferred under article 15 of the Letters Patent against the judgment of Mr. Justice Moore, dated 24th September 1901, in Appeal against Order No. 72 of 1900, against the order of remand in Appeal Suit No. 112 of 1899 on the file of W. Gopalachariar, Subordinate Judge of Coimbatore (Original Suit No. 1455 of 1897 on the file of A. Narayanan Nambiar, District Munsif of Erode).

the first defendant, his junior wife, adopted, on the 27th October 1879, his brother's son, one Venkataramanien, a brother of the plaintiffs, and on the same day made a settlement of some of his properties upon the first defendant for life with remainder to one Kuppammal, his daughter by the first defendant. Yagna Ramien died in 1885 and shortly afterwards Krishnammal died and after her the adopted son Venkataramanien died unmarried in 1886. Plaintiffs' father brought Original Suit No. 512 of 1890 against the first defendant herein, her daughter Kuppammal, and the present second defendant, to obtain a declaration that he was entitled to succeed to the properties left by Yagna Ramien—including the properties comprised in the deed of settlement made by him in favour of the first defendant and her daughter—as the reversionary heir of the deceased Venkataramanien, his brother's adopted son, after the lifetime of the first defendant and that the hypothecation deed, dated 15th October 1890, executed by the first defendant in favour of third defendant in that suit, charging a portion of the property comprised in the deed of settlement cannot affect his reversionary right and bind him after the first defendant's lifetime.

It will be seen that the cause of action on which the said suit was based was that the first defendant succeeded to the estate of Venkataramanien, as his mother by adoption, having the limited estate of a widow under the Hindu law, that the plaintiff in that suit was the contingent reversionary heir entitled to succeed to his properties on the death of his limited heir, the first defendant, and that the settlement made by Yagna Ramien in favour of the first defendant and her daughter was not binding on his adopted son, the deceased Venkataramanien. The defendants in that suit did not deny the right of Subba Dikshitar, the plaintiff therein, as the reversionary heir of the adopted son entitled to succeed to his properties, after the death of the first defendant, but contended that the deed of settlement, subject to which the adoption was made was binding upon the adopted son and that therefore his suit was not maintainable in respect of the properties comprised in that settlement, viz., items 1, 2, 3, 7 and 8 and a moiety of items 9 and 10 in the schedule annexed to the plaint therein. The deed of hypothecation under which the third defendant in that suit claimed related apparently to the whole of items 9 and 10 and not simply to the moiety thereof, which was comprised in the deed of settlement.

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Among other issues—which it is here unnecessary to refer to—the following were framed and numbered as 3 and 5 therein—"Whether Yagna Ramien gave away items 1 to 3, 7 and 8 and half of 9 and 10 to the first defendant in 1879? Is it valid in law?" "Whether the mortgage in question was granted by the first defendant to the third defendant for legal necessity binding on the plaintiff." The finding on the third issue was against the plaintiff, viz., that the adopted son was bound by the disposition of property made by the adoptive father prior to, or at the time of, the adoption, in favour of the first defendant and her daughter. On the fifth issue, the finding was that the hypothecation deed was executed without any legal necessity but that such finding became immaterial by reason of the finding on the third issue so far as a moiety of items 9 and 10 was concerned. The material portion of the decree passed in that suit was as follows:—"It is decreed that the plaintiffs' suit, so far as regards plaint items 1, 2, 3, 7 and 8 of the property and half the share in items 9 and 10, be dismissed; that it is declared that the plaintiff be entitled to the other items of property mentioned in the plaint as the reversioner after the lifetime of the first defendant." There was no appeal against the said decree and the same has become final.

Subba Dikshitar, the plaintiff therein died in December 1891 and the plaintiffs claiming under him as his only sons and legal representatives have brought this suit in 1897 against the first defendant and defendants Nos. 2, 3 and 4 forming members of an undivided family claiming under the first defendant under exhibit IV, a sale-deed, dated 6th March 1891. The plaintiffs pray that a decree may be passed declaring "that the plaintiffs alone are entitled to inherit the immoveable properties described in the schedule and directing that the same be put in possession of these plaintiffs."

A reference to paragraph 9 of the plaint clearly shows that the present suit does not relate to the properties comprised in the deed of settlement in respect of which the claim of plaintiffs' father was absolutely dismissed as unsustainable in Original Suit No. 512 of 1890, but only to the remaining properties in respect of which the plaintiffs' father was expressly declared by the decree therein to be entitled to them as the reversioner, after the lifetime of the first defendant. The plaintiffs' cause of action as set forth in the plaint is that, on the death of Venkataramanien in 1886, the properties

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claimed in the suit legally devolved by inheritance on his divided uncle, the plaintiffs' father—the first defendant being only in the position of adoptive step-mother and not adoptive mother of the deceased—and that, on the death of their father, the same devolved on them by descent, as his heirs. The decree in Original Suit No. 512 of 1890, which declared that plaintiffs' father was entitled to these properties as reversioner only on the death of the first defendant, is not impugned as obtained by fraud or collusion or delivered by a Court not competent to deliver it (section 44 of the Indian Evidence Act). The plaintiffs seek to avoid the effect of that decree on the ground that though their father and the first defendant were both equally aware of all the facts which would enable one to know who the heir of Venkataramanien was, yet they were under a mutual mistake of law and assumed that the first defendant was entitled to succeed as adoptive mother and that the plaintiffs' father was only presumptive reversionary heir on her death and that therefore Original Suit No. 512 of 1890, which was brought by the plaintiffs' father in ignorance of his legal right as the immediate heir of Venkataramanien—a mistake of law which was shared also by the Court—and the decree passed therein, can be no bar to the present suit. It is also contended that in a declaratory suit which was brought by a presumptive reversioner during the lifetime of a Hindu widow no decree could be passed declaring his right to succeed to certain properties after the lifetime of the widow, but that the only decree which could be passed in his favour in such a suit is a declaration that an alienation made by the widow was made without legal necessity and therefore void beyond her lifetime [illustration (*e*) to section 42 of the Specific Relief Act].

It is contended on behalf of the defendants (appellants) that the present suit is barred firstly by section 43 and secondly by section 13, Civil Procedure Code. The former contention is clearly untenable and must be overruled. Section 43 only requires that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action on which the suit is founded and not that every suit should include every claim or every cause of action which the plaintiff may have against the defendant, in respect of the object-matter of the suit (*Pittapur Raja* v. *Suriya Row*(1) and *Ittappan* v. *Manavikrama*(2). If the

(1) I.L.R., 8 Mad., 520 at p. 524. (2) I.L.R., 21 Mad., 153 at pp. 157, 161.

present suit had been for a declaration of the reversionary right of the plaintiffs' father to succeed on the death of the first defendant to certain items of properties other than those comprised in the former suit, such a claim would be a part of the claim arising from the cause of action on which the former suit was founded and the suit would be barred by section 43, Civil Procedure Code. But the claim made in the present suit is one arising from a cause of action quite different from, and inconsistent with, the cause of action on which the former suit was brought and it could not possibly have been included in that suit as part of the claim arising from the cause of action on which that suit was in fact brought.

But the other contention, viz., that the suit is barred as *res judicata*, is fatal to the plaintiffs' suit. It has been admitted all along—and the respondents' vakil properly admits—that if the present suit could not have been maintained by the plaintiffs' father if he were now alive, the plaintiffs could not stand on a different footing. The respondents' vakil, however, argues that the plaintiffs' father could have himself maintained this suit, notwithstanding the decree in Original Suit No. 512 of 1890. It is impossible to accede to this contention in the face of the express adjudication in the former decree that the plaintiffs' father was entitled to succeed to the properties now sued for only on the death of the first defendant. This necessarily implies that the first defendant and those claiming under her were entitled to the possession and enjoyment of the property during her lifetime. When such declaration is embodied in the decree itself, it is immaterial that no question or issue was actually raised and decided as to whether or not the plaintiffs' father was entitled to succeed to the properties on the death of Venkataramanien as his immediate heir—which is the claim on which the present suit is founded. This claim cannot be allowed and declared in the present suit and plaintiffs put into possession by ejecting the defendants, without virtually setting at naught the decree in Original Suit No. 512 of 1890. The declaration which is sought for in this suit, viz., that the plaintiffs' father was entitled to the possession of the properties on the death of Venkatarmanien is diametrically opposed to the declaration made in the former decree, viz., that he was entitled to possession only after the death of the first defendant; and the present suit is therefore clearly barred as *res judicata*, quite independently of explanation I or explanation II to section 13, Civil Procedure Code.

The operation of a decree as *res judicata*, so far at any rate as the object-matter of a direct adjudication contained in the decree is concerned, can in no way be affected, in the absence of fraud or collusion by the fact that the suit was the result of a mistake of law or that the decree proceeded on such mistake. The remedy, *if any*, in such a case, can only be by way of review and certainly not by a separate suit for relief on the ground of mistake. Article 96 of Act XV of 1877 cannot be relied upon as sanctioning such a suit and it is therefore unnecessary to consider the plea of limitation which was raised by the defendants with reference to that article. It may here be mentioned that the mistake of law committed in Original Suit No. 512 of 1890 by all the parties therein concerned—including the Judge—which is supposed to have been discovered only in 1897, subsequent to the decision of this Court and of the Privy Council in the Oothoomalai case (*Annapurni Nachiar* v. *Forbes*(1)) might well have been discovered in 1890 at the time of the institution of the former suit itself on reference to the decision of the Privy Council in the *Ramnad case*(2), in which the point of Hindu Law in question was laid down just as it has since been decided in the Oothoomalai case—to say nothing of *Kasheshuree* v. *Giresh Chunder*(3).

As for the contention principally relied upon by the learned pleader for the respondents, that the decree in the former suit, in so far as it declared that the plaintiffs' father was entitled to the items of properties now sued for—being a portion of the properties comprised in the former suit—as reversioner, after the lifetime of the first defendant, should be treated as null and void, by reason that no such declaration could legally have been made inasmuch as the plaintiffs' father was only a presumptive reversionary heir during the lifetime of the first defendant, it is admitted and cannot be denied that the Court which passed that decree was a Court of competent jurisdiction to pass such declaratory decree if the plaintiff was entitled to such declaration. The plaintiffs' father prayed for such declaratory decree and apparently no objection was raised to it by the first defendant and the Court did make such declaration by its decree, though the suit was dismissed as regards the items of

(1) I.L.R., 23 Mad., 1.
(2) [1868], 12 M.I.A., 397 at pp. 424, 446 and 447.
(3) [1864], Reported in Supl. Vol. of the W.R., January to July, (1864), p. 71.

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property comprised in the deed of settlement. The correct view, no doubt, is that such a declaratory decree ought not to have been passed and that the decree in Original Suit No. 512 of 1890 should have been simply limited to the dismissal of the suit. But it is now too late to seek to set aside the remaining portion of the decree as if the present suit was an appeal from that decree. Whatever may be the correct view, such decrees have sometimes been passed and as between the parties thereto, they must be held to be binding and to operate as *res judicata*, just like any other declaratory decree passed under section 42 of the Specific Relief Act (*vide* section 43 of the Specific Relief Act), notwithstanding that it is now conclusively shown that such declaratory decree ought not to have been passed with reference to the proviso to section 42, by reason that the then plaintiff was, at the date of the suit, able to seek further relief than a mere declaration of title, but omitted to do so. The binding effect of judicial decrees and adjudications cannot be allowed to be questioned between the parties thereto and their representatives merely because they have proceeded upon an erroneous view of law or on a view of law, which though rightly or wrongly then believed to be sound has now been exploded.

No doubt if this contention of the respondents were acceded to, the decree in Original Suit No. 512 of 1890, in so far as it dismissed the claim of the plaintiffs' father to certain items of property therein comprised—which do not form a portion of the subject-matter herein—would not operate as *res judicata* to the present suit, for the ground of dismissal was that the settlement made by Yagna Ramien, comprising the said items was binding upon the adopted son and in that view it was immaterial whether plaintiffs' father was or was not either the immediate or the reversionary heir of the adopted son and neither explanation I nor explanation II to section 13, Civil Procedure Code, will apply to a matter which was not necessary for the decree passed in the suit, any more than a finding on an express issue in the suit would operate as *res judicata* when such finding became immaterial for the final decree passed therein.

On the ground, therefore, that the declaratory portion of the decree in Original Suit No. 512 of 1890 is a bar to the present suit, this Letters Patent Appeal must be allowed and the order of this Court in appeal against Order No. 72 of 1900, as well as the order of the lower Appellate Court, is reversed and the decree of the District Munsif restored with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

ANNAMALAI CHETTY (PLAINTIFF), APPELLANT,

1902. March 14.

v.

VEERABADRAM CHETTY (THIRD DEFENDANT), RESPONDENT.*

Contract Act—IX of 1872, s. 74—Act VI of 1899, s. 4.—Stipulation for enhanced interest and for compound interest in case of default—Penalty.

A bond stipulated for the payment, on a specified date, of half the principal sum advanced, together with interest at the rate of 15 per cent. per annum, and for the payment, on another date, of the balance of the principal, together with interest at the same rate. In case of default in the payment of either instalment it was provided that the whole amount of principal then due was to become payable, together with interest at the rate agreed, and compound interest on the whole amount at the rate of 24 per cent. per annum. Default was made, but the Subordinate Court awarded no compensation:

Held, that inasmuch as by section 74 of the Contract Act (as amended) the Court is to award reasonable compensation not exceeding the amount named in the contract, the Subordinate Court should find whether an addition of 9 per cent. was an unreasonable sum to allow as compensation, and, if so, what compensation should be allowed as reasonable for the non-payment of principal in the manner agreed upon; the stipluation for payment of compound interest being regarded as compensation for non-payment of interest alone and not for non-payment of principal.

SUIT to recover from the first two defendants the sum of Rs. 604-2-0, by the sale of hypothecated property, that being the amount due under a registered hypothecation bond executed to plaintiff by the father of the first two defendants (since deceased), their family being undivided. The bond, which bore date 27th November 1890, stipulated for payment of Rs. 50 out of the principal, and interest on the whole amount, at the rate of 15 per cent. per annum, on 12th August 1891, and for payment of the remaining Rs. 50 of principal, and interest thereon at the same rate, on 12th August 1892. In the event of default in payment of either instalment, the whole amount of principal then due was to be paid, together with interest at the said rate then accrued

* Second Appeal No. 88 of 1901 presented against the decree of B. Cammaran Nair, Additional Subordinate Judge of Tinnevelly, in Appeal Suit No. 432 of 1899, presented against the decree of S. Ramasami Ayyangar, District Munsif of Srivilliputtur, in Original Suit No. 439 of 1899.

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due, and compound interest on the whole at the rate of 24 per cent. per annum. The principal defence was that the compound interest at the enhanced rate was penal and not enforcible. The District Munsif held that the stipulation for compound interest at the enhanced rate was not penal. He decreed the amount claimed, the interest to be calculated at the contract rate up to the date of suit, and at the rate of 6 per cent. thereafter. The Subordinate Judge (on an appeal, preferred by third defendant, the purchaser of the hypothecated property) considered that the provision for compound interest to be payable on default was not penal, and that it gave plaintiff reasonable damages, but he held that the further provision that the compound interest should be payable at the enhanced rate of 24 per cent. was penal. He disallowed the enhanced rate and reduced the amount of the decree to Rs. 331-3-4.

Plaintiff preferred this second appeal. Defendant No. 3 filed a memorandum of objections contending that the compound interest should have been held to be penal, and that plaintiff was only entitled to Rs. 246 in all, in respect of principal and interest.

Mr. *Stephen Andy* and *Ramakrishna Ayyar* for appellant.

Mr. *Peter Pillai* and Dr. *Swaminadhan* for respondent.

JUDGMENT.—When the contract has been broken, as it has been here, the law (section 74, Indian Contract Act as revised) provides that the Court shall award reasonable compensation not exceeding the amount named in the contract. Here, however, the Subordinate Judge has awarded no compensation. We must call on the Subordinate Judge to submit a finding on the evidence on record as to whether he holds that an addition of 9 per cent. is an unreasonble amount to allow as compensation and, if so, what compensation he would allow as reasonable for non-payment of the principal according to the instalments. The stipulation in the document for payment of compound interest must be looked on as compensation for non-payment of interest only and not for non-payment of principal.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Moore.

KIDAMBI RAGAVA CHARIAR AND OTHERS (DEFENDANTS), APPELLANTS,

v.

TIRUMALAI ASARI NALLUR RAGAVACHARIAR (PLAINTIFF), RESPONDENT.*

1902. January 30, 31.

Limitation Act—XV of 1877, s. 120—Suit by Dharmakarta to recover possession of a temple and of the properties belonging to it—Claim based on prescription and not on hereditary right—Right to the properties secondary to, and dependent on, the right to the office.

Plaintiff, who was found to have been in adverse possession of a temple and its properties for at least six years (after which he was dispossessed by certain magisterial proceedings) sued to recover possession, as Dharmakarta, basing his claim on prescription and not on an hereditary title. On the defence being raised that plaintiff's possession had been adverse for a period less than twelve years and that, in consequence, his title was not complete under article 144 of schedule II to the Limitation Act:

Held, that the suit for the possession of the office was governed by article 120, and that plaintiff, by his adverse possession of more than six years, had obtained a title to it by prescription. *Jagan Nath Das* v. *Birbhadra Das*, (I.L.R., 19 Calc., 776), followed.

Held also, that the suit was not for possession of immoveable property, within the meaning of article 144, the right to the land being only secondary to, and dependent on, the right to the office.

Tammirazu Ramazogi v. *Pantina Narsiah*, (6 M.H.C.R., 301), followed.

PLAINT filed under section 331 of the Code of Civil Procedure. Plaintiff had obtained a decree in Original Suit No. 46 of 1893, against certain persons, in which he was declared to be sole Dharmakarta of the temple of Lakshminarayanaswami, at Mamandur in Arcot taluk, and entitled to recover the immoveable property attached to it. When steps were taken to execute that decree, in pursuance of a warrant to put plaintiff in possession, obstructions were raised by the present defendants. Further petitions were filed and warrants were issued and returned unexecuted, whereupon the defendants' claim was registered as a suit, under section 331 of the Code of Civil Procedure. Plaint and

* Appeal No. 154 of 1899 against the decree of K. C. Manavedan Raja, District Judge of North Arcot, in Original Suit No. 35 of 1898.

written statement were duly filed, and the first issue was:—"Whether the plaintiff is the sole Dharmakarta of the temple in dispute, or whether the whole or any portion of the Tengalai communities are the Dharmakartas." The District Judge stated that plaintiff's claim was not based on hereditary right, but on the acquisition of an exclusive title by prescription; and he held that plaintiff had established his title to the office of Dharmakarta by adverse possession from 1875 to 1892 after which he had been dispossessed by certain magisterial proceedings. He gave him a decree for possession of the temple, in pursuance of the decree in Original Suit No. 46 of 1893, already referred to.

Defendants preferred this appeal.

P. R. Sundara Ayyar and *M. S. Gopalasamy Ayyar* for second and third appellants.

C. Sankaran Nair, S. Kasturiranga Ayyangar and *V. Krishnasamy Ayyar*, for respondent.

JUDGMENT.—The plaintiff obtained a decree in Original Suit No. 46 of 1893 against certain persons declaring him to be sole Dharmakarta of the plaint temple and entitled to recover the property attached to it. When he tried to execute the decree the present defendants were in possession and claimed to be entitled to possession as Dharmakartas. They were no parties to Original Suit No. 46 of 1893. Their claim was therefore regarded as a suit under section 331, Civil Procedure Code. The first issue was whether the plaintiff was the sole Dharmakarta or whether the defendants' community was the Dharmakarta. The lower Court held that plaintiff had established his title to the office of Dharmakarta by adverse possession of it from 1875 to 1892, and gave him a decree for possession of the temple.

Against this decree the defendants appeal. They urge that exhibits II and VI show that the plaintiff was in possession in 1872, as a tenant in common with other Tengalais, and that he made no claim to adverse possession until 1882 and that the period between 1882 and 1893 (when plaintiff was deprived of possession by certain magisterial proceedings) being less than twelve years, his title by adverse possession was incomplete with reference to article 144 of the second schedule of the Limitation Act. There is no doubt but that the plaintiff was in adverse possession from 1882 until 1893, or at least until after October 1892. The office of Dharmakarta was not claimed by the plaintiff as an hereditary office,

though his father was said to have built the temple. Exhibits UUI, BBB and EEE, and plaintiff's own evidence show that he claimed to be in possession of the office during many years of his father's lifetime and there is no allegation that his father ever was himself Dharmakarta. We must, therefore, hold that the office was not claimed as an hereditary office. A suit for possession of the office would therefore not fall under article 124 of the Limitation Act, but under article 120 which is the general article prescribed for suits for which no special article is prescribed and the period within which a suit under that article must be brought is six years from the time when the right to sue accrued. The plaintiff therefore having been in adverse possession of the office for more than six years obtained a title by prescription. This conclusion is in accordance with the decision reported in *Jagan Nath Das* v. *Birbhadra Das*(1). It is contended for the defendants that the suit is for the possession of immoveable property and that article 144 of the second schedule of the Limitation Act therefore applies; but in accordance with the view taken in the case reported in *Tammirazu Ramazogi* v. *Pantina Narsiah*(2), we are of opinion that the right to the land is only secondary to, and dependent upon, the right to the office, and that, if the right to recover the office is barred, the right to recover the land attached to it is equally barred.

On the ground that plaintiff has established a title by six years' adverse possession of the office, we must hold that he is entitled to the decree in his favour passed by the District Judge. We therefore dismiss this appeal with costs.

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(1) I.L.R., 19 Calc., 776. (2) 6 M.H.C.R., 301.

APPELLATE CRIMINAL.

Before Mr. Justice Bhashyam Ayyangar.

1902. May 28.

IN RE PAREE KUNHAMMED AND ANOTHER, PETITIONERS.*

Criminal Procedure Code—Act V of 1898, *s.* 195—*Petition to revoke sanction.*

A person whose prosecution had been sanctioned by a Sub-Magistrate petitioned the Special Assistant Magistrate for its revocation. The Special Assistant Magistrate declined to interfere, on the ground that as the Sub-Magistrate had had judicial evidence before him and had also held the necessary enquiry before granting sanction, the necessary conditions had been fulfilled and it was not for him, at that stage, to usurp the functions of a Court trying the petitioner for the offence:

Held, that it is the duty of the authority giving sanction or upholding it, under section 195, to go into the merits of the application for sanction, with reference to the evidence before it, which is relied on as justifying the according of sanction. Unless there is sufficient *primâ facie* evidence and a reasonable probability of conviction, the Court giving the sanction or upholding it will not be properly exercising the discretion vested in it by law.

PETITION to revise an order declining to interfere with sanction to prosecute the petitioners. An order had been passed by the Sub-Magistrate of Tiruvangadi, sanctioning the prosecution of the petitioners for the abetment of giving false evidence, under section 193 of the Indian Penal Code. Against that order, petitioners appealed to the Special Assistant Magistrate of Malabar, who passed the following order:—"The Sub-Magistrate had judicial evidence before him and also held the necessary enquiry before granting sanction. These necessary conditions having been fulfilled it is not for me, at this stage, to usurp the functions of a Court trying petitioners for the offences, their prosecution for which has been sanctioned. I decline to interfere."

Petitioners presented this criminal petition.

Dr. *S. Swaminadha* for petitioners.

JUDGMENT.—The Special Assistant Magistrate of Malabar, in disposing of the appeal petition presented to him under section

* Criminal Revision Petition No. 244 of 1902, presented against the order of A. R. L. Tottenham, Special Assistant Magistrate of Malabar, dated 24th December 1901, in Criminal Appeal No. 119 of 1901, declining to revoke the sanction for prosecution accorded by K. Kunhiraman, Sub-Magistrate of Tiruvangadi, in Miscellaneous Case No. 10 of 1901.

In re PAREE KUNHAMMED.

195 (6), Criminal Procedure Code, for revocation of the sanction given by the Sub-Magistrate of Tiruvangadi for the prosecution of the petitioners for the abetment of offences under sections 211 and 193, Indian Penal Code, summarily dismissed the petition on the ground that "the Sub-Magistrate had judicial evidence before him and also held the necessary enquiry before granting sanction," and such necessary conditions having been fulfilled "it was not for him at this stage to usurp the functions of a Court trying the petitioners for the offences." The Special Assistant Magistrate is entirely mistaken as to his functions and responsibility in dealing with a petition presented to him under section 195 which is really in the nature of an appeal against the order of one of his Subordinate Magistrates giving sanction to prosecute the petitioners. He is quite right in saying that in dealing with the petition of appeal before him he ought not to usurp the functions of the Court which will have to try the petitioners if the sanction be upheld and they are brought to trial. That Court will have to try the petitioners upon the evidence which may be adduced at that trial and either convict or acquit them with reference to such evidence. But the authority giving the sanction or upholding the sanction given under section 195 must go into the merits of the application for sanction with reference to the evidence before such authority which is relied upon as justifying the according of sanction. The object of section 195 is to protect parties resorting to Courts and witnesses against vexatious or frivolous prosecutions for their resorting to Courts and giving evidence therein and such protection is afforded by prescribing the necessity of a preliminary sanction by the Court before which the offence is alleged to have been committed before a prosecution is launched and by giving a right of appeal to the Court to which the Court giving sanction is subordinate. Unless there is sufficient *primâ facie* evidence and a reasonable probability of conviction the Court giving the sanction or upholding it will not be properly exercising the discretion vested in it by law and the safeguard provided by law against vexatious or frivolous prosecutions of parties resorting to Court and of witnesses attending and giving evidence in Courts of Justice in discharge of a public duty imposed upon them by law will be rendered nugatory. The according of sanction or upholding the same when a sufficient *primâ facie* case is not made out will, in the majority of cases, simply lead to waste of public time and subject

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the person against whom the sanction is given to serious annoyance and expense which he can in no way be compensated for even though he be honourably acquitted. And such prosecutions launched under the sanction of a Court of Justice are certainly not calculated to produce a wholesome effect upon the administration of justice or to improve the quality of evidence forthcoming in Courts of Justice.

In the present case sanction has been accorded to prosecute the petitioners for the abetment of a false charge preferred by one Pathumma who is being prosecuted for having preferred a false complaint (exhibit A) and for abetting her in giving false evidence. The order of the Sub-Magistrate giving sanction, which extends over eight pages, does not disclose the existence of any evidence as to the complaint made by Pathumma being really false and false to the knowledge of the petitioners. Several witnesses seem to have been examined simply to prove that the petitioners instigated Pathumma to prefer the complaint, but that is quite compatible with the complaint itself being well founded and true. Exhibit C, which was a petition presented by Pathumma herself shortly after she presented the complaint A, in which (C) she says that her complaint (A) is a false one and that she preferred such false complaint at the instigation of petitioners and some others, and the sworn statement taken from her in support of C, are no evidence against petitioners, not to say that the conduct of Pathumma as manifested by exhibit C and its contents and the compounding of the complaint (exhibit B) which was reported to be true by the Police is extremely suspicious. The complaint A was not dismissed by the Sub-Magistrate as false after holding any enquiry and the Sub-Magistrate does not point to any evidence as to petitioners having abetted Pathumma in giving false evidence if she gave any such evidence. It is strange that in the enquiry made by the Sub-Magistrate in connection with the application for sanction against the petitioners he should have examined on oath (*vide* section 5, Indian Oaths Act) as a Court witness Pathumma, who was then an accused person before the Special Assistant Magistrate in connection with the very matter of enquiry, namely, her having preferred a false complaint. Even assuming that the evidence thus elicited from her is not illegal it can hardly be used as evidence against the petitioners whom it is sought to bring to trial jointly with her and in view to which the proceedings against Pathumma

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have been stayed by the Special Assistant Magistrate. Exhibits D and E and F which, the Sub-Magistrate states, show that the first petitioner is by profession a law agent and mediator and interferes in many cases to earn something are perfectly irrelevant and inadmissible. The Sub-Magistrate also says that the first witness swears that the first petitioner is a proclaimed law tout and that he read recently the proclamation to that effect on the notice board of the Parappanangadi Munsif's Court. The authority giving sanction under section 195 should never be influenced in giving sanction by evidence which it ought to know will be altogether inadmissible against an accused person in a criminal trial. It would be an abuse of the power vested in Courts under section 196, Criminal Procedure Code, if sanction should be given or upheld on the principle that, though the conviction of the party complained against is a *mere possibility* and is by no means *probable* yet the giving of sanction would in itself operate as a punishment which, in the opinion of the authority giving or upholding the sanction, will be fully deserved by the person whose prosecution is sanctioned, for, he will have either to pay a substantial consideration to his adversary as an inducement to the latter quietly dropping the sanction and allowing it to die a natural death by effluxion of the period of six months prescribed by law or to undergo the worry, hardship and expense of a criminal prosecution, though eventually he may be acquitted and acquitted honourably too. As this case comes before this Court not by way of appeal under section 195, but only as a Court of Revision under section 439, I pass no final order in the matter of sanction, but, under sections 439 and 423 [1(6)], I set aside the order of the Special Assistant Magistrate, dated 24th December 1901, in Criminal Appeal No. 119 of 1901, declining to revoke the sanction given by the Sub-Magistrate and direct that the said appeal be restored to the file and disposed of according to law, with reference to the foregoing observations, by the Head Assistant Magistrate at Palghat, as I think it undesirable that the appeal should be heard and disposed of on the merits by the Special Assistant Magistrate before whom the case against Pathumma is pending and at whose suggestion, as appears from the Sub-Magistrate's order, application was made by the Police Inspector to the Sub-Magistrate for sanction to prosecute the petitioners for abetment of the false complaint preferred by Pathumma.

APPELLATE CIVIL.

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

1902. March 3.

RAJAH OF RAMNAD (DEFENDANT), APPELLANT,

v.

SEETHARAM CHETTY AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Indian High Courts Act—24 & 25 *Vict., cap.* 104 *of* 1861, *s.* 11—*Letters Patent* 1865, *Art.* 11—*Letters Patent* 1800, *Arts.* 15 *and* 21—*Jurisdiction of High Court to issue warrant against judgment-debtor and appoint special bailiff for its execution.*

A Judge, in the exercise of the ordinary original civil jurisdiction of the High Court at Madras, directed a warrant to issue against the person of a judgment-debtor and appointed a special bailiff to execute the warrant of arrest against the judgment-debtor, wherever he might be found in the Presidency of Madras:

Held, that the order was made without jurisdiction.

Sagore Dutt v. *Ramchunder Mitter*, (1 Hyde, 136), referred to.

Monomothu Nath Day v. *Greender Chundu Ghose and others*, (24 W.R., 366), referred to.

Jamuna Bhai v. *Sadagopa*, (I.L.R., 7 Mad., 56), referred to.

ORDER for the issue of a warrant against the person of the defendant in a suit, and appointing a special bailiff for its execution. On the application of the plaintiffs in a suit, the Judge, sitting in Chambers, in the exercise of the ordinary original civil jurisdiction of the High Court at Madras, ordered as follows:—

"That a current warrant do issue out of and under the seal of this Court directed against the person of the defendant herein. That C. Krishna Rau, a clerk in the service of the plaintiffs be, and he is hereby appointed a special bailiff to execute the said warrant of arrest against the defendant herein wherever he may be found within the Presidency of Madras. That the Sheriff of this Court be and he is hereby directed to grant his special warrant or deputation to the said C. Krishna Rau upon being indemnified by the plaintiffs against any illegal or irregular act or proceeding of the said C. Krishna Rau in executing such warrant of arrest."

* Appeal No. 25 of 1900, from an order of the High Court of Judicature at Madras, dated 25th July 1900, passed in the exercise of its ordinary civil jurisdiction, in Civil Suit No. 244 of 1899.

A subsequent application by the defendant, to have the order set aside, was dismissed, but the execution of the warrant was ordered to be suspended for two weeks to enable the defendant to prefer an appeal against the order under which it was issued, and it was further ordered that if within that time an appeal should be filed, the warrant should remain suspended until the appeal should be disposed of. Defendant preferred this appeal against the order passed on the application last mentioned, on the ground that it was illegal and that Judge ought to have held that the Court had no jurisdiction to pass such an order.

V. Krishnaswmi Ayyar, *K. N. Aiya* and *S. Srinivasa Ayyangar*, for appellant.

R. Subramania Ayyar, for respondent.

JUDGMENT.—In this case Boddam, J., in the exercise of his ordinary original civil jurisdiction directed a warrant to issue against the person of a judgment-debtor and appointed a special bailiff to execute the warrant against the judgment-debtor wherever he might be found in the Presidency of Madras. We are told that the order is in accordance with a practice which obtains on the original side of the High Court. The question is—is the order in accordance with law? We are constrained to hold that it is not. Section 11 of the Indian High Courts Act 1861 is in these terms:—"Upon the establishment of the said High Courts in the said Presidencies, respectively, all provisions then in force in India of Acts of Parliament, or of any Orders of Her Majesty in Council or Charters, or of any Acts of the Legislature of India, which at the time or respective times of the establishment of such High Courts are respectively applicable to the Supreme Courts at Fort William in Bengal, Madras and Bombay, respectively, or to the Judges of those Courts shall be taken to be applicable to the said High Courts, and to the Judges thereof respectively, so far as may be consistent with the provisions of this Act and the Letters Patent to be issued in pursuance thereof, and subject to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council." Section 11 of the Amended Letters Patent for the High Court of Judicature at Madras 1865 runs as follows:—"And we do hereby ordain that the said High Court of Judicature at Madras, shall have and exercise ordinary original civil jurisdiction within such local limits as may from time to time be declared and

prescribed, within the limits of the local jurisdiction of the said High Court of Madras at the date of the publication of these presents and the ordinary orginal civil jurisdiction of the said High Court shall not extend beyond the limits for the time being declared and presented as the local limits of such "Jurisdiction." Section 45 is as follows:—"And it is our further will and pleasure that these Letters Patent should be published by the Governor in Council, and shall come into operation from and after the date of such publication, and that from and after the date on which effect shall have been given to them, so much of the aforesaid Letters Patent granted by His Majesty King George the Third as was not revoked or determined by the said Letters Patent of the twenty-sixth of June, one thousand eight hundred and sixty-two, and is inconsistent with these Letters Patent, shall cease, determine, and be utterly void, to all intents and purposes whatsoever." The effect of this is to repeal all the provisions of the Letters Patent of December 26th, 1800, establishing the Supreme Court, which are inconsistent with the Amended Letters Patent of 1855.

The combined effect of section 15 (provisions as to Sheriff) and section 21 (Jurisdiction of the Court) of the Letters Patent of 1800, is to enable the Supreme Court to make an order in the form adopted by Boddam, J., in cases which fell within section 21 of the Letters Patent of 1800 and the form appears to be a survival from a time anterior to the Indian High Courts Act, 1861. It seems clear to us that the present case does not come within the provisions of section 21 of the Letters Patent of 1800. Assuming for the sake of argument, that it does, we are of opinion that section 11 of the Letters Patent of 1865 is inconsistent with the provisions of section 21 of the Letters Patent of 1800. Section 11 of the Letters Patent is express—"The ordinary original civil jurisdiction of the said High Court shall not extend beyond the limits for the time being declared and prescribed as the local limits of such jurisdiction."

We are of opinion that the order of Boddam, J., was made without jurisdiction. This view is supported by the decisions of the Calcutta High Court in the case reported in *Sagore Dutt* v. *Ramchunder Mitter*(1) and *Monomothu Nath Day* v. *Greender Chundu Ghose*(2)

(1) 1 Hyde, 136. (2) 24 W.R., 366.

and the observations of Innes, J., in *Jamuna Bhai* v. *Sadagopa*(1). Under the Letters Patent of 1865, the High Courts were authorized to make their own rules of civil procedure, being guided in doing so as far as possible by Act VIII of 1859, the complete adoption of which by the High Courts had been found very inconvenient. The rules framed by the High Court under the Letters Patent adopted those sections of the Civil Procedure Code (254 to 296) relating to the transfer of decrees for execution to the Court within whose local limits they were. This necessarily put a stop to the practice, so far as it may have existed, of the Sheriff going beyond the local limits of the High Court to execute process of execution. The contention that the order was in fact made in the exercise of the extraordinary original civil jurisdiction conferred by section 13 of the Letters Patent of 1865 cannot possibly be accepted.

As regards the case of *Narayan Babaji* v. *Nana Manohar*(2), it seems clear from the report that the proceeding was not one by way of execution of a decree, and that the Court in making the order was not acting in the exercise of its ordinary original civil jurisdiction. The case was one of contempt of Court. In *Navivahoo* v. *Narotamdas Candas*(3), it was expressly held that an order for attachment for contempt is not an order made in exercise of the High Court's civil jurisdiction.

We must set aside the order of Boddam, J., but in the circumstances we make no order as to costs.

(1) I.L.R., 7 Mad., 56. (2) 7 B.H.C.R., 172.
(3) I.L.R., 7 Bom., 5.

APPELLATE CRIMINAL.

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

1902. April 28.

EMPEROR, APPELLANT,

v.

RAVALU KESIGADU (ACCUSED), RESPONDENT.*

Madras Abkári Act—I of 1886, s. 34—Power of officer in one Circle to arrest offenders in another.

An officer of the Salt and Abkári Department belonging to Circle A, received certain information and entered Circle B, and, under section 34 of the Madras Abkári Act, arrested an offender in the latter circle. The Magistrate who, in due course, tried the offender, held that the officer's powers of arrest were restricted to his own circle, and acquitted the accused, though he believed the prosecution evidence as to an offence having been committed. Upon an appeal being preferred against the acquittal:

Held, that the order of acquittal was wrong and must be set aside: also, that the question whether the officer who effected the arrest was acting within or beyond his powers in making the arrest did not affect the question whether the accused was or was not guilty of the offence with which he was charged.

CHARGE, under section 55 of Act I of 1886, of being in possession of materials for illicit distillation. The charge was laid by the Salt and Abkári Inspector of the Kanuparti Circle. It appeared that the Assistant Inspector of the Pakala Circle received information at Kanigiri that illicit tapping and distillation was going on in the village of Mahammadapuram, situated in the Kanuparti Circle, and went there and arrested the accused, in the vicinity of a still, secreted in certain bushes. The accused was handed over to the police at the station at Gottagotta. The Second-class Magistrate, who ultimately tried the case, believed the prosecution evidence, but raised the question whether the Abkári officers of the Pakala Circle had been empowered by the Abkári Act I of 1886, or by any notification of Government, to enter a village in the Kanuparti Circle and detect a case there. He referred to the notification of 24th November 1899, published in the *Fort St. George Gazette* of 28th November 1899, and held that it restricted the limits of jurisdiction, at the date when the accused was arrested, and that the proceedings of the officers of the Pakala Circle were unwarranted.

* Criminal Appeal No. 146 of 1902, under section 417 of the Code of Criminal Procedure against the judgment of acquittal passed by C. Rama Row, Second-class Magistrate of Podili, in Calendar Case No. 55 of 1901.

EMPEROR *v.* RAVALU KESIGADU.

He also remarked that the restriction had since been removed by the more recent notification of 18th July 1901 (G.O., Revenue, No. 606). He acquitted the accused under section 245 of the Code of Criminal Procedure.

Against that order, the Public Prosecutor preferred this appeal.

The Public Prosecutor in support of the appeal.

JUDGMENT.—The Magistrate appears to have been of opinion that the evidence showed that the accused were guilty of an offence under section 55 of the Abkári Act. He, however, acquitted them on the ground that the officer who arrested them was an officer who, under the terms of the notification of 24th November 1899, had only authority within the area of his circle and that when he arrested the accused he was acting outside that area. The notification in question did not, and could not, operate so as to limit the powers conferred upon officers by section 34 of the Act. The question whether the officer who effected the arrests was acting within or beyond his powers in making the arrest does not affect the question of whether the accused were guilty or not guilty of the offence with which they were charged.

The Magistrate had jurisdiction under section 190 of the Criminal Procedure Code to take cognizance of the offence.

We must set aside the acquittals and direct the retrial of the accused.

APPELLATE CRIMINAL.

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

1902. August 11.

KRISHNASAMI PILLAI (SECOND ACCUSED), APPELLANT,

v.

EMPEROR, RESPONDENT.*

Criminal Procedure Code—Act V of 1898, ss. 233, 235—Misjoinder of charges—Objection first taken on appeal—Same transaction.

A person was convicted on three charges, namely;—(1) of abetting the falsification of a document (an account book), (2) of fraudulently destroying and secreting documents, and (3) abetting criminal breach of trust, no objection on

* Criminal Appeal No. 259 of 1902 against a conviction and sentence by R. D. Broadfoot, Sessions Judge, South Arcot Division, in Calendar Case No. 11 of 1902.

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the ground of misjoinder being taken before the Sessions Judge. The only manner in which the alleged falsification and destruction were connected was that the account book and the document were both in the custody of the accused, who thus had opportunity to falsify the one and to destroy the other. It was not suggested that the account book was falsified in order to conceal the fact that documents had been destroyed, or that documents had been destroyed in order to prevent the particular falsification from being detected:

Held, that the offences charged did not constitute one series of acts so connected together as to form the same transaction within the meaning of section 235 of the Code of Criminal Procedure. Also that the misjoinder could not be treated as an irregularity curable under section 537, and that the conviction must be set aside.

Subramania Ayyar v. *King-Emperor*, (I.L.R., 25 Mad., 61), followed.

CHARGES of (1) abetting the falsification of a document (under section 477-A of the Indian Penal Code); (2) fraudulently destroying a document and fraudulently secreting a document (under section 477); and (3) abetting criminal breach of trust (under sections 109 and 458). The accused (with another who was tried jointly with him) was tried by a Judge sitting with assessors, and convicted and sentenced to three years' rigorous imprisonment.

He now preferred this appeal.

Mr. *John Adam* for appellant.

The Acting Public Prosecutor in support of the conviction.

JUDGMENT.—In this case the Sessions Judge has convicted the second accused on three charges:

(1) A charge of abetting the falsification of a document,—an offence under section 477-A of the Indian Penal Code.

(2) A charge of the fraudulent destruction of a document and the fraudulent secretion of other documents,—offences under section 477.

(3) A charge of abetting criminal breach of trust,—an offence under sections 109 and 408.

These are distinct offences and the second accused having been tried at the same trial for the three distinct offences the conviction is bad as being in contravention of section 233 of the Code of Criminal Procedure, unless it appears that the alleged offences were committed by the same person in a series of acts so connected together as to form the same transaction within the meaning of section 235. It has been urged on behalf of the prosecution that because the different offences are alleged in the charge to have been committed at or about the same time and place and because

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the objection of misjoinder was not taken before the Sessions Judge, it is not open to us to say the conviction is bad. We entirely disagree with this contention. The fact that the charge alleges that the different offences were committed at or about the same time or place does not of course show that the case falls within the provisions of section 235.

The only sense in which the alleged falsification of the account book and the alleged fraudulent destruction and secretion of documents can be said to be "connected together" is that the fact of the first accused being left in charge of the account book and of the documents gave him an opportunity of defrauding the complainant by falsifying the account book and destroying the documents. It is not suggested that the account book was falsified in order to conceal the fact that documents had been destroyed or that documents had been destroyed in order to prevent the particular falsification from being detected.

We are of opinion that the offences charged do not constitute one series of acts so connected together as to form the same transaction. This misjoinder of charges cannot be treated as an irregularity which is curable under section 537 of the Criminal Procedure Code (*Subramania Ayyar* v. *King-Emperor*(1)).

We set aside the conviction and direct that the second accused be retried.

APPELLATE CRIMINAL.

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

IN THE MATTER OF BYRAVALU NAIDU (COMPLAINANT).* 1902. September 9.

Criminal Procedure Code—Act V of 1898, *ss.* 250, 388 (2)*—Compensation in respect of vexatious complaint—Sentence of imprisonment on non-production of sureties and on complainant's plea of inability to pay—Legality.*

A Deputy Magistrate, having held that a complaint was vexatious, ordered the complainant to pay compensation under section 250 of the Code of Criminal Procedure. He recorded the following order:—"The complainant is unable

(1) I.L.R., 25 Mad., 61.

* Case Referred No. 90 of 1902, for the orders of the High Court under section 438 of the Code of Criminal Procedure, by E. L. Vaughan, District Magistrate of North Arcot, in his letter, dated 13th July 1902, R.C. No. 951, Magisterial of 1902.

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to produce any sureties and pleads inability to pay the compensation. He is awarded 30 days' simple imprisonment." No attempt was made to levy the amount of the compensation:

Held, that the order was invalid whether it were passed under section 250 (2) or section 388 (2) of the Code of Criminal Procedure. Where an order to pay compensation has been made under section 250, the Magistrate cannot make an order for imprisonment on the mere intimation by the person who is directed to pay the compensation that he is unable to do so. Under section 388 (2), the issue of a warrant for the levy by distress of the amount awarded as compensation is a condition precedent to the carrying out of the sentence of imprisonment.

ORDER to pay compensation. The Deputy Magistrate of Chittoor discharged the accused in a case on his file and, holding the complaint to be vexatious, ordered the complainant to pay Rs. 38 as compensation, under section 250 of the Code of Criminal Procedure. He passed the following order :—" The complainant is unable to produce any sureties and pleads inability to pay the Rs. 38 of the compensation. He is awarded 30 days' simple imprisonment." The case was referred to the High Court for orders, by the District Magistrate, who, while doubting the legality of the Deputy Magistrate's order, suggested that it had apparently been passed under section 388 (2) of the Code of Criminal Procedure. No attempt had been made to levy the sum in the manner provided by section 386 of the Code of Criminal Procedure. The District Magistrate suspended the execution of the sentence of imprisonment, and requested that the unexpired portion of the term should be set aside.

The Court passed the following Order :—

Sir ARNOLD WHITE, C.J.—The order of the Deputy Magistrate is in these terms: " The complainant is unable to produce any sureties and pleads inability to pay the Rs. 38 of the compensation. He is awarded 30 days' simple imprisonment." The question is, is this a legal order?

The District Magistrate assumes that, in making this order, the Deputy Magistrate purported to act under the powers conferred by section 388 (2) of the Code of Criminal Procedure. I am not at all sure that, when he made the order, the Deputy Magistrate had in mind the provisions of section 388 (2). It is difficult to say what is meant by the words of the order " the complainant is unable to produce any sureties ". These words do not appear to have been used with reference to the provisions of section 388, since the bond referred to in that section may be executed with

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or without sureties. Having regard to the terms of the order it seems to me that the Deputy Magistrate was under the impression that, under section 250 of the Code of Criminal Procedure, he could make an order for imprisonment on an intimation by the person directed to pay compensation that he was unable to pay. So far as section 250 is concerned it is clear that the Deputy Magistrate had no jurisdiction to make the order. The words of section 250 (2) are :—" Compensation of which a Magistrate has ordered payment under sub-section (1) shall be recoverable as if it were a fine: Provided that, if *it cannot be recovered*, the imprisonment to be awarded," etc. See, too, the cases (*Ramjeevan Koormi* v. *Durgacharan Sadhu Khan*(1) and *Parsi Hajra* v. *Bandhi Dhanuk*(2)).

The question, however, remains,—can the order be upheld as an order under section 388 (2)? I think not. In my opinion the issue of a warrant for the levy by distress and sale of the amount awarded as compensation is in all cases a condition precedent to the carrying out of the sentence of imprisonment. It seems to me that section 388 (2) clearly contemplates the issue of a warrant, although it empowers the Court to pass sentence of imprisonment, although no attempt to execute the warrant has been made, if the person ordered to pay compensation on being required to execute a bond to appear on the day fixed for the return of the warrant, fails to execute the bond.

The object of section 388 (1) is to enable the Court to give time, not exceeding 15 days, to an offender who has been sentenced to pay a fine. If the fine is not paid within the time so given the Court may direct the sentence of imprisonment to be carried into execution at once. The object of section 388 (2) (which in terms applies to all orders for the payment of money whether by way of fine or compensation) on non-recovery of which imprisonment may be awarded, is to enable the Court to pass sentence of imprisonment without waiting for the return of the warrant, if the person ordered to make the payment fails to execute a bond to appear on the day appointed for the return.

The compensation which the Court is empowered to award under section 250 is not a fine but is in the nature of damages for malicious prosecution, although it is made recoverable in a

(1) I.L.R., 21 Calc., 979. (2) I.L.R., 28 Calc., 251.

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summary manner as if it were a fine. The governing section is section 250, where the words "if it *cannot be recovered*" are used, and if section 388 (2) can be construed, and grammatically it certainly can, as not inconsistent with these words, I think it ought to be so construed. In the circumstances of this case I do not think it necessary to order that any further action be taken.

On the facts I agree with the District Magistrate and I think the unexecuted term of the sentence may be set aside.

DAVIES, J.—I agree.

APPELLATE CRIMINAL.

Before Mr. Justice Bhashyam Ayyangar.

1902. June 25.

RAGHUNATHA PANDARAM (FIRST ACCUSED), PETITIONER,

v.

EMPEROR, RESPONDENT.*

Criminal Procedure Code—Act V of 1898, s. 528—Order by Sub-Divisional Magistrate transferring case from one Sub-Magistrate to another—Order by District Magistrate cancelling that order and re-transferring the case—Legality.

A District Magistrate has no power to cancel an order made by a Sub-Divisional Magistrate directing the transfer, under section 528 of the Criminal Procedure Code, of a case from the file of one Sub-Magistrate to that of another Sub-Magistrate, and to direct the re-transfer of the case to the file of the Sub-Magistrate from whom it was transferred.

PETITION. A petition was presented by the complainant in Calendar Case No. 78 of 1902, on the file of the Stationary Second-class Magistrate of Tirutturaippundi, to the District Magistrate of Tanjore, requesting that a case which had been transferred by the Sub-Divisional Magistrate of Mannargudi to the file of the Stationary Second-class Magistrate of Mannargudi might be transferred back to the file of the Tirutturaippundi Magistrate. Vakils were heard on behalf of the complainant and the accused, whereupon

* Criminal Revision No. 267 of 1902, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the proceedings of Francis Du Pré Oldfield, Acting District Magistrate of Tanjore, dated 23rd May 1902, and direct Calendar Case No. 78 of 1902, on the file of the Stationary Second-class Magistrate of Tirutturaippundi to be tried by the Stationary Sub-Magistrate of Mannargudi or by any other Magistrate.

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the District Magistrate made the order as prayed. It appeared that the accused had previously applied for a transfer of the case from the Tirutturaippundi Magistrate without success, but that a second application had been acceded to by the Sub-Divisional Magistrate of Mannargudi, on the ground, as the District Magistrate stated in his order, that the Tirutturaippundi Magistrate had several heavy cases on his file. The examination-in-chief of the witnesses for the prosecution had already been taken there. The District Magistrate, in his order, said:—"The Divisional Magistrate acted, so far as his order shows, not on the counter-petitioner's allegations, which are in my opinion either trivial or vague, but on the departmental ground that the Tirutturaippundi Sub-Magistrate had a number of Mettupalayam cases on his file. As regards those cases, it is within my knowledge that two have already been disposed of. As regards convenience, there is nothing to be said in favour of Mannargudi. I consider transfer should not be granted without much better reason than has been shown, and direct that the case be tried by the Tirutturaippundi Sub-Magistrate, to whom the records should be sent." This order was dated 23rd May 1902.

The accused presented this Criminal Revision Petition against that order on the ground that the District Magistrate had no power to cancel the order of the Sub-Divisional Magistrate transferring the case, and because, for reasons disclosed in an affidavit filed with the petition, a fair trial could not be had before the Tirutturaippundi Magistrate.

V. Viswanatha Sastri for petitioner.

Mr. *N. Subrahmanyem* for the Acting Public Prosecutor.

JUDGMENT.—This revision petition is presented against the proceedings of the Acting District Magistrate of Tanjore, dated 23rd May 1902, cancelling the order of the Sub-Divisional Magistrate of Mannargudi, dated 16th April 1902, which directed the transfer under section 528, Criminal Procedure Code, of Calendar Case No. 78 of 1902 on the file of the Tirutturaippundi Sub-Magistrate to the Court of the Stationary Second-class Magistrate of Mannargudi, and directing its retransfer to the Tirutturaippundi Sub-Magistrate. The action of the District Magistrate in entertaining virtually an appeal against an order of the Sub-Divisional Magistrate passed under section 528 is clearly illegal. If the District Magistrate thought that the order of the Sub-Divisional

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Magistrate was not legal or proper it was competent to him to call for and examine the record of the proceedings of the Sub-Divisional Magistrate under section 435, Criminal Procedure Code, and report under section 438 for the orders of the High Court the result of such examination. In the matter of a transfer under section 528, Criminal Procedure Code, the District Magistrate and Sub-Divisional Magistrate have co-ordinate authority over Magistrates subordinate to the Sub-Divisional Magistrate and the order passed by the Sub-Divisional Magistrate cannot be appealed against to the District Magistrate. It may be that under section 528 a case once transferred from one Magistrate to another may be withdrawn from the latter by the District Magistrate or even by the Sub-Divisional Magistrate and he may enquire into or try such case himself or refer it for enquiry or trial to some other competent Magistrate on a substantive application made that it is inexpedient that the Magistrate to whom it had been transferred or his successor in office should enquire into or try the case. But that is not the nature of the application made to the District Magistrate in the present case nor are the proceedings of the District Magistrate of such nature either in form or in substance. He expressly says that the reasons which induced the Sub-Divisional Magistrate to transfer the case from the Tirutturaippundi Sub-Magistrate are in his opinion insufficient and that much better grounds than have been shown should have been established. And he therefore cancels the order of the Sub-Divisional Magistrate and directs the retransfer of the case to the Tirutturaippundi Sub-Magistrate himself. It is unnecessary to issue any notice to the complainant and thus unnecessarily prolong the proceedings and I accordingly set aside, under section 439 and section 423 (1) (*c*), Criminal Procedure Code, the order of the Acting District Magistrate, dated 23rd May 1902, above referred to.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

VENKATA SUBBA RAO (PLAINTIFF), APPELLANT,

v.

PURUSHOTTAM AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1902. February 11.

Hindu Law—Exclusion from inheritance—Lameness of a member of an undivided family—Effect on right of inheritance.

Lameness which is not congenital is no bar to the right of inheritance which a member of an undivided Hindu family ordinarily possesses.

Whether lameness which is congenital would be a bar—*Quære.*

SUIT to recover possession of certain property which plaintiff contended had been awarded to him at a partition; or, if the Court should hold that there had been no partition, for the allotment of a half share in the property. Plaintiff was the nephew (brother's son) of first defendant, and he alleged that a partition of ancestral property had been effected some years before suit, but that first defendant had subsequently refused to recognise it and prevented plaintiff from dealing with or occupying the lands. Second defendant was the minor son of first defendant. First defendant denied the alleged partition, and also pleaded that inasmuch as plaintiff was a lame man he was incapable of inheriting and, in consequence, could not maintain a suit for partition. This question was raised in the sixth issue. The District Munsif dealt with it as follows:—"The plaintiff is not able to move on his legs. He has to move on his haunches. With some difficulty he was able to stand for a minute or so supporting himself with his hands on two almirahs. The first defendant says that he lost the use of his legs when 7 or 8 years old and by the plaintiff's side it is stated that he got the affection much later than that. In any case plaintiff's lameness is not congenital and the question is whether such lameness disqualifies him from inheritance. No authority has been cited which is free from doubt. The text of Manu runs 'Eunuchs and outcastes, persons born blind or deaf, madmen, idiots, the dumb, and

* Second Appeal No. 718 of 1900 against the decree of S. Gopalachariar, Subordinate Judge of Kistna, in Appeal Suit No. 589 of 1899 against the decree of A. Ramaswami Sastri, District Munsif of Masulipatam, in Original Suit No. 482 of 1896.

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such as have lost the use of a limb are excluded from a share of the heritage.' Mitakshara also is to the same effect. The Sanscrit expression used in Manu to denote such as have lost the use of a limb is 'Nirindruja' which seems to have been by some held as meaning such as have lost the sense of smell, but there seems to be a consensus of opinion that it includes one who has lost the use of a limb. But whether such loss is to be a congenital one or not has not been clearly laid down. Deafness, dumbness and blindness do not disqualify one from inheriting unless they are congenital. It is argued for plaintiff therefore that lameness not congenital is no disqualification. Sir Thomas Strange and Grady favour plaintiff's contention. In his Tagore Law lectures, Rajakumar Sarvadhikari says (p. 960) 'that supervening deficiency in a limb organ, or sense does not work disinheritance; but congenital defects, if incurable, are grounds of disqualification.' He who wants to exclude a coparcener ought to clearly prove liability to execution. There being no direct authority on the point arising in this case, and it by no means being certain that the lameness of the plaintiff is an incurable one, I hold that his lameness is no disqualification." He found that there had been no previous partition, but that there was other joint immoveable property which should have been included in the claim, and, on this ground, namely, that it was a claim for partial division, dismissed the suit.

Plaintiff appealed to the Subordinate Judge, who also found against the alleged previous partition. On the question whether it was a suit for partial division he disagreed with the District Munsif and held that it was not, and that the suit was maintainable. On the question whether plaintiff's lameness debarred him from inheriting he first found, on the evidence, that plaintiff had not been born a cripple, and that he had the use of both his legs for the first ten or fifteen years of his life; also, that he had, at the time of suit, lost the use of both legs, and that his condition was obviously incurable; also that the common ancestor of plaintiff and first defendant had died before plaintiff became a cripple. He referred to *Fithick Chundu Chatterjee* v. *Juggut Mohinee Dabee*(1); also to the Mitakshara and Smirithi Chandrika and to the Hindu Law texts of Manu, Vishnu, Narada, Dayabhaga, Dayakrama, Sangraha, Datta Chandrika, Vyavahara Mayugu, Vivada Ratnagara, Vivada

(1) 22 W.R., 348.

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Chintamani; and to the modern text-books. The effect of these was, he considered, not to limit the disqualification to one who had been born a cripple. He added:—"The only authority that is against this view is Jagannatha, the compiler of Colebrooke's 'Digest' who, as is pointed out by Dr. Jolly in the Tagore Law Lectures for 1883, seems to have had before him a wrong text of Narada. The true text of Narada is to be found in verse 22, page 194 of volume 23 of the Sacred Books of the East. What should be read as 'Jota Unmatta' has been read as 'Janma Unmatta,' and hence the material difference made by Jagannatha. The few text writers who support the plaintiff's contention are simply followers of Jagannatha. As the matter would receive full consideration at their Lordship's hands I do not think it necessary to dilate on it. For the same reason I omit to refer to the several decisions which relate to other disqualifications such as blindness, deafness and dumbness, insanity, leprosy, &c., which have been cited as throwing light upon the correctness or otherwise of the view that one born lame would alone be disqualified. My conclusion is that plaintiff, by reason of his lameness, that is, inability to use both his legs for the last 15 or 20 years, which is apparently remediless, is disqualified for a share. On this ground and not on the technical ground taken by the District Munsif, I affirm his decree and dismiss the appeal, but in the circumstances of the case, without costs."

Plaintiff preferred this second appeal.

P.S. Sivaswamy Ayyar and *P. Naghablushanam* for appellant.—In this case it is admitted that the lameness with which the plaintiff is afflicted was not congenital. Yajnavalkya excludes from inheritance (see Yajnavalkya 2, 141) a "Pangu." "Pangu" is defined in Mitakshara as "Páda Vikala." The word "Vikala" means "*devoid or destitute* of." Therefore, "Páda Vikala" means one who has no feet. The reference is obviously to one who is born without feet. From the text of Manu (Manu 9, 20) it is clear that *blindness* and *deafness* must be congenital in order to operate as a ground of exclusion from inheritance. The same restriction must apply also to lameness. Surely, it could not be maintained that Yajnavalkya meant to lay down that a person who lost his legs, say, in the battle field, must be deprived of his inheritance. After all, some of these texts which set out the grounds of exclusion from inheritance must be deemed to have become obsolete. If a person

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suffered from some malady or infirmity which incapacitated him altogether for the business of life, that might be a reasonable ground of exclusion from inheritance. Such a person might possibly only have a right of maintenance. But here the plaintiff has had the use of his legs for some time, and can read and write and manage property, as has been shown by evidence. Narada declares (Narada 13, 21) that "*an enemy to his father*, an outcaste, an impotent person and one who is addicted to vice take no shares of the inheritance even though they be legitimate." It is doubtful now if the Courts would be prepared to follow this rule to the extent of excluding from inheritance a person who is not on friendly terms with his father. The only decision which can be found on the subject seems to favour the view that lameness, to disentitle one to inheritance, must be congenital (*Fithick Chundu Chatterjee* v. *Juggut Mohinee Dabee*(1)).

V. Ramesam for respondent.—It is submitted that lameness which is subsequently acquired is also a ground of exclusion. I rely on Manu IX, 201. The word used is 'Nirindruja' or those who have lost a sense or a limb (Colebrooke's 'Mitakshara' II, X, 3). Sir William Jones translates it as "such as have lost the use of a limb." The author of Mitakshara explains it thus:—Any person who is deprived of an organ of sense or action *by disease or other cause* is said to have lost that sense or limb (Mitakshara II, X, 4). Yagnavalkya uses the word 'Pangu' (Yagnavalkya II, 141), which the author of Mitakshara explains as "one deprived of the use of his feet" (Mitakshara II, X, 2). The word 'born' qualifies only 'deaf or dumb.' In *Baboo Bodhnarain Singh* v. *Baboo Omrao Singh*(2), the question whether lunacy, though not congenital, would exclude from inheritance was considered. [Bhashyam Ayyangar, J.—Have you found any case in which the point was raised?] None. In *Fithick Chundu Chatterjee* v. *Juggut Mohinee Dabee*(1) the point was not raised but conceded. [Bhashyam Ayyangar, J.—That shows that it is obsolete as a ground of exclusion. What do you say as to one who is an enemy of his father?] Physical disqualifications, which are definite, must be distinguished from moral disqualifications, which are indefinite.

JUDGMENT.—Even assuming that under the Hindu Law texts in case the lameness was congenital there would be a bar, a matter

(1) 22 W.R., 348. (2) 13 M.I.A., 519.

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regarding which we give no opinion, it is admitted in the present case that the lameness was not congenital and that the plaintiff for years after his birth had the use of his limbs.

No case has been quoted where any Court has held that lameness congenital or otherwise is a bar to inheritance. In the only case that has been quoted, *Fithick Chundu Chatterjee* v. *Juggut Mohinee Dabee*(1), the decision proceeds upon the assumption that lameness would be no bar unless it were proved that the person proposed to be excluded was a cripple from birth. Such being the case we cannot uphold the decision of the Subordinate Judge.

We must therefore set aside the decrees of both Courts and hold that there should be a partition and that the plaintiff is entitled to a one-half share in the lands and houses in Chinamutevi village (as per schedule A) with costs throughout and mesne profits amounting to Rs. 126 for the three years prior to the suit, and subsequent mesne profits up to the date of delivery of the plaintiff's share after partition, such profits to be ascertained in execution.

APPELLATE CRIMINAL.

Before Mr. Justice Bhashyam Ayyangar.

V. SHANMUGAM CHETTY, PETITIONER, 1902. July 22.

v.

PENNAPPA MUDALY AND OTHERS, COUNTER-PETITIONERS.*

Criminal Procedure Code—Act V of 1898, *ss.* 195, 435—*Order by Sessions Judge staying proceedings pending reference to High Court for orders on proceeding relating to grant of sanction—Prosecution proceeding in Court outside jurisdiction of Sessions Judge—Legality.*

Sanction was accorded by a Second-class Magistrate in the Sessions Division of South Arcot, for the prosecution of A on various charges. A then applied to the Deputy Magistrate of Cuddalore (in the same Sessions Division) who confirmed the sanction. A charge was laid against A in the Court of a Second-class Magistrate in the Sessions Division of Chingleput. A, however, petitioned the Sessions Judge of South Arcot to revise the sanction and stay proceedings

(1) 22 W.R., 348.

* Criminal Revision Petition No. 282 of 1902 praying the High Court to revise the order of the Sessions Judge of South Arcot, dated 7th July 1902, in Criminal Miscellaneous Petition No. 4 of 1902.

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until his petition should be disposed of, and the Sessions Judge passed an order staying proceedings pending the disposal of the petition. On a criminal revision petition being presented to the High Court:

Held, that the order was *ultra vires*.

PETITION. Petitioner had laid a charge of cheating against counter-petitioner in the Court of the Second-class Magistrate of Pandarutti, which is situated in the Sessions Division of South Arcot. Counter-petitioner was acquitted, but the Magistrate, in his judgment, expressed the belief that a certain document which had been produced in the case was a forgery. Petitioner thereupon applied to the Magistrate for sanction to prosecute counter-petitioner for offences under sections 193, 467, 471 and 109 of the Indian Penal Code, and sanction was accorded. Counter-petitioner applied to the Deputy Magistrate of Cuddalore (also in the Sessions Division of South Arcot), who confirmed the sanction on 24th May 1902. On 1st July 1902, petitioner filed a complaint against counter-petitioner, in pursuance of the sanction, in the Court of the Second-class Magistrate of Madurantakam, which is situated in the Sessions Division of Chingleput. Counter-petitioner, on 7th July 1902, presented a criminal revision petition in the Court of the Sessions Judge of South Arcot, in which he complained of the manner in which the sanction had been confirmed by the Deputy Magistrate of Cuddalore and asked for revision and for a stay of proceedings pending the disposal of the petition. The Sessions Judge, on the same day, passed the following order:—"Proceedings (if any) should be stayed pending the disposal of the revision petition."

Against that order, petitioner presented this criminal revision petition.

T. Rangaramanuja Chariar for petitioner.

JUDGMENT.—It may be competent to the Sessions Judge of South Arcot, under section 438 of the Code of Criminal Procedure, to report, for the orders of the High Court as a Court of Revision, the result of his examination of the record of the proceedings in relation to the according of sanction under section 195, Criminal Procedure Code, before the Deputy Magistrate of Cuddalore which is within the Sessions Division of South Arcot. He certainly cannot himself revise such proceedings and section 438 also distinctly provides in what way he may take action in favour of the accused, pending his recommendation to the High Court that a

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sentence be reversed or altered. In this case the prosecution, in pursuance of the sanction, was instituted before the Stationary Sub-Magistrate of Madurantakam which lies within the Sessions Division of Chingleput and the proceedings in connection with that prosecution are pending before him, but the Sessions Judge of South Arcot, after entertaining a petition under section 435 from the accused before the Madurantakam Sub-Magistrate, and on a motion made by him on the 7th July 1902, passed on the same day an order that proceedings (if any) should be stayed pending disposal of the Revision Petition. This order is clearly *ultra vires*, the Court of the Madurantakam Sub-Magistrate being outside the territorial jurisdiction of the Sessions Judge of South Arcot, even assuming that the Sesssions Judge could stay proceedings before any Criminal Court in his own Sessions Division pending the disposal of any proceedings before him under section 435. I accordingly set it aside without prejudice to his disposing, according to law, of the petition presented to him by the accused under section 435 to move the High Court under section 438 to quash the sanction.

APPELLATE CRIMINAL.

Before Mr. Justice Bhashyam Ayyangar.

IN RE CHENNANAGOUD AND ANOTHER, PETITIONERS.* 1902. August 5.

Criminal Procedure Code—Act V of 1898—ss. 435, 439—Jurisdiction of High Court under Criminal Procedure Code to revise order according sanction which has been granted by a Civil Court.

The High Court has no jurisdiction, under sections 435 and 439 of the Code of Criminal Procedure, to revise an order passed by any Court other than a

* Criminal Revision Petitions Nos. 303 and 304 of 1902, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise an order of S. Russell, Acting Sessions Judge of Bellary, dated 1st April 1902, passed on Criminal Revision Petitions Nos. 5 and 4 of 1902, respectively, seeking to revoke the sanction granted by V. G. Narayana Ayyar, District Munsif of Bellary, to prosecute the petitioners under sections 193 and 468 of the Indian Penal Code.

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Criminal Court under clause (*b*) or (*c*) of sub-section (1) of section 195 of the Code of Criminal Procedure, according sanction to institute a prosecution; or an order passed under sub-section (6) of section 195 revoking or refusing to revoke a sanction which has been given or granting a sanction which has been refused.

It may be open to the High Court, under section 622 of the Code of Civil Procedure, to revise such proceedings of a Civil Court, in cases which come within the terms of that section.

PETITION for sanction to prosecute counter-petitioners under sections 193, 196 and 465 of the Indian Penal Code. The petition was filed in the Court of the District Munsif of Bellary, in whose Court the first counter-petitioner had instituted a suit to recover a sum of money due on a bond executed by the father of the present petitioner. A decree was passed in favour of the first counter-petitioner. In execution of that decree a sale was held and a sale-list was prepared, which petitioner contended was a false one. It was with reference to this sale-list that sanction was asked for. The District Munsif considered that a *primâ facie* case was made out and accorded sanction for their prosecution under sections 193 and 468 of the Indian Penal Code. The counter-petitioners then presented Criminial Revision Petitions in the District Court of Bellary, under section 195 of the Code of Criminal Procedure, praying the Court to revoke the sanction which the District Munsif had granted. The District Judge, treating the applications as having been made to him as Sessions Judge, upheld the finding that a *primâ facie* case had been made out and dismissed the petitions.

Against that order, the counter-petitioners presented this Criminal Revision Petition to the High Court under sections 435 and 439 of the Code of Criminal Procedure.

T. Venkatasubba Ayyar and *Narayana Sastry* for petitioners in Criminal Revision case No. 303 and *K. Narayana Rau* for petitioners in Criminal Revision case No. 304.

JUDGMENT.—In my opinion the High Court cannot, under the provisions of sections 435 and 439, Criminal Procedure Code, revise an order passed by any Court other than a Criminal Court under clause (*b*) or (*c*) of sub-section (1) of section 195, Criminal Procedure Code, according sanction for the prosecution of any person who is alleged to have committed any of the offences therein referred to in relation to any proceeding in such Court, nor revise an order passed under sub-section (6) of section 195

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revoking or refusing to revoke a sanction given or granting a sanction refused by such Court.

Sub-section (2) of section 195 defines the 'Court' referred to in clauses (*b*) and (*c*) of the same section to be a Civil, Revenue or Criminal Court. Sub-section (7) declares that the Court which under sub-section (*b*) may revoke or grant a sanction given or refused under clauses (*b*) and (*c*) of sub-section (1) is the Court to which appeals ordinarily lie from the Court so giving or refusing.

In the present case the sanction was given by the District Munsif and applications were made under sub-sections (6) and (7) of section 195 to the District Judge to revoke such sanction. But the District Judge, treating them as applications made to him as a Sessions Judge, refused to revoke the sanction. Under sub-section (7) it is quite clear that the applications lay to him only as District Judge, for appeals from the District Munsif's Court lie only to the District Judge and not to the Sessions Judge, and he acted irregularly in dealing with them as a Sessions Judge. This, however, is only an irregularity which is not material and the order passed by him refusing to revoke the sanction given by the District Munsif must be treated as one passed by him as District Judge. As the District Judge did not in this case grant a sanction refused by the District Munsif, the High Court cannot act under sub-sections (6) and (7) and revoke a sanction given by the District Munsif, who is not, within the meaning of sub-section (7), subordinate to the High Court, which sanction the District Judge refused to revoke.

Under section 435, Criminal Procedure Code, the High Court can only call for and examine the record of any proceeding of a Criminal Court and, under section 439, it can only revise the proceedings of a Criminal Court, including of course, proceedings in a Criminal Court under section 195, and under that same section 439 it can also exercise the power of according original sanction in respect of an offence of the description referred to in clauses (*b*) and (*c*) of section 195 (1) committed in a Criminal Court, or of revoking or granting a sanction given or refused by a Criminal Court, though appeals do not lie to the High Court from such Criminal Courts. The reference in section 439 to section 195 is thus given full effect to, without assuming that under sections 435 and 439 the High Court can also revise the proceedings of Civil and Revenue Courts acting under section 195. It is only under section

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195 that a Revenue Court also gives or refuses sanction in respect of offences therein referred to and if a Revenue Court gives sanction under clause (*b*) or (*c*) and such sanction is under sub-section (6) revoked or refused to be revoked by a higher Revenue Court, say, the Board of Revenue, to which appeals lie from such Revenue Court, it is obvious that the High Court cannot, under section 439, revise those proceedings. If that be so, it is difficult to see on what principle similar proceedings of a Civil Court can be revised by the High Court under section 439, Criminal Procedure Code. When a Civil or Revenue Court acts with the powers of a Criminal Court under section 478 and makes a commitment to a Court of Session, section 215 authorizes the High Court to quash such commitment on a point of law.

It may be that, under section 622 of the Code of Civil Procedure the powers of revision under which are much narrower than those conferred by sections 435 and 439, Criminal Procedure Code, the High Court may, in a fit and proper case, revise the proceedings of a Civil Court under section 195, Criminal Procedure Code, whether it be the Court of First Instance or an Appellate Court. In the present case there are no grounds for revising under section 622, Code of Civil Procedure, the order of the District Judge refusing to revoke the sanction accorded by the District Munsif and there is therefore no object in treating this Criminal Revision Petition as a Civil Revision Petition presented under section 622, Civil Procedure Code, and allowing the same to be thus amended.

The Revision Petitions are therefore rejected.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Bhashyam Ayyangar.

SREERAMULU (PLAINTIFF), APPELLANT,

v.

KRISTAMMA AND OTHERS (DEFENDANTS), RESPONDENTS.*

1902. February 24, 25. March 26.

Hindu law—Widow's estate—Alienation by widow—Subsequent adoption—Right of adopted son to claim property alienated—Limitation—Act XV of 1877, sched. II, art. 144.

Where a Hindu widow alienates part of the immoveable property belonging to her husband's estate and then adopts a son, the son cannot sue to recover possession of the property until the termination of her widowhood.

Where such a suit is brought during the widowhood it is governed by article 144 of schedule II to the Limitation Act, and the starting point for the period of limitation is the date of the adoption.

If the alienation is for a necessary purpose, the adoption does not divest the alienee, and the adopted son succeeds only to the remaining portion of his adoptive father's property. If the alienation is not for a necessary purpose, the subject of the alienation is severed from the inheritance only during the widowhood, and the remainder therein vests, at the moment of adoption, in the adopted son, as a vested remainder to fall into possession at the termination of the widowhood.

Observations by Bhashyam Ayyangar, J., on the effect of an alienation by a Hindu widow.

SUIT to set aside an alienation. Plaintiff sued as the adopted son of first defendant to recover possession of 16 acres of land and for mesne profits. The plaint alleged that first defendant had been empowered by her late husband to adopt a son to him, and that she, with the consent of her gnatis, had adopted plaintiff in February 1887, and had performed the upanayanam or thread ceremony. It further alleged that, during the minority of first defendant, her father had sold the land in question to his brother-in-law, defendant No. 8, collusively and without any legal necessity. The date of this sale was stated as 6th March 1879. Defendant No. 8 had, on 19th January 1895, conveyed the

* Second Appeal No. 706 of 1900 against the decree of W. C. Holmes, District Judge of Kistna, in Appeal Suit No. 462 of 1899 presented against the decree of V. Subrahmanyan Pantulu, District Munsif of Guntur, in Original Suit No. 432 of 1895.

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property to defendants Nos. 9 and 10. Plaintiff stated that he had been born in October 1875, had attained his majority in October 1893, and he laid his cause of action as having accrued either at the date of his adoption (namely, February 1887), or at the date when he first became aware of the alienation (namely, in 1889), or at the date at which he attained his majority (namely, in October 1893). Defendants Nos. 2 to 7 were the brothers of first defendant,—who remained *ex parte*. The brothers pleaded that they had no concern in the suit and wished to be exonerated. Defendants Nos. 8, 9 and 10 denied the alleged adoption, and pleaded that the land had been sold to defendant No. 8 by the widow in liquidation of debts incurred by her husband and that the sales were *bonâ fide*. They also set up the plea of limitation. The District Munsif, before whom the case first came, found that the land had been sold by the father of first defendant during her minority, to defendant No. 8, on 6th March 1879. He held that plaintiff's right to question the validity of the sale by suit arose within three years of his attaining majority. He said that, at the date on which the suit was instituted, plaintiff was more than 24 years of age, and held that the suit was barred by limitation. The Subordinate Judge reversed this finding on the ground that it had been arrived at merely from an inspection of the plaintiff and without his having been afforded an opportunity to adduce evidence on the point. The suit was remanded, and came before another District Munsif, who found further facts,—among them, that the husband of first defendant died prior to 1878, leaving her a minor; that the affairs of first defendant were managed by her father, who effected the sale in question in 1879, to defendant No. 8, who, in 1895, sold it to defendant No. 9; and that plaintiff's adoption had taken place in 1887, in pursuance of authority given to first defendant by her husband. He held that the suit was not barred by limitation as it had been brought within 12 years of the adoption; that plaintiff was entitled to sue to have the alienation made prior to his adoption set aside; and that it had not been proved that there was legal necessity for the sale. In the result he decreed that defendants Nos. 9 and 10 should deliver up the property to plaintiff.

The District Judge, on appeal, dealt with the question of limitation. He stated it thus:—"The first question is whether, when the guardian of a minor widow sells certain property of the

widow's late husband, purporting to do so for necessary purposes, and when, subsequently, the widow adopts, the adopted son is allowed by the law of limitation a period of 12 years, from the date of sale or from the date of adoption, to bring a suit to set aside the sale on the ground that the sale was collusive and without consideration?" Considering this question he said:—"It is contended for the plaintiff respondent, that article 144 of the second schedule of Act XV of 1877 is the article that governs the case. The only other article that could possibly apply would be article 142. Article 142 would only be applicable if the word 'plaintiff' as used in the first column of the schedule under article 142 included not only the adopted son, but also the adopting widow. If it does, the suit is barred. If article 144 applies, the question is whether the word plaintiff in the third column of the schedule under article 144 includes not only the adopted son, but the adopting widow. Thus, whether article 142 or article 144 governs the case, the question whether the suit is or is not barred depends on the meaning to be attached to the word 'plaintiff.' Plaintiff is defined in section 3 of the Act and includes, unless there is something repugnant in the subject or context (which is not the case here) 'any person from or through whom a plaintiff derives his right to sue.' The question then reduces itself to this,—should it be held within the meaning of section 3 of the Limitation Act of 77 that the 'right to sue' of the adopted son is derived from or through the adopting widow. The widow had a right to sue to set aside the sale made by her guardian on the ground that it was collusive and without consideration. On the instant the adoption was completed by her the right to sue to set aside the sale ceased to exist in her, and at the same instant a right to sue to set aside the sale came into existence in the adopted son. The question is, does the adopted son *derive his right to sue* from the adopting mother within the meaning of section 3 of Act XV of 1877." He discussed the point at length and decided that the suit was barred by limitation, on the ground that the period of limitation should be reckoned from the date of the alienation, and that plaintiff had derived his right to sue from or through his adoptive mother.

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Against that decree plaintiff preferred this second appeal.

Sundara Ayyar for appellant.

Mr. *Joseph Satya Nadar* for respondents.

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BHASHYAM AYYANGAR, J.—It is found that the plaintiff was adopted in 1887 by the first defendant in pursuance of authority given to her by her husband who died prior to 1878. The lands mentioned in the plaint were sold in March 1879, during the minority of the first defendant, by her guardian and father, to the eighth defendant. This suit was instituted in 1895 (September), more than three years after plaintiff had attained his age of majority, to eject the eighth defendant and those claiming under him and recover possession of the lands on the ground that the alienation thereof was not made for purposes which will bind the inheritance in the hands of the reversionary heirs of the first defendant's husband. The District Judge dismissed the plaintiff's suit as barred by limitation, either under article 142 or 144, on the ground that the period of limitation should be reckoned from the date of the alienation, *i.e.*, 1879 and not from the date of the plaintiff's adoption, 1887, and that within the definition of the word "plaintiff" in section 3 of the Limitation Act, 1877, the plaintiff in the present case, notwithstanding that he claims the lands as the heir of his adoptive father, should be regarded as one who derives his right to sue from or through his adoptive mother, the first defendant.

The first defendant, after attaining the age of majority, did not repudiate the alienation made by her guardian and the case has been argued before us on the footing that the alienation of 1879 should be regarded as one made by the first defendant herself. The learned pleader for the appellant contends that the suit is not barred by limitation, as it has been instituted within 12 years from the date of the plaintiff's adoption and the District Judge is wrong in his view that the plaintiff should be regarded as deriving his right to sue from or through his adoptive mother, the first defendant. The learned pleader was also required to argue on what principle he maintained that the plaintiff was entitled to eject the vendee during the lifetime of the first defendant.

Regarding the alienation in question as one made by a widow, who had authority from her husband to make an adoption, which authority was exercised and the adoption made only subsequent to the alienation, I am of opinion that, if the plaintiff were entitled to maintain this suit during the lifetime of the widow, the period of limitation should be computed only from the date of the plaintiff's adoption and not from the date of the alienation, but that the

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vendee, having prior to the plaintiff's adoption acquired under the alienation in question an estate in the land during the lifetime of the widow, the adoption of the plaintiff cannot divest him of that estate and that consequently this suit is not maintainable during her lifetime.

The plaintiff claims to recover possession of the land as the legal representative of his adoptive father and he, therefore, derives his right to sue from or through his father and he cannot be regarded as deriving such right from or through the first defendant, merely by reason that his status as the adopted son and legal representative of the deceased father is the immediate result of her action in adopting him, which act of hers, however, would have been inefficacious but for the authority conferred on her by the husband. Though the inheritance is fully vested in a widow as the legal representative of her deceased husband, yet it has been definitely established by judicial decisions in *Srinath Kur* v. *Prosunno Kumar Ghose*(1) with reference to article 141 of the Indian Limitation Act, 1877, and the corresponding article 142 of Act IX of 1871, that in the case of her making an alienation of her husband's property or even of her being dispossessed by a trespasser, she does not represent the inheritance for purposes of limitation and that limitation does not begin to run during her lifetime, against any reversionary heir of her husband. The case of a son adopted by the widow is not specifically provided for in the Limitation Act as are those covered by articles 140 and 141 of the Limitation Act, 1877. It will be straining the language of article 140 to include the adopted son in the term 'reversioner' occurring therein. That term applies only to a donor or his representative to whom the remainder of an estate reverts, such remainder not having been disposed of by the donor. The case of an adopted son claiming during the lifetime of the widow falls, therefore, under article 144 and possession can be adverse to him only from the date of adoption. If the widow does not represent the inheritance for purposes of limitation as against the reversionary heirs of her husband, it will be unreasonable to hold that it would be otherwise as against a son adopted by her, when he claims under his adoptive father. I concur in the decision of the Bombay High Court in *Moro Narayan Joshi* v. *Balaji Raghunath*(2) so far as it bears on the

(1) I.L.R., 9 Calc., 934. (2) I.L.R., 19 Bom., 809.

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as a vested remainder, to fall into possession on the death of the widow or the termination of her widowhood. The same principle regulates the rights of a son adopted by the father himself. By the mere act of adoption, the adopted son becomes a joint owner with the father in respect of all ancestral property then possessed by the latter. If, prior to the adoption, the father had alienated, either permanently or for the term of his life or of his wife's life any portion of the ancestral property, the son becomes a joint owner only in respect of the remaining ancestral property. When the alienation was only for a term, the son becomes joint owner with the father, so far as such property is concerned, in the reversionary interest therein. The only difference in the case of an adoption by a widow is that the adopted son becomes *sole* owner, and not joint owner with the widow, of the inheritance as it then vests in the widow. If, prior to the adoption, a portion of the inheritance had been alienated for a necessary purpose, or the widow, in exercise of her absolute personal right, carved out of such portion, in favour of a stranger, an estate for the term of her widowhood, the adopted son can succeed to the inheritance only as it exists at the time of the adoption. In the former case, it is undoubted that the adoption cannot have the effect of divesting the alience and it is difficult to see on what principle the adoption can operate so as to divest the alienee in the latter case. The learned pleader for the appellant contends that the adoption must be taken to relate back to the date of the adoptive father's death and that the rights of such adopted son will be those of a posthumous son. If such were the position of a son adopted by the widow, the widow could have no personal right of enjoyment or of disposition over her husband's estate and the inheritance cannot be regarded as vested in her even until the adoption. Her powers will only be those of a guardian of a minor in existence or in the womb and in fact she will be accountable to the adopted son for the income derived from the estate until the adoption. It is impossible to maintain this proposition and it was virtually exploded long ago in an elaborate judgment of the Sadar Court of Bengal, which was appealed against and adopted in its entirety by the Privy Council and which has ever since been considered as having settled the question (*Bamundoss Mookerjea* v. *Mussamut Tarinee*(1).

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

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The whole of the authorities on the point were examined in that case and the Court refused to act upon the fanciful analogy of a posthumous son and laid it down that although a son when adopted, entered at once into the full rights of a natural-born son, his rights could not relate back to any earlier period. Till he was adopted it might happen that he never would be adopted and when he was adopted his fictitious birth into the new family could not be antedated (Mayne's 'Hindu Law and Usage,' 6th edition, para. 197; West and Buhler, pp. 1151-1152; see also I.L.R., 19 Bom. at pp. 814-815). The above decision of the Sadar Court of Bengal, which was adopted by the Privy Council, was acted upon by this Court in *Lakshmana Rau* v. *Lakshmiammal*(1) and explained as follows (at pp. 164-165):—

"The Sadar Dewany Adalat pronounced that 'an authority to adopt a son possessed by a widow does not supersede or destroy her personal rights as widow and that those rights continue in force until an adoption is actually made,' and held that the property is in the widow from the date of the husband's death until the power to adopt is exercised, and that the adoption divests it from the widow and vests it in the adopted son. In the interval then between the death of her husband and the exercise of the power, the widow's estate is neither greater nor less than it would be if she enjoyed no such power or died without making the adoption. She has the same power, no greater and no less, to deal with the estate. Such acts of hers as are authorised and would be effective against reversioners will bind the son taken in adoption. Such acts as are unauthorised and in excess of her powers may be challenged by the son adopted or by any other successor to the estate. . . . . The decision of the Sadar Dewany Adalat is authority for holding that the widow would not have been deprived of her power by reason that she has received her husband's consent to make an adoption." This view was also acted upon by Subrahmania Aiyar, J., in *Ganapati Ayyan* v. *Savitri Ammal*(2).

In that case the adoptive father made a nuncupative bequest of a portion of his property for a certain charity and he also gave verbal authority to the widow to make an adoption. After holding on the authority of *Bamundoss Mookerjea* v. *Mussamut Tarinee*(3)

(1) I.L.R., 4 Mad., 160. (2) I.L.R., 21 Mad., 10 at pp. 16 and 17.
(3) 7 M.I.A., 169.

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that "it is too late to question the doctrine that the adopted son's rights arise from the time of the adoption," he upheld the devise as against the adopted son, on the ground that "the title of the adopted son could not affect the right of the charity, for the latter right had vested long before the adopted son's right arose and that his right must, therefore, be held to be subject to that created in favour of the charity by the oral devise." If the title of the adopted son related back to the death of the adoptive father, as that of a posthumous son, his right by survivorship would prevail and the devise made by the father could not take effect. The devise, however, did take effect because the adopted son's right arose only from the time of the adoption, and his adoption, therefore, could not divest an estate which vested in the trustee for the charity, on the adoptive father's death and prior to the adoption. An alienation of her life-interest, made by a widow prior to the adoption must stand on the same footing. The only extent to which, by analogy to the case of a posthumous son, the title of a son adopted by a widow relates back to the death of his father is that he will divest the interest of any person in possession of the property of the father, to whom he would have had a preferable title if he had been in existence at his adoptive father's death (*Babu Anaji* v. *Ratnaji*(1)). A son adopted by the widow will thus divest not only the widow—or widows, if there be more than one, though the adoption was made by only one of them (*Mondakini Dasi* v. *Adinath Dey*(2))—but also either in whole or in part an undivided co-parcener of the father, on whom the estate had devolved by survivorship (*Surendra Nandan* v. *Sailaja Kant Das Mahapatra*(3), *Vithoba* v. *Bapu*(4), *Sri Raghunadha* v. *Sri Brozo Kishoro*(5), *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo*(6)).

The question as to how far alienations made by a male holder on whom, by survivorship, the estate of an undivided family had devolved will bind a son subsequently adopted by a widow into the family is suggested by Mr. Mayne in paragraph 198 of his book ('Hindu Law and Usage'—6th edition) and he inclines to the opinion that such alienations will be absolutely binding upon

(1) I.L.R., 21 Bom., 319.
(2) I.L.R., 18 Calc., 69.
(3) I.L.R., 18 Calc., 385.
(4) I.L.R., 15 Bom., 110.
(5) 3 I.A., 154.
(6) I.L.R., 1 Mad., 69.

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the adopted son. It is unnecessary, however, to consider or decide that question in the present case.

The learned pleader for the appellant drew attention to a passage in the judgment of this Court in *Jagannadha* v. *Papamma*(I) in which, adverting to the father's power to dispose of his property as he pleases, before adoption, it was observed that a widow with power of adoption derived from her husband had no *such* power of disposition over the property and therefore cannot impose any condition as to the enjoyment of the property by the adopted son. It will be noted that in this as well as in other cases, also referred to on behalf of the appellant, all that was held was that even prior to the adoption by the widow she had not an absolute or unrestricted power of disposition over her husband's estate. The question as to her limited power of disposition was not raised or decided. In the well-known case of *Moniram Kolita* v. *Kerry Kolitany*(2) in which the nature of a widow's estate under the Hindu Law and judicial decisions was fully considered by the Judicial Committee of the Privy Council, and it was decided that a widow who has once inherited the estate of her deceased husband is not liable to forfeit that estate by reason of subsequent unchastity, there is a dictum which has an important bearing on the question now under consideration. Their Lordships observe that "if the widow's estate ceases upon her committing an act of unchastity, the period of succession will be accelerated and the title of the heirs of her husband must accrue at that period. . . . . If her estate were to cease by reason of her unchastity, the benefit which her deceased husband's brother and the immediate reversionary heir would derive from her fall would give him an interest in direct conflict with his moral duty of shielding her from temptation. . . . . But, further, the widow has a right to sell or mortgage her own interest in the estate. . . . . If the estate ceases by an act of unchastity, the purchaser or mortgagee might be deprived of the estate, if the surviving brother of the husband should prove that the widow's estate had ceased in consequence of an act of unchastity committed by her *prior* to the sale or mortgage." (The italics are mine.) It will be noted that in this passage the Privy Council distinctly assume that even if the widow's estate should cease by her committing an act

(1) I.L.R., 16 Mad., 400 at p. 404.
(2) L.R., 7 I.A., p. 115 at p. 154.

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of unchastity and the succession of her husband's heirs should thereby be accelerated, the purchaser or mortgagee, from her, of her own life-interest in the estate, would not be divested of it, if the sale or mortgage had taken place prior to her act of unchastity, but only if it had been *subsequent* thereto. If this be sound law, it would equally hold good in the case of an alienation, made by a widow, of her life estate in the property prior to her making the adoption. If, on the other hand, a son adopted by the widow were to be at liberty, during her lifetime to recover possession of property alienated by her to a stranger, it will follow that a reversionary heir, whose succession is accelerated by her complete withdrawal from the husband's estate, *i.e.*, by the surrender or extinction of the prior interest, namely, her life interest therein, (*Behari Lal* v. *Madho Lal*(1), *Kolandaya Sholagan* v. *Vedamuthu Sholagan*(2), *Marudamuthu Nadan* v. *Srinivasa Pillai*(3)) would be equally entitled to recover, during her life-time, property alienated by her prior to such surrender.

The rule of law deducible from judicial decisions as to the widow's absolute power of alienation of her personal interest in the husband's property and the nature of the estate transferred in exercise of such power, is, by implication, clearly stated by article 125 of the second schedule to the Limitation Act, 1877. The suit therein referred to is one brought by a reversionary heir, during the lifetime of the widow for a declaration that an alienation made by her is void, except for her life or until her re-marriage. This implies that the estate which a widow can convey in exercise of her personal right over the husband's property determines only by her death or by her re-marriage in the meanwhile, and she being lawfully entitled to carve out such an estate prior to her making the adoption, the adopted son can succeed to the property so alienated only after the determination of such estate.

If an alienation made by or on behalf of a widow is invalid against the widow herself and does not bind her, the right of action to set aside the same will at once vest in the adopted son, on the adoption, and the law of limitation applicable to any suit which he may bring during her lifetime to recover possession of property so alienated will be the same as would be applicable to a

(1) I.L.R., 19 Calc., 236. (2) I.L.R., 19 Mad., 337.
(3) I.L.R., 21 Mad., 128.

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suit brought for the purpose by the widow herself without having made an adoption. A suit brought after the death of the widow by a son adopted by her to recover possession of immoveable property alienated by her, prior to adoption, for a purpose not binding upon the adopted son, would be governed by the 12 years' period of limitation prescribed by article 141, to be reckoned from the date of her death.

The proposition that a son adopted by the widow cannot, before the termination of her widowhood by death or re-marriage, recover possession of any portion of his adoptive father's estate which she might have alienated prior to the adoption, is not only sound in principle, but is in consonance with justice and equity. A widow, having authority from her husband,—however imperative such authority may be—is not bound to exercise the same and it is entirely optional with her to adopt or not as she may choose. Even when the alienation has in fact been made for a necessary purpose, a purchaser from the widow, or his representative in interest, is, in not a few cases, unable to adduce the requisite legal evidence for discharging the onus, which the law casts on him, of establishing the necessity for the sale—especially when the question is raised on the death of the widow, many years after the alienation. The purchaser may know nothing of the authority given her by the husband to make an adoption and even if he is informed of the same, the widow may represent to him or lead him to believe that she will not make an adoption. Even in the absence of any authority from the husband, the widow can make an adoption at any time with the consent of her sapindas. A person dealing with a widow reasonably calculates that the alienation will hold good, at any rate, during her lifetime, and except of course in the rare case of a re-marraige, this will be ensured by the conclusion herein arrived at even when an adoption takes place subsequent to the alienation. When the widow has made an alienation prior to the adoption, the parties concerned will, before giving the boy in adoption, be fully aware of the same and of the extent of the property remaining with the widow, which will immediately come into the possession of the adopted son and the extent of property which will come into his possession only after the lifetime of the adopting widow—provided such property had not been alienated for a necessary purpose. I need hardly add that any contrivance which, in anticipation of an adoption by her, may be made to secure

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to herself an estate for life in her husband's property or any considerable portion thereof exceeding what may be a reasonable provision for her maintenance, or any conveyancing device intended to secure to her directly or indirectly a beneficial interest for life in such property will be legally inefficacious against the rights of the adopted son.

The second appeal fails and the decree appealed against is affirmed except in respect of costs, but only on the ground that the suit as now brought is premature.

Under the circumstances of the case, it is ordered that each party do bear his or their own costs throughout.

DAVIES, J.—I have nothing to add to my learned colleague's judgment, with which I entirely agree.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar.

1902. March 24.

ABDULLA (PETITIONER), DEFENDANT,

v.

MAMMOD (RESPONDENT), PLAINTIFF.*

Contract—Transfer of license to collect ferry charges—Validity as between renter and transferee where transfer is contrary to terms of license.

Where, by the terms of a lease of a ferry, the renter should not transfer or sub-rent the ferry, but such a transfer or sub-lease is not prohibited by Statute, or by a Rule framed under a Statute, a transfer of it will be valid as between the renter and his transferee, though it may be invalid as against Government.

SUIT to recover the balance due under an agreement by which plaintiff assigned his license to collect ferry charges to defendant. Defendant denied the assignment and his liability under the alleged agreement. The Subordinate Judge (sitting on the Small Cause side), found in plaintiff's favour on the agreement, and held that it was valid in law, though the receipts had been made out in plaintiff's favour, because the Revenue authorities would regard an assignment as invalid. He decreed the amount claimed.

* Civil Revision Petition No. 361 of 1901, presented under section 25 of Act IX of 1887, praying the High Court to revise the decree of K. Krishna Rau, Subordinate Judge of South Malabar at Calicut, dated 29th day of July 1901, in Small Cause Suit No. 160 of 1901.

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Defendant preferred this civil revision petition on the grounds that the suit was not maintainable, and that the assignment of the ferry was void in law as such assignments are prohibited by Government. He relied on the principle laid down in *Marudamuthu Pillai* v. *Rangasami Mooppan*(1).

M. Bhaskara Menon for petitioner.

V. Ryru Nambiar for respondent.

JUDGMENT.—One of the terms of the lease of ferries in the District of Malabar seems to be that the renter shall not transfer or sub-rent the ferry without the previous sanction of the Collector. But it does not appear that any rule was framed under section 16 of the Canals and Public Ferries Act (II of 1890 (Madras)), prohibiting such transfer or sub-lease. Though the transfer may be invalid against Government, it will be valid as between the renter and his assignee. The cases of *Bhikanbhai* v. *Hiralal*(2) and *Gauri Shankar* v. *Mumtaz Ali Khan*(3) support this position. The decision of this Court (*Marudamuthu Pillai* v. *Rangasami Mooppan*(1)) under the Abkári Act is inapplicable to the present case.

The petition is therefore dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Bashyam Ayyangar and Mr. Justice Moore.

1902. March 10, 25.

PARAMESHRI AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

VITTAPPA SHANBAGA AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Landlord and tenant—Permanent lease with covenant against alienation—Subsequent alienations—Suit to evict alienees—Maintainability—Transfer of Property Act—IV of 1882, *ss.* 10, 111 (*g*)—*Applicability of principles of the Act to lease executed prior to its enactment.*

In 1862, V leased certain land on permanent lease to Y, the instrument reciting that Y had no right to alienate the property. In 1890, Y sold the

(1) I.L.R., 24 Mad., 401. (2) I.L.R., 24 Bom., 622.
(3) I.L.R., 2 All., 411.

* Second Appeal No. 841 of 1900, presented against the decree of M. Achutan Nair, Subordinate Judge of South Canara, in Appeal Suit No. 39 of 1899, presented against the decree of V. C. Mascarenhas, District Munsif of Karkal, in Original Suit No. 185 of 1898.

PARAMESHRI v. VITTAPPA SHANBAGA.

holding to S. In 1892, plaintiff acquired the rights of the original lessor V, by purchase; in 1894, S sold the holding to the defendants. Plaintiff now sued to evict the defendants claiming that the alienation to them operated as a forfeiture of the lease. The lease contained no express condition to that effect, nor did it provide that, on breach of the stipulation against alienation, the lessor might re-enter:

Held, that the alienation did not entitle the plaintiff to terminate the permanent lease and re-enter upon the land.

SUIT to the evict tenants from land. The plaint recited that the land had been originally obtained on mulgeni, or permanent lease by one Yellappa Shetti, in 1862, from the then Mulgar, Venkatesha Pai, and alleged that the lessee had, by the terms of the lease, no right to alienate the holding. Plaintiff's title was derived by purchase in March 1892, from an intermediate purchaser from the heirs of Venkatesha Pai. Plaintiff alleged that Yellappa Shetti had, in 1890, sold the holding to one Sheshappaya, and that Sheshappaya had in 1894, sold it to the defendants, who had since occupied it. He claimed that the sale was opposed to the terms of the lease and invalidated it. Defendants admitted the mulgeni lease but denied plaintiff's rights to recover the holding, pleading that the lease contained no provision for forfeiture as a consequence of alienation. The lease, which was filed as exhibit A, was to the following effect:—

"Mulgeni chit, dated 24th April 1862, executed to Venkatesappa . . . . by Yellappa Shetti . . . . is as follows:—I have taken for mulgeni from you this day all property [describing it] and have settled a geni of . . . . for the same which I shall pay you every year in four instalments according to kistbandi and shall obtain a receipt from you. I have no right to alienate the said property, &c., to any body in any manner whatever. While I enjoy the said property by planting plantain plants and effecting improvements therein you have no reason to ask me either to surrender the said property or to claim more rent. If I do not require the said land and if by that time there are any improvements made by me I shall have only to sell them to you for the price fixed by four (respectable) persons and I shall have no right to sell them to any one else. If the geni for any year is left in arrears unpaid out of the said geni amount, I shall have no objection, &c., to your engaging the said property to any tenant that you please and enjoying the same. According to the Gadi mentioned in your sale deed I and my descendants shall have to enjoy the soil and fields watershed and springs rights and privileges, &c. Thus this mulgeni chit has been executed. [Signed] Yellappa Shetti."

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The District Munsif upheld this plea, and merely granted plaintiff a decree for certain rent that was in arrears, dismissing the suit in other respects. The Subordinate Judge held that alienation was forbidden by the terms of the lease, and that it was not necessary that a right of re-entry should be given in so many words. He modified the decree by adding a direction for the property to be surrendered to the plaintiffs.

Defendants preferred this second appeal.

C. V. Anantakrishna Ayyar for appellants.

C. Ramachandra Rau Saheb for respondents.

BHASHYAM AYYANGAR, J.—The plaintiffs (respondents) sue to evict the defendants (appellants) from the holding mentioned in the plaint on the ground that the permanent lease (mulgeni lease), dated 24th April 1862, under which defendants claim to hold the property, has become void by reason of its absolute assignment to them, in or about 1894, by one Sheshappaya, who in 1890, became the assignee of the lease from the original lessee Yellappa Shetti, and that by reason of such assignment in favour of the defendants there has been a forfeiture of the lease and the plaintiffs are entitled to re-enter. It was stipulated in the counterpart of the lease, exhibit A, that the lessee "had no right to alienate the holding to any body in any manner whatever" and that in the event of his "not requiring the land," he would sell the improvements, which he might have made upon the holding by that time, to the lessor alone, for a price that might be fixed by four respectable persons and that he would not sell the same to any one else. The construction placed by the Subordinate Judge upon the lessee's stipulation that he would not sell the same to any other person, that it refers to the land itself and not simply to the improvements is clearly erroneous and the repondents' pleader is unable to support such a construction.

The District Munsif held that there was no forfeiture of the lease by reason of the alienation and dismissed the plaintiffs' suit so far as it sought to recover possession of the holding. But the Subordinate Judge, on appeal, differed from the District Munsif and gave a decree in favour of the plaintiffs for possession of the land on the ground that it was not necessary that the right of

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re-entry should be provided for in express terms and that inasmuch as, under the terms of the lease, the lessee had no right to alienate and if he did not want the land, he was to sell the same to the lessor with improvements, if any, effected by him, it followed that by reason of the alienation made in favour of the defendants, "the lessor was entitled to have the sale set aside." As already stated the Subordinate Judge misconstrued the lease in holding that the lessee agreed to sell his interest in the land to the lessor.

The result of merely setting aside the sale would only be to restore the permanent lease-hold to the defendants' assignor and that would not entitle the plaintiffs to recover possession of the holding. The Subordinate Judge must be understood to mean that the plaintiffs are entitled to set aside the lease.

In my opinion the decision of the Subordinate Judge cannot be upheld and the decree of the District Munsif should be restored. Though the Transfer of Property Act, as such, may not be applicable to the case [sec 2 (*c*) and 117 of the Transfer of Property Act], yet the principle of law governing the case will be found clearly enunciated in sections 10 and 111 (*g*) of the Transfer of Property Act. Section 10 provides that in the case of a lease a condition absolutely restraining the lessee or any person claiming under him from alienating his interest in the property is not void where such condition is for the benefit of the lessor or those claiming under him. The stipulation that the lessee shall have no right to transfer his interest is clearly one intended for the benefit of the lessor and it would be unreasonable to hold, following the dictum in *Nil Madhar Sikdar* v. *Narattam Sikdar*(1) that the condition against alienation cannot be said to be for the benefit of the lessor and hence it is void under the provisions of section 10 of Act IV of 1882. The stipulation against alienation is not void but valid (*Vyankatraya* v. *Shivrambhat*(2)) and if the plaintiffs had sued for an injunction to restrain the defendants' assignor from making the assignment or sued for damages for breach of the stipulation, they would have been entitled to the remedy sought for (*Jivandas Keshavji* v. *Framji Nanabhai*(3), *Tamaya* v. *Timapa Ganjaya*(4), *McEachern* v. *Colton*(5) and Foa on 'Landlord and

(1) I.L.R., 17 Calc., 827. (2) I.L.R., 7 Bom., 256.
(3) I.L.R., 7 Bom., H.C.R., (A.C.T.) 69.
(4) I.L.R., 7 Bom., 262 at p. 265. (5) [1902] A.C., 104.

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Tenant,' 2nd edition, p. 211). It may also be that a transfer by the lessee, absolutely or by way of mortgage or sub-lease, in breach of the covenant not to alienate, will be void as against the lessor and he may realise arrears of rent due by the lessee, by attaching and selling his interest in the lease as effectually as if there had been no transfer by the lessee and the transfer will also be inoperative to secure to the transferee, as against the lessor, the benefit of the lessor's contract under section 108 (*c*) of the Transfer of Property Act. Assuming, therefore, that the stipulation against alienation is valid, the real question in the case is whether by reason of an alienation in breach of such stipulation, the permanent lease is determined, in the absence of an express condition providing that on breach of the stipulation against alienation, the lessor may re-enter or the lease shall become void. The fact that the landlord waived or did not enforce the forfeiture, if any, which took place by the first absolute assignment in 1890, would not disentitle him to enforce the forfeiture, if any, which subsequently accrued on the occasion of the second assignment in 1894. But the authorities are clear that in the absence of such express condition there will be no forfeiture of the lease (*Tamaya* v. *Timapa Ganpaya*(1), and *Nil Madhar Sikdar* v. *Narattam Sikdar*(2)). Even if there is no express provision for re-entry on breach of a stipulation against alienation, yet, if the lease were subject to a 'condition subsequent' that by alienation the lease shall become void, the lease would become void on breach of such condition and the lessor would be entitled to re-enter (Woodfall's 'Landlord and Tenant,' 16th edition, pp. 192–193, 328; Foa on 'Landlord and Tenant,' pp. 237–238; *Madar Saheb* v. *Sannabawa*(3). In the present case it is impossible to construe the lease either as reserving a right of re-entry on breach of the covenant not to alienate or as conditional on the lessee not making any alienation. The clause providing for sale of the improvements to the lessor himself and none else, when the lessee does not require the lands, is evidently intended to restrain the lessee from selling the improvements to a stranger, while surrendering the lease during the term thereof. A somewhat similar clause in a lease, with reference to which the case of *Narayan Dasappa* v. *Ali Saiba*(4).

(1) I.L.R., 7 Bom., 262. (2) I.L.R., 17 Calc., 826.
(3) I.L.R., 21 Bom., 195. (4) I.L.R., 18 Bom., 603.

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arose, was held not to give the lessor a right of re-entry by reason of the lessee having alienated the holding (at p. 605).

The difference between a provision against alienation which amounts merely to a 'covenant' not to alienate—a covenant which runs with the land (*McEachern* v. *Colton*(1))—and one which amounts to a 'condition' which dispenses with the express right of re-entry in the event of breach, is explained in Woodfall's 'Landlord and Tenant,' 16th edition, pp. 192–193, and in the English cases of *Shaw* v. *Coffin*(2), *Crawley* v. *Price*(3) and *Doe* v. *Watt*(4) cited in *Madar Saheb* v. *Sanabawa*(5).

I am therefore clearly of opinion that the alienation under which the defendants claim does not entitle the landlord to terminate the permanent lease and re-enter upon the land. The unreported decision of a Division Bench of this Court in Second Appeal No. 109 of 1879 cited in the judgment of the lower Appellate Court is strongly relied upon by the respondents in support of their contention that though no right of re-entry is reserved in the lease, yet a breach of the covenant against alienation works a forfeiture of the lease. That decision does seem, on the face of it, to support this contention, but it is opposed to the current of decisions above referred to and the law as laid down in the Transfer of Property Act which is in conformity with the English law.

The second appeal therefore must be allowed with costs both in this and in the lower Appellate Court and, in modification of the decree of the lower Appellate Court, so much of the decree of the District Munsif as was reversed by the lower Appellate Court must be restored.

MOORE, J.—I concur.

(1) L.R. [1902], A.C., 104.
(2) 14 C.B.N.S., 372.
(3) L.R., 10 Q.B., 302.
(4) 8 B. and C., 308.
(5) I.L.R., 21 Bom., 195, at p. 197.

APPELLATE CIVIL.

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

CHINNATHAMBI MUDALIAR (DEFENDANT), PETITIONER,

v.

VEERABADRIAH NAIDOO (PLAINTIFF), RESPONDENT.*

1902. March 24, 26.

Presidency Small Cause Courts Act—I of 1895, s. 38—New trial of contested cases—Application to set aside order restoring suit dismissed for default of appearance.

An application does not lie, under section 38 of the Presidency Small Cause Courts Act, to set aside an order of a Judge of the Court setting aside his previous order dismissing a suit for default of the plaintiff's appearance.

PETITION to revise an order of the Full Bench of the Court of Small Causes at Madras. On a suit being called on for hearing, the plaintiff failed to appear, whereupon the Judge dismissed the suit, and ordered the plaintiff to pay the costs of the defendant. Subsequently the Judge passed the following order:—"This *ex parte* decree has been set aside." The defendant then petitioned the Court of Small Causes against the order of the Judge restoring the suit. The application was heard by a Full Bench of the Court. The Judges concurred with the following judgment which was delivered by Mr. V. P. D. Rozario:—"In this case, in consequence of the plaintiff's failure to appear at the adjourned hearing of a contested suit, the suit was dismissed. On plaintiff's application, the order of dismissal, after notice to defendant, was set aside by the learned Judge and a day appointed for proceeding with the suit. The defendant applies to the Full Court to reverse the order setting aside the dismissal of the suit. I am of opinion that this application does not lie. Section 38 of the Presidency Small Cause Courts Act provides 'where a suit has been contested, the Small Cause Court may, on the application of either party made within eight days from the date of the decree or order in the suit (not being a decree passed under section 522 of the Code of Civil

* Civil Revision Petition No. 350 of 1901, presented under section 622 of the Code of Civil Procedure, praying the High Court to revise the order of the Full Bench of the Court of Small Causes, Madras, dated 26th August 1901, in Suit No. 19585 of 1900.

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Procedure), order a new trial to be held, or alter, set aside, or reverse the decree, or order, upon such terms as it thinks reasonable, and may, in the meantime, stay the proceedings. *Explanation.*—Every suit shall be deemed to be contested in which the decree is made otherwise than by consent of or in default of appearance by the defendant.' A contested suit was defined in the explanation as a suit in which a 'decree' is made. An order setting aside a dismissal for default is not a decree. 'Decree', as defined in rule 1 of the Small Cause Court Rules, means 'the formal expression of an adjudication upon any right claimed, or defence set up in a Civil Court, when such adjudication, so far as regards the Court expressing it, decides the suit or appeal.' The order in question is not an adjudication deciding the suit. The adjudication has yet to be made, and the effect of the order is to restore the suit for the purpose of such adjudication. It is contended by the defendant's vakil that a decree was made in this suit when the order was passed dismissing the plaintiff's suit for default. But that decree was in favour of the defendant and his present application is not to set aside that decree. The decree in the explanation clearly refers to the decree in the first paragraph of section 38, a decree which a party applies to set aside. But the defendant's vakil contends that under section 38 a party may apply to set aside a decree or order. But the first paragraph must be read with the explanation. A decree will include orders which are so far in the nature of decrees that unless and until set aside they put an end to the whole suit (*Soonderlal* v. *Goorprasad*(1)). The order in question did not put an end to the suit. It was not in the nature of a decree, and, no order of the nature of a decree having been made, it is not competent to the defendant to apply to set aside the 'order.' The omission of "order" in the Explanation appears to me to show that the legislature intended that a decree (or order having the force of a decree) adverse to the party, to be a condition necessary for an application to be allowed whenever an interlocutory order is made in the suit. Such a provision would not be in harmony with the object of the Small Cause Courts Act finality of decision and might lead to this consequence that a party who has appealed from an order before a decree is made may, in the end, be successful in the suit. In that case he would have

(1) I.L.R., 23 Bom., 425.

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been putting the Court in motion unnecessarily. I would dismiss the application with costs."

Against that decision, defendant presented this civil revision petition.

Bhashyam Ayyangar for petitioner.

A. G. Veerabhadriah Naidu for respondent.

Sir ARNOLD WHITE, C.J.—I think the construction which has been placed on section 38 of the Presidency Small Cause Courts Act by the Full Bench of the Small Cause Court is right and that an application does not lie to the Full Bench of the Court to set aside an order of a Judge of that Court setting aside his order dismissing a suit for default of appearance. I think the words "decree or order" in the section mean decree or order having the effect of a decree, and that the words "in which the decree is made" in the explanation mean in which the decree which it is sought to alter, set aside, or reverse is made. The petition is dismissed.

BENSON, J.—I agree with the Full Bench of the Small Cause Court that an application does not lie under section 38 of the Presidency Small Cause Courts Act to set aside an order of a Judge of the Court setting aside his order dismissing a suit for default of plaintiff's appearance. An order setting aside such a dismissal of a suit is not a decree, nor is it an order having the force of a decree. The explanation to section 38 shows that it is only where there is a decree (which word includes an order having the force of a decree) that a suit is said to be "contested" within the meaning of section 38 so as to give the Court power to set aside the decree. As observed by the Full Bench, it would be contrary to the scheme and policy of the Small Cause Courts Act to allow an appeal against interlocutory orders.

I would dismiss the petition.

APPELLATE CIVIL.

Before Mr. Justice Benson.

1902. March 27.

SATURLURI SEETARAMANUJA CHARYULU, PETITIONER,

v.

NANDURI SEETAPATI AND ANOTHER, COUNTER-PETITIONERS.*

Religious Endowments Act—XX of 1863, s. 18—Leave to institute suit—Necessity for showing exercise of control by Board of Revenue.

For a Court to have jurisdiction to grant sanction, under section 18 of the Religious Endowments Act, to institute a suit, it is not necessary for it to be shown that the Board of Revenue has actually exercised control over the temple in question. *Muthu* v. *Gangathara*, (I.L.R., 17 Mad., 95), explained.

PETITION, under section 18 of Act XX of 1863, for sanction to institute a suit. The District Judge passed the following order:—"The application is opposed on the ground among others that the temple was not under the management of the Revenue Board, and transferred to the Darmakartas, and that therefore sanction should not be granted. *Muthu* v. *Gangathara*(1) is relied on. On the other side, *Sivayya* v. *Rami Reddy*(2) is quoted, but it did not overrule the previous decision. The petitioner states that counter-petitioners are hereditary trustees of the Venugopalasawmi temple, to which certain land is an endowment. To entitle the petitioners to sanction, it should appear that Madras Regulation VII of 1817 was applicable to the temple. As to whether Regulation VII of 1817 applied to the Venugopalasawmi temple, an extract from the Inam fair register (exhibit A) shows that there was an Inam belonging to the temple. It does not show that the temple was either under the direct management of Board of Revenue or that the Darmakartas were under its management. It is not shown that petitioner is entitled to the sanction prayed for." He dismissed the application. Against that order of dismissal, the petitioner preferred this Civil Revision Petition.

* Civil Revision Petition No. 347 of 1901, presented under section 622 of the Code of Civil Procedure, praying the High Court to revise the order of W. C Holmes, District Judge of Kistna, dated 19th April 1901, passed on Civil Miscellaneous Petition No. 610 of 1900.

(1) I.L.R., 17 Mad., 95. (2) I.L.R., 22 Mad., 223.

V. Ramesam for petitioner.

V. Krishnasvami Ayyar for respondents.

JUDGMENT.—The learned District Judge has held that he had no jurisdiction to grant sanction under section 18 of Act XX of 1863, because it is not shown that the temple referred to in the petition before him had been under the management of the Board of Revenue or that its Darmakartas had been under its management, and he has referred to the case of *Muthu* v. *Gangathara*(1). It may, I think, be doubted whether this Court intended to hold in that case that section 14 of Act XX of 1863 applied only to cases to which Regulation VII of 1817 was applicable. If it did do so, the decision was in conflict with the express ruling in the case of *Fakurudin Sahib* v. *Ackeni Sahib*(2). It certainly did not hold, as the District Judge holds, that it is necessary to show that the Board of Revenue had actually exercised control. That such actual control is not a condition necessary to make Act XX of 1863 applicable is clear also from the other case to which the District Judge refers (viz., that reported in *Sivayya* v. *Rami Reddy*(3)). I think that the District Judge has misunderstood the scope of sections 14 and 18 of Act XX of 1863, and has in consequence failed to exercise a jurisdiction vested in him by law by refusing to deal with the petition on its merits. I set aside his order and direct him to restore the petition to his file and dispose of it according to law. Costs in this Court will abide and follow the event.

(1) I.L.R., 17 Mad., 95. (2) I.L.R., 2 Mad., 197.
(3) I.L.R., 22 Mad., 223.

APPELLATE CIVIL.

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

1902. April 24, 25.

SUBBA NAIDU AND ANOTHER (FIRST AND THIRD DEFENDANTS), APPELLANTS,

v.

HAJI BADSHA SAHIB AND THREE OTHERS (PLAINTIFFS AND SECOND DEFENDANT), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 493—Temporary injunction—Specific Relief Act—I of 1877, ss. 54, 56, 57—Breach of negative covenant—Injunction.

Plaintiffs advanced money to the defendants for the purpose of carrying on work in certain mica mines, in pursuance of an agreement by which defendants undertook, in consideration of the advance, to send all the mica produced from the mines to plaintiffs and bound themselves not to send any of it to any firm other than plaintiffs', or keep any in stock. Plaintiffs now complained that defendants had, in breach of their agreement, arranged to consign and had already made consignments of mica to another firm and were keeping mica in stock. Plaintiffs filed this suit for specific performance and for an injunction restraining defendants from acting in violation of the terms of the agreement; a temporary injunction was subsequently applied for and obtained. Upon an appeal being preferred by defendants against the order granting the temporary injunction:

Held, that the injunction was rightly granted.

The granting of such an injunction, under section 493 of the Code of Civil Procedure, is a matter of judicial discretion. Whether the principles which govern the grant of a temporary injunction under the Code of Civil Procedure are the same as those which are laid down in the Specific Relief Act relating to the grant of a perpetual injunction.—*Quære*.

Nusserwanji Merwanji Panday v. *Gordon*, (I.L.R., 6 Bom., 266), referred to.

SUIT for an injunction. Plaintiffs were merchants carrying on business in Madras, and defendants were mica miners and merchants carrying on business as such in partnership in Nellore. The plaint alleged that by a registered agreement, dated 9th June 1899, executed at Madras by the plaintiffs and defendants, the latter agreed, in consideration of a sum of Rs. 10,000 advanced to them without interest by plaintiffs, as capital for their mica mining business, to consign all mica produced in their mines to plaintiffs at Madras for sale upon terms set forth in the agreement. The material portions of this agreement are to be found in the judgment

* Appeal No. 19 of 1902 from a decree of the High Court of Judicature, Madras, in the exercise of its ordinary original civil jurisdiction, made in Civil Suit No. 49 of 1902, dated 9th April 1902.

of the Chief Justice. On 7th November 1901, a mortgage agreement was entered into between plaintiffs and defendants Nos. 1 and 3, the effect of which is also given in the judgment. Plaintiffs alleged that the Rs. 10,000 had been duly advanced by them in pursuance of the agreement and that mica had been consigned to them by defendants until November 1901, when the consignments ceased, though large quantities of mica had since been collected and stored by defendants. They complained that defendants had, in contravention of the agreement of 9th June 1899, entered into an agreement with a third party to consign mica to him instead of to plaintiffs and had, in fact, consigned 231 cases to him. They alleged that defendants Nos. 1 and 3, the principal partners, had, by the mortgage of 7th November 1901, agreed to discharge large debts due by them to plaintiffs out of the shares of the drawings against the consignments of mica to be made to plaintiffs, and declared that unless defendants were restrained by perpetual injunction from acting in violation of the terms of the agreement and from consigning mica through others, plaintiffs would sustain large and irreparable loss. They prayed that defendants might be directed specifically to carry out and act according to the terms of the agreement of 9th June 1899; for a perpetual injunction; for a temporary injunction restraining defendants from dealing with the 231 cases of mica pending disposal of the suit; and, in case specific performance should not be granted, for an account and damages. The Court was subsequently moved, and an interim injunction was granted, which was subsequently ordered to be continued till the hearing of the suit.

Against that order, defendants preferred this appeal.

Mr. *R. F. Grant* and Mr. *W. Barton* for appellants.

The Advocate-General (Hon. Mr. *J. P. Wallis*) and Mr. *Allan Daly* for respondent No. 4.

The Hon. Mr. *Eardley Norton* and Mr. *K. Brown* for respondents Nos. 1 to 3.

Sir ARNOLD WHITE, C.J.—This is an appeal from an order of Mr. Justice Boddam by way of an interlocutory or temporary injunction. On the 9th of June 1899 the plaintiffs and the defendants entered into an agreement, of which the provisions which are material for the purposes of the question now before the Court are as follows:—

Paragraph 1 says "for the purpose of carrying on the said mica mining work the said firm shall advance to the said Ansar

SUBBA NAIDU v. HAJI BADSHA SAHIB.

Subba Naidu, Mahomed Khyruddin Sahib and Makina Kondappa Naidu to enable them to carry on the same the sum of Rs. 10,000 only without interest."

Paragraph 2 says "that for these considerations the defendants agree to deliver at the godowns of the plaintiffs at Madras all mica produced by the mines worked by them as aforesaid."

Paragraph 6 says "the defendants bind themselves to consign all mica produced by their mines worked by them to the plaintiffs upon the terms agreed to between the parties and they bind themselves that they will not directly or indirectly, either in their own names or in the names of their servants, relatives or others, deliver for sale or dispose of otherwise or keep in stock anywhere outside the mines any mica produced from the mines worked by them or on their behalf to any one other than the said firm for a period of nine years from the date of this agreement."

Paragraph 20 says "on the expiry of the period of nine years the defendants will refund the amount of Rs. 10,000 advanced to them for carrying on all their mining work."

On the 7th of November 1901 a mortgage agreement was entered into between the plaintiffs and the first and third defendants. The mortgage agreement no doubt placed matters upon a new footing. But the mortgage agreement does not relieve the defendants from their positive obligation to consign all their mica to the plaintiffs during the currency of the agreement or from their negative obligation not to consign the mica to third parties during that period. Neither of these obligations is qualified or modified by the terms of the mortgage-deed of November 1901. Now, the injunction which has been granted by the learned Judge is in these terms:—"That the defendants, their agents and all persons claiming through or under them be restrained from moving, consigning, selling, alienating or disposing of 231 cases of mica marked with certain letters now in the Madras Salt Cotaurs or elsewhere and all or any such other mica as may be produced from the defendants' mines pending the further order of this Court." Mr. Grant's first contention was this. He says that inasmuch as the positive covenant could not be enforced by a decree for specific performance, a breach of the negative covenant ought not to be restrained by an injunction. Now, we are relieved from considering the question as to whether the positive covenant in this case can or cannot be specifically enforced, because it is conceded by the counsel on behalf of the plaintiffs that it cannot. In this state of things,

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therefore, it has to be considered whether, under the law of this country, a breach of the negative covenant not to consign to third parties can be restrained by injunction. The law with regard to the granting of permanent injunctions is regulated by the provisions of the Specific Relief Act. Section 56 says an injunction cannot be granted in certain specified cases, including an injunction to prevent the breach of a contract, the performance of which would not be specifically enforced. That is clause (*f*) of section 56.

Section 57 says "Notwithstanding section 56, clause (*f*), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, expressed or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement, provided the applicant has not failed to perform the contract so far as it is binding on him."

Then, section 54, which is the first section of chapter X which deals with perpetual injunctions, is as follows:—"Subject to the other provisions contained in, or referred to by, this chapter, a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant whether expressly or by implication. When such obligation arises from contract, the Court shall be guided by the rules and provisions contained in chapter II of this Act."

Now, some of the rules and provisions are to be found in section 21, which speaks of contracts which cannot be specifically enforced, and one of the contracts which under that section cannot be specifically enforced is referred to in paragraph (*b*)—"a contract which runs into such minute or numerous details, or which is dependent on the personal qualifications or volition of the parties, or otherwise from its nature, is such, that the Court cannot enforce specific performance, of its material terms," and Mr. Grant's proposition of law is that section 57 only applies to the case of contracts which are specified in section 21, clause (*b*). In other words, he says that section 57 only applies to cases which I may describe compendiously as cases like *Lumley* v. *Wagner*(1). There is certainly nothing in the words of section 57 to suggest that so narrow a construction should be placed upon it. The section is

(1) 1 D.M.G., 604.

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really a proviso to section 56, which cuts down the operation of the preceding section. Mr. Grant has been unable to cite any decision of the Courts in this country in support of the proposition which he put forward, though no doubt there are expressions of opinion in the text-books which support his proposition. The authorities, such as there are, are against the proposition which he invites us to adopt. Although the facts in *Madras Railway Company* v. *Rust*(1) are not precisely the same as those in the present case, it supports the view that section 57 means what it says and that it is not to be cut down as Mr. Grant suggests. That decision no doubt was only the decision of a single Judge. With reference to the point the learned Judge says, "It is argued that when the remedy by specific performance of a contract is expressly refused by chapter II of the Specific Relief Act, then, by virtue of section 54, clause (2), an injunction cannot be granted, and therefore that this contract being one extending over more than three years, and therefore not capable by section 21, clause (*g*) of specific performance cannot be the subject of an injunction. It seems to me that this argument would make section 57 of the Act a nullity." In that case Mr. Grant appeared as counsel and he advanced precisely the same argument which he advanced to-day. In that case the Court declined to adopt his argument and I think rightly. As regards *Charlesworth* v. *MacDonald*(2) I do not think it can be said to afford us any assistance, because the question in that case arose in Zanzibar, where the Specific Relief Act has no application. With regard to Mr. Grant's contention that section 57 only applies to what I have described as cases like *Lumley* v. *Wagner*(3), it has to be observed that one of the illustrations to section 57, viz., illustration *c* is a re-production of the decision in *Lumley* v. *Wagner*(3). But that is only one of the five illustrations. The other illustrations relate to facts which are quite distinct from the facts which were in question in *Lumley* v. *Wagner*(3). That, I should have thought, was decisive as to the question whether the Legislature intended that section 57 should only apply to cases falling under section 21 (*b*). If the Legislature intended that section 21 should apply nothing would have been easier than to have said so. It seems

(1) I.L.R., 14 Mad., 18. (2) I.L.R., 23 Bom., 103.
(3) 1 D.M.G., 604.

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to me it may well be that the Legislature designedly adopted these general terms for the purpose of avoiding in this country the difficulties which have arisen in the English Courts with regard to cases of this character—difficulties which resulted in the English authorities being somewhat confused and not altogether reconcileable.

As regards section 57, it comes to this. Can it be said that the applicant has failed to perform the contract so far as it is binding on him? Because, if he has failed to perform the contract so far as it is binding on him, then, by the express words of the proviso to section 57 he will not be entitled to any relief. Now, what is the evidence before the Judge when he made the order which is sought to be set aside. First he had the affidavit which was filed on behalf of the plaintiffs. I need refer to only one or two paragraphs. Paragraph 2 refers to the terms of the agreement and the third paragraph says "that the defendants consigned mica to us at Madras only up to November 1901 but have failed to consign any further mica although I am informed and believe they have large quantities of mica collected and stored since that date." Paragraph 5 says "That the first and third defendants have entered into an agreement with one Venkata Subbiah to consign through him for sale all the mica produced in the defendants' mines." Paragraph 7 says "In pursuance of the fraudulent agreement with the said person, the first and third defendants have consigned for sale by him mica which was produced by the defendants' mines since November 1901 consisting of 231 cases or thereabouts and valued at Rs. 40,000 or thereabouts and the said cases, I am informed and believe, have arrived by rail at the Salt Cotaurs, Madras, and marked (with certain letters) instead of the usual mark indicating my firm." These are the material allegations in the affidavit of the plaintiff. A very long affidavit was filed on behalf of the defendants. With regard to that affidavit I have not the least hesitation in holding nineteen-twentieths of it to be wholly irrelevant to the question which we have to consider. I have given the best attention I can to this affidavit and the conclusion I have come to is that it does not show that the plaintiffs failed to perform their contract in so far as it was binding upon them.

But having regard to the admissions which the defendants themselves make in their affidavit and reading the allegations in

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the affidavit filed on behalf of the plaintiffs by the light of these admissions, it seems to me that if the plaintiffs have failed to perform their part of the contract, their failure is the direct result of the deliberate breach of the contract by the defendants. If this is so, it does not lie in the mouths of the defendants to say that plaintiffs have failed to perform the contract so far as it was binding upon them. But, as I have said, I think there is nothing on evidence to show that the plaintiffs failed to perform the contract so far as it was binding on them. Of course it has to be borne in mind that the injunction granted in the present case was not a permanent injunction, the law with regard to which is laid down in the Specific Relief Act; but a temporary injunction, the law with regard to which is regulated by the provisions of the Civil Procedure Code. Section 493, Civil Procedure Code, is quite general and says "In any suit for restraining the defendant from committing a breach of contract or other injury, whether compensation be claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right." The granting of a temporary injunction under the powers conferred by this section is a matter of discretion. True it is a matter of judicial discretion. But if the Court which grants the injunction rightly appreciates the facts and applies to those facts the true principles, then that is a sound exercise of judicial discretion. With regard to this part of the case, Mr. Grant contended that the issue of an interlocutory or temporary injunction is governed by precisely the same principles as the granting of a permanent injunction at the trial of the case, and in support of that proposition he referred to an observation of Sir Charles Sargent in *Nusserwanji Merwanji Panday* v. *Gordon*(1). The observation is at page 279 of the report and there the learned Judge says, "It is plain, however, that, apart from the special circumstances which determine whether the Court should in its discretion grant an injunction

(1) I.L.R., 6 Bom., 266.

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before the hearing of the suit, the same general principles must equally apply to the granting of a temporary injunction as to a perpetual injunction, and those principles must, therefore, be sought in the Specific Relief Act itself." Now, having regard to the fact that the law with regard to the granting of a perpetual injunction is to be found in the Specific Relief Act and is laid down with great precision and that the law with regard to the granting of a temporary injunction is to be found in the Civil Procedure Code and is declared to be a matter for discretion, if it were necessary to consider the point I am not sure I should be prepared to go quite so far as Sir Charles Sargent. However, it is not necessary to consider that point now, because, so far as this case is concerned I am prepared to go so far, and I say that the conduct of the plaintiffs has not been such that the Court will decline to give them any relief by way of a permanent or temporary injunction. Here, can it be said that the conduct of the plaintiffs has been such as to disentitle them to an injunction. That has to be considered with reference to the allegations made in the affidavit filed on behalf of the defendants. With regard to that I do not desire to repeat the observation which I have made.

Various other grounds were urged by Mr. Grant as reasons why this injunction ought not to be allowed to go, and he referred to the offer which was made by the defendants at the bar. It has been decided, at any rate in England, that an injunction was rightly refused on account of the conduct of the plaintiffs in refusing an offer made by the defendants, there being no suggestion that the offer would not be carried out. The facts in that case are widely different from the facts in the present case. In the present case, even if the offer is accepted, there is considerable doubt whether, having regard to the financial position of the defendants, the offer would in fact be carried out. Then, Mr. Grant referred to the balance of convenience and he cited numerous English authorities in which it was held on the facts of those particular cases that the balance of convenience was not in favour of the injunction going. All I say with regard to this case is that on the evidence as it now stands I am not satisfied that the balance of convenience is not in favour of the injunction in the form in which it was issued. The matter is one of judicial discretion, and it seems to me the learned Judge in making the

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order did exercise a sound judicial discretion and his order was right. I think this appeal should be dismissed with costs of plaintiffs and second defendant.

BENSON, J.—I concur.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice.

1902. February 21, 25.

RAMASAMY CHETTIAR (FIRST DEFENDANT), PETITIONER,

v.

R. G. ORR AND TWO OTHERS (PLAINTIFFS), RESPONDENTS.*

Provincial Small Cause Courts Act—IX of 1887, *sched. II—Suit for damages for breach of covenant not to cut and carry away trees—Jurisdiction of Small Cause Court—Civil Procedure Code—Act XIV of* 1882, *s.* 622—*Suit brought on the ordinary side of Court though maintainable on the Small Cause side—Revision by High Court—Jurisdiction.*

By an agreement between a landlord and his tenants, it was recited that the landlord had authorised his tenants to enjoy all his rights, and the tenants covenanted not to cut trees growing on the estate. The landlord's rights included the right to cut certain green trees for his own use and certain other green trees for agricultural purposes, as well as all trees planted by himself, at his option, and he was further entitled to take and use all decayed and fallen trees. The landlord sued the tenants to recover Rs. 20, being the value of trees which, it was alleged, the tenants had cut and taken away. The suit was instituted on the ordinary side of the Court of First Instance, and no objection was raised either there or on appeal, as to the competency of that Court to entertain it. The District Munsif passed a decree in plaintiffs' favour for a portion of the amount claimed, which was increased by Rs. 1-8-0 by the Subordinate Judge, on appeal. Upon a civil revision petition being filed in the High Court:

Held, that the suit was one for damages for breach of covenant and as such was cognizable by a Court of Small Causes, and that the Court in which it had been instituted had no jurisdiction to entertain it:

Held also, that where it appears that the Court of First Instance, or of appeal, has exercised a jurisdiction not vested in it by law the High Court is bound to interfere under its revisional powers.

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* Civil Revision Petition Nos. 200 and 201 of 1901, presented under section 622 of the Code of Civil Procedure, praying the High Court to revise the decree of T. M. Rangachari, Subordinate Judge of Madura (West), in Appeal Suits Nos. 401 and 387 of 1900, presented against the decree of P. S. Seshiah, District Munsif of Sivaganga, in Original Suit No. 228 of 1898.

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SUIT to recover the value of trees cut and carried away. The facts are fully set out in the judgment.

V. Kishnasvami Ayyar for petitioner.

P. S. Sivasami Ayyar for respondents.

JUDGMENT.—In this case the defendants are the tenants of the plaintiffs under an agreement, dated 10th April 1889, filed as exhibit A in the case. The first paragraph of the agreement recites that the plaintiffs had leased to the defendants certain villages at a certain rent. The third paragraph of the agreement states that "You [meaning the plaintiffs] have authorised us [the defendants] to enjoy all your rights in the said villages for the said period of 19 years including certain rights to which you [the plaintiffs] are entitled in the zamindari." The lease agreement contains this covenant:—"We [the defendants] shall not cut nor shall permit any one to cut the trees which have been already taxed or which are liable to be taxed or which are growing in the zamindari forests." The rights of the plaintiffs referred to in paragraph 3 of the agreement have to be ascertained by reference to the agreement between the plaintiffs and the Zamindar. By a supplemental agreement between the plaintiffs and the Zamindar, which is exhibit II in the case, the parties covenanted in the following terms:—"The lessees [plaintiffs] may cut green trees standing in beds of tanks for their own use and may also cut green trees in other places for agricultural purposes as well as cut at their option all trees planted by themselves and are further entitled to take for their own use all decayed and fallen trees, but the lessor may cut firewood for the use of his own personal household." The present suit was brought by the plaintiffs against the defendants to recover a sum of Rs. 20 which was alleged to be the value of nine trees which the defendants were alleged to have cut and carried away. The prayer in the plaint is a prayer for a decree for the value of the trees cut and carried away. The suit was instituted on the ordinary side of the Court of First Instance and no objection was taken that it was not competent for the Court on its ordinary side to entertain the suit. There was an appeal and no objection was taken by the defendants to the jurisdiction of the Court. The point is now raised by the defendants that this is a suit which is cognizable by a Court of Small Causes. Section 16 of the Provincial Small Cause Courts Act is in these terms:—"Save as expressly provided by this Act or by any other enactment

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for the time being in force, a suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable." It has been argued by Mr. Sivaswami Aiyar on behalf of the plaintiffs that this suit is not a suit which is cognizable by a Court of Small Causes. He says that the suit falls within the words of article 31 of the schedule to the Provincial Small Cause Courts Act. These words are "any other suit for an account including a suit by a mortgagor, after the mortgage has been satisfied, to recover surplus collections received by the mortgagee, and a suit for the profits of immoveable property belonging to the plaintiffs which have been wrongfully received by the defendant." I find it impossible to construe the words of that article as applying to a suit of the kind now before me. It seems to me to be perfectly clear, I should have said beyond argument, if it had not been for the ingenious argument addressed to me by Mr. Sivaswami Aiyar, that this is a suit for damages for breach of covenant, and it is impossible to regard the suit as a suit for profits of immoveable property which have been wrongfully received by the defendants. That being so, I am bound to hold that the Court before which this suit was instituted, had no jurisdiction to entertain the suit. It is perfectly clear that the objection as to jurisdiction cannot be given up by consent, nor can it be waived. This is well settled law and it was so laid down in express terms by the Privy Council in the case of *Minakshi Naidu* v. *Subrahmania Sastri*(1).

Then, the further question arises,—am I bound to interfere and exercise the powers which are conferred on the High Court by section 622 of the Code of Civil Procedure? Mr. Sivaswami Aiyar has argued that I am not bound to exercise those powers and that I ought not to interfere in the special circumstances of this case. He referred to two authorities in support of the proposition that I ought not to interfere unless I am satisfied that injustice has been done. The two cases to which he referred are those of *Nathekhavalad Bhekhankha* v. *Abdul Alli*(2) and *Ghasiti* v. *Umrao Jan*(3). These cases have really no bearing upon the point I have to consider. It seems to me that if I am satisfied that the Court of

(1) I.L.R., 11 Mad., 26. (2) I.L.R., 18 Bom., 449.
(3) I.L.R., 21 Calc., 149 at p. 152.

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First Instance or the Court of Appeal exercised a jurisdiction not vested in it by law, I am bound to interfere and exercise the powers conferred by the section. I am driven to hold that the Courts in this case have exercised a jurisdiction not vested in them by law. I confess I would be glad to find some mode of escape; but in my opinion I have no alternative but to set aside all the proceedings in this suit and to direct that the plaint be returned for presentation to the proper Court. I make no order as to costs of these petitions.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice.

RAMANATHAN CHETTIAR (PETITIONER),

1902. February 27

v.

SUBRAMANIA SASTRIAL AND FIVE OTHERS (COUNTER-PETITIONERS).*

Civil Procedure Code—Act XIV of 1882, s. 295—Rateable distribution of proceeds of execution sale—"Prior to the realisation"—"Same judgment-debtor."

The properties of a judgment-debtor were brought to sale, at the instance of one judgment-creditor, in two parcels. After the proceeds of sale of the first parcel had been paid into Court and before the proceeds of sale of the second parcel had been so paid in, the petitioner (also an execution-creditor) applied under section 295 of the Code of Civil Procedure for a rateable distribution:

Held, that he was entitled to participate in a rateable distribution in the proceeds of sale of both parcels, the assets having been realised, within the meaning of the section, when the whole of the proceeds of the property sold in execution of the decree were paid into Court, and his application having been filed prior to such realization. *Tiruchittambala Chetti* v. *Seshayyangar*, (I.L.R., 4 Mad., 384), referred to.

The decree of one of the judgment-creditors above referred to was against a father, whilst the decree of the other judgment-creditor was against the father and his son, but the properties from which the assets had been realized by sale were the ancestral properties of the family of which the father and son were undivided members:

Held, that the decrees were "against the same judgment-debtor" for the purposes of section 295.

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* Civil Revision Petition No. 42 of 1901, presented under section 622 of the Code of Civil Procedure praying the High Court to revise the order of P. S. Gurumurti, Subordinate Judge of Kumbakonam, dated 22nd November 1901, in Civil Miscellaneous Proceedings, No. 880 of 1900 (Original Suit No. 11 of 1899).

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PETITION for rateable distribution of assets realised by the sale of a judgment-debtor's properties. The properties had been sold, at the instance of another judgment-creditor, in two parcels, each of which contained two items. The proceeds of the first parcel had been paid into the Court of the Subordinate Judge prior to the date upon which the execution petition of the petitioner had been filed. The proceeds of the second parcel were paid in subsequently. The Subordinate Judge referred to *Tiruchittambala Chetti* v. *Seshayyangar*(1) and *Srinivasa Ayyangar* v. *Seetharamayyar*(2) and decided that petitioner was only entitled to rateable distribution of the proceeds which were paid into Court subsequently to the filing of his execution petition.

Against that order petitioner filed this civil revision petition.

V. C. Desikachariar for petitioner.

T. R. Venkatarama Sastri for counter-petitioner.

JUDGMENT.—This is a petition against an order for rateable distribution made under section 295, Code of Civil Procedure. For the sake of convenience I will refer to the judgment-creditor at whose instance the land was sold in execution as judgment-creditor No. 1 and to the judgment-creditor who made the application to the Subordinate Judge's Court under section 295 and who is the petitioner before this Court as judgment-creditor No. 2. The land which was sold in execution at the instance of judgment-creditor No. 1 was sold in parcels, or in four items and it would seem that these four items exhaust the whole land which was sold in execution of the decree in question. Now, judgment-creditor No. 2 put in his application under section 295, Civil Procedure Code, before the proceeds of the sale of items 3 and 4 had been paid into Court and after the proceeds of the sale of items 1 and 2 had been paid into Court and in this state of things the Subordinate Judge held that as regards the proceeds of the sale of items 3 and 4 the petitioner was entitled to participate by way of rateable distribution together with judgment-creditor No. 1, but as regards the sale-proceeds of items 1 and 2 he held that he was not entitled to participate, because his application was made after the sale-proceeds of these two items had been paid into Court. Now, in so holding I think that he was wrong. The question turns upon the construction of section 295, Civil Procedure Code.

(1) I.L.R., 4 Mad., 383. (2) I.L.R., 19 Mad., 72.

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It seems to me that the word "assets" in section 295 means the proceeds of the sale of the property which is sold in execution of the decree. As far as the present case is concerned I am of opinion that the assets were realized when the whole of the proceeds were paid into Court. At the time the petitioner (judgment-creditor No. 2) applied under section 295, Civil Procedure Code, in my opinion the assets had not been realised for the purpose of the section. Only a portion of the assets had been realised. It seems to me, therefore, that as regards items 1 and 2 as well as regards the proceeds of items 3 and 4 the application can fairly be said to have been made prior to the realization of the proceeds of the property which was sold in execution of the decree. This appears to me to be a reasonable construction to place upon the words. It certainly does not do violence to the express terms of the section and I do not read the judgment in the case of *Tiruchittambala Chetti* v. *Seshayyangar*(1) as precluding me from adopting this construction. I decide this case upon the facts which appear on the record or which were admitted in the course of the argument and I do not propose to consider the general question of construction which was raised in *Hafez Mahomed Ali Khan* v. *Damodar Pramanick*(2). It is not necessary for me to say whether I should be disposed to adopt the construction which the Calcutta High Court, as a general question of construction, placed upon the words "whenever assets are realized." In my judgment the petitioner is entitled to participate in the sale-proceeds of items 1 and 2 as well as of items 3 and 4, and I think the case must go back to the Subordinate Judge with a direction that he must deal with it upon that footing.

Now it has been further argued on behalf of judgment-creditor No. 1 that the order made on the application of judgment-creditor No. 2 is bad in its entirety on the ground that the judgment-debtor of judgment-creditor No. 1 is not "the same judgment-debtor" of judgment-creditor No. 2 within the meaning of those words as they occur in section 295, Civil Procedure Code.

Now, it is proved or admitted that the decree of judgment-creditor No. 2 is against the father and the decree of judgment-creditor No. 1 is against the father and son, and it is admitted that the property from which the assets were realized by the sale

(1) I.L.R., 4 Mad., 383. (2) I.L.R., 18 Calc., 244.

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was the ancestral property of the family of which the father and the son are undivided members; and in that state of things the Subordinate Judge has held that the judgment-debtors are the same for the purposes of section 295 of the Code, and I think he was right in so holding. I do not say that this point is precisely covered by the decision of this Court in the case of *Grant* v. *Subramaniam*(1), but that case certainly seems to me to go a long way towards establishing the contention which is relied upon on behalf of judgment-creditor No. 2, the petitioner in this case. Then with regard to the Bombay cases, I think they can all be distinguished. As regards the case of *Nimbaji Tulsiram* v. *Vadiavenkati*(2), the property attached was not the ancestral property of the defendants in the two suits. In the present case it is the ancestral property. Then, again, in the case of *Govind Abaji Jakhadi* v. *Mohoniraj Vinayak Jakhadi*(3) there was one decree against the father and other against the son. Here, we have a decree against the father and a decree against the father and the son. It seems to me, therefore, as I have said, the Subordinate Judge was right in holding that the judgment-debtors were the same for the purposes of section 295, Civil Procedure Code. I have dealt with this question but I think it is extremely doubtful whether it is competent for judgment-creditor No. 1 to raise the point at all now without having made substantive application for the revision of the order made by the Subordinate Judge, and which is recited in the order now before this Court as an order made by him on Petition No. 761 of 1900.

As regards the main point which has been argued in this revision petition it is not altogether free from doubt and the authorities on the point are not uniform. In that state of things I do not consider it necessary that I should make any order with regard to the costs of this petition, but the result will be that the case will have to go back to the Subordinate Judge with the direction that he must deal with it on the footing that the petitioner is entitled to participate in the sale-proceeds of items 1 and 2 as well as items 3 and 4.

(1) I.L.R., 22 Mad., 241. (2) I.L.R., 16 Bom., 683.
(3) I.L.R., 25 Bom., 494.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

1903. March 18.

SRI RAJA PAPAMMA RAO BAHADUR, ZAMINDAR GARU (HAVING SUBSEQUENTLY DIED), D. JAGANNADHA RAO PANTULU GARU, RECEIVER OF NIDADAVOLE ESTATE (DEFENDANT), APPELLANT,

v.

NIDAMARTI UMMAYYA (PLAINTIFF), RESPONDENT.*

Rent Recovery Act— Madras Act VIII of 1865, *s.* 20.

A landlord distrained cattle, belonging to his tenant, for arrears of rent. The distraint was held, in a suit, to be illegal, the judgment being delivered on 7th September 1898. Out of 17 animals which were distrained, only 11 were restored to plaintiff, the date of their restoration being 28th November 1898. Of those which were not restored, four died more than thirty days prior to the institution of the suit; one died within thirty days of suit, and one died after the suit had been filed. Upon a summary suit being filed by the tenant to recover the value of the cattle illegally distrained:

Held, that the cause of action arose on the date of the death of the cattle, and that plaintiff was only entitled to recover the value of one animal. *Also*, that he would have been entitled to recover the loss sustained by being deprived of the services of the cattle, had he so framed his suit.

SUMMARY suit under the Rent Recovery Act to recover the value of cattle illegally distrained. Plaintiff was a tenant of first defendant. On 6th July 1898 defendant distrained 17 head of cattle for arrears of rent. The distraint was held to be illegal in Summary Suit No. 3 of 1898, the date of the judgment in that suit being 7th September 1898. Of the 17 animals which had been distrained, only 11 were restored to plaintiff. The date of their restoration was 28th November 1898. The plaint was sent by post to the Deputy Collector at Madras on 26th December 1898, it being vacation. Plaintiff claimed: (1) the value of six animals which, he alleged, died in consequence of neglect on the part of the distrainer; (2) the cost incurred by plaintiff in restoring the others to their original health, that health having been injured by similar neglect; (3) damages for the loss of crop which plaintiff might have raised if he had had the use of the animals for ploughing;

* Second Appeal No. 1252 of 1900, presented against the decree of J. H. Munro, District Judge of Godaveri, in Appeal Suit No. 296 of 1899, presented against the decision of N. S. Somasundara Sastri, Deputy Collector of General Duties, Narasapur, in Summary Suit No. 1 of 1899.

(4) the costs incurred in connection with Summary Suit No. 3 of 1898, in which the distraint was held to be illegal. Plaintiff stated his cause of action as having arisen on 28th November 1898, when the surviving animals were returned to him. The Deputy Collector gave plaintiff relief in respect of items (1) and (2) alone. He assessed the value of the animals which had died at Rs. 100 and allowed Rs. 10 for item (2). The defendant appealed to the District Judge, who held that the plaint had been accepted and the suit sufficiently instituted. He however remanded it for a finding as to when the cattle had died, and when plaintiff had been apprised of their death. The finding was that of the six cattle which died, two had died on 25th July, one on 9th August, one on 15th September, one on 16th December 1898, and one on 3rd or 12th February 1899. The value of the animal which died on 16th December was, according to the evidence, Rs. 30. He was unable to return a finding on the second point, there being no evidence. The District Judge, dealing with this finding, said :—"The lower Court finds that all the cattle died before delivery on 28th November 1898, except two. As to when the plaintiff came to know of the death of the cattle no finding is given owing to paucity of evidence. In the absence of evidence, however, the proper finding is, in the circumstances of the case, that plaintiff came to know of the death of his cattle only on the date when the surviving cattle were delivered to him and I hold that his cause of action arose from that date. The suit is, therefore, in time. It is contended that plaintiff is not entitled to the value of cattle which died subsequent to delivery, in December and February. There is, however, sufficient evidence to warrant the finding that these two animals died in consequence of the previous neglect. As to the value of the cattle I am not satisfied that the rates allowed are unreasonable. I see no reason to interfere."

He dismissed the appeal.

Defendant preferred this second appeal.

P. Nagabhushanam for appellant.

V. C. Seshachariar for respondent.

JUDGMENT.—On the 7th September 1898 it was decided that the distraint was illegal. The plaintiff was bound to apply for the return of his cattle as soon as possible after that date. It is perfectly impossible to hold that his cause of action in a suit under section 20, Act VIII of 1865, did not arise till the living

cattle were returned to him on the 28th November 1898. It must be held that the cause of action arose on the date of the death of the cattle. Of the five cattle that died before the filing of the suit, two died on the 25th July, one on the 9th August and one on the 15th September 1898. As all these animals died more than thirty days before the filing of the suit, the plaintiff's claim as regards them is barred by limitation and the award to him on account of these cattle must be set aside. One animal died on the 16th December 1898 and it is shown by the evidence that its value was Rs. 30 and that it died in consequence of negligence while it was in the hands of the distrainer. The plaintiff is entitled to recover Rs. 30 on account of this animal. The sixth head of cattle died after the suit was filed and on account of this animal the plaintiff cannot recover anything in this suit. We must also disallow the sum of Rs. 10 awarded as representing the cost of the means resorted to by the plaintiff to restore certain of his cattle to health. The plaintiff might have sued to recover the amount of loss which he sustained owing to his having been deprived of the services of these cattle but this he has not sued for. He cannot under section 20 recover anything on account of food that he supplied to his cattle. The objection that the plaint cannot be regarded in law as having been presented on 26th December 1898, the day on which it was delivered by post to the Deputy Collector, has been rightly overruled. The Deputy Collector received it and ordered the issue of notice and did not reject or return it. There is no section in the Rent Recovery Act corresponding to the strict provisions of section 36 of the Civil Procedure Code. The decree of the District Judge will be modified and the plaintiff will be given a decree for Rs. 30 only. There will be proportionate costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

1902. August 21.

MANJUNATHA KAMTI (SECOND DEFENDANT), APPELLANT,

v.

DEVAMMA *alias* GOMATHIAMMA (PLAINTIFF), RESPONDENT.*

Limitation Act—XV of 1877, sched. II, art. 64—Accounts stated—Acknowledgment of indebtedness without reciprocal demands.

The defendant in a suit had, within three years of the date on which the plaint was filed, signed a written acknowledgment that a sum of money was due by himself and his partner to plaintiff. Upon this being relied on as saving the suit from being barred by limitation, it was pleaded that the document was not an account stated as there were no reciprocal demands between plaintiff and defendants:

Held, that the document was an account stated, within the meaning of article 64 of schedule II to the Limitation Act, and that the suit was not barred. It is not necessary, in order to bring a case under that article, that there should be reciprocal demands between the parties.

Ganga Prasad v. *Ram Dayal*, (I.L.R., 23 All., 502), and *Shankar* v. *Mukta*, (I.L.R., 22 Bom., 513), commented on.

SUIT for money. Issues were raised as to whether there was a settlement of accounts in October 1897, and whether the suit was barred by limitation. The following document, signed by first defendant, was filed as exhibit A:—"A sum of Rs. 206-5-10 is due to (plaintiff) from the shop wherein (first defendant) and (second defendant) carry on trade in partnership. Dated 25th October 1897." The District Munsif, sitting on the Small Cause side, found that first and second defendants were, in fact, partners in trade. He held that exhibit A saved the suit from being barred by limitation, as against first defendant, the plaint having been filed within three years from its date, but he considered that it did not bind second defendant, against whom he dismissed the claim. Against that order, plaintiff filed this petition in the High Court, which came on for hearing before Benson, J., who held that first defendant must be regarded as the agent of second defendant,

* Appeal No. 18 of 1901 under article 15 of the Letters Patent against the judgment of Mr. Justice Benson, dated 23rd September 1901, in Civil Revision Petition No. 33 of 1901, preferred from Small Cause Suit No. 275 of 1900 on the file of U. Achutan Nair, Subordinate Judge of South Canara.

and, as such, duly authorised to settle the accounts with plaintiff. He held that article 64 of schedule II to the Limitation Act was applicable, and modified the decree by making second defendant also liable.

Against that decree second defendant preferred this appeal under article 15 of the Letters Patent.

T. V. Seshagiri Ayyar for appellant.

K. P. Madhava Rau for respondent.

JUDGMENT.—We are clearly of opinion that this case comes under article 64 of the second schedule attached to the Limitation Act. It is urged that there were no reciprocal demands between the plaintiff and the defendants in this case and that consequently exhibit A cannot be looked on as an account stated. The judgments in *Ganga Prasad* v. *Ram Dayal*(1) and *Shankar* v. *Mukta*(2) are relied on in support of this contention. If these judgments do bear the interpretation put on them we should not be prepared to follow them as we are clearly of opinion that in order to bring a case under article 64 it is not necessary that there should be reciprocal demands between the parties. Even if, however, we did accept this view there would be no ground for interference with the decision of the learned Judge as the evidence of the first defendant examined as the first witness for the plaintiff shows that there were reciprocal demands. Under section 251 of the Contract Act it is clear that the second defendant is bound by the act of the first defendant in settling the account between the partnership and the plaintiff.

This appeal must be dismissed with costs.

(1) I.L.R., 23 All., 502. (2) I.L.R., 22 Bom., 513.

APPELLATE CRIMINAL.

Before Mr. Justice Davies and Mr. Justice Bhashyam Ayyangar.

1902. September 2.

ARUMUGA TEGUNDAN AND ANOTHER, PETITIONERS.*

Criminal Procedure Code—Act V of 1898, ss. 145, 526—Jurisdiction of High Court to transfer a case pending disposal under s. 145.

A case under section 145 of the Code of Criminal Procedure is a "criminal case," and the High Court has jurisdiction to transfer it, both under section 526 of the Code of Criminal Procedure and article 29 of the Letters Patent.

Re Pandurang Govind Pujari, (I.L.R., 25 Bom., 179), not followed.

TRANSFER petition. A Deputy Magistrate took proceedings with reference to the possession of certain land, under section 145 of the Code of Criminal Procedure, and passed an order for the issue of notice calling upon petitioner to appear and file a written statement. This order had been preceded by numerous others relating to the same piece of land. Petitioner applied for a transfer to the District Magistrate, who, though he stayed proceedings for the time being and issued notice, and expressed disapproval of the Deputy Magistrate's proceedings, ultimately dismissed the application on the ground that the allegations of bias and prejudice were insufficient. Petitioner presented this petition for a transfer to the High Court, when the question whether the High Court has jurisdiction to transfer a case under section 145 of the Code of Criminal Procedure was considered.

A. S. Balasubramania Ayyar for petitioners.

Acting Public Prosecutor for Crown.

JUDGMENT.—We have no doubt of our power to transfer this case under both section 526 of the Code of Criminal Procedure and clause 29 of the Letters Patent. If a case under section 145 of the Code of Criminal Procedure is not a "criminal case" it is difficult to conceive what it is. With all respect we are unable to agree with the decision of the Bombay High Court in *Re Pandurang Govind Pujari*(1). Upon the merits, we think, upon the facts stated by the Acting District Magistrate, that he ought to have made the transfer . . . .

* * * *

* Criminal Miscellaneous Petition No. 168 of 1902, for an order transferring Possession Case No. 3 of 1902 from the file of Ramacha Nedungadi, Sub-Divisional First-class Magistrate of Tanjore, to that of any other Magistrate in the district.

(1) I.L.R., 25 Bom., 179.

APPELLATE CRIMINAL.

Before Mr. Justice Bhashyam Ayyangar.

1902. September 1.

PACHAI AMMAL (ACCUSED), PETITIONER.*

Criminal Procedure Code—Act V of 1898, s. 195—Prosecution sanctioned by competent authority—Trial by another Magistrate in pursuance of sanction—Competency of Court to question propriety of sanction.

Where sanction has been accorded under section 195 of the Criminal Procedure Code by a competent Court and a prosecution is instituted in pursuance thereof, it is not competent to the Court which is trying the case to question the propriety or legality of the sanction in respect of an offence of the kind mentioned in section 195, which is alleged to have been committed in any proceeding in the Court by which the sanction was granted.

PETITION to revise a conviction and sentence. Petitioner had preferred against one Chennam in January 1901 a charge of theft, and in February 1901 a charge of indecent assault. Both charges were ultimately thrown out as false, and application was made to the Tahsildar-Magistrate for sanction to prosecute her. This was accorded, and petitioner was accordingly charged with having made the two false charges. When the case was being tried by the Sub-Divisional Magistrate of Salem, objection was taken on behalf of the petitioner that the sanction had not been accorded by the Tahsildar-Magistrate who originally threw out the complaints as false, but by his successor; also that sanction had been accorded without notice to the petitioner. The Sub-Divisional Magistrate overruled both objections, tried the case, and convicted the petitioner. On appeal, the Sessions Judge regarded the sanction as invalid, and considered that the Sub-Divisional Magistrate should not have accepted it, but held that the defect was cured by section 537 of the Criminal Procedure Code. He dismissed the appeal on the merits.

Petitioner now preferred this criminal revision petition.

Mr. *Nugent Grant* for petitioner.

JUDGMENT.—The Magistrate before whom a prosecution is instituted in pursuance of a sanction given under section 195 of

* Criminal Revision Case No. 373 of 1902 against the judgment of Leslie C. Miller, Sessions Judge of Salem, confirming the sentence passed by the Joint Magistrate of Salem in Calendar Case No. 30 of 1902.

PACHAI AMMAL.

the Criminal Procedure Code by a competent Court cannot question the propriety or legality of the sanction given by the Magistrate in respect of an offence of the kind mentioned in section 195, which is alleged to have been committed in any proceeding before his Court.

The petition is rejected.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1902. April 7.

IN RE MUTHUKUDAM PILLAI (ACCUSED), PETITIONER.*

Criminal Procedure Code—Act V of 1898, s. 195—Sanction to prosecute—Computation of the period of six months—Starting point—Date of original sanction and not of appellate order.

The period of six months during which sanction to prosecute remains in force under section 195 (6) of the Code of Criminal Procedure is to be computed from the date of the original order granting sanction and not from that of a final order of an Appellate Court declining to revoke it.

CASE referred for orders. On 30th March 1901, the Stationary Second-class Magistrate of Periyakulam sanctioned the prosecution of one Muthukudam Pillai. An appeal was preferred against this order to the Joint Magistrate, at Dindigul, who, on 9th May 1901, confirmed the proceedings of the Stationary Magistrate. Muthukudam Pillai then filed a revision petition in the High Court against the orders granting and upholding sanction, which was dismissed on 1st October 1901. On 30th September 1901 complaint was filed, but the Sub-Magistrate declined to take further proceedings against the accused as the period of six months from the date of the original sanction expired on 29th September. The question referred to the High Court was whether the six months during which sanction remains in force under section 195 of the Code of Criminal Procedure should be computed from the date of the original order granting it or from that of the order of

* Case referred, No. 17 of 1902, for the orders of the High Court, by A. G. Cardew, District Magistrate of Madura, in his letter, dated 1st February 1902, Reference No. 253 (Magisterial) of 1902.

In re MUTHUKUDAM PILLAI.

an Appellate Court declining to revoke it. The Court was requested to extend the time if necessary.

JUDGMENT.—The application is not opposed. We do not think that the period of six months can be reckoned from the date of the final order of the Appellate Court declining to revoke the sanction. The sanction will lapse at the expiration of six months from the date on which it was given. The fact that an appeal has been preferred against it is no impediment to the institution of criminal proceedings on the strength of the sanction, though, as a general rule, it may be a reasonable ground for stay of proceedings by the Magistrate before whom the complaint has been preferred, pending the disposal of the appeal.

We resolve, in the circumstances now reported, to extend the time under section 195 (6), Criminal Procedure Code, to the 7th May next inclusive.

APPELLATE CRIMINAL.

Before Mr. Justice Bhashyam Ayyangar.

EMPEROR, APPELLANT,

1902. July 29.

v.

CHERATH CHOYI KUTTI (ACCUSED), RESPONDENT.*

Evidence Act—I of 1872, s. 155 (3)—Statements previously made by witnesses—Inadmissibility as substantive evidence.

Two persons made statements to the effect that C and another had robbed them and caused hurt while doing so. One statement was made to their employer, and the other to the Head Constable. C was subsequently charged and these two persons were called as witnesses for the prosecution, but they then denied that C was one of the men who had assaulted them. Their previous statements were filed, but neither the employer nor the Head Constable was called to depose to the terms of the statements which the witnesses were said to have made:

Held, that the former statements referred to, and which implicated the accused, could be used only under section 155 (3) of the Evidence Act for discrediting their evidence and not as substantive evidence against the accused.

* Criminal Appeal No. 409 of 1902 under section 417 of the Code of Criminal Procedure, against the judgment of acquittal passed on the accused in Criminal Appeal No. 126 of 1901 by A. Venkataramana Pai, Sessions Judge of South Malabar.

EMPEROR v. CHERATH CHOYI KUTTI.

CHARGE of voluntarily causing hurt in committing robbery under section 394 of the Indian Penal Code. The accused was convicted and sentenced by the Special Assistant Magistrate of Malabar to nine months' rigorous imprisonment. That conviction was set aside by the Acting Sessions Judge, from whose judgment it appeared that (according to the case for the prosecution) two of the prosecution witnesses had, on the night of 5th May 1900, been assaulted by the accused and another, and had been forced to give up money that was in their possession. The other assailant had already been convicted of robbery. The two prosecution witnesses stated at the trial that the accused was not the man who assaulted them. It appeared, however, that shortly after the robbery they had complained of it to their employer, and mentioned the name of the accused. A record made by the Police Head Constable of the complaint of one of the witnesses was filed as exhibit A: and a letter from their employer setting out the complaint of the other was filed as exhibit B, and in both of these the accused was named. Neither the Head Constable nor the employer was called. The Acting Sessions Judge held that exhibit B ought not to have been placed on the record, and that if the witnesses complained to their employer, the latter should have deposed to the terms of their complaint. He acquitted the accused.

Against that order of acquittal the Public Prosecutor preferred this appeal.

The Public Prosecutor in support of the appeal.

JUDGMENT.—There is no legal evidence at all against the accused. The former statements made by the first and second prosecution witnesses which are evidenced by exhibits B and A implicating the accused can be used only under section 155 (3) of the Indian Evidence Act for discrediting their evidence given in this case, but in themselves they cannot be used as substantive evidence against the accused by converting and regarding the same as the evidence now given on oath by the first and second witnesses subject to cross-examination. The appeal is dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Bhashyam Ayyangar.

VENKATESA AYYANGAR, PETITIONER.*

1902. July 21.

Criminal Procedure Code—Act V of 1898 s. 195—Grant of sanction to prosecute—Failure to decide that a primâ facie case has been made out—Legality of sanction

Application was made to a Second-class Magistrate for sanction to prosecute a person on a charge of abetment of giving false evidence in a judicial proceeding. The Magistrate held an enquiry and examined three witnesses, and then refused to accord sanction. Application was then made to the Sub-Divisional Magistrate, who granted sanction. In doing so, he did not hold that a *primâ facie* case had been made out, or that there was a probability of securing a conviction. He expressed the view that it was essential that the truth of the matter should be threshed out and, for that reason, sanctioned the prosecution as that appeared to be the only course by which it could be decided whether or no the very serious offence charged had been committed:

Held, that this was no ground for granting sanction, or for setting aside the order of the Second-class Magistrate refusing sanction.

PETITION to revise an order according sanction to prosecute. Application was made to the Second-class Magistrate of Tiruvadamarudur for sanction to prosecute the petitioner on a charge of abetment of giving false evidence in a judicial proceeding. After holding an enquiry and examining three witnesses, the Magistrate refused to grant sanction. Application was then made to the Sub-Divisional Magistrate of Kumbakonam, who, by an order dated 4th April 1902, granted sanction. He said (after referring to the charge and to the proceedings before the Second-class Magistrate and to the arguments addressed to him): "I consider it is essential that the truth of the matter should be threshed out and, for that reason, I sanction the prosecution of the counter-petitioner as this appears to be the only course by which it can be decided whether or no this very serious offence was committed."

Against that order, petitioner presented this Criminal Revision petition.

R. Sadagopachariar for petitioner.

* Criminal Revision Petition No. 141 of 1902, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the proceedings of Lionel Vibert, Sub-Divisional Magistrate of Kumbakonam, dated 4th April 1902, in Criminal Miscellaneous Petition No. 1 of 1902.

VENKATESA AYYANGAR.

JUDGMENT.—The petitioner is accused of abetment of giving false evidence in a judicial proceeding before the Second-class Magistrate of Tiruvadamarudur. An application was made to the Magistrate for sanction, under section 195 of the Criminal Procedure Code, to prosecute the petitioner. The Magistrate held an enquiry in connection with such application and after examining three witnesses refused to give sanction. Against this order of refusal an application was made, under section 195 of the Criminal Procedure Code, to the Sub-Divisional Magistrate of Kumbakonam to set aside the order refusing sanction and to grant sanction. This application was granted; application is now made by the petitioner to this Court, under section 439 of the Criminal Procedure Code, for revising the order of the Sub-Divisional Magistrate and revoking the sanction accorded by him. The Sub-Divisional Magistrate does not say that there is any *primâ facie* case made out against the petitioner, or that there is any probability of securing a conviction if he be prosecuted. He simply says that he "considers it essential that the truth of the matter should be threshed out and that for that reason" he "sanctions the prosecution of" the petitioner "as this appears to be the only course by which it can be decided whether or no this very serious offence was committed." This is clearly no ground whatever for exercising the powers vested in Courts to grant sanction for prosecution (*vide* judgment in Criminal Revision Case No. 244 of 1902(1)) and the Sub-Divisional Magistrate was not warranted in law in setting aside on such grounds the order of the Second-class Magistrate refusing to accord sanction, and I accordingly set it aside and quash the sanction accorded by the Sub-Divisional Magistrate.

(1) *Vide* page 116 *supra*.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar.

KARAMPALLI UNNI KURUP (PETITIONER), FIRST PLAINTIFF, 1902. March 24.

v.

THEKKU VITTIL MUTHORAKUTTI AND ANOTHER (RESPONDENTS), DEFENDANT AND SECOND PLAINTIFF.*

Evidence Act—I of 1872, *s.* 92, *proviso* 4—*Registered document—Subsequent oral agreement—Contract Act—IX of* 1872, *s.* 63—*Remission of portion of promise—Discharge in full on receipt of portion of amount due—Evidence of oral agreement.*

In a suit for two years' rent, due under a registered lease, defendant pleaded a subsequent oral agreement by plaintiff to remit a portion of the rent each year, and filed a receipt by which plaintiff accepted payment at the reduced rate in full discharge in respect of one of the years:

Held, that though under proviso 4 to section 92 of the Evidence Act, evidence of such an agreement was inadmissible and plaintiff was entitled to claim rent at the rate stipulated in the registered lease, the discharge for one of the years was valid, under section 63 of the Contract Act, and took effect. It was immaterial that the discharge had been given in pursuance of the alleged oral agreement, which, though not admissible in evidence, was not illegal.

SUIT for arrears of rent due in respect of the Malayalam years 1075 and 1076. By the terms of the document of lease sued on and which was registered, the rent payable was Rs. 50-2-6 per annum. This lease was admitted, but it was pleaded in defence that the amount of rent claimed was not due, and a subsequent oral agreement was set up by the terms of which the plaintiff was said to have remitted rent to the extent of Rs. 15 per annum as from the year 1872. Defendant claimed to be entitled to deduct that amount, in which case only Rs. 35-2-6 would be due down to the end of the year 1876. A receipt was filed by which defendant was given a discharge in full in respect of the rent due for the year 1875, though only Rs. 35-2-6 was actually paid and the District Munsif said that as this receipt was admitted by the plaintiff, it tended to prove that the reduction in the rent had been made. After

* Civil Revision Petition No. 333 of 1901, presented under section 25 of Act IX of 1887, praying the High Court to revise the decree of U. Babu Rau, Principal District Munsif of Calicut, in Small Cause Suit No. 248 of 1901.

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considering some other matters he gave plaintiff a decree for Rs. 31-2-6, and dismissed the rest of his claim.

Plaintiff presented this civil revision petition.

J. L. Rosario for petitioner.

JUDGMENT.—This is a suit to recover rent due under a registered lease for the Malayalam years 1075 and 1076, the rent stipulated in the lease being Rs. 50-2-6 besides some rent in kind. The defendant set up a subsequent oral agreement that the Karnavan being convinced that the lessee was not realising proper income promised to reduce the rent by Rs. 15 a year from the year 1072. Under proviso No. 4 to section 92 of the Indian Evidence Act no evidence of such agreement is admissible and the first plaintiff is therefore entitled to claim rent at the rate stipulated in the registered lease (*Mayandi Chetti* v. *Oliver*(1)). For the year 1075, however, the Karnavan gave a discharge for the whole rent on receiving only Rs. 35-2-6. Under section 63 of the Contract Act a promisee may remit in whole or in part the performance of the promise made to him or may accept instead of it any satisfaction which he thinks fit. The fact that he did so in pursuance of an alleged prior oral agreement is immaterial and the discharge as such will take effect under section 63 independently of the prior oral agreement which certainly is not illegal, though it cannot be proved under section 92 of the Evidence Act. The first plaintiff, therefore, cannot claim the alleged balance of rent for the year 1075, but no discharge having been given by the Karnavan for the rent which become payable for 1076, the alleged oral agreement cannot be relied on in respect thereto. The decree will accordingly be modified by substituting Rs. 46-2-6 for Rs. 31-2-6. The revision petition is allowed but without costs.

(1) I.L.R., 22 Mad., 261.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar.

SUBRAMANIA CHETTIAR, PETITIONER (TRANSFEREE DECREE-HOLDER),

1902. March 24.

v.

RAMACHANDRA AYYAR AND ANOTHER (DEFENDANT AND PLAINTIFF), RESPONDENTS.*

Limitation Act—XV of 1877, sched. II, art. 179—Execution of decree—Application in accordance with law.

A petition in execution presented by the vakil of the decree-holder, duly authorized, is an application "in accordance with law" within the meaning of article 179 of schedule II to the Limitation Act, though the vakalat be not dated.

EXECUTION petition. The date of the decree, of which execution was sought, was 14th December 1891; the date of the present petition was 13th July 1900. The petition set out previous execution proceedings on the following dates:—2nd November 1892, 30th October 1895, 2nd March 1897, and 14th February 1900. Petitioner applied as assignee of the original decree-holder. The Subordinate Judge, referring to the application of 14th February 1900, stated that it was returned to the petitioner on account of various defects, one of which was that the vakalat bore no date of execution. A vakalat in proper form was not filed until 29th August 1900. As the present petition had been filed more than three years after the application of 2nd March 1897 and as the application of 14th February 1900 was, in his opinion, invalid, he held that the present application was out of time, and dismissed it.

Plaintiff preferred this appeal.

Kasturiranga Ayyangar for petitioner.

Subrahmania Ayyar for respondent.

JUDGMENT.—The Subordinate Judge heard vakils on both sides with reference to the application, dated 13th July 1900, for

* Civil Revision Petition No. 340 of 1901, presented under section 25 of Act IX of 1887, praying the High Court to revise the order of P. S. Gurumurti, Subordinate Judge of Kumbakonam, dated 29th March 1901, passed on Civil Miscellaneous Petition No. 1640 of 1900 in Small Cause Suit No. 1400 of 1891.

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execution of the decree and reserved judgment, and the order now appealed against was passed nearly seven months afterwards, that is, on 29th March 1901. The decree-holder, it is represented, is a native of Coimbatore, and owing to the great delay which took place in giving judgment, he came to know of the passing of the order only some time before the 10th of August 1901, applied for a copy of the order on the 10th of August 1901 and obtained copy on the 21st of August, and the present revision petition was presented within one month thereafter, viz., on the 20th of September 1901. Under these circumstances and especially as the Subordinate Judge's order that the execution of the decree is barred, is clearly wrong, and has caused a miscarriage of justice, I do not think I would be justified in rejecting the petition on the ground that there was a considerable interval between the date of the order sought to be revised and the date of the revision petition.

The last preceding application was made on the 14th February 1900 by the petitioner as assignee of the original decree-holder. The vakil who presented that petition filed a vakalat which was duly attested but not dated. It appears that the Subordinate Judge required that certain additional particulars should be mentioned in the petition and that the petitioner should also produce authenticated copies of certain proceedings in the District Munsif's Court at Cuddalore, to which the execution of the decree had been originally transferred. The particulars required were not such as to invalidate the presentation of the petition for execution on the 14th February 1900. The petition and the vakalat appear to have been returned for amendment and, as the vakalat was not re-presented within the time fixed, the petition was rejected on 26th February 1900. The present application was subsequently presented on the 13th of July 1900 accompanied by a fresh vakalat. The Subordinate Judge holds that the application of the 14th February 1900 cannot be regarded as one made in accordance with law, as it was not presented either by the party in person or by a vakil authorized with a "vakalat worthy of the name," and as the present application will be more than three years after the last application of the 2nd March 1897 preceding the application of the 14th February 1900, he dismissed the application as barred by limitation. The fact that the application of the 14th February 1900 was presented by a vakil who was duly authorized cannot be held to be one which was not presented

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in accordance with law by reason that the vakalat was not dated. There is no law which requires that a vakalat should be dated, and the fact that it was not dated will not invalidate it any more than a sale-deed or mortgage-deed will be invalidated, if it is not dated. The Subordinate Judge was right in returning the vakalat in order that it might be amended by being dated, but that did not justify him in holding that the presentation of the application for execution on the 14th February 1900 was not in accordance with law and was a nullity. In the present case it further appears that the old vakalat was, after being dated, re-presented on the 29th August 1900. Even if this had not been done it would not have invalidated the presentation of the application on the 14th February 1900, and for the purposes of limitation under article 179 the starting point is the date of the last application, which was presented in accordance with law on the 14th February 1900, though it was rejected, rightly or wrongly on 26th February 1900 on the ground that the vakalat was not re-presented and the petitioner prayed for two weeks' further time for complying with the Subordinate Judge's requisition. The order appealed against is reversed and the Subordinate Judge will restore to his file the application of the 13th July 1900 and dispose of it according to law.

The first respondent must pay the petitioner's costs in this Court.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar.

1902. March 21.

SUNDARALINGAM CHETTI AND ANOTHER (PLAINTIFFS), PETITIONERS.

v.

MARIYAPPA CHETTI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Provincial Small Cause Courts Act—IX of 1887, sched. II, art. 18—Suit for money borrowed by a trustee from his co-trustees out of the moneys belonging to the trust estate—"Suit relating to a trust"—Jurisdiction of Small Cause Court.

One of several trustees of a charity personally borrowed from other trustees some moneys belonging to the estate of the charity, and gave a promissory note therefor. The other trustees subsequently instituted a suit in the Small Cause Court to recover the amount:

Held, that the suit was not one "relating to a trust," within the meaning of article 18 of schedule II to the Provincial Small Cause Courts Act, and that the Small Cause Court had jurisdiction to try it.

SUIT on a promissory note. The two plaintiffs as well as the two defendants were trustees of the Velliyambalam charities, in Madura, and on 1st September 1900, first defendant executed the following promissory note to plaintiffs: "Promissory note executed on 1st September 1900 in favour of the committee members of Velliyambalam charity, Madura, namely, two persons [naming the two plaintiffs]. The amount I borrowed in cash this day from T. M. Chatram Fund is Rs. 300. I shall, on demand, pay this Rs. 300 with interest accruing thereon at eight annas per cent. per month to you or to your order and then take back this note." Plaintiffs now sued to recover this money in the Court of Small Causes. The plaint set out that plaintiffs and defendants were the trustees of the charities and stated that second defendant had been joined, as he did not join plaintiffs in the suit. The terms of the promissory note were also set out. The Subordinate Judge passed an order returning the plaint, on the ground that the suit was one relating to a trust, and, as such, excepted

* Civil Revision Petition No. 372 of 1901, presented under section 25 of Act IX of 1887, praying the High Court to revise the order of T. M. Rengachari, Subordinate Judge of Madura (West), dated 2nd September 1901, passed in Small Cause Suit No. 1021 of 1901, returning the plaint for presentation to the proper Court.

from the cognizance of a Small Cause Court, under article 18 of schedule II to Act IX of 1887.

Against that order plaintiff presented this Civil Revision Petition.

P. S. Sivasami Ayyar for petitioners.

K. Srinivasa Ayyangar for respondents.

JUDGMENT.—The plaintiffs, alleging themselves and two defendants to be trustees of a charitable endowment, sue the first defendant on a promissory note made by the first defendant for Rs. 300 which he borrowed from the funds of the endowment, promising to repay the same to the two plaintiffs or their order with interest at 6 per cent. per annum. The second defendant is also joined by way of precaution as a defendant, because he is one of the co-trustees and did not join the plaintiffs in bringing this suit. The plaint was presented to the Subordinate Judge on the Small Cause side, but it was returned under section 57 of the Civil Procedure Code, on the ground that the cognizance of this suit by a Court of Small Causes is barred by article 18 of the second schedule to the Provincial Small Cause Courts Act. Though the amount was a loan to one of the trustees by two of the remaining trustees out of trust funds, a suit for the recovery of the debt due personally by a trustee for an amount lent to him out of trust funds is no more a suit relating to a trust within the meaning of the said article than a suit to recover a debt advanced out of trust fund to a stranger who is not a trustee would be a suit relating to a trust. The suit therefore is one cognizable by a Court of Small Causes, and the order of the Subordinate Judge returning the plaint under section 57, Civil Procedure Code, is set aside, and he should proceed in accordance with law when the plaint is re-presented to him without prejudice to his taking action under section 23 of the Provincial Small Cause Courts Act if he should deem fit to do so, a point on which it is unnecessary to express any opinion in this judgment. The Revision Petition is allowed with costs payable by the first defendant.

PRIVY COUNCIL.

P.C.*
1902.
November 19.
December 13.

RAJAJI BAHADUR, GARU, DEFENDANT,

v.

PARTHASARADHI APPA RAU AND OTHERS, PLAINTIFFS.

[On appeal from the High Court of Judicature at Madras.]

Grant—Construction of grant—Grant, whether for maintenance only or for an estate of inheritance—Intention as shown by documents—Partition by grantees on assumption that grant conferred an hereditary estate.

On a question as to whether a grant of lands made in 1844 out of the zamindari of Nidadavolu to collateral members of his family was a maintenance grant only and therefore resumable, or whether it conferred an estate of inheritance, it appeared that the grantees held other lands on what was admittedly a permanent tenure, and that of the latter lands and the lands granted in 1844 they had in 1846 made a partition "through and in the presence of the zamindar," and on the assumption that all the lands were held on an absolute and permanent tenure. The Judicial Committee (reversing the decision of the High Court) held, on the construction of the documents evidencing the grant, and under the circumstances of the case, that it conferred an hereditary estate and that the title was completed by the partition.

APPEAL from a decree (12th July 1897) of the High Court at Madras affirming a decree (16th September 1895) of the Subordinate Judge of Ellore in favour of the respondent.

The facts out of which this litigation arose were as follows:—One Raja Narayya had three sons—Venkata Narasimha, Ramachendra, and Narasimha. Venkata Narasimha owned the zamindari of Nidadavolu, and Ramachendra owned the zamindari of Nuzvid. The third son Narasimha only received a money maintenance allowance. Venkata Narasimha died leaving a son Narayya II, Ramachendra died leaving a son Sobhanadri, and Narasimha died leaving two sons Simhadri and Venkatadri. Narayya II and Sobhanadri succeeded to their respective fathers' estates, and Simhadri and Venkatadri had for a time a money maintenance allowance.

* *Present:* Lord MACNAGHTEN, Lord LINDLEY, Sir ANDREW SCOBLE, Sir ARTHUR WILSON, and Sir JOHN BONSER.

In 1827 when Narayya II succeeded his father, the zamindari of Nidadavolu was greatly encumbered. Large sums were due for arrears of revenue, and also to the Nuzvid zamindar, and to other creditors. In 1841 and 1842 complaints were made to the Collector by Simhadri and Venkatadri of the non-payment of their maintenance allowance, and in the latter year the Court of Directors ordered that the entire zamindari of Nidadavolu should be sold for the purpose of carrying out an arrangement by which certain portions of it were to be assigned to the Nuzvid zamindar in satisfaction of his debt. The remainder was to be conferred upon Narayya II by a new sanad on his satisfying his remaining creditors.

On 18th November 1843 the Collector addressed the Board of Revenue in a letter which showed the manner in which Narayya II had effected the composition with his creditors on which the restitution of the residue of his zamindari depended. After stating the arrangements made with some of the largest creditors he proceeded to state the mode in which certain claims for maintenance were dealt with as follows:—

"9. Enclosures Nos. 5 and 6 contain stipulations entered into by Narayya Appa Rao on the one hand and Simhadri Appa Rao and Venkatadri Appa Rao on the other, by which it is agreed that eight villages appertaining to the Ambarpettah Muttah, viz., six Sary villages, Mukkapuram otherwise called Palagoodem, Tangellamudi, Comadavole, Poonukollu, Calaparru and Kokirapadoo; and two Mocassah villages under attachment, viz., Nagulapadoo and Medinarowpallem shall be permanently alienated to Simhadri Appa Rao and Venkatadri Appa Rao; they paying the peishcush which may be assessed on them with reference to the sub-division accounts. This cession, it will be observed, is proposed, not only in full satisfaction of the whole amount of arrear (Rs. 44,757-2-2) of the amount due for marriage expenses and the monthly allowance of Rs. 400 due up to this period, but also in lieu of all further payment on account of the monthly allowance.

"10. Enclosures Nos. 7 and 8 contain stipulations entered into between Narayya Appa Rao and Lutchmicantamah, his adoptive mother relative to her monthly allowance as well as the arrears due on that account which amounted to Rs. 11,400. The result of this arrangement is that on condition of the village of Taudiparru being alienated to her during her life, she agrees, not only to give up her claim for the monthly allowance in future but also to forego the

amount of arrears of allowance due up to this period, with the exception of Rs. 500 which Narayya Appa Rao agrees to pay her on receiving charge of his estate. It is also agreed that the peishcush of the village will be paid by Narayya Appa Rao during the life of Lutchmicantamah, and that at her death the village shall revert to him."

The enclosures Nos. 5 and 6 referred to in paragraph 9 were two arzies of the same date (13th August 1843) from the zamindar, and from Simhadri and Venkatadri. The latter arzi says :—

"He therefore reconciled us in your presence regarding the payment of the arrears as well as of the future continuance of our allowances in the manner particularized below :—

"4. That, in lieu of the amount of Rs. 40,757-2-2 being the arrears of the allowances due to us by him from 4th February 1835 up to July 1843 at Rs. 400 per month, as well as Rs. 4,000 on account of marriages, making in all Rs. 44,757-2-2, he will alienate to us a village called Malakapuram *alias* Palagoodem appertaining to Ambarpett Muttah in the Nidadavolu zamindari—that, in lieu of the monthly allowance which should be continued to us from the month of August he will give up to us seven villages, viz., Tangellamudi, Kalaparroo, Kokerapadu, Poonoocollo, Comaduvole, Naguladevonypadu and Medenirowpalem, appertaining to the said Muttah, making in all eight villages with their Sevars or subordinate hamlets, gardens and dependent water-courses, tanks, &c.; that these eight villages shall be separated and made over to us at the time when the Nidadavolu and Bahurzally Parganahs as well as Ambarpett shall be given to him by the Honourable Government and the separate cowle should be obtained in our names for those villages fixing the circar peishcush thereon distinctly in proportion to the other parganahs according to the subdivision accounts which may be formed by the Circar and that you may (after the villages are made over to us) continue to pay ourselves the Circar peishcush which may be fixed thereon and take receipts for the same enjoying the fruit thereof in perpetuity as long as our posterity continues, moreover that Nariah Appa Row or his heirs, etc., shall never at any time advance any claim regarding the villages in question, nor shall ourselves nor our heirs, etc., bring any claim hereafter against him regarding the allowances aforesaid. That in the event of the said villages not having (sic) alienated to us according to the aforesaid stipulations, we shall, without adverting to the aforesaid stipulations, continue to receive our allowance above set forth. For these conditions, we have agreed and presented this our arzi strictly to attend to the foregoing conditions without any failure on our part."

The Zamaindar's arzi went less into detail but referred to the agreement in the presence of the Collector, and to the arzi addressed to him by Simhadri and Venkatadri as containing the conditions to which he assented and by which he agreed to abide. The Board of Revenue, in forwarding this correspondence for the orders of Government, said in paragraph 3 of their letter :—

The alienation in favour of the Simhadri branch of the family, it is proposed, shall be in perpetuity. They are to pay such amount of peishcush on the portion ceded to them as shall be determined by the sub-division accounts now in preparation and to receive the villages granted them both for their support and in full of all demands upon the Zamindar past and future.

On 15th March 1846, Sobhanadri, Zamaindar of Nuzvid, assigned the Muttah of Chavendra to Simhadri and Venkatadri in satisfaction of their claims in regard to maintenance past and future. That this assignment was absolute and permanent was not in dispute. On 7th August 1846, Simhadri and Venkatadri made a partition, by which Simhadri received Tangalamudi, and Venkatadri Chavendra and two other villages. The partition proceeded on the assumption that Tangalamudi and Chavendra were held on the same tenure, and the agreement to partition stated that the arrangement was made through and in the presence of Narayya II, and was signed not only by Venkatadri and Simhadri but also by Narayya as a party assenting to the agreement.

As the result of all these proceedings it became necessary to sub-divide the whole zamindari of Nidadavolu into four portions, upon which a separate assessment was placed, one of these including the villages which remained in the possession of the Zamindar, one those which were handed over to the Zamindar of Nuzvid and the remaining being Tangalamudi and Chavendra which were assigned respectively to Simhadri and Venkatadri, the names of the two latter were registered as proprietors paying revenue direct to Government, by order of the Revenue Board, dated the 30th March 1848. From that date the Zamindar of Nidadavolu ceased to have any connection with either village.

On the 4th April 1850, the Zamindar of Nidadavolu addressed an arzi to Government in which he referred to the above transactions as follows :—

The Government having sold in auction my taluk of Nidadavolu zamindari, and out of the same given the Pentapadu and Gundu

Golanu parganahs and the muttah of Chavendra to Raja Sobhanadri Appa Row Bahadur Garu and the muttah of Tangalamudi consisting of Tangalamudi and seven other villages attached to Ambarpeta muttah to Raja Simhadri Appa Row Bahadur Garu and Venkatadri Appa Row as (their) own, and delivered to me back possession of the remainder, *i.e.*, the parganahs of Nidadavolu and Baharjhalli and the *Khandam* (division) attached to Ambarpeta muttah, and your honour having submitted to the Board of Revenue (accounts) after effecting sub-division for separate peishcush being fixed on the said estates, I learnt the contents of the inayatnamah and the draft *Koboliyat* enclosed therein, sent on the 4th February 1850 by you to me stating, among other matters, that a permanent peishcush of Rs. 1,37,646 has been fixed on my parganahs of Nidadavolu and Baharjhalli and the *Khandam* of Ambarpeta muttah according to the proceedings of the Commissioner for the Northern Circars, dated 31st December 1849, that instalments therefor have been written, that payment should be continued in the said manner from fasli 1259, that a draft of the *Kabbliyat* which should be presented by me herefor has been sent, that I should affix my seal and signature thereon in the presence of witnesses and send the same to you and that the peishcush temporarily fixed already on the said parganas will be in force up to fasli 1258.

Simhadri died in 1861 and his widow Sitayya took possession of Tangalamudi. Venkatadri sued her in 1863 for recovery of Tengalamudi, alleging that, under the partition deed of 7th August 1846 and a subsequent agreement alleged to have been entered into between Simhadri and himself in December 1851, he was entitled to succeed in the absence of male heirs. That suit was dismissed and the Court held that, under the arrangement with the Zamindar, "the estates were as much at the absolute disposal of the plaintiff and defendant's husband as the sums would have been in lieu of which it is stated they were given." He discredited the alleged agreement of December 1851. This judgment was confirmed by the High Court.

On 24th April 1880, Sitayya executed a document, whereby, after reciting that she was old and unable to manage the estate and had incurred considerable debts, she assigned over Tangalamudi for life to her elder daughter Venkayamma and after her death to her younger daughter, who had issue, to be enjoyed from son to grandson. Venkatadri objected to the registration of the estate in the name of Venkayamma, and she brought a suit to enforce registration in which she succeeded both in the Original

Court and on appeal to the High Court. Sitayya died on 17th February 1885.

On 23rd July Papamma, the widow of Narayya II, presented a petition in a suit then pending, in which she stated that she had, on 19th June, adopted Raja Venkatramayya, nephew of her late husband.

On 5th April 1886 Papamma sued Venkayamma for a declaration that the deed of April 1880 was ineffectual against her own rights and for possession of Tangalamudi. The plaintiff alleged that Tangalamudi was granted to Simhadri and Venkatadri to be held in lieu of maintenance and that it reverted to the estate when there were no larger representation of Simhadri whose maintenance was a charge on the estate. Venkatadri was added as a defendant at his own request on 25th November 1887.

The defendant Venkayamma filed a written statement, in which she pleaded that Venkatramayya, the adopted son of Papamma, was the proper person to sue, and alleged that Simhadri held Tangalamudi on an absolute heritable title.

The defendant Venkatadri in his written statement asserted that Palagudem, one of the villages of Tangalamudi, was granted absolutely in lieu of past maintenance, and that the rest of the muttah was granted for the future maintenance of himself and Simhadri "with the condition that the said estate should continue so long as the male members and females of the same gotra of the family survive." He claimed to be the person entitled to succeed on the death of Sitayya.

The only issue now material was "Whether the muttah of Tangalamudi was granted for mere enjoyment or absolutely"?

On 18th December 1888 the Subordinate Judge dismissed the suit, finding (*a*) that the plaintiff was not the proper person to sue, and (*b*) that the tenure of the muttah was permanent. The plaintiff appealed to the High Court. Pending the appeal the defendant Venkayamma died and her sister's son Rajaji was substituted on the record. Subsequently the defendant Venkatadri died and his son Parthasaradhi was substituted as a defendant. On 4th February 1892 the High Court remanded the suit for disposal on the merits; and on 16th September 1895 the Subordinate Judge held that "the village of Palagudem was granted absolutely; while the remaining seven villages were granted for mere enjoyment, and not absolutely." And he gave a decree for possession in favour of the plaintiff,

Against this decision the defendant Rajaji appealed to the High Court, and that Court (COLLINS, C.J., and SHEPHARD, J.) dismissed the appeal on the ground that *primâ facie* a grant for future maintenance does not avail beyond the time during which the obligation to maintain exists; that it was necessary to look in the first place to Narayya's arzi to see what was his intention and that there were no words in that arzi to indicate any intention on his part to create an estate of inheritance in his cousins. "In the face of these considerations" the Judges of the High Court said "we cannot attach any weight to the expression used by the Collector or by the two brothers in their arzis."

On this appeal, Mr. *Cohen, K.C.*, and Mr. *Mayne*, for the appellant, contended that the High Court was in error in looking only at Narayya's arzi and deciding on that document that there was no intention on his part to create an estate of inheritance, and in not attaching any weight to the arzi by the two brothers Simhadri and Venkatadri. The two arzis together constituted the agreement between the parties. The language of the Collector who had personally brought about the agreement showed that the estate conferred was intended to be an hereditary one. The character of the estate assigned was also established by other documentary evidence to which the High Court had given no consideration, and which showed that the rights of the Zamindar over the villages assigned had terminated after the assignment. If the arrangement was intended to be merely temporary, it would have been easy to say so explicitly. This was done in the case of the arrangement with the zamindar's mother which was only for her life: the language there used is very different from that used in the arrangement with Simhadri and Venkatadri.

Mr. *J. Jardine, K.C.*, and Mr. *De Gruyther*, for the respondents, contended that the grant of the seven villages to Simhadri and Venkatadri was one for maintenance only, and that they were resumable on the death of Sitayya who was the last person entitled to maintenance from them. The grant was not intended to be a grant of inheritance. The test of the ownership of the property was that the Government charges on the property were paid by the granter, the Zamindar, and not by the grantees, showing that it was only made for a temporary purpose and was not of a permanent nature. A grant for maintenance is not a grant of inheritance unless special words making it so are inserted in the deed. As

to the construction of maintenance grants, the cases of *Rameshar Baksh Singh* v. *Arjun Singh*(1), *Azizunnissa* v. *Tissadduk Husain Khan*(2), *Karim Nensey* v. *Henericks*(3) and *Tulshi Pershad Singh* v. *Ramnarain Singh*(4) were referred to.

13*th December* 1902.—The judgment of their Lordships was delivered by

Sir ANDREW SCOBLE.—For some years after succeeding to his estate Narayya, Zamindar of Nidadavolu, was in serious pecuniary difficulties. He owed a large sum of money to his kinsman, the Zamindar of Nuzvid, besides considerable sums to other creditors and to Government for arrears of revenue. In 1839, a compromise was effected, whereby a portion of the Nidadavolu estate was to be handed over to the Nuzvid Zamindar in satisfaction of his claim; and to complete the matter, it was proposed that the Government demand should be relinquished, and "the remaining portion of the estate" made over to Narayya, "in the event of his satisfying other private creditors."

In order to carry out these arrangements the Court of Directors of the East India Company, in a despatch dated 24th August 1842, directed that the whole estate of Nidadavolu should be sold; and this was accordingly done; and the estate was purchased by the Government for eight lakhs of rupees. By this purchase the Government became absolute owner of the estate, and the proprietary rights of Narayya were for the time extinguished. The claim of the Zamindar of Nuzvid was satisfied by the transfer to him of certain villages; but the Board of Revenue, in a letter dated 4th January 1844, recommended that it was not advisable that Narayya should be placed in possession of his part of the estate "until all questions connected with the subject be definitely settled."

Among these questions was the satisfaction of the claims of other private creditors. It was proposed by the Collector of Masulipatam, who represented the Government in the negotiations, that "the most possible method of adjusting these claims, if the consent of the parties could be obtained, would be by the transfer permanently or temporarily, as the circumstances of each case might appear to require, of a certain portion of the estate, from the

(1) [1900], L.R., 28 I.A., 1; I.L.R., 23 All., 194.
(2) [1901], L.R., 28 I.A., 65; I.L.R., 23 All., 324.
(3) [1901], L.R., 28 I.A., 198; I.L.R., 25 Bom., 563.
(4) [1885], L.R., 12 I.A., 205; I.L.R., 12 Calc., 117.

proceeds of which each claim might be realised"; and an adjustment on this basis was eventually made after frequent conferences between Narayya and the various parties in the presence of the Collector.

Of the claims thus adjusted the only one with which their Lordships have to deal is that of Simhadri and Venkatadri, the representatives of a younger branch of Narayya's family, who were entitled to maintenance out of the estate, and to whom a considerable sum was owing for arrears. The terms of the settlement with these claimants are contained in two documents which are thus described in paragraph 9 of the Collector's Report to the Board of Revenue, dated 18th November 1843:—"Enclosures 5 and 6 contain stipulations entered into by Narayya on the one hand, and Simhadri and Venkatadri on the other, by which it is agreed that eight villages appertaining to the Ambarpeta Muttah . . . and two Mocassah villages . . . shall be permanently alienated to Simhadri and Venkatadri, they paying the peishcush which may be assessed on them . . . This cession, it will be observed, is proposed not only in full satisfaction of the whole amount of arrears due for marriage expenses and the monthly allowance of 400 rupees due up to this period, but also in lieu of all further payment on account of the monthly allowance." In forwarding the Collector's proposals for the sanction of Government, on 4th January 1844, the Board of Revenue say: "The alienation in favour of the Simhadri branch of the family, it is proposed, shall be in perpetuity." The final orders of Government appear to have been given on this basis; and Simhadri and Venkatadri were placed in possession of the villages, which may conveniently be described as the Tangalamudi Muttah.

On the 15th March 1846, the Zamindar of Nuzvid assigned the Muttah of Chavendra to Simhadri and Venkatadri in satisfaction of their claims upon him for maintenance past and future, and on the 7th August 1846, the two brothers made a partition of their joint property, under which Simhadri took the Muttah of Tangalamudi, and Venkatadri took Chavendra and two other villages. This partition was made "through and in the presence of Narayya" and proceeded on the assumption that Tangalamudi and Chavendra were held on the same absolute and permanent tenure.

Simhadri died in 1861, and his widow Sitayya succeeded to his estate. Sitayya died in 1885, and the contest in the suit under appeal is now between her daughter's son (who would be her heir

according to Hindu law) and persons who claim either under Venkatadri or Narayya. The sole question is whether, under the settlement of 1844, and the subsequent partition of 1846, Simhadri acquired an absolute title to the Tangalamudi Muttah.

Upon the history of the case, as above stated, their Lordships have no doubt that the origin of the title was in a grant from the Government, and not from Narayya, who at the time of the transaction had no estate out of which he could make a grant. Nor do the documents relied on by the respondents, and which have already been mentioned as Enclosures 5 and 6 to the Collector's report of 18th November 1843, conflict with this view. These documents are two arzis dated 13th August 1843, addressed to the Collector of Masulipatam, one by Narayya and the other by Simhadri and Venkatadri. It was contended on behalf of the respondents that the arzi signed by Narayya was, as regards seven of the villages mentioned therein, a grant by him for maintenance only, and therefore resumable on the death of Sitayya, the last person entitled to maintenance thereout. This was the view taken by the Subordinate Judge who tried the case in the first instance, and by the High Court of Madras on appeal. But their Lordships are unable to accede to this view. The arzi signed by Narayya was in no sense a conveyance. It was, as its name denotes, a petition to the Collector, which, after stating the terms of settlement agreed on between the parties, went on to say—"further that no claims of whatever nature may hereafter be for ever advanced, either by them for the payment of the said allowances, or by us regarding the aforesaid villages. I also gave my assent, and agree to abide according to the aforesaid conditions, and humbly solicit you will therefore be pleased to forward our petitions with your recommendation to the honourable Government and to the Board of Revenue, and at the time when the Nidadavolu and Baharjhalli parganahs as well as Ambarpet Muttah may be made over to me by the Circar, allow the aforesaid eight villages in the Ambarpett Muttah to be taken possession of by the said Simhadri and Venkatadri and continue the aforesaid conditions in force." These words leave no doubt that what Narayya contemplated was a grant by the Government to Simhadri and Venkatadri of these villages in full settlement of their past and future claims on the estate, and by the partition in 1846 Simhadri's title to them was completed.

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Their Lordships will humbly advise His Majesty that this appeal should be allowed, and the decrees of the Court of the Subordinate Judge and the High Court reversed, and the plaintiff's suit dismissed with costs throughout. The respondents who were substituted for Papamma Row, the original respondent, must pay the costs of the appeal, including the costs of the revivor proceedings.

Appeal allowed.

Solicitors for the appellant: Messrs. *Frank Richardson* and *Sadler*.

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

APPELLATE CIVIL—FULL BENCH.

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

1902. December 22.

1903. January 22.

HARI KAMAYYA (DEFENDANT), PETITIONER,

v.

HARI VENKAYYA (PLAINTIFF), RESPONDENT.*

Provincial Small Cause Court—Act IX of 1887, ss. 16, 32 (2)—Munsif invested with Small Cause jurisdiction—Extension of jurisdiction—Transfer of cases on file on regular side to small cause side—Cases disposed of as small cause suits—Legality.

A District Munsif, who had small cause jurisdiction up to Rs. 100, had, on his file on the regular side of his Court, suits of a small cause nature for amounts between Rs. 100 and 200, some of which were partly tried. His small cause jurisdiction was then extended to Rs. 200, whereupon he transferred the cases in question to his small cause file and tried and disposed of them as small causes: *Held*, that the transfer and trial were not in accordance with law.

QUESTION referred to a Full Bench. The case came on in the first instance before Mr. Justice Bhashyam Ayyangar, who made the following Order of Reference to a Full Bench:—

When the District Munsif of Narasapur was invested with small causes jurisdiction up to Rs. 200, he having till then exercised

* Civil Revision Petition No. 32 of 1902 presented under section 25 of Act IX of 1887, praying the High Court to revise the decree of A. Raghunatha Rao, District Munsif of Narasapur, dated 4th November 1901, in Small Cause Suit No. 1101 of 1901.

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such jurisdiction up to a limit of Rs. 100, there were on his regular file seventy-seven suits of a small cause nature between Rs. 100 and 200, some of which had been partly tried, including the present suit. He transferred all these seventy-seven suits to his small cause file and tried and disposed of them as small causes, advancing the dates of final hearing which had been originally fixed when they were on the regular file. The question for consideration is whether such transformation into small causes of suits which were legally commenced, instituted and in some cases partly tried as regular suits was legal—*vide* section 16 of Act IX of 1887 and sub-section (2) of section 32, Act IX of 1887.

As the question is of importance and as there does not seem to be any ruling on it, though the practice seems to be to transfer such suits from the regular side to the small causes side and dispose of them as small causes—a practice which does not seem to be in conformity with law—I direct that this be laid before the Chief Justice for being referred to a Full Bench.

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

P. Nagabhushanam for petitioner.

K. Subrahmania Sastri for respondent.

The Court expressed the following

OPINION.—The effect of section 32 (2) of Act IX of 1887 is that none of the provisions of the Act apply to a suit which has been commenced in a Court which has been invested with small cause jurisdiction before the date when the Court was so invested. The object of the sub-section appears to have been to prevent doubts arising as to whether the investment of a Court with small cause jurisdiction acted retrospectively with reference to a suit which had been commenced in that Court before the Court was so invested. The effect of holding that, in a case like the present, it was competent for the Court to transform a regular suit into a small cause suit would be to deprive a party of a right of appeal which he had at the time he instituted his suit. It has been argued that section 32 (2) only applies where a Court is invested with small cause jurisdiction for the first time and not, as in the present case, where the pecuniary limit of a jurisdiction which has already been conferred is raised. We do not think the sub-section should be so construed. The fact that the Judge was invested with small cause jurisdiction up to Rs. 100 prior to his investment

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with such jurisdiction up to Rs. 200 does not prevent the latter investment, so far as it goes, from being an investment with the jurisdiction of a Court of Small Causes within the meaning of the sub-section (2). In this Presidency, at any rate, the investment of jurisdiction, in cases like the present, is the investment of an individual Judge with particular powers.

Our answer to the question referred to us is that the trial of the suits in question as small cause suits (or, as it is put in the Order of Reference, the transformation of the suits into small cause suits) was not in accordance with law.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

1902. April 29. June 19.

NUNNA BRAHMAYYA SETTI AND TWO OTHERS (PLAINTIFFS), APPELLANTS,

v.

CHIDARABOYINA VENKITASWAMY (DECEASED), SANKA DANAYYA AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

Insolvent Debtors Act—11 *&* 12 *Vict., Cap.* 21, *ss.* 7, 30—*Ancestral trade carried on by brothers in undivided family—Insolvency and discharge of all the adult members—Minor son of one brother not a party to insolvency proceedings —Order vesting family property in Official Assignee—Sale by Official Assignee of land so vested—Subsequent suit against minor—Sale of his interest in the land—Validity.*

Seven brothers who carried on a business (which had previously been conducted by their family for very many years) applied to be adjudged insolvents in the Court for the relief of insolvent debtors in Madras. They comprised all the adult members of the family at the time when the application was made, and all the debts included in their schedule had been incurred in connection with the family business. A, being a son of one of them and a minor at the time, was not a party to the insolvency proceedings. The applicants in due course obtained their discharge and an order was passed vesting their property (which included land) in the Official Assignee in Madras. At a date subsequent to that of the vesting order, plaintiffs purchased from the Official Assignee part of the land so vested; and, later still, B brought a suit against A for money due on a

* Second Appeal No. 112 of 1901, presented against the decree of I. L. Narayana Rao, Subordinate Judge of Kistna, at Masulipatam, in Appeal Suit No. 119 of 1900, presented against the decree of K. Rangamannar Ayyangar, District Munsif of Bapatla, in Original Suit No. 546 of 1898.

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bond, and obtained a decree. In the execution of that decree, A's share in the said land was brought to sale and purchased by B. Upon a suit being brought by plaintiffs for a declaration that the purchase by B was inoperative and void by reason of the prior sale to plaintiffs by the Official Assignee:

Held, that plaintiffs were entitled to the declaration. *Also*, that inasmuch as the trade was an ancestral one (and not one commenced by the managing members during the minority of A), and as the scheduled debts were incurred in the course of such trade, and all the adult members had applied for the benefit of the Insolvency Act, the debts were, at least, *primâ facie* binding on the whole family, including the minor. It was not, therefore, necessary for plaintiff to prove the character of each debt on the existence of family necessity.

In cases in which section 7 of the Indian Insolvent Debtors Act applies, the vesting order vests in the Official Assignee only the real and personal estate and effects of the insolvent. And where the insolvent is a member of an undivided Hindu family his undivided interest in the joint family property, and it alone vests in the Official Assignee, whether he be the managing member or a junior member of the family. The proprietary interest of the members other than the insolvent (even though they be his sons), will continue vested in them.

The effect of section 30 of the Insolvent Debtors Act and the analogous provision contained in section 266 of the Code of Civil Procedure, considered.

SUIT for the cancellation of a sale of land. Plaintiffs claimed title to the land in question as part of a larger estate purchased by them under a sale-deed executed in their favour by the Official Assignee of Madras on 7th April 1898. The second defendant (whose purchase was sought to be set aside) had purchased a one-tenth share of the estate at a Court auction sale in execution of a decree in a suit which he brought against first defendant on 19th April 1898. The facts were these :—Sanka Murthi Setti was the representative of a family which had for over a hundred years carried on a business in Madras and elsewhere, and Sanka Murthi Setti adopted Chinnabbi Setti, and had a natural son Kotappa Setti. Chinnabbi had six sons, and Kotappa had five. In 1891, the family ceased to carry on the business, because of the losses which had been sustained, and the only surviving adult members of which the family then consisted applied for relief in the Insolvent Court in Madras. These were :—Chinnabbi's eldest son Raghavulu, and Chinnabbi's fifth and sixth sons, and Kotappa's first, second, fourth and fifth sons. At the time of the application two minor sons of Chinnabbi's fourth son (then already deceased), were alive. The elder of these was the present first defendant. In January 1894, the applicants obtained their discharge in the Insolvent Court, and on 29th of that month an order was passed vesting all their property estate and effects

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in the Official Assignee. The scheduled debts had (as is stated in the judgment of the High Court) been incurred in the course of carrying on the family business.

On 7th April 1898, the Official Assignee sold to plaintiffs, for Rs. 2,000, a casuarina plantation, being portion of the estate which had vested in him under the vesting of order of 29th January 1894. On 19th April 1898 the present second defendant instituted Original Suit No. 208 of 1898 against first defendant in the Court of the District Munsif of Bapatla, on a bond, and obtained a decree. In execution of that decree, a one-tenth share in the casuarina plantation already referred to was put up for sale and bought at a Court auction by the present second defendant. Plaintiffs, claiming that one-tenth share of the plantation under their sale-deed of the entire plantation from the Official Assignee, now filed this suit for a declaration that the sale to the present second defendant was inoperative and void. First defendant filed no written statement, though he was represented before the District Munsif. Second defendant resisted the claim and pleaded that first defendant had not been a party to the proceedings in the Insolvent Court, and that the order of 29th January 1898 vesting the plantation in the Official Assignee, as part of the estate of the insolvents, and the subsequent sale thereof to plaintiffs could not affect the right title and interest of first defendant in the plantation. The Official Assignee was subsequently added by plaintiffs, as third defendant, and supported plaintiffs' claim.

The District Munsif held that first defendant's share in the plantation was only one-fortieth part therein, and as to this he held that the purchase by second defendant was inoperative, as the sale by the Official Assignee had been effected for the purpose of discharging debts incurred in connection with the ancestral family trade and, as such, was binding upon the family property, including first defendant's share therein. He made the declaration.

The Subordinate Judge, on appeal, upheld the finding as to the quantum of the first defendant's share in the plantation, but held that the purchase by second defendant was valid to that extent, on the ground that plaintiffs had adduced no proof as to the character of the debts which had been included in the schedule of the insolvent members of the family, and which amounted in all to a lakh and seven thousand rupees, and which were represented as being due to about one hundred and fifty creditors. He held

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that it could not be presumed, in the absence of such proof, that all the scheduled debts had been incurred for necessary purposes which would be binding on first defendant. He modified the decree by ordering that the purchase by plaintiffs should be ineffective so far as it related to first defendant's one-fortieth share in the plantation.

Plaintiffs preferred this appeal.

P. R. Sundara Ayyar for appellants.

BHASHYAM AYYANGAR, J.—Plaintiffs claiming as vendees for a price of Rs. 2,000 of a casuarina plantation under a deed of sale, dated 7th April 1898, executed by the Official Assignee of Madras and as such the assignee of one Sanka Raghavulu Chetti and six others who were adjudged insolvents, brought this suit for a declaration that the purchase made by the second defendant of a one-tenth share in the said plantation in Court auction-sale in execution of the decree in Original Suit No. 208 of 1898 on the file of the District Munsif of Bapatla which he brought on the 19th April 1898 against the first defendant on a bond executed by the latter, is inoperative and void by reason of the prior aforesaid sale made to them by the Official Assignee of the entire plantation.

The first defendant, his younger brother and the said Sanka Raghavulu Chetti and six others were members of an undivided Hindu family which was carrying on an ancestral trade for many years which resulted in heavy losses necessitating the stoppage of business in 1891 and all the major members of the family, viz., the said Sanka Raghavulu Chetti and six others applied to the Insolvent Court at Madras to be adjudged insolvents and on the 29th January 1894 an order was passed vesting all the property, estate and effects belonging to them in the Official Assignee. The District Munsif held that the first defendant's share in the casuarina plantation was only one-fortieth and not one-tenth as claimed by him, but that even in respect of this one-fortieth share the purchase by the second defendant was inoperative inasmuch as the sale by the Official Assignee of the entire plantation was for the purpose of discharging debts incurred in connection with the ancestral family trade and as such binding upon the family property including the first defendant's share. The Subordinate Judge, in appeal, while concurring with the Munsif that the first defendant's share in the plantation was only one-fortieth, modified his decree and held that the purchase made by the second defendant was valid to the extent

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of one-fortieth share in the plantation on the ground that the plaintiffs had adduced no proof as to the character of the schedule debts, amounting to one lakh and seven thousand rupees, due to about a hundred and fifty creditors and that it could not be presumed in the absence of such proof that all the debts must have been incurred for necessary purposes which will bind the first defendant. It is impossible to uphold this finding of the Subordinate Judge who, in reversing the finding of the Munsif, has proceeded on an altogether erroneous principle of law, viz., that the plaintiffs ought to prove the character of each debt or at least establish "by the production of accounts that the family was in a chronic need of money for the current outgoings of the family life or its trade necessities and that the moneys were advanced for such objects." It is clearly shown by the Munsif in paragraph 25 of his judgment and it is not disputed that the family consisted of members belonging to two branches and the ancestral family trade was principally managed by the eldest member in each of the two branches and that, subsequent to the death of the father of the first defendant, he and his younger brother (both of whom were minors) were represented in various documents executed on behalf of the family by their paternal uncles as their guardians. The application for the benefit of the Insolvency Act was made by all the adult members including the uncles of the first defendant. The first defendant and his brother did not join in such application, apparently because they were minors. Considering that the trade was an ancestral trade and not one commenced by the managing members during the minority of the first defendant, that the schedule debts were incurred in the course of such trade and that all the adult members applied for the benefit of the Insolvency Act, the debts were at least *primâ facie* binding upon the whole family including the minor members and it is difficult to see on what grounds the Subordinate Judge held that the first defendant's share in the family property was not liable for the debts. If the sale in favour of the plaintiffs had been made by all the adult members of the family under the above circumstances the two minor members would certainly be bound by such sale and it can make no difference, assuming that it was competent to the Official Assignee to transfer the interest of the first defendant in the casuarina plantation, a question which will be immediately considered, that the sale was made by the Official Assignee and not by the insolvents. Even if all and every one of the schedule debts

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amounting to upwards of a lakh of rupees were not binding upon the first defendant, it by no means follows that a sale of the casuarina plantation for Rs. 2,000 would not be effectual to transfer the first defendant's share therein. The real question, therefore, in the case is whether, by reason of the first defendant not having been adjudged an insolvent, the Official Assignee could exercise the power of sale which one or other of the members of the family who were adjudged insolvents could have exercised in respect of the first defendant's share in the joint family property. This question has been considered and decided in three cases, each of which, however, was decided only by a single Judge. In *Fakirchand Motichand* v. *Motichand Hurruckchand*(1) Latham, J., held with reference to section 7 of the Indian Insolvency Act (11 & 12 Vict., cap. 21) under which all the real and personal estate and effects of the insolvent and all his future estate, right, title, interest and trust in or to any real or personal estate or effects vest in the Official Assignee that he had no doubt that the right of the father to dispose of the son's interest in ancestral immoveable estate for the payment of his debts vests in the Official Assignee and that he could exercise such right even after the death of the father, the insolvent. With reference to section 30 of the Act which provides that all powers vested in any "insolvent which he might lawfully execute for his benefit shall be and are hereby vested" in the Official Assignee to be executed by him for the benefit of the creditors, Latham, J., observed as follows:—"It has been suggested that this right vests in the Official Assignee as being a 'power' within the meaning of section 30. But I think that it falls more appropriately within the words of section 7; and that there is no occasion to resort to section 30, which seems to apply to powers in the ordinary legal sense of the term, created by will or instrument *inter vivos*." In *Rangayya Chetti* v. *Thanikachalla Mudali*(2) Subrahmania Ayyar, J., following this decision as well as the decision of West and Birdwood, JJ., in *Jagabhai Lalubhai* v. *Bhukandas Jagjivandas*(3) as to the interpretation of the expression, "property over which" the judgment-debtor "has a disposing power which he may exercise for his own benefit," which occurs in section 266 of the Civil Procedure Code, held upon the evidence as to the nature of the

(1) I.L.R., 7 Bom., 441. (2) I.L.R., 19 Mad., 74.
(3) I.L.R., 11 Bom., 37.

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debts in the case before him that the sale by the Official Assignee passed the interest of the sons of the insolvent but not of the undivided brother of the insolvent. It is not clear whether Subrahmania Ayyar, J., considered that the Official Assignee's power is derived from section 7 of the Insolvency Act (which was the view taken by Latham, J.) or from section 30 of the Act. In the former case the power of sale could be exercised by the Official Assignee even after the death of the insolvent, but in the latter case, such power cannot be exercised after the death of the insolvent (*Nichols* to *Nixey*(1)). In *Sardarmal* v. *Aravayal Sabhapathy*(2), Strachey, J., after holding that certain property which was attached subsequent to the vesting order, in execution of a decree passed against the insolvent as manager of a joint family consisting of himself and his two nephews, which decree, however, was in terms only against the insolvent alone, was not the separate property of the insolvent but the joint property of himself and his nephews, released the whole property from attachment on a claim made by the Official Assignee and in doing so stated as follows :—"If it had not been for the vesting order, the plaintiffs could have attached and sold on account of the family debt for which the suit was brought, not only the interest of the judgment-debtor but also the interests of the whole joint family of which he was the manager . . . . I do not see however how they can attach and sell those interests in execution of a decree passed against the manager alone at a time when not only his personal interest, but, if the decision in *Rangayya Chetti* v. *Thanikachalla Mudali*(3) is right, his power as manager to convey the family property in payment of family debts had vested in the Official Assignee . . . . Here all the property of the judgment-debtor and all that he could honestly dispose of, whether for his own benefit or for the benefit of the joint family, had, prior to the attachment, passed to the Official Assignee, and consequently there was nothing which the plaintiffs could attach and sell." Strachey, J., arrived at the same conclusion after adverting to the provisions of the English Bankruptcy Act, 1890, and the decisions of English Courts in cases where, before the execution is completed, something happens which makes the property cease to be the property of all

(1) L.R., 29 Ch. D., 1005. (2) I.L.R., 21 Bom., 205.
(3) I.L.R., 19 Mad., 74.

the partners and vests an interest in somebody else,—that somebody else being the trustees in the bankruptcy of one of those partners. So far as the present case is concerned, in which it is not alleged that the insolvent was dead before the sale made by the Official Assignee or that, prior to such sale, though subsequent to the vesting order, the first defendant disposed of his share in the plantation, it is immaterial whether the disposing power of the Official Assignee over the first defendant's share was derived under section 7 or section 30 of the Indian Insolvency Act. But if the Official Assignee has such power, I am decidedly of opinion that it can be derived only under section 30 and not under section 7. In an undivided Hindu family governed by the Mitakshara each member has a vested joint right with the rest which, according to the decisions, he can transfer for value or which can be attached in his lifetime by an execution-creditor against him personally and brought to sale. The vesting order under section 7 purports to vest in the Official Assignee only the real and personal estate and effects of the insolvent and whether the petitioner be the managing member or a junior member of the Hindu family, his undivided interest alone in the joint family property will under that section vest in the Official Assignee and the proprietary interest of the other members even if they should be the sons of the petitioner would continue vested in them. If the petitioner were a junior member of a Hindu family it could hardly be contended that anything beyond his own interest in the joint family property would vest in the Official Assignee and so far as section 7 is concerned it will be difficult to maintain that it can have a different operation when the petitioner is the managing member. In a joint Hindu family the right, title and interest, whether proprietary or otherwise, of each member in the real and personal estate and effects of such family is exactly the same whether the individual member be the managing member thereof or a junior member of the family. Each member has absolute power of disposition for value over his interest or share in such property and the only respect in which the managing member has a superior right is that he has a power of disposition for causes which are recognised as just and proper under Hindu Law and Usage over the whole family property, including the interests and shares of the junior members. And the only question, therefore, is whether, when such managing member is adjudged an insolvent such power

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is one which, by virtue of section 30, is transferred to and vested in the Official Assignee. It may be, as observed by Latham, J., in *Fakirchand Motichand* v. *Motichand Hurruckchand*(1) that the "powers" referred to in section 30 are under English law created by will or instrument *inter vivos* and in its ordinary legal sense, the term connotes such powers. If the question were *res integra* and not covered by a course of judicial decisions bearing upon the corresponding expression occurring in section 266 of the Civil Procedure Code, I should entertain considerable doubt as to whether a power, which, under the Hindu Law, a managing member of a joint Hindu family has over the interests and shares of the junior members in the family property, is, within the meaning of section 30 of the Insolvency Act, a power vested in the insolvent which he can lawfully execute for his benefit. Section 266 of the Code of Civil Procedure in enumerating the various descriptions of property of a judgment-debtor which are liable to attachment and sale in execution of a decree for money mentions, among other things, the moveable and immoveable property over which the judgment-debtor "has a disposing power which he may exercise for his own benefit." This power is the same as the power referred to in section 30 of the Insolvency Act. It is now well settled, following the course of decisions of the Judicial Committee of the Privy Council, that in execution of a decree for money passed against a Hindu father or other managing member, attachment and sale of joint family property will vest in the purchaser not only the personal right, title and interest of the judgment-debtor in his share in such property, but also the right, title and interest of his sons or other junior members in such property though such shares are not vested in the father or other managing member, the judgment-debtor, but only a power of disposition over them is vested in him by law which, for just and proper purposes, he may exercise for the benefit of the family including himself. When this question was raised pointedly in *Jagabhai Lalubhai* v. *Bhukandas Jagjivandas*(2) West, J., explained the decision of the Privy Council in *Nanomi Babuasin* v. *Modhun Mohun* (3) as follows:—"By this, the father's disposition of the family estate, or a disposal of it under proceedings taken against the father alone,

(1) I.L.R., 7 Bom., 441. (2) I.L.R., 11 Bom., 37.
(3) I.L.R., 13 Calc., 21.

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is made to affect the son's as well as the father's interest, except so far as the son can establish, in a proceeding taken for that purpose, that the voluntary disposal was made under circumstances which deprived the father of the disposing power, or that the enforced disposal was on account of an obligation to which the son was not subject. The father, in fact, is made the representative of the family, both in transactions and suits, subject only to the right of the sons to prevent an entire disposition of the estate by particular instances of wrong-doing on the father's part. The District Judge has relied on section 266 of the Code of Civil Procedure which says that the property subject to attachment must be such as the judgment-debtor could dispose of for his own benefit. This is the direction, no doubt; but it does no more than state a general principle, which, though the section is not referred to, must have been present to the minds of the Judicial Committee. Their Lordships thought probably that the father could dispose of the family estate for his own benefit, at least *primâ facie*, and subject only to the right on which the sons could rely in particular cases." Adverting to this exposition by West, J., of the decision of the Privy Council, Subrahmania Ayyar, J., in *Rangayya Chetti* v. *Thanikachalla Mudali*(1) observed as follows:—"If this conclusion were erroneous, the innumerable cases, including the leading decisions of the Judicial Committee on the point, wherein the interest of sons was held to have passed by a sale in execution of decrees obtained against the father alone, must be considered to have been wrongly decided, a contention which is impossible, at all events at this time of the day . . . . For if the son's share is property which the father has power to dispose of for his own benefit in the restricted sense explained by West, J., in the passage quoted above, how can the share of any other undivided co-parcener, which the managing member can convey for debts incurred by him for legal necessity, be treated differently?"

I may also here observe that it will be too late now to contend that when an undivided member of a Hindu family governed by the law of the Mitakshara is adjudged an insolvent his separate estate and effects alone, if any, will vest in the Official Assignee under section 7, but that his undivided interest in the joint family property is not within the meaning of section 7 "his real and

(1) I.L.R., 19 Mad., 74.

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personal estate and effects," and that therefore such undivided share and interest will not vest in the Official Assignee. I would, therefore, allow this appeal and reversing the decree of the lower Appellate Court, restore the decree of the District Munsif. The respondents should pay the costs of the appellants in this Court and in the lower Appellate Court.

MOORE, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1902. April 16.

MEENATCHI ACHI *alias* NACHIAMMAI ACHI (SECOND PLAINTIFF), APPELLANT,

v.

P. S. ANANTHANARAYANA AYYAR AND ANOTHER (DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *s.* 365—*Application to be brought on record in place of deceased plaintiff—Order—Continuance of suit—Objection by defendant at late stage of case—Procedure.*

L instituted a suit to recover a debt, and died while the suit was pending, leaving no issue. Within two and-a-half months of his decease his widow applied, under section 365 of the Code of Civil Procedure, as the legal representative of the deceased plaintiff, to have her name entered on the record in his place. She was brought on the record, accordingly, and adjournments took place and during several weeks thereafter the suit was partially heard. A defendant then, after a number of witnesses had been examined, presented a petition, purporting to be under sections 365 and 367 of the Code, stating that it had become evident from the deposition of plaintiff's second witness that plaintiff's husband had left an undivided brother. The petitioner asked the Court to decide the question, under section 367, as to who was the legal representative of the deceased plaintiff. The District Munsif heard the parties, and (without making an elaborate enquiry), held that the widow was the proper heir (and should produce a succession certificate before judgment should be delivered), but he also directed, in order

* Second Appeal No. 1132 of 1900, presented against the decree of H. Moberly, District Judge of Madura, in Appeal Suit No. 154 of 1900, presented against the decree of P. S. Sesha Ayyar, District Munsif of Sivaganga, in Original Suit No. 362 of 1898.

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to prevent future disputes, that the alleged undivided brother should be joined as a party. A petition signifying his consent to be so joined was filed by the last-mentioned person:

Held, that the order was right. Under section 365 of the Code, the Court was bound to proceed with the suit after the name of the applicant had been entered on the record in place of the deceased. The right, if any, of the defendant to object to the widow being added as legal representative in place of her deceased husband arose on the death of the plaintiff, and the defendant was bound to have used all reasonable diligence in acquainting himself with the state of the family of the deceased with a view to ascertaining whether his widow was entitled to prosecute the suit as his legal representative. Objection, if raised at all, should have been raised at the earliest opportunity, and failure to object then precluded the defendant from raising it, as he had done, at a late stage of the suit.

Oula v. *Beepathee*, (I.L.R., 17 Mad., 209), and *Subbayya* v. *Saminadayyar*, (I.L.R., 18 Mad., 496), distinguished.

ORDER bringing a person on to the record in place of a deceased plaintiff. Lakshmanan Chetty had filed a suit to recover the amount of a debt, but died while the suit was still pending. His widow then applied, as his legal representative, under section 365 of the Code of Civil Procedure, to be brought on to the record in his place. The District Munsif passed an order as prayed. The suit was adjourned from time to time, and then partially heard, a number of witnesses being called. First defendant then presented a petition questioning the widow's right to proceed with the suit, as he contended that the evidence which had been adduced showed that the deceased plaintiff had left an undivided brother him surviving. The District Munsif made no elaborate enquiry, but held that the widow was the heir, and also joined (with his consent) the person who was alleged to be the undivided brother. First defendant appealed against both orders to the District Judge, who directed evidence to be taken for the determination of the question whether the widowwas entitled to be admitted as legal representative; and he also set aside the order joining the supposed undivided brother. The District Munsif accordingly took evidence and held on it that the widow was not the legal representative, and struck off her name from the record. He then passed judgment in the suit, holding that it had abated, and dismissing it. The widow appealed against the Munsif's order holding that she was not her husband's legal representative, and she also appealed against the decree dismissing her suit. The District Judge dismissed both appeals.

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The widow preferred this second appeal against the decree dismissing the suit, and a Civil Revision Petition against the order holding that she was not her late husband's legal representative.

C. Ramachandra Rau Saheb for appellant and petitioner.

Mr. *J. G. Smith* and *P. S. Sivaswami Ayyar* for respondents and counter-petitioners.

JUDGMENT.—Following the decision in *Subbayya* v. *Saminada Ayyar*(1) we overrule the preliminary objection that Second Appeal No. 1132 of 1900 does not lie. As an appeal lies, Civil Revision Petition No. 386 of 1900 which was presented in the alternative is rejected but without costs. We also overrule the preliminary objection that Civil Revision Petition No. 343 of 1900, which is preferred against the order of the District Judge in Civil Miscellaneous Appeal No. 9 of 1900, does not lie by reason that the appeal did lie to the District Court and that though the Munsif who passed the order appealed against acted in the exercise of his jurisdiction with material irregularity yet the order passed by the District Judge on appeal cannot be revised by this Court under section 622, Civil Procedure Code, though, in the exercise of his appellate jurisdiction, he failed to set aside the order appealed against which was erroneous in consequence of the Munsif having acted with material irregularity in the exercise of his jurisdiction. The suit was instituted by one Lakshmanan Chetti for the recovery of a debt either from the first defendant or from the second defendant. Pending the suit the plaintiff died issueless and within two months and-a-half of his death his widow, Nachiammai Achi, applied under section 365 of the Civil Procedure Code as the legal representative of the deceased plaintiff to have her name entered on the record in place of the deceased plaintiff. This application was made on the 14th of April 1899 and her name was entered on the record on the 15th idem. The suit was then adjourned from time to time, and, after the trial of the suit had extended over several weeks, the first defendant on the 20th of September 1899 presented a petition purporting to be under sections 365 and 367 stating that it became evident during the trial from the deposition of plaintiff's second witness, that the deceased plaintiff had left an undivided brother, by name Narayana Chetti, and that, even if the widow obtained a certificate

(1) I.L.R., 18 Mad., 496.

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of succession, it would be of no avail for the suit and the Court must decide the question finally under section 367, Civil Procedure Code, as to who was the legal representative of the deceased plaintiff. The District Munsif, after hearing the plaintiff's vakil, held on the 21st of September, without making any elaborate enquiry, that the widow was the proper heir and that she should produce a succession certificate before judgment in the case and he also directed, in order to prevent future disputes, that Narayana Chetti be also joined as a party. Narayana Chetti presented a petition signifying his willingness to be joined as a co-plaintiff with the widow without prejudice to the widow recovering the amount sued for as he, the petitioner, was not entitled to the same. Against both these orders, the first defendant preferred Civil Miscellaneous Appeal Nos. 12 and 13 to the District Judge who, by his orders, dated 29th November 1899, directed the District Munsif to hear all the evidence which the parties might adduce and, after holding a proper judicial enquiry, to determine whether the widow of the deceased plaintiff was, or was not entitled to be admitted as the legal representative of the deceased plaintiff, and he also set aside the order of the District Munsif joining Narayana Chetti as co-plaintiff. He thereupon held an elaborate enquiry between the widow on the one hand and the first defendant on the other as to who the legal representative of the deceased plaintiff was, and, rightly or wrongly, came to the conclusion that she was not the legal representative and "struck off her name from the record," the name of Narayana Chetti having already been struck off. He then passed judgment holding that the suit abated and passed a decree dismissing the suit with costs. The widow preferred Civil Miscellaneous Appeal No. 9 of 1900 to the District Judge against the order of the District Munsif, dated 12th February 1900, holding that she was not the legal representative of the deceased plaintiff and striking her name off from the record and she also preferred to the District Judge Appeal No. 154 of 1900 against the decree of the District Munsif, dated 13th February 1900, dismissing the suit with costs. The District Judge, concurring with the District Munsif that the widow had not established her right as the legal representative of her husband, dismissed both the appeals on 16th July 1900.

In our opinion the Original Order of the District Munsif, dated 21st September 1899, rejecting the first defendant's application

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dated 20th September 1899, and directing in view to prevent future disputes that Narayana Chetti should also be joined as a party, was perfectly right and it ought not to have been reversed by the District Judge on appeal. No objection was raised to the widow's name being entered on the record in the place of the deceased plaintiff under section 365 before her name was so entered, and neither of the defendants raised any objection to her prosecuting the suit for several months after her name was so entered and a number of witnesses had also been examined, and it was only towards the conclusion of the trial that the first defendant, and he alone, presented a petition questioning the widow's right to prosecute the suit as the legal representative of the deceased plaintiff. Assuming that the defendants had the right to raise such an objection, that right accrued to them on the death of the plaintiff and they were bound to use all reasonable diligence in acquainting themselves with the state of the family of the deceased in view to ascertain whether the widow was entitled to prosecute the suit as the legal representative of her deceased husband and they were bound to take the objection at the earliest opportunity if they meant to insist upon their alleged right to raise that objection. After having allowed the widow to proceed with the prosecution of the suit till it almost reached its conclusion, they have precluded themselves from raising such objection at a late stage of the suit. Assuming, as in *Oula* v. *Beepathee*(1) and *Subbayya* v. *Saminada Ayyar*(2) that section 367, Civil Procedure Code, is applicable not only to a case in which there is a dispute between rival claimants as legal representatives of a deceased plaintiff but also to a case in which the defendant disputes that the applicant under section 365 is the legal representative of the deceased plaintiff, the present case is clearly distinguishable. For, in the first of the two cases above referred to, the objection was raised by the defendant before the applicant's name was entered on the record under section 365 and the defendant did not allow the applicant to prosecute the suit, as in the present case, as the legal representative of the deceased. Under section 365 it is clear that the Court is bound to proceed with the suit after the name of the applicant is entered on the record in the place of the deceased plaintiff. In the present case if in the succession certificate which was obtained by

(1) I.L.R., 17 Mad., 209. (2) I.L.R., 18 Mad., 496.

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the widow after the death of her husband, the debt in question be specified, as presumably it is, her right to prosecute the suit as the legal representative of the deceased and recover the debt is conclusive under section 16 of the Succession Certificate Act (1889). If her husband had died before he had brought the present suit, it is obvious that the widow, as the holder of the succession certificate, and she alone, would have been entitled to bring the present suit and to recover the amount sued for. If so, it is difficult to see on what principle she, as the holder of the succession certificate, would not be entitled as of right to prosecute the suit commenced by her husband. The explanation to section 366 has no bearing whatever upon this question. It is unnecessary to refer to several other material irregularities in this case. We allow both the appeal and the revision petition, and, setting aside the decrees and orders of both the lower Courts, direct that the suit be restored to its original number on the file of the District Munsif and that he do proceed with the trial of the suit from the stage which it reached before his orders, dated 21st September 1899, and 25th September 1899, were erroneously set aside by the District Judge on appeal.

Both the respondents must pay the costs of the appellant and petitioner in this Court and the first defendant must pay the costs of all the appeals to the lower Appellate Court and of the proceedings in the Court of First Instance relating to the enquiry as to the question of the appellant being the legal representative of her deceased husband.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1902. April 9, 24.

KADIR MOHIDEEN MARAKKAYAR (SECOND DEFENDANT), APPELLANT,

v.

N. V. MUTHUKRISHNA AYYAR AND ANOTHER (PLAINTIFF AND SIXTH DEFENDANT), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *s.* 368—*Bringing one out of several legal representatives of a defendant on record—Effect of decree on the estate—Income Tax Act II of* 1886—*Sale of property for arrears of tax*—Lis pendens—*Purchase at sale for arrears of income tax—Subsequent sale in execution of prior mortgage decree—Duty of purchaser at revenue sale to pay amount due under mortgage and prevent sale in execution.*

Plaintiff, as the assignee of a mortgage executed by the father of first defendant, sued the mortgagor, in 1894, on the mortgage. During the pendency of the suit, and before the decree in it was passed, the mortgagor died. Plaintiff thereupon brought the first defendant on the record as legal representative under section 368 of the Code of Civil Procedure. In December 1894 a decree for sale was passed, which was never impeached as being fraudulent or collusive. As a fact, first defendant was not the sole legal representative of the mortgagor, who left two other sons and three daughters. The second son was, at a date subsequent to the decree, assessed to pay income tax, for arrears of which the mortgaged property was sold (under the Revenue Recovery Act), and purchased by second defendant in 1896. In 1897 the mortgaged property was sold in execution of the decree in plaintiff's suit on the mortgage, and plaintiff became the purchaser, the sale being confirmed soon after, and plaintiff obtaining a sale certificate which purported to convey the whole of the mortgaged property to him, and obtaining delivery of the property under section 318 of the Code of Civil Procedure in 1898. Plaintiff was subsequently dispossessed by defendants Nos. 2 to 5, and brought the present suit to recover possession of the property:

Held, that the sale of the property for arrears of income tax affected only the share of the second son and not the shares of the other co-heirs, and that, in consequence, the whole of the mortgaged property had not passed to the second defendant under that sale:

Held also, that the second defendant, by his purchase, had acquired only the equity of redemption in respect of the second son's share in the mortgaged property. The effect of section 30 of the Income Tax Act is not to convert income tax into an arrear of land revenue, due in respect of the land which may be

* Second Appeal No. 1147 of 1900, presented against the decree of T. M. Ranga Chariar, Subordinate Judge of Madura (West), in Appeal Suit No. 444 of 1899, presented against the decree of P. S. Sesha Ayyar, District Munsif of Sivaganga, in Original Suit No. 224 of 1898.

brought to sale for the realization of the income tax, but merely to extend the procedure prescribed by the Revenue Recovery Act to the recovery of arrears of income tax:

Held further, that the share of the second son was bound by the decree in the mortgage suit, notwithstanding that the second son was not joined in that suit as one of the legal representatives of the deceased mortgagor. Where a defendant in a suit dies and the plaintiff, under section 368 of the Code of Civil Procedure, brings a person on the record, whom he alleges to be the legal representative of the deceased defendant, such person sufficiently represents the estate of the deceased for the purposes of the suit, and, in the absence of fraud or collusion, the decree passed in the suit will bind the estate:

Held lastly, that the sale in execution of plaintiff's decree subsequently to the second defendant's purchase in the revenue sale extinguished second defendant's equity of redemption.

SUIT to recover immovable property. The facts of the case are set out in the head note and in the judgment. The District Munsif gave plaintiff a decree as prayed. An appeal preferred by second defendant to the Court of the Subordinate Judge was dismissed.

Second defendant preferred this second appeal.

V. Krishnaswami Ayyar for appellant.

P. S. Sivaswami Ayyar for first respondent.

JUDGMENT.—Plaintiff, as the assignee of a mortgage executed by first defendant's father Kadir Lavvai, brought Original Suit No. 540 of 1894 against Kadir Lavvai to enforce the mortgage by sale. During the pendency of the suit and before the passing of the decree Kadir Lavvai died and the name of his son, the first defendant, was on plaintiff's application entered on the record as legal representative in place of the deceased defendant under section 368 of the Civil Procedure Code. Subsequently, on the 20th December 1894, a decree was passed *ex parte* against the first defendant as legal representative of the deceased defendant, directing the sale of the mortgaged property. Plaintiff purchased the property at the sale held, on the 7th September 1897, in execution of the decree and the sale was confirmed on the 8th November 1897. After obtaining the usual certificate of sale which purported to convey to the plaintiff the whole of the mortgaged property—as it must be assumed—as that of the deceased defendant, the mortgagor, he obtained delivery of the same under section 318 of the Civil Procedure Code on the 18th February 1898. He was subsequently dispossessed by defendants Nos. 2 to 5, at the instigation, as is alleged, of the first defendant, hence this suit, which was instituted on the 22nd July 1898.

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It is admitted that Kadir Lavvai left three sons and two daughters, of whom first defendant was the eldest and that none but the first defendant were joined as the legal representatives of the deceased Kadir Lavvai in Original Suit No. 540. It is found by both the Courts that subsequent to the decree in the above suit, Mahomad Moideen, the second son of Kadir Lavvai, was assessed to income tax and that for arrears of tax due by him, the mortgaged property was sold under the Revenue Recovery Act and purchased by the second defendant on the 15th July 1896. The decree in Original Suit No. 540 is not impeached as having been obtained by fraud or collusion. Both the Courts below have decreed the plaintiff's claim.

Second defendant appeals against the decree and the only points urged before us in support of the appeal are that the decree in Original Suit No. 540 can at the most only bind first defendant's share in the mortgaged property and that it will not affect the shares of the other heirs of Kadir Lavvai as they were not made parties to it and that the sale of the mortgaged property under the Revenue Recovery Act for realizing arrears of income tax will vest the same in the second defendant, the purchaser, free of the mortgage encumbrance, at any rate so far as the share of Mahomad Moideen therein is concerned.

It will be convenient to consider the latter contention first. Mahomad Moideen was not assessed to income-tax as representing all the heirs of Kadir Lavvai in respect of income derived by or for all of them, but was assessed for income derived by him individually or, it may be, in partnership with two strangers with whom he carried on trade. Under section 30 of the Income Tax Act (II of 1886) the Collector may in default of payment of the tax recover the amount as if it were arrears of land revenue or by any process applicable to the recovery of a municipal or local tax or may pass an order for recovery of the amount from the defaulter, which order may be executed as a decree for payment of money passed under the Code of Civil Procedure. The defaulter Mahomad Moideen had a several share in the mortgaged property as one of the heirs of Kadir Lavvai and that alone could legally have been proceeded against for the recovery of the tax payable by him. In the present case the Collector proceeded to recover the amount under Act II of 1864, as if it were an arrear of land revenue and the sale can affect only the defaulter's property, *i.e.*,

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his share in the mortgaged property and not the shares of the other co-heirs. The contention that the whole of the mortgaged property would pass to the second defendant under such sale is therefore manifestly untenable.

The next question is whether under such sale the share of Mahomad Moideen would pass to the second defendant free of the mortgage encumbrance which was affirmed by the decree in Original Suit No. 540 of 1894, as if the income tax due by Mahomad Moideen were revenue which accrued due in respect of the land forming his share in the mortgaged property; in which case, under section 2 of Act II of 1864, the land, the buildings upon it and its products form the security for the public revenue. We are clearly of opinion that section 30 of the Income Tax Act has not the effect of converting income tax into an arrear of land revenue due in respect of the land which may be brought to sale for realisation of the income tax, but that its effect simply is to extend the procedure prescribed by (Madras) Act II of 1864 and (India) Act I of 1890, to the recovery of arrears of income tax.

The decision of this Court in *Ramachandra* v. *Pitchai Kanni*(1), which relates to a sale under Act II of 1864, for arrears of abkári revenue due under Act III of 1864 and the reasoning on which the decision proceeds are equally applicable to a sale under Act II of 1864, for arrears of income tax. The difference in the wording between the corresponding sections of the Income Tax Act and Abkári Act is merely verbal.

In our opinion, therefore, the second defendant by his purchase acquired only the equity of redemption in respect of Mahomad Moideen's share in the mortgaged property; and this leads to the consideration of the two questions involved in the first contention, viz., whether the decree in Original Suit No. 540 of 1894 will bind such share notwithstanding that Mahomad Moideen was not joined in the suit as one of the legal representatives of Kadir Lavvai and whether, if it so binds, the sale in execution thereof which took place subsequent to the second defendant's purchase in the revenue sale would extinguish his equity of redemption notwithstanding that he was made no party to the execution proceedings.

As already stated, on the application of the plaintiff, the first defendant's name was entered on the record in the place of the

(1) I.L.R., 7 Mad., 434.

deceased defendant as his legal representative. He raised no objection that he was not the, or the sole, legal representative of the deceased defendant and that there were others who ought also to be joined, nor did Mahomad Moideen or any of the other co-heirs apply, as they might, under the last paragraph of section 368 of the Civil Procedure Code (as amended), to have his or their names joined as legal representatives in place of the deceased defendant. In our opinion a person whom the plaintiff alleges to be the legal representative of the deceased defendant and whose name the Court enters on the record in the place of such defendant sufficiently represents the estate of the deceased for the purposes of the suit and in the absence of any fraud or collusion the decree passed in such suit will bind such estate. It will of course be open to any other person who is or claims to be the legal representative or one of the legal representatives of the deceased defendant to apply to have his name also entered on the record as a legal representative in the place of the deceased defendant. Even before section 368 of the Civil Procedure Code was amended to this effect, such course was adopted in *Athiappa* v. *Ayanna*(1). If this were not the law, it would, in no few cases, be practically impossible to secure a complete representation of a party dying pending a suit and it would be specially so in the case of a Muhammadan party and there can be no hardship in a provision of law by which a party dying during the pendency of a suit, is fully represented for the purpose of the suit, but only for that purpose, by a person whose name is entered on the record in place of the deceased party under sections 365, 367 and 368 of the Civil Procedure Code, though such person may be only one of several legal representatives or may not be the true legal representative. If the true legal representative or all the legal representatives do not intervene, it can be due only to his or their laches. This is the principle of representation which obtains under the English law when it is necessary that the representative of a person deceased be made a party to a pending suit and that principle is reproduced in section 38 of the (Indian) Probate and Administration Act. A person prosecuting or defending a suit as the legal representative of a deceased party will of course be accountable to others who

(1) I.L.R., 8 Mad., 300.

like himself are also the legal representatives of the deceased or to the true legal representative as the case may be.

Among the heirs of Kadir Lavvai, none but the first defendant, who has not put in an appearance in this suit—and Mahomad Moideen, as represented by the second defendant, the assignee of his share—are parties to this suit. It is unnecessary to consider and reconcile the cases referred to in the judgments of the lower Courts, which, with a few additional cases, were also cited in the argument before us. With the exception perhaps of *the General Manager of Durbhanga* v. *Maharaja Coomar Ramaput Sing*(1) they are all cases in which the debtor died before the suit and the suit was brought against only one or two of his representatives excluding the others or against a person who was not the true representative, and not as here, in which the suit was brought against the debtor himself.

In *The General Manager of Durbhanga* v. *Maharaja Coomar Ramaput Singh*(1) case above, it is not clear whether one of the two suits for rent due by the deceased was brought against himself and his widow joined as legal representative on his death pending suit or the suit itself was brought against her as his legal representative. It would appear from the head note that the former was the case, but it does not appear clearly from the report of the case that it was so. The Judicial Committee of the Privy Council held that though the deceased left him surviving a son, who must be taken to be his legal representative and not the widow, yet the sale in execution of the decree in that suit was not of the widow's personal interest, but of that of the representative of her deceased husband notwithstanding that the suit was not brought or continued against the son, who in law was the true legal representative of the deceased.

The cases in *Mohan Manor* v. *Togu Uka*(2), *Ghamandi Lal* v. *Amir Begam*(3), *Musala Reddi* v. *Ramayya*(4) relate to the question of the abatement of an appeal when the appellant died pending the appeal and his legal representatives were not all brought on the record within the period of limitation and those cases have no direct bearing upon the question now under consideration.

(1) 14 Moo. I.A., 605.
(2) I.L.R., 10 Bom., 226.
(3) I.L.R., 16 All., 211.
(4) I.L.R., 23 Mad., 125.

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The only point which remains to be considered is whether the second defendant's equity of redemption in respect of Mahomad Moideen's share was extinguished by the sale in execution of the decree in Original Suit No. 540 of 1894 and this depends upon the application of the law of '*lis pendens*' to an involuntary sale in execution proceedings of the judgment-debtor's interest in the property affected by the decree. If Mahomad Moideen had actually been a party to the decree, could the second defendant assert his equity of redemption and seek to redeem Mahomad Moideen's share notwithstanding the sale in favour of the plaintiff in execution of the decree in Original Suit No. 540. This question is concluded against the appellant by the decision of this Court in *Kunhi Umah* v. *Amed*(1) and the other decisions therein cited. As observed by the learned Judges in that case, the second defendant, after he became the purchaser in the revenue sale of the equity of redemption, pending execution of the mortgage decree "ought to have paid the amount under the mortgage decree and prevented the sale in execution in the same way in which the mortgagors might have done." It can in principle make no difference whether Mahomad Moideen was actually a party on record or was sufficiently represented by the first defendant. If the second defendant had been a purchaser at a revenue sale for arrears of land revenue which accrued due in respect of the land purchased by him the case would be quite different and the doctrine of '*lis pendens*' would not apply; for in that case the revenue sale would be in enforcement of a right of the Crown paramount to the mortgage right sought to be enforced by the decree of the Civil Court, and not simply of the right, title and interest of the defaulter as in the case of a sale for arrears of income tax. A purchaser in a revenue sale is a voluntary purchaser and as such is affected by the doctrine of '*lis pendens*' and is not an assignee '*in invitum*' like the official assignee, who is not affected by the doctrine of '*lis pendens*' (*Wood* v. *Sur*(2), *Punithavelu Mudaliar* v. *Bhashyam Ayyangar*(3)).

The second appeal therefore fails and is dismissed with costs.

(1) I.L.R., 14 Mad., 491. (2) 19 Beav., 551.
(3) I.L.R., 25 Mad., 406.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1902. April 15.

THE ARYAN BANK OF VIZAGAPATAM (UNLIMITED) (PLAINTIFF), APPELLANT,

v.

KAMMA VENKATA NARASAYYAMMA GARU (FIRST DEFENDANT), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, s. 244—Order by High Court directing District Court to take account of amount due under mortgage—Order by District Court declaring amount due—Appeal.

The High Court, by its decree, directed a District Court to take an account of the amount due to a decree-holder under a mortgage. The District Court accordingly took the account and passed an order declaring, in Court, under section 88 of the Transfer of Property Act, the amount so due. Against that order the decree-holder appealed to the High Court, when the objection was raised that no appeal lay:

Held, that the order appealed against was one falling under section 244 (c) of the Code of Civil Procedure and an appeal lay.

By an order, dated 30th August 1901, the District Judge of Vizagapatam declared, in Court, under section 88 of the Transfer of Property Act, the amount due, up to a certain date, to a decree-holder for principal and interest on a mortgage, on taking an account as directed by the High Court in its decree in Original Suit No. 37 of 1896, and Pauper Appeal No. 5 of 1900. Against that order, the decree-holder preferred this appeal.

P. R. Sundara Ayyar, for respondent, took the preliminary objection that no appeal lay.

T. Rungachariar for appellant.

JUDGMENT.—This is an appeal by the decree-holder in Original Suit No. 37 of 1896 (Pauper Appeal No. 5 of 1900 on the file of the High Court) against the order of the District Judge of Vizagapatam, dated 30th August 1901, declaring in Court, under section 88 of the Transfer of Property Act, the amount due to the decree-holder for principal and interest on the mortgage up to 7th August 1901, on taking an account as directed by the decree of this Court,

* Appeal against the Order No. 164 of 1901, presented against the order of M. D. Bell, District Judge of Vizagapatam, dated 30th August 1901, in Original Suit No. 37 of 1896 (Pauper Appeal No. 5 of 1900 on the file of the High Court).

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dated 7th February 1901, in the above appeal. The respondent's pleader raises the preliminary objection that no appeal lies to this Court against the said order and he admits that, if this objection be well founded, the account itself should have been taken in this Court and the order fixing the amount should have been declared in Court by this Court on the 30th of August 1901. In our opinion the objection is not well founded and the order appealed against is really one falling under section 244 (*c*) of the Civil Procedure Code being a question arising between the parties to the suit in which the decree was passed on appeal by this Court and relating to the execution of that decree. Following the decision of this Court in the recent Full Bench cases, we hold that a decree for sale passed under section 88 of the Transfer of Property Act is the final decree in the suit and that all proceedings taken subsequent to that decree for the purpose of enforcing and working out such decree are proceedings in execution of that decree. A decree for sale passed under that section may declare the amount due on the mortgage at the date of such decree or direct, as was done in this case, that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage on a future day, which is to be fixed by the decree itself. In this case the 7th of August 1901 was the day so fixed by the appellate decree of this Court, dated 7th of February 1901; and the decree further provided that the amount that might be declared due on the 30th of August 1901 should be paid on or before the 31st of December 1901. In our opinion an application which the decree-holder may make for taking the account and declaring the amount which may be found due on the taking of such account is an application to enforce that portion of the decree within the meaning of section 230 of the Code of Civil Procedure; and that being so the decree-holder is entitled to apply under section 583 to the Court which passed the decree against which the appeal was preferred to the High Court. The Court which is to declare the amount due by virtue of the appellate decree is, therefore, the Court which passed the original decree. In this view the order in question falls under section 244 (*c*) and is analogous to orders under clauses (*a*) and (*b*) of section 244 fixing the amount of mesne profits or interest payable under a decree.

[The judgment dealt with the items of account.]

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

JAMBU RAMASWAMY BHAGAVATHAR (PLAINTIFF), APPELLANT,

v.

SUNDARARAJA CHETTI AND ANOTHER (FIFTH AND SIXTH DEFENDANTS), RESPONDENTS.*

1902. March 21. April 3.

Negotiable Instruments Act—XXVI of 1881, *s.* 98 (*c*)—*Damage suffered by drawer by omission to give notice of dishonour—Onus of proof—Partnership between drawer and acceptor—Acceptor also drawer—Discharge of acceptor by limitation—Effect on liability of drawer.*

When the endorsee of a bill sues the drawer to recover the amount due under the bill, and relies upon section 98 (*c*), of the Negotiable Instruments Act to excuse the omission to give notice of dishonour, the onus lies on the endorsee to establish that the drawer could not have suffered damage by the omission.

The mere fact that the drawer and acceptor of a bill are partners, does not give rise to the presumption that they are partners in respect of the drawing of the bill, or that the bill was drawn by one of them on behalf of both. In such a case the acceptor is not also a drawer, so as to render notice of dishonour unnecessary, under section 98 (*c*).

The fact that the acceptor of a bill is not liable (because he was joined as a party to the suit after the period of limitation had expired), does not discharge the drawer from his liability, where the suit has been instituted as against him in time.

SUIT on a hundi. Plaintiff sought to recover Rs. 575 due on a hundi, together with interest accrued thereon. The hundi had been drawn by fifth defendant, in favour of first defendant, accepted by sixth defendant, and endorsed over by first defendant to plaintiff. Plaintiff alleged that the hundi directed the acceptor, who was a partner with fifth defendant, to pay the amount due at Rangoon within 21 days after demand; that plaintiff had sent the hundi to Rangoon and demanded the amount of it from sixth defendant, who, however, failed to pay and returned the hundi; that plaintiff had given notice of dishonour to defendants, who, he alleged, were liable to pay the amount due under it. First

* Second Appeal No. 967 of 1900, presented against the decree of P. S. Gurumurti, Subordinate Judge of Kumbakonam, in Appeal Suit No. 408 of 1898, presented against the decree of J. C. Fernandez, District Munsif of Negapatam, in Original Suit No. 329 of 1896.

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defendant admitted that the hundi had been drawn in his favour by fifth defendant, but pleaded that it had been drawn on plaintiff's behalf for the price of goods sold by plaintiff to first defendant, and that he, first defendant, was not liable under it. He also pleaded that the suit was bad for want of notice of dishonour, and was barred by limitation as against him inasmuch as it was barred as against the acceptor (sixth defendant), who was joined as a party after the period of limitation had expired. Fifth defendant also admitted execution of the hundi, but pleaded ignorance of its endorsement to plaintiff, and claimed that the last endorsee, and not plaintiff, was the proper person to sue on it. He also set up want of notice of dishonour, and denied that sixth defendant was his partner. Sixth defendant pleaded that he had accepted as the agent of fifth defendant and not as his partner, and that he was not liable on it. He also pleaded limitation. On the issues, the District Munsif found that the suit was barred as against sixth defendant; and that, in consequence, the liability of first defendant, as surety, had also become discharged. He, however, held that the position of fifth defendant was not thereby affected and that he still remained liable as principal debtor. He found that notice of dishonour had been given to defendants Nos. 1 and 5, though not within a reasonable time, and that none had been given to second defendant. He held that notice of dishonour was not necessary to fifth defendant, but that it was necessary to defendants Nos. 1 and 2. On that ground he dismissed the suit as against first and second defendants. He found that there was no partnership between first and second defendants. The suit was dismissed as against defendants Nos. 3 and 4, who were sons of second defendant. In the result, he gave a decree against fifth defendant for the amount due on the hundi.

Fifth defendant appealed to the Subordinate Judge, who considered that, as the sixth defendant was discharged from liability, the fifth defendant was also discharged. In any case he held that fifth defendant was discharged from liability by reason of the fact that notice of dishonour had not been given to him within a reasonable time. He allowed the appeal and dismissed the suit.

Plaintiff preferred this second appeal.

V. Krishnaswami Ayyar and *K. Ramachandra Ayyar* for appellant.

V. C. Desika Chariar for respondent.

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JUDGMENT.—In support of this second appeal it is urged that the plaintiff (appellant) is entitled to a decree against the fifth defendant (the first respondent), firstly because the fifth defendant has not proved that he suffered any damage for want of notice of dishonour of the bill, secondly because no notice of dishonour is necessary since the fifth defendant, the drawer, and the sixth defendant, the drawee and acceptor, are partners, and thirdly because the fifth defendant received notice of dishonour of the bill by the acceptor within the meaning of section 30 of the Negotiable Instruments Act.

The first contention is governed by section 98 (*c*) of the Negotiable Instruments Act, which runs as follows:—No notice of dishonour is necessary when the parties charged could not suffer damage for want of notice. It is clear that the onus is upon the plaintiff who relies upon this exception to the general rule enacted by section 30—that the drawer of a bill of exchange is bound in case of dishonour by the drawee or acceptor thereof, to compensate the holder provided due notice of dishonour has been given to or received by the drawer—to establish and prove that the fifth defendant could not have suffered damage by reason of notice not having been given to him of the dishonour of the bill by the sixth defendant (*Moti Lal* v. *Moti Lal*(1)). The plaintiff did not allege in the plaint that the fifth defendant could not suffer damage for want of notice, nor has any such issue been raised and proved.

In support of the second contention the learned pleader for the appellant relies on the English case of *Porthouse* v. *Parker*(2). The decision in that case is virtually reproduced in section 98 (*e*) of the Negotiable Instruments Act which runs as follows:—No notice of dishonour is necessary to charge the drawers, when the acceptor is also a drawer. In that case, the bill was drawn by one Wood, as the agent of George James and John Parker on John Parker. The bill was accepted by a certain person as the agent of John Parker on his account. It was held that there was sufficient evidence of its having been regularly drawn and further that the acceptor being likewise a drawer and having dishonoured the same that must necessarily have been known to him and as he was one of the three drawers the knowledge of one was the knowledge of all and that, therefore, it was not necessary to give notice of

(1) I.L.R., 6 All., 78. (2) 10 R.R., 637.

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dishonour. Assuming, as alleged by the plaintiff, that the fifth and sixth defendants are partners, which allegation is denied by both of them, it is not alleged in the plaint, nor is it proved that the fifth defendant drew the bill in question both on behalf of himself and the sixth defendant. The mere fact that the drawer and the drawee happen to be partners cannot lead to any presumption that they are partners in respect of the drawing of the bill or that the bill was drawn by one of them on behalf of both. Even assuming that within the meaning of section 98 (*e*) and the definition of the word "drawer" a person can be regarded as the drawer of a bill of exchange, when his name does not appear on the face of it either individually or collectively, as included in the name of the firm, the present case does not fall within the principle of the above decision and clause (*e*) of section 98.

As regards the third contention, it is impossible to hold upon the facts found by the Sub-Judge, that the fifth defendant was given or received notice of dishonour within the meaning of section 30, in the manner prescribed by section 94, or within a reasonable time as required by section 106.

The Subordinate Judge has dismissed the plaintiff's claim against the fifth defendant also for another reason, viz., that as the suit was barred against the sixth defendant, the acceptor, who was joined as a party to the suit after the expiration of the period of limitation, the fifth defendant was also, therefore, discharged under section 134 of the Indian Contract Act. We may point out that this is clearly erroneous. If the suit be within time against the fifth defendant the fact that it is barred by limitation as against the sixth defendant, cannot operate as a discharge of the fifth defendant's obligation.

The second appeal fails and is dismissed with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

PATTIKADAN UMMARU, APPELLANT,

v.

EMPEROR, RESPONDENT.*

1902. June 18, 19.

Criminal Procedure Code—Act V of 1898,—*ss.* 418, 536—*Trial by jury for offence triable by jury—Verdict of acquittal—Opinion of jury of guilt in respect of offence not triable by jury—Conviction—Appeal on facts.*

Two persons were charged, as first and second accused, before a Court of Session, with robbery (under section 392 of the Indian Penal Code) and first accused was also charged with having caused grievous hurt in the course of the

* Criminal Appeal No. 300 of 1902, presented against the sentence of N. S. Brodie, Sessions Judge of South Malabar Division, in Calendar Case No. 25 of 1902.

Criminal Appeal No. 215 *of* 1895 (*unreported*).—This case was heard by Sir Arthur Collins, C.J., and Parker, J., the judgment being delivered on 5th November 1895. The portion bearing on the question raised in the principal case is as follows :—

The first prisoner is the manager of the Jambukeswaram temple appointed by the Devastanam committee of Trichinopoly under Act XX of 1863. He has been convicted of breaking into the temple and stealing therefrom a large number of jewels under sections 457, 381 and 380 of the Indian Penal Code, and the prisoners 2 to 4 and 6, who assisted him, have been convicted under sections 457 and 380.

The first objection taken is that the convictions for house-breaking, theft by a servant, and theft, cannot be sustained since the temple was in the possession of the first prisoner as were also the jewels. To constitute the offences of house-breaking and of theft, it is necessary to prove that the property was in the possession of another.

The learned counsel argues that the Sessions Judge wrongly directed the jury in telling them that the temple was in the possession of the committee, and argues that if the facts alleged by the prosecution are true, the offence committed by the first prisoner would be criminal breach of trust—which is triable by assessors—and not theft. We think this contention must be allowed. The Devastanam committee appointed under Act XX of 1863 exercise the same powers of supervision that were formerly exercised by the Board of Revenue under Regulation VII of 1817, but the property of the temple is not vested in them nor do they represent the property. The person who represents the property is the trustee or manager, who is indeed appointed, and may, no doubt, be removed, by the committee for sufficient cause. But the trustee or manager is not in the position of a clerk or servant removable at the pleasure of the committee. He holds his office permanently though subject to removal for misconduct. It was held in I.L.R., 12 Mad., 366, that the members of a Devastanam committee were not entitled as against the trustee or manager to be put in possession of the property of the temple or to the receipt of its income. The right view appears to be that the deity is regarded as the owner of the

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robbery (under section 397). Both offences are triable, and the accused were, in fact, tried by a jury, who, by their verdict, acquitted both of the accused of the charges framed under the sections referred to, but found first accused guilty of voluntarily causing grievous hurt—an offence which is triable, not by a jury but by assessors. The Sessions Judge acquitted both accused in respect of the charges under section 392 and section 397, but convicted first accused of having voluntarily caused grievous hurt, under section 325. Against that conviction first accused preferred this appeal, when it was objected that inasmuch as the trial had been held before a jury, the appeal lay on matter of law only, and not on questions of fact:

Held, per BENSON, J., that the conviction of the first accused for causing grievous hurt was not one by a jury but by the Judge, who treated the finding of the jury in regard to the grievous hurt as the opinion of assessors. An appeal therefore lay on the facts, as in the case of *Muthusami Pillai v. Queen-Empress*, (Criminal Appeal No. 215 of 1895, unreported—see judgment in footnote hereto), and in *Empress v. Mohim Chunder Rai* (I.L.R., 3 Calc., 765).

Per BHASHYAM AYYANGAR, J.—That the effect of section 238 of the Criminal Procedure Code is to invest a jury trying an offence triable by a jury with authority to find, as an incident to such trial, that certain facts only are proved in the trial, which facts constitute a minor offence, and return a verdict of guilty of such offence though such minor offence be not triable by a jury. And that a Sessions Judge may thereupon record judgment convicting the accused of such minor offence although he is not charged with it and tried on such a charge by the Sessions Judge with the aid of the jurors as assessors. The jury having found

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temple property, and the trustee or the manager appointed by the committee is the agent of the deity subject to the committee's control. The first prisoner was therefore in possession of the temple and its jewels, and if he has made away with the property, his offence is criminal breach of trust by an agent punishable under section 409 of the Indian Penal Code. The offence therefore should have been tried by the Sessions Judge with the aid of assessors. Section 536 of the Criminal Procedure Code provides that the trial shall not on that ground only be invalid, and the next point we have to consider is whether on appeal we should treat the case as having been tried by a jury or by assessors. The learned counsel for the appellants claims to be heard on the facts and refers to the decisions reported in 18 W.R., 59; 24 W.R., 30; and I.L.R., 3 Calc., 765. as authorities for taking that course.

All these decisions were passed under earlier Codes of Procedure, but those Codes contained provisions similar to section 536. In 3 Calc., 765, Mr. Justice Mitter doubted the correctness of the practice—but the other decisions are distinctly in point. Section 537 of the present Code provides that no finding of a competent Court shall be reversed on account of any irregularity during trial unless such irregularity has occasioned a failure of justice. A similar provision is to be found in section 283 of the old Code X of 1872. If it be granted that there is a possibility of the jury having gone wrong upon the facts, the accused would no doubt be prejudiced by being precluded from going into the facts before the Appellate Court. The only alternative in such a case would be to order a retrial, but this course is not desired either by the accused or by the prosecution. We think the reasonable course is to follow the cases reported in 18 W.R., 59, and 24 W.R., 30, treating the charge as the judgment in the case and the verdict of the jury as the opinion of the assessors.

first accused guilty of causing grievous hurt and the Judge having given judgment convicting him of the same, an appeal lay only on a point of law, as the accused had been convicted in a trial by jury.

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APPEAL against a conviction, under section 325, Indian Penal Code, for voluntarily causing grievous hurt. The case is reported with reference to the question whether, in the circumstances of the conviction, the appeal lay on the evidence as to questions of fact, or whether, the case having been tried before a jury, the appeal lay, under section 418 of the Code of Criminal Procedure, only on a matter of law. The facts are set out in the head-note and in the judgments.

Mr. *C. Krishnan* for appellant.

The Acting Public Prosecutor in support of the conviction.

BENSON, J.—In this case the first and second accused were charged with robbery (section 392, Indian Penal Code) and the first accused was also charged with having caused grievous hurt in the course of the robbery (section 397, Indian Penal Code).

These offences are triable by a jury, and, in the present case, were so tried. The jury found that the first accused had committed the offence of voluntarily causing grievous hurt (section 325, Indian Penal Code), but that the elements necessary to constitute the offence of robbery were not proved. They therefore acquitted both the accused on the charges framed under sections 392 and 397, Indian Penal Code, and the Sessions Judge, as I understand, treating the findings of the jury in regard to the grievous hurt as the opinion of assessors, himself convicted the first accused of the offence of voluntarily causing grievous hurt, section 325, Indian Penal Code.

Against this conviction the first accused appeals and claims to be allowed to go into the evidence and to show that the offence under section 325, Indian Penal Code, is not proved.

The Public Prosecutor contends that in the present case the trial was by jury and takes the preliminary objection that under section 418, Criminal Procedure Code, an appeal in such a case lies on a matter of law only, not on a question of fact.

I do not think that the objection is sustainable. An offence under section 325, Indian Penal Code, is not triable by a jury, but by a Judge with the aid of assessors; and an offence punishable under section 397, Indian Penal Code, is triable by a jury. An offence under the latter section is a compound offence. It is

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constituted by the combination of two offences committed in one transaction, that is the offence of voluntarily causing grievous hurt (section 325) and the offence of robbery (section 392). Each of these offences might have been, and in a Court in England would have been, separately charged. If they had been separately charged there can be no question but that the trial on the charges under sections 392 and 397 would have been by the jury and the trial on the charge under section 325 would have been by the Judge with the aid of the jurors as assessors. This is the procedure expressly prescribed by section 269 (3), Criminal Procedure Code, which provides that "when the accused is charged at the same trial with several offences of which some are and some are not triable by jury he shall be tried by jury for such of those offences as are triable by jury, and by the Court of Session, with the aid of the jurors as assessors, for such of them as are not triable by jury". Had the charge been framed in this way an appeal on the facts as regards the offence under section 325, Indian Penal Code, would certainly have been open to the accused. Does the omission, then, to expressly frame a separate head of charge under section 325 make any difference as to the nature of the trial or the right of appeal? I do not think that it does. Broadly speaking an omission or error in a charge, or even the failure to frame a charge is treated by the Criminal Procedure Code as immaterial unless it in fact, leads to a failure of justice. When that is so, can it be supposed that an omission to separately charge a minor offence included in a greater offence actually charged would operate to deprive an accused person of a right of appeal which he would have if the minor offence had been separately charged? The charge under section 397 is an intimation to the accused that he is charged with robbery (section 392) and with voluntarily causing grievous hurt (section 325). He is on his trial with regard to both offences. One or the other or both may be proved against him. Section 238 (1), Criminal Procedure Code, provides that "when a person is charged with an offence consisting of several particulars a combination of some only of which constitutes a complete minor offence and such combination is proved, but the remaining particulars are not proved he may be convicted of the minor offence, though he was not charged with it."

In this case the accused has in fact been convicted of the minor offence, and he has been convicted, as I understand it, by the Judge

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who treated the finding of the jury in regard to the grievous hurt as the opinion of assessors. It is not, in my opinion, correct to say that the conviction under section 325 was by the jury. It is expressly a conviction by the Judge and the Judge's procedure was, I think, correct. I can see no reason why the accused should not be allowed to appeal on the facts. The decision of this Court in *Muthusami Pillai* v. *The Queen-Empress*(1) and in *Empress* v. *Mohim Chunder Rai*(2) support this view.

As regards the merits, I can find no reason for regarding the conviction under section 325, Indian Penal Code, as incorrect. The sentence, however, seems to me to be excessive considering that the complainant and the appellant are near relations and have always been on good terms. I would reduce the term of substantive imprisonment to three months and the imprisonment in default of payment of fine to two months. The amount of fine and order as to compensation I would leave unaltered.

BHASHYAM AYYANGAR, J.—The appellant, the first accused, was charged with robbery under section 392, Indian Penal Code, and also with the offence of causing grievous hurt at the time of committing robbery under section 397, Indian Penal Code, both being offences triable by a jury. The jury, while returning a verdict of not guilty on both the charges, found the appellant guilty of causing grievous hurt. The Sessions Judge, accepting their verdict of not guilty, acquitted the appellant on both the charges, but convicted him of causing grievous hurt under section 325, Indian Penal Code, and sentenced him to three years' rigorous imprisonment and a fine of Rs. 100, or in default six months' further rigorous imprisonment. The appellant's counsel contends that the appellant must be taken to have been convicted of an offence under section 325 by the Sessions Judge in a trial held before him with the aid of the jury as assessors inasmuch as an offence under section 325 is one not triable by a jury; and that therefore an appeal lies on a matter of fact as well as matter of law. I am unable to accede to this contention. If the Sessions Judge had also framed an additional charge under section 325 the appellant could have been tried by the Sessions Judge on that charge under sub-section 3 of section 269, Criminal Procedure Code, with the aid of the jurors as assessors. In my opinion the appellant

(1) Criminal Appeal No. 215 of 1895—*vide* p. 243 *supra*.
(2) I.L.R., 3 Calc., 765.

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was in fact tried by a jury and I may also add legally tried by a jury inasmuch as the two offences with which he was charged, viz., sections 392 and 397, Indian Penal Code, were triable only by a jury and that therefore under section 418 this appeal will be on a matter of law only. The omission to frame or add a charge separately under section 325 is not even a defect or irregularity and as such curable under section 537 (*a*) for under section 238 (1) the appellant was liable, without any separate charge, to be convicted incidentally of the minor offence though he was only charged with and tried for the compound offence. Reading section 418, Criminal Procedure Code, with section 536 it seems to me that the question as to whether an appeal will lie on a matter of fact as well as a matter of law or only on a matter of law depends upon the question as to whether the trial was in fact with the aid of assessors or was by a jury and not upon the question as to whether the offence of which the appellant has been convicted was of a class which ought to have been tried with the aid of assessors or one of a class which ought to have been tried by a jury; so far as trial by jury is concerned the trial will not be invalid even if the accused is charged expressly with an offence triable with the aid of assessors and even if the objection to trial by jury was taken by the accused but was overruled by the Sessions Judge on the erroneous ground that it was triable by jury. In such a case the accused if convicted cannot claim the right of appeal on matters of fact, section 418.

Under sub-section (1) of section 238 the appellant was liable to be convicted of the minor offence under section 325, without there being a separate charge under that section. The effect of section 238 in my opinion is to invest a jury trying an offence triable by a jury with authority to find as an incident to such trial that certain facts only are proved in the trial which facts constitute a minor offence and return a verdict of guilty of such offence though such minor offence be not triable by a jury. And the Sessions Judge may thereupon record judgment convicting the accused of such minor offence although he is not charged with it and tried on such a charge by the Sessions Judge with the aid of the jurors as assessors. In cases in which having regard to the charge and the evidence adduced at the trial it is appropriate to do so, the Sessions Judge in his charge to the jury should draw their attention to the provisions of section 237 or 238 as the case

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may be so that the jury may, if they deem fit to do so, return a verdict of guilty on a cognate or minor offence though they return a verdict of not guilty on the offences with which the accused has been actually charged. In this case the jury found that the first accused was guilty of causing grievous hurt and the Judge has given judgment convicting him of the same. And therefore an appeal will lie from such judgment only on a point of law, the appellant having been convicted in a trial by jury *Bhootnath Dey* and others(1), *Surja Kurmi* v. *Queen-Empress*(2). There being nothing contrary to law in the trial or in the conviction of the appellant for the reasons already given, the appeal in my opinion fails except in regard to the severity of the sentence. I agree with my learned colleague as to the reduction of sentence proposed by him.

APPELLATE CRIMINAL.

Before Mr. Justice Bhashyam Ayyangar.

1902. March 18.

REGULA BHEEMAPPA AND THREE OTHERS, PETITIONERS,

v.

EMPEROR, COUNTER-PETITIONER.*

Penal Code—Act XLV of 1860, *ss.* 97, 101, 104—*Private defence —"Protect a right"—Unlawful assembly.*

The villagers belonging to C walked in a religious procession, through a part of the village of K, carrying with them a vessel containing water which purported to be consecrated. The villagers of K, objecting, obstructed the procession, whereupon the members of it resisted the obstruction, and used some violence, causing grievous hurt to one of the obstructors and hurt to others of them. The members of the procession were charged with and convicted of being members of an unlawful assembly, possessing deadly weapons, and causing grievous hurt, and their convictions were upheld on appeal. On revision:

(1) 4 C.L.R., 405. (2) I.L.R., 25 Calc., 555.

* Criminal Revision Petition No. 525 of 1901, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of S. Russell, Sessions Judge of Bellary, in Criminal Appeal No. 55 of 1901, confirming the finding and sentences passed on the petitioners by E. Seetharama Row Naidu, Sub-Divisional First-class Magistrate of Adoni, in Calendar Case No. 18 of 1901.

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Held, that the convictions were wrong. The accused were justified, in the circumstances, in exercising their right of private defence; and the harm inflicted was not more than appeared to have been necessary for the purpose of self-defence.

CHARGES of being members of an unlawful assembly, possessing deadly weapons, and causing grievous hurt. All the accused belonged to the village of Chintakunta, and went in procession to worship a goddess in the village of Kaminahal,—situated three miles distant. A disturbance occurred, and 106 persons were charged by the police. The case for the defence was that a procession went from a temple situated in Chintakunta to a sacred spot in the limits of Kaminahal, a pot of consecrated water being carried with the people. When the accused had performed their acts of devotion and were returning, they were attacked by the people of Kaminahal, and the pot of sacred water was broken. Violence was used in defending the pot. It was contended for the defence that, in these circumstances, no offence was committed. The Sub-Divisional Magistrate of Adoni discharged 78 of the accused as they had not been sufficiently identified. He convicted the others and sentenced them to rigorous imprisonment for terms varying from four months downwards, and to fines varying from Rs. 300 to Rs. 50.

The accused appealed to the Sessions Judge who confirmed the convictions and sentences.

The accused now preferred this criminal revision petition.

Mr. *John Adam* for petitioners.

The Public Prosecutor in support of the conviction.

JUDGMENT.—The conviction of the accused is based on the assumption that they were doing an illegal act so long as they were carrying, within the limits of the village of Kaminahal, the pot of water which was propitiated and taken from the pond in question. It is admitted that ordinarily anybody may take water in his pot from the tank, which is not alleged to be the private tank of the Kaminahal villagers. Their objection to the accused carrying the pot of water in question on the particular occasion of the worship of a deity within the precincts of the tank is altogether a sentimental one founded upon certain notions which the Courts cannot take notice of as affecting the right of the accused to take water from the tank in a pot and carry it over the high-way to their own adjacent village, nor can the Court take any notice of

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the motives sentimental religious or otherwise which actuated the accused in taking water supposed to be consecrated or propitiated from a public tank and carrying it in a pot. They were therefore acting legally in carrying the water in a pot and the obstruction caused thereto on the high road by the villagers of Kaminahal was clearly unlawful. Their resistance amounted to wrongful restraint of the accused and at least to an attempt to commit mischief in respect of the pot of water which was the property of the accused. The accused therefore were justified under the circumstances in exercising their right of private defence of body and of property and resisting the villagers in the obstruction they offered to the carrying of the pot of water (*vide* section 97, first and secondly, and sections 101 and 104 of the Indian Penal Code). The harm inflicted by one or other of the accused on some of the prosecution witnesses was simple hurt and on one of them it was grievous hurt. I am unable to say from the evidence on record that within the meaning of section 99 any of the accused inflicted more harm than was necessary under the circumstances to inflict for the purpose of self-defence; nor does either of the lower Courts find that if they had the right of private defence the accused exceeded the limits of private defence.

The conviction of all the petitioners is set aside and it is directed that they be set at liberty and the fines, if paid or realized, be refunded.

Ordered accordingly.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Moore.

1902. March 18. April 3.

NARAYANA AYYANGAR (FIRST DEFENDANT), APPELLANT,

v.

R. G. ORR AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Landlord and tenant—Tenants holding kudivaram rights in perpetuity—Right to trees growing on the lands—Claim by zamindar—Regulation XXV of 1802—*Regulation IV of* 1822.

Plaintiffs, as lessees of a zamindari in the district of Madura, sued their tenants to recover the value of trees cut by the tenants on their holdings and carried away therefrom. The tenants admittedly held the *kudivaram* right in perpetuity, and it was not shown that they derived their title from the zamindar, or that the ordinary *kudivaram* right was limited, in their case, by any contract or special or local usage.:

Held, that plaintiffs were not entitled to recover.

SUIT to recover the value of trees. Plaintiffs, as lessees of the Sivaganga zamindari, in the district of Madura, sued certain of their tenants to recover the value of trees which they alleged, the tenants had illegally cut and carried away from their holdings. Plaintiffs claimed that all the trees on the zamindari belonged to them and not to the tenants, and claimed the value of about 50 cart-loads of *babul* trees which the tenants had cut and carried away. The tenants were admittedly the holders of the kudivaram right in perpetuity. It was not contended that they derived their title from the zamindar, or that the ordinary kudivaram right was limited in their case by any contract or special or local usage. The amended issue which raised question of the plaintiffs' right was in the following terms:—"Whether the plaint trees belong, by law, to plaintiffs, or to defendants." The District Munsif decided this issue in plaintiffs' favour and gave them a decree for the amount claimed. This was confirmed by the Subordinate Judge on appeal.

Defendants preferred this second appeal.

S. Sreenivasa Ayyangar for appellant.—The question is whether an occupancy ryot in a zamindari is entitled to cut trees on his

* Second Appeal No. 59 of 1901, presented against the decree of C. Venkobah, Subordinate Judge of Madura (East), in Appeal Suit No. 62 of 1900, presented against the decree of V. T. Subramania Pillai, District Munsif of Manamadura, in Origi al Suit No. 442 of 1898.

holding and dispose of them for any purpose he likes without the zamindar's permission. The lower Courts hold that the zamindar owns the trees as proprietor under Regulation XXV of 1802. The term "proprietor" in the regulation is used with reference to the payment of revenue and not as meaning "owner." Regulation XXV was explained by IV of 1822 as not affecting the right of tenants. The true position of an occupancy tenant in a zamindari is that he is the holder of the *kudivaram* in the land. He is not a tenant in any sense, least of all in the English sense. The ordinary law of landlord and tenant does not apply. This has been established by the two recent cases in *Muthia Chetti* v. *Orr*(1), *Cheekati Zamindar* v. *Ranasooru Dhora*(2). All trees upon the holding, unless they are fruit trees or assessed trees, are the absolute property of the ryot. The ryot pays tirva for punja lands, but the crops are his; and trees such as *babul* are really crops. In the case of fruit trees, the fruits will be the crops (*Venkayya* v. *Ramasami*(3)). Unless there is an express contract or custom, the tenant is bound to pay only the tirva and all the products of the land are his. The cases of *Rangayya Appa Rau* v. *Kadiyala Ratnam*(4), *Appa Rau* v. *Narasanna*(5) do not really decide the question. First, they were not cases relating to occupancy ryots, but apparently only to tenants holding on short leases; secondly, the true theory as to the position of an occupancy ryot was not fully established till the decisions in *Venkata Narasimha Naidu* v. *Dandamudi Kotayya*(6), *Cheekati Zamindar* v. *Ranasooru Dhora*(2); thirdly, no reasons are given in those cases and the ryot is apparently treated as an ordinary tenant. The case of *Bhupathi* v. *Rajah Rangayya Appa Rau*(7) does not carry the matter further.

K. Sreenivasa Ayyangar for respondents.—The zamindar is the proprietor and owns the trees. Occupancy right is only a right to occupy the land for purposes of cultivation. The tenant can, no doubt, cut trees for purposes of cultivation. But for any other purpose, he has no right to use the land and its products except with the landlord's permission. The cases of *Muthia Chetti* v. *Orr*(1) and *Cheekati Zamindar* v. *Ranasooru Dhora*(2) only decide

(1) I.L.R., 20 Mad., 229.
(2) I.L.R., 23 Mad., 318.
(3) I.L.R., 22 Mad., 39.
(4) I.L.R., 13 Mad., 249.
(5) I.L.R., 15 Mad., 47.
(6) I.L.R., 20 Mad., 299.
(7) I.L.R., 17 Mad., 54.

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that a tenant in a zamindari tract is *primâ facie* a permanent tenant. They do not decide that he is the owner of the land and everything growing upon the land. On the other hand, this Court has held in *Ramanadhan* v. *Zamindar of Ramnad*(1), *Orr* v. *Mrithyunjaya Gurukkal*(2) that an occupancy tenant in a zamindari cannot build dwelling houses on his holding even though he pays the accustomed tirva or rent. Those cases proceeded upon the principle that the permanent tenant's right is only for purposes of cultivation. In this case, the tenant has cut the trees and sold them as firewood and made a profit. The position taken up by the appellant equally applies to valuable timber or other trees. The cases of *Rangayya Appa Rau* v. *Kadiyala Ratnam*(3), *Appa Rau* v. *Narasanna*(4), *Bhupathi* v. *Rajah Rangayya Appa Rau*(5) are conclusive on the point. They are all cases of occupancy tenants in zamindaris and govern the present case.

JUDGMENT.—The plaintiffs are the lessees of the Sivaganga zamindari in the Madura district. The defendants are ryots with permanent occupancy rights in their lands. The question for decision is whether *babul* trees which have grown on the defendants' pattah land belong by law to the plaintiffs or to the defendants. The Courts below have held that they belong to the plaintiffs. Against this decision the first defendant appeals. We have no doubt that the appeal is well-founded. The plaintiffs do not rely on any agreement or any custom whereby their right to the trees is established. The first issue as to the ownership of the trees was originally in general terms, but, at the request of the plaintiffs' vakil, it was restricted to "whether the plaint trees belong, by law, to plaintiff or to defendants." The plaintiffs contend, and the Courts below have held, that, according to Regulation XXV of 1802, the proprietary right in the soil vests in the zamindar; and as it is a well established principle of law that the trees go with the land to which they are attached, the zamindar is the owner of the trees also. We think that this view is radically unsound. It takes no account of Regulation IV of 1822, and it ignores the true relations and mutual rights that exist between zamindars and their so-called tenants in this part of India. Regulation IV of 1822 was passed expressly because Regulation XXV of 1802 and some other early regulations had been misunderstood and had been so construed so as to infringe the established rights of the actual cultivators of the soil. The regulation recites that such rights are "properly determinable by judicial investigations only," and it declares that Regulation XXV of 1802, and certain other regulations "were not meant to define, limit, infringe or destroy the actual rights of any description of landholders or tenants; but merely to point out in what manner tenants might be proceeded against, in the event of their not paying the rents justly due from them." The rights of the ryots in regard to their lands were not altered by the passing of the regulation. The mutual relationship and rights of the ryots and of the zamindar were recently explained in the case of *Venkata Narasimha Naidu* v. *Dandamudi Kotayya*(1). It was there pointed out that there is no substantial analogy between an English tenant and an Indian ryot, for the simple reason that the rights of the ryots, in most cases came into existence, not under any letting by the Government of the day, or its assignees, the zamindars, etc., but independently of them. This view was further developed in the case of *Cheekati Zamindar* v. *Ranasooru Dhora*(2). In *Venkata Narasimma Naidu* v. *Dandamudi Kotayya*(1) it was also pointed out that the interest in the land is divided into the two main heads of the *kudivaram* interest and the *melvaram* interest, and that the holder of the *kudivaram* right, far from being a tenant of the holder of the *melvaram* right, is really a co-owner with him. The *kudivaram* right originated in priority of effective occupation and beneficial use of the soil, and the claim of Government and the assignees of Government, was always, in these parts, to a share in the produce raised by the ryots. Lastly, it was pointed out that "in essence there is no difference between a ryot holding lands in a zamindari village and one holding lands in a Government village," and that in both cases the ryot "in the absence of proof of contract or of special or local usage to the contrary, is entitled to occupy his lands so long as he pays what is due and if he should commit any default in this or other respect, until he is evicted by the processes provided by law."

(1) I.L.R., 16 Mad., 407.
(2) I.L.R., 24 Mad., 65.
(3) I.L.R., 13 Mad., 249.
(4) I.L.R., 15 Mad., 47.
(5) I.L.R., 17 Mad., 54.

(1) I.L.R., 20 Mad., 299.
(2) I.L.R., 23 Mad., 318.

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In the present case the defendants are admittedly the holders of the *kudivaram* right in perpetuity. There is no suggestion that they derived their title from the zamindar or that the ordinary *kudivaram* right is limited, in their case, by any contract, or special or local usage. It is obvious that in these circumstances it is misleading to speak of the zamindar as the owner or proprietor of the soil in the sense in which an English landlord is the proprietor of the soil, and to say that the trees growing in the soil must belong to the zamindar as the owner of the soil. Rather should we say that the ryot, as the holder of the permanent right to occupy and cultivate the soil, is the owner of the soil, so far, at least, as the title to the produce of the soil, whether ordinary crops, or trees, is concerned. No doubt, in many parts of the country the zamindars are entitled by custom to a payment on account of certain classes of fruit trees, such as mangoes, palmyras, and the like, and this is in accordance with the principle that the holder of the *melvaram* right is entitled to a share in the produce in the fruit raised by the holder of the *kudivaram* right. By an extension of the same principle the zamindar is sometimes entitled by custom to a share in the profit made by the sale of timber, and it may even be that in some places he is entitled by custom to a share in the profit made by the sale of small trees, such as *babul*, which are used chiefly for firewood, though, so far as our experience, extending over some thirty years, goes, this is very rare. But such a right resting on custom, is altogether different from what the plaintiffs claim in this suit, viz., that apart from custom and contract, they are, by law, entitled as zamindars, to the ownership of all trees growing on the lands even of the permanent occupancy ryots of the zamindari. We have no hesitation in holding that this claim is not supported by any law, and that it is opposed to correct fundamental conceptions of their rights and those of the occupancy ryots in their zamindari.

The case of the true tenant in the English sense, that is, of the man who holds by a title derived from the landlord, may, of course, be very different, especially in the case of short leases and of trees in existence before the letting began. In one of the cases quoted by the Subordinate Judge (*Rangayya Appa Rau* v. *Kadiyala Ratnam*(1)) the leases were for three years only and this Court

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

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naturally held that *primâ facie* a tenant would not be at liberty to cut down fruit trees on the holding, especially as there was evidence of a recognized custom to the same effect, and the Court added "it is shown that the prohibition does not extend to shrubs and small trees which are usually at the disposal of the tenant for the purposes of his holding." In the other case quoted by the Subordinate Judge (*Appa Rau* v. *Narasanna*(1)) it does not appear that the ryots had permanent occupancy rights, and apparently a tax on the trees had previously been payable to the zamindar. In these circumstances, the observation of Parker, J., that "*primâ facie* a tenant has no right to cut down trees without his landlord's permission" cannot be regarded as a decision opposed to the views we have set forth above. The Courts below have also relied on a series of judgments of the District Court in regard to other defendants in other villages of the zamindari, exhibits C, D, E, F, G and H. Two of these (exhibits C and F) maintain the rights of the zamindar to trees grown on the tank bunds and waste lands of the zamindari.

In regard to these waste lands the zamindar is, no doubt, the proprietor, by virtue of Regulation XXV of 1802, and his claim to the trees growing on the waste lands was rightly allowed; but they have no bearing on the rights of ryots to trees growing on their own pattah lands. In the other cases the District Court proceeded on the same view of the effect of Regulation XXV of 1802 which we have now shown to be incorrect. The present defendants were not parties to those suits, and are not bound by the decisions.

In the view we have taken it is not necessary for us to decide on the effect of exhibit I, on which the defendants rely as a bar to the plaintiffs suit.

In the result we set aside the decrees of the Courts below and we dismiss the plaintiffs' suit with costs throughout.

(1) I.L.R., 15 Mad., 47.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar.

1902. March 25.

CHATHOTH KUNHI PAKKI, PETITIONER,

v.

SAIDINDAVIDE KUNHAMNAD, RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, ss. 223, 336—Surety for presentation of insolvency petition by judgment-debtor—Failure to apply—Transfer of decree—Application by transferree for decree to be sent to another Court for execution against judgment-debtor and surety.

A transferree decree-holder is entitled to apply under section 223 of the Code of Civil Procedure, to the Court which passed the decree, to send it for execution to another Court; and where a person has become surety for the judgment-debtor, under section 336, and the judgment-debtor has failed to apply to be declared an insolvent, the transferree-decree-holder is entitled to have his decree sent for execution as against the surety as well as against the judgment-debtor, if his transfer has been recognized.

PETITION to forward a decree for execution to another Court. Petitioner had obtained an assignment of a decree and now petitioned the District Court of Malabar, in Small Cause Suit No. 156 of 1898, under sections 223 and 232 of the Code of Civil Procedure, that notice might be sent to the decree-holder, to the defendant and to the surety, that the transfer might be recognized and that the decree might be transmitted to the Court of the District Munsif of Tellicherry for execution. The District Judge, on 16th August 1901, passed the following order: "Recognize and send but not as against third defendant,"—the person therein referred to as "third defendant" being a surety under section 336 of the Code of Civil Procedure. Further facts bearing on the present application appear from the judgment.

Petitioner preferred this civil revision petition.

J. L. Rosario for petitioner.

Ryru Nambiyar for respondent.

* Civil Revision Petition No. 390 of 1901, presented under section 25 of Act IX of 1887, praying the High Court to revise the order of the District Court of North Malabar, dated 16th August 1891, in Small Cause Miscellaneous Petition No. 480 of 1901.

JUDGMENT.—The definition of a decree-holder includes any person to whom such decree has been transferred and such person therefore is entitled to apply, under section 223, Civil Procedure Code, to the Court which passed the decree, to send it for execution to another Court. In the present case, on an application made by the transferree, the District Judge who passed the decree ordered notices to be issued to the parties concerned under section 232, Civil Procedure Code. On the 16th August 1901, the District Judge passed the order now sought to be revised, viz., "Recognize and send but not as against the third defendant." Both parties represent that this means that the transfer is recognized and the decree is to be sent to the District Munsif's Court of Tellicherry to be executed against the judgment-debtor alone but not against the surety who is therein referred to as third defendant. The person styled as third defendant became surety under section 336, Civil Procedure Code, and on the failure of the judgment-debtor to apply to be declared an insolvent, the original decree-holder applied in M. P. No. 799 of 1899 for realizing the security given under section 336 by executing the decree against the surety, and, after giving notice to the surety, the District Judge passed an order on the 20th September 1899 directing the issue of a warrant for his arrest in execution of the decree against the surety under section 253, Civil Procedure Code. The amin returned the warrant on the 27th September 1899 reporting that the surety was not found. Nothing more appears to have been done since with reference to M.P. No. 799 of 1899, and the present application is made by the transferree of the decree praying that the decree may be sent for execution to the District Munsif's Court of Tellicherry. As the District Judge saw no objection to recognize the assignment and send the decree for execution to another Court as prayed for, he was not warranted in limiting its execution against the judgment-debtor alone. By order passed on M.P. No. 799 of 1899, he already directed the security to be realized under section 336 by allowing execution to proceed against the surety under section 253, instead of committing the judgment-debtor to jail in execution of the decree. The order of the Judge, therefore, so far as it directs that the decree be not executed against the surety, the third defendant is set aside, and he is directed to send the decree for execution to the District Munsif's Court of Tellicherry in the manner prescribed by section 224 accompanied, under clause (*c*)

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of that section, with copies of the orders already passed for the execution of the decree.

The respondent will pay the costs of the petitioner in this Court.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1902. April 10, 11.

PICHUVAYENGAR (PLAINTIFF), APPELLANT,

v.

G. T. OLIVER AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Rent Recovery Act—(Madras) VIII of 1865, s. 14 — Demand by land-holder of an amount in excess of rent actually due by tenant—Non-compliance with demand—Attachment and sale in consequence of non-compliance—Legality.

A land-holder made a demand on his tenant for payment of a sum in excess of what was in fact due in respect of rent. The demand was not complied with, and, as a consequence of such non-compliance, the holding was attached and sold:

Held, that inasmuch as the sale had been held by reason of a demand which was not shown to be correct, it must be set aside.

SUIT for a declaration that an attachment of certain land by first defendant was invalid, and to set aside a sale of it by first defendant and second defendant. The attachment had been made, by first defendant, for arrears of rent which he alleged to be due. The evidence showed (as found by the High Court) that the amount payable by plaintiff to first defendant could not exceed Rs. 33-8-0. A demand was, however, made for payment of a larger sum, namely, Rs. 52--9-5. Plaintiff did not comply with this demand, and the land was sold in consequence of his non-compliance, though a temporary injunction had been obtained staying the sale. Plaintiff now sued to set aside that

* Second Appeal No. 1267 of 1900, presented against the decree of G. F. T. Power, District Judge of Tanjore, in Appeal Suit No. 666 of 1899, presented against the decree of R. Annaswami Ayyar, District Munsif of Tiruvadi, in Original Suit No. 288 of 1898.

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sale. The District Munsif considered that the larger amount was due, but he held that even if it were not due in its entirety, something was due, and the sale was not rendered illegal by reason of the fact that too large a sum had been demanded. He refused to make the declaration and dismissed the suit. That order was upheld on appeal.

Plaintiff preferred this second appeal.

T. Rangachariar for appellant.

V. Krishnaswami Ayyar for first respondent.

JUDGMENT.—We think that the decrees of the Courts below cannot be supported. There is no evidence that the rent demanded in the notice of sale, viz., Rs. 52-9-5 was the rent due by the plaintiff. That, no doubt, is the sum mentioned in the *izara* pattah which was tendered to the plaintiff by the first defendant, but plaintiff refused to accept this pattah and both in a summary suit and in a regular suit between the parties it was decided that that pattah was an improper one and that plaintiff was entitled to a *varam* or *Amani* pattah. The only evidence, documentary or oral, in the case is that adduced by the plaintiff. The defendants have adduced no evidence whatever. According to the evidence in the case the value of the share of the produce payable by plaintiff to first defendant would at the outside be Rs. 33-8-0. The only reason assigned by the District Munsif for finding that the amount claimed, viz., Rs. 52-9-5, is proper, is the conduct of the plaintiff in not having brought a summary suit within one month under the Rent Recovery Act, and in having brought this regular suit two and-a-half months after the attachment.

It is impossible to regard these facts as relevant to warrant an inference that the rent was Rs. 52-9-5, as claimed in the notice of demand. The sale having been held by reason of plaintiff's non-compliance with this demand, which is not shown to be correct, it must be set aside as illegal. The argument of the first defendant's vakil before us that at least Rs. 20 rent was admittedly due by the plaintiff, and that therefore the sale must be held to be good, is untenable. It does not follow that because the plaintiff refused to pay an illegal demand for Rs. 52-9-5, he would not have paid a demand for Rs. 20, or whatever was legally due if such sum had been demanded in the notice of sale and have thus averted the necessity for a sale. The case of

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Ramachandra v. *Narayanasami*(1) does not apply to the present case in which subsequent to the suit a sale has actually taken place, and that in spite of the temporary injunction granted to stay the sale.

In this connection we must express our surprise that the first defendant who is the permanent Receiver of the Tanjore Palace estate appointed by the District Court, and as such a responsible officer of the Court, should have been guilty of a flagrant breach of the injunction issued by a competent Court and that too, in spite of the fact that the first defendant's vakil opposed the grant of the injunction. That first defendant had full knowledge of the injunction may be inferred not only from the fact that his vakil unsuccessfully opposed it and was present when it was ordered, but also from the detailed telegram sent to him by the plaintiff on the 25th September and received by him on the 27th, the day prior to the sale. It was his plain duty to have taken immediate steps to stay the sale.

The excuse given by his vakil that the sale on the 28th September "was the act of the Revenue authorities" is futile if no worse. After the sale, on application by the plaintiff that the second defendant had purchased the property really on behalf of the first defendant, the second defendant was joined as a party, but did not defend the suit. First defendant's vakil contends before us that there is no evidence on record to show that the purchase was for the first defendant. It is, however, unnecessary to send for a finding on this point as the sale is illegal for reasons already stated other than the breach of injunction.

We therefore allow the second appeal and, setting aside the decrees of both the lower Courts, we set aside the attachment and sale and direct that the first defendant do pay the plaintiff's costs throughout.

(1) I.L.R., 10 Mad., 229.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

V. M. SUBBARAYA REDDI (PLAINTIFF), APPELLANT,

v.

JAGANNATHA REDDI (DEFENDANT), RESPONDENT.*

1902. April 17.

Illegal detention of property by village officer—Detention under orders of his superiors—Liability of village officer—Madras Act II of 1864, *s.* 60.

A village officer who had attached plaintiff's crops for arrears of cist refused to deliver the crops to plaintiff after receiving payment of the arrears. On a suit being brought by plaintiff for the illegal detention by the village officer of plaintiff's property, the village officer pleaded that he had acted under the orders of a Tahsildar and that the suit should have been brought against the Secretary of State and not against village officer:

Held, that the suit was maintainable against the village officer.

SUIT to recover the value of crops. Plaintiff alleged that his crops were attached on 11th January and on 10th March 1899 for arrears of cist, and that he paid the arrears on 19th March and 29th March 1899 respectively, but the crops had not been delivered to him. Defendant stated that he was the monegar of the village. He admitted that he had attached the crops for arrears of cist, and his excuse for not returning them after payment of the arrears was that plaintiff was, as he pleaded, not the pattahdar, and that the crops were not plaintiff's. He also said that he was acting under the orders of his superiors, and contended that the suit should have been brought against the Tahsildar or the Collector of the district, and not against him personally. The third issue raised the question whether the suit was sustainable against the monegar alone, without the Collector being made a party. The District Munsif held that it could not, and dismissed the suit. The District Judge, on appeal, upheld that finding and dismissed the appeal.

Plaintiff preferred this second appeal.

T. Rangaramanuja Chariar for appellant.

C. Mahadeva Ayyar for respondent.

* Second Appeal No. 1206 of 1900, presented against the decree of D. Broadfoot, District Judge of South Arcot, in Appeal Suit No. 124 of 1900, presented against the decree of P. Aiyasami Mudaliar, District Munsif of Tindivanam, in Original Suit No. 29 of 1900.

SUBBA-RAYA REDDI v. JAGANNATHA REDDI.

JUDGMENT.—We are not aware of any authority for District Judge's view that a suit for illegal detention of property by a village officer purporting to be acting under Madras Act II of 1864 and under the orders of a Tahsildar must be brought against the Secretary of State and cannot be brought against the official in default.

Section 60 of Act II of 1864 contemplates suits against the Collector, and chapter 27 of the Civil Procedure Code contemplates suits against public officers without impleading the Secretary of State and lays down rules in regard to them. Under the general law any servant who commits a tort under the orders of his master is liable to be personally sued.

We must reverse the decree of the District Judge on this preliminary point, and remand the appeal for disposal according to law.

Costs will abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1902. April 18.

BOMMANAPATI VEERAPPA (PLAINTIFF), APPELLANT,

v.

CHINTAKUNTA SRINIVASA RAU AND TWO OTHERS (FIRST DEFENDANT AND SECOND DEFENDANT'S REPRESENTATIVES), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 244—Suit by assignee of decree for declaration of validity of assignment—Maintainability.

A suit lies at the instance of the assignee of a decree for a declaration as to the validity of his assignment. The amendment of section 244 by section 26 of Act VII of 1888 has not taken away this right.

Raman v. Muppil Nayar, (I.L.R., 14 Mad., 478), referred to.

SUIT for a declaration that plaintiff had obtained a valid assignment of a decree. Both of the lower Courts dismissed the suit on

* Second Appeal No. 1261 of 1900, presented against the decree of T. M. Horsfall, District Judge of Bellary, in Appeal Suit No. 142 of 1899, presented against the decree of V. Suryanarayana Garu, District Munsif of Bellary, in Original Suit No. 157 of 1899.

ROMMANAPATI VEERAPPA v. CHINTAKUNTA SRINIVASA RAU.

a preliminary point not material to the present report. Plaintiff preferred this second appeal.

C. Ramachandra Rau Saheb for appellant.

P. S. Sivaswami Ayyar for first respondent.

C. Balarama Rau for second and third respondents.

JUDGMENT.—Before the amendment of section 244 of the Civil Procedure Code by section 26 of Act VII of 1888 it had been held that a suit, like the present, by an assignee of a decree for a declaration that he had obtained a valid assignment of the decree might properly be brought (*Raman* v. *Muppil Nayar*(1)). We do not think that the alteration of the section made in 1888 was intended to take away that right. The amendment was made in order to settle the conflict of decisions as to whether an appeal would lie against an order made under section 232.

If the amendment had been made by an addition to section 232 of the Civil Procedure Code, as it might logically have been, no appeal would lie; but by introducing the amendment into section 244 an appeal lies as against a decree, even in a case in which the question is not between the parties to the suit or their representatives, but only between the decree-holder and a person claiming as his assignee. It would be unreasonable to construe the phrase "and not by a separate suit" in the first sentence of section 244 as applicable to the question referred to in the amendment. The judgment-debtor, as a person interested in the question as to *factum* and validity of the assignment, is a proper party at any rate under section 32 to a suit in which such declaration is sought for.

The Court passing such a decree should simply decide as to the *factum* and validity of the assignment, and should not declare that the assignee is entitled to execute the decree, that being, under section 232, a matter within the province and discretion of the Court which has to execute the decree.

It is unnecessary to decide in this suit whether the Court which has to execute the assigned decree can allow the plaintiff in this suit to execute that decree, notwithstanding that his former application was rejected under section 232 for reasons which do not appear on the record of this case. It may be that the plaintiff is not entitled to the alternative relief which he seeks against the second defendant, but that is no ground for rejecting the suit

(1) I.L.R., 14 Mad., 478.

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altogether, as the lower Courts have done. Both Courts having disposed of the suit on a preliminary point we set aside their decrees and remand the suit to the Court of First Instance for disposal according to law, with reference to the observations made above.

Costs hitherto incurred will be costs in the suit.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Moore.

1902. April 18.

SRI SRI SRI VIKRAMADEO MAHARAJULUM GARU, APPELLANT,

v.

SRI NELADEVI PATTAMADHADEVI GARU AND ANOTHER, RESPONDENTS.*

Agency Court at Vizagapatam—Act XXIV of 1839—Order in execution petition—Appeal—Review—Decree—Agency Rule No. XXXI.

There is no appeal to the High Court against an order passed in execution proceedings in the Agency Court at Vizagapatam:

Semble, that the remedy open to a party aggrieved by such an order is by petition under Rule No. XXXI of the Agency Rules for Ganjám and Vizagapatam.

An order passed by the Agent in execution proceedings under the Agency Rules is not a "decree" within the meaning of those rules, and is not subject to review by the High Court.

EXECUTION PETITION. Petitioner presented an execution petition in the Court of the Governor's Agent at Vizagapatam, on which an order was passed. Against that order petitioner now preferred this appeal. A review petition was also preferred.

V. Krishnaswami Ayyar, *C. R. Thiruvenkatachariar* and *V. Ramesam* for appellant and petitioner.

P. R. Sundra Ayyar for respondent.

JUDGMENT [in the appeal].—No provision is made in the rules for an appeal against an order in execution passed by the Agent. We apprehend that the remedy open to a party deeming himself aggrieved in a matter of execution is by petition against the

* Appeal against the decree of the Court of the Agent to the Governor at Vizagapatam in Miscellaneous Appeal No. 1 of 1900 (Civil Miscellaneous Petition No. 10 of 1899).

SRI SRI SRI VIKRAMADEO MAHARAJULUM GARU v. SRI NELADEVI PATTAMADHADEVI GARU.

proceedings of the Agent under Rule XXXI of the Agency Rules for Ganjam and Vizagapatam.

The appeal is accordingly dismissed but without costs.

ORDER [on the review petition].— We do not consider an order passed in execution under the Agency Rules to be a "decree" within the meaning of those rules. We therefore dismiss this petition.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

1902. April 28.

PATINHARE TARKATT RAMA MANNADI AND SEVEN OTHERS (DEFENDANTS NOS. 1, 3, 4, 5 AND 8), APPELLANTS,

v.

VELLUR KRISHNAN MENON, KARNAVAN AND MANAGER (OF THE TARWAD (PLAINTIFF), RESPONDENT.*

Counsel—Pleader—Dismissal of appeal for default—Appearance of appellants by pleader—Application for adjournment on ground of absence of counsel—Dismissal of appeal—No written judgment—Invalidity of order.

On an appeal being called on for hearing in a District Court, the pleader for the appellants duly appeared, but asked for an adjournment. He did not withdraw from the case, but urged that, as the records were in possession of counsel retained to lead him and who was absent, he was unable to argue the appeal. The District Judge refused to grant an adjournment and dismissed the appeal:

Held, **on appeal to the High Court, that though it was, no doubt, open to the Judge to refuse the adjournment, he was bound to write a judgment and dispose of the appeal. He could not dismiss it for default. The appeal was accordingly remanded to him to be heard.**

Jamnadas Ohhabildas v. Sorabji Kharsedji, (I.L.R., 16 Bom., 27), followed.

SUIT to recover land. The District Munsif decreed that the defendants should deliver up the property to plaintiff. Against that decree defendants appealed to the District Court. When the appeal came on for hearing, the pleader for the appellants appeared and represented that he had engaged counsel to argue the appeal, that

* Second Appeal No. 1296 of 1900, presented against the order of E. L. Vaughan District Judge of South Malabar, in Appeal Suit No. 423 of 1900, presented against the decree of A. Venkataramana Pai, Subordinate Judge of South Malabar at Palghat, in Original Suit No. 20 of 1899.

PATINHARE TARKATT RAMA MANNADI v. VELLUR KRISHNAN MENON.

important papers were with counsel, and that the pleader was not prepared to argue the case. He asked for an adjournment. It was admitted that his client had had sufficient notice. The District Judge passed an order reciting these facts and dealt with the appeal as follows :—" I reject the appeal with costs."

Defendants preferred this second appeal.

C. Sankaran Nayar for appellants.

J. L. Rosario and *M. Bhaskara Menon* for respondents.

JUDGMENT.—There was no default on the part of the appellants. Their pleader duly appeared and asked for an adjournment. He did not withdraw from the case but merely urged that, as the records were in possession of his leader (counsel) who was absent, he could not argue the appeal. It was no doubt open to the Judge to refuse the adjournment, but when he did so he was bound to write a judgment and dispose of the appeal (*Jamnadas Chhabildas* v. *Sorabji Kharsedji*(1)). He could not dismiss it for default. We set aside the order of the District Judge and remit the appeal to him to be heard. Costs will be costs in the cause.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

1902. March 5, 10. April 25.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF CHINGLEPUT (DEFENDANT), APPELLANT,

v.

KASTURI REDDI (PLAINTIFF), RESPONDENT.*

Alienation of Crown lands—22 & 23 Vict., cap. 41, &c.—Power of Governor in Council to alienate through authorized agent under dharkast rules—Alienation so made binding and irrevocable—Jurisdiction of Civil Court to determine validity of grant under dharkast rules—Assignment of waste duly made in accordance with dharkast rules not liable to revision by any one.

The Civil Courts have jurisdiction to determine whether a grant of land, alleged to have been made by an officer on behalf of the Crown, is binding on

(1) I.L.R., 16 Bom., 27.

* Second Appeal No. 1203 of 1900, presented against the decree of A. C. Tate, District Judge of Chingleput, in Appeal Suit No. 16 of 1900, presented against the decree of J. S. Gnaniyar Nadar, District Munsif of Tiruvallur, in Original Suit No. 339 of 1899.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. KASTURI REDDI.

the Crown or persons claiming under it subsequent to the grant; and the mere fact that the alleged grant purports to have been made under the dharkast rules does not affect that jurisdiction.

A grant which purports to have been made under the dharkast rules by an officer empowered by them to make it is a grant made by a person authorized in that behalf and has the validity of a grant made by the Governor in Council. Such an officer is an agent generally or specially appointed by the Governor in Council in that behalf and his acts, if within the scope of his authority, are as binding on the Crown as if they had been done by the Governor in Council.

Where such a grant has been made, the action of the officer to whom an appeal lies with reference to it is final and binding on Government, if his act was within the scope of his authority. His action is not subject to any other control. And when the proposal of an applicant is accepted by an officer duly authorized in that behalf by the dharkast rules, and the acceptance is communicated to the applicant, there is a valid contract and disposal of the land (unless the grant was procured by fraud, misrepresentation or mutual mistake as to any matter of fact essential to the agreement). Such a grant cannot, therefore, be annulled or revoked by the officer who made the grant, his successor in office, or even by the Governor in Council. Such a grant is subject under the rules only to one condition, namely, it may be revoked or annulled by an officer of a higher grade, on an appeal being preferred to him.

Observations by Bhashyam Ayyangar, J., on alienations by the Crown under Statutes 21 & 22 Vict., cap. 106; 22 & 23 Vict., cap. 41; 32 & 33 Vict., cap. 29; 33 & 34 Vict., cap. 59; Act XV of 1895 (India) and under the dharkast rules.

SUIT for a declaration that plaintiff was entitled to land. The following is a short summary of the facts:—Two ryots (of whom plaintiff was one) who resided in a non-mirasi village near certain land which had been classed as "assessed waste" in the settlement register competed to obtain the land on ryotwari tenure, subject to the payment of the assessment. The Deputy Tahsildar passed an order assigning the land to S, against which plaintiff appealed to the Deputy Collector, who cancelled the assignment to S and assigned the land to plaintiff, who (as the proceedings recited) agreed to pay up the full assessment. The Deputy Collector communicated this to the Deputy Tahsildar, who in his turn communicated it to the munsif and karnam of the village, and directed them to register the land in the name of the plaintiff. S preferred an appeal against the order of the Deputy Collector, which was dismissed by the Collector on 10th August 1896 on the ground that he saw no reason to interfere. While the last-mentioned appeal was pending, certain ryots of the village represented in a petition, dated 30th July 1896, that the assignment of the land would cause hardship, and asked that it might be cancelled.

The Collector, by an endorsement thereon, dated 14th August 1896, forwarded the petition, for report, to the Deputy Collector, who in his turn, by endorsement, dated 27th August 1896, forwarded it to the Deputy Tahsildar for report. A report, dated 6th October 1896, was submitted by the Deputy Tahsildar, who supported the petition. On 23rd October 1896, the Collector authorised the then Deputy Collector to revise the previous assignment to the plaintiff if he thought fit to do so, and by an endorsement, dated 4th February 1897, referred the petition to him for disposal. On 25th February 1897, the Deputy Collector cancelled the assignment to plaintiff. At the date of that order of cancellation, the village officers had not formally placed plaintiff in possession, nor had any pattah been issued to him. Plaintiff had, however, taken possession, and, on an attempt being made to levy from him a penal assessment, brought this suit for a declaration of his right to the land. The District Munsif dismissed plaintiff's suit. On appeal, the District Judge held that plaintiff was entitled to the declaration and made it.

Defendant preferred this second appeal.

The Government Pleader for appellant.

T. V. Seshagiri Ayyar for respondent.

BHASHYAM AYYANGAR, J.—This is an appeal preferred on behalf of the Secretary of State for India in Council and the admitted facts of the case, so far as they are material, are as follows:—

The land in question (survey No. 159 measuring 116·30 acres, and assessed at Rs. 43–10–0), lying in the non-mirasi village of Santavelur, in the Chingleput district has been classed as "assessed waste" in the settlement register. The respondent and one Srinivasulu Reddi, both being resident ryots of the said village, were the competing applicants before the Deputy Tahsildar of Satyavedu, in whose territorial jurisdiction the said village is situate, for obtaining the land, on the ordinary ryotwari tenure, subject to the payment of the said assessment. The Deputy Tahsildar passed an order assigning the land to Srinivasulu Reddi in preference to the respondent. Against this, the respondent preferred an appeal to the Deputy Collector in charge of the Tiruvallur Division in which the said village is comprised and that officer by his proceedings (exhibit H), dated 25th June 1896,

cancelled the assignment in favour of Srinivasulu Reddi and assigned the whole extent of survey No. 159 to the present respondent (who, it is recited in the proceedings, agreed to pay up the full assessment) and communicated the same to the Deputy Tahsildar, who by his order (exhibit J), dated 29th July 1896, communicated it to the munsif and karnam of Santavelur directing them to register the whole extent of survey No. 159 in the name of the respondent. Against the order of the Deputy Collector, Srinivasulu Reddi preferred an appeal to the Collector of the district which was dismissed on the 10th August 1896 (exhibit L) on the ground that he saw no reason to interfere. While the said appeal was pending before the Collector, certain ryots of the village by a petition (exhibit I), dated 30th July 1896, represented to the Collector that if the land be assigned on dharkast, it would entail great hardship by depriving "several cattle of their resource of water during the hot season" and prayed that the assignment of the same might be cancelled. The Collector by his endorsement thereon, dated 14th August 1896, forwarded the same, for report, to the Deputy Collector, who, in his turn, by endorsement, dated 27th August 1896, forwarded it to the Deputy Tahsildar for early report. That officer submitted a report (exhibit II), dated 6th October 1896, stating that the land was useful "to a large number, about 3,000, of the cattle of the village," that "the villagers turned out *en masse* and bitterly complained against the assignment of the land as it was used by them as a grazing ground, and that, in his opinion, the prayer of the petitioners, that the land should be reserved for communal purposes, was a reasonable one. With reference to this report made by the Deputy Tahsildar, the Collector on the 23rd October 1896 observed that the Deputy Collector "may revise his order as he thinks fit, in the light of the facts now before him" and by endorsement, dated 4th February 1897 (exhibit V) referred the petition of the ryots to the Deputy Collector for disposal. The Deputy Collector, who was the successor in office of the Deputy Collector who had made the assignment to the respondent by his proceedings (exhibit VI), dated 25th February 1897, cancelled the assignment and directed the Deputy Tahsildar "to submit the necessary application for transferring it to grazing ground poramboke." The village officers had not

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formally placed the respondent in possession of the land nor had any pattah been issued to him. He, however, appears to have taken possession of the land himself and as an attempt was made by the Revenue officer to levy from him what is styled a " penal assessment " he brought this suit for a declaration of his right to the land.

On behalf of the Secretary of State for India in Council, a written statement was filed contending that " the Civil Courts are not competent to take cognizance of the orders passed by Revenue officers under the dharkast rules " and that the land claimed by the respondent " has not been handed over to the plaintiff nor has pattah been issued to him " and issues were framed with reference to these contentions.

In my opinion these contentions are entirely beside the point,—the real question in the case being, whether the respondent has, as against the Crown, acquired a valid title to the land. If he had so acquired title, he has a right to possession and it is perfectly immaterial whether the land was delivered to him by the Revenue officers or without such delivery he entered on possession of the land. It is equally immaterial whether a pattah was issued to him or not. A reference to the form and wording of a pattah (see " revised forms of village accounts," page 57 ; and Board of Revenue (Revenue Settlement, etc.) Proceedings, No. 332, dated 17th July 1900, page 4, will show that as correctly characterised by the District Judge, it is in the nature of a mere bill and is not nor does it purport to be in the nature of a grant or conveyance (*Freeman* v. *Fairlie*(1)). He is entitled to specific performance of the contract, if there was a valid contract binding upon the Crown and he can claim the issue of pattah if necessary. The Deputy Collector, after assigning the land to the respondent, directed the village officers, through the Deputy Tahsildar, to register the land in respondent's name. I presume that this is the registration of proprietors of land contemplated by Regulation 26 of 1802. Whether this direction was given effect to, by actually entering respondent's name in the village register as proprietor of survey No. 159, does not appear. But that is equally immaterial, if the assignment be binding upon the Crown and the respondent can,

(1) 1 Moo. I.A., 305.

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if necessary, take steps to enforce the registry of the land in his name under Regulation 26 of 1802.

The solution of the real question in the case involves the following issues :—

(i) Whether the Deputy Collector, the Divisional officer who, it is alleged made the grant, was competent to make a grant which would bind the Crown.

(ii) Whether it was competent to him or to his successor in office to annul and revoke such grant.

(iii) Whether, if he could not do so of his own accord or on application made to him, it was competent to him to do so by reason of the Collector having authorized him to revise his order of assignment in the light of the facts then brought to notice.

The plea on behalf of the Crown that the Civil Courts have no jurisdiction to take cognizance of orders passed by the Revenue officers under the dharkast rules is altogether untenable (*The Collector of Salem* v. *Rangappa*(1)). It may be that no one can advance in a Civil Court any claim against the Crown or any one claiming under it, to the grant to him, under the dharkast rules of land for which he has applied to the Revenue authorities under those rules (*Subbaraya Mudali* v. *The Sub-Collector of Chingleput* (2)). Whether any such claim can, in certain cases, be taken cognizance of by Civil Courts, in what are styled " mirasi " villages, need not be considered in this case; for the village in question, though it is now in the district of Chingleput, is admittedly a " non-mirasi " village. But when a person claims that a grant has been made to him by an officer on behalf of the Crown, the mere fact that the alleged grant purports to have been made under the dharkast rules does not affect the jurisdiction of Civil Courts, to determine whether a grant has been made which would bind the Crown or any one claiming under it subsequent to such grant (*The Collector of Salem* v. *Rangappa*(1)).

I shall therefore now proceed to consider the legal basis on which such grants stand and the bearing which the so-called dharkast rules have on the question. The law applicable to the subject is contained in the following Statutes 21 & 22 Vict., cap. 106, sections 39 and 40 ; 22 & 23 Vict., cap. 41, sections 1 and 2 ; 32 & 33 Vict., cap. 29, section 1 ; 33 & 34 Vict., cap. 59, sections

(1) I.L.R., 12 Mad., 404. (2) I.L.R., 6 Mad., 303.

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1 and 2; India Act XV of 1895 (Crown grants). Sections 39 and 40 of 21 & 22 Vict., cap. 106, vested all lands and hereditaments and other real and personal estate of the East India Company, including such as may thereafter be acquired, in the Crown, to be applied and disposed of for the purposes of the Government of India and empowered the Secretary of State in Council to sell and dispose of the same, as he may think fit, the necessary conveyance and assurances being required to be made by the authority of the Secretary of State in Council under the hands and seals of three members of the Council. This provision which restricted the authority to sell and dispose of all real and personal estate vested for the time being in the Crown, to the Secretary of State in Council alone, was found to be extremely inconvenient from an administrative point of view and it was therefore enacted by section 1 of 22 & 23 Vict., cap. 41, that the Governor-General of India in Council, the Governors in Council of Fort Saint George and Bombay, respectively, and the Lieutenant-Governor of the North-West Provinces or any officer for the time being entrusted with the Government charge or care of any presidency, province or district in India, may, subject to such provisions or restrictions as the Secretary of State in Council with the concurrence of a majority of votes at a meeting, shall from time to time prescribe, sell and dispose of all real and personal estate whatsoever in India for the time being vested in the Crown within the limits of their respective governments, provinces or districts and to enter into any contracts whatsoever within the said respective limits for the purposes of the Government of India. Section 2 prescribed the form of any contract, deed or other instrument, which they may enter into and the mode of executing the same.

As this form was not adopted in the title-deeds issued by the Inam Commissioner in this Presidency, a special Statute (32 & 33 Vict., cap. 29) was passed validating the same. Section 1 of that Statute, which is now spent, runs as follows :— "No title-deed for inam lands issued by the Inam Commissioner in the Presidency of Fort Saint George up to the date of the passing of this Act shall be deemed invalid on the ground that such deed is not expressed therein to have been executed by order of the Governor in Council, or that it is expressed to have been executed on behalf of the Governor in Council of Fort Saint George, instead of on behalf of the Secretary of State for India in Council; and

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all such title-deeds shall be read and have the same effect as if they were expressed to have been executed by order of the Governor in Council and on behalf of the Secretary of State for India in Council." As it was discovered that the objection to which the inam title-deeds were open was equally applicable to several other classes of deeds, contracts and instruments made for the purpose of disposing of real and personal estate in India vested in the Crown and for other purposes, a general Statute (33 & 34 Vict., cap. 59) was passed validating such contracts, deeds and instruments and authorizing the Governor-General, by resolution in Council, from time to time, to vary the form of execution prescribed by 22 & 23 Vict., cap. 41, and to empower such authorities as to him may seem expedient, to vary it within the respective limits of their local jurisdiction.

The expression "or any officer for the time being entrusted with the Government, charge or care of any presidency, province or district," occurring in section 1 of 22 & 23 Vict., cap. 41, has been construed in practice as including only Lieutenant-Governors and Chief Commissioners and not "District officers in the special Indian sense." [Ilbert, 'Government of India,' page 171, section 33 (4) (*a*).] The authority conferred upon the Governor-General by section 2 of 33 & 34 Vict., cap. 59, to vary the form of execution and to empower local authorities to vary the same within the respective limits of their local jurisdiction, appears to have been exercised by the resolution of the Government of India, in the Home Department, of March 28, 1895 [Ilbert 'Government of India,' page 172, section 33 (4) (*d*)], though "a copy of this resolution is not accessible." Though the Government of India and local Governments were empowered by 22 & 23 Vict., cap. 41, to sell and dispose of all real and personal estate whatsoever in India, for the time being vested in the Crown, yet it will be noted that the exercise of such power is made subject to such provisions or restrictions as the Secretary of State in Council, with the concurrence of a majority of votes at a meeting shall from time to time prescribe. The provisions or restrictions which may be so prescribed are really in the nature of *Statutory* bye-laws, which if infringed by the Government of India or any local Government, will invalidate as against the Crown, the disposal of such real or personal estate. If any such provisions or restrictions have been prescribed by the Secretary of State in Council,

authentic copies of the same are not available nor do any seem to have been published in the official gazette nor in the two volumes of "local rules and orders."

It is, however, admitted by the Counsel for the Crown that if the grant in question is regarded as made by or on behalf of the Governor in Council of Fort Saint George, it does not transgress any such provision or restriction. It is also admitted with reference to the provisions of 33 & 34 Vict., cap. 59, and the resolution of the Government of India (dated 28th March 1895 already referred to) that disposals of land under the ordinary dharkast rules need not be made by deed, contract or other instrument made and executed in any particular form. There can hardly be any doubt that all waste lands, whether assessed or otherwise, are within the meaning of sections 39 and 40 of 21 & 22 Vict., cap. 106, "real estate vested in the Crown in trust for the purposes of the Government of India" and that assignment of the same, under the dharkast rules whether on payment of a premium or price or without it, subject to the payment of assessment, is within the meaning of the above Statutes, "sale or disposal of real estate for the time being vested in the Crown," as much as inam title-deeds, releasing the reversionary rights of Government in the inam lands are within the meaning of the said Statutes "disposal of real estate vested in the Crown" and that such sale or disposal, in order that the same may be binding upon the Crown should comply with the provisions of the said Statutes. The Crown Grants Act (India Act XV of 1885) exempts Crown grants from the operation of the Transfer of Property Act (1882) and sections 17 (*j*) and 90 (*d*) of the Indian Registration Act (1877) exempt from registration "grants of immoveable property by Government" and "all documents purporting to be or to evidence grants or assignments by Government of land or of any interest in land."

Having regard therefore to the two admissions above referred to made by the Counsel for the Crown and the provisions of the Crown Grants Act and the Indian Registration Act, the question for consideration is reduced to this—whether in fact a grant or assignment has been made to the respondent of the land in question by or under the authority of the Governor in Council of Fort Saint George. The respondent does not contend that the grant has been directly made or ratified by the Governor in Council and his contention is that the grant has been made on behalf of the

Governor in Council by a person duly authorised in that behalf by the Governor in Council and that therefore it is as valid against the Crown, as if it had been made directly by the Governor in Council. The question, therefore, is narrowed to this—whether a grant purporting to be made under the dharkast rules by an officer empowered to make such a grant under those rules can be regarded as one made by a person authorised in that behalf so as to give it the same validity as if it was made by the Governor in Council himself. It is admitted that the darkhast rules, published in the Standing Orders of the Board of Revenue, have all been made with the previous approval and sanction of Government, though unfortunately no authentic record of these rules and of the sanction of Government thereto is available, so that one may be sure whether what appears in the standing orders is a *verbatim* edition of the rules or merely a summary thereof and whether some of them are simply interpretations of the rules or amendments thereof made with the sanction of Government.

The only portion of the rules with which the Courts need concern themselves are those which define the officers competent to make assignments of land, the *extent* of their authority including the *description* of lands which the said officers may respectively dispose of under the dharkast rules and the *degree of control* by a *higher grade officer* to which the exercise of such authority *is subject;* and so far as the present case is concerned, there can be no doubt that the officer under whose grant the respondent claims was competent to make the grant and the land which he granted, *i.e.*, assessed waste land was of a description which he was authorised to grant on dharkast. The bulk of the dharkast rules, which are in the nature of instructions issued by Government to the various officers concerned, as to the principles which should *guide them* in entertaining or rejecting applications for grant of various descriptions of land and determining to which of several competing applicants the grant should be made, if at all and the *procedure* to be adopted by them do not concern the Civil Courts (*Periaroyalu Reddi* v. *Royalu Reddi*(1)).

In the course of argument I put to the Counsel for the Crown the question as to whether it was his contention that the

(1) I.L.R., 18 Mad., 434.

Governor in Council could not, in any particular case or class of cases, lawfully delegate to any of his subordinate officers the power of disposing of lands vested in the Crown, and I also asked him whether any periodical returns of alienations of lands under the dharkast rules were made to Government for confirmation. He stated that his contention only was that until there is delivery of possession by the Revenue authorities and the pattah is issued, there is no valid grant and that the assignment made under dharkast rules are not made subject to confirmation by Government. It must be admitted that there is no statutory provision authorizing the Governor in Council to delegate his power in this respect to any subordinate officer. Such, however, has undoubtedly been the long-standing practice and such delegation is essential in the class of cases contemplated by the dharkast rules for the administration of the executive Government of the Presidency, which is vested in the Governor in Council of Fort Saint George, by 3 & 4 William IV, cap. 85, section 56, subject, under section 65, to the control of the Governor-General of India in Council. In the case of release by the Crown of its reversionary rights in inam lands by enfranchisement of the same, the Governor in Council delegated his power to an officer specially appointed for the purpose by an executive act, *i.e.*, the Inam Commissioner and when 32 & 33 Vict., cap. 29, was passed to validate the title-deeds issued by him in a form not in conformity with that prescribed by 22 & 23 Vict., cap. 41, section 2, it was not considered that it was incompetent to the Governor in Council to delegate his powers to the Inam Commissioner as his agent and that it was therefore necessary to validate the same by a statutory declaration to the effect that such delegation was valid or that the action of the Inam Commissioner shall be deemed to have been ratified by the Governor in Council.

In my opinion the various officers specially empowered by the dharkast rules to dispose of Crown lands thereunder are really agents appointed by the Governor in Council in their official capacity by executive orders and are on the same footing as the Inam Commissioner who was appointed as the sole agent in regard to enfranchisement of inams. The authority conferred, under the dharkast rules, upon the Board of Revenue, the Collector, the Divisional officer and the Tahsildar, including a

Deputy Tahsildar, to dispose of various classes of Crown lands either in the first instance or on appeal made to them, not being conferred upon them by any statute or statutory rules, they can only be regarded as agents, generally or specially appointed by the Governor in Council in that behalf and their acts within the scope of their respective authorities are as binding upon the Crown as if they were done by the Governor in Council himself and as between the applicants and the Governor in Council, the latter should be regarded as a principal represented, under the general law, by such officers as his agents. The distinction as to the extent to which acts and declarations of a private agent bind his principal and those of public agents bind the Government is well pointed out by Story in his 'Law of Agency' [ninth edition (1882), section 307 (*a*)] in the following terms:—"In respect to the acts and declarations and representations of public agents it would seem that the same rule does not prevail which ordinarily governs in relation to mere private agents. As to the latter the principals are in many cases bound where they have not authorised the declarations and representations to be made. But in the case of public agents, the Government or other public authority is not bound unless it manifestly appears that the agent is acting within the scope of his authority or he is held out as having authority to do the act or is employed in his capacity as public agent to make the declaration or representation for the Government. Indeed this rule seems indispensable in order to guard the public against losses and injuries arising from the fraud or mistake or rashness and indiscretion of their agents. 'By the law of agency at the common law there is difference between individuals and the Government—the former are liable to the extent of the power they have apparently given to their agents, while the Government is liable only to the extent of the power it has actually given to its officers' (foot-note). And there is no hardship in requiring from private persons dealing with public officers, the duty of inquiry as to their real or apparent power and authority to bind the Government." The same distinction was recognized by the Judicial Committee of the Privy Council in *the Collector of Masulipatam* v. *Cavally Venkatanarayanappa*(1) in the following terms:—"Again the acts

(1) 8 Moo. I.A., 554.

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of a Government officer bind the Government only when he is acting in the discharge of a certain duty within the limits of his authority or if he exceeded that authority, when the Government in fact or in law directly or by implication ratified the excess."

Applying, therefore, the above principles of law to the present case, and extracting from the dharkast rules that portion which really constitutes the power of attorney under which the various officers therein referred to act as the agents of the Governor in Council so much as is relevant and applicable to the present case, the matter stands thus :—

Under Standing Order No. 15, Tahsildars (including Deputy Tahsildars acting within their own division) may ordinarily grant unoccupied assessed lands to applicants on their own authority subject to an appeal to the Divisional officer, unless such land falls under one or other of the classes specified in clauses 1 to 14 of paragraph 2. The land in question is, as already stated, unoccupied assessed land and it is not the case for the Crown that it falls under any of the exceptions above referred to. The Deputy Tahsildar rejected the respondent's application and granted the one made by Sirinivasulu Reddi, subject to the result of an appeal which under paragraph 13 of the above order lies to the Divisional officer against the action of the Tahsildar in rejecting the respondent's application and granting that of Srinivasulu Reddi. The said paragraph 13 has to be read as part of the power-of-attorney and its legal effect is materially to qualify the authority conferred upon an inferior agent (Deputy Tahsildar) by subjecting the exercise of that authority to the control of a superior agent (Divisional officer) who, in the event of the applicant being dissatisfied with the action of the inferior agent and applying to him by way of appeal, is authorised to dispose of the land to which the application relates. Paragraph 13 expressly provides that no second appeal shall lie from a dharkast decision. If the application was originally made to a Tahsildar or Deputy Tahsildar, his action with reference thereto is liable to be superseded by an appeal to the Divisional officer, whether such Divisional officer be the Collector of the District or an Assistant or Deputy Collector. In cases in which the original application may be made to the Divisional officer himself, an appeal will lie to the Collector if the Divisional officer be an Assistant or Deputy Collector or to the Board of Revenue if

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the Divisional officer be the Collector himself. The action of the officer to whom the appeal lies is final and binding upon Government if his act be within the scope of his authority. The power of attorney not providing for further control by a still higher agent neither the Collector nor the Board of Revenue can set aside a grant made by the Divisional officer on appeal and it will bind the Crown if it was within the scope of his authority.

Neither Regulation I of 1803 (Board of Revenue) nor Regulation II of 1803 (Collectors) nor Regulation VII of 1828 has any bearing upon the question. Section 9 of Regulation II of 1803 empowers Collectors to superintend and control, under the orders of the Board of Revenue, all persons employed in the administration of the public revenue as far as such superintendence and control may relate to the executive administration of the revenue "*under the Regulations now enacted or hereafter to be enacted.*" Section 44 provides that Collectors shall not in any case authorise alienation of land without authority from the Board of Revenue, and section 42 of Regulation I of 1803 virtually prohibits the Board of Revenue from making or confirming alienations of land without the authority of the Governor in Council. I do not pause to ascertain the provisions of the Company's Charter Act then in force bearing upon the disposal of lands and hereditaments vested in the East India Company (*vide* sections 1 and 2 of 3 & 4 William IV, cap. 85). Under section 3 of Regulation VII of 1828 Subordinate and Assistant Collectors in charge of a particular division of a district are authorised *ex-officio* to exercise, within the division under their charge, all the powers granted to Collectors by "*the Regulations now in force or that may be hereafter enacted*" unless the contrary shall be expressly declared in any regulations, and the Collectors are also authorised to delegate any of the powers granted to them by "*any Regulation now in force or that may be hereafter enacted*" to any of their Subordinates or Assistants not in charge of a particular division of a district or to any of their Subordinates or Assistants in charge of a division, beyond the limits of the division under his charge. And it further provides that the proceedings of Subordinate and Assistant Collectors *acting under the preceding clause* of the section shall be subject in all cases and in the fullest manner to the superintendence, control and revision of the Collector, etc. (the italics in the above are mine). It will be

noted that the powers of Collectors above referred to which may *ex-officio* be exercised by any Divisional officer and which may be delegated by the Collector to any Subordinate or Assistant Collector under him are *statutory powers* and not powers which may be conferred by Government by *executive* acts and the proceedings of the Subordinate and Assistant Collectors, which in the fullest manner are subject to the superintendence, control and revision of the Collector are proceedings held by such Subordinate and Assistant Collectors in exercise of the *statutory powers* above referred to either *ex-officio* or by delegation from the Collector and not proceedings held by them in exercise of powers specially conferred upon them by an *executive order* of the Governor in Council or other authority. It is therefore clear that in the exercise of the authority conferred by Government under the dharkast rules on a Tahsildar (including a Deputy Tahsildar), Divisional officer, Collector and the Board of Revenue, their respective action in the disposal of lands under those rules is not subject to any control other than that specially provided by the dharkast rules, by way of appeal from any of the officers in the district to another officer in the district or to the Board of Revenue as the case may be.

Paragraph 11 provides that orders passed in dharkast cases should at once be communicated by the Tahsildar to all the parties concerned and paragraph 14 provides that when an appeal is admitted the admitting authority shall forthwith send a notice to the officer whose decision is appealed against informing him of the fact and instructing him to withhold registry of the land until the appeal has been disposed of or if already ordered such registry will be only considered as conditional till the appeal is disposed of. Some stress was laid by the Counsel for the Crown upon the concluding portion of paragraph 14, which runs as follows:—"It should be distinctly understood that registry ordered by Subordinate officers will be considered only conditional and that it will be liable to cancellation by a superior authority if the grant is found to be irregular and unauthorised although there may be no proof of fraud." This is nothing more than the explicit statement of the legal consequence of any of the officers authorised to dispose of land under the dharkast rules acting beyond the scope of their authority, *i.e.*, that such grants will be invalid and the mere fact that the land has been registered in the name of the applicant can

give him no title as against the Crown. When the proposal of an applicant is accepted by an officer duly authorised in that behalf by the dharkast rules and the acceptance is communicated to the applicant, there is a valid contract and disposal of the land, unless the grant was procured by fraud, misrepresentation or mutual mistake as to any matter of fact essential to the agreement (Indian Contract Act, sections 17, 18 and 20). The grant, therefore, cannot be annulled or revoked by the officer who made the grant, by his successor in office or even by the Governor in Council. Under the very terms of the authority conferred upon the various classes of officers, a grant of land made by any one of them within the scope of his authority is subject only to one condition, *i.e.*, it may be revoked or annulled by an officer of a higher grade on appeal preferred to him.

Applying these principles to the present case, the grant made by the Deputy Tahsildar to Srinivasulu Reddi in preference to the respondent being subject to the result of an appeal to the Divisional officer by the respondent, the respondent acquired a valid title under the grant made to him by the Divisional officer in supersession of that made to Srinivasulu Reddi by the Deputy Tahsildar. He cannot be divested of that title by the Collector, the Board of Revenue or even the Governor in Council, or by the Crown and it is admitted that the grant was not the result of any fraud, misrepresentation or mutual mistake as to a material fact. As a matter of fact, a further appeal was preferred by Srinivasulu Reddi to the Collector against the action of the Divisional officer and the appeal was dismissed. As I understand the dharkast rules as they appear in the Standing Orders of the Board of Revenue the exercise of the authority of the Divisional officer in appeal is not subject to the result of a further appeal, whether the Divisional officer makes a grant refused by the Tahsildar or confirms one made by him. Even if, in the present case, the Collector had, instead of having dismissed the appeal, allowed it and annulled the grant made by the Divisional officer, that in my view would have been inefficacious. After he had dismissed the appeal preferred to him, he forwarded to the Deputy Collector for disposal, the petition preferred to him by the ryots of the village praying that the land should be set apart for communal purposes and in doing so he expressed it as his opinion that the Deputy Collector might, if he saw fit to do

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so, revise his former order in the light of the circumstances subsequently brought to notice by the Deputy Tahsildar.

The grant made by the Deputy Collector to the respondent on the 25th June 1896 took effect when it was communicated to him, apparently on or about the same date, or at any rate when it was communicated to him through the village officers on the 29th July 1896 (exhibit J) and they were directed to register the land in the name of the respondent in the land register of the village. The Collector's opinion that the Deputy Collector could revoke the grant, if he deemed fit to do so, is clearly erroneous and it cannot, therefore, confer upon the Deputy Collector an authority which he does not possess under the power-of-attorney which has to be extracted from the dharkast rules. The cancellation of the grant by the Divisional officer and the assignment of the land by him for communal purposes of the villagers are void as against the respondent. If the land were really required for communal purposes of the ryots of the village the only legal course open to Government is to acquire the same under the Land Acquisition Act.

The second appeal therefore fails and is dismissed with costs.

MOORE, J.—A Deputy Collector, on appeal reversed an order of a Deputy Tahsildar and directed that certain assessed lands should be made over to the respondent (plaintiff) (exhibit H, dated 25th June 1896). What appears to have been taken as a second appeal against this order was preferred to the Collector (*vide* Board's Standing Order No. 15, paragraph 13, which directs that there shall be no second appeal in dharkast cases), but it was dismissed by him on the 10th August 1896 (exhibit L). The order of the Deputy Collector was communicated to the Subordinate Revenue authorities and the Deputy Tahsildar on the 29th July 1896 sent an order to the head of the village directing that the land should be registered in the name of the respondent (exhibit J). Subsequently representations were made to the Collector by the villagers that the land was required for grazing purposes and that it should be reserved as poramboke. Enquiries were made and the Collector eventually gave the Deputy Collector permission to revise the order of his predecessor in the light of the facts that had subsequently been brought to notice (exhibit IV). The Deputy Collector

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accordingly on the 25th February 1897 directed that the assignment of the land to the respondent should be cancelled and ordered the Deputy Tahsildar to submit the necessary application for transferring the land to "grazing ground porambokes." The respondent on this preferred the present suit against the Secretary of State for India for a declaration of his right to the land that had been directed to be registered in his name. The District Munsif dismissed his suit, but the District Judge reversed his judgment and gave the plaintiff a decree as prayed for. The Secretary of State has preferred this second appeal.

The main ground of appeal as taken in the memorandum is that "the rules of the Revenue Board drawn up for the guidance of Revenue officers in disposing of waste lands do not constitute rights enforceable in a Court of Law." When the appeal was being argued the Government Pleader, however, also tried to show that the action of the Revenue authorities was not in reality unwarranted by the dharkast rules. This contention, it is clear to me, cannot be maintained. The rules which are to be found in Standing Order No. 15 do not empower a Collector or Deputy Collector to act as has been done in the present case. The order of the Deputy Tahsildar declining to make over the land to the respondent having been set aside on appeal by the Deputy Collector, by whom a grant was made of it to the respondent, it was not open to a Deputy Collector, who subsequently succeeded that officer in charge of the division, even with the sanction of the Collector, to cancel the order granting the land to the respondent and direct that it should be transferred to poramboke. The terms of the Standing Order are clear as to this. The concluding portion of the paragraph 14 of Standing Order No. 15 is as follows :—"It should be distinctly understood that registry ordered by Subordinate officers will be considered only conditional and that it will be liable to cancellation by a superior authority if the grant is found to be irregular and unauthorised although there may be no proof of fraud." Here the grant is not alleged to have been either irregular or unauthorised.

All that was found was that as the land was shown to be useful to the villagers for grazing their cattle it was inadvisable to grant it for cultivation. There having been a valid grant of the land it was not open to the Revenue authorities to cancel that

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grant on the ground that it appeared to be advisable to convert the land into poramboke. That no pattah was issued in the name of the respondent for the land is immaterial. It having been ordered that the land should be registered in his name and the grant in pursuance of which registry was directed not having been shown to be irregular and unauthorised, the respondent acquired a valid title to the land which it was not in the power of the Revenue authorities to set aside.

The dharkast rules are rules drawn up in the first instance by the Board of Revenue, but sanctioned by Government and promulgated under its authority. When in accordance with those rules, a grant of land is made by the Revenue official authorised under them to make the grant, it would be impossible to hold that it is open to Government or to any subordinate acting on its behalf to cancel the grant and refuse to make the land over to the grantee, and where such a revocation of a grant is irregularly ordered by a Collector in violation of a distinct provision in the rules, the decisions reported at (*Longbottom* v. *Sutoor*(1), *Collector of Salem* v. *Rangappa*(2)) are, in my opinion, sufficient authority for the proposition that it is open to a Civil Court to give the grantee a decree declaring his right to the land.

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

(1) 1 M.H.C.R., 429. (2) I.L.R., 12 Mad., 404.

APPELLATE CIVIL—FULL BENCH.

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

1902. August 29. September 9, 23, 30.

MAHAMMAD ALI RAJA AVERGAL (FIRST CLAIMANT), APPELLANT,

v.

AHAMMED ALI RAJA AVERGAL AND ANOTHER (CLAIMANTS NOS. 2 AND 3), RESPONDENTS.*

Land Acquisition Act—I of 1894, s. 32—Person having "no power to alienate"—Money awarded as compensation—Claim by karnavan of tarwad.

The Government acquired, under the Land Acquisition Act, property belonging to a Mahomedan family in North Malabar governed by the Marumakatayam law, and the money awarded as compensation was deposited in Court under clause 2 of section 31 of the Act. On claims being made to this amount:

Held, that inasmuch as the tarwad had power to alienate the land in respect of which the compensation had been awarded, section 32 of the Land Acquisition Act did not apply, and an order directing it to be dealt with in accordance with the provisions of that section was wrong.

QUESTION referred to a Full Bench. The Government acquired under the Land Acquisition Act (I of 1894) certain property belonging to a Mahomedan family in North Malabar governed by the Marumakatayam law. The amount of the compensation, which was deposited in Court under clause 2 of section 31, was claimed by the karnavan of the tarwad and an anandravan, respectively. The District Judge ordered the money to be invested and disposed of under section 32.

Against that order the first claimant preferred this appeal. The appeal first came on for hearing before Davies and Benson, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.—The question for decision is whether the District Judge was right in ordering the compensation money to be dealt with in accordance with the provisions of section 32 of the Land Acquisition Act I of 1894. The property acquired by Government under the Act belonged

* Appeal Suits Nos. 77 to 79 of 1901, presented against the awards of N. S. Brodie, District Judge of North Malabar, in Miscellaneous Petitions Nos. 559, 561 and 565 of 1900.

to a Mahomedan family in North Malabar governed by the Marumakatayam law, and the claimants are the karnavan of the tarwad and an anandravan, respectively. The money awarded as compensation was deposited in Court under clause 2 of section 31 of the Act. Section 32 enacts that when money is so deposited "and it appears that the land in respect whereof the same was awarded belonged to any person who had no power to alienate it," the Court shall invest the money in the manner prescribed. The appellant contends that the "person" to whom the land "belongs" is the tarwad, and that the tarwad has power to alienate the land, and that the section, therefore, does not apply. He contends that the money should be paid to the karnavan on behalf of the tarwad.

In Appeal Suit No. 122 of 1899 (not reported) the Chief Justice and Subramania Ayyar, J., held that "for the purposes of this section the karnavan is a person who has no power to alienate" and directed the procedure under section 32 of the Act to be adopted. They referred to *Elayachanidathilkombi Achen* v. *Kenatumkora Lakshmi Amma*(1) and *Sheo Rattan Rai* v. *Mohri*(2) in support of their view.

The former case laid down that a karnavan could not alienate tarwad land, except with the consent of the tarwad, which is usually evidenced by the then senior anandravan joining in, or attesting, the conveyance. In the Allahabad case the land belonged to a person (either widow or daughter) who had only a life-interest, and the Court held that it was manifestly a case to which section 32 was applicable. In two other cases before a Bench of this Court (Appeal Suits Nos. 159 to 163 of 1900 and Appeal Suits Nos. 49 and 50 of 1900) the provisions of the section were applied, but in each of them there was a karar, or family arrangement, whereby the tarwad had set apart the land for the special purpose of maintaining a tavazhi or branch of the tarwad and had thereby determined the general power of alienation possessed by the tarwad, and it was expressly on this ground that section 32 was held to be applicable. In a recent case (Appeal Suits Nos. 74 and 75 of 1901) very similar to the case now before us the present Bench directed section 32 to be applied, but the question of its applicability was not discussed. The vakils on both sides assumed that it was applicable, no doubt in accordance with the decision in Appeal

(1) I.L.R., 5 Mad., 201. (2) I.L.R., 21 All., 354.

Suit No. 122 of 1899 above referred to. On the other hand, a Division Bench in Appeal Suits Nos. 127 to 129 of 1900 directed the money to be paid to all the co-uralans jointly, and in several cases the money has been paid to the karnavan, but in none of these cases was the question of the applicability of section 32 considered.

The only case, then, in which it has been deliberately decided that section 32 is applicable is Appeal Suit No. 122 of 1899 and that is not a reported case.

We are inclined to doubt the correctness of that decision. It seems to us that the land in such a case "belongs" to the tarwad or body of co-proprietors, and that they, as a body, have "power to alienate" the land. If this view is correct, the terms of section 32 would be inapplicable to tarwad land, and the fact that the karnavan by himself cannot alienate the land, or has only a very restricted power of alienation, would be immaterial.

The cases to which under English Law the principle of section 32 is applicable appear to be "any corporation, tenant for life or in tail . . . . guardian, committee of lunatic or idiot, trustee, executor or administrator, or person having a qualified or partial interest only" mentioned in section 69, Lands Clauses Consolidation Act, 1845 (8 & 9 Vict., cap. 18).

The Malabar tarwad is not exactly similar to any of these. The great bulk of the land in Malabar is tarwad land, and it is held by an immense number of tarwads. In many cases the amount of compensation paid is only a few rupees. In one of the present cases it is only Rs. 6, in another Rs. 16. We fear that there would be much practical difficulty and but little, if any, practical advantage, in applying the provisions of section 32 to tarwad land, as such, especially as the Indian Law has no simple provisions for dealing with small sums similar to the provisions of sections 71 and 72 of the English Act referred to above.

The karnavan of the tarwad has very large powers of management in regard to the tarwad property and we are inclined to think that it would be within the scope of his powers to receive compensation awarded to the tarwad on account of tarwad property, and it would then be his duty to re-invest it, or otherwise apply it, for the benefit of the tarwad. The question is not free from difficulty and is one of great general importance in view of the large extent of lands now being taken up under the Act in Malabar on account of railway extensions.

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We resolve, therefore, to refer for the decision of a Full Bench the question whether the procedure prescribed by section 32 of the Act is applicable to the case before us.

This question came on in due course before the Full Bench constituted as above.

C. Sankaran Nayar for appellant.

OPINION.—Assuming that in the three cases referred to in the order of reference the claim is made by the first claimant on behalf of the tarwad and not on his individual behalf, we are of opinion that the procedure prescribed by section 32 of the Land Acquisition Act is not applicable to the cases in question. The order of reference states in effect that the land in respect of which the compensation was awarded was the property of the tarwad. The tarwad had power to alienate it, and section 32, which can only come into force where the land in respect of which the compensation was awarded belonged to a person who had no power to alienate, does not apply. Our answer to the question referred to us is therefore in the negative.

The appeals came on for final hearing in due course before Davies and Benson, JJ., when the Court delivered the following

JUDGMENT.—In accordance with the decision of the Full Bench we hold that the procedure prescribed by section 32 of the Land Acquisition Act is inapplicable and we therefore reverse the order made under that section and direct that the compensation awarded be paid over to the first claimant as karnavan of the tarwad, and for the benefit of the tarwad. [The judgment then dealt with the costs.]

APPELLATE CIVIL.

Before Mr. Justice Benson, Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

RATNAMASARI (PLAINTIFF), APPELLANT,

v.

AKILANDAMMAL AND THREE OTHERS (DEFENDANTS), RESPONDENTS.*

1902. September 4. October 3.

Limitation Act—XV of 1877, sched. II, art. 119—Suit by an adopted son more than six years after interference with plaintiff's rights—Claim for declaration as to adoption and to recover possession of property due to plaintiff as adopted son—Maintainability.

Plaintiff's rights, as the adopted son of A, were interfered with, in connection with certain immoveable property, in 1889. In 1897 plaintiff sued for a declaration that he was the adopted son of A, and sought to recover the property:

Held (Bhashyam Ayyangar, J., dissenting), that the suit was barred under article 119 of schedule II to the Limitation Act.

Jagadamba Chaodhrani v. *Dakhina Mohun*, (L.R., 13 I.A., 84; I.L.R., 13 Calc., 308), followed; *Parvathi Ammal* v. *Saminatha Gurukal*, (I.L.R., 20 Mad., 40), and *Shrinivas* v. *Hanmant*, (I.L.R., 24 Bom., 260), approved.

Per MOORE, J.—Where a plaintiff cannot obtain a decree for possession without a decision that an adoption is invalid or never in fact took place, or that an adoption is valid, the question whether his claim is barred by limitation must be decided with reference to the provisions of articles 118 and 119 of schedule II to the Limitation Act.

Per BHASHYAM AYYANGAR, J.—The suit was governed by article 144. Article 119 is applicable only to a suit of the character defined by section 42 of the Specific Relief Act, for a declaration that the plaintiff is entitled to a status or legal character as adopted son. In the present case, the plaintiff having been out of, and the defendant having been in, possession since 1889, plaintiff could not maintain a suit for a mere declaration of title, and the only suit he could maintain was the present, which was governed by article 144 and was, in consequence, not barred.

SUIT for a declaration and for possession of immoveable property. Arunachela Asari, who owned the property (a bungalow) now claimed, in 1885 verbally authorized one of his wives to adopt as his son the plaintiff. In June 1885, Arunachela Asari died. His nephew, who claimed to be undivided, thereupon applied for a

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* Appeal Suit No. 52 of 1900 presented against the decree of W. Gopalachariar, Subordinate Judge of Bellary and Salem at Salem, in Original Suit No. 7 of 1897.

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certificate for the collection of his debts. In March 1886, the nephew also died, whereupon the two widows of Arunachela continued the proceedings and obtained the certificate. Only one of the widows survived, and she was impleaded as the present first defendant. In May 1886, plaintiff was duly adopted. From 1889 forward, first defendant collected the rent from the tenant of the bungalow, and thus interfered with the rights of plaintiff as the adopted son. In 1896, first defendant took possession of the property. On 4th May 1897, plaintiff instituted the present suit for a declaration that he was the adopted son of the late Arunachela Asari; that he was, as such, entitled to the property; and he sought to recover it. The Subordinate Judge dismissed the suit as barred under article 119 of schedule II to the Limitation Act.

Plaintiff preferred this appeal.

R. Sadagopachariar for appellant.

P. S. Sivaswami Ayyar for first respondent.

MOORE, J.—The plaintiff's suit has been dismissed as being barred by limitation under article 119 of the second schedule attached to the Limitation Act. There is practically no dispute as to the facts of the case. The adoption is alleged to have taken place in 1886. The rights of the plaintiff as adopted son were interfered with in 1889, and this suit was not brought till 1897. In the plaint the plaintiff prays for a declaration that he is the adopted son of Arunachela Asari and also for the recovery of certain properties which he claims to be entitled to as such adopted son. It is clear that under article 119 this suit, in so far as the prayer for a declaration is concerned, is barred. It is, however, urged that the plaintiff has twelve years within which to bring his suit for the recovery of the property.

The decisions of the several High Courts in India on the important question thus raised are most conflicting, and it cannot be said that the matter has been conclusively decided by the Privy Council. The decisions of their Lordships bearing on this point which have to be considered are *Jagadamba Chaodhrani* v. *Dakhina Mohun*(1), *Mohesh Narain Munshi* v. *Taruck Nath Moitra*(2) and *Lachman Lal Chowdhri* v. *Kanhaya Lal Mowar*(3). The case of

(1) L.R., 13 I.A., 84; I.L.R., 13 Calc., 308.
(2) L.R., 20 I.A., 30; I.L.R., 20 Calc., 487.
(3) L.R., 22 I.A., 51; I.L.R., 22 Calc., 609.

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Jagadamba Chaodhrani v. *Dakhina Mohun*(1) was one which came under article 129 of Act IX of 1871 which was as follows:—

Description of suit.	Period of limitation.	Time from which period begins to run.
129. To establish or set aside an adoption.	12 years.	The date of the adoption or (at the option of the plaintiff) the date of the death of the adoptive father.

As to the wording of this article their Lordships observe that the expression "suit to set aside an adoption" is not quite precise as applied to any suit. "An adoption may be established but can hardly be set aside though an alleged or pretended adoption may be declared to be no adoption at all." It is further pointed out that the expression "set aside an adoption" has been for years applied to "proceedings which bring the validity of an alleged adoption under question and applied quite indiscriminately to suits for possession of land and to suits of a declaratory nature." Reference is then made to the alteration introduced in the Limitation Act of 1877 where the two following articles take the place of article 129 in the Act of 1871:—

Description of suit.	Period of limitation.	Time from which period begins to run.
118. To obtain a declaration that an alleged adoption is invalid or never in fact took place.	6 years.	When the alleged adoption becomes known to the plaintiff.
119. To obtain a declaration that an adoption is valid.	6 years.	When the rights of the adopted son as such are interfered with.

Alluding to these new articles their Lordships observe that whether the alteration of the language denoted a change of policy or how much change of law it effected were questions not then before them, adding, however, that they might "fairly infer that

(1) L.R., 13 I.A., 84; I.L.R., 13 Calc., 308.

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the Legislature considered the expression 'suit to set aside an adoption' to be one of a loose kind and that more precision was desirable." Their Lordships proceed as follows:—"if then the expression is not such as to denote solely, or even to denote accurately, a suit confined to a declaration that an alleged adoption is invalid in law or never took place in fact, is there anything in the scope or structure of the Act to prevent us from giving to it the ordinary sense in which it is used, though it may be loosely, by professional men? The plaintiff's Counsel were asked, but were not able, to suggest any principle on which suits involving the issue of adoption or no adoption must, if of a merely declaratory nature, be brought within twelve years from the adoption, while yet the very same issue is left open for twelve years after the death of the adopting widow it may be fifty years more, if only it is mixed up with a suit for the possession of the same property. It seems to their Lordships that the more rational and probable principle to ascribe to an Act whose language admits of it is the principle of allowing only a moderate time within which such delicate and intricate questions as those involved in adoptions shall be brought into dispute, so that it shall strike alike at all suits in which the plaintiff cannot possibly succeed without displacing an apparent adoption by virtue of which the defendant is in possession."

The next decision to be considered is that of *Mohesh Narain Munshi* v. *Taruck Nath Moitra*(1). In that case the plaintiff who had been in possession of one-half of an immoveable estate as the adopted son of one Shib Narain sued for the recovery of the possession of the remainder of that estate. The defendant who was in possession of the property sued for, maintained that he was entitled to it as the adopted son of Shib Narain. Their Lordships observed:—"The present is not a suit in which the plaintiff expressly asks for a decree to 'set aside' the defendant's adoption or to obtain a declaration that the 'adoption was invalid,' which would probably be a more apt expression to use. The plaintiff merely asks for a declaration of his right, and that possession may be given to him of the properties in dispute. But this, in the circumstances, obviously involves the setting aside of the defendant's adoption, or in effect a judgment or finding by the Court that the adoption is invalid, for the defence of possession founded on the adoption

(1) L.R., 20 I.A., 30; I.L.R., 20 Calc., 308.

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directly involves the decision of the question—was the adoption invalid?" Their Lordships therefore following the decision in *Jagadamba Chaodhrani* v. *Dakhina Mohun*(1) held that the plaintiff's suit was barred by limitation. Towards the conclusion of their judgment their Lordships, in refusing to adopt a suggestion that had been made before them that the question of limitation should be decided by them with reference to the provisions of the Act of 1877 and not of 1871, remark that it seemed to them to be more than doubtful whether, if the case then before them was to be decided as if the words of the Act applicable to the case were "to obtain a declaration that an alleged adoption is invalid or never in fact took place" in lieu of the phrase "to set aside an adoption," the plaintiff would thereby take any advantage. The last decision of the Privy Council that has to be considered is that of *Lachman Lal Chowdhri* v. *Kanhaya Lal Mowar*(2). The case there dealt with is the only case in which the effect of article 118 of the Act of 1877, in a suit for possession, can be deemed to have come up for decision before the Privy Council. The case was argued before their Lordships with reference to article 118 which was assumed to govern the case. In their judgment it was pointed out by their Lordships that if the adoption there under consideration was one made by the widow of a son to herself and not to her husband, which the High Court had held was the right construction of the deed of adoption produced, the plea of limitation could have no application to the suit, which was one brought for the recovery of the husband's estate. Their Lordships, however, went on to observe that the suit was not barred by limitation on the ground that it had not been shown that the alleged adoption became known to the plaintiff (respondent) within six years of the institution of the suit. Here it is clear that their Lordships, dealing with a suit by a reversioner seeking possession of an estate on the death of a widow and being met by the plea of the defendant in possession that he had been adopted by the widow as a son to her husband, held that such a case would be governed by the provisions of article 118 in the second schedule attached to the Act of 1877. As to the view that should be taken of the effect of this judgment I agree with the

(1) L.R., 13 I.A., 84; I.L.R., 13 Calc., 308.
(2) L.R., 22 I.A., 51; I.L.R., 22 Calc., 609.

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opinion of Jenkins, C.J. (at p. 278) and Candy, J. (at pp. 279–281) in *Shrinivas* v. *Hanmant*(1). Reading these three decisions of the Privy Council carefully it appears to me to admit of no reasonable doubt that the view that their Lordships take is that, where the plaintiff cannot obtain a decree without getting a decision that an adoption is invalid or never in fact took place, or, on the other hand, a decision that an adoption is valid, the question as to whether his claim is barred by limitation must be decided with reference to the provisions of articles 118 and 119 of the Act of 1877 just as in the case of similar cases brought before that Act was passed, the question of limitation had to be dealt with under the provisions of article 129 of the Act of 1871. Article 141 of the Act of 1877 can be applied only in cases where the plaintiff can succeed without impugning the validity of an adoption or obtaining a decision that an adoption is valid. There is, in fact, as it appears to me, no distinction that can possibly be drawn between a suit to set aside an adoption and a suit to get a declaration that an adoption is invalid except that the former is a loose and inaccurate expression, while the latter is the correct phrase to use. If their Lordships of the Privy Council had drawn a distinction between the two classes of cases, we should, of course, be bound to accept this view taken by them, but they have, on the other hand, as it appears to me, in the judgments that I have referred to, shown clearly that they are not prepared to make any distinction. I am bound to follow and accept the clearly expressed opinion of their Lordships, notwithstanding that no one of their judgments can be considered, as I have already observed, to amount to an absolutely conclusive decision on the matter at issue in the present case. The question, in short, is, in my opinion, decided by authority. I assent to the view taken as to this matter by our own Court (*Parvathi Ammal* v. *Saminatha Gurukal*(2)) and Bombay (*Shrinivas* v. *Hanmant* (1)) and dissent from the decision arrived at by Calcutta (*Jagannath Prasad Gupta* v. *Runjit Singh*(3)) and Allahabad (*Lali* v. *Murlidhar*(4)). This appeal should, in my opinion, be dismissed with costs.

(1) I.L.R., 24 Bom., 260.
(2) I.L.R., 20 Mad., 40.
(3) I.L.R., 25 Calc., 354.
(4) I.L.R., 24 All., 195.

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BHASHYAM AYYANGAR, J.—The facts admitted or found are that one Arunachela Asari, who was the owner of the bungalow for the recovery of which this suit is brought, died in June 1885, leaving him surviving a widow, whom, shortly before his death, he authorized by word of mouth to adopt as his son the plaintiff, his daughter's son, and that in May 1886 the plaintiff was duly adopted by the widow of Arunachela Asari. On the death of Arunachela Asari his nephew Ariyaputra, claiming as his undivided nephew, applied for a certificate for the collection of debts due to Arunachela and, on his death in March 1886, two of his widows, the first defendant and one Chinna Angammal, now deceased, continued the proceedings and obtained a certificate for the collection of the debts. And on the strength of such certificate the first defendant has been collecting the rent due by the tenant in occupation of the bungalow from 1889 and appears to have taken actual possession of the bungalow from the tenant in 1896. The present suit was instituted on the 4th May 1897 for recovery of possession of the bungalow and was dismissed by the Subordinate Judge as barred by the law of limitation under article 119 of schedule II to Act XV of 1877. And the question for consideration in this appeal is whether article 119 of schedule II to the Limitation Act is applicable to the case.

It appears from paragraph 10 of the judgment of the Subordinate Judge that the plaintiff was a minor in 1889 when the first defendant began to collect the rent and thus reduced the bungalow into her possession. I presume that the suit was not instituted within three years after the plaintiff attained the age of majority. For, if it was instituted within three years after attaining majority, the suit can in no view be barred by the law of limitation. In paragraph 4 of the plaint it is stated that the plaintiff's status as adopted son was finally adjudicated on in Civil Suit No. 416 of 1895 on the file of the District Munsif of Namakal "though the first defendant contested it"; the judgment in the said suit does not appear to have been filed in the case and no argument has been founded upon it on behalf of the plaintiff in connection with the question of limitation either before us or in the Court below. I mention this for the reason that, if the statement made in paragraph 4 of the plaint be well founded, it may be that article 119 would be inapplicable to the suit, even if it were otherwise applicable, for, in that case, it would be unnecessary

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for the plaintiff to establish again in this suit his status as adopted son of Arunachela Asari, if he had already obtained in a previous suit a decree declaratory of such title (*Chagan Lal* v. *Bapu Bhai*(1)). The Subordinate Judge relying principally on the decision of this Court in *Parvathi Ammal* v. *Saminatha Gurukal*(2) held that as the rights of the plaintiff as adopted son were interfered with by the first defendant in 1889, more than six years before date of suit, the plaintiff's suit was barred under article 119 of the Limitation Act, notwithstanding that the plaintiff does not seek in this suit for a bare declaration of his right as an adopted son under section 42 of the Specific Relief Act, but for recovery of possession of property to which he is entitled by virtue of his adoption. I am unable to concur in this view. And in my opinion article 119 is applicable only to a suit of the character defined by section 42 of the Specific Relief Act for a declaration that the plaintiff is entitled to a status or legal character as adopted son. In the present case the plaintiff being out of, and the defendant in, possession ever since 1889, the plaintiff could not maintain a suit for a mere declaration of title and the only suit he could maintain is the present one and the article of the Limitation Act governing the suit is, in my opinion, article 144.

The decision of this Court in *Parvathi Ammal* v. *Saminatha Gurukal*(2) relates to article 118 of the Limitation Act, and not to article 119, though one of the learned Judges who took part in that decision expressed an opinion that a suit like the present would be governed by article 119. The only decisions in which the application of article 119 to a suit brought by a person claiming by virtue of his adoption to recover possession of immoveable property had to be considered are those reported in *Jagannath Prasad Gupta* v. *Runjit Singh*(3) and *Lali* v. *Murlidhar*(4). And in both these cases it was held that article 119 was applicable only to a mere declaratory suit when such a suit could be brought under section 42 of the Specific Relief Act. The reasoning on which the above two decisions proceed, in which I fully concur, will be equally applicable to article 118, and in both of them the decision of this Court in *Parvathi Ammal* v.

(1) I.L.R., 5 Bom., 68 at p. 71.
(2) I.L.R., 20 Mad., 40.
(3) I.L.R., 25 Calc., 354.
(4) I.L.R., 24 All., 195.

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Saminatha Gurukal(1) was dissented from. Though the present case may be distinguished from *Parvathi Ammal* v. *Saminatha Gurukal*(1) on the ground that that decision turned on article 118, yet it must be admitted that the reasoning on which it proceeds would be equally applicable to article 119. In the view which I take, both the articles (118 and 119) refer only to mere declaratory suits which are sanctioned by section 42 of the Specific Relief Act. Article 118 provides a period of limitation for a suit which forms illustration (*f*) to section 42 of the Specific Relief Act and article 119 provides the same period of limitation for a suit which is the converse of illustration (*f*) corresponding to illustration (*h*) to section 42 of the Specific Relief Act.

If the question to be decided in this case were governed by a ruling of the Privy Council, we should of course be bound to implicitly follow it. The only decision of the Privy Council which can be regarded as a ruling is the case of *Jagadamba Chaodhrani* v. *Dakhina Mohun*(2), in which it was held that a suit to recover possession of immoveable property from a person who was in possession claiming title as an adopted son is in the ordinary language of Indian lawyers a suit to "set aside an adoption" within the meaning of article 129 of the Limitation Act IX of 1871, and that such a suit was therefore barred by the law of limitation, the same having been instituted more than twelve years after the date of the adoption, notwithstanding that the suit was brought within twelve years after the death of the widow who made the adoption, on whose death the succession opened in favour of her husband's heirs, who were the plaintiffs in the case. This ruling is of course decisive in regard to a question of adoption which is governed by Act IX of 1871, though the suit in which such question arises may have been instituted after the coming into operation of Act XV of 1877 (*vide* section 2, Act XV of 1877); but, in my opinion, that ruling is not applicable to cases governed by article 118 or 119 of the new Limitation Act, corresponding to article 129 of the old Limitation Act IX of 1871. Articles 118 and 119 of Act XV of 1877 are radically different from article 129 of Act IX of 1871 in every respect, viz., (1) the phraseology in column 1 descriptive of the suit, (2) the period of

(1) I.L.R., 20 Mad., 40.
(2) L.R., 13 I.A., 84; I.L.R., 13 Calc., 308.

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limitation prescribed in column 2, and (3) the starting point for the period of limitation. Article 129 of Act IX of 1871 was applicable as well to a suit to "establish" an adoption as to a suit to "set aside" an adoption, and the ruling of the Privy Council above referred to expounded only the meaning of the phrase "to set aside an adoption" and the case was one in which the suit was brought against the adopted son and not one by an adopted son to establish his adoption. The said article No. 129 was split into two articles in Act XV of 1877, viz., 118 "to obtain a declaration that an adoption is invalid, &c., &c."; 119 "to obtain a declaration that an adoption is valid." The High Court of Calcutta in *Jagannath Prasad Gupta* v. *Runjit Singh*(1), already referred to, held that article 119 was applicable to a mere declaratory suit, both on the ground that the decision of the Privy Council in *Jagadamba Chaodhrani* v. *Dakhina Mohun*(2) was inapplicable to cases governed by Act XV of 1877 and also on the ground that the said ruling did not warrant the conclusion that the expression "suit to establish an adoption" which was a part of article 129 (which part corresponds to article 119 of Act XV of 1877) included also a suit for the possession of immoveable property upon a title by adoption. It is true that there has been no decision of the Privy Council, or, so far as I am aware, of any High Court in India, in which it was decided that a suit brought by an adopted son to recover possession of immoveable property must be regarded as a suit to establish the plaintiff's adoption within the meaning of article 129 of Act IX of 1871 and that, as such, it was governed by the said article and not by article 142 or 145 of that Act. But in my opinion the expression "establish" is in the ordinary language of Indian lawyers, the correlative of the expression "set aside" and applies, like its correlative, as I shall show hereafter by reference to various articles of the Limitation Act, "quite indiscriminately to suits for possession of land and to suits of a declaratory nature." If the ruling of the Privy Council in *Jagadamba Chaodhrani* v. *Dakhina Mohun*(2) is a binding authority as to cases falling under article 118 of Act XV of 1877, it will, in my opinion, be equally applicable to a suit like the present governed by article 119; but after bestowing my best

(1) I.L.R., 25 Calc., 354. (2) L.R., 13 I.A., 84; I.L.R., 13 Calc., 308.

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consideration on the point I am satisfied that the question for determination in this appeal is not concluded by any ruling of the Privy Council and I am equally satisfied that there is no considered dictum of that tribunal bearing on the question. The earliest Privy Council case is that of *Jagadamba Chaodhrani* v. *Dakhina Mohun*(1) and the latest Privy Council case in which the ruling in the above case was expounded in considering a cognate question governed by article 12 (A) of the Limitation Act, viz., to set aside a sale in execution of a decree of a Civil Court, is *Malkarjun* v. *Narhari*(2). A reference to the judgment in the former case clearly shows that the application of article 129 turned entirely upon the peculiar meaning in which the expression "set aside an adoption" is used in the ordinary language of Indian lawyers and in several reported cases therein cited, however inaccurate such expression may be from a judicial point of view, as was pointed out by Lord Blackburn in the course of the argument when he addressed the appellant's Counsel as follows:—"How do you make them out to be suits to set aside adoptions? They seek to recover possession and may admit the adoptions while denying their efficacy to pass title." After adverting to those cases their Lordships of the Privy Council expressed their conclusion as follows at page 94:—"It thus appears that the expression 'set aside an adoption' is and has been for many years applied in the ordinary language of Indian lawyers to proceedings which bring the validity of an alleged adoption under question, and applied quite indiscriminately to suits for possession of land and to suits of a declaratory nature. It is worth observing that in the Limitation Act of 1877, which superseded the Act now under discussion, the language is changed. Article 118 of the Act of 1877, which corresponds to article 129 of the Act of 1871, so far as regards setting aside adoptions, speaks of a suit 'to obtain a declaration that an alleged adoption is invalid or never in fact took place,' and assigns a different starting point to the time that is to run against it. Whether the alteration of language denotes a change of policy, or how much change of law it effects, are questions not now before their Lordships. Nor do they think that any guidance in the construction of the earlier Act is to be gained from the later one,

(1) L.R., 13 I.A., 84; I.L.R., 15 Calc., 308.
(2) I.L.R., 25 Bom., 237 at p. 350.

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except that we may fairly infer that the Legislature considered the expression 'suit to set aside an adoption,' to be one of a loose kind, and that more precision was desirable."

"If then the expression is not such as to denote solely, or even to denote accurately, a suit confined to a declaration that an alleged adoption is invalid in law or never took place in fact, is there anything in the scope or structure of the Act to prevent us from giving to it the ordinary sense in which it is used, though it may be loosely, by professional men? The plaintiff's Counsel were asked, but were not able, to suggest any principle on which suits involving the issue of adoption or no adoption must, if of a merely declaratory nature, be brought within twelve years from the adoption, while yet the very same issue is left open for twelve years after the death of the adopting widow, it may be fifty years more, if only it is mixed up with a suit for possession of the same property. It seems to their Lordships that the more rational and probable principle to ascribe to an Act whose *language admits of it*, is the principle of allowing only a moderate time within which such delicate and intricate questions as those involved in adoptions shall be brought into dispute, so that it shall strike alike at all suits in which the plaintiff cannot possibly succeed without displacing an apparent adoption by virtue of which the defendant is in possession."

From the above extract it is abundantly clear that their Lordships of the Privy Council guarded themselves at every step against expressing any opinion as to the effect of the change introduced in the Indian Limitation Act of 1877, and they observe that the later Act cannot be any guidance in the construction of the earlier Act, and their observations as to the principle on which article 129 is founded "of allowing only a moderate time within which such delicate and intricate questions as those involved in adoptions shall be brought into dispute" are expressly based upon the expression "suit to set aside adoption" which they say "is not such as to denote solely or even to denote accurately a suit confined to a declaration that an alleged adoption is invalid in law or never took place in fact" and they observe that there is nothing in the scope or structure of the Act to prevent them from giving to the expression the ordinary sense in which it is used, though it may be loosely, by professional men. Lord Hobhouse, who delivered the judgment of the Committee in the above case, expounded the same

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view as follows in the case of *Malkarjun* v. *Narhari*(1): "In the case of *Jagadamba Chaodhrani* v. *Dakhina Mohun*(2), the plaintiffs were reversionary heirs of a deceased Hindu, subject to the interest of his widows. They brought suits not long after the surviving widow's death to recover the estate. But adoptions had been made in 1853 and 1856, either of which, if valid, would displace the plaintiffs. The law of limitation applicable to the case (the Act of 1871) provided that a suit to set aside an adoption must be brought within twelve years after the date of adoption. The plaintiffs sued, not to set aside the adoptions, but to recover the estate; and they argued that their title was good until an adoption was set up; that those who set it up must prove its validity, which accordingly might be controverted by the plaintiffs. There was difficulty in the case because the expression 'set aside an adoption' is inaccurate; an adoption cannot be set aside, though its validity may be impeached; and in fact the language was altered in 1877 before the appeal was heard. This Board found, however, that the expression had been frequently used in legal documents and was known to Indian lawyers as a short way of denoting any process in which the fact or the validity of an adoption was disputed. On *that ground* they held that the Legislature must have intended to place the specified limit on suits for these purposes. Then the suit being rightly described as one to *set aside* an adoption, attracted the consequence that the time for suing ran from the date of the adoptions, and that the suits of 1873 and 1874 were barred." It will be noted that Lord Hobhouse specially refers to the ruling in the case reported in 13 Indian Appeals as one under the *Act of 1871* and he explains that the *ratio decidendi* of the decision in that case was that the Judicial Committee found that the expression "*set aside an adoption*" "had been frequently used in legal documents and was known to Indian lawyers as a short way of denoting any process in which the fact or validity of an adoption was disputed" and that "*on that ground* they held that the Legislature must have intended to place the specified limit on suits for these purposes" and he concludes by saying "then the suit being rightly described as one to *set aside* an adoption attracted the consequence that the time for suing ran from

(1) I.L.R., 25 Bom., 337 at p. 350.
(2) I.L.R., 13 I.A., 84; I.L.R., 13 Calc., 308.

the date of the adoption and that the suits of 1873 and 1874 were barred." (The italics are mine.) It seems to me perfectly clear from the above explanation of the ruling in the case of *Jagadamba Chaodhrani* v. *Dakhina Mohun*(1) that that ruling is the result of the suit being described in article 129 as one to *set aside an adoption* and of the technical meaning which that expression has in Indian legal phraseology and that it cannot apply to the corresponding articles 118 and 119 in the Act of 1877, in both of which articles the expressions " set aside " and " establish " were eliminated and the suits described as declaratory suits. The decision of the Privy Council in *Malkarjun* v. *Narhari*(2) was given in the latter part of 1900 and it was subsequent to the decision of this Court in *Parvathi Ammal* v. *Saminaiha Gurukal*(3) and also to he Full Bench decision of the Bombay High Court (*Shrinivas* v. *Hanmant*(4) which followed the decision of this Court in *Parvathi Ammal* v. *Saminatha Gurukal*(3). In both these cases reliance is placed upon the Privy Council cases of *Mohesh Narain Munshi* v. *Taruck Nath Moitra*(5) and *Lachman Lal Chowdhri* v. *Kanhaya Lal Mowar*(6) which were intermediate between *Jagadamba Chaodhrani* v. *Dakhina Mohun*(1) and *Malkarjun* v. *Narhari*(2).

In the case of *Mohesh Narain Munshi* v. *Taruck Nath Moitra*(5) it was held that though the suit was brought in 1885, yet according to section 2 of that Act and the ruling of the Privy Council in *Appasamy Odayar* v. *Subramania Odayar*(7) the question of the validity of the defendant's adoption therein was governed by article 129 of Act IX of 1871, inasmuch as the period of twelve years after the defendant's adoption expired in 1863, long before the Act XV of 1877 came into operation. Following, therefore, the ruling in *Jagadamba Chaodhrani* v. *Dakhina Mohun*(1) it was held that the suit was one to set aside an adoption within the meaning of article 129 of Act IX of 1871 and that the suit was therefore barred by limitation. Lord Shand, in delivering the judgment of the Committee in that case, after alluding to the suggestion made on behalf of the appellant that the Act of 1871 having been superseded by the Act of 1877, the question of limitation should be determined with reference to

(1) L.R., 13 I.A., 84; I.L.R., 13 Calc., 308.
(2) I.L.R., 25 Bom., 337 at p. 350.
(3) I.L.R., 20 Mad., 41.
(4) I.L.R., 24 Bom., 260.
(5) L.R., 20 I.A., 30; I.L.R., 20 Calc., 487.
(6) L.R., 22 I.A., 51; I.L.R., 22 Calc., 609.
(7) I.L.R., 12 Mad., 26.

the provisions of the later statute, which argument was eventually overruled, observed as follows :— " It seems to be more than doubtful whether if these (' to obtain a declaration that an alleged adoption is invalid or never in fact took place ') were the words of the statute applicable to the case, the plaintiff would thereby take any advantage." Both in *Jagannath Prasad Gupta* v. *Runjit Singh*(1) and in *Ramchendra Mukerji* v. *Runjit Singh*(2) the meaning of the above passage in the judgment of the Privy Council was considered and explained as follows :—" What their Lordships considered to be more than doubtful, even if the language of the old law (article 129 of Act IX of 1871) were the same as that of the present law (article 118 of Act XV of 1877), was not whether that would make any change in the law, but whether the plaintiff would take any advantage, that is, whether the plaintiff in the case before their Lordships would succeed under the circumstances of the case. That this is the meaning of the above passage appears to us to be clear, not only from the language used, but also from the fact that the High Court held that the suit was barred by adverse possession and their Lordships in an earlier part of the judgment say that they decide the question upon the construction of article 129 of Act IX of 1871, without expressing any dissent from the view of the High Court, that the suit was barred by adverse possession." It is possible that this may be the right interpretation, but I am by no means convinced of it and I prefer to construe it as it has been construed both by this Court and by the Bombay High Court, viz., that in the opinion of the Judicial Committee, whose judgment was delivered by Lord Shand, it was more than doubtful whether, if the language of article 129 of Act IX of 1871 had been the same as that of the Act of 1877, the result would have been different, that is, whether the plaintiff's suit would not have been barred by limitation. Assuming this to be the correct interpretation of the passage, what does this amount to ? It amounts only to the expression of a doubt, and no more than a strong doubt, as to whether article 118 may not apply to a suit which is not merely one for declaration of the invalidity of the defendant's adoption. The expression of such doubt cannot be regarded as carrying the weight even of an *obiter dictum* which must at least be the expression of an *opinion* " by the way."

(1) I.L.R., 25 Calc., 354 at p. 363.
(2) I.L.R., 27 Calc., 242 at p. 255.

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The next case (*Lachman Lal Chowdri* v. *Kanhaya Lal Mowar*(1) is one which was carried in appeal to the Privy Council and in which the Counsel for the appellant (defendant who claimed by virtue of an adoption made by a widow) on the assumption that article 118 of Act XV of 1877 was applicable to the suit notwithstanding that it was not a mere declaratory suit, argued that the suit was barred by limitation under that article and that the widow must be understood to have purported to adopt the defendant as son to her husband and not simply to herself as held by the High Court. Counsel for the respondent was not called upon and Lord Shand, in delivering the judgment of the Committee, held that, if the adoption of the defendant was really made by the widow as a son to herself and not to her husband, which the High Court has held to be the true construction of the deed of adoption produced, the plea of limitation could have no application in this suit which related entirely to the husband's estate. His Lordship then added that, in the opinion of their Lordships, there was another ground in respect of which also the defence clearly failed, viz., that it has not been proved that the alleged adoption did become known to the respondent (plaintiff) till the death of the widow which occurred within two years of the institution of the suit. If the adoption was not to the husband, and the question involved in the suit was the right to inherit the husband's estate, neither article 129 of Act IX of 1871 nor article 118 of Act XV of 1877 would apply to such a suit. That, therefore, was a complete answer to the argument urged by the appellant's Counsel and on the assumption on which he argued the case, viz., that article 118 was applicable to the case and he could therefore rely on it in defence of the suit, their Lordships made another complete answer to his argument, viz., that it was not proved that the plaintiff had knowledge of the adoption more than six years before date of the institution of the suit. No question at all was raised or considered as to whether article 118 would apply to a case which was not merely one for declaration. And the Counsel for the respondent, in whose interest it would have been to raise the contention that article 118 would govern only suits for a mere declaration, was not called upon, for the obvious reason that even on the assumption on which the appellant rested his case, viz., that article 118 was applicable to the case, the appeal failed on the

(1) L.R., 22 I.A., 51 ; I.L.R., 22 Calc., 609.

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two grounds already mentioned. I may also note here that it is distinctly stated in the judgment of the Privy Council, at page 614, that the adoption was alleged to have been made by the widow two years after the death, in 1846, of her husband. If this were so the law of limitation applicable to the alleged adoption, even if it had been made to the husband, which it was not, would be article 129 of Act IX of 1871. Under all these circumstances it is impossible to regard the judgment of the Privy Council in this case as a decision that article 118 would be applicable even if the suit was not one for mere declaration but one for recovery of possession of immoveable property from one claiming to be in possession as adopted son and I venture to state that it cannot be regarded even as a dictum. The pronouncement of the Judicial Committee on a question of law which was argued and considered, though such pronouncement may not have been necessary to the decision of the case, is of course entitled to the highest weight, and so far as this Court is concerned will stand nearly on the same footing as an authoritative ruling. In *Parvathi Ammal* v. *Saminatha Gurukal*(1) Shephard, J., did not rely upon this judgment of the Privy Council either as a decision or dictum in support of his conclusion, for he refers to it as a later case in which "it appears to have been assumed that notwithstanding the change a plaintiff suing for possession must bring his suit within six years of his knowledge of the defendant's adoption." In the Bombay Full Bench case, however, Jenkins, C.J., strongly relies upon the decision of the Privy Council in this case and says that "the judgment does not profess to proceed on an assumption made merely for the purpose of the decision and I think it must be left for their Lordships alone to distinguish the case on the ground that has been suggested at the bar if it be necessary. It certainly does not appear to me to be paying due respect to their Lordships' considered judgment, for such it was, to say that they either overlooked a point which must have been brought to their notice or that without so expressing themselves they decided on an article of the Limitation Act which had no application." With all deference I am compelled to express my dissent from this view. If the judgment of their Lordships in the case had been that the suit *was barred* under article 118, it would then certainly be a

(1) I.L.R., 20 Mad., 40.

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decision on the point; and it would not be paying due respect to their Lordships' judgment to say that they either overlooked a point which ought to have been, but was not, brought to their notice by the respondent's Counsel or that without so expressing themselves they decided that the suit was barred by an article of the Limitation Act which article had no application to the case and that therefore it is not a binding authority. It is a matter of almost daily experience in Courts of appeal that when the arguments of the appellant's Counsel fail even on the assumption on which he bases his arguments, the appeal is dismissed without the respondent's Counsel being called upon and without considering or deciding whether the assumption on which the appellant's Counsel has proceeded is well-founded in law or not. As pointed out already by me, the slender inferences which may be drawn in support of the decision of this Court in *Parvathi Ammal* v. *Saminatha Gurukal*(1) and of the Bombay High Court in *Shrinivas* v. *Hanmant*(2) from certain passages detached from their context in the three judgments of the Privy Council above referred to and a casual remark by way of illustration, made in the judgment of the Privy Council in *Sri Balasu Gurulingaswami* v. *Ramalakshmamma*(3) as to the six years' rule of limitation enacted by the Legislature in regard to adoption, are sufficiently repelled by the explanation given in the latest Privy Council decision in *Malkarjun* v. *Narhari*(4) of the ruling in the leading case of *Jagadamba Chaodhrani* v. *Dakhina Mohun*(5). Both the Calcutta High Court and the Allahabad High Court have, after consideration of the three decisions of the Privy Council above referred to, come to the conclusion that the ruling of the Privy Council in *Jagadamba Chaodhrani* v. *Dakhina Mohun*(5) is applicable only to a case in which the question of adoption is governed by article 129 of Act IX of 1871 and that neither that decision nor the decision in either of the two subsequent cases is an authority that articles 118 and 119 govern a suit for the recovery of possession of immoveable property when the title to such possession involves the determination of the invalidity of an adoption relied upon by the defendant or the validity of an adoption relied upon by

(1) I.L.R., 20 Mad., 40. (2) I.L.R., 24 Bom., 260.
(3) I.L.R., 22 Mad., 398 at p. 418. (4) I.L.R., 25 Bom., 337 at p. 350.
(5) L.R., 13 I.A., 84; I.L.R., 13 Calc., 308.

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the plaintiff, and they have dissented from the decision of this Court in *Parvathi Ammal* v. *Saminatha Gurukal*(1) and the decision of the Bombay High Court in *Shrinivas* v. *Hanmant*(2).

I shall now proceed to consider the question with reference to the provisions of the three Limitation Acts, viz., Acts XIV of 1859, IX of 1871, and XV of 1877, and the provisions of the Specific Relief Act, 1877, which has a most important bearing upon the construction of articles 118 and 119 of Act XV of 1877. Under Act XIV of 1859 declaratory suits in respect of adoption were governed by clause 16 of section I which prescribed a limitation of six years, to commence with the time when the cause of action arose, to all suits not specially provided for and it was held that the period of six years ran from the date of adoption (*Mrino Moyee Debia* v. *Bhoobun Moyee Debia*(3)) and it was undoubted under that Act that suits for the recovery of immoveable property were governed by the twelve years' period of limitation prescribed by clause 12 of section I, notwithstanding that such suits involved the validity of an adoption relied upon by the plaintiff or the invalidity of an adoption relied upon by the defendant (*Sreenath Gangooley* v. *Mohesh Chunder Roy*(4)). This Act was superseded by Act IX of 1871 which provided in schedule II various periods of limitation ranging from 30 days to 60 years for different classes of suits described respectively in 150 articles. The first column of the schedule describes the nature of the suit, the second column specifies the period of limitation and the third column the time when such period begins to run. The phrase "to set aside" was fully used in describing several classes of suits, for example, in articles 14, 15, 16, 92, 96, 125 and 129. The same expression "to set aside" is used in several articles prescribing a period of limitation under the head of "applications." A reference to those articles will clearly show that, in most of those cases at any rate, the suits would comprise not only suits for a mere declaration of the validity or the invalidity of certain sales, orders, decisions, acts or instruments, but also suits for the recovery of immoveable property in which the validity or otherwise of a sale, order, decision, act or instrument may be involved. There were also certain articles in that very Act describing certain suits as suits

(1) I.L.R., 20 Mad., 40. (2) I.L.R., 24 Bom., 260.
(3) 23 W.R., (C.R.), 42 at p. 44. (4) 4 B.L.R., F.B.

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to obtain a declaration (see for example articles 93 and 146). Article 118 prescribed a period of six years for suits not otherwise provided for. In certain articles the suits therein referred to are described as suits to avoid or contest something, apparently in the same sense as the expression "set aside." The article which had to be construed by the Privy Council in the leading case of *Jogadamba Chaodhrani* v. *Dakhina Mohun*(1) was article 129 and there was certainly no reason why the expression "set aside" in that article should be construed in a sense different from that in which it was used in most of the other articles in the same schedule, a sense in which the expression has been for many years used in the ordinary language of Indian lawyers, as appeared from the various reported cases referred to by the Privy Council. Whether the provision made in article 129 in regard to suits involving the question of adoption was scientific or not, the prescribing of twelve years as the period of limitation leads strongly to the inference that it was the intention of the Legislature that article 129 should apply also to suits for the recovery of immoveable property, in which suits the question of adoption was involved. If article 129 had been intended to govern suits for mere declaration in respect of adoption, it is extremely unlikely that the period of six years which was applicable thereto under the Act of 1859 would have been changed and assimilated to the period of twelve years, which both under the Act of 1859 and the Act of 1871 is the general period of limitation for suits for the recovery of immoveable property. When the Act of 1871 was superseded by the Act XV of 1877 the phrase "set aside" was retained in all the articles corresponding to the above articles in the Act of 1871, except in article 118 corresponding to article 129 of the Act of 1871. Article 44 was also added providing three years as the period of limitation for a suit by a ward who has attained majority "to set aside" a sale by his guardian, such period to be reckoned from the time of the ward's attaining majority. It was held by the Privy Council in *Malkarjun* v. *Narhari*(2) differing from the decision of the Bombay High Court in *Bhagavant Govind* v. *Kondi*(3) that this article in which the expression "set aside" is used would apply to a suit for

(1) L.R., 13 I.A., 84; I.L.R., 13 Calc., 308. (2) I.L.R., 25 Bom., 337 at p. 350.
(3) I.L.R., 14 Bom., 279.

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redemption for which the period of limitation is sixty years, when such suit was brought more than three years after the plaintiff had attained majority and the mortgagee resisted the claim for redemption by relying upon a sale of the equity of redemption made by the ward's mother and guardian during his minority. Shortly before Act XV of 1877 was passed on the 19th of July 1877 the Specific Relief Act had been passed into law on the 7th February 1877 and the law as to declaratory decrees was laid down by section 42 of that Act with a number of illustrations appended thereto. The illustration (*f*) relating to adoption runs as follows:—

"A Hindu widow in possession of property adopts a son to her deceased husband. The person presumptively entitled to possession of the property on her death without a son may in a suit against the adopted son obtain a declaration that the adoption was invalid."

Article 129 of the Act of 1871 was split into two articles, 118 and 119, in the new Act and the expressions "establish" and "set aside" were dropped, notwithstanding that such expressions were retained in other articles and the period of limitation was cut down from twelve to six years and the starting point was also altered from the date of adoption to the date of plaintiff's knowledge of the alleged adoption or the date of interference with the rights of the adopted son. Article 118 embraced two classes of suits, viz., suits to obtain a declaration that an alleged adoption is invalid and suits to obtain a declaration that an alleged adoption never in fact took place. Article 129 of the old Act could not apply to the latter class of suits, for the expression "set aside" cannot apply to a case in which there was in fact no adoption at all and therefore there was nothing to set aside. Such suits therefore even under the Act of 1871 would have been governed by the six years' rule prescribed for suits not otherwise provided for by article 118 corresponding to article 120 of the Act of 1877. Article 119 of the Act of 1877 corresponds to the first part of article 129 of the Act of 1871, *i.e.*, a suit to establish an adoption. Unlike article 118, article 119 does not separately provide for a suit to obtain a declaration that an alleged adoption in fact took place, for the simple reason that the mere *factum* of adoption will not entitle one to a legal character unless the adoption is also valid. A plaintiff, therefore, will have to sue for a declaration that his adoption is valid

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whether the *factum* itself is denied or the *factum* is admitted but the validity is challenged. Taking into consideration that the expressions "establish" and "set aside" were dropped in articles 118 and 119 and that the language descriptive of the two classes of suits is identical with the language of section 42 of the Specific Relief Act and illustration (*j*) thereto and that the period of twelve years was reduced to six years, which was the period generally applicable to suits for mere declaration under Act XIV of 1859 and was the period applied to suits for declaration in respect of adoption under that Act (*Mrino Moyee Debia* v. *Bhoobun Moyee Debia*(1)) it is impossible to resist the conclusion that the Legislature deliberately departed from the policy of article 129 of the Act of 1871 and confined the operation of articles 118 and 119 of the new Act to mere declaratory suits as defined in section 42 of the Specific Relief Act. It is most unlikely that the change of policy was only to reduce to six years the period of twelve years provided by the Act of 1871 (article 129) and to fix a different starting point. In *Parvathi Ammal* v. *Saminatha Gurukal*(2) Shephard, J., adverting to this point observes that "there was no need for the abbreviation of the period or indeed for the retention of any special article if it was intended only to apply to cases in which the plaintiffs seek for a mere declaration and nothing more." If articles 118 and 119 had not been enacted in the Act of 1877 the result would have been that the general article 120 prescribing a period of six years from the date of the cause of action would govern such suits and the period of six years would reckon from the date of adoption as was held to be the case under the Act of 1859 and not from the date of the plaintiff's knowledge of the alleged adoption or from the date of interference with the plaintiff's rights as adopted son, as provided in the third column of articles 118 and 119. The retention of articles 118 and 119 was therefore necessary in view of the provision made in the third column thereof as to the time from which the period of six years was to run. On the hypothesis that articles 118 and 119 relate to mere declaratory suits and that a plaintiff wishing to avail himself of the extraordinary and equitable relief to be obtained in such suits should be vigilant, the curtailment of the period of limitation from twelve to six years becomes perfectly intelligible and the provision made in the third column that the

(1) 23 W.R., (C.R.), 42 at p. 44.

(2) I.L.R., 20 Mad., 40.

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period of six years is to be reckoned from the date of knowledge or interference strongly supports the conclusion that the suits to which the articles relate are declaratory suits of the character defined in section 42 of the Specific Relief Act.

This conclusion derives further support from the general scheme of the second schedule to the Limitation Act. I shall for example refer to articles 92, 93, 128, 129 and 131 of the second schedule. After providing a period of limitation in article 91 for a suit to set aside an instrument not otherwise provided for—an article which has given rise to numerous conflicting decisions as to the class of suits for the recovery of immoveable property to which it is applicable (*Janki Kunwar* v. *Ajit Singh*(1))—articles 92 and 93 prescribe a period of limitation of three years for a suit to obtain a *declaration* that a certain instrument issued, registered or attempted to be enforced against the plaintiff is a forgery. As in the case of articles 118 and 119, the period of limitation is to be reckoned from the date of the plaintiff's knowledge or from the date of the attempt to enforce the instrument. Can it be contended that a suit brought for redemption or recovery of immoveable property or for the recovery of a debt within the period of limitation prescribed for such suits would be governed by articles 92 and 93 and barred thereunder, if the defendant resists the suit by relying upon a forged instrument of conveyance or a receipt and proves that the plaintiff had knowledge of its issue or registration more than three years before the date of the suit? If the interpretation placed by this Court and by the High Court of Bombay on articles 118 and 119 be sound, the above contention as to articles 92 and 93 ought also to prevail.

Article 129 of Act XV of 1877 provides a period of twelve years to be reckoned from the time when the right is denied, to obtain a declaration of one's right to maintenance. If such suit were not a mere declaratory one how are we to account for article 128 which prescribes a period of twelve years for a suit for recovery of arrears of maintenance. Reading articles 128 and 129 together, it is obvious that though the right to maintenance may have been denied long before twelve years of the date of suit, the suit for recovery of arrears of maintenance for twelve years preceding the suit can be maintained. Article 131, however, which provides a

(1) I.L.R., 15 Calc., 58 at p. 65.

period of twelve years in respect of a periodically recurring right does not relate to a mere declaratory suit and the expression used in that article is not "for a declaration," but "to establish"—which latter expression also occurs in article 11 and, as already pointed out, is used in the Limitation Act as the correlative of "set aside" (*Raoj* v. *Bala*(1), *Ramnad Zemindar* v. *Dorasami*(2)). This seems to account for the absence of an article providing a period of limitation, as in the case of arrears of maintenance (article 128) for recovery of arrears of amount due in respect of a periodically recurring right.

The compendious expressions "set aside" and "to establish," which occur in several articles of the second schedule have, in no few instances, led to various conflicting rulings by the different High Courts and it is to be sincerely hoped that when Act XV of 1877 is revised these expressions will be dropped and the suits to which they relate, in the various articles, will be described with greater precision and completeness.

If articles 118 and 119 are to be construed as curtailing the periods of limitation prescribed by articles 141, 142, 144, 147 and 148 for recovery of immoveable property or for foreclosure or redemption of a mortgage, in cases in which the title will depend on the validity of an adoption relied on by the plaintiff or the invalidity of an adoption relied on by the defendant, it will follow that, in the like cases, articles 118 and 119 will have the effect of enlarging the shorter periods of limitation prescribed by articles 10 (one year), 32 (two years), 48 and 49 (three years) of the second schedule. Suits for a declaratory decree are excepted from the cognizance of Courts of Small Causes by article 19 of the second schedule of the Provincial Small Cause Courts Act of 1877. That article has always been construed as referring to mere declaratory suits of the character defined in section 42 of the Specific Relief Act and when a suit prays for a declaration of right accompanied by consequential relief, which relief is within the cognizance of a Court of Small Causes, it has invariably been held that the prayer for a declaration of right is merely ancillary to the consequential relief and that therefore the suit is not excepted from the cognizance of the Court of Small Causes.

(1) I.L.R., 15 Bom., 135. (2) I.L.R., 7 Mad., 341 at p. 343.

If articles 118 and 119 are otherwise construed and made applicable to suits in which the relief or consequential relief claimed is recovery of immoveable property, such construction will be attended with numerous anomalies and great hardship. If a party remains and continues to remain in possession of immoveable property notwithstanding that, to his knowledge, an adoption is alleged, which if valid would disentitle him to the property, the only suit he could maintain would be a mere declaratory one under section 42 of the Specific Relief Act; but it would be entirely in the discretion of the Court to entertain and decree such a suit. If, therefore, he does not bring such a suit or if such suit is brought, but dismissed in the exercise of the discretion of the Court, and if before he has been in possession for the statutory period, he should be dispossessed by the person claiming as adopted son or by some one claiming under him, a suit which he may have to bring in ejectment against either of such persons will be barred under article 118. A declaratory decree is not a matter of course and the Privy Council has in several suits relating to adoption refused to give a declaratory decree. So recently as 1890, in *Rani Pirth Pal Kunwar* v. *Rani Guman Kunwar*(1) where the only object of a declaratory suit was to prevent a defendant who claimed property under an alleged adoption, from obtaining possession after the plaintiff's death, it was held that the suit was properly dismissed. In that case, the plaintiff, the mother-in-law of the first defendant, prayed for a declaration that the adoption of the second defendant by the first defendant was invalid and that a proposed transfer to him of certain property was ineffectual. The plaintiff, besides being in possession of some property for life, as a provision for maintenance, was the reversionary heir entitled to succeed to the whole estate on the death of her daughter-in-law, the first defendant, if the second defendant's adoption, which was made in 1883, two years before the suit, was invalid. Sir Barnes Peacock, in delivering the judgment of the Committee, stated as follows:—(Quoting from *Sree Narain Mitter* v. *Sree Mutty Kishen Soondary Doose*(2). "It is not a matter of absolute right to obtain a declaratory decree. It is discretionary with the Court to grant it or not and in every case the Court must exercise a sound judgment as to whether it is reasonable or not, under the circumstances of the

(1) L.R., 17 I.A., 107. (2) L.R., I.A., Sup. Vol., p. 149.

case, to grant the relief prayed for. There is so much more danger than here, of harassing and vexatious litigation that the Courts in India ought to be most careful that mere declaratory suits be not converted into a new and mischievous source of litigation" . . . . " All that is suggested by the learned Counsel on the part of the appellant in support of a declaratory decree is this: that, at some time or other, after the death of the present plaintiff, the person who, according to the plaintiff's contention, is not an adopted son, may, by some means, either by an act of Government or otherwise, obtain possession as an adopted son. The only object, therefore, of having a declaratory decree is to prevent him being put into possession. Their Lordships cannot assume that the Government, if petitioned to put the person claiming to be an adopted son into possession, would do so unless they saw that he had a right to that possession. The officers of Government would in ordinary course, if there were any doubt as to the title, refer the parties to the Civil Court. If the person claiming to have been adopted brings an action to enforce his title, the question will be investigated whether he was validly adopted or not."

It is perfectly clear from the above extract that the declaratory decree would not have been refused, in the exercise of judicial discretion, if the law were that a future suit for possession would be barred under article 118, on the ground that the suit was not brought within six years of the date of the knowledge of the alleged adoption.

It is also settled law that a suit for declaration of the invalidity of a defendant's alleged adoption can be brought only by the presumptive reversionary heir, unless the presumptive reversionary heir is in collusion with the widow or has precluded himself from questioning the adoption (*Rani Aumed Koer* v. *The Court of Wards*(1). In *Tekait Doorga Persaid* v. *Tekaitri Doorga Konwaree*(2), their Lordships of the Judicial Committee, in the exercise of their discretion, declined to remand the case for adjudication as to whether the plaintiff was the presumptive reversionary heir, with a view to his obtaining the declaratory decree sought for, and in so doing, observed as follows (at page 163):—" Such an inquiry would be attended with considerable expense, and would cause great delay, and if the

(1) L.R 8 I.A., 14 at p. 22.

(2) L.R., 5 I.A., 149.

inquiry should result in a finding favourable to Joy Mungal, the decision might not be final in his favour, because the present plaintiff might die in the lifetime of the widow and the estate might never come to him. Further, there are others who might prove a preferable title to the plaintiff and to the defendant No. I and who would not be bound by any decision in this or in the former suit to which they are no parties. It appears, therefore, to their Lordships that they would not be exercising a sound discretion in sending the case for a further inquiry, which after causing considerable expense and delay would not be binding upon the whole family."

Having regard to these decisions it will be most unreasonable to construe articles 118 and 119 as relating to suits other than suits for a mere declaration of the invalidity or validity of an adoption as the case may be. If limitation begins to run in favour of an alleged adoption under article 118, it will run not only against the presumptive reversionary heir, but also against the person who may be the actual reversionary heir at the date of the death of the widow, and if a suit of a declaratory character cannot be maintained during the widow's lifetime by a remoter reversionary heir in the absence of collusion between the widow and the nearer reversionary heirs, the actual reversionary heir may find himself barred by limitation under article 118, when he sues to recover possession on the death of the widow. If we turn to article 119 the anomalies are not the less. In this very case, the plaintiff's rights as adopted son of Arunachela Asari were interfered with in 1889. Has limitation been running against him from 1889 only in respect of his claim to recover possession of his adoptive father's estate or also in respect of any claim which may hereafter accrue to him to recover possession of the properties of any agnate or cognate relation of Arunachella Asari to whom he would be entitled to inherit if he had been the born son of Arunachella Asari? In all the cases in which the question has hitherto been considered, it was assumed that the party seeking to invalidate the adoption would have to do so only in view to his succeeding to the estate of the deceased husband as his reversionary heir after the death of the widow—an estate which after all may be nominal or very inconsiderable. It was overlooked that the alleged adopted son (including his descendants) would, if his adoption were valid, become the heir or a possible heir to each of the numerous agnate or cognate relations of the alleged adoptive father, the estate possessed by some of

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whom might be very considerable. Can each of them bring, and if so, ought each to bring, a declaratory suit under section 42 of the Specific Relief Act, within six years after knowledge of the alleged adoption? If no such suit has been brought, is it to be held that if he or any of his descendants manages to get into possession of all or of any of the properties of any such agnate or cognate relation on or after his death, the person who would be his heir, if the adoption never took place in fact or if it did take place, was invalid, would be barred by article 118 from successfully maintaining a suit against the alleged adopted son or a descendant of his in possession of the property? Would a decree obtained by only one of such agnate or cognate relations of the alleged adoptive father, declaring the invalidity of the adoption, enure to the benefit of the other agnate or cognate relations, to each of whom the alleged adopted son would be in the line of heirs if the adoption were true and valid? The alleged adopted son himself may deny the factum of adoption or its validity, and claim a share in the property belonging to the family in which he was born —vide *Bireswar Mukerji* v. *Ardachander Roy*(1); and if he brings a suit for partition of such property on the ground that he has been excluded therefrom, is the suit to be governed by the twelve years' period prescribed by article 127 or the six years' period prescribed by article 118? When the language of articles 118 and 119 is plain, especially when those articles are read in the light thrown upon them by other articles in the same schedule and by section 42 of the Specific Relief Act which was passed contemporaneously with the Limitation Act of 1877, I fail to discover any justification for adopting a construction which results in the anomalies already pointed out and numerous other anomalies and complications which can be mentioned. Even if, grammatically, articles 118 and 119 are susceptible of either of the two constructions, there can be little doubt as to which of the two constructions ought to prevail. In the Full Bench Bombay decision (*Shrinivas* v. *Hanmant*(2)) Jenkins, C.J., observes as follows (at page 274):—"Thus I take it to be clear that a man can with the requisite leave combine in one suit a claim to establish his status as an adopted son where his rights as such had been interfered with and a claim to

(1) I.L.R., 19 Calc., 452 at p. 460.
(2) I.L.R., 24 Bom., 260.

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recover possession of property, his title to which depends *on a devise* and no one would, I imagine, in so obvious a case think of suggesting that the suit so far as it sought a declaration that the adoption was valid, did not fall within article 119." The leave of the Court referred to above is evidently the one contemplated by section 44, rule (*a*), Civil Procedure Code (the italics in the above extract are mine) and I fully concur in the proposition of law therein laid down. It only illustrates that two causes of action may, with the leave of the Court, be combined in one suit though one of them is purely of a declaratory character and the other for recovery of possession of property to which his title is founded upon a different cause of action, viz., his rights as devisee of a testator. The law of limitation applicable to the former is article 119, and the law of limitation applicable to the latter is article 134; but if the property claimed in the suit was one to which he would be entitled by reason of his status as an adopted son, then, in that case, the suit is founded only upon one cause of action and the suit is not one in which two causes of action are combined. The declaration of his status as an adopted son is then simply an ancillary one. The article of the law of limitation applicable to it will be only one article, viz., article 141, or 142 or 144 as the case may be and the prayer for declaration of his status as adopted son is only ancillary to the proof of his title to the immoveable property which he seeks to recover from the defendant. The next instance mentioned by Jenkins, C.J., at the same page is exactly the same in principle and stands on the same footing as the first illustration given by him. But can it be contended that a suit for the recovery of immoveable property is barred by limitation, because it was brought more than six years after the cause of action for declaration of title accrued? In such a suit if the plaintiff succeeds, the plaintiff's right is declared and delivery of the property decreed. Indeed, as a general rule, the plaint in such a suit contains an express prayer for declaration of title as ancillary to the consequential relief by delivery of property. As regards article 119, I am, with all respect, unable to concur in the reasoning of the learned Chief Justice which has led him to the conclusion that the suit contemplated by article 119 cannot be a mere declaratory suit, but that it must almost necessarily be one including a claim for relief "at least to an injunction." The reasoning, as I understand it, is that inasmuch as the starting

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point from which the period of six years runs is the date when the rights of the adopted son as such, are interfered with, therefore the suit is one in which the plaintiff is almost necessarily entitled to some consequential relief, by reason of the supposed interference and that, therefore, having reference to the proviso to section 42 of the Specific Relief Act, the suit contemplated by article 119 cannot be a mere declaratory one. If the interference was, as in this case, an interference by taking possession of the property to which the plaintiff was entitled as adopted son, the suit cannot be one for mere declaration under section 42 of the Specific Relief Act, but must be in ejectment, as the present case is. In the two cases of *Jagannath Prasad Gupta* v. *Rungit Singh*(1) and *Lali* v. *Murlidhar*(2) which are the only two cases in which the question as to the application of article 119 arose, the interference with the rights of the adopted son, which took place during the lifetime of the widow, was not such as to have entitled the plaintiff to any relief further than a mere declaration of his status as an adopted son. The interference may no doubt in some cases be such as to induce the Court to give relief by way of injunction,—if such relief were applied for,—and not merely relief by way of declaration of title. Whether injunction will be given or not will rest entirely in the discretion of the Court, in the exercise of which discretion the Court will be guided by the principles and rules enacted in chapter 10 of the Specific Relief Act. If a party claiming as adopted son brings a suit to obtain an injunction against the defendant, and not a mere declaration of his legal character as adopted son, the article of the Limitation Act applicable thereto will not be article 119, but the general article 120, though, so far as the question of limitation goes, it will make no difference in the majority of cases whether the one article or the other is applied to the suit. I am not aware that a person who is actually in possession of property, but whose possession is interfered with—it may be casually or repeatedly—cannot content himself with a declaratory suit, but must sue for an injunction. If he is ousted, then no doubt he must sue in ejectment, as that is the necessary relief he is entitled to in law consequent upon the declaration of his legal character as adopted son. If the interference was by way of trespass which, however, was only casual, he may get a

(1) I.L.R., 25 Calc., 355. (2) I.L.R., 24 All, 195.

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declaratory decree, but it is hardly likely that an injunction will ever be given. Even if the interference was by repeated trespass, I do not think it has ever been held that that circumstance is a bar to his contenting himself with a mere declaratory decree. The further relief referred to in the proviso to section 42 of the Specific Relief Act cannot in my opinion apply to an equitable injunction, which the Court may or may not, having regard to all the circumstances of the case, grant. However that may be, it does not affect the construction of article 119 as relating only to a declaratory suit. If the interference be such as would compel the adopted son—as in the present case—to seek further relief than a mere declaration, he ought to shape his suit accordingly and the limitation article 119 will not apply to such a suit. The Legislature in using the expression "interfered with" has chosen the mildest expression which would denote some overt act denying the adoption and in my opinion such expression was advisedly chosen as the suit contemplated by article 119 is a mere declaratory suit.

In my opinion the language of articles 118 and 119 is unambiguous and denotes a declaratory decree of the character defined by section 42 of the Specific Relief Act and it is impossible to regard the decision of the Privy Council in the leading case of *Jagadamba Chaodhrani* v. *Dakhina Mohun*(1) as applicable to cases governed by the new Limitation Act when in that very judgment their Lordships of the Privy Council expressly say that it is unnecessary to consider or express any opinion as to whether the alteration of language introduced in the Act of 1877 denotes a change of policy or how much change of law it effects. For the reasons above given I am unable to concur in the reasoning on which the decision of this Court in *Parvathi Ammal* v. *Saminatha Gurukal*(2) proceeds, as to the application of article 118 to a suit brought against an alleged adopted son and by logically extending that reasoning to article 119, to hold that the present suit, which is brought by an alleged adopted son, is barred by limitation. I would, therefore, allow the appeal and, reversing the decree appealed against, give a decree in favour of the plaintiff as prayed for, the findings on the issues relating to the merits of the case being all in favour of the appellant.

(1) L.R., 13 I.A., 84; I.L.R., 13 Calc., 308.
(2) I.L.R., 20 Mad., 40.

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BENSON, J.—If the question were *res integra* I should attach great weight to the arguments put forward by my learned brother, whose judgment has just been delivered, to show that article 119 is applicable only to a suit where a declaration without further relief is sought; but I do not consider myself free to disregard what appears to be the necessary consequence of the judgment of the Privy Council in the case of *Jagadamba Chaodhrani* v. *Dakhini Mohun*(1) and of the reasoning by which that judgment is supported.

I therefore concur in the conclusion of my learned brother Moore, J., and dismiss the appeal with costs. It is much to be desired that where, as in this case, there is a direct conflict between the rulings of the several High Courts on matters of great and general importance, the Legislature should take an early opportunity of so amending the law as to remove doubts as to its true meaning.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1902. April 18, 29.

PUTTI NARAYANAMURTHI AYYAR (DEFENDANT), APPELLANT,

v.

MARIMUTHU PILLAI (PLAINTIFF), RESPONDENT.*

Contract Act—IX of 1872, *s.* 145—*Implied promise by principal debtor to indemnify surety—Joint decree against two judgment-debtors—Satisfaction by one of them by execution of promissory note—Suit by him for contribution—Maintainability—"Sum paid under the guarantee."*

Two persons jointly executed a negotiable promissory note payable to S for Rs. 1,000, each receiving Rs. 500 out of the consideration. S subsequently sued them on the note and obtained a decree against them jointly for Rs. 1,480, being the amount due under the note, costs, etc. That decree was executed

(1) L.R., 13 I.A., 84; I.L.R., 13 Calc., 308.

* Second Appeal No. 1253 of 1900, presented against the decree of W. Gopalachariar, Subordinate Judge of Coimbatore, in Appeal Suit No. 185 of 1899, presented against the decree of C. Sriranga Chariar, District Munsif of Karur, in Original Suit No. 470 of 1898.

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as against one of them, namely, the present plaintiff, who gave S another promissory note (in which a third party joined), for the whole amount due under the decree, namely, Rs. 1,480, and obtained a receipt which showed that the last-mentioned promissory note was accepted by S as payment of the amount due under the decree. This note had not, at the date of the suit, been paid. Plaintiff now sued the other joint maker of the original promissory note for contribution:

Held, that he had no cause of action at the date of suit.

SUIT for money. The facts, as found, were that plaintiff and defendant were joint makers of a negotiable promissory note, dated 5th July 1893, for Rs. 1,000, payable to Subba Chari, who sued both plaintiff and defendant on the note, in Original Suit No. 282 of 1895, and obtained a decree against them jointly for the amount of the note and costs, amounting in all to Rs. 1,480. Subba Chari executed that decree against plaintiff alone, by issuing a warrant for his arrest, whereupon plaintiff, in conjunction with one Muthurra Pillai gave a promissory note for the amount payable under the decree, namely, Rs. 1,480, to Subba Chari, who accepted it in satisfaction of the decree and gave plaintiff a receipt, which was filed as exhibit B, bearing date 25th September 1896. The finding of the High Court was that the promissory note for which this receipt was given was accepted as payment of the amount decreed. Further facts and findings are contained in the judgment of the High Court. Plaintiff contended that defendant had received the whole of the consideration for the original promissory note of 5th July 1893, and he now sued to recover the whole amount of the note given by him in satisfaction of Subba Chari's decree. The lower Courts, however, agreed in the finding that plaintiff and defendant must be taken, on the evidence, to have divided the Rs. 1,000 equally between them. The District Munsif accordingly passed a decree in plaintiff's favour for one-half of the Rs. 1,480 claimed, together with interest and proportionate costs. Both parties appealed to the Subordinate Judge who, after discussing the facts, said: "The suit brought by plaintiff is virtually one for contribution. The fact that plaintiff claimed a larger amount does not debar his recovering the amount which he is found entitled to. The vakil for the defendant contends that, as plaintiff had not actually paid the decree amount in Original Suit No. 282 of 1895 he cannot maintain the suit. The decree-holder does not deny that the decree was satisfied, and the promissory note given by plaintiff having been accepted as complete satisfaction, there is no doubt that the defendant's liability under the decree in Original Suit

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No. 282 of 1895 ceased. The omission to report the adjustments to Court may prohibit the Court when executing the decree from recognizing it if the decree-holder denied, but he does not deny it now. The English cases referred to by the vakil relate to actions brought for recovering money said to have been paid solely for defendant's benefit. I agree with the Munsif that plaintiff is entitled to recover a moiety of the amount from defendant for his share of the debt."

He confirmed the decree of the lower Court and dismissed both appeals.

Defendant preferred this second appeal.

K. Narayana Rau for appellant.

P. R. Sundara Ayyar for respondent.

BHASHYAM AYYANGAR, J.—The appellant and respondent were joint makers of a negotiable promissory note (dated 5th July 1893) for Rs. 1,000 payable to one Subba Chari, who obtained a decree thereon in Original Suit No. 282 of 1895 against the appellant and respondent jointly. The decree was executed against the respondent alone by the issue of a warrant for his arrest. The respondent thereupon, in conjunction with one Muthurra Pillai, gave a promissory note for the amount payable under the decree, viz., Rs. 1,480, to Subba Chari, who accepted the same in satisfaction of the decree and gave respondent a receipt (exhibit B), dated 25th September 1896. It is clear from the terms of the receipt that this promissory note—which is not filed as an exhibit in the case—was accepted as payment of the amount decreed and the decree was thus satisfied under section 257 (*b*), Civil Procedure Code. Under section 258, Civil Procedure Code, the decree-holder, Subba Chari, ought to have certified such payment to the Court but he did not do so, nor did the respondent take any steps under the latter part of section 258 and apply to the Court to record satisfaction of the decree. But Subba Chari in his deposition as a witness in this suit, which was instituted and tried in the same Court, admitted satisfaction of the decree and even if that were not technically sufficient for the purposes of section 258, the respondent undertakes, that, if necessary, Subba Chari shall certify the payment to the Court before the disposal of this appeal, so as to remove any doubt as to the possibility of the decree-holder taking any steps to execute the decree against the appellant. The circumstance that such preappointed evidence

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as to the payment of the decree amount was not procured prior to the date of the suit is immaterial, for the payment which, prior to this suit, had been made out of Court to the decree-holder was valid under section 257 (*b*), and section 258 simply prescribes the procedure for recording the fact of such payment in the Court which has to execute the decree.

Each party asserted that the other alone was the principal debtor in respect of the amount borrowed under the original promissory note and that he himself was only a surety. Both the Courts below have come to the conclusion—and, as I think, rightly in the absence of any evidence to the contrary—that each borrowed a moiety, *i.e.*, Rs. 500, out of the Rs. 1,000, for which the promissory note was, by them, jointly given and this finding has not been seriously questioned in the arguments before us.

The original promissory note having merged in the judgment in Original Suit No. 282 of 1895, the legal relation between the appellant and respondent is that of joint judgment-debtors each of whom, *inter se*, was liable to bear the burden of a moiety of the judgment-debt, but one of whom alone discharged the whole debt, not however by payment in cash or by transferring to the decree-holder any property, real or personal, of value equivalent to the decree-amount, but by giving a promissory note jointly with a third party, apparently as his surety for the note. There is nothing on the record to show whether this promissory note was negotiable or not, but I do not think it necessary to call for a finding on this point, for even assuming that it was payable "to order," it will not, in the view which I take, affect the result of the case.

As between the appellant and respondent, each party was, under the original promissory note, a principal debtor in respect of a moiety of the debt and a surety for the other, in respect of the other moiety and the same will be their relative position in respect of the judgment-debt. The appellant's pleader urges that the giving of a promissory note by the respondent is not such a payment of the decree-debt as would entitle him to sue the appellant for contribution; and in support of this argument, he principally relies upon the cases of *Tailor* v. *Higgins*(1) and *Maxwell* v. *Jameson*(2). Upon the finding already referred to, the plaintiff's cause of action, if any, is only in respect of a moiety of the debt, which was

(1) 3 East, 169. (2) 2 Barn and Ald., 51.

primarily payable by the appellant and in respect of which respondent is only a surety. The principle of law applicable to the case is laid down in section 145 of the Indian Contract Act, which runs as follows:—"In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety, and the surety is entitled to recover from the principal debtor, whatever sum he has rightfully paid under the guarantee; but no sum which he has paid wrongfully." It will be noted that the surety's right is to recover from the principal debtor whatever sum the former paid to the creditor, which sum ought to have been paid by the principal debtor. The principal debtor being bound to indemnify the surety, it is obvious that the cause of action cannot be merely the procuring, by the surety, of the principal debtor's exoneration from liability to the creditor, but also the surety being himself damnified.

In the two cases above referred to, the creditor accepted the surety's bond, in discharge of the principal debtor's obligation and also of that of the surety as such, in other words, after the coming into existence of the surety's obligation on default of payment by the principal debtor, the creditor accepted a bond from the surety in discharge of the obligation, both of the principal debtor and of the surety as such. Nevertheless it was held in both the cases that the surety was not entitled to maintain a suit against the principal debtor for contribution and that though the bond was accepted as equivalent to payment, in the sense that the original obligation was thereby discharged, yet it was not a payment which would entitle the surety to maintain such suit. In my opinion, the giving, by the surety, of a promissory note even if it was payable to "order or bearer" and accepted by the creditor as payment of the debt and not as a mere collateral security therefor, cannot be treated as payment as between the surety and the principal debtor.

In support of the contrary position, the respondent's pleader relies upon the case of *Barclay* v. *Gooch*(1). In that case, no doubt, Lord Kenyon held, at *nisi prius*, that "if a party gives a promissory note for the debt of another, which the creditor accepts in payment, it is as a payment of money to the party's use and can be recovered as such." A motion subsequently appears to have

(1) 2 Esp., 571.

been made for a new trial, but the Court agreed with his Lordship and refused a rule. It does not appear, however, clearly upon what ground the new trial was applied for and refused. This latter view seems also to prevail generally in America and a surety who gives his own note for the debt of the principal which is accepted as full payment by the creditor and the principal discharged, may treat the note as money paid and maintain an action of assumpsit thereon (Sedgwick on 'Damages,' 8th edition, section 797), though in one case in New York (*Van Ostrand* v. *Reed*(1)) the doctrine that negotiable notes are to be considered as money has been restricted to cases where the notes have been parted with to *bonâ fide* holders for value (Sedgwick, section 798). The authority of the *nisi prius* case is very much shaken by the two later cases already referred to—though these two cases related to the giving of a bond and not a note of hand, by the surety—and by the doubt thrown by Lord Ellenborough in *Tailor* v. *Higgins*(2) as to the correctness of that decision as well as by the dissent of Bayley, J., therefrom in *Maxwell* v. *Jameson*(3).

In the last-mentioned case Bayley, J., considered that *Barclay* v. *Gooch*(4) was in conflict with *Tailor* v. *Higgins*(2) and in following the latter observed as follows:—"Then, as the authorities differ it becomes necessary to look to the reason of the thing. No money has yet come out of the plaintiff's pocket and *non constat* that any ever will; for if he recovers from the defendant in the present action, it is still possible that he may never pay it over to Batson and Co. Then, the period of time at which his remedy against the defendant shall commence has not yet arrived. If hereafter he is compelled to pay the money due upon the bond, he may then have his remedy against Jameson for his contribution." Abbot and Holroyd, JJ., also concurred in the decision of Bayley, J.

The reasoning of Bayley, J., is, to my mind, convincing and it indicates the true principle, viz., that it is not merely the gain resulting to the principal debtor from the act of the surety, but the loss which the surety has sustained by the default of the principal debtor, which entitles the surety to sue the principal debtor for recovery of the amount by way of contribution; and I would certainly follow that in preference to the American decisions

(1) 1 Wend, 424 at p. 430.
(2) 3 East, 169.
(3) 2 Barn and Ald., 51.
(4) 2 Esp., 571.

and the decision in *Barclay* v. *Gooch*(1), which seems also to have been followed in a case in Ireland (*M'Kenna* v. *Harnett*(2)). In the present case it is not certain that the plaintiff will pay the amount of the promissory note or that he will be solvent when demand may be made upon him for payment. The decision is *Barclay* v. *Gooch*(1) will in my opinion be sound if restricted to cases in which the surety himself was the holder in due course of the promissory note and circulated the same as currency by delivery or indorsement, to the creditor. In that case, he would have parted with a chattel being property in his hands and sustained a loss and not have simply incurred a liability to the creditor, as in the present case, by himself making and giving a promissory note—a liability which may or may not be enforced against him to his detriment.

The giving by delivery or assignment to the creditor, of any other property belonging to the surety, whether personal or real (Sedgwick on 'Damages,' section 800) in discharge of the debt, will also stand on the same footing and in the absence of any fraud or collusion, the value of such property will, as against the principal debtor, be taken to be the same as that agreed to between the surety and the creditor, in the transaction by which the debt was discharged, whether wholly or in part. In my opinion, the expression "whatever sum he has rightfully paid" occurring in section 145 of the Contract Act will include not only coin, but also property of whatever kind which is parted with in lieu of money, but not the mere incurring of a pecuniary obligation of the creditor in lieu or discharge of the debt owing to him.

In my opinion the decision in *Rodgers* v. *Maw*(3) cannot be regarded as amounting to an approval of the *nisi prius* case of *Barclay* v. *Gooch*(1). In that case, the question was whether a certain amount paid by the Sheriff under an execution against the goods of a surety can be recovered from the principal debtor as money paid by the surety for his use. It was held that the Sheriff simply made money of the surety's goods and therewith had paid the claim in the action and that therefore it was money paid by the surety and Pollock, C.B., referred to the case of *Barclay* v. *Gooch*(1) only in this connection. In *Rodgers* v. *Maw*(3), the surety suffered actual loss in that his goods were

(1) 2 Esp., 571. (2) 13 Ir. L.R., 206.
(3) 15 Maud W., 449.

sold and converted into money for payment of the debt to the creditor.

The case of *Wolmershansen* v. *Gullick*(1) which was cited on behalf of the respondent, has no bearing whatever upon the question arising in this case. All that was held in that case was that a surety against whom a judgment was obtained by the creditor, might, in equity, take proceedings against his co-surety, making the creditor also defendant, and would be entitled to a declaration of his right to contribution and to an order upon the co-surety to pay his proportion to the principal creditor. But, as in that case the principal creditor had not been made a party to the action, the plaintiff's right was declared and a prospective order made under which, whenever he had paid any sum beyond his share, he was to get it back by way of contribution from the co-surety and there was a direction that upon the plaintiff paying his own share, the defendant—the co-surety—was to indemnify him against further payment or liability and was, by payment to him or to the principal creditor, or otherwise, to exonerate the plaintiff from liability beyond the extent of his own share, with liberty to the plaintiff to apply in chambers and generally to apply.

In *Ram Pershad Singh* v. *Neerbhoy Sing*(2) a somewhat similar relief was prayed for by a surety against whom judgment alone had been obtained but not executed. But such relief by way of mere prospective declaration was refused on the ground that it would amount merely to an interlocutory decree and could not be worked out under the Indian procedure, except in a new suit (per Phear, J., at p. 84).

On the ground, therefore, that the plaintiff had no cause of action at the date of the suit, I would reverse the decrees of both the lower Courts and dismiss the plaintiff's suit, but only on that ground. Under the circumstances of the case, each party will bear his own costs throughout.

BENSON, J.—I concur.

(1) L.R., [1893], 2 Ch., 514. (2) 11 B.L.R., 76.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice; and Mr. Justice Benson.

1902. July 24, 29.

SUBRAMANIA AYYAR (MINOR) BY GUARDIAN *ad litem* KRISHNASWAMI AYYAR (DEFENDANT), APPELLANT,

v.

ARUMUGA CHETTY AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Hindu Law—Suit on promissory note executed by mother of a minor as his guardian in respect of a debt for which the minor's share in the ancestral estate was liable —Liability of minor to the extent of his share in the ancestral estate.

The mother of a minor executed, as his guardian, a promissory note in respect of a debt for which the son's share in the ancestral estate was liable at the time. On a suit being brought against the minor on the note:

Held, that the defendant was liable on the note to the extent of his share in the ancestral estate.

Bachubai v. Shamji Jadowji, (I.L.R., 9 Bom., 551), and *Indur Chunder Singh v. Radhakrishore Ghose*, (I.L.R., 19 Calc., 507), distinguished.

SUIT on a promissory note. Three brothers lived as members of an undivided family, namely, defendant's father and the two brothers of the latter. Defendant's father died in 1894, leaving a widow and a minor son, the present defendant, him surviving. In 1896 the surviving members made an attempt to effect a partition, and a division was made of the family debts. In pursuance of that arrangement, defendant's mother, in 1896, executed, as the guardian of defendant, a promissory note, filed as exhibit A, in favour of the father of the plaintiffs. On the same day, one of defendant's uncles also executed a promissory note in respect of his share of the family indebtedness. Plaintiffs now sued defendant on exhibit A. The District Munsif found that defendant's uncle had managed the family affairs, that defendant's father had himself recommended that money should be borrowed from plaintiffs' father for the purpose of the family business, and that, accordingly, the money was borrowed for the family benefit.

* Second Appeal No. 754 of 1901, presented against the decree of A. C. Tate, District Judge of Chingleput, in Appeal Suit No. 50 of 1900, presented against the decree of J. S. Gnaniyar Nadar, District Munsif of Trivellore, in Original Suit No. 72 of 1899.

He passed a decree for the amount claimed. On appeal, the District Judge said:—"The Munsif has found that the debt for which exhibit A was executed did really exist and was due by the family; that the debt was fairly allotted to the defendant; that there is no doubt whatever that the mother acted in his interest and for his benefit, and without any attempt to defraud him. In all these conclusions I agree. The promissory note was attested by the defendant's two paternal uncles and also by his mother's brother, who had come to protect the interests of her and her minor son."

He agreed that the defendant's ancestral property was liable for the debt, and dismissed the appeal.

Defendant preferred this second appeal.

K. Srinivasa Ayyangar for appellant.

T. V. Seshagiri Ayyar for respondents.

JUDGMENT.—The plaintiffs sue on a promissory note executed by the mother and guardian of the defendant, a minor. The note was executed in respect of a debt which had been previously incurred by the defendant's uncle, the managing member of the defendant's family. According to the finding of both the lower Courts this antecedent debt was a real debt and was binding on the family. In our judgment the defendant is liable on the note executed by his guardian to the extent of his share of the ancestral estate. Prior to the execution of the note the members of the family had entered into an arrangement for a partition; in accordance with which, as between the members of the family, the defendant was to be liable for the amount of the note. As a matter of fact these arrangements were never given final effect to; but this is immaterial. At the time of the execution of the note the defendant's share of the ancestral estate was liable in respect of the original debt. His guardian had authority to acknowledge this liability provided it was not barred by limitation. See the case of (*Sadhanadri Appa Rau* v. *Sriramulu*(1)). The Privy Council cases relied on by the appellant (*Bachubai* v. *Shamji Jadowji*(2), *Indur Chunder Singh* v. *Radhakrishore Ghose*(3)) are not in point. In these cases a guardian purported to contract on behalf of a ward so as to impose a personal liability on the latter, there

(1) I.L.R., 17 Mad., 221. (2) I.L.R., 9 Bom., 551.
(3) I.L.R., 19 Calc., 507.

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being no pre-existing liability on the part of the ward at the time the guardian entered into the contract.

In the present case the effect of the guardian's contract was to keep alive a liability to which, at the date of the contract, the minor's share of the ancestral estate was already subject.

The second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1902. April 4, 17.

K. MALLIKARJUNADU SETTI (COUNTER-PETITIONER), APPELLANT,

v.

A. LINGA MURTI PANTULU (PETITIONER), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 310-A—Application by second mortgagee to set aside sale of mortgaged property under decree obtained by first mortgagee in suit to which second mortgagee had not been made a party—"Person whose immoveable property has been sold"—Transfer of Property Act—Act IV of 1882, s. 75.

Land, which was subject to two mortgages, was sold under a decree obtained by the first mortgagee, in a suit in which the second mortgagee was not made a party. The second mortgagee then applied to have the sale set aside, and paid into Court the amount due to the first mortgagee:

Held, that the second mortgagee was not entitled to have the sale set aside. Inasmuch as he had not been made a party to the suit in which the decree was obtained his interest had not passed under the sale, and his right to redeem the prior mortgage continued. He was, therefore, not a person whose immoveable property had been sold within the meaning of section 310-A of the Civil Procedure, and had no *locus standi* to apply under that section.

PETITION under section 310-A of the Code of Civil Procedure and section 75 of the Transfer of Property Act. The plaintiff in Original Suit No. 567 of 1898 had obtained a decree upon a mortgage

* Appeal against the Appellate Order No. 35 of 1901 of V. Venugopaul Chetty, District Judge of Ganjam at Berhampur, dated the 6th August 1900, passed in Civil Miscellaneous Appeal No 9 of 1900, preserted against the order of D. Ragavendra Rao Pantulu Garu, District Munsif of Sompeta, dated the 28th December 1899, passed in Miscellaneous Petition No. 1713 of 1899 (Executive Petition No. 458 of 1899; Original Suit No. 567 of 1898).

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over land executed in his favour by the two defendants in that suit. Petitioner held a second mortgage on the same land. A portion of the land was sold in execution of the plaintiff's decree. Petitioner had not been joined as a party in Original Suit No. 567 of 1898, and only heard of the sale after it was over. He now claimed the right to have the sale set aside and to redeem the plaintiff's mortgage, and, with that object, paid the necessary amount into Court. The application was opposed by the auction-purchaser, who raised the objection, among others, that the petitioner's right of redemption had not been affected by the sale, and claimed that petitioner was not entitled to have the sale set aside. He further, at the hearing of the petition, offered to pay petitioner the amount due to him under his mortgage. The District Munsif held that petitioner was entitled to apply under section 310-A, but, as the auction-purchaser was willing to redeem petitioner's mortgage, he rejected the application. The Acting District Judge upheld the Munsif's finding that petitioner was entitled to apply under section 310-A, and considered that his right to so apply was not affected by the fact that he was a subsequent mortgagee. He next considered whether petitioner's position was altered by the subsequent offer of the auction-purchaser to pay petitioner the amount due on his mortgage. He held that that subsequent offer should not have been taken notice of and that, under section 310-A, as soon as petitioner paid the money into Court, the Court was bound to give petitioner the benefit of that section and cancel the sale. He ordered the sale to be set aside.

The auction-purchaser preferred this appeal.

P. S. Sivaswami Ayyar for appellant.

P. R. Sundara Ayyar for respondent.

JUDGMENT.—Following the opinion of the Full Bench we hold that the provisions of section 310-A of the Civil Procedure Code are applicable to a sale of mortgaged property sold under a mortgage decree; but in the present case, the applicant under section 310-A is a second mortgagee who was not made a party to the suit. His interest therefore could not have passed under the sale which he seeks to set aside under section 310-A for his right to redeem the prior mortgage will continue notwithstanding the decree and the sale thereunder. We hold therefore that he is not a person whose immoveable property has been sold within the meaning of

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section 310-A. He has therefore no *locus standi* to apply under that section.

We set aside the order of the lower Appellate Court and restore that of the District Munsif, but on the ground stated above.

Each party will bear his own costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1902. April 8.

VADALI MAMIDIGADU (PLAINTIFF), APPELLANT,

v.

KOTIPALLI RAMAYYA AND THREE OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Law—Alienation by one of two co-widows—Effect on the inheritance and on the interest of the alienor.

Though one of two co-widows, who is not the managing member on behalf of both, cannot charge the inheritance, even where the transaction is for the benefit of the estate, an alienation by her will bind her own interest in the property during her life-time.

SUIT for a declaration. Plaintiff alleged that one Mandra Venki, whom he described as the sole widow of Veeraswamigadu, deceased, had conveyed certain land to him under a sale-deed, but that, when he endeavoured to obtain possession of the land, he was prevented from doing so by the four defendants. First defendant remained *ex parte*. Second defendant pleaded that she also was a widow of the deceased Veeraswamigadu, and, as such, entitled, jointly with first defendant, to possession and enjoyment of the land. Third defendant also remained *ex parte*. Fourth defendant had attached the property in execution of a decree which he had obtained against defendants Nos. 1 and 2 on a bond executed by Veeraswamigadu. His suit was filed after the alienation by first defendant to plaintiff. He supported second defendant.

* Second Appeal No. 485 of 1901, presented against the decree of J. H. Munro, District Judge of Godavari, in Appeal Suit No. 26 of 1900, presented against the decree of K. S. Sambasiva Ayyar, District Munsif of Tanuku, in Original Suit No. 3 of 1898.

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The District Munsif found as a fact that second defendant was the wife of the late Veeraswamigadu. He also found that the conveyance to plaintiff was supported by consideration to the extent of Rs. 57-2-3, which went towards the discharge of a debt due by first defendant's husband. He set aside plaintiff's sale-deed as invalid, on the ground that one widow cannot, without the consent of her co-widow, mortgage property to which both are jointly entitled, but he declared plaintiff entitled to a charge over the property, to the extent of the Rs. 57-2-3, already referred to. In default of payment of that sum within six months he ordered the property to be put into plaintiff's possession.

Against that decree, fourth defendant appealed to the District Judge, who said:—"Plaintiff sues to obtain possession of certain property sold to him by first defendant, widow of one Veeraswami. For the defence it was alleged *inter alia* that second defendant was a co-widow with first defendant and that first defendant had no power to sell without her consent. The District Munsif found that second defendant was a co-widow as alleged, and no attempt has been made to traverse the finding. In *Sri Gajapati Radhamani Garu* v. *Maharani Sri Pusapati*(1), it is laid down that one widow cannot, without the consent of her co-widow, dispose of any portion of the property to which they are jointly entitled. The District Munsif notices this ruling, but as he finds that part of the consideration was a debt due by the late Veeraswami, he gives plaintiff a charge on the suit property. But at page 10 of the ruling quoted it is clearly laid down that even legal necessity would not validate a mortgage by one alone of two co-widows. The respondent's pleader is unable to distinguish the case."

He reversed the decree and dismissed the suit.

Plaintiff preferred this second appeal.

T. V. Seshagiri Ayyar for appellant.

K. Subrahmania Sastri for first respondent.

JUDGMENT.—The Privy Council case of *Sri Gajapati Radhamani Garu* v. *Maharani Sri Pusapati*(1) was one in which the question was whether a mortgage made by one of two co-widows without the consent of the other would bind the estate in the hands of the surviving widow, if the debt was contracted for the

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

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benefit of the estate. In that case the suit was brought upon the mortgage bond after the death of the widow who made the mortgage, *i.e.*, after her interest therein had ceased.

In the present case the suit is brought during the life-time of the widow who made the alienation (first defendant) and it is found that a portion of the consideration for the alienation by way of sale, viz., Rs. 57-2-3, went towards the discharge of a debt due by her husband. The fourth defendant, who alone contests the suit, brought a suit subsequent to the alienation against both the widows for a debt due by the husband and obtained a decree and in execution attached the whole of the property left by the deceased in the hands of the widows which was comprised in the prior alienation made to the plaintiff.

The District Munsif upheld the alienation in favour of the plaintiff only as a charge to the extent of Rs. 57-2-3. Against this decree the plaintiff did not appeal, but fourth defendant appealed with the result that the suit was dismissed by the District Judge.

We think that though one of two co-widows, who is not the managing member on behalf of both, cannot charge the inheritance, even when the transaction is for the benefit of the estate, yet the transaction will bind her own interest in the property during her life-time.

From this point of view, the plaintiff is entitled to a charge to the extent of Rs. 57-2-3 on the property attached by the fourth defendant and if the same be not discharged within three months from this date, the plaintiff is entitled to realize it by sale of first defendant's life interest in a moiety of the property.

We therefore set aside the decrees of the Courts below and give judgment for plaintiff as above stated and dismiss his suit in other respects. Each party will bear his own costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Bhashyam Ayyangar.

MUHAMMAD KUNI ROWTHAN (PLAINTIFF), APPELLANT, 1902. July 24.

v.

VISVANATHAIYAR AND TWO OTHERS (DEFENDANTS NOS. 1 TO 3), RESPONDENTS.*

Res judicata—*Civil Procedure Code—Act XIV of* 1882, *s.* 13—*Previous suit in which same matter was in issue between plaintiff and the respective defendants, but not as between the defendants themselves—Suit by one of the then defendants to establish his priority over one of the other defendants—Maintainability.*

In a former suit, the question whether each of the defendants had mortgages upon certain property was a matter which was in issue between the plaintiff and the respective defendants therein, but *not* as between the defendants themselves, no question of priority being gone into, and the rights of the parties not being dealt with further than by making a decree for sale subject to certain encumbrances, of which that of the fifth defendant therein was one. The fifth defendant in that suit now sued as plaintiff in the present suit, for a declaration that a sale of the same mortgaged property was invalid. His present claim was based on the allegation that his mortgage had priority over the mortgage on which the decree had been obtained, in execution of which the property had been sold; and that mortgage was held by one of his co-defendants in the previous suit:

Held, that the claim was not *res judicata*.

SUIT for a declaration that a sale of property in execution of a decree was invalid, and to recover possession of the property. One of the issues raised the question whether the claim was *res judicata* by reason of Original Suit No. 324 of 1896 on the file of the same District Munsif's Court. It was admitted that the property now claimed was the same as that which had formed the subject-matter of the former suit. The facts were thus summarized by the District Judge on appeal:—"The plaintiff's case is that the decree obtained by Janakiammal in Original Suit No. 413 of 1895 and the sale in execution of the decree at which the first defendant bought the house are invalid inasmuch as the house was not the property of Janakiammal's mortgagors, Ibramsah and Madarsa

* Second Appeal No. 1243 of 1900, presented against the decree of G. F. T. Power, District Judge of Tanjore, in Appeal Suit No. 752 of 1899, presented against the decree of K. Krishnama Chariar, District Munsif of Valangiman, in Original Suit No. 376 of 1898.

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but belonged to plaintiff's mortgagor Abdul Khadir alone. He therefore sues for a declaration that the sale is invalid and to recover possession of the house. The District Munsif has dismissed the suit on the ground that the question raised in this suit has been decided by the judgment and decree in Original Suit No. 324 of 1896. In my opinion he is right. In Original Suit No. 324 of 1896 the present first defendant was the plaintiff, and the present plaintiff and Janakiammal were defendants. It was decided in that suit (which was brought on a hypothecation bond executed by Abdul Khadir and Ibramsah to the present first defendant) that Janakiammal and the present plaintiff were prior encumbrancers and that the house was to be sold for recovery of the debt due to first defendant subject to their mortgages. The question whether they were prior incumbrancers was the subject of the fourth issue in the suit. This is a decision that Janakiammal's mortgage was a valid mortgage, and as the plaintiff was a party to the suit, the decision binds him and he cannot now be allowed to sue for a declaration that the mortgage and the decree obtained by Janakiammal and the sale which followed on the decree at which first defendant bought the house are all invalid and that he is entitled to recover the house from first defendant. The fact that the plaintiff was *ex parte* in Original Suit No. 324 of 1896 does not, I think, make any difference."

He held that the suit, as brought, could not succeed in the face of the decision in Original Suit No. 324, to which plaintiff was a party, and dismissed the appeal.

Plaintiff preferred this second appeal.

P. S. Sivaswami Ayyar for appellant.

P. R. Sundara Ayyar for first respondent.

JUDGMENT.—Though in the former suit the question whether each of the defendants had mortgages upon the property was a matter which was in issue between the plaintiff and the respective defendants, there was no such issue as between the defendants themselves. So long as the interests of the fifth defendant were protected by the decree for sale being subject to his mortgage, it was entirely immaterial to him whether it was subject to other mortgages or not. There was no question of priority or of redemption gone into, and the rights of the parties were not further dealt with than by making the decree for sale subject to certain encumbrances, of which the fifth defendant was one. In

these circumstances there was no *res judicata* as between the fifth defendant and his co-defendants. MAHAMMAD KUNI ROWTHAN v. VISVANATHA-IYAR.

The decrees of both the lower Courts must be reversed and the suit remanded to the Court of First Instance for disposal according to law. The costs in this and the lower Appellate Court will be costs in the cause.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

GUNNAIYAN (PLAINTIFF), APPELLANT,

v.

KAMAKCHI AYYAR AND SEVEN OTHERS (DEFENDANTS NOS. 1 TO 3, 11, 12 AND 14 TO 16), RESPONDENTS.*

1902. March 12, 13. April 25.

Enfranchisement of inam service land in name of office holder—Hindu Law—Effect of enfranchisement—Liability to partition.

Three items of land, numbered 5, 6 and 7, were originally village service inams having been annexed by the State as emoluments to the office of karnam in a ryotwari village. R, the father of plaintiff and first defendant and grandfather of second defendant, in March 1889, established his right, as the heir to the late encumbent, to this office of karnam, and the lands were, in November 1889, ordered to be delivered to R, and were actually delivered to him in December 1889. Before the actual delivery, R applied that the lands might be registered and a title-deed be issued in his name, as the Government were taking steps to enfranchise service inams in the district, and the Inam Commissioner, in November 1889, notified to R, that his name was included in the register. In January 1890, second defendant's father, the eldest son of R, died and in February 1890, R resigned the office of karnam in favour of his grandson, second defendant, who was duly appointed by the Collector. Item No. 5 was enfranchised and a title-deed issued to and in the name of R. The Inam Commissioner, in 1891, passed an order that items 6 and 7 had been "resumed and fully assessed." R had died at a date prior to this, and second defendant was holding the office. On a suit being instituted by plaintiff for partition:

Held, per BHASHYAM AYYANGAR, J.—That when a personal inam is enfranchised by the imposition of a quit-rent, the resumption by Government simply

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* Second Appeal No. 1189 of 1900, presented against the decree of T. M. Rangachariar, Subordinate Judge of Madura (West), in Appeal Suit No. 323 of 1899, presented against the decree of V. Swaminatha Ayyar, District Munsif of Tirumangalam, in Original Suit No. 539 of 1899.

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consists of so much of the assessment or melvaram as is equal to the quit-rent, neither the land nor the assessment in excess of the quit-rent being resumed.

Similarly, the enfranchisement of a service inam does not operate as a resumption and fresh grant by Government subject to the payment of a quit-rent, any more than it *is so in* the case of the enfranchisement of a personal inam. It stands on the same footing so far as the family in which the village office is hereditary is concerned. The enfranchisement only converts the inam into ordinary property.

Narayana v. *Chengalammal*, (I.L.R., 10 Mad., 1), followed; *Venkata* v. *Rama*, (I.L.R., 8 Mad., 249), explained; *Dharnipragada* v. *Kadambari*, (I.L.R., 21 Mad., 47); and *Venkatarayadu* v. *Venkata Ramayya*, (I.L.R., 15 Mad., 284), dissented from.

Per MOORE, J.—Even assuming item No. 5 to be the self-acquisition of R, according to *Dharnipragada* v. *Kadambari*, (I.L.R., 21 Mad., 47), and *Venkatarayadu* v. *Venkata Ramayya*, (I.L.R., 15 Mad., 284), the plaintiff was entitled as his son to his share. As to items 6 and 7, there was no enfranchisement and no fresh grant or title-deed in favour of second defendant. They were liable to partition and it was unnecessary, therefore, to decide whether *Narayana* v. *Chengalammal* (I.L.R., 10 Mad., 1), or *Dharnipragada* v. *Kadambari*, (I.L.R., 21 Mad., 47), and *Venkatarayadu* v. *Venkata Ramayya*, (I.L.R., 15 Mad., 284), were correctly decided. *Venkata* v. *Rama*, (I.L.R., 8 Mad., 249), explained.

Per curiam, that items 5, 6 and 7 were liable to partition.

SUIT for partition. The following statement of facts is taken from the judgment of Bhashyam Ayyangar, J.—"Plaintiff and first defendant are undivided uterine brothers and the second defendant is their undivided nephew of the half-blood. Plaintiff brings this suit for partition of various items of property, including plaint items 5 to 8. Both the lower Courts dismissed the plaintiff's suit in respect of items 5 to 8 on the ground that items 5 to 7 were the exclusive property of the second defendant by a *grant* from Government and that item 8 was his self-acquisition, and this appeal relates only to these items.

"The finding that item 8 was acquired by second defendant with money borrowed on his personal credit and funds supplied to him by his maternal uncle, the third defendant, and that, therefore, it is his self-acquisition is conclusive in second appeal, and the appeal therefore fails in respect of that item.

"The case in regard to items 5 to 7 stands on quite a different footing and depends entirely on the construction of certain exhibits relating thereto and the legal effect of enfranchisement by Government of village service inams. These three items, the first of which is dry land and the other two wet lands, were emoluments annexed by the State, on maniyam or inam tenure, to the hereditary office of karnam in the ryotwari village of Polanandapuram in the Madura district. The plaintiff's father, as the cognate heir of the deceased incumbent of the office, established, under exhibit L, dated 1st March 1889, his right to the said office with its emoluments in the appeal which he preferred against the decree in Regulation Suit No. 5 of 1887, and in pursuance thereof an order, exhibit M, dated 24th March 1889, was issued appointing him to the said office. The appellate decision was confirmed on the 30th September 1889 (exhibit V) by the Board of Revenue and the lands attached to the office were, on the 6th November 1889, ordered to be delivered to the plaintiff's father and actually delivered to him in December 1889 (exhibits Q, R, W and E). It is admitted that the lands themselves and not merely the Government assessment thereon formed the emoluments of the office. In other words, both the kudivaram and the melvaram formed the service inam. Before the actual delivery of the lands to him, the plaintiff's father, by petition, dated 29th May 1889 (exhibit N), applied for the registry of the inam lands—items 5, 6, and 7—in his name, as the Government were then taking steps to enfranchise service inams in the Madura district and as he apprehended that they might be registered in the name of one Subbaraya Mudali, who was then in actual possession, though his claim to the office had been negatived in the regulation suit. The Collector of the district reported to the Inam Commissioner on the 5th November 1889 (exhibit P) that he saw no objection to the karnam inam being registered in the name of the petitioner, Ramasami Ayyar, father of plaintiff and first defendant and grandfather of second defendant. The Inam Commissioner, by his order (exhibit T), dated 25th November 1889, informed the said Ramasami Ayyar, with reference to his petition, No. 93 of 1889, praying for the issue of a title-deed in his name for the karnam inam lands in question, that in accordance with the recommendation of the Collector for the issue of the title-deed in the name of the petitioner, the petitioner's name was included in the register. Shortly afterwards, in January 1890, second defendant's father, who was the eldest son of Ramasami Ayyar, died and Ramasami Ayyar then resigned the office of karnam in favour of the second defendant, his minor grandson, on the 11th February 1890 (exhibit XIII*a*) and the Collector accordingly appointed the second defendant to the office (exhibit VI), on the 27th March 1890, one Swaminatha Pillai

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being appointed his gumastha during minority. In August 1890, a further order was issued to the second defendant (exhibit VII) communicating his appointment under the revision scheme. After the appointment of the second defendant as karnam, Ramasami Ayyar executed in favour of the third defendant, one Subramanya Ayyar, the brother of his first wife, who was the grandmother of the second defendant, a document (exhibit B), dated 9th April 1890, which is in the nature of a power of attorney and usufructuary mortgage of the inam lands, for the liquidation of a debt of Rs. 1,500, which Ramasami Ayyar had borrowed through the third defendant, apparently in connection with the expenses of the regulation suit above referred to. The document also purports, in effect, to constitute the third defendant guardian of the second defendant and enjoins him, after liquidation of the debt, to hand over the inam lands, either to Ramasami Ayyar, or his grandson, the second defendant. On the 2nd March 1891, a petition (exhibit O) was sent to the Inam Commissioner by the third defendant on behalf of the second defendant, praying that the title-deed in respect of the inam lands, which was 'directed to be but not yet issued' in the name of the petitioner's grandfather, as per Inam Commissioner's order (exhibit T), dated 25th November 1889, might be ordered to be issued in the name of the petitioner himself, who was the registered mirasi karnam and the person in actual possession of the inam lands. To this a reply (exhibit VIII, dated 14th March 1891) was received in the following words:—'A title-deed will be issued, in the name of Ramasami Ayyar, in due course.' Exhibit S is the inam register in respect of the dry land (item No. 5). The Inam Deputy Collector on the 16th June 1888, while the regulation suit was pending, recommended that item No. 5 might be enfranchised in favour of Subbaraya Mudali, already referred to, who was then in possession of the land. He also alluded to the claim put forward by Ramasami Ayyar and to the suit he was then prosecuting under Regulation VI of 1831. The Inam Commissioner apparently delayed disposal of the matter pending the determination of the regulation suit and on receipt of a report from the Collector (exhibit P, dated 5th November 1889, already referred to) confirmed the inam on the 22nd November 1889, in the name of Ramasami Ayyar, whose right was established in the regulation suit and the same was communicated to Ramasami Ayyar on the 25th November 1889 (exhibit T). Below the confirmation of the

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inam by the Inam Commissioner reference is made to the title-deed as No. 291 which is exhibit IX in the case. This title-deed stands in the name of Ramasami Ayyar and was originally dated 23rd November 1889, the very next day after the confirmation of the inam in the name of Ramasami Ayyar, but was subsequently altered into 27th February 1891, on which date apparently the Inam Commissioner signed the title-deed and also initialled the scoring out of the original date. Subsequently the title-deed seems to have been forwarded in the usual course to the Collector and received from the latter by the second defendant."

The lower Courts found that the inam, item No. 5, had been enfranchised and that the title-deed had been issued to second defendant. Material portions of the judgment of the Subordinate Judge are set out in the judgment of the High Court. Both the lower Courts dismissed the claim in respect of items Nos. 5 to 7, on the ground that these items were the exclusive property of second defendant by a grant from Government.

Plaintiff preferred this second appeal.

T. V. Seshagiri Ayyar for appellant.

K. Srinivasa Ayyangar and *K. Kuppuswami Ayyar* for second respondent.

BHASHYAM AYYANGAR, J. [after stating the facts as already set out] ;—It is incomprehensible that on such admitted facts, both the lower Courts should have arrived at the conclusion that the inam, item No. 5, was enfranchised and the title-deed issued in favour of the second defendant, who bears the same name as his grandfather, though with an *alais* Ramayyan. [His Lordship then dealt with the evidence on this point, holding, in the result, that it was issued to and in the name of the grandfather of second defendant. The judgment continued as follows] :—Thus, even assuming that it would have been competent to the Inam Commissioner, after confirming the inam in the name of the grandfather and communicating the same to him, to revoke the same without the consent of the grandfather and issue the title-deed in the name of his grandson, it is perfectly clear that the Inam Commissioner never meant to change his original decision and the title-deed was issued to and in the name of the grandfather himself, though it was handed by the Collector to the second defendant just as it might have been given to some agent or servant of the grandfather. In respect of item No. 5, the case therefore will have to be decided

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on the footing that the title-deed was issued to and in the name of the grandfather, and that by a mental process the name of his namesake, the second defendant, was not substituted therein. If that be so, the plaintiff's claim to a third share in item No. 5 cannot be resisted unless exhibit B, which is registered, can be given effect to as a deed of gift, by the grandfather in favour of his grandson, the second defendant. When the inam was confirmed on the 22nd November 1889, and a quit-rent of Rs. 2-4-0 (which I presume represented $\frac{1}{8}$ of the full assessment) imposed thereon, it became enfranchised from the burden of karnam service and ceased to be annexed to the office of karnam as its emoluments. When the office was subsequently transferred to the second defendant in 1890, it would not necessarily carry with it item No. 5 which had already been disannexed from the office. The Transfer of Property Act was in force at the date of exhibit B, and having regard to the decision of the Privy Council in *Immudipattam Thirugnana Kondama Naik* v. *Periya Dorasami*(1), it is impossible to construe exhibit B and give effect to it as a transfer, by gift, of item No. 5, in favour of the second defendant. It may be that the grandfather was under the impression, though an erroneous one, that the transfer of the office by resignation in favour of the second defendant, legally carried with it the transfer of item No. 5, just as the mortgagor in the abovementioned Privy Council case was under the impression that he had already transferred the zamindari to his illegitimate son, the plaintiff in that case, by the petitions which he had presented to the Revenue authorities. If the enfranchisement of item No. 5, operates in law, as a resumption by Government and a fresh grant of it to the grandfather, it would be his self-acquisition and he could have disposed of it at his will and pleasure subject to the provisions of the Transfer of Property Act. He died intestate in August 1892 and as exhibit B cannot be construed as a transfer of item No. 5 in favour of the second defendant, the plaintiff and first and second defendants are jointly entitled to it and the plaintiff to a third share therein by partition.

In my opinion, the enfranchisement of a service inam does not operate as a resumption, and fresh grant by Government, subject to the payment of a quit-rent, any more than it is so in the case of

(1) I.L.R., 24 Mad., 377 at p. 384.

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the enfranchisement of a personal inam. No doubt it is competent to Government in the case of a service inam annexed by the State as the emoluments of a village hereditary office, to substitute a salary as remuneration for the service and resume the inam in its entirety, according as it may consist of the melvaram alone or of both melvaram and kudivaram just as in the case of personal inams. According to the theory of the common law of the land applicable to hereditary grants of grants of public revenue as inam in favour of individuals and to the interpretation of such Crown grants, succession, in such cases, is, or at any rate is supposed to be, limited to the undivided brothers and to the direct lineal heirs, including a daughter's son, of the last incumbent, as also his widow and failing them, to the direct lineal heirs of the original grantee. And under that law, it is or it is supposed to be, competent for Government to resume personal inams, when the reversion falls in, or—in the language of the Revenue Department—when the inam lapses either by expiration of the lives for which the inam was granted or by reason of the extinction of direct lineal heirs of the body of the original grantee or of a forfeiture incurred by alienation to a stranger. The question as to whether the Crown has such prerogative reversionary right in the case of hereditary personal inams has never been subjected to the test of a judicial decision, for the simple reason that claims in respect of personal inams which have not been enfranchised, are exempt from the cognizance of Civil Courts and can be adjudicated upon only by the Governor in Council or other executive authority [Madras Regulation IV of 1831 repealed by India Act XXIII of 1871; Madras Act IV of 1862; India Act XXIII of 1871, sections 3, 4, 5, 6 and 7 (1)]. The Government of course was not bound to exercise its right of resumption and it was open to it to exercise it only partially and surrender its reversionary rights. The declared policy of Government, when the Inam Commissioner was appointed in 1859 and rules framed for his guidance, was to waive its right of resumption and enfranchise personal inams and convert them into ordinary heritable property and forego its reversionary right in consideration of the holder of the inam agreeing to pay a quit-rent the rates of which varied with reference to the value and prospect of the reversionary claim of the Government in each case. In certain cases, which it is unnecessary to mention the holder of the inam had no option in the matter;

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but in other cases in which it was optional with the holder either to submit to enfranchisement or not the Government reserved its right of resumption if the holder did not care to have his inam enfranchised. Even when the Government exercises its right of resumption, it rarely, if ever, resumes the land even if the land itself had been granted as inam. It simply resumes the full assessment and it does so by the imposition of full assessment upon the land (*Vide Rajaha Raje Bommaranza Bahadur* v. *Pemmasamy Venkatadry Naidoo*(1)) and converts it into ordinary ryotwari tenure. There is really no object served in resuming the land and making a fresh grant of it subject to full assessment, either to the holder or a stranger. This is so even in the case of religious (devadayam) and other charitable (dharmadayam) inams (which were simply confirmed by the Inam Commissioner subject to the conditions of the original grant) when by reason of the grantee's family failing to fulfil the objects and conditions of the grant, Government have the right to resume the same. According to the theory applicable to grants of land or land-revenue made by the ruling authority in this country for a specified religious or charitable purpose the grant is not construed as an out-and-out grant, but as reserving a reversion when the particular trust fails and the *doctrine of cypres* is therefore considered inapplicable to them. It is open to the ruling power to resume the grant and appropriate it for other religious or charitable purposes or *incorporate* it with public revenue. In the latter case Government simply imposes full assessment without extinguishing the right of the family of the grantee in the land and making a fresh grant of it. When a personal inam is enfranchised by the imposition of a quit-rent, the resumption by Government simply consists of so much of the assessment or melvaram as is equal to the quit-rent, neither the land nor the assessment in excess of the quit-rent being resumed.

In my opinion the enfranchisement of village service inams which are one of the descriptions of inams stands on the same footing so far as the family in which the village office is hereditary is concerned. The enfranchisement consists in disannexing it from the office and imposing, instead of the full assessment, a quit-rent which is generally equivalent to $\frac{3}{4}$ of the full assessment. The

(1) 7 M.I.A., 128 at p. 142.

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resumption by Government, therefore, is nothing more than that of $\frac{3}{4}$ of the assessment or melvaram.

Section 2 of Regulation VI of 1831 (now repealed and superseded by Madras Act III of 1895) declared that all emoluments derived from lands annexed by the State to hereditary village and other offices in the Revenue and Police Departments, were inalienable from such offices by mortgage, sale, gift or otherwise and all transfers thereof by the holders of such offices were also declared to be null and void. Section 3 of the same regulation barred the jurisdiction of the Civil Courts to entertain claims to the possession of or succession to such offices or to the enjoyment of any of the emoluments annexed thereto and invested the Collector of the district in which the claim has risen or may arise to adjudicate upon such claims. The effect of enfranchising a service inam is clearly declared by Madras Act IV of 1866. Section 1 of that Act enacts that a service inam which has been enfranchised from the condition of service by the Inam Commissioner, shall be exempt from the operation of Regulation VI of 1831. Section 2 enacts that the title-deed issued by the Inam Commissioner or an authenticated extract from the register of the Inam Commissioner shall be deemed sufficient proof of the enfranchisement of the land previously held on service tenure. It is thus made abundantly clear that the effect of enfranchisement and the issue of a title-deed by the Inam Commissioner is simply to exonerate the inam from the condition of service and convert it into ordinary property subject to the payment of a quit-rent and not to resume the same from the family or person entitled to the hereditary office and make a fresh grant of the same.

The form of the title-deed also makes this clear. The portion of it bearing upon the question runs as follows:—"I acknowledge your title to an inam consisting of the right to the Government revenue on land claimed to be——acres. This inam being held for——service, now otherwise provided for, will be subject to the payment of an annual quit-rent of Rs.——which is hereby imposed upon it in commutation both of the service and of the reversionary interest possessed by Government in the inam. The inam is now confirmed to you in freehold; in other words, the inam will be your absolute property to hold or dispose of as you think proper, subject only to the payment of the abovementioned quit-rent." It will thus be seen that after acknowledging the existing title of the

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grantee to the inam, a quit-rent is imposed upon it in consideration of its being exonerated from the burden of service and of the release, by Government, of its reversionary interest therein. The title-deed then declares the consequential result of such enfranchisement, viz., that the grantee will thereafter hold the inam in freehold, *i.e.*, like any other ordinary property, he will hold the inam as his own absolute property, which he can dispose of as he thinks proper, subject only to the payment of the quit-rent imposed.

Under Regulation VI of 1831, the inam being annexed to the office, can devolve only with the office and cannot be transferred. The Government could also resume it, making other provision for the remuneration of the office-holder. By enfranchising the inam and imposing a quit-rent Government absolutely renounces all its rights in the inam and as between the Government and himself the grantee's title becomes absolute. The enfranchisement of personal inams also stands exactly on the same footing. Under Regulation IV of 1831 (now repealed) and Acts XXXI of 1836 and XXIII of 1838, all hereditary and personal inams were removed from the cognizance of Courts of Civil Jurisdiction and the power of deciding on claims to the same was reserved to Government. Act IV of 1862 was passed exempting from the operation of the said Regulation and Acts all such inams as may be enfranchised by the Inam Commissioner in consideration of an annual quit-rent and placed in the same position as other descriptions of landed property by being converted into freeholds in perpetuity. Section 2 of the Act simply declares that the title-deed or an authenticated extract from the register of the Inam Commissioner or Collector shall be deemed sufficient proof of its enfranchisement. It will be noticed that in regard to both classes of inams, the inam title-deed is on the same footing as an extract from the inam register in proof of enfranchisement. In *Cherukuri Venkanna* v. *Lakshmi Narayana Sastrulu*(1) the effect of enfranchisement of a personal inam and the operation of the title-deed issued by the Inam Commissioner were considered and it was there held that the Courts do have jurisdiction to enquire into the title of land enfranchised by the Inam Commissioner and adjudge the same to the plaintiff, notwithstanding the production, by the defendant, of the Inam Commissisner's title-deed showing that the land had been enfran-

(1) 2 M.H.C.R., 327.

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chised in favour of the defendant and the title-deed granted to him. The title-deed is operative only in so far as the inam is enfranchised and converted into ordinary property subject to the payment of a quit-rent to Government in consideration of the surrender by it of its reversionary rights therein. It does not profess to make a fresh grant or determine who has the title thereto. The above decision is equally applicable to the enfranchisement of a service inam. The freehold title will enure to the benefit of such person or family, as, at the time when the service inam was enfranchised, was entitled to the hereditary office, no matter in whose name the enfranchisement was effected and the title-deed issued. In *Narayana* v. *Chengalammal*(1) the effect of the enfranchisement, from the condition of service, of an unsettled *poliem* held on service tenure and the operation of a title-deed issued by the Inam Commissioner to a Hindu widow, were considered and explained as follows at (pp. 4, 6, and 7): "It is contended that the properties in dispute were Kannammal's self-acquisitions and that Chengalamma (the reversionary heir) is not therefore at liberty to impeach their alienation . . . . In *Sri Raja Yanumula Venkayama* v. *Sri Raja Yanumula Bochia Venkondara*(2) the Privy Council considered what circumstances would support a plea of self-acquisition in regard to an estate originally granted by Government. They held that unless there was a confiscation of the antecedent estate and a fresh grant by a person competent to confer a legal title, the new occupant must be considered to take the estate not as self-acquisition, but in continuation of the former title. Considerable stress was next laid on the words in the inam title-deed (exhibit C) 'confirmed to you in freehold or as your absolute property, etc.' In construing those words regard must be had to the other parts of the document and to the parties between whom they were intended to have operation. The document commences with the words; 'On behalf of the Governor in Council of Madras, I acknowledge your title to the mokhasa village of Chittetivarpaliams.' What was then the title which was acknowledged as the basis of enfranchisement? Was it not Kannamma's title as the widow of the late palayagar or the descendant of the original grantee of an ancient palayam? If it was is not the enfranchisement in the nature of a mere accretion to what was undoubtedly

(1) I.L.R., 10 Mad., 1. (2) L.R., 12 M.I.A., 333.

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an ancestral and hereditary tenure? Nor is there reason to doubt that the words were intended to be operative only as between the Crown and the inamdar and not as between the latter and his heir. . . . . There is then no foundation for the contention that the inam title-deed conferred a new title upon Kannamma or that the enfranchisement had a larger operation than as a release granted by the Crown in respect of its reversionary interest and of the obligation of rendering service . . . . It is not clear whether the palayam in dispute was treated by Government as a service inam or as an unsettled palayam, but in either view of the case Kannamma acquired no new right of property under the inam title-deed. It has been repeatedly held, with reference to ancient palayams and zamindaris brought under the permanent settlement, that such settlement only changed a precarious tenure into permanent property and a varying assessment into a fixed demand and did not otherwise alter the incidents of the estates, either in regard to their mode of descent or partibility as evidenced by family usage."

I fully concur in the above lucid exposition of the law bearing upon the enfranchisement of inams, whether they be personal inams or service inams and upon the permanent settlement of an estate under Regulation XXV of 1902, a settlement which has the effect of changing a precarious tenure into permanent property and a varying assessment into a fixed demand and thus enfranchising the estate from a tenure that subjects it to the burden of assessment thereon being increased from time to time, at the will and pleasure of the sovereign authority and in some cases also from the condition of military or police service. I attach special value to that decision as Muttusami Ayyar, J., who was one of the Judges who took part in it, had considerable experience not only in the Revenue Department, but also in the Inam Commission itself. The only difference between that case and the present one is that in the former the office itself was abolished as unnecessary, whereas in the present case the office was retained, a fixed salary being attached thereto in lieu of the inam. This, of course, can make no distinction in principle.

The authority of this decision is doubted in *Dharnipragada* v. *Kadambari*(1) on the ground that no reference is made in it to

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

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the Full Bench decision of this Court in *Venkata* v. *Rama*(1), and that it is opposed to that decision. With all deference I venture to state that the decision in *Narayana* v. *Chengalammal*(2), in which case I appeared as pleader for the respondent, is in no way in conflict with the Full Bench decision in which Muttusami Ayyar, J., also took part and wrote a separate judgment and that the ruling in *Dharnipragada* v. *Kadambari*(3) that the widow in whose name the service inam was enfranchised in that case "must be held to have acquired the land under the inam title-deed as her own absolute property by grant from Government," in other words, as her own stridhanam property, is not warranted by the decision in the Full Bench case. Nor is that in *Venkatarayadu* v. *Venkata Ramayya*(4) warranted by the Full Bench decision. In the Full Bench case, Turner, C.J., concludes his judgment as follows :— "On the ground that the respondent (plaintiff) was not the holder of the office when the lands were enfranchised, I must hold that he has failed to establish his title to the lands and that his claim is unfounded. If he had established a title, if he had shown that at the time of the enfranchisement of the inam he had been appointed to the office, the Court would have had jurisdiction to determine whether the enfranchisement in favour of the appellant could be supported." Kernan, J., observes :—"The ordinary Courts of Judicature cannot determine whether the plaintiff (respondent) ought to have been appointed or should be considered as entitled to the office of karnam. I do not think the case calls for any decision whether the defendant holds the lands granted by the Commissioner as his own or as a member of the undivided family." Muttusami Ayyar, J., in his judgment states :—"The respondent's father had no legal right to continue in possession and the Collector was at liberty to put an end to it at any time and re-attach the land to the office from which it was illegally severed" . . . . although if the appellant's appointment was made provisionally or temporarily it might make a difference, still it was not so made in this case. The question is 'Is such appointment illegal?' There is nothing either in Regulation II of 1806 or VI of 1831 to warrant the conclusion that the permanent appointment of a stranger is illegal when there is no one duly

(1) I.L.R., 8 Mad., 249.
(2) I.L.R., 10 Mad., 1.
(3) I.L.R., 21 Mad., 47.
(4) I.L.R., 15 Mad., 284.

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qualified for the office, in the family having hereditary claim . . . . On these grounds, I am also of opinion that the respondent (plaintiff) is not entitled to the possession of the inam and that the appellant's appointment was legal owing to the respondent's incompetency when it was made." Hutchins, J., who dissented from the majority of the Full Bench, based his dissent only on the ground that the appointment by the Collector of the appellant (to whom the title-deed was issued) to the office of the karnam before the inam was enfranchised could not be regarded as a judicial adjudication, under Regulation VI of 1831 of his claim to the office and that it was therefore open to the Court to adjudicate upon the title of the respondent to the office and determine that the enfranchisement will operate in his favour.

It will thus be seen that all the Judges, except perhaps Brandt, J., proceed on the footing that the enfranchisement does not operate as a fresh grant after the extinction of the title of the office-holder, but that it enures to the benefit of the person lawfully entitled to or holding the office at the time of the enfranchisement. When an estate or land owned and possessed by a person, as his own exclusively or on behalf of the family of which he is the head, is subject to the payment of such assessment as may be fixed at the will and pleasure of Government from time to time or to certain reversionary rights of Government, though held either wholly rent-free or subject only to the payment of a favourable quit-rent or is held as the emoluments of a public office and the Government for reasons of public policy and for fiscal reasons, converts the same into a freehold on zamindari tenure under Regulation XXV of 1802 or on inam or ryotwari tenure and accordingly grants a sanad, title-deed or ryotwari patta to the person, these documents do not operate as a grant of the estate or land and as the root of title. The title remains with the person or persons who possessed the same immediately before the enfranchisement but is freed from certain conditions and liabilities which had attached thereto in favour of Government. It is only in cases in which, prior to the permanent settlement, the proprietary title of the holder was extinguished by confiscation, as in the Sivaganga Case (*Katama Natchiar* v. *The Rajah of Sivaganga*(1)), and Hunsapore Case (*Baboo Beer Pertab Sahu* v. *Maharajah Rajender*

(1) 9 M.I.A., 543 at p. 606.

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Pertab Sahu(1)), or by resumption for arrears of revenue in virtue of the prerogative right of the Crown under the common law of the land before such law was modified by statutory or regulation law, as in the Nuzvid Case (*Raja Venkata Rao* v. *Court of Wards*(2)), that the restoration of the estate to or the permanent settlement thereof with a member or representative of the old family and the issue of a sanad to him under the Regulation XXV of 1802, legally operate as a fresh grant and root of title, so as to constitute the estate the self-acquisition of the grantee.

Applying the principles above explained to item No. 5 in the present case, the effect of its enfranchisement in favour of the second defendant's gradfather on the 22nd November 1889, when he was lawfully entitled to the office, was to convert it into the freehold property of the grandfather and impress it with the same character as if it had devolved upon him by inheritance by cognate succession from the previous holder, unconnected with the hereditary office. It will not be his self-acquisition (Sivagiri Case, *Muttayan Chettiar* v. *Sangilivira Pandia Chinnatambiar*(3)), but property which has come to him as "obstructed heritage" in which his sons could claim no partition against his will (*Rayadur Nallatambi Chetty* v. *Rayadur Mukunda Chetty*(4)). It has now been judicially established beyond all controversy that, even under the Mitakshara law, a Hindu father can absolutely dispose of all his self-acquired property and disinherit his male issue of the same. But whether he has the same powers of disposition over property which he had inherited otherwise than from his paternal ancestors has not yet been definitely settled, though the tendency of judicial decisions is to place the same on the footing of self-acquired property (see Mayne's 'Hindu Law and Usage' sixth edition, paragraph 275). It is, however, unnecessary to consider and determine that question in the present case, as I have already held that exhibit B cannot be construed as a transfer by way of gift of item No. 5 in favour of the second defendant.

Even if the enfranchisement of item No. 5 and the title-deed in respect of the same were to be regarded as made in favour of the second defendant, as held by the Courts below, after his succession to the hereditary office of karnam had been accelerated by

(1) L.R., 12 M.I.A., 1 at p. 38.
(2) I.L.R., 2 Mad., 128.
(3) L.R., 9 I.A., 128 at p. 143.
(4) 3 M.H.C.R., 455.

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the grandfather's surrender or resignation, the result will be that his title to item No. 5 will be just the same as if it had devolved upon him by inheritance from his grandfather, unconnected with the office and he will hold it as joint family property liable to partition. The decision of a Division Bench of this Court in *Sitapati* v. *Narasimhan*(1), proceeded on the footing that if the office of karnam was hereditary in a Hindu family which at the time when the service inam appertaining to the office was enfranchised consisted of a father and his adopted son and the inam was enfranchised in the name of the actual holder of the office, viz., the father, it would not become his self-acquisition, that the adopted son could set aside an alienation made by the father and recover his one-half share, just as in the case of ancestral property. It was there held that the decision in *Venkatarayadu* v. *Venkata Ramayya*(2) cannot be regarded as conflicting with this view, inasmuch as the judgment in that case showed that there was no intention to go beyond the Full Bench decision in *Venkata* v. *Rama*(3). The following issue was remitted for trial to the District Judge "whether the family of the parties were the holders of the office of karnam up to the date of the enfranchisement of the lands." But the District Judge returned no finding as no evidence was offered on either side. The second appeal was dismissed and the decree of the lower Courts awarding to the adopted son his half share in the enfranchised inam was affirmed. The District Judge gave a decree in favour of the adopted son on the ground that he must adhere to the view which he expressed in the Pittapore succession suit "that a man who has adopted a son on the understanding that the adopted son is to inherit his property, may not afterwards with intent to injure the adopted son alienate without consideration his self-acquired property." This view, which was overruled in the appeal preferred to the High Court in the Pittapore succession suit, was not adopted by the High Court, and the basis of the decision of the High Court in the said second appeal can only be that the service inam did not become the self-acquisition of the adoptive father by reason of its having been enfranchised and title-deed issued in his name and that in the absence of any evidence to the contrary it must be presumed that the family of the parties were the holders of the

(1) S.A. No. 222 of 1896 (unreported). (2) I.L.R., 15 Mad., 284.
(3) I.L.R., 8 Mad., 249.

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hereditary office up to the date of the enfranchisement of the inam.

So long as the inam formed the emoluments of a hereditary office, it was family property only in the sense in which the hereditary office itself belonged to the family. From the nature of things the office can be held only by one member of the family at a time, either by the principle and custom of primogeniture, or by rotation among the different members or branches of the family and in theory the inam forming the emoluments of such office can be held and enjoyed only by such member, though, as a general rule, the custom was to hold and enjoy the inam as any other joint family property and even share its income, the incumbent for the time being, of the office, taking naturally a larger share. After it is enfranchised from the condition of service, it is placed on the same footing as ordinary partible property.

Turning now to items Nos. 6 and 7, the matter stands thus:—The Inam Deputy Collector made the same recommendation in respect of these two items as in respect of item No. 5, viz., that they be enfranchised in the name of one Subbaroya Mudali, the mirasdar already referred to. But the Inam Commissioner, for reasons which are not apparent, did not enfranchise them on the 22nd November 1889, as he did in the case of item No. 5, in favour of the second defendant's grandfather after his title to the office had been established in the regulation suit. But it appears from exhibit DD, that on the 25th February 1891, the then Inam Commissioner, Mr. Grose, without enfranchising it on inam tenure subject to the payment of a quit-rent equivalent to $\frac{3}{4}$ of the full assessment, passed the following order:—"Resumed and fully assessed" (*vide* G.O., No. 46, dated 22nd January 1891). The Government Order above referred to is filed as exhibit Z in the case. It is by no means clear from it why items 6 and 7, instead of being enfranchised on inam tenure, were resumed and fully assessed, nor is it clear to me how it was in the province of the Inam Commissioner as such to resume an inam and impose full assessment thereon. By that act its character as inam necessarily ceased and it became incorporated with Government or ryotwari lands and consequently claims in respect of items 6 and 7 became cognizable by Civil Courts. However that may be, on the 25th February 1891, items 6 and 7, which are wet lands, were permanently enfranchised from the condition of service, rightly or wrongly, on ryotwari tenure, instead of on inam tenure. At the

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time of such enfranchisement, the office-holder was the second defendant himself and not his grandfather, who was then alive. As stated by me already the resumption is simply the resumption of melvaram by the imposition of the full assessment upon the land and it is not to be understood as a resumption of the land which would extinguish the previous title thereto of the second defendant and other members of the family. Though full assessment was levied in 1891, the issue of the ryotwari patta to the second defendant appears to have taken place only in 1894–95 [*vide* exhibits X and XI (*a*)]. But whether in the meantime full assessment was levied or not in respect of these items, does not appear.

Items 6 and 7 not having been disannexed from the office until February 1891, it must be taken in law that the same devolved with the hereditary office of karnam on the second defendant in 1890, when his succession thereto by lineal primogeniture was accelerated by his grandfather's surrender. For reasons already given, after it was enfranchised from the condition of service, which was commuted into full assessment, it was impressed in his hands with the same character as if it had devolved upon him as ordinary property from his grandfather independently of the hereditary office. The subsequent grant to him of the ordinary ryotwari patta can in no way enlarge his previous title or affect the title of the other members of the family (*Freeman* v. *Fairlie*(1)). From and after February 1891 it was in his hands as ordinary joint family property to which the other members of the joint family were equally entitled with himself.

In my opinion, therefore, this appeal must be allowed, in so far as it relates to items 5, 6 and 7 and the decree appealed against modified by allowing the plaintiff his one-third share in these items. Each party will receive and pay proportionate costs throughout.

MOORE, J.—In deciding this second appeal the case as to item No. 5 must be considered apart from that relating to items 6 and 7. It is shown that, when the question of the enfranchisement of item No. 5 was under consideration by the Inam Department, the Deputy Collector recommended that the inam should be enfranchised in the name of certain non-mirasidars on the ground that the land was in the possession of their family (Mudali by caste) and that the karnam's work was performed by a gumastah on

(1) 1 M.I.A., 305 at pp. 347, 348.

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behalf of one of them who was a minor. The Deputy Collector, however, mentioned in his note that one Ramasami Ayyar, who claimed to be a member of the mirasi family (Brahmin) had filed a suit under Regulation VI of 1831 for recovery of the post and the inam land. The Inam Commissioner, Mr. Whiteside, having received a letter (exhibit P) from the Collector to the effect that Ramasami Ayyar had been successful in his litigation and that there was no objection to the inam being registered in his name, passed the following order on the 22nd November 1889 :—" Confirmed in the name of Ramasami Ayyar " (exhibit S). There can be no possible doubt that this Ramasami Ayyar was the father of the plaintiff and the first defendant and the grandfather of the second defendant whose name also is Ramasami Ayyar. The title-deed (exhibit IX) was accordingly issued on the 27th February 1891 in the name of Ramasami Ayyar. The District Munsif and the Subordinate Judge have, for reasons that appear to me to be utterly insufficient, arrived at the conclusion that the Ramasami Ayyar in whose name the title-deed was issued is not the Ramasami in whose name Mr. Whiteside ordered that the inam should be confirmed, but his grandson, the second defendant. There is nothing that can be called evidence to support this assumption. No importance can be attached to the fact that there was a delay of fifteen months in issuing the title-deed as it is well known that such delays are of frequent occurrence. It is very doubtful if it could be held that Mr. Grose, as Inam Commissioner, had the power in February 1891 to set aside the order of his predecessor passed in November 1889, but it is unnecessary to consider this question, as there are no grounds for supposing that Mr. Grose had any such intention. Item No. 5 must be held to have been granted to Ramasami Ayyar, the elder. The question, therefore, that has to be decided is as to what was the exact nature of this grant, *i.e.*, was there a confiscation of the antecedent estate by the Inam Commissioner acting on behalf of Government and a fresh grant issued in favour of Ramasami Ayyar, or, in other words, did Ramasami Ayyar take the estate as his self-acquisition or in continuation of a former title? *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vankondora*(1). This is a question of considerable difficulty regarding which there is, in my opinion, a conflict of decisions in this Court. To these decisions I shall

(1) 13 M.I.A., 333.

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now briefly refer. In the case of *Narayana* v. *Chengalammal*(1) it appears that on the death of the last male holder of a palayam, which had been granted on the condition that the grantee should maintain a body of police, Government discontinued the service and, in lieu thereof and of the reversionary interest of the Crown, imposed a quit-rent and an inam patta was issued to the widow of the last male holder by the Inam Commissioner by which her title to the estate was acknowledged by the Government of Madras and the estate was confirmed to her as her absolute property subject to the quit-rent. Considering the nature of this grant the High Court observed they had no hesitation in overruling the contention that the palayam by virtue of this grant became the widow's self-acquisition and held that she succeeded to the palayam as her husband's heir, and took in it nothing but a Hindu widow's estate. A different view was, however, taken in the judgment in *Venkatarayadu* v. *Venkata Ramayya*(2). In that case the holder of an hereditary office of karnam had two undivided sons. He resigned his office in favour of one of them. Subsequently, at the revision of the village establishment, this new karnam was removed from the office, and the lands which constituted its endowment having been enfranchised by the Inam Commissioner, a title-deed in respect of them was issued to him. After his death his nephews sued to establish their right to the land. The High Court held as follows: "The land which formed the emolument of the office of karnam did not become the family property of the person appointed to the office although he may have had an hereditary claim to the office. The land was designed to be the emolument of the person into whose hand the office of the karnam might pass and was inalienable by him. The effect of enfranchisement was to free the lands from their inalienable character and to empower the Government to deal with them as they pleased. The grant of them to Venkata Narasiah was not a grant to the undivided family, of which he formed a unit, but to him personally and the future succession and transmission of the land was placed in the same position as any other private property." In the decision of *Dharnipragada* v. *Kadambari*(3), the judgment in *Venkatarayadu* v. *Venkata Ramayya*(2) was followed and the decision of *Narayana* v. *Chengalammal*(1) to which reference

(1) I.L.R., 10 Mad., 1. (2) I.L.R., 15 Mad., 284.
(3) I.L.R., 21 Mad., 47.

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has been already made, dissented from on the ground that it was in conflict with the Full Bench judgment of *Venkata* v. *Rama*(1). It appears to me that, with all due deference to the learned Judges who joined in the decision in *Dharnipragada* v. *Kadambari*(2), it cannot be held that there is any conflict between the decision in *Narayana* v. *Chengalammal*(3) and the Full Bench decision in *Venkata* v. *Rama*(1). All that was held in the Full Bench decision was, as has been pointed out in *Tariya Gowdu* v. *Vonamo Gowdu*(4), "that when Government had enfranchised the lands in favour of the office-holder, a person who was one of the family of the hereditary office-holders but who was not actually in office at the time of the enfranchisement, had no right to question the grant of the lands by Government to the office-holder." In the Full Bench decision, which is a lengthy one, many other questions were no doubt mooted and discussed, but it appears to me that there was no binding decision on any one of them with the exception of that which I have already alluded to. Mr. Justice Brandt, at page 271, alludes to the question now under discussion and says with reference to certain lands which formed part of the emolument of the hereditary post of karnam: "I think it may be taken that such lands were enfranchised in favour, not of the family generally, but of the office-holder for the time being, in which case they would presumably descend not to all the members of the family, but to the branch or heirs of the person in whose favour it was enfranchised." I do not, however, find that the other Judges expressed agreement or disagreement with this opinion, or that it can be held that the point was actually decided in that judgment. The result is that there is on one side the decision of *Narayana* v. *Chengalammal*(3), and on the other the decisions of *Venkatarayadu* v. *Venkata Ramayya* (5), and *Dharnipragada* v. *Kadambari*(2), to which I have already alluded. Such being the state of the decisions and the Full Bench judgment not having settled the question, it appears to me that we should be bound to refer it to the Full Bench were it not that whether item No. 5 is held to be the self-acquisition of Ramasami the elder, or to have been received by him in continuation of the former title, the effect would be the same, and the plaintiff would be entitled to a share of it in partition. As therefore the point is

(1) I.L.R., 8 Mad., 249. (2) I.L.R., 21 Mad., 47.
(3) I.L.R., 10 Mad., 1. (4) I.L.R., 22 Mad., 205.
(5) I.L.R., 15 Mad., 284.

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not one which it is necessary should be adjudicated on for the decision of the present appeal, I do not think it necessary to refer it to a Full Bench. The facts as to items 6 and 7 may here be briefly alluded to. The recommendation of the Deputy Collector as to these items was the same as that made by him with respect to item 5 (exhibit S). The Inam Commissioner, however, before he passed orders in the case of these items received Government Order No. 46 of the 22nd January 1891 (exhibit Z) and in consequence of the instructions therein conveyed passed the following order on the 25th February 1891: "Resumed and fully assessed" (exhibit DD). I feel somewhat doubtful as to whether Mr. Grose, if the Collector's letter (exhibit P) had been brought to his notice, would have thought he was bound under the circumstances there stated to order that the land should be transferred to ordinary assessed land. This is a question, however, which it is impossible to go into now. The result of the Inam Commissioner's order was that the land ceased to be in any sense an inam and became ordinary ryotwari land which it was open to Government to hand over to whomsoever they pleased for cultivation. The land was accordingly given over to the second defendant in due course and a patta was made out in his name. It appears to me that it must be held that the only effect of the Inam Commissioner's order was that the land which has been previously held as an inam by the office-holder on certain conditions, was transferred into land held by the same person on the same conditions but as fully assessed ryotwari land in lieu of inam. There was no fresh grant of the land. It therefore follows that the land cannot be looked upon as being in any sense the self-acquisition of Ramasami the younger, the second defendant. The question with respect to these items is not complicated as it is the case of item No. 5 by the wording of the inam title-deed issued in respect to that item. I would therefore direct that in the case of items 6 and 7 also it be decreed that the plaintiff is entitled to a share of the land as family property. With respect to item 8 this appeal must be dismissed.

I concur with my learned colleague in the order that he proposes as to costs.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Moore.

KAREDLA VIJAYARAGHAVA PERUMALAYYA NAIDU (DEFENDANT), APPELLANT,

1902. July 25.

v.

VEMAVARAPU SITARAMAYYA (PLAINTIFF), RESPONDENT.*

Religious Endowments Act—XX of 1863, s. 16—Suit for the removal of trustee—Reference of entire suit to arbitrator—Legality.

Under section 16 of the Religious Endowments Act, a Court may refer any matter in difference in the suit for decision by an arbitrator, but it is not open to the Court to refer the whole suit.

SUIT under section 14 of the Religious Endowments Act for the removal of a trustee. The District Judge referred the suit to a person whom he selected to act as sole arbitrator. The arbitrator prepared a scheme of management which, it was thought, was not legal, and the matter was again referred to him. He thereupon prepared a second scheme. The District Judge accepted that scheme and made appointments in accordance with it.

Against that order the defendant preferred this appeal.

P. S. Sivaswami Ayyar for appellant.

V. Krishnaswami Ayyar and *K Subrahmania Sastri* for respondent.

JUDGMENT.—Under section 16 of the Religious Endowments Act XX of 1863 it was open to the Judge to refer any matter in difference in the suit for decision by an arbitrator, but it was not open to him to refer the whole suit for decision to an arbitrator as he has done in this case.

One result of this irregularity has been that the arbitrator has drawn up a scheme for the management of the temple, which not even the District Judge had the power to do under the Act.

On this ground we allow the appeal, and, reversing the decree, remand the suit to be replaced on the file and disposed of according to law.

Costs of the appeal to abide and follow the result. The memorandum of objections is dismissed without costs.

* Appeal Suit No. 197 of 1900, presented against the decree of W. C Holmes District Judge of Kistna, in Original Suit No. 1 of 1899.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Bhashyam Ayyangar.

1902. July 23.

NARASINGA ROW (FIRST DEFENDANT), APPELLANT,

v.

MUTHAYA PILLAI (PLAINTIFF), RESPONDENT.*

Malicious Prosecution—Information given to police—Prosecution by police after investigation—Acquittal of accused—Suit for malicious prosecution against informant of police—Maintainability.

A gave certain information to the police regarding B. The police, after holding an investigation, instituted a prosecution against B, who was tried and acquitted. B now sued A for damages for malicious prosecution:

Held, that the suit was not maintainable, as A had not instituted the prosecution.

SUIT for malicious prosecution. Plaintiff had acted as Village Munsif in the village of Ponnakudi in 1898, when first defendant, a ryot owning lands in that village, gave information to the Station-house officer of Ponnakudi that plaintiff had illegally broken open the outer door of his house with intent to attach his properties for arrears of kist. The Station-house officer then held an investigation and subsequently charged the plaintiff before the Second-class Magistrate of Palamcottah. The Magistrate tried the case and dismissed it. Plaintiff now sued for damages. Defendants Nos. 2 to 6 were said to have conspired with first defendant in getting up the false charge and were impleaded for that reason. The first issue was:—"Whether the first defendant made the criminal complaint to the police against the plaintiff maliciously and without reasonable and probable grounds." The District Munsif found as a fact that first defendant had not himself made the charge before the Magistrate, but had laid it before the police, who, after investigation, made the charge. He also found that there was not sufficient evidence that plaintiff was innocent and did not commit the act complained of, and that it was not shown that there was absence of reasonable and probable cause. He dismissed the suit.

* Second Appeal No. 806 of 1901, presented against the decree of S. Doraisamy Ayyangar, Subordinate Judge of Tinnevelly, in Appeal Suit No. 11 of 1900, presented against the decree of T. A. Ramakrishna Ayyar, District Munsif of Tinnevelly, in Original Suit No. 83 of 1899.

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Plaintiff appealed to the Subordinate Judge, who allowed the appeal and gave plaintiff a decree for Rs. 200 as against first defendant.

First defendant preferred this second appeal.

M. R. Ramakrishna Ayyar for appellant.

V. C. Sesha Chariar for respondent.

JUDGMENT.—We think the decree of the lower Appellate Court should be reversed.

The only person who can be sued in an action for malicious prosecution is the person who prosecutes. In this case, though the first defendant may have instituted criminal proceedings before the police, he certainly did not prosecute the plaintiff. He merely gave information to the police and the police, after investigation, appear to have thought fit to prosecute the plaintiff. The first defendant is not responsible for their act and no action lies against him for malicious prosecution (see *Trilochana Bakshi Patnaik* v. *Brojo Patro*(1)).

We must reverse the decree of the Subordinate Judge and restore that of the additional District Munsif with costs in this and the lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Bhashyam Ayyangar.

1902. January 2. September 9.

SUBBIEN (PLAINTIFF), APPELLANT,

v.

RAMASAMI CHETTY AND OTHERS (DEFENDANTS NOS. 1 TO 3), RESPONDENTS.*

Rent Recovery Act—(Madras) Act VIII of 1865, s. 4—Pattah containing name of tenant's father and not mentioning tenant—Death of the father before tender of pattah—Tender of pattah without alteration—Validity—Practise—Point not taken in plaint or at settlement of issues—Right to raise it on appeal.

Pattah for land was tendered to *A*, but stood in the name of *A*'s father. It appeared that *A*'s father was really the tenant for the fasli in respect of which

(1) Second Appeal No. 805 of 1900 (unreported).

* Second Appeal No. 745 of 1899, presented against the decree of S. Russell, District Judge of Madura, in Appeal Suit No. 451 of 1898, presented against the decree of N. Sambasiva Ayyar, District Munsif of Sivaganga, in Original Suit No. 366 of 1897.

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the pattah had been tendered, but had died after the pattah had been prepared and signed by the landholder:

Held, that the tender was legal.

Where a plaintiff in a suit to set aside a sale of land fails to take the objection, either in his plaint or at settlement of issues, that the notice of sale prescribed by section 39 of the Rent Recovery Act had not been served upon him, he should not be allowed to raise it on appeal.

SUIT to set aside a sale of land. Plaintiff contended that defendant had brought the land to sale without tendering plaintiff any pattah. The rent in respect of which the land had been sold was due for the fasli 1304. Defendants pleaded that the sale was valid, and that pattah had been tendered to plaintiff who had refused to accept it. The District Munsif held that a pattah had been tendered to plaintiff. This pattah was in the name of plaintiff's father, who had died after it had been prepared and signed by the landholder.

The District Munsif ordered the sale to be set aside, as prayed. He held that the pattah which had been tendered did not contain the names of the contracting parties, as the name of plaintiff's father was mentioned therein, and not that of plaintiff. He considered that the irregularity was not excused by the fact that at the time when the pattah was prepared plaintiff's father was alive, and that he had died before it had been tendered. Defendants appealed to the District Judge, who reversed that decree, and also held that plaintiff should not be allowed to raise the objection that notice of sale had not been served on him, as the point had not been taken in the plaint or at the settlement of issues.

Plaintiff preferred this second appeal.

V. C. Desikachariar for appellant.

K. N. Ayya for second to fourth respondents.

JUDGMENT.—We agree with the District Judge that the tender of the pattah to the plaintiff was legal notwithstanding that the pattah stood in the name of his deceased father, inasmuch as the father was really the tenant for the fasli 1304 for which the pattah was issued, and died only after the pattah was prepared and signed by the landlord.

We also agree with the Judge that the plaintiff's objection that the notice of sale prescribed by section 39 of the Rent Recovery Act was not served upon him, should not be allowed to be raised in the case, as the plaintiff took no such objection either in the plaint or at the settlement of issues. [The judgment then dealt with matters not material to this report.]

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar.

ERODE MANIKKOTH KRISHNAN NAIR, PETITIONER,

v.

PUTHIEDETH CHEMBAKKOSERI KRISHNAN NAIR AND ANOTHER, RESPONDENTS.*

1902. August 13.

Civil Procedure Code Act XIV of 1882, s. 310 A—Application to set aside a sale—Gift of the land prior to attachment—Effect of sale—Applicability of the section.

Certain land was attached under a decree and sold. Application was thereupon made by a person, who claimed as donee of the land from the judgment-debtor, to have the sale set aside under section 310 A of the Code of Civil Procedure. It was alleged that the gift had been made prior to the date of attachment:

Held, that the interest of the donee (assuming his gift to be valid) could not be affected by the subsequent attachment and sale, and that, in consequence, he could not seek to set the sale aside under section 310 A. If the gift had been made while the property was under attachment, the sale would have been binding on the donee, who, in consequence, could have applied under section 310 A.

Any one whose interest in immoveable property is bound by a sale may apply under section 310 A, though he be no party to the suit or to the decree under which the sale took place.

PETITION under section 310 A of the Code of Civil Procedure to have a sale of immoveable property set aside. Petitioner alleged that the land in question, which had been sold, had been given to him. It was alleged that the gift had been made before the property was attached. The Acting District Judge held that as petitioner was not a party to the suit under the decree in which the sale had taken place, he had no right under section 310 A.

Petitioner preferred this civil revision petition.

P. R. Sundara Ayyar for petitioner.

J. L. Rosario for respondent.

JUDGMENT.—Though a person may be no party to a suit or decree, yet, if the sale will bind his interest in the property, he can apply under section 310 A of the Civil Procedure Code to set

* Civil Revision Petition No. 109 of 1902, presented under section 622 of the Code of Civil Procedure, praying the High Court to revise the order of A. M. Slight, District Judge of North Malabar, dated 27th January 1902, passed on Civil Miscellaneous Petition No. 667 of 1901 (in Original Suit No. 49 of 1893).

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aside the sale. In the present case, if the petitioner had been a donee of the property from the judgment-debtor while the property was under attachment, the sale would bind him under section 276 of the Civil Procedure Code and in that case he could apply under section 310 A. But it is alleged he became donee prior to attachment. If so, the subsequent attachment and sale cannot affect him, if the gift were valid, and he cannot seek to set aside the sale under section 310 A.

The petition is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar.

1902. July 29.

KRISHNAIYAR (SURETY FOR JUDGMENT-DEBTOR), PETITIONER,

v.

KRISHNASAMY AYYAR (DECREE-HOLDER), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, s. 336—Surety that judgment-debtor will apply to be declared insolvent—Due application by judgment-debtor—Liability of surety.

Where a surety enters into a bond, under section 336 of the Code of Civil Procedure, undertaking to produce a judgment-debtor when ordered to do so within a month, in order to render the surety liable for the non-production of the judgment-debtor, the order to produce the judgment-debtor should be made on the surety. A bond providing that the surety will produce the judgment-debtor does not mean that the surety will produce him when the judgment-debtor is directed to appear.

Where a surety entered into a bond that a judgment-debtor would, within a certain time, file a petition in insolvency, and the judgment-debtor, within that time, filed his petition, but subsequently withdrew it:

Held, that the surety was discharged.

EXECUTION PETITION. A decree-holder sought to execute his decree against petitioner, who had stood as surety that the judgment-debtor would, within one month's time, file a petition in insolvency. The judgment-debtor, within the time limited, duly filed his petition.

* Civil Revision Petition No. 28 of 1902, Presented under section 622 of the Code of Civil Procedure, praying the High Court to revise the order of the Court of the District Munsif of Palghat, dated 19th November 1901, in Execution Petition No. 1370 of 1901 (in Original Suit No. 28 of 1901).

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The judgment-creditor had not applied to petitioner to produce the judgment-debtor. Petitioner accordingly opposed the application on these grounds, and contended that his liability had ceased when the judgment-debtor filed his petition in insolvency. The District Munsif passed the following order:—"The surety undertook to get the judgment-debtor to put in an insolvent petition by 2nd November and to produce him whenever ordered within that date. On 26th October petitioner put in an insolvent petition and appeared by vakil. The Court directed that he must appear in person. It was the duty of the surety to have produced him by 2nd November in obedience to the order passed on 28th October. Warrant will issue."

Against that order the surety filed this petition.

T. V. Seshagiri Ayyar for petitioner.

C. V. Anantakrishna Ayyar for respondent.

JUDGMENT.—Following the decisions in *Imbichunni Nayar* v. *Lalji Ram Doss Sail*(1), *Dwarkadas Parshotamdas* v. *Isabhaidaudkhan*(2) and *Koylash Chandrashaha* v. *Christophoridi*(3), I hold that the decree in this case cannot be executed against the petitioner, the surety, inasmuch as the judgment-debtor applied within one month to be declared an insolvent. The fact that he withdrew his application subsequently does not affect the question. Further, the surety's bond only provides that the petitioner is to produce the judgment-debtor when ordered to do so within one month. The meaning is quite clear that the surety should have been ordered to produce the debtor. It does not mean that when the debtor is directed to appear, as in this case, the surety will produce him. The District Munsif acted with material irregularity, if not illegally, in ordering execution to issue against petitioner. I accordingly allow this petition with costs both here and in the Court below, and, setting aside the order of the District Munsif, dismiss the application of the decree-holder to execute the decree against petitioner.

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(1) I.L.R., 24 Mad., 560. (2) I.L.R., 19 Bom., 210,
(3) I.L.R., 15 Calc., 171.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar.

1902. August 6.

M. V. SUBRAMANIA AYYAR (PLAINTIFF), PETITIONER,

v.

PANDI DORAISAMI TAVER AND OTHERS (DEFENDANTS), RESPONDENTS.*

Provincial Small Cause Courts Act—IX of 1887, art. 18—Suit relating to a trust—Appointment of plaintiff under trust deed on a salary—Suit for unpaid salary—Jurisdiction of Small Cause Court.

By a deed of trust, the settlor vested a press in trustees with the object of conducting a newspaper and appointed plaintiff as editor and manager on a fixed salary. Plaintiff acted but subsequently resigned. On a suit being brought by plaintiff, on the Small Cause side of the Subordinate Judge's Court, to recover the amount due to him by way of salary between the date of the trust deed and that of his resignation:

Held, that the Small Cause Court had no jurisdiction to try the suit. If the plaintiff had a cause of action it was to enforce the performance of the trust in so far as it related to him, and the suit was barred, under article 18 of schedule II to the Provincial Small Cause Courts Act.

SUIT for salary. By a deed of trust, dated 27th July 1898, the Rajah of Ramnad vested a printing press in trustees to hold on trust, to conduct a newspaper, of which plaintiff was, by the deed, appointed editor and manager, on a stated salary. Plaintiff resigned his appointment on 11th October 1898, and now filed this suit on the Small Cause side of the Subordinate Judge's Court, claiming the amount of salary which had accrued due between the date of the trust deed and his resignation. The Subordinate Judge considered that the plaintiff had not done any appreciable amount of work and dismissed the suit.

Plaintiff preferred this civil revision petition.

S. Srinivasa Ayyangar for petitioner.

P. S. Sivaswami Ayyar for respondent.

JUDGMENT.—This suit clearly falls under article 18 of the second schedule to Act IX of 1887, being a suit relating to a trust. The plaintiff was appointed by the author of the trust, and not by

* Civil Revision Petition No. 100 of 1902, presented under section 25 of Act IX of 1887, praying the High Court to revise the decree of T. M. Rangachariar, Subordinate Judge of Madura (West), in Small Cause Suit No. 964 of 1901.

the trustees, as editor, and relying upon that appointment he claims that the defendants as trustees should carry out the direction in the instrument of trust and pay him his salary as therein provided until his resignation. If the plaintiff therefore has any cause of action it is to enforce the carrying out of one of the directions in the instrument of trust, *i.e.*, to enforce the performance of the trust in so far as it relates to the plaintiff. In this view the plaint should have been returned to be presented to the proper Court and it is accordingly now ordered to be returned. The revision petition is otherwise dismissed but without costs.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

1902. August 18.

MAILTHI (FIRST PLAINTIFF), PETITIONER,

v.

SOMAPPA BANTA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Code of Civil Procedure—Act XIV of 1882, ss. 404, 592—Presentation of application for leave to appeal in formâ pauperis—Necessity for personal application—Application of Rules in Chapter XXVI after presentation of application.

The provision in section 404 of the Code of Civil Procedure, which requires an application for permission to sue *in formâ pauperis* to be presented (except in certain circumstances) by the applicant in person, does not apply to an application under section 592 to be allowed to appeal as a pauper.

After an application has been presented under section 592, all action taken subsequent to such presentation is, by the terms of section 592, to be subject to the rules contained in chapter XXVI of the Code, but the presentation of the application itself is not subject to those rules.

In re Narisi, (I.L.R., 8 Mad., 504), not followed.

APPLICATION to be allowed to appeal *in formâ pauperis*. On 29th March 1901, the District Munsif of Puttur passed a decree against the applicant. On 26th June 1901, the applicant presented an application through a vakil, asking to be allowed, under section

* Civil Revision Petition No. 5 of 1902, presented under section 622 of the Code of Civil Procedure, praying the High Court to revise the order of J. W. F. Dumergue, District Judge of South Canara, dated 15th July 1901, on Miscellaneous Petition No. 155 of 1901 (Original Suit No. 187 of 1900 on the file of the District Munsif's Court of Puttur).

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592 of the Code of Civil Procedure, to appeal *in formâ pauperis*. The District Munsif passed the following order:—"This should be presented in person or by one specially authorized to do so." The applicant re-presented the application in person on 18th August 1901, but the District Munsif then held that it was out of time. The applicant then appealed to the District Judge, who rejected the petition on the same ground, adding that there was no discretion in the case of a pauper appeal.

The applicant preferred this civil revision petition.

K. Narayana Rau for petitioner.

K. P. Madhava Rau for respondent.

JUDGMENT.—We are of opinion that this application under section 592 of the Civil Procedure Code was in time. The decree of the District Munsif was passed on 29th March 1901, and the application praying for permission to appeal *in formâ pauperis* was put in on the 26th June. As, however, this application was presented by a vakil and not in person or by a duly authorized agent (section 404, Civil Procedure Code), the application was returned. It was presented in person on the 11th July and was then held to to be out of time. We do not consider that the provision in section 404, Civil Procedure Code, requiring an application for leave to sue as a pauper to be presented in person, or in certain circumstances by a duly authorized agent, applies to an application under section 592, Civil Procedure Code, for leave to appeal as a pauper. With all deference to the learned Judge we are unable to follow the ruling of a single Judge in *In re Narisi*(1) and the reasoning on which it is based. Section 592 provides that any person entitled to prefer an appeal, who is unable to pay the fee required for the petition of appeal, may, on presenting an application, be allowed to appeal as a pauper, subject to the rules in chapter XXVI, etc. The proper grammatical construction to be placed on this section is, in our opinion, that a person entitled to appeal, having presented an application to be allowed to appeal as a pauper, all action taken subsequent to the presentation of that application is to be subject to the rules contained in chapter XXVI, but not that the presentation of the application itself is subject to such rules. In the view that we take of the present application it should not have been returned as not complying with the terms of section 404, Civil Procedure

(1) I.L.R., 8 Mad., 504.

Code, and was therefore in time. We set aside the order of the District Judge and direct him to retake the application to him on the file and dispose of it according to law. Costs of this petition will be costs in the cause.

MAILTHI v. SOMAPPA BANTA.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Benson.

SIVANTHA NAICKEN AND OTHERS (COUNTER-CLAIMANTS NOS. 1 TO 4 AND 6 TO 18), APPELLANTS,

v.

NATTU RANGA CHARI AND ANOTHER (CLAIMANTS), RESPONDENTS.*

1902. August 4, 5.

Land Acquisition Act—I of 1894, s. 30—Lands waste from time immemorial taken up—Compensation awarded—Amount claimed by Mirasidars and Shrotriemdars—Persons entitled.

Certain lands which had been waste from time immemorial were taken up by Government, and compensation was awarded. Claims were made by the Mirasidars for the amount so awarded. The rights of the Government in the lands had been alienated by Government to certain Shrotriemdars, who also claimed to be entitled to the amount awarded as compensation:

Held, that the Shrotriemdars were entitled.

CLAIM, under section 30 of Act I of 1894, to money awarded as compensation. The District Judge passed the following order:—

"This is a reference from the Sub-Collector, under section 30, Act I of 1894. There is no dispute about the amount of compensation awarded. The dispute is between the Shrotriemdars of Vellachi village, wherein the land is situated, and certain persons, styling themselves 'Mirasidars' of the village, as to who is entitled to the amount of compensation awarded. The land is immemorial waste or jungle land, and the compensation amount represents rent for the occupation of the land for five years as an artillery range, and the value of trees removed from it, together with interest. The land being admittedly immemorial waste, I think that the

* Appeals Nos. 212 of 1900 and 12 of 1901 presented against the orders of A. C. Tate, District Judge of Chingleput, in Compensation References Nos. 1 and 2 of 1900.

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Shrotriemdars within whose shrotriem it is situated must be regarded as the owners. The counter-claimants try to conjure with the word 'Mirasidar.' Some of them have given evidence and state that they have kudivaram right in the uncultivable land in question. They seemed to me to be giving false evidence. The evidence appears to me to show that the Shrotriemdars have been actually exercising their right as owners of the land in question. They have apparently been leasing out these uncultivated lands on long leases. My order is that the Shrotriemdars are entitled to the compensation awarded in this case. I am unable to find that the counter-petitioners have established any case entitling them to compensation in this case. They will bear the Shrotriemdar's costs in equal shares."

Against that order the Mirasidars preferred this appeal.

S. Subrahmania Ayyar for appellants.

T. V. Seshagiri Ayyar for respondents.

JUDGMENT.—We see no reason to question the status of the appellants as Mirasidars of the village. Exhibit V leaves no doubt on the point.

The only question is whether, as Mirasidars, they are entitled to compensation for immemorial waste lands taken up under the Land Acquisition Act in this village. There is no allegation or evidence that such a right has ever been claimed or established against Government in villages where Government has not alienated its right to third parties, as it has in this case to the Shrotriemdars, who are the respondents in these appeals.

The rights of the Mirasidars over immemorial waste (apart from their preferential right to cultivate) appear to be confined to grazing, cutting firewood and similar common privileges, as stated by the Board of Revenue in the passage quoted in this Court's judgment in *Sakkaji Rau* v. *Lakhmana Gaundan*(1), but those rights were liable to be extinguished by the Government alienating the land. As already remarked there is nothing to show that Government has ever treated the Mirasidars as entitled to compensation for such curtailment of their communal rights. The Shrotriemdars stand in the place of Government in this case, and the evidence is that they have from time to time leased portions of the waste lands of the village to the Mirasidars of the village, and sometimes to

(1) I.L.R., 2 Mad., 149 at p. 158.

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strangers without giving the Mirasidars a share of the rent or other compensation. There is moreover the recent admission of one of the leading Mirasidars, who is also an appellant, that in the village "the poramboke lands belong to the Shrotriemdars: the '*tarasa*' or uncultivated lands which are not in the holding of anybody else do also belong to the Shrotriemdars only" (exhibit B). We do not attach any importance to the recitals in exhibits I to IV, which are sales between the Mirasidars themselves, and to which the Shrotriemdars were no parties. Our attention has been drawn to a decision of this Court in *Govindarajulu Naidu* v. *Venkataramanjulu Naidu*(1), in which the Mirasidars were allowed a part of the compensation given for land taken up under the Land Acquisition Act, but the facts of that case were different from those of the present case. In these cases we agree with the District Judge that the appellants have failed to show that they are entitled to any part of the compensation, and the appeals are accordingly dismissed with costs.

APPELLATE CIVIL.

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

SHAKUL KAMEED ALIM SAHIB (PLAINTIFF), PETITIONER, *v.* SYED EBRAHIM SAHIB AND ANOTHER (DEFENDANTS), RESPONDENTS.* 1902. July 24, 2

Contribution—Suit against three defendants—Decree against all for payment of plaintiff's costs—Payment of entire costs by one defendant—Suit by him against his co-defendants for contribution—Maintainability.

A, B and C, being defendants in a partition suit, were ordered to pay the costs of the plaintiff therein. A was impleaded because he held a mortgage which had been executed in his favour by B over a portion of the property. Upon a warrant of attachment being issued against A, he paid the whole amount due in respect of the costs, and now sued B and C for contribution:

(1) Appeal Suit No. 76 of 1891 (unreported).

* Civil Revision Petition No. 468 of 1901, presented under section 25 of Act IX of 1887, praying the High Court to revise the decree of T. M. Rangachariar, Subordinate Judge of Madura (West), in Small Cause Suit No. 1244 of 1901.

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Held, that he was entitled to contribution.

Fakire v. *Tasadduq Husain*, (I.L.R., 19 All., 462), distinguished.

Merryweather v. *Nixon*, (8 T.R., 186), commented on.

PETITION. Syed Bavuddeen Sahib sued the present plaintiff and the two present defendants in Original Suit No. 7 of 1899 on the file of the Subordinate Court of Madura (East). That was a suit for partition against the present defendants, plaintiff being impleaded (as defendant No. 16) because he held a mortgage over a portion of the property then in question, which mortgage had been executed in his favour by the present first defendant. The present plaintiff and the two present defendants were ordered to pay the costs of Syed Bavuddeen Sahib. The whole amount of these costs was subsequently paid by the present plaintiff upon a warrant of attachment being taken out against him. He now sued the defendants for contribution, alleging that, as mortgagee, he was a necessary party to Original Suit No. 7 of 1899, and that the defendants were liable to costs therein in proportion to their interest in the property which formed the subject-matter of that suit. The defence was that plaintiff was not entitled to make the claim and that the suit was not maintainable. An issue was framed on this point, and the Subordinate Judge, following *Fakire* v. *Tasadduq Husain*(1), held that the suit was not maintainable. He considered that the parties had contested the former suit independently; that they had put in a false defence and, having failed in that defence, were mulcted in costs. There had been no contract between them, and he saw no equity creating a duty on the present defendants to contribute to the costs of the previous suit. All the defendants in that suit, he considered, were wrong-doers. He dismissed the suit.

Plaintiff preferred this appeal.

T. V. Seshagiri Ayyar for appellant.

K. Kuppuswami Ayyar for respondent.

JUDGMENT.—In our judgment the plaintiff is entitled to contribution from the two defendants. The two defendants were defendants Nos. 1 and 2 in Original Suit No. 7 of 1899 in the Subordinate Judge's Court of Madura (East). The plaintiff was the sixteenth defendant in that suit. In Original Suit No. 7 of 1899 the plaintiff in that suit obtained a decree for partition against defendants Nos. 1 and 2 in the present suit. The plaintiff

(1) I.L.R., 19 All., 462.

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in the present suit was a necessary party to Original Suit No. 7 of 1899 inasmuch as the first defendant in that suit had purported to mortgage a portion of the property in question to him. In these circumstances we think the plaintiff is clearly entitled to contribution as against the first defendant, and we think he is also entitled to contribution as against the second defendant.

In the case of *Fakire* v. *Tasadduq Husain*(1) relied on by the Subordinate Judge the facts were entirely different from the facts in the present case. In the Allahabad case the Court held that each defendant was acting independently and for his own benefit, and set up a title against the plaintiff to the former suit which was inconsistent with the title set up by the other defendants, and that the defendants' claims were mutually exclusive. In the present case, the case of the sixteenth defendant was consistent with that of defendants Nos. 1 and 2 and was in fact dependent upon their case. *Dearsly* v. *Middleweek*(2) was a case in which an action was brought against the tenant and the under-tenant of a certain messuage to restrain a breach of covenant, and an injunction was granted against both. The tenant afterwards brought an action against the under-tenant for rescission of the under-lease, and the under-tenant, who had paid all the costs of the injunction suit, counter-claimed for a moiety. Fry, J., held there was no precedent for the claim. This was a decision on the particular facts. There are numerous English decisions that contribution for costs between co-defendants may be ordered. See, for example, *Wilson* v. *Thomson*(3). Even assuming the rule of law laid down in *Merryweather* v. *Nixon*(4) forms part of the jurisprudence of this country (and this seems doubtful, see the observations of Lord Herschell in *Palmer* v. *Wick & Pulteney Town Steam Shipping Company, Limited*(5), the doctrine does not apply to this case. In *Merryweather* v. *Nixon*(4) the suit was in tort. Here the suit was not in tort. Even the English doctrine is restricted to cases where it must be presumed that the party knew he was committing an unlawful act (*Pearson* v. *Skelton*(6)) or the act is of an obviously illegal character (*Betts and Drewe* v. *Gibbins*(7)).

(1) I.L.R., 19 All., 462.
(2) L.R., 18 Ch.D., 236.
(3) L.R., 20 Eq., 459.
(4) 8 T.R., 186.
(5) L.R., [1894], A.C., 318.
(6) 1 M. & W., 504.
(7) 2 A. & E., 57.

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The petition is allowed with costs.

We must set aside the decree dismissing the suit and the case must be restored to the file of the Subordinate Judge in order that it may be disposed of according to law.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Benson.

1902. August 11, 12, 21.

SADAGOPACHARIAR AND OTHERS (PLAINTIFFS NOS. 1, 2, 4 TO 13, 15 AND 16), APPELLANTS,

v.

A. RAMA RAO AND OTHERS (DEFENDANTS NOS. 1 TO 15, 17 TO 32 AND 34 TO 36), RESPONDENTS.*

Processions—Right to conduct through public streets.

The right to conduct religious processions through the public streets is a right inherent in every person, provided he does not, thereby, invade the rights of property enjoyed by others, or cause a public nuisance or interfere with the ordinary use of the streets by the public, and subject to directions or prohibitions for the prevention of obstructions to thoroughfares or breaches of the peace.

Every member of the public and every sect, has a right to use the streets in a lawful manner, and it lies on those who would restrain him in its exercise to show some law or custom having the force of law depriving him of the privilege.

SUIT for a declaration and for an injunction. The declaration sued for was that the plaintiffs, as representing the Vadagalai community in the village of Tiruvèndipuram, in the district of South Arcot, had the right that no public worship of any Tengalai idol should take place in any street in the village, and that no procession of any Tengalai deity should take place in any street in the village; and the injunction claimed was to restrain the Tengalais from such worship and from holding such processions. The District Judge, after dealing with the history of the dispute (many of the facts of which are set out in the report of the previous case (*Sadagopachari* v. *Krishnamachari*(1)) and, at great length with

* Appeal Suit No 211 of 1900, presented against the decree of D. Broadfoot, District Judge of South Arcot, in Original Suit No. 4 of 1898.

(1) I.L.R., 12 Mad., 356.

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the evidence, said:—"There is not a single document forthcoming to support the position now assumed by plaintiffs on behalf of the Vadagalai community. . . . The claim never appeared in its exact present form till after the hint dropped by the Judges in *Sadagopachari* v. *Krishnamachari*(1). We occasionally find before that date an assertion that the streets belonged to the Devanayagasami himself. The reason that this position has been departed from, is that the trustee will not support plaintiffs and, under *Seshayyangar* v. *Seshayyangar*(2), only the trustee can sue to enforce a right resident in the Swami. Hence the right is now stated to reside in the Vadagalai community. The only oral evidence in support of the theory of full ownership is that of fourth, seventh, eleventh and twelfth plaintiffs' witnesses. It is entirely hearsay. I doubt if it is admissible, for the dispute has been going on since 1760, thus even the statements of aged grandfathers cannot have been made *ante litem motam*. Even if it be admissible and true, I consider it quite insufficient to justify a finding that the village site is the absolute property of the Vadagalai community. From the defence evidence it is clear that Tiruvendipuram is an ordinary ryotwari village, and the village site vests in Government, subject to the grant lawfully made by the revenue authorities. The streets are Government poramboke. With regard to the custom, plaintiffs put their case thus: 'Our claim to prohibit the public worship and procession of any rival deity within the limits sacred to the deity in possession is in accordance with the Shastras. We have struggled to enforce our claim for more than a century back. We obtained a decree of the Supreme Court in our favour over fifty years ago. From that time to date, we have successfully resisted every attempt to hold a procession for any rival deity, and we stopped public worship till eleven or twelve years ago, when officers not conversant with Hindu thought wrongly allowed it.' The bare facts of the above statement are correct. The question is, do they prove such a custom as the law, as it now is interpreted, will enforce? Two of the requisites of a valid custom are peaceableness and reasonableness. Plaintiffs' vakil says that the exercise of his alleged right must be held to be peaceable, because he eventually got the best of each dispute. I do not think this can be accepted where a matter has all along been bitterly disputed.

(1) I.L.R., 12 Mad., 356. (2) I.L.R., 2 Mad., 143 at p. 145.

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I do not think it can be considered peaceable. As to reasonableness, a good deal depends upon whether we are to apply the Hindu, or the British standard. The idea that a minority can have any rights is totally foreign to the Hindu. He has a very short way with dissenters. If the Hindu standard be applied, there is nothing unreasonable in the custom claimed by plaintiff, that the ruling deity shall bear no rival near his throne. But, if I understand *Sundram Chetti* v. *Queen and Ponnusami* v. *Queen*(1) aright, it has been definitely laid down that the standard to be applied is that of the British common law and the prejudices of a particular sect ought not to be allowed to influence the law (pages 217–218). The head note of that case, which fairly represents the body, is that no sect is entitled to deprive others for ever of the right to use public streets for procession on the plea of the sanctity of their place of worship. This ruling seems to me to be fatal to the contention that the custom as to procession pleaded by plaintiffs, is a reasonable custom. It is even more unreasonable to claim to prevent public worship being held on land which does not belong to the objectors. Hence, I am of opinion that though the Tengalai claim may, in a certain sense be described as an innovation, it is not an illegal innovation, and it cannot be legally resisted." Further facts, material to the report are set out in the judgment of the High Court.

The District Judge dismissed the suit. Plaintiffs Nos. 1, 2, 4 to 13, 15 and 16 preferred this appeal.

V. Krishnaswami Ayyar, *P. R. Sundara Ayyar* and *T. Rangaramanuja Chariar* for first to eighth and tenth to fourteenth appellants and *S. Srinivasa Ayyangar* for sixth appellant.

The Advocate-General (Hon. Mr. *J. P. Wallis*) for first to fourteenth and sixteenth to thirty-fourth respondents and *T. Runga Chariar* for second to fourteenth and sixteenth to thirty-fourth respondents.

JUDGMENT.—The present suit is the latest phase in the disputes which have been going on for the past century between the Vadagalai and Tengalai sects of Vaishnava Brahmins in the village of Tiruvendipuram.

The plaintiffs are Vadagalais, and they, as representing the Vadagalai community of the village sue the defendants, as repre-

(1) I.L.R., 6 Mad., 203 at pp. 217, 218.

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senting the Tengalai community of the village, for a declaration (1) that they (the Vadagalais) have the right that no public worship of any Tengalai idol shall take place in any street of the village, and (2) that they (the Vadagalais) have the right that no procession of any Tengalai deity shall take place in any street of the village, and for a perpetual injunction to restrain the defendants (Tengalais) from such worship and processions.

A complete *resumé* of those disputes is given in the case of *Sadagopachari* v. *Krishnamachari*(1) and in the judgment of the lower Court in the present case. It is necessary for us to refer only to the main facts, so far as they are essential to a correct understanding of the present litigation.

There is in the village a Vaishnava temple dedicated to Devanayagasami, and annexed to it is a shrine of Vedanta Desikar, a saint and religious preceptor held in great veneration by the Vadagalai sect. The Tengalais venerate a saint known as Manavala Mahamuni, and as early as 1807 we find that certain Tengalais sued certain Vadagalais for damages for having prevented them (the Tengalais) from placing an image of this saint in the temple. That suit was dismissed and an image which the Tengalais had, *pendente lite*, placed in the temple was removed by order of the Court. Again in 1828 the Tengalais set up a similar image of their saint in a private house and began to hold processions in the streets in his honour. Ten of the Vadagalais then instituted Original Suit No. 30 of 1828 against 13 of the Tengalais for having, contrary to alleged established custom, publicly worshipped the saint and carried the idol in procession through the streets. The Vadagalais alleged that the streets were attached exclusively to the temple and that the worship of the Tengalai saint was opposed to usage. These allegations the Tengalais denied. The Court referred certain questions to the Hindu pandits attached as Law Officers to the Court, and, on receiving their replies, decided that the practice of the defendants assembling in a private house and there performing ceremonies to an idol of their priest Manavala Mahamuni and its public worship and the carrying of it in procession through the streets should be discontinued, and that "should they continue to make the idol, subject of the cause, an object of worship, the same be removed from the defendants' houses." The

(1) I.L.R., 12 Mad., 356.

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Court also awarded damages to the plaintiffs. The case was taken in special appeal to the Court of Sudder Adawlut (1 of 1839) which in 1840 modified the decision in the following terms:—"The Sudder Adawlut consider the Tengalais to have entirely failed in proving that their public worship, or their publicly carrying in procession through the streets of the said village, of any image of the said saint, is established by immemorial custom. On the contrary, they deem both unauthorized innovations. But there is nothing to prevent the inmates alone of any Tengalai family, resident therein, from worshipping within their own respective dwellings, in a private manner, the household image of their said saint, set up for family worship, which in size is invariably different from what is fixed in pagodas or carried in procession, provided all but the inmates of such house are excluded from such worship, so as to distinguish such family from public worship."

In 1868 the Tengalais attempted to erect a new temple for a similar idol, but on the motion of the Vadagalais were restrained by an order of the Magistrate made with a view to prevent a breach of the peace. In 1886, however, the Magistrate refused to prohibit public worship of the idol by the Tengalais and referred the Vadagalais to the Civil Court. The Vadagalais then sought to have certain of the Tengalais arrested and imprisoned in execution of the decree of 1840 of the Sudder Adawlut. The Courts, however, dismissed the petition on the ground, *inter alia*, that the present Tengalais were not parties to the suit of 1828 (*Sadagopachari* v. *Krishnamachari*(1)). Subsequent applications were made by both sects for the aid of the Magistrates in support of their alleged rights, and in 1886 the District Magistrate declared that "the Tengalais will be protected in the performance of acts which are not illegal, in the village of Tiruvendipuram as elsewhere" and he supported them in holding one "Eyal" or funeral procession in the streets and also, in 1896, in conducting the monthly procession of Manavala Mahamuni in the public streets, referring the Vadagalais to the Civil Courts for redress. Hence the present suit.

The Vadagalais base their suit on three grounds: *firstly*, that the Vadagalais were the original owners of all the land of Tiruvendipuram village and allowed houses to be built and streets

(1) I.L.R., 12 Mad., 356.

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formed subject to the reservation that no worship or procession of a Tengalai idol should be allowed in them; *secondly*, that even if the above cannot now be proved, still the Vadagalais have, by immemorial usage and custom, acquired the right to prevent such worship and processions in the streets; and *thirdly*, that so far at least as Manavala Mahamuni is concerned the rights of the parties are *res judicata* by the decision in Original Suit No. 30 of 1828.

We agree with the District Judge that there is not the smallest foundation for supposing that the village at any time belonged exclusively to the Vadagalais. At present the houses of the Tengalais are almost as numerous as those of the Vadagalais, though in the Brahmin quarters the Vadagalais are in a considerable majority. The evidence shows that it is an ordinary ryotwari village of Government, the village-site and the streets of which vest in Government and are dealt with as Government poramboke.

Indeed, no serious attempt was made before us to show directly from the evidence that the village ever belonged exclusively to the Vadagalais. The supposed copper-plate grant is not shown to refer to the village, and the oral evidence is mere hearsay and as such is inadmissible. We are, however, asked to infer the original ownership of the Vadagalais from the legal proceedings which have taken place between the sects. It is not easy to formulate the somewhat elusive argument addressed to us on this part of the case, but it appears to be that for nearly one hundred years the Vadagalais had successfully prevented the Tengalais from worshipping their saint, that this was proof of a custom, and that when a custom was proved we should refer it to a legal origin and presume in the present case that the Vadagalais must have been the original owners and have allowed others to build houses and use the streets subject to the reservation which we find to exist. We are unable to admit the validity of this argument.

It is noteworthy, as pointed out by the Judge, that the claim of the Vadagalais to the ownership of the village was never put forward until the present suit. In some of the former disputes the Vadagalais alleged that the streets belonged to Devanayagasami himself, but, if that were so, the right to sue in regard to them would be in the trustee, who has declined to join the plaintiffs. Hence the right is now stated to reside in the Vadagalai community. So far as the right to sue depends on the alleged original

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ownership of the village by the Vadagalais, there is clearly no foundation for it.

The plaintiffs, however, base their suit also on an alleged immemorial custom whereby they have the right to prevent the Tengalais from using the public streets for the worship of their saint and for processions in his honour. They contend that such a custom is in accordance with Hindu feeling and the Shastras, and that it was recognised by the decree of the Sudder Adawlut in 1840, and that, since then, they have, until a few years ago, resisted every attempt of the Tengalais to conduct such processions and worship. The decree of the Sudder Adawlut was based on the opinion of the Hindu pandits as to the Hindu law applicable to the case, but it cannot be denied that the law of British India, as laid down in later cases, is opposed to the view of the pandits As pointed out by this Court in *Parthasarathy* v. *Chinna Krishna*(1) following the decision of the Sudder Court (*Sambalinga Moorty* v. *Vembarry Govinda Chetty*(2)) the right to conduct religious processions in the public streets is a right inherent in every person, provided he does not thereby invade the rights of property enjoyed by others, or cause a public nuisance or interfere with the ordinary use of the streets by the public, and subject to such directions or prohibitions as may be issued by the Magistrate to prevent obstructions to the thoroughfare or breaches of the public peace. In the present case it is not suggested that the plaintiffs have been prevented from exercising any right, or obstructed in the exercise of any right by the defendants, nor is it alleged that the plaintiffs have suffered any injury or damage, save, perhaps, such moral or sentimental injury as might result from seeing a religious procession which one would rather not see. In the Full Bench case of *Sundram Chetti* v. *Queen and Ponnusami Chetti* v. *Queen*(3), Sir Charles Turner, Chief Justice, is reported to have said "With regard to privileges claimed on the ground of caste or creed, I may observe that they had their origin in times when a state religion influenced the public and private law of the country, and are hardly compatible with the principles which regulate British administration, the equal rights of all citizens and the complete neutrality of the State in matters of religion.

(1) I.L.R., 5 Mad., 304 at p. 309. (2) M.S.D., 1857, 219 at p. 223.
(3) I.L.R., 6 Mad., 203 at pp. 217, 218.

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The members of one caste have not been allowed to restrict members of other castes from the free use of public thoroughfares. The Pariah in Malabar is no longer excluded from Courts of Justice. These are innovations, but the superseded usages are obviously condemned by the spirit of our laws. When anarchy or absolutism yield place to well-ordered liberty, change there must be, but change in a direction which should command the assent of the intelligence of the country. With regard to processions, if they are of a religious character, and the religious sentiment is to be considered, it is not less a hardship on the adherents of a creed that they should be compelled to intermit their worship at a particular point, than it is on the adherents of another creed, that they should be compelled to allow the passage of such a procession past the temples they revere. But the prejudices of particular sects ought not to influence the law. A man may have just ground of complaint if he is compelled to recognize the sanctity claimed for a place as the seat of a worship he believes to be false: he has no just ground of complaint if he is compelled to recognize the civil right of his fellow citizens to be protected from disturbance when they are assembled for public worship, unless indeed all recognition of public worship is repugnant to him. Again, assuming that the Courts were satisfied that a privilege had been duly acquired and that it was competent to them to recognise it, it must be remembered that it is based on custom and that custom is sound only when and in so far as it is reasonable. It would have then to be considered whether it was reasonable to require persons exercising a natural right to abstain from its exercise when passing a place where no public worship was proceeding."

We think that these observations are appropriate to the present case.

We do not think that the custom which the plaintiffs plead is a reasonable one or such as the Courts should recognize any more than the Courts would now recognize the practice widely prevalent in Malabar by which men of the Cheruman caste are obliged to leave the public road if they meet a man of the Nair caste on it. We have not been referred to a single reported case in which such a right of one sect to interdict a rival sect from the use of the public streets has been recognised by the superior Courts in India. Even in the case of the present disputants the decision of the Sudder Adawlut proceeded on the ground that the Tengalais had failed

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to prove that their proceedings were in accordance with established usage. It did not proceed on the view that the Vadagalais had a right in themselves to regulate worship in the streets, or to interdict the use of the streets to the other sect.

The correct view, as stated in the later cases, is that every member of the public, and every sect, has a right to use the public streets in a lawful manner, and it "lies on those who would restrain him in its exercise to show some 'law' or 'custom having the force of law' depriving him of the privilege" (*Sambalinga Moorty* v. *Vembarry Govinda Chetty*(1)).

In our opinion no such custom has been established in the present case.

As regards the plaintiffs' plea of *res judicata* with regard to Manavala Mahamuni, we are clearly of opinion that it is untenable. In the suit of 1828—40 the parties were not described as representing the rival sects—the relief sought and given was different from that now asked for, and the basis on which the suit was brought and on which the decision was given was different from that on which the present suit is brought.

We think that the suit was rightly dismissed and we dismiss this appeal with costs.

(1) M.S.D., 1857, 219 at p. 223.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

SANAGAPALLY LAKSHMAYYA (MINOR) BY HIS MOTHER AND GUARDIAN VENKAMMA (SECOND DEFENDANT), APPELLANT,

v.

INTOORY BOLLA REDDY AND OTHERS (PLAINTIFF AND FIRST DEFENDANT), RESPONDENTS.*

1902. March, 19, 20. September 15.

Transfer of Property Act—IV of 1882, s. 65 (c)—Duty of mortgagor to pay public revenue on mortgaged land—Default in payment—Sale for arrears of revenue—Subsequent sale by purchaser at revenue sale to original mortgagor—Right of mortgagee under original mortgage.

It is the duty of a mortgagor, under section 65 (*c*) of the Transfer of Property Act, to pay the public revenue accruing due on the mortgaged property when it continues in his possession. If he fails to perform that duty, and the land is sold for arrears of revenue and the purchaser at the revenue sale sells the land to the original mortgagor, the mortgage is not extinguished.

A man cannot be allowed to take advantage of his own wrong, and notwithstanding that the land might have vested in the purchaser at the revenue sale free of the mortgage, the original mortgagor (or his son), on his purchase from the auction purchaser, cannot plead, for his own benefit, that by reason of such wrong there has been a statutory extinction of the original mortgage.

Nawab Sidhee Nuzur Ally Khan v. *Rajah Ojoodhyaram Khan*, (10 M.I.A., 540 at p. 557), followed.

ON 1st June 1886, first defendant's father gave one Mala Ramaswami a simple mortgage over a certain piece of land. In August 1888, the mortgaged land was sold by the revenue authorities for arrears of revenue, Linga Reddi being the purchaser. In December 1894, Linga Reddi sold the land to first defendant, and on the same day, first defendant's guardian mortgaged it to plaintiff. In 1895, the original mortgagee Mala Ramaswami transferred his mortgage to second defendant's father, and in the same year second defendant brought Original Suit No. 386 of 1895, in the Court of the District Munsif of Guntur, on the mortgage bond and obtained a decree. Plaintiff also sued, in the same year, in

* Second Appeal No. 867 of 1900, presented against the decree of W. C. Holmes, District Judge of Kistna at Masulipatam, in Appeal Suit No. 634 of 1899, presented against the decree of C. Bapayya, District Munsif of Guntur, in Original Suit No. 686 of 1895.

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Original Suit No. 686 of 1895, to recover his money by sale of the mortgaged land free from first defendant's mortgage. The plaint asked for a declaration that the second defendant's decree in Original Suit No. 386 of 1895 was null and void, and claimed from first defendant the mortgage amount, and, in default of payment, asked for sale of the mortgaged land. First defendant remained *ex parte*, and the District Munsif decreed in plaintiff's favour for the mortgage amount, and, on default of payment, ordered the land to be sold and the proceeds paid in the first instance to plaintiff. Second defendant appealed to the District Judge, contending that when the first defendant purchased the land (from Linga Reddi) the liability to second defendant's mortgage re-attached to the land. The District Judge refused to adopt this view, holding that on the sale to Linga Reddi, for arrears of revenue, the land was sold free of all incumbrances. He considered that the mortgage by first defendant's guardian to plaintiff was not a bogus transaction and that the doctrine of estoppel did not apply. He dismissed the appeal.

Second defendant preferred this second appeal contending, *inter alia*, that inasmuch as first defendant himself purchased the land from the auction purchaser (Linga Reddi), it was not open to first defendant to dispute the second defendant's prior mortgage.

C. Ramachandra Rau Sahib for appellant.

K. Jagannadhayyar for third to sixth respondents.

JUDGMENT.—We do not think that the decrees of the Courts below can be supported. Inasmuch as the land was sold during first defendant's minority for arrears of revenue, we must take it, having regard to Regulation X of 1831, that it was sold for arrears which became due during the life-time of first defendant's father. It was a duty which the first defendant's father, as mortgagor, owed to his mortgagee (under whom second defendant claims as assignee) to pay the public revenue accruing due on the mortgaged property which continued to be in his possession [section 65 (*c*), Transfer of Property Act, 1882]. This duty the father failed to perform, and the arrears not having been paid by the first defendant before the day fixed for sale, the land was sold under Act II of 1864 to realize the revenue. Linga Reddi purchased the land, and under Act II of 1864 the land vested in him free of the mortgage. A few years afterwards the property was purchased by first defendant from Linga Reddi and on the same day was mortgaged by first

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defendant to plaintiff and this suit is now brought to enforce that mortgage by sale of the land. The Courts below have held that the second defendant's prior mortgage was extinguished by the revenue sale, and have given plaintiff a decree for sale of the land on the footing that second defendant had no mortgage thereon.

If the first defendant himself, instead of Linga Reddi, had been the purchaser at the revenue sale, it is clear that the second defendant's mortgage would not have been extinguished and that he could enforce his mortgage against first defendant just as if there had been no revenue sale (*Nawab Sidhee Nuzur Ally Khan* v. *Rajah Ojoodhyaram Khan*(1)), and the plaintiff, who claims as mortgagee under the first defendant, cannot be in a better position than first defendant himself. The principle of law on which that decision was based was mainly that a man cannot be allowed to take advantage of his own wrong, and that therefore the mortgagor in that case had a title by estoppel to redeem the mortgage as against the mortgagee who failed to pay the arrears of revenue and himself became the purchaser at the revenue sale brought about by his own default. This principle is, in our opinion, applicable to the present case notwithstanding that the property vested free of mortgage in Linga Reddi, and the fact that the first defendant did not purchase the property himself at the revenue sale, but from Linga Reddi who was the purchaser at the revenue sale, makes no difference as between himself and his mortgagee. He cannot be allowed to take advantage of his father's wrong and plead for his own benefit that by reason of such wrong there has been a statutory extinction of second defendant's mortgage security. [See note (at p. 242, Vol. XV; second edition) to "Market Overt" A1 in Viner's Abr. cited and followed in *Nawab Sidhee Nuzur Ally Khan* v. *Rajah Ojoodhyaram Khan*(1).] We may observe that the same principle underlies section 65 of the Indian Trusts Act in the case of trust property.

We shall therefore have to set aside the decrees of the Courts below and give plaintiff a decree as a puisne mortgagee only, the second defendant having the rights of a prior mortgagee.

Before passing the decree we must call for a finding as to the amount due under second defendant's mortgage, and the amount

(1) 10 M.I.A., 540 at p. 557.

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due under the plaintiff's mortgage up to the date on which the finding may be recorded by the lower Appellate Court.

In compliance with the order contained in the above judgment, the District Judge submitted the following

FINDING.—"This suit has been remanded by the High Court for a finding on the following issue :—

"'What are the amounts due under the plaintiff's mortgage and the second defendant's mortgage up to the date of this finding?'

"2. No evidence has been adduced by either side and it is admitted that the amount due up to 15—12—1895 is Rs. 553-15-9 according to the terms of exhibit II. For the appellant it is contended that interest at 6 per cent. per annum is due on that amount from 15—12—1895 up to the date of this finding. For respondents it is urged that the appellant is not entitled to such interest.

"3. I consider that the respondents' contention should prevail. The mortgage bond is not before me and there is no means of ascertaining the interest due under it. The bond has to all intents and purposes been merged in exhibit II and under that exhibit appellant is not entitled to any further interest.

"4. My finding therefore is that the amount due under the plaintiff's mortgage and the second defendant's mortgage is Rs. 553-15-9."

The case coming on for final hearing after the return of the finding of the lower Appellate Court, the Court delivered the following

JUDGMENT.—We accept the finding, which it is agreed, is that the amount due to the second defendant under his mortgage is Rs. 553-15-9, and the second defendant's vakil says that he does not insist on interest as the mortgage bond is not produced to fix the rate of interest. The plaintiff, as subsequent mortgagee, will be entitled to redeem the second defendant's mortgage on payment of the said amount into Court on or before the 15th February 1903, the said sum to carry interest at 6 per cent. from the date of such payment till realization. A decree will be drawn up reversing the decrees of the Courts below with an additional direction that the amount due to the plaintiff by the first defendant under the plaintiffs' mortgage be also declared in Court by the District Munsif on or before the 15th January 1903. The decree will also give further necessary directions for the first defendant redeeming, on or before the 15th April 1903, the plaintiffs, on the latter redeeming the second defendant and also for the first defendant redeeming both by payment into Court, in default of plaintiffs redeeming the second defendant, with additional provisions for sale in default of redemption. The plaintiff must pay the second defendant's costs throughout and the first defendant must pay the plaintiff's costs throughout, excluding the costs which the plaintiff will have to pay to the second defendant.

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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT), APPELLANT,

v.

ROBERT FISCHER (PLAINTIFF), RESPONDENT.*

1902. November 18, 19.

Assessment of Land Revenue Act—(Madras) Act I of 1876, s. 7—Appeal to Board of Revenue from assessment fixed by Collector—Limitation—Revenue Recovery Act—(Madras) Act II of 1864, s. 45—Regulation II of 1803, s. 18—Effect of Act I of 1876 on the procedure prescribed by s. 18 of Regulation II of 1803.

The period of ninety days prescribed by section 7 of Act I of 1876, during which an appeal may be preferred to the Board of Revenue from an order by a Collector apportioning the assessment on land, runs from the date when the Collector declares the apportionment of assessment, after the apportionment proposed by him to the Board of Revenue has been sanctioned. It does not commence to run, under the Act of 1876, from the date when the Collector himself fixes the amount and submits his proposal to the Board of Revenue for sanction.

Under section 18 of Regulation II of 1803, the Collector was bound, when transmitting for the consideration of the Board a statement of the assessment to be apportioned on the sub-division, to furnish a copy of such statement to the proprietor of the estate, who was directed to appeal if he objected to the assessment. Under that Regulation the appeal was against the proposal for

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* Appeal No. 70 of 1901 presented against the decree of T. Varada Rao, Subordinate Judge of Madura (East), in Original Suit No. 68 of 1899.

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apportionment, and time ran from the date of the proposal. But the effect of Act I of 1876 has been to supersede the procedure prescribed under section 18 of Regulation II of 1803, and the right of appeal given by the later Act is against the apportionment made under section 2 after it has acquired validity by being sanctioned by the Board of Revenue.

SUIT for a declaration that plaintiff's sub-division of a zamindari is liable to pay a fixed assessment of only Rs. 2,757-4-1.

The following statement of facts is taken from the judgment of the High Court :—

"The plaintiff, in whose name Kondagai, a sub-division of the Sivaganga zamindari, has been registered under Madras Act I of 1876, sues the Secretary of State for India in Council in effect to obtain a declaration that his sub-division is liable to pay a fixed assessment of only Rs. 2,757-4-1 and not Rs. 3,027-4-8, the amount claimed on behalf of the defendant. On the 13th November 1890 the Collector of Madura, after determining that the plaintiff was entitled to separate registration of Kondagai, submitted to the Board of Revenue, for its sanction, his proposal to fix the assessment on the separated portion at Rs. 2,757-4-1. The Board of Revenue by its proceedings, dated 5th December 1890, signified to the Collector its sanction. On receipt of the sanction the Collector deducted from the peishcush payable in respect of the whole zamindari, the assessment sanctioned by the Board of Revenue in respect of the Kondagai sub-division and the separate assessment of Kondagai and the reduction of the peishcush of the whole zamindari was communicated by the Treasury officer, on the 19th January 1891, to the lessees of the zamindari, fixing the instalments in which the peishcush of the zamindari, as thus reduced, was payable. The lessees and the zamindar being aggrieved by such apportionment, presented appeals to the Board of Revenue under section 7, on the 15th March and 18th April 1891, respectively; and the Board of Revenue, after calling for further information from the Collector, passed an order, dated 17th August 1891, whereby it enhanced the assessment payable by the plaintiff in respect of Kondagai to Rs. 3,027-2-8, and made a corresponding reduction of peishcush payable by the Zamindar on the rest of the zamindari. The suit is brought by the plaintiff for a declaration that this order of the Board of Revenue is *ultra vires*.

"The Subordinate Judge upheld the plaintiff's contention that the period of ninety days prescribed by section 7 of Act I of 1876,

for an appeal to the Board of Revenue, should be reckoned from the 13th November 1890, the date on which the Collector fixed the assessment at Rs. 2,757-4-1 and submitted his proposal for the sanction of the Board of Revenue, and not from the 19th January 1891, the date when the apportionment as sanctioned by the Board was effected and communicated to the Zamindar and the lessees of Sivaganga. The Sub-Judge also held that it was incompetent to the Board of Revenue to exercise its appellate jurisdiction by entertaining an appeal preferred after the expiration of the period prescribed by section 7, and that its order allowing the appeal was *ultra vires*. The Sub-Judge further overruled certain pleas taken on behalf of the defendant to the maintainability of the suit, and passed a decree in favour of the plaintiff declaring that the plaintiff was not bound to pay the enhanced assessment fixed by the Board of Revenue on the 17th August 1891.

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"Against this decree this appeal is preferred on behalf of the Secretary of State for India in Council and it is urged in support of the appeal that the declaration of assessment referred to in section 7, from the date of which the period of ninety days therein prescribed for an appeal to the Board of Revenue begins to run, is not the proposal made and submitted by the Collector to the Board of Revenue for its sanction, but the declaration referred to in section 3, which, it is contended, is the one made by the Collector after receipt of the sanction of the Board of Revenue, whereby the apportionment of the assessment is made. It is also contended that it is competent to the Board of Revenue to entertain an appeal which may be preferred after the prescribed period."

The Acting Government Pleader for appellant.

V. Krishnaswami Ayyar and *T. Rangachariar* for respondent.

JUDGMENT.—[After setting out the statement of facts which has already been printed] :—Assuming (without deciding) that section 5 of the Indian Limitation Act is inapplicable to an appeal preferred to the Board of Revenue under section 7 of Act I of 1876, we are clearly of opinion that the period of ninety days is to be reckoned only from the date when the Collector declared the apportionment of the assessment, after the apportionment proposed by him to the Board of Revenue had been sanctioned, and not from the date when he submitted his proposal to the Board of Revenue. The plaintiff has neither alleged nor shown that the appeal to the Board of Revenue was preferred more than ninety days

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after the date of such declaration. On the contrary, the evidence in the case shows that, after the Board's sanction was received by the Collector, the apportionment of assessment was declared and communicated by the Treasury officer to the lessees of Sivaganga on the 19th January 1891, the date of exhibit II, and there is nothing on the record to show that there was any such declaration prior to the said date Both the lessees' appeal and the Zamindar's appeal were preferred to the Board of Revenue within ninety days from that date. That the right of appeal conferred by section 7 is from the apportionment of assessment which is declared and made after the Collector's proposal had been sanctioned by the Board of Revenue, is made clear by the language as well as the scheme of Act I of 1876—an enactment which, in respect of its subject-matter, aims at being exhaustive and complete in itself. Even prior to the passing of that Act, there were certain provisions enacted in Regulation XXV of 1802 (sections 8 and 9), Regulation II of 1803 (sections 17 and 18) and Madras Act II of 1864 (sections 45 and 46) under which alienated portions of permanently-settled estates were separately assessed and registered. But as such provisions were considered inadequate, Act I of 1876 was passed to make better provision for the separate assessment of portions of permanently-settled estates when such portions were voluntarily alienated. The enquiry under section 2 of that Act, made after giving due notice to the parties, is confined to ascertaining whether the alleged alienation has taken place, and whether objections, if any, to the separate registration, should be allowed or disallowed.

If, on such enquiry, the Collector comes to the conclusion that separate registration should be effected, he is directed to proceed to register the alienated portion and to apportion the assessment on the alienated portion in the manner provided in Madras Act II of 1864, subject to the sanction of the Board of Revenue as prescribed by section 45 of that Act.

The proceedings which the Collector takes under section 45 are taken by him purely as a fiscal officer and the enquiry in the presence of parties under section 2 of Act I of 1876 does not extend to the proceedings under section 45 of Act II of 1864. Under that section he fixes the assessment and submits his proposal to the Board for sanction, and section 45 expressly declares that the amount so fixed by the Collector shall have no validity until it

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has been confirmed by the Board of Revenue. Under the law as it stood prior to Act I of 1876, the Collector was bound, under section 18 of Regulation II of 1803, when transmitting for the consideration of the Board a statement of the assessment to be apportioned on the sub-division, to furnish the proprietor of the estate with a copy of such statement, and should the proprietor object to the same and appeal to the Collector, the latter was directed to at once submit the appeal with his remarks to the Board.

If this section, so far as it relates to alienation of portions of permanently-settled estates, had been, like sections 45 and 46 of Act II of 1864, incorporated in Act I of 1876, and if the same had not been superseded in respect of such alienations, there would have been no necessity to provide for a right of appeal to the Board of Revenue under section 7 of the Act, so far at any rate as the proprietor of the estate is concerned, and the appeal by the proprietor would have been, in the absence of section 7, against the proposal for the apportionment made to the Board of Revenue by the Collector, and the respondent's present contention would in that case be well founded; but under Act I of 1876 the procedure under section 18 of the Regulation does not apply, and the right of appeal is given in favour both of the proprietor and of the alienee of a portion of the estate, against the apportionment of the assessment made under section 2 of the Act, after it has acquired validity by the sanction of the Board of Revenue. Section 7 expressly provides that the period of ninety days allowed by it for exercising the right of appeal conferred by it is to be reckoned from the date of the *declaration* of such assessment, and section 3 makes it clear that such declaration is made after the receipt of the Board's sanction, for it is absurd to suppose that the Collector would be required to deduct the peishcush proposed for the alienated portion from the existing peishcush of the entire estate, before the proposal acquired validity by the sanction of the Board. Even assuming for the sake of argument, that the procedure prescribed by section 18 of Regulation II of 1803 has not been superseded by Act I of 1876 in cases falling under that Act and can co-exist with it, this cannot affect the exercise of what in this view would be an additional right of appeal given by section 7 of the Act.

Section 3 assumes that, on the receipt of the Board's sanction, the Collector, who is the authority to give effect to the

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apportionment, will declare the apportionment in such mode as may be customary, so that the parties concerned may have an opportunity of knowing it, and of appealing therefrom to the Board if aggrieved by the apportionment. The proposed apportionment of the assessment by the Collector, and the sanction of the Board being both the result of *ex parte* proceedings, there is nothing anomalous in allowing a party affected thereby to appeal to the Board against the apportionment thus made. The Board of Revenue, therefore, did not act *ultra vires* in entertaining the appeals of the lessees and of the Zamindar against the apportionment of assessment which was declared by the Collector on the 19th January 1891, and in revising that apportionment.

In this view it becomes unnecessary to decide the other questions argued before us.

We therefore allow the appeal and dismiss the suit with costs throughout.

APPELLATE CRIMINAL.

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

1902. November 5, 6. December 9, 12, 15.

SEVAKOLANDAI, ACCUSED,

v.

AMMAYAN, COMPLAINANT. *

Criminal Procedure Code—Act V of 1898, s. 528—Power of District or Sub-Divisional Magistrate to transfer a criminal case from the file of a Village Magistrate—Extent of power—Petty thefts triable under Regulation IV of 1821.

The jurisdiction which a District or Sub-Divisional Magistrate has, under section 528 of the Code of Criminal Procedure, to transfer a criminal case from the file of a Village Magistrate is limited to the cases (namely those relating to petty thefts) which a Village Magistrate is empowered by Regulation IV of 1821 to try and punish.

REFERENCE for orders. The letter of Reference set out the facts as follows :—

* (Criminal Revision Case No. 454 of 1902.) Case referred for the orders of the High Court under section 438 of the Code of Criminal Procedure by E. A. Elwin, District Magistrate of South Arcot, in his letter, dated 15th September 1902.

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"One Ammayan presented a complaint of insult (triable under Regulation XI of 1816) against one Sivakolandai in the Court of the Village Magistrate of Alambadi, Chidambaram taluk. The accused in the case petitioned the Deputy Magistrate, Chidambaram division, for the transfer of the case to the file of any other Magistrate on the ground that the Village Magistrate was prejudiced against him. The Deputy Magistrate, after hearing both sides, ordered the transfer of the case to the file of the Stationary Sub-Magistrate of Chidambaram. Against this order a so-called appeal has been presented to this Court by the complainant.

"From the proceedings of the Deputy Magistrate, dated 16th July 1902, it appears that there is sufficient ground for the accused to fear that a fair and impartial trial cannot be had before the Village Magistrate. The point for consideration, however, is whether the Deputy Magistrate had the power under the Criminal Procedure Code to make the order he did. Under the old Code (Act X of 1882) it was held that no such power existed. Clause 4 of section 528 was newly introduced in the present Code and although the intention of the Legislature appears to have been to invest a superior Magistrate with power to transfer *any* case pending before a Village Magistrate (see statement of objects and reasons of the new Code printed as supplement to the *Fort St. George Gazette*, dated 16th November 1897), yet the wording of the clause, which refers only to Regulation IV of 1821 under which petty thefts are triable, seems to include cases triable by a Village Magistrate under Regulation XI of 1816. I think, therefore, that the Deputy Magistrate's order was *ultra vires*.

"Again, I feel considerable doubt whether I have any appellate power or power of interference in respect of a Sub-Divisional Magistrate's order directing the transfer of a case, for the District Magistrate and the Sub-Divisional Magistrate have co-ordinate jurisdiction under section 528, Criminal Procedure Code. I understand that the High Court decided the question in a similar case on or about 25th June last."

The District Magistrate concluded by stating that he considered that it was a case in which transfer should be made.

The case came on in the first instance before the Chief Justice and Bhashyam Ayyangar, J., who delivered the following judgments :—

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SIR ARNOLD WHITE, C.J.—The question raised in this reference is whether under section 528 of the Code of Criminal Procedure a District or Sub-Divisional Magistrate has power to transfer any criminal case pending before a Village Magistrate or whether this power of transfer is limited to the case referred to in section 6 of Regulation IV of 1821, that is to say, petty thefts where the value of the property does not exceed one rupee.

Section 10 of Regulation XI of 1816 gave to heads of villages criminal jurisdiction "in cases of a trivial nature such as abusive language and inconsiderable assaults or affrays." By section 6 of Regulation IV of 1821 the powers granted to heads of villages under the section above referred to are extended to the punishment of petty thefts not attended with aggravating circumstances nor committed by persons of notoriously bad character and when the value of the property stolen does not exceed one rupee.

Paragraph (4) of section 528 of the Code of Criminal Procedure was apparently introduced to meet the decision of this Court in *Madavarayachar* v. *Subba Rau*(1), where it was held that since a Village Munsif was not a Magistrate under the Criminal Procedure Code, a Joint Magistrate had no power under section 528, as it then stood, to transfer a case from a Village Munsif. The offence in the case of *Madavarayachar* v. *Subba Rau*(1), though this is not stated in the report, as in the reference now before us, was abusive language.

The amendment to section 528 is not happily worded. If the Legislature had adopted the phraseology of section 1 (2) (*b*) of the Code, viz., "Heads of villages in the Presidency of Fort St. George" no question could have arisen. The amending words in section 528 refer expressly to the Regulation of 1821 and do not refer to the Regulation of 1816. But having regard to the circumstances in which the amendment appears to have been made, viz., to meet a decision in general terms that a Joint Magistrate had no power to transfer any criminal case from a Village Magistrate, the intention of the Legislature seems obvious.

I cannot bring myself to believe that the Legislature intended to give a power of transfer when the case was theft of an article of the value of not more than one rupee and not to give this power in the case of the trivial offences referred to in section 10 of

(1) I.L.R., 15 Mad., 94.

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Regulation XI of 1816. I can conceive no object for making this distinction. The question is can we give effect to the intention of the Legislature without unduly straining the words of section 528. I think we can. Under section 6 of the Regulation of 1821 the powers granted by the Regulation of 1816 to punish trivial offences "are hereby extended . . . to the punishment of petty thefts, etc." It seems to me that the effect of those words is that the provisions of the Regulation of 1816 with reference to criminal offences of a trivial nature are implicitly incorporated and re-enacted in the Regulation of 1821 and that the head of a village under Madras Regulation IV of 1821 has jurisdiction under that Regulation to deal with cases of petty theft, and also has jurisdiction both under that Regulation and under the Regulation of 1816 to deal with the trivial offences referred to in the earlier Regulation.

This being so I think it was competent for the Deputy Magistrate to make the order of transfer.

BHASHYAM AYYANGAR, J.—The question for decision in this case is whether, under section 528, Criminal Procedure Code, a Sub-Divisional Magistrate can withdraw from the head of a village, a case of "a trivial nature"—viz., "of abusive language"—and refer the same for trial to a Magistrate subordinate to him. The solution of the question depends upon the right construction of sub-section 4 of section 528, Criminal Procedure Code, which was introduced for the first time in the Code of 1898 and which runs as follows:—

"The head of a village under Madras Regulation IV of 1821 is a Magistrate for the purposes of this section."

If, as is invariably the case, in various enactments [*e.g.*, section 50 of Act XXIV of 1859; section 6 of Act I of 1871; section 19, clause 16, of Act VII of 1870 (Court Fees); section 26 (explanation) of Act I of 1872 (Evidence Act)] including section 1 (2) (*b*) of the Criminal Procedure Code, the functionary in question had been referred to in the above clause as "the head of a village in the Presidency of Fort St. George," no doubt could arise as to the power of a District Magistrate or a Sub-Divisional Magistrate to withdraw *any* case from the head of a village and refer it for trial to any other Magistrate or head of a village subordinate to him. The head of a village in this Presidency is empowered to act as a Magistrate and deal with "cases of a trivial nature, such as abusive language, inconsiderable assaults or

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affrays," by section 10 of Regulation XI of 1816, and with cases of petty thefts by section 6 of Regulation IV of 1821. It will be noted that in sub-section 4 of section 528, Criminal Procedure Code, reference is made only to Regulation IV of 1821 and not to Regulation XI of 1816. If the object of the Legislature had been to empower District and Sub-Divisional Magistrates to transfer any case from the head of a village, it is unaccountable that it should have departed from the usual phraseology used in section 1 (2) (*b*) of the Criminal Procedure Code, and the various other enactments already referred to or that reference should have been made only to Regulation IV of 1821 instead of to both that and Regulation XI of 1816. The conclusion I have come to is that the power of transfer is limited to cases of "petty thefts" which are triable by heads of villages under Regulation IV of 1821 and does not extend to "cases of abusive language, and inconsiderable assaults and affrays" which are also triable by heads of villages but under Regulation XI of 1816.

The obvious and grammatical interpretation of sub-section 4 of section 528, Criminal Procedure Code, is that the head of a village *acting* under Madras Regulation IV of 1821 is a Magistrate for the purposes of section 528. I can see no reason for departing from this interpretation and, in my opinion, such interpretation leads to no absurd or incongruous results. It is by no means difficult—were it necessary to do so—to assign reasons why the Legislature, while conferring on District and Sub-Divisional Magistrates power to withdraw cases from the heads of villages, should have deliberately limited that power to cases of theft only. Cases dealt with by heads of villages under Regulation XI of 1816 are expressly of a trivial nature—a conviction in respect of which will in no case affect the character of the accused or subject him to any civil disability—and if it be one of "abusive language," it will, in the majority of cases, not amount to any offence under the Indian Penal Code. But the case of a theft, though it be a petty one, the value of the property stolen not exceeding one rupee, stands altogether on a different footing. It is a serious offence under the general criminal law and a conviction for such an offence will permanently affect the character of the accused and subject him also to certain civil disabilities. There is nothing said in the Code of Criminal Procedure as to the law which is to be applied to a case transferred from the head of a village to a Magistrate appointed

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under the Code of Criminal Procedure. Under both the Regulations the head of a village may "on a verbal enquiry dismiss the parties" or "if the offence charged is proved to have been committed by the accused and is of a nature deserving of punishment, he may confine the accused in the village choultry for a time not exceeding 12 hours" or if he be of a low caste, "put him in the stocks for a time not exceeding 6 hours." There can, however, be little doubt that when the case is transferred to and tried by a Magistrate, it will have to be dealt with, by him, under the Indian Penal Code and the Code of Criminal Procedure and not under the provisions enacted in the Regulations. Cases of a trivial nature referred to in section 10 of Regulation XI of 1816 may not, in some cases, amount to an offence at all under the general criminal law and the Magistrate may therefore be unable to deal with the same under the Indian Penal Code and the Code of Criminal Procedure, whereas every case of theft under Regulation IV of 1821 can be dealt with by a Magistrate under the Indian Penal Code, and in some cases though the value of the property stolen may not be more than one rupee, the punishment which the head of a village can, under Regulation IV of 1821, inflict will be very inadequate and it will therefore be desirable to transfer the case to a Magistrate who can deal with it effectually under the Penal Code. It seems to me therefore by no means unlikely that the Legislature did not consider it advisable or necessary to empower District and Sub-Divisional Magistrates to withdraw, from heads of villages, "cases of a trivial nature" falling under Regulation XI of 1816 and deliberately limited the power to cases of theft falling under the later Regulation IV of 1821.

I am unable to adopt the view that inasmuch as the powers conferred upon heads of villages by clause (1) of section 10 of Regulation XI of 1816, to deal with and punish the offences therein referred to, have, by incorporation with section 6 of Regulation IV of 1821, been extended to the punishment of petty thefts under that section, the head of a village should now be regarded as acting under Regulation IV of 1821, not only when he deals with cases of petty theft but also when he deals with "cases of a trivial nature" mentioned in section 10 of the Regulation of 1816 and that therefore under section 528 (4) of the Criminal Procedure Code any case may be withdrawn from the head of a village. This view proceeds on the assumption that not only does

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section 6 of the later Regulation incorporate with it the portion in question of section 10 of the earlier Regulation, but that section 10 has in its entirety been consolidated with and that it has merged in section 6 of Regulation IV of 1821. The case of *Boden* v. *Smith*(1) in no way lends any support to this view. All that was held in that case was that assuming that the 8 & 9 Vict., cap. 21, was a "Local Act" and that as such the period of limitation applicable to suits thereunder would be the general period provided by 5 & 6 Vict., cap. 97, for suits under "Local Acts," yet that by reason of the incorporation generally in 8 & 9 Vict., of "all the provisions of any Act of Parliament relating to County Rates" (The County Rates Act 55 Geo. III, cap. 51), the shorter period prescribed by the 55 Geo. III should be held to apply to suits under the 8 & 9 Vict,. cap. 21, and that as far as regards the period of limitation for actions under this statute the 5 & 6 Vict., cap. 97, must be taken to have been repealed.

If the correct view be that section 10 of Regulation XI of 1816 has become merged in section 6 of Regulation IV of 1821, the former must be taken to have been spent and now become obsolete and heads of villages should be regarded as acting under Regulation IV of 1821, not only when they deal with cases of petty theft, but also when they deal with "cases of a trivial nature, such as abusive language, inconsiderable assaults and affrays." In none of the Acts passed from time to time, ending with Act XI of 1901 repealing obsolete enactments, has the Indian Legislature adopted this view either with reference to section 10 of Regulation XI of 1816 or with reference to various other enactments on the Indian Statute-book, which have been applied to or incorporated with later enactments. If the Legislature were now to repeal section 6 of Regulation IV of 1821, could it be contended that heads of villages in this Presidency could not deal with "cases of a trivial nature" provided for by section 10 of the earlier Regulation? Section 10 of Regulation XI of 1816, notwithstanding its incorporation with section 6 of the later Regulation has continued and still continues to be in force as part of the earlier Regulation and if the Legislature were now to repeal this Regulation, heads of villages could no longer deal with offences of "a trivial nature" mentioned in section 10. But such repeal would not affect the

(1) 18 L.J.C.P., 121.

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operation of section 6 of Regulation IV of 1821,—as regards petty thefts provided for therein—and this section would operate just as if the words of section 10 of the Regulation of 1816, defining the powers of heads of villages to deal with the trivial offences therein mentioned, and only those words had, without any reference to that section, been actually reproduced, written and printed in section 6 itself when it was passed [per Lord Denman, C.J., in *The Queen* v. *The Inhabitants of Brecon* (1).] Where the provisions of one statute are incorporated by reference in another,—a method which is frequently adopted in drafting statutes, to save labour and avoid repetition—the effect is not to repeal the former enactment by consolidating it with the latter, but only to extend its provisions, without actually reproducing the words therein to the new matters in the later enactment; and, should the Legislature afterwards repeal the earlier statute, the provisions thereof, which have been incorporated in the later enactment continue in force for the purposes of the later enactment notwithstanding such repeal [*Reg.* v. *Merionethshire*(2), *The Queen* v. *Smith*(3), see also section 4 of (India) Act XI of 1901].

As the case which was withdrawn by the Sub-Divisional Magistrate from the head of the village was one of "abusive language" and not "theft," the order of the Sub-Divisional Magistrate should, in my opinion, be cancelled.

The case came on for further hearing before the Court constituted as above.

V. Krishnasami Ayyar for complainant.

V. C. Desikachariar for the accused.

JUDGMENT.—The question raised in this reference is whether a District or Sub-Divisional Magistrate has jurisdiction, under section 528, Criminal Procedure Code, to transfer any criminal case from the file of a Village Magistrate or whether the power of transfer is limited to the cases, viz., petty thefts which a Village Magistrate is empowered by Regulation IV of 1821 to try and punish.

We think that the power of transfer is limited to the latter class of cases.

(1) 15 Q.B. Rep., 813 at p. 816. (2) 6 Q.B. Rep., 343.
(3) L.R., 8 Q.B., 146.

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Section 1 (2) (*b*) of the Code of Criminal Procedure enacts that, in the absence of any specific provision to the contrary, nothing in the Code shall apply to "heads of villages in the Presidency of Fort St. George," and prior to 1898 it was held by the Courts that the effect of these words was that the power of transfer vested in the District and Sub-Divisional Magistrates under section 528 did not extend to cases pending before Village Magistrates in this Presidency.

By Act V of 1898, section 528 was amended: sub-section 4 of the amended section is as follows:—

"The head of a village under Madras Regulation IV of 1821 is a Magistrate for the purposes of this section."

The expression "under Madras Regulation IV" is an elliptical one, and might grammatically mean either *appointed* under that Regulation or *acting*, that is, exercising powers under that Regulation. The Regulation, however, does not deal with the appointment of heads of villages, but merely gives them the same powers in regard to punishing petty thefts, which they already had under Regulation XI of 1816 "in cases of a trivial nature, such as abusive language and inconsiderable assaults and affrays." The clause therefore means "the head of a village acting in exercise of the powers conferred on him by Regulation IV of 1821." We do not think that it can properly be held that the provisions of Regulation XI of 1816 are implicitly incorporated and re-enacted in Regulation IV of 1821. If the Legislature had intended to give the power of transfer in the trivial cases punishable under Regulation XI of 1816, we think that that Regulation would have been specified in the section along with Regulation IV of 1821, or else the language of section 1 of the Code would have been followed and no reference to any particular Regulation would have been made.

The reference to Regulation IV was, we think, made advisedly for the purpose of limiting the power of transfer to cases punishable under that Regulation. There are many reasons why the Legislature may have thought such a limitation desirable. Theft —even petty theft—is a serious offence, punishable under the Penal Code with imprisonment for three years. A conviction for theft permanently affects the character of the accused and entails civil disabilities, and liability on a second conviction to greatly enhanced punishment. Conviction for the trivial offences triable

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under Regulation XI of 1816 entails none of these consequences. It may, therefore, well have been thought that the power of transfer was necessary in the one class of cases though not in the other. However that may be, when the words of the enactment are plain in themselves and can reasonably be given effect to in their ordinary grammatical meaning, we think that they should be so interpreted.

We, therefore, hold that the Sub-Divisional Magistrate had no power to transfer the cases of insult pending before the Village Magistrate to the Stationary Sub-Magistrate of Chidambaram and we set aside his order.

As, however, the transfer is on the merits advisable, we, in exercise of our powers under section 29 of the Letters Patent, transfer the case to the Sub-Magistrate specified in the Sub-Divisional Magistrate's order.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Benson.

1902. August 18, 20. September 9.

SRI RAJAH SOBHANADRI APPA RAO BAHADUR (FIRST DEFENDANT), APPELLANT,

v.

SRI RAJAH VENKATANARASIMHA APPA RAO BAHADUR AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 2 TO 17), RESPONDENTS.*

*Land tenure—"Mokhassadars"—Distinction between outright grant subject to performance of services and grant of an office with remuneration from use of lands—*Primâ facie *ownership—Burden of proof of right to eject or resist ejectment.*

The tenure known as "mokhassa" is one which is created by an assignment of a village or land to an individual either rent free or at a low quit-rent on condition of service.

Where the grantor of land on mokhassa tenure has made the grant as payment for services in lieu of money, *semble*, that he may discontinue the employment and, with it, the remuneration, and resume the subject-matter of the grant.

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* Appeal No. 157 of 1900 presented against the decree of S. Gopalachariar, Subordinate Judge of Kistna at Masulipatam, in Original Suit No. 6 of 1899.

But where the grant was outright, subject only to the performance of certain services, the grantor is only entitled to insist upon the performance of the services, and is not entitled to eject the grantees until such performance is refused.

Where the lands granted were the lands of the Zamindar and the grant was on the condition that services should be rendered, and that a certain sum should be payable to the Zamindar in recognition of his ownership, *prim facie* the ownership would remain with the Zamindar; *Sanniyasi* v. *Salur Zamindar*, (I.L.R., 7 Mad., 268); and the burden of proving the plea that the plaintiff was not entitled to eject would lie on the person resisting ejectment; *Mahadevi* v. *Vikrama*, (I.L.R., 14 Mad., 365), referred to.

A village was granted on a quit-rent of Rs. 144 per annum, and on condition that the grantees would provide the services of certain persons to act as custodians of the Zamindar's property and to give personal attendance on the Zamindar. These services were rendered intermittently and not continuously, and batta was paid to the grantees when on duty. The quit-rent had never been varied throughout a period of 120 years, and the land descended hereditarily from father to son, there having been no instance of resumption during that period. Moreover, the present holder of the Zamindari had taken leases from the mokhassadars as if they were the owners of the land, and had purchased other lands from them:

Held, that the village had been granted in perpetuity to the mokhassadars and that the present holder of the zamindari was not entitled to dispense with the services and resume the lands.

Forbes v. *Meer Mahomed Tuquee*, (13 M.I.A., 438 at p. 464), and *Kooldeep Narain Singh* v. *The Government*, (14 M.I.A., 247), followed.

SUIT to recover a village. The facts of the case and the grounds on which plaintiff based his claim are fully set out in the judgment. The Subordinate Judge decreed in plaintiff's favour and ordered possession of the village to be delivered to him.

First defendant preferred this appeal.

V. C. Desikachariar and *C. R. Thiruvenkatachariar* for appellant.

Hon. Mr. *C. Sankaran Nayar* and *P. Nagabhushanam* for respondents.

JUDGMENT.—The village of Hanumantunigudem, the subject of this suit, is a mokhassa village granted to an ancestor of defendants Nos. 2 to 17 by the Zamindar of Nuzvid. In the division of the Nuzvid zamindari in 1882 this village fell to the plaintiff's share. But the whole village is now in the possession of the first defendant, not in his right as another sharer in the zamindari, which he is, but as the assignee of defendants Nos. 2 to 17. He holds the lands that are usually leased out to cultivators under four leases (exhibit I series) obtained by his father from

defendants Nos. 2 to 17 who represent the shareholders of the four equal shares into which the village is divided, and these leases are for a term of thirty years from 1881. He holds the *Kamatam* lands or the lands which defendants Nos. 2 to 17, who will hereafter be called the mokhassadars, ordinarily cultivate themselves under a purchase by himself in the year 1895 in execution of a decree (exhibit XIV). The plaintiff sues to eject the first defendant from the entire village on the grounds that as a mokhassa village it was granted to the ancestor of defendants Nos. 2 to 17 subject to certain services to be rendered to the Zamindar, that these services he has now dispensed with, and that he consequently is entitled to resume the grant. Defendants Nos. 2 to 17 do not defend the suit. In fact they appear to be colluding with the plaintiff, to whom three-fourths of them have made assignments similar to those made by all of them to the first defendant and his father (exhibits III series and VII series). The Subordinate Judge held (1) that the village was granted for the purpose of rendering services to the Zamindar and (2) that it was resumable at the will and pleasure of the Zamindar for the time being. On the appeal by the first defendant these are the broad questions we have to decide. In regard to the first point, the "mokhassa" is a well known tenure in the Northern Circars and the term itself implies that it is a tenure subject to service. In Wilson's Glossary it is defined as "a village or land assigned to an individual either rent-free or at a low quit-rent *on condition of service*." There is no deed or sanad setting forth the particulars of the grant in this case. But from the documentary evidence contained in the exhibits A, B and E there is no doubt whatever that the village was granted about the year 1776 on a quit-rent of Rs. 144 per annum for providing the services of one Naik and 14 peons, whose duties were to guard the Zamindar's fort, treasury, &c., and to attend upon the Zamindar on hunting excursions and the like. From the entries in the inam statement, exhibit A, it further appears that the services were actually being rendered in 1860, and we may therefore presume up till then. But the question is concluded by the stipulation contained in all the leases (exhibit I series) taken by the first defendant's father in 1881 from the mokhassadars in which it is recited that they will "be doing the services of the Zamindar as usual," and have taken that responsibility upon themselves. We have therefore no hesitation in

agreeing with the Subordinate Judge that the mokhassadars hold their lands conditionally upon the performance of the services mentioned above.

The second and really difficult question is whether the Zamindar can dispense with the services and resume the lands. It is not the plaintiff's case that the mokhassadars have refused to render him service, in which event it can hardly be questioned that his right to resume would accrue. But the plaintiff's case is that, even if they are ready and willing to continue their services, he can choose to dispense with them and revoke the grant. Now, if he could show that the lands were given to the mokhassadars simply as payment for their services in lieu of money, then he might be entitled to say "I discontinue the employment and therefore put an end to the remuneration for the same." But if the land was granted outright subject only to certain services to be performed, all that the plaintiff could insist upon would be that those services should be performed, and not until such performance was refused could he eject the grantees. Mr. Justice Jackson has observed in the case of *Narain Singh* v. *Mahadeo Singh*(1) and their Lordships of the Privy Council have agreed with the observation in *Forbes* v. *Meer Mahomed Tuquee*(2):—"It appears to me that there is a clear distinction between the grant of an estate burdened with a certain service, and the grant of an office the performance of whose duties is remunerated by the use of certain lands." If the grant in this case belongs to the former class it would not be resumable, for which proposition we have the authority of the Chief Justice, Sir Barnes Peacock, in the case just quoted. The following are his observations on the point, at page 203:—

"Some cases were cited to show that, even assuming these lands to be subject to a *ghatwali* tenure, the Zamindar has a right, whenever he pleases, to dispense with the *ghatwali* services, and to take back the lands. Now, I must say that this is the first time I have ever heard such a contention as that a landlord can dispense with the services upon which lands are held whenever he pleases, and take back the estate. It is not because the services are released or dispensed with, or become unnecessary, that the estate can be resumed. If a grantor release

(1) 6 W.R., (C.R.), 199. (2) 13 M.I.A., 438 at p. 464.

the services, or a portion of the services, upon which lands are holden, the tenant may hold the land free of the services; but the landlord cannot put an end to the tenure and resume the lands. Many services upon which very valuable estates are held are of little value now. The estates may be very valuable and the services almost valueless. But some large landed proprietors would be somewhat astonished if they were told that the services have been dispensed with, and their estates are liable to be resumed. It might as well be contended that, if lands were granted at a small quit-rent, the landlord might relinquish or dispense with the payment of the rent and take back the lands.

"It is said, in the plaintiff's written statement, that the sannad was granted upon condition of rendering services. But even if it were so, the person to whom the condition is to be performed cannot, by dispensing with the performance of the condition, put an end to the grant. If lands were granted upon condition of paying a certain rent, the grantor or his representatives would have no right to say, when the lands are very valuable, 'I will dispense with the performance of the condition. I will exempt you from the payment of the rent and I will take back the estate.' If he could not do so in the case of rent, why should he be able to do so in the case of services?"

The Judicial Committee have expressed their concurrence in these principles also in *Forles* v. *Meer Mahomed Tuquee*(1), already referred to, at page 463 and again in *Kooldeep Narain Singh* v. *The Government*(2) wherein the decision of the Calcutta High Court based on these principles was confirmed in appeal. So that what we have to determine is whether, in the circumstances of this case, the holding of the mokhassadars is to be deemed a holding of an office for the remuneration of which they were allowed the use of the land or a holding upon the grant of the land itself but burdened with a service. We can only look to the facts of this particular case. It will be no guide to us to take cases of a different character or with different conditions which have been brought to our notice, such as *amaram* grants in this Presidency (*Unide Rajaha Raje Bommarauze Bahadur* v. *Penmasamy Venkatadri Naidoo*(3);

(1) 13 M.I.A., 438 at p. 464. (2) 14 M.I.A., 247. (3) 7 M.I.A., 128.

Narasayya v. *Venkatagiri Rajah*(1) which have been held to be resumable and *chakeran* or *ghatwali* grants in Bengal (*Joykishen Mookerjee* v. *The Collector of East Burdwan*(2) and *Kooldeep Narain Singh* v. *The Government* (3)) which have been held to be irresumable. No doubt in a case like this where the lands were the lands of the Zamindar and were granted on condition of rendering services and of paying a certain sum of money to the Zamindar in recognition of his ownership of the land, *primâ facie* the ownership would remain with the Zamindar (*Sanniyasi* v. *Salur Zamindar*(4)) and the burden of proving the plea that the plaintiff was not entitled to eject would lie on the first defendant (*Mahadevi* v. *Vikrama*(5)). But beyond that presumption there is nothing else to support the plaintiff's case while all the facts tell against it. In the first place no office by any particular designation was conferred upon the original grantee, but an obligation of a feudal character was imposed on him. He was simply to provide a specified number of men as custodians, so to speak, of the Zamindar's property, and their services appear to have been rendered intermittently and not continuously. Besides, they were paid in money when they actually performed such services, as appears from the inam statement (exhibit A); that is to say, batta was given to them when actually on duty. It is also certain that in later years their services were not in frequent requisition, because, as Mr. Taylor points out in his report (exhibit E), the Zamindar would have had to pay in the shape of batta more than the services were worth. In the second place, the following circumstances indicate as plainly as possible a fixity of tenure. The mokhassadars have paid a uniform rent of Rs. 144 a year for the last 120 years without alteration at any time, and the land has descended from father to son hereditarily. There has been no instance of resumption, or even an attempt at resumption during all this time. There has also been no attempt to enhance or to alte the rent or to interfere with the devolution of the property from heir to heir. Lastly the plaintiff himself has not only taken leases from the mokhassadars, as if they were the owners of the land, but he has actually purchased (exhibit VII series of 1883) some of their

(1) I.L.R., 23 Mad., 262.
(2) 10 M.I.A., 16.
(3) 14 M.I.A., 247.
(4) I.L.R., 7 Mad., 268.
(5) I.L.R., 14 Mad., 365.

Kamatam lands, which shows a consciousness on his part, even if it does not amount to an admission, that the mokhassadars hold a permanent tenure subject, albeit, to a burden of service, for he would not have paid hard cash for what he could on his present contention have got for nothing. We think these various considerations are sufficient to show that the plaint village was granted in perpetuity to the mokhassadars. We attach no weight to two circumstances relied on by the plaintiff as showing that the grant was resumable at will. The first is that, in a statement prepared by the Circuit Committee in the year 1786 (exhibits G and G1) and referred to in Mr. Taylor's report (exhibit E), it was noted that this and other mokhassas were given by the Zamindar and are resumable whenever he pleases, and the second circumstance is that, in assessing the zamindari in respect of peishcush in the permanent settlement of 1802 (exhibit D), the Government treated this mokhassa village as one resumable by the Zamindar, because they made no deduction in fixing the peishcush on account of it. It will be observed that both these are acts of Government and cannot be said to be disinterested, for in the first matter the justification for including the full value of the mokhassa in the Government collections was this very ground, that they were resumable by the Zamindar at pleasure, and in the second matter upon the same ground the Government was benefited by imposing an increased peishcush on the zamindari. In any case we do not see how these dealings by Government with the Zamindar's property can affect the rights of the mokhassadars as against the Zamindar. The result is that we must hold that the plaint village is not resumable by the plaintiff, so far as the first defendant is concerned, as regards the *Kamatam* lands at any time, and as regards the leased lands until the year 1911, when the leases for thirty years held by the first defendant expire. With respect to these latter lands we may say that even if we had found for the plaintiff's general title to resume, he could not have resumed these leased lands until 1911, as, in a suit brought by the first defendant's father against the plaintiff and others, it was held that the first defendant's leases were valid (exhibit VI). Plaintiff then set up a plea that he had resumed the lands, which of course implied his right to do so. But it was found against him that he had not resumed the lands. It is true that his right to resume was not then adjudicated

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upon, but, as already observed, his right to do so was implied in his plea that he had resumed and it was his duty then to establish that right if he wished to invalidate the leases. Being declared valid in that suit and running as they do for a term of thirty years they must be held good for that period as a matter that is *res judicata*. This suit, so far as the leases go, is therefore premature.

There are two minor points to be noticed to make this judgment complete. The first is the first defendant's plea that he received no notice to quit. We agree with the Subordinate Judge that he had due and reasonable notice. The other point is that raised in the memorandum of objections put in by the plaintiff that the mesne profits awarded by the Subordinate Judge are not sufficient. We agree with the Subordinate Judge's finding on the point, and accordingly dismiss the memorandum of objections with costs, as well as upon the ground that it must fail as the appeal succeeds. The appeal is allowed and the plaintiff's suit is dismissed with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1902. December 2, 9, 10.

RAJAH OF VENKATAGIRI (PLAINTIFF), APPELLANT,

v.

ISAKAPALLI SUBBIAH AND OTHERS (DEFENDANTS NOS. 1 TO 36, 38 TO 43, 45 TO 68), RESPONDENTS.*

Limitation Act—XV of 1877, *ss.* 23, 28, *sched. II, arts.* 120, 142, 144—*Attachment by Magistrate under s.* 146, *Criminal Procedure Code—Cross-suits for declaration of right to possession—"Continuing wrong"—Limitation.*

Certain lands were attached by a Magistrate, in 1886, under section 146 of the Code of Criminal Procedure, in consequence of disputes relating to their possession. The Magistrate continued in possession of the lands, and realised some

* Appeal Suits Nos. 149 and 150 of 1900 presented against the decrees of T. M. Swaminadha Ayyar, District Judge of Nellore, in Original Suits Nos. 20 and 26 of 1897.

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income from them. Both claimants instituted, in 1897, suits in which each claimed the lands as his own, and sought to obtain a declaration of title to them, as well as to the accumulated income, with a view to obtaining possession of the lands and money from the Magistrate. On the question of limitation being raised:

Held, that in so far as the suits were for declaration of title to immoveable property and the profits therefrom, they were governed by article 120 of schedule II to the Limitation Act.

Articles 142 and 144 were not applicable, the suits not being for the recovery of immoveable property, within the meaning of either. The actual or physical possession was with the Magistrate, who was not and could not be made a party to the suits. With regard to article 142 the Magistrate could not be regarded as having dispossessed either party nor could either party be regarded as having discontinued possession. The attachment by the Magistrate operated, in law, for purposes of limitation, simply as a detention or custody, pending the decision by a Civil Court, on behalf of the party entitled. For the purposes of limitation the seizin or legal possession was, during the attachment, in the true owner.

Goswami Ranchor Lalji v. *Sri Girdhariji*, (I.L.R., 20 All., 120), commented on.

With regard to article 144, it was still less applicable, as each plaintiff claimed as the true owner and as being in legal possession (by the possession of the Magistrate), and the legal possession for purposes of limitation was constructively in the person who had the title at the date of the attachment, and such title could not be extinguished by the operation of section 28, however long the attachment might continue.

The right to sue accrued on the date of the attachment. The cause of action for the declaratory suit was the alleged wrongful denial by the defendant in each case of the plaintiff's title and possession, and the procuring by such denial the attachment by the Magistrate. There was no continuing wrong, within the meaning of section 23 of the Limitation Act, so as to give a fresh starting point for limitation at every moment of the time during which the attachment continued.

Chukkun Lal Roy v. *Lolit Mohan Roy*, (I.L.R., 20 Calc., 906 at p. 925), commented on.

Though the suits were barred in so far as they were for a declaration of right to the lands, that bar affected only the remedy or relief by way of declaration and did not extinguish the right and title of the true owner to the property. The operation of section 28 of the Limitation Act is limited to cases in which the bar of limitation applies to suits for possession of property. The right of the true owner to lands cannot be extinguished, however long such an attachment may continue; nor can lands attached under section 146 of the Code of Criminal Procedure be ever forfeited to Government.

SUITS for declarations of title to land, and to recover possession of them.

The following statement of facts is taken from the judgment of the High Court:—

"These are cross-suits between the agraharamdars of

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Daggavolu on the one hand and the Rajah of Venkatagiri on the other—the proprietor of the villages of Vakyam and Kadagunta adjoining Daggavolu. The lands which form the subject-matter of the suits were attached by the Sub-Divisional Magistrate of Naidupet on the 5th May 1886, under section 146 of the Criminal Procedure Code, in consequence of certain disputes between the agraharamdars of Daggavolu and the ryots of Vakyam in regard to the possession of these lands. It does not appear clearly whether the Magistrate acted under section 146 because he was satisfied that neither of them was then in possession or because he was unable to satisfy himself as to which of them was then in possession. The Magistrate has since continued to be in management of the lands and at the date of the suit there was in deposit a sum of Rs. 207 (or Rs. 267 ?), being the net income realized by him therefrom. The plaintiffs in the two suits claim the lands respectively as their own and seek to obtain a declaration of his or their title to the lands and the amount in deposit above referred to, with a view to producing such adjudication before the Sub-Divisional Magistrate and obtaining from him possession of the lands and payment of the sum in question. There is also in each suit a prayer for an injunction restraining the other party from taking possession of the lands and from interfering with the enjoyment of the lands by the plaintiffs. This last is an unintelligible prayer, the injunction sought for being really to restrain the other party from prosecuting his suit successfully and applying to the Sub-Divisional Magistrate to obtain possession of the lands and from interfering with the plaintiff's enjoyment thereof, after he or they obtain possession of the lands from the Magistrate. It is probably in consequence of this prayer for an injunction that *ad valorem* Court fee was paid, instead of a fixed fee of Rs. 10 for a mere declaration."

The District Judge found in favour of the agraharamdars regarding the lands claimed by them, and to the rents and profits therefrom held in deposit. He dismissed the Rajah's suit—20 of 1897.

Plaintiff in Original Suit No. 20 of 1897 preferred this appeal.

S. Subrahmania Ayyar for appellant.

T. V. Seshagiri Ayyar for respondent.

JUDGMENT.—[After setting out the facts already printed.]

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As on the face of the plaint, the suits seem to be merely of a declaratory character, neither party being in actual possession, the preliminary question was argued as to whether the suits were or were not barred by the six years' rule of limitation, prescribed by article 120 of the second schedule to Act XV of 1877, article 47, which prescribes a period of three years, being applicable only to a case in which a Magistrate, under sub-section 6 of section 145, Criminal Procedure Code, confirmed the possession of either party, and not to a case, like the present, when, acting under section 146, he attached the property (*Akilandammal* v. *Periasami Pillai*(1), *Goswami Ranchor Lalji* v. *Sri Girdhariji*(2)). In the Madras case, the suit was brought within six years from the date of the Magistrate's order of attachment. But in the Allahabad case, the suit was apparently brought more than six years after the Magistrate's order and the lower Appellate Court dismissed it as barred under article 120. The High Court, however, in second appeal, after holding that article 47 was inapplicable, held, without assigning any reasons therefor, that 'the article applicable is either 142 or 144'—both of which relate to suits for 'possession' of immoveable property, the former prescribing a period of twelve years from the date of the plaintiff's dispossession or his discontinuance of possession, and the latter, twelve years from the date when the possession of the defendant becomes adverse to the plaintiff. Both the present suits were brought more than 10 years after the date of attachment and it is therefore to the interest of each of the contesting parties to rely upon the above decision of the Allahabad High Court and contend that the period of limitation applicable to the suit is twelve years and not six. With all deference to the learned Judges who took part in the above decision of the Allahabad High Court, we are unable to regard either of these suits as a suit for possession of immoveable property within the meaning of either article 142 or article 144. The actual or physical possession is with the Magistrate, who is not and cannot legally be made a party to the suits. So far as article 142 is concerned, the Magistrate cannot be regarded as having dispossessed either party nor can either party be regarded as having discontinued possession. If no other person

(1) I.L.R., 1 Mad., 309. (2) I.L.R., 20 All., 120.

has taken possession of the property as his own or if the so-called possession of another person is mere detention or possession on behalf of the true owner, there can have been no dispossession or discontinuance of possession in law and article 142 is inapplicable. In *Smith* v. *Lloyd*(1) Parke, B., in delivering the judgment of the Court stated as follows:—(at page 572). "We have not the slightest doubt that the title of the grantees of the mines is not barred in this case under the 3 William IV, cap. 27, sections 2 and 3, for we are clearly of opinion that that statute applies, not to cases of want of actual possession by the plaintiff, but to cases where he has been out of, and another in, possession for the prescribed time. There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute." This principle was approved of and followed by the Judicial Committee in the *Trustees & Agency Company* v. *Short*(2) in which it was held that limitation does not continue to run against the rightful owner of land after an intruder has relinquished possession before the expiration of the statutory period and that possession so abandoned by the intruder leaves the rightful owner in the same position in all respects as he was in before the intrusion took place. Both these cases were recently followed by the Privy Council in an appeal from India (*The Secretary of State for India* v. *Krishna Moni Gupta*(3)) in which it was held that in order to sustain a claim to land by limitation under the Indian Act, there must be actual possession of a person claiming as of right by himself or by persons deriving title from him and that if, before title has been perfected by limitation, there is dispossession of the intruder by the *vis major* of the floods, it will be an interruption to his possession, and the constructive possession of the land would, during its submergence,—however long it may continue—be in the true owner, and the decision of the Calcutta High Court in *Kally Churn* v. *Secretary of State*(4) in which a contrary view was taken, viz., that the possession of the trespasser must be deemed to have continued in law, while the lands were under water and to have revived on their being reformed, was overruled.

(1) 9 Exch., 562.
(2) L.R., 13 App. Cas., 793.
(3) L.R., 29 I.A., 104.
(4) I.L.R., 6 Calc., 725.

In the present case the Magistrate acted in due course of law and, either because he found that neither party was in possession or because he was unable to satisfy himself as to which of them was then in possession, he has simply attached the property. Such attachment operates in law for purposes of limitation simply as detention or custody of the property by the Magistrate who, pending the decision by a Civil Court of competent jurisdiction, holds it merely on behalf of the party entitled, whether he be one of the actual parties to the dispute before him or any other person. For purposes of limitation the seizin or legal possession will, during the attachment, be in the true owner and the attachment by the Magistrate will not amount either to dispossession of the owner, or to his discontinuing possession.

In each of the present suits, the plaintiff claims as the true owner and as being in legal possession—the physical possession by the Magistrate being one on behalf of the true owner—and prays for a declaration of his title, as against the defendant (the plaintiff in the other suit) who denies his title and claims the property as his own. Under section 146, Criminal Procedure Code, the Magistrate is bound to continue the attachment and have statutory possession of the lands for purposes of continuing the attachment until a competent Civil Court determines the rights of the parties to the dispute before him or the person entitled to the possession of the lands and he cannot deliver the property to any of the parties or other person without an adjudication by a Civil Court. During the continuance of the attachment, the legal possession for purposes of limitation will constructively be in the person who had the title at the date of the attachment and such title cannot be extinguished by the operation of section 28 of the Limitation Act, however long such attachment may continue.

In the above view article 144 will be even less applicable to the suit than article 142.

The suits, therefore, are essentially suits for declaration of title to immoveable property and the profits thereof which are in deposit, the plaintiffs respectively claiming to be in legal possession thereof and the period of limitation applicable is therefore the period of six years prescribed by article 120 of the second schedule to Act XV of 1877, which period is to be reckoned from the time when the right to sue accrued (*Pachamuthu* v.

Chinnappan(1), *Puraken* v. *Parvathi*(2) and *Muhammad Baqar* v. *Mango Lal*(3). In this view it is immaterial whether the Rajah of Venkatagiri (the plaintiff in Appeal No. 149) was or was not actually a party to the dispute before the Magistrate in 1886. The right to sue certainly accrued on the date of the attachment, the 5th May 1886, which is rightly given as the date of the cause of action in both the suits. The alleged wrongful denial, by the defendants in each case, of the plaintiff's title and possession and the procuring by such denial of the attachment by the Magistrate, is the cause of action for the declaratory suit and it is impossible to hold that there is a 'continuing wrong' within the meaning of section 23 of the Indian Limitation Act, during the time that the attachment continues so as to give for the purpose of reckoning the period of limitation a fresh starting point at every moment of the time during which the attachment continues. If the ruling of the Calcutta High Court in *Chukkun Lal Roy* v. *Lolit Mohan Roy*(4) —which decision was reversed on appeal (*Lalit Mohun Singh Roy* v. *Chukkun Lal Roy*(5)) by the Privy Council on another point—be that a suit for a declaration of title to immoveable property cannot be held to be barred so long as the plaintiff's right to such property is a subsisting right and that for purposes of limitation, the right to bring such a suit is "a continuing right" so long as the right to the property in respect of which declaratory relief is prayed for is not extinguished, we are unable to concur in it. The criterion is not whether the '*right*' is a 'continuing' one but whether the '*wrong*' is a continuing one. The actual decision in that case, however, was that the suit having been brought within six years from the time of (the widow) Rajeshwari's death—when alone the plaintiffs (as reversionary heirs) became entitled to possession or other consequential relief—the suit was amply within time. But on what principle the starting point under article 120 was taken to be the time of Rajeshwari's death does not appear.

The present suits, therefore, so far as they pray for a declaration of right to the lands in question are barred by the law of

(1) I.L.R., 10 Mad., 213.
(2) I.L.R., 16 Mad., 138.
(3) I.L.R., 22 All., 90.
(4) I.L.R., 20 Calc., 906 at p. 925.
(5) L.R., 24 I.A., 76.

limitation; but such bar affects only the remedy or relief by way of declaration and does not extinguish the right and title of the true owner to the property, the operation of section 28 of the Limitation Act being limited to cases in which the bar of limitation applies to suits for the possession of property, and for the reasons already stated neither suit can be regarded as a suit for the possession of property. The right of the true owner, therefore, to the lands cannot be extinguished, however long the attachment may continue; nor can lands attached under section 146, Criminal Procedure Code, be ever forfeited to Government and be at its disposal, as in the case of the properties of proclaimed offenders and absconding witnesses whose properties have been attached under the Code of Criminal Procedure.

In cases in which by the operation of the law of limitation the right of the true owner to the property is at the determination of the period of limitation extinguished, such extinguishment takes effect retrospectively and the consequence therefore is that the true owner cannot maintain a suit for the recovery of any rents and profits derived by the trespasser from the land before the extinguishment of the right, though such profits may be due for a period within three years before the date of the suit. But where the right is not so extinguished and the title is still subsisting, though a suit for declaration thereof may be barred, the owner's right and remedy in respect of the rents and profits derived from the property remain unaffected. In the present case, it clearly appears from paragraph 5 of the plaint in Appeal No. 150, that out of the amount in deposit the greater portion, *i.e.*, Rs. 139, represents the profits received by the Magistrate within six years before the date of the suit and the suit, therefore, so far as it seeks for a declaration of right to this amount, is not barred, article 120 being applicable to suits for declaration of right to moveable property also (*Mahomed Riasat* v. *Hasin*(1)), and the right to sue within the meaning of the third column of the article having accrued only from time to time as the profits were received.

Bearing in mind that the right to the property attached continues though the declaratory relief prayed for in respect of it

(1) I.L.R., 21 Calc., 157.

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has been barred, it will not, in a case like this, be a sound exercise of discretion to refuse to give a declaratory decree in respect of the greater portion of the amount in deposit when, in respect of such portion, relief by way of declaration is not barred by limitation. The granting of this relief will of course necessarily involve the determination of the title to the land under attachment, though if the plaintiffs in either case establish his or their title, the *decree* will have to be limited only to a declaration of right to the said portion of the amount in deposit. But the finding, in the *judgment* on the issue of title, will have the force of *res judicata* and for the purposes of section 146, Criminal Procedure Code, practically operate as a determination of the right of the successful plaintiffs to the lands under attachment as well as to the balance of the amount in deposit.

We have therefore heard the appeals on the merits, and we agree with the conclusion of the District Judge.

[Their Lordships then dealt with the evidence.]

We uphold the finding of the Judge as to the right of the agraharamdars to the lands claimed by them in their plaint, and to the rents and profits thereof in deposit, but, for the reasons already given, declaratory relief will have to be limited to the amount realized during the six years immediately preceding the suit, viz., Rs. 139.

The decree in Appeal Suit No. 150 will be modified accordingly and the appellant therein must pay the respondents' costs. Appeal Suit No. 149 is dismissed with costs.

APPELLATE CRIMINAL—FULL BENCH.

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

IN THE MATTER OF RAMAYA NAIKA (ACCUSED), PETITIONER.*

1903. February 6.

Penal Code—Act XLV of 1860, s. 187—Rendering assistance to a public servant—Refusal to sign search list by person who attended search under Abkári law—Liability—Criminal Procedure Code—Act V of 1898, s. 103 (1)—Party called upon to attend and witness a search.

A person was called upon by an Abkári Inspector to attend a search held under section 103 of the Code of Criminal Procedure, and did so. He, however, refused to sign the search list when it was prepared. On a charge being preferred against him under section 187 of the Indian Penal Code of intentionally omitting to assist a public servant in the execution of his duty:

Held, that the accused was not guilty of an offence under section 187. Assuming that a person called upon to attend and witness a search, under section 103 of the Code of Criminal Procedure, is under a legal obligation to attend the search and sign the search list, the "assistance" which a person is bound, by the earlier part of section 187 of the Penal Code, to render is *ejusdem generis* with the various forms of assistance referred to in the latter part of the section. It must have some direct personal relation to the execution of the duty by the public officer. The signing of the search list required by section 103, is an independent duty which is imposed on the witness, whereas the word, "assistance," as used in the section, implies that the party who assists is doing *something which, in* ordinary circumstances, the party assisted could do for himself.

QUESTION referred to a Full Bench. Accused was charged before the Second-class Magistrate of Kasaragod taluk with having wilfully neglected to aid a public servant, under section 187 of the Indian Penal Code. The complaint was lodged by the Sub-Inspector of Abkári and Customs, under the orders of his Inspector. Complainant stated that on 18th March 1902 he had visited a certain house with the object of searching it for contraband liquor under the Abkári Act. He called upon the accused and others, as respectable inhabitants of the locality, to accompany

* Criminal Revision Case No. 524 of 1902, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of V. Ramachendra Rau, General Duty Deputy Magistrate of South Canara, in Criminal Appeal No. 78 of 1902, presented against the conviction and sentence of C. Narayanan, Stationary Second-class Magistrate of Kasaragod, in Criminal Case No. 298 of 1902.

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him and witness the search. The accused attended with reluctance and was present during the search, but, as the complainant alleged wilfully neglected and refused to attest the search list, though his attention was drawn to section 187 of the Indian Penal Code, and he was warned that he was bound to comply with the complainant's request. It was stated by the prosecution that the reason which the accused gave for his refusal was that if he attested the search list he would have to attend at the enquiry and at Courts, which would put him to expense. The Magistrate held that this was not a lawful excuse, and that the conduct of the accused was an intentional omission to render or furnish assistance within the meaning of section 187, and inflicted a fine of Rs. 50 with one week's simple imprisonment on default. An appeal to the Deputy Magistrate was dismissed.

The accused preferred this criminal revision petition.

K. N. Ayya for petitioner.

The Public Prosecutor in support of the conviction.

The case came, in the first instance, before Subrahmania Ayyar and Davies, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.—The accused, on requisition, attended a search held under section 103 of the Code of Criminal Procedure, and witnessed the search, but refused to sign the search list when it was duly prepared. The refusal was intentional. The question is whether the accused was guilty of an offence under section 187 of the Indian Penal Code. Having regard to the importance of the question, we refer it for the decision of a Full Bench.

The case came on for hearing in due course before the Full Bench constituted as above, when the Court expressed the following

OPINION.—For the purposes of the question referred we assume that a party called upon to attend and witness a search under section 103 (1) of the Code of Criminal Procedure is under a legal obligation to attend the search and sign the search list.

Section 187 of the Indian Penal Code provides, first, in general terms, for the punishment when a person being bound by law to render assistance to a public servant in the execution of his public duty intentionally omits to assist; secondly, it provides for the punishment when the assistance is demanded for certain specified

IN THE MATTER OF RAMAYA NAIKA.

purposes. We think the "assistance" referred to in the former part of the section is *ejusdem generis* with the various forms of assistance specified in the latter half. The "assistance" must have some direct personal relation to the execution of the duty by the public officer. The signing of the search list required by section 103 is an independent duty imposed on the witness. The word "assistance" as used in the section implies that the party who assists is doing something which, in ordinary circumstances, the party assisted could do for himself.

Our answer to the question referred is, that on the facts stated, the accused was not guilty of an offence under section 187 of the Indian Penal Code.

APPELLATE CRIMINAL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Bhashyam Ayyangar.

VEMURI SESHANNA AND ANOTHER, ACCUSED IN CRIMINAL CASE No. 180 OF 1902.* 1902. January 16.

Criminal Procedure Code—Act V of 1898, s. 423 (b)—Conviction of two accused and order against both accused to pay Court and process fees in equal shares—Acquittal of one accused on appeal—Order by Appellate Court for entire Court and process fees—Legality—"Enhancement of sentence."

A Magistrate convicted two accused, and, in addition to the sentences which he passed on them, ordered them to pay the Court and process fees in equal shares. The Appellate Court acquitted one of the accused and ordered the other accused (whose conviction was affirmed) to pay the whole amount of the Court and process fees:

Held, that the order of the Appellate Court was legal under section 423 (*d*) of the Criminal Procedure Code and did not amount to an enhancement of sentence within the meaning of section 423 (*b*). Fees ordered to be paid under section 31 (iv) of the Court Fees Act are recoverable as if they were fines imposed by the Court, but they are not part of the fine imposed as a punishment for the offence.

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* Case referred for the orders of the High Court, under section 438 of the Code of Criminal Procedure, by R. Morris, District Magistrate of Kistna, in his letter, dated 29th November 1902, Revision Case No. 1329 of 1902 (Criminal Revision Case No. 567 of 1902).

him and witness the search. The accused attended with reluctance and was present during the search, but, as the complainant alleged wilfully neglected and refused to attest the search list, though his attention was drawn to section 187 of the Indian Penal Code, and he was warned that he was bound to comply with the complainant's request. It was stated by the prosecution that the reason which the accused gave for his refusal was that if he attested the search list he would have to attend at the enquiry and at Courts, which would put him to expense. The Magistrate held that this was not a lawful excuse, and that the conduct of the accused was an intentional omission to render or furnish assistance within the meaning of section 187, and inflicted a fine of Rs. 50 with one week's simple imprisonment on default. An appeal to the Deputy Magistrate was dismissed.

The accused preferred this criminal revision petition.

K. N. Ayya for petitioner.

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ORDER OF REFERENCE TO A FULL BENCH.—The accused, on requisition, attended a search held under section 103 of the Code of Criminal Procedure, and witnessed the search, but refused to sign the search list when it was duly prepared. The refusal was intentional. The question is whether the accused was guilty of an offence under section 187 of the Indian Penal Code. Having regard to the importance of the question, we refer it for the decision of a Full Bench.

The case came on for hearing in due course before the Full Bench constituted as above, when the Court expressed the following

OPINION.—For the purposes of the question referred we assume that a party called upon to attend and witness a search under section 103 (1) of the Code of Criminal Procedure is under a legal obligation to attend the search and sign the search list.

Section 187 of the Indian Penal Code provides, first, in general terms, for the punishment when a person being bound by law to render assistance to a public servant in the execution of his public duty intentionally omits to assist; secondly, it provides for the punishment when the assistance is demanded for certain specified

purposes. We think the "assistance" referred to in the former part of the section is *ejusdem generis* with the various forms of assistance specified in the latter half. The "assistance" must have some direct personal relation to the execution of the duty by the public officer. The signing of the search list required by section 103 is an independent duty imposed on the witness. The word "assistance" as used in the section implies that the party who assists is doing something which, in ordinary circumstances, the party assisted could do for himself.

Our answer to the question referred is, that on the facts stated, the accused was not guilty of an offence under section 187 of the Indian Penal Code.

APPELLATE CRIMINAL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Bhashyam Ayyangar.

VEMURI SESHANNA AND ANOTHER, ACCUSED IN CRIMINAL CASE No. 180 OF 1902.* 1903. January 16.

Criminal Procedure Code Act V of 1898, s. 423 (b)—Conviction of two accused and order against both accused to pay Court and process fees in equal shares—Acquittal of one accused on appeal—Order by Appellate Court for entire Court and process fees—Legality—"Enhancement of sentence."

A Magistrate convicted two accused and, in addition to the sentences which he passed on them, ordered them to pay the Court and process fees in equal shares. The Appellate Court acquitted one of the accused and ordered the other accused (whose conviction was affirmed) to pay the whole amount of the Court and process fees.

Held, that the order of the Appellate Court was legal under section 423 (d) of the Criminal Procedure Code and did not amount to an enhancement of sentence within the meaning of section 423 (b). Fees ordered to be paid under section 31 (iv) of the Court Fees Act are recoverable as if they were fines imposed by the Court, but they are not part of the fine imposed as a punishment for the offence.

* Case referred for the orders of the High Court, under section 438 of the Code of Criminal Procedure, by R. Morris, District Magistrate of Kistna, in his letter, dated 29th November 1902, Revision Case No. 1330 of 1902 (Criminal Revision Case No. 567 of 1902).

VEMURI SESHANNA.

Queen-Empress v. *Tangavalu Chetti*, (I.L.R., 22 Mad., 153), and the *High Court Ruling, 20th July 1870*, (5 M.H.C.R., App. 28), distinguished.

SENTENCE, on two accused, to undergo imprisonment and to pay a fine, respectively, and to pay Rs. 3-2-0 in equal proportions on account of Court and process fees. On appeal, the Head Assistant Magistrate altered the conviction in the case of the first accused, but confirmed the sentence, and quashed the conviction in the case of the second accused. He also directed that the Court and process fees should be paid by the first accused alone to the complainant. The District Magistrate referred the case for orders, as he entertained a doubt as to the legality of the Head Assistant Magistrate's order, as the order to pay the costs was an integral part of the sentence, and to enhance the liability of the first accused by ordering him to pay the whole of the Rs. 3-2-0 instead of only a half of it was to enhance his sentence, which an Appellate Court is debarred, under section 423 of the Criminal Procedure Code, from doing. He referred to *Queen-Empress* v. *Tangavalu Chetti*(1).

The Court made the following

ORDER.—We think that the action of the Appellate Magistrate is legal under section 423 (*d*), Criminal Procedure Code, and it does not amount to an enhancement of sentence within the meaning of section 423 (*b*). Under section 31 (iv) of the Court Fees Act, the fees ordered to be repaid under that section are to be recovered as if they were fines imposed by the Court, but there is no warrant for treating the same as part of the fine imposed as a punishment for the offence. The present case is distinguishable from *Queen-Empress* v. *Tangavalu Chetti*(1) and from the *High Court Ruling, 20th July 1870*(2), though the view which we take is in apparent conflict with them. We therefore see no reason to interfere.

(1) I.L.R., 22 Mad., 153. (2) 5 M.H.C.R., App. 28.

APPELLATE CIVIL.

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

MUTHUSAMI NAIDU (PETITIONER—PLAINTIFF), APPELLANT,

v.

PRINCE ALAGIA MANAVALA SIMMALA RAJA (COUNTER-PETITIONER—DEFENDANT), RESPONDENT.*

1902. July 23, 29. August 13.

Civil Procedure Code—Act XIV of 1882, s. 266 (g)—Pensions Act—XXIII of 1871, s. 11—Attachment of pension payable to descendants of reigning family in Ceylon—Pensions payable in British India—Validity of attachment.

Certain descendants of the family which formerly reigned in Ceylon, resided in British India, where the Collector of the district, on behalf of the Government of India, paid them pensions. Apparently, though this was not proved, the cost of these pensions was ultimately defrayed by the Government of Ceylon. These pensions were attached in execution of certain decrees. Upon application being made by the pensioners to have the attachments set aside:

Held, that the pensions were exempt from attachment as being "political pensions" within the meaning of section 266 (*g*).

Per Sir ARNOLD WHITE, C.J.—If the Government of India were to be regarded as merely the agent of the Ceylon Government for the purpose of paying the pensions, the Courts of British India would have no jurisdiction to proceed by way of attachment since the rights of the pensioners (assuming them to be enforceable at law) would only be enforceable in Ceylon. *Ghamsham Lal* v. *Bhansali*, (I.L.R., 5 Bom., 249), and *Bishamber Nath* v. *Imdad Ali Khan*, (I.L.R., 18 Calc., 216), referred to.

EXECUTION PETITION. Petitioners were described as "Candyan pensioners"—descendants of two families who at one time occupied the throne of Ceylon. Their pensions had been attached in execution of decrees, and petitioners applied to have those attachments set aside on the ground that they were exempt from attachment under section 266 (*g*) of the Code of Civil Procedure. The Subordinate Judge considered that the section applied only to pensions payable by the Government of India, and he took the same view

* Appeal against Appellate Orders Nos. 17 and 92 of 1901, passed by G. F. T. Power, District Judge of Tanjore, dated 20th November 1901, passed on Civil Miscellaneous Petition No. 996 of 1901, presented against the order of the Court of the District Munsif of Tanjore passed on Execution Petition No. 500 of 1900 in Original Suit No. 152 of 1900.

with regard to section 11 of the Pensions Act XXIII of 1871.* He said:—"The judgment-debtor is a Candyan Prince and presumably the pension is one payable to him by the Ceylon Government, and if he draws the pension in British India, it must be by reason of some arrangement entered into between the two Governments. The judgment-debtor has not made out that the pension is one payable or continued by the Government of India. I do not concur in the judgment-debtor's contention that section 266 of the Civil Procedure Code refers also to pensions payable by the Government of India on behalf of another Government, say Ceylon Government (see the observations of the Privy Council in *Bishambar Nath* v. *Imdad Ali Khan*(1)." He disallowed the application. The District Judge, on appeal, passed the following order:—"I think that there can be no doubt that the pension in question is one of a political nature. It was granted to the appellant because he is a member of the family of the former King of Candy, and, in virtue of an arrangement made by the Government of Ceylon with the Government of India, it is paid to him by the Government of India. I think, therefore, that section 266 (*g*) of the Civil Procedure Code applies. The Privy Council say, in the case referred to by the Subordinate Judge, that the enactments of section 266 (*g*) certainly include all pensions of a political nature payable directly by the Government of India. The pension in this case is, I consider, payable directly by the Government of India, for it admittedly is in fact paid directly to the pensioner every month from the Government treasury in Tanjore." He allowed the appeal and set aside the attachment. Against that order the decree-holder preferred this appeal.

T. Ethiraja Mudaliar for appellant.

R. Sadagopachariar and *T. Narasimha Ayyangar* for respondent.

Sir ARNOLD WHITE, C.J.—The question raised in these appeals is whether the moneys payable to certain pensioners are

* Section 11 of the Pensions Act XXIII of 1871 is as follows:—

"No pension granted or continued by Government on political considerations, or on account of past services or present infirmities or as a compassionate allowance,

and no money due or to become due on account of any such pension or allowance,

shall be liable to seizure, attachment, or sequestration by process of any Court in British India, at the instance of a creditor, for any demand against the pensioner, or in satisfaction of a decree or order of any such Court."

(1) I.L.R., 18 Calc., 216 at p. 223.

attachable in execution of judgments which have been obtained against them in this country. The pensioners, who are known as the "Candyan pensioners," are the descendants of two families who at one time occupied the throne of Ceylon.

It appears from the Madras Administration Manual (see vol. I, page 51) that the families of the present pensioners were deported to Madras in 1815 after the annexation of Candy by the English and that the greater number of the pensioners now live in Tanjore. The manual states that the Candyan pensioners are paid at the expense of the Ceylon Government and that the Collector of every district where they reside pays them, being in account with the local Government.

The first question for consideration is one of construction, namely, whether the Indian enactments relating to the attachment of debts apply to the pensions in question. It is clear that the pensions are not "granted or continued" by the Indian Government. They are not therefore exempt from attachment by virtue of the provisions of section 11 of the Pensions Act, 1871 (*Ghamsham Lal* v. *Bhansali*(1)). Are they liable to attachment under section 266 of the Code of Civil Procedure?

This section enacts that certain descriptions of property shall be liable to attachment and then provides that certain particulars shall not be liable. The only descriptions of property as given in the enabling words of this section under which the pensions in question could possibly be said to fall are "debts" and "other saleable property moveable or immoveable, belonging to the judgment-debtor or over which or the profits of which he has a disposing power which he may exercise for his own benefit."

We have not been furnished with any information as to the terms and conditions on which these pensions were granted. It seems unlikely that under the terms of the grant the pensions are "debts" conferring on a pensioner a right to sue therefor, or that they are "property over which or the profits of which he has a disposing power." But even assuming that the pensions come within the enabling words of the section they are in my opinion exempt from attachment as being 'political pensions' within the meaning of clause (*g*) of the section.

(1) I.L.R., 5 Bom., 249.

If I had been of opinion that as a question of the construction of section 266 of the Code the pensions were attachable it would have been necessary to consider the further question of jurisdiction, in other words whether it would be competent for the Indian Legislature to give powers to proceed by way of attachment in such a case as this.

If the Government of India is to be regarded as merely the Agent of the Ceylon Government for the purpose of paying these pensions, I do not think the Courts of this country would have any jurisdiction to proceed by way of attachment since the rights of the pensioners (assuming them to be enforceable at law) would only be enforceable in Ceylon. See for instance the judgment of Sir Charles Sargeant in *Ghamsham Lal* v. *Bhansali*(1).

In the judgment of the Judicial Committee in *Bishambar Nath* v. *Imdad Ali Khan*(2) their Lordhips observe: "It is probable (although the point is not one which it is necessary to determine in this case) that the enactments of section 266 (*g*) of the Code were not meant to cover pensions payable by a foreign State when remitted for payment to their pensioners in India; but these enactments certainly include all pensions of a political nature payable directly by the Government of India." The pensions in question are not remitted by the 'foreign State' to the pensioner in India. They are paid monthly at the Government of India treasury in Tanjore. The pensions would seem to be payable directly by the Government of India, although apparently (though this is not clear) they are ultimately payable out of funds provided by the Ceylon Government.

I do not think we have sufficient information as to the circumstances in which these pensions are paid to enable us to pronounce a confident opinion upon this question of jurisdiction. But it is not necessary for us to do so. The pensions, if attachable at all, are attachable by virtue of the provisions of section 266 and in my opinion the pensions in question are not attachable under these provisions.

I think the appeals should be dismissed with costs.

BENSON, J.—I concur in the conclusion which has been arrived at by the learned Chief Justice, but I think it is sufficient to base the conclusion on the terms of section 266 (*g*) of the Civil Procedure

(1) I.L.R., 5 Bom., 249. (2) I.L.R., 18 Calc., 216 at p. 223.

Code. That clause expressly exempts from attachment 'stipends and gratuities allowed to Military and Civil pensioners of Government and *political pensions*.'

That the pensions with which we are concerned were in their origin 'political pensions', that is, pensions granted or paid by a State for reasons of State seems to me to admit of no doubt, nor is there anything before us to indicate that the allowances have lost their character as political pensions by reason of the arrangement by which the payments are made by the officers of Government in India. Rather does it emphasize the truly political character of the pensions. The section does not restrict the exemption to political pensions granted by the Government in India, and I do not think that we would be justified in adding such a limitation to the plain words of the section.

If the Legislature intended the exemption to be so restricted there would have been no difficulty in finding appropriate language in which to express the intention. It would only have been necessary to say 'stipends and gratuities allowed to Military, Civil and Political Pensioners of Government,' whereas the language used is 'stipends and gratuities allowed to Military and Civil pensioners of Government and political pensions', thus apparently extending the exemption to political pensions other than those granted by the Indian Governments. It would not be difficult to suggest reasons why such pensions should be protected, but it is unnecessary to do so.

As observed by their Lordships of the Privy Council in the recent case of *Gokul Mandar* v. *Pudmanund Singh*(1), dated 9th July 1902, the essence of a Code is to be exhaustive on matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction.

I would dismiss these appeals with costs.

(1) I.L.R., 29 Calc., 707.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Bhashyam Ayyangar.

1902. August 11, 14.

SINNU PANDARAM (ASSIGNEE—DECREE-HOLDER), APPELLANT,

v.

SANTHOJI ROW AND TWO OTHERS (PLAINTIFF—JUDGMENT-DEBTOR AND FIRST AND THIRD DEFENDANTS—DECREE-HOLDERS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, ss. 233, 246—Cross-decrees on same day against same parties in different suits—Subsequent transfer of one decree to third party—Petition for execution by transferee decree-holder—Right of transferee subject to equity of cross decree-holder.

On 3rd February 1900 cross-decrees were passed between A and B in different suits. A's decree against B was for a larger amount than B's decree against A. On 25th January 1900 B transferred his decree to C, but A only received notice of the assignment in October 1900:

Held, that C was not entitled to execute the decree against A. The transfer from B to C could take effect against A in respect of his cross-decree only after A received notice of it. That being so, the decree so transferred, being for a smaller amount than A's, became incapable of execution under the equitable principle enunciated in section 246 of the Code of Civil Procedure. At the date of the completion of transfer by notice, B's decree was subject to the equity, and, consequently, the right of C, as the transferee of it was also subject to that equity, under section 233 of the Code.

Section 246 of the Code of Civil Procedure is not inapplicable to a case where cross-decrees are passed by the Court whose duty it is to execute them, and neither decree has been transferred for execution to another Court.

Rewa Mahton v. *Ram Kishen Singh*, (L.R., 13 I.A., 106), explained.

EXECUTION PETITION. Petitioner, Santhoji Row obtained a decree on 3rd February 1900 against three defendants (the present counter-petitioners Nos. 1, 2 and 3) in Original Suit No. 7 of 1895 in the District Court of Coimbatore, for costs, amounting to Rs. 658-8-0. On the same day, the said defendants also obtained a decree against petitioner in Original Suit No. 39 of 1897, in the same Court, for costs for a smaller amount. On 28th January 1900

* Appeal against Order No. 15 of 1902, passed by V. A. Brodie, District Judge of Coimbatore, dated the 26th September 1901, on Civil Miscellaneous Petition No. 275 of 1901, in Execution Petition No. 60 of 1900 in Original Suit No. 39 of 1897.

the defendants (counter-petitioners Nos. 1, 2 and 3) transferred their decree to the fourth counter-petitioner, but petitioner received notice of the assignment only on 23rd October 1900. Counter-petitioner No. 4 filed an execution petition praying that his transfer might be recognised and executed, and an order was passed *ex parte* to that effect, after notice had been served. Petitioner now applied that the last-mentioned order might be set aside, alleging that the assignment to fourth counter-petitioner was fraudulent and without consideration and had been effected to defraud petitioner of the benefit of his decree. The District Judge passed the following order:—"The assignment was made only a few days before the decision of the other suit in which the assignor has been decreed to pay a much larger sum to the other party. Under section 232 of the Civil Procedure Code, the transferee stands in the shoes of the transferor and hence he cannot execute his decree till the transferor has satisfied the cross-decree against him."

Against that order, counter-petitioner No. 4 preferred this appeal.

P. S. Sivaswami Ayyar for appellant.

JUDGMENT.—We are of opinion that the application for execution should have been dismissed absolutely. The transfer of the decree in Original Suit No. 39 of 1897 to the appellant will take effect against the judgment-debtor (Santhoji) in respect of the cross decree which he obtained for a larger amount against the transferor in Original Suit No. 7 of 1895 on the 3rd February 1900 only on some day subsequent to the 23rd October 1900 when alone he had notice of the assignment, it not being alleged that he had notice prior thereto. That being so, on 3rd February 1900 the decree for a smaller amount in Original Suit No. 39 of 1897 became incapable of execution under the equitable principle enunciated in section 246, Civil Procedure Code, and at the date of the completion of the transfer by notice as against Santhoji the decree in Original Suit No. 39 of 1897 was subject to such equity, and therefore under section 233 the appellant, as assignee of the decree sought to be executed, was subject to such equity.

In our opinion section 246 is not inapplicable to a case where the cross decrees are passed by the very Court whose duty it is to execute them and neither has been transferred for execution to another Court.

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The decision in *Rewa Mahton* v. *Ram Kishen Singh*(1) does not militate against this view, the ground of the decision being that a sale made by granting execution in contravention of section 246 will not affect the title of a *bonâ fide* purchaser.

The appeal fails and is dismissed.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Moore.

1902. September 1.

THITHI PAKURUDASU (PLAINTIFF), APPELLANT,

v.

BHEEMUDU AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Abkári Act—(Madras) I of 1886, *s.* 24 (*e*)—*License to sell arrack issued under the Act—Rule contained in license imposing duty on license-holder to obtain Collector's permission to sub-let—Agreement to sub-let and sell arrack to sub-lessee without sanction—Suit on agreement for rent and for price of arrack sold—Contract Act—IX of* 1872, *s.* 23—*Unlawful consideration—Void agreement—Maintainability of suit.*

Plaintiff, being the holder of a license issued under section 24 (*e*) of the (Madras) Abkári Act of 1886, entered into an agreement with the defendants that the latter should sell arrack in plaintiff's licensed shop and that plaintiff should supply the liquor to be sold. Rule 21 of plaintiff's license imposed a duty on plaintiff to obtain the sanction of the Collector in case he should sub-let. Neither plaintiff nor defendants obtained such sanction. On a suit being filed by plaintiff for a sum of money due under the agreement:

Held, that the agreement was illegal and that plaintiff could not sue on it.

SUIT for Rs. 156, being the price of arrack supplied and the profit on arrack sold. Second defendant, who alone defended the suit, pleaded that the agreement in pursuance of which the arrack had been sold was illegal and void and an issue was framed on the point. Plaintiff, in his evidence, stated that first defendant's father and second defendant were his commission agents for the sale of arrack in a shop for which plaintiff was the license-holder. The material terms of the agreement were the following:—"In the

(1) L.R., 13 I.A., 106.

* Second Appeal No. 134 of 1901, presented against the decree of F. Murray, District Judge of Ganjam, in Appeal Suit No. 103 of 1900, presented against the decree of D. Raghavendra Row, District Munsif of Sompeta in Original Suit No. 103 of 1900.

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abkári shop No. 1 in the village of Sompeta, for which you obtained a lease for the official year commencing April 1896 and ending by the close of March 1897, we shall sell every month G. 70 (seventy gallons) of No. 60 *Kacha*, at a price of not more than Rs. 2-4-0 per gallon of No. 60 *Kacha*, from this day till the end of March 1897, out of the liquors sent for by you from the Aska Distillery and supplied to us, in accordance with the terms of the license you obtained from the Government and caused to be given to us; and we shall pay you out of the said sale-proceeds at the rate of Rs. 2 (two rupees) per gallon; if less than the aforesaid 70 gallons are sold, we shall pay you profit at the rate of As. 8 (eight annas) per gallon on the number of gallons in deficit. We shall sell the No. 30 *Pongu* supplied by you at the price fixed by you, and we shall take a commission of As. 4 (four annas) per gallon on the *Pongu* liquor sold by us. We shall carry on the sale of liquors and the other business in the said No. 1 shop with care and in accordance with the Abkári Act and with the rules made or to be made by the Government. If water, etc., be mixed with the liquors, if they are adulterated in any other manner, if, in the business done by us, the shop is not kept open always according to the stipulation in the license if liquors from other shops, etc., or other liquors are sold, or if there should be any theft or misappropriation of the liquors given and supplied by you, in each of the above cases we shall not only make good the entire loss incurred by you, but shall also be liable to the rules, stipulations and punishments fixed by the Government." Plaintiff admitted that he had not sent the agreement to any Revenue officials for their sanction, and the District Munsif found that he had not obtained their sanction or permission to have arrack sold on his behalf by the defendants, or to sub-let his shop to them. He held that the agreement to supply arrack for sale in that manner was opposed to the terms of the Abkári Act and to rule 21 of plaintiff's license, and was, in consequence, invalid and illegal. He further held that as the agreement was illegal and invalid plaintiff was not entitled to seek enforcement of it, and he dismissed the suit.

Plaintiff appealed to the District Judge, who upheld the Munsif's decision. He referred to rule 28 in plaintiff's license which contained the clause "no licensee shall sell without obtaining a Collector's license" based on section 22 of the Abkári Act I of 1886. He said:—"The defendant, selling as he did without such a

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license, contravened the law, and the agreement which he entered into with plaintiff is therefore invalid and cannot be acted on, since any such agreement is void under section 23 of the Contract Act. Such an agreement is obviously opposed to public policy, for it is necessary for the Collector to know who and what manner of men are the lessees who sell liquor in order that bad characters may not be found among them, for liquor shops are often the resort of bad characters. Thus the only question to be determined in this appeal, viz., whether the plaintiff's agreement with defendant is valid or not, is found in the negative for the above reason. Consequently, I dismiss the appeal with costs."

Plaintiff preferred this second appeal.

V. C. Seshachariar for appellant.

V. Ramesam for respondents.

JUDGMENT.—Section 22 of the Abkári Act I of 1886 imposes a duty on the lessee or assignee, that is on the defendant, not the plaintiff in this case; but clause 21 of the plaintiff's license, which is issued under section 24, clause (*e*) of the Act, imposes the duty on the plaintiff also, as grantee of Government, to obtain the Collector's license for his lessee, the defendant.

Thus there was a legal duty on the part of both the plaintiff and the defendant to obtain the Collector's permission to the sub-letting. They failed to do so, and the contract entered into between them that defendant should sell arrack was illegal, and the plaintiff therefore cannot sue on it.

We dismiss the second appeal with costs.

APPELLATE CIVIL.

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

1902. September 10.

CAMANI (PLAINTIFF), APPELLANT,

v.

BAREFOOT AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

Succession Act—X of 1865, *ss.* 90, 94—*Bequest to three children "or the survivors or survivor of them"—Incapacity of one to take by his attestation of the will—Residuary bequest to widow—Construction—Doctrine of accelaration.*

By his will, a testator, after giving a life interest in certain property to his wife, directed that after her death the property should be divided into equal shares between his "three children James, Cornelius and Florence, or the survivors or survivor of them," and the will contained a residuary bequest in favour of the wife. James (who was appointed a trustee) was an attesting witness to the will. The widow having died, Florence brought this suit, seeking to have it declared that James was incapacitated from taking under the will (by reason of his having attested it) and that she was entitled to a moiety of the property bequeathed:

Held, that the share of the legacy to James, which had lapsed, fell into the residue. The effect of the bequest to the three children "or the survivors or the survivor of them" would, in case James had predeceased the testator, have been to take the case out of the ordinary rule that a legacy lapses where the legatee dies during the lifetime of the testator. But as the two children had not survived James, the contingency on the happening of which they were to take had not happened. The testator having made a testamentary disposition which was incapable of taking effect, the share of James fell into the residue. The doctrine of acceleration could not be applied to such a case.

SUIT for the construction of a will. By his will, dated 24th September 1887, James Barefoot directed (*inter alia*) as follows:—"I will and direct that the interest only of all money or moneys that may at the time of my death be in any Bank or Banks in fixed deposits and also the interest only on all my Railway shares be enjoyed by my dear wife Matilda Barefoot absolutely for her sole use and benefit up to the time of her death and that after her death, the said fixed deposits and Railway shares be divided into equal shares between my three children, namely, James Joseph Barefoot,

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* Original Side Appeal No. 5 of 1902, presented against the Decree of the Honourable Mr. Justice Boddam in the exercise of the ordinary original civil jurisdiction of the High Court in Civil Suit No. 64 of 1901.

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Cornelius Barefoot and Florence Dinah Barefoot or the survivors or survivor of them and for this purpose I direct that the said fixed deposits as aforesaid be renewed from year to year or from such times according to the Bank Rules as may be necessary: and as to the residue of all my estate personal and real I will devise and bequeath the same to my dear wife Matilda Barefoot consisting of all my household goods chattels and jewellery with the exception of the aforesaid gold watch and gold chain together with all money or moneys that may be in any current or other account except the fixed deposits and Railway shares aforesaid together with all property not hereinbefore referred to for her sole use and benefit and to be disposed of as she may think fit and proper." And he appointed his son the said James Joseph Barefoot and his wife the said Matilda Barefoot, to be executor and executrix respectively. James Joseph Barefoot was one of two attesting witnesses to the will. The testator died. Plaintiff, the said Florence Dinah (now the wife of Charles William Camani) now sued the said James Joseph, and the said Cornelius, and she subsequently impleaded the representative of the said Matilda, and prayed for a declaration that James Joseph was incapacitated from taking under the will and that plaintiff was entitiled to a moiety of the property bequeathed to plaintiff, James Joseph and Cornelius (first and second defendants). Consequential relief was also sought. James Joseph (first defendant) admitted that the bequest to him was void by reason of the fact that he was an attesting witness to the will, but submitted that his lapsed legacy would not go to the plaintiff and second defendant, but that either there was an intestacy with regard to it or it fell into the residuary estate which was bequeathed to the widow. Cornelius (second defendant), left the construction of the will to the Court. The Administrator-General, as representing the widow, since deceased, pleaded that the lapsed legacy fell into the residuary estate, or that there was an intestacy in respect of it, and that the widow's estate would be entitled to one-third thereof. The first issue was: "Does the bequest to James Joseph Barefoot lapse into the residue of the testator's estate and pass under the will or is the same in the circumstances to be treated as an intestacy?" The learned Judge held that the lapsed legacy passed, under the residuary clause, to the third defendant.

Plaintiff preferred this appeal.

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Mr. *Allan Daly* for appellant.

Mr. *John Adam* for first and second respondents.

Sir ARNOLD WHITE, C.J.—This case is not entirely free from difficulty, but it has been fully argued and we do not think any advantage would be gained by further considering it. The will in question provides or directs that the interest of all moneys at the time of the testator's death in any Bank in fixed deposit and also the interest on all his Railway shares be enjoyed by his wife for life and that after the death of his wife the deposits and the shares "be divided into equal shares between my three children, James Joseph Barefoot, Cornelius Barefoot and Florence Dinah Barefoot, or the survivors or survivor of them." James Joseph Barefoot is appointed a trustee under the will. Then, there is a residuary bequest in these terms: "and as to the residue of all my estate, I will and devise to my wife all my property except the fixed deposits and Railway shares aforesaid together with all property not hereinbefore referred to for her sole use and benefit and to be disposed of as she may think fit and proper." Now James Joseph Barefoot was an attesting witness to the will, and consequently under the provisions of section 54 of the Succession Act the bequest to him is void. The question is,—does James Joseph's share of the legacy bequeathed to him pass to Cornelius Barefoot and Florence Dinah Barefoot in the events which have happened, or does it fall into the residue. As it seems to me, if the will had not contained the words "or the survivors or survivor of them," it would have been a perfectly clear case. The will would have had to be construed in the same way as if James Joseph had died during the lifetime of the testator. Section 94 of the Succession Act is in these terms: "But where a legacy is given to legatees in words which show that the testator intended to give them distinct shares of it, then if any legatee die before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator's property." The illustration to that section is "a sum of money is bequeathed to A, B and C to be equally divided among them. A dies before the testator. B and C shall take so much as they would have had if A had survived the testator." The real difficulty in the case arises in connection with the words "or the survivors or survivor of them." I think the effect of these words is this. If James Joseph Barefoot had died before the testator the effect of the words would have been to take

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the case out of the ordinary rule that a legacy lapses where the legatee dies during the lifetime of the testator. This is the proposition which was submitted by Mr. Daly and it is supported by the authority to which he has drawn our attention. So far I am with Mr. Daly. But that of course is not sufficient for his case. Then, for the purpose of establishing that Cornelius and Florence take James Joseph's share in the events which have happened—he relied on what is known as the doctrine of "acceleration." I think this doctrine has really no bearing, or at the best, only a remote bearing upon the question we have to determine. In all the cases in which this doctrine has been applied the parties ultimately benefited under the will were bound to take at some time or other, and in accordance with that doctrine the Courts of Chancery have held that where the will purports to create a life estate but the words which purport to create such estate are ineffective, those who take after the termination of the life estate are "accelerated." In the present case the effect of the will is that Cornelius and Florence or either of them only take on the happening of an express contingency, viz., that they survive James Joseph. That contingency has not happened. That being so it seems to me that the doctrine of acceleration cannot be applied. It has been argued that there is a sufficient expression of intention on the part of the testator as to what was to be done if James Joseph did not take the benefit which the testator intended, to justify us in construing the will so as, in the events which have happened, to give his share to Cornelius and Florence. The proposition comes to this. That because it is apparent that the testator intended that certain consequences should issue on the happening of a contingency which he contemplated, we are to assume he intended that the same consequences should ensue on the happening of a contingency which he did not contemplate. I do not know of any case which would warrant us in assuming in these circumstances what the intention of the testator was and in remoulding his will so as to give effect to what we assume would have been his intention if he had contemplated the contingency which actually happened. The provisions of section 90 of the Succession Act and the illustration to that section have a material bearing upon the question we have to decide. The section says "under a residuary bequest, the legatee is entitled to all property belonging to the testator at

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the time of his death, of which he has not made any other testamentary disposition which is capable of taking effect." Here the testator has made a testamentary disposition which is incapable of taking effect because the bequest is in favour of a party who is an attesting witness. It seems to me that the share of James Joseph falls into the residue and does not go to Cornelius and Florence. I think the construction adopted by the learned Judge is right and that this appeal should be dismissed. Costs of all the parties as between attorney and client (including the Administrator-General) should be paid out of the estate.

MOORE, J.—I concur.

Mr. *James Short*, Attorney, for appellant.

Mr. *A. E. Rencontre*, Attorney, for first and second respondents.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

APPASAMI PILLAI (PLAINTIFF), APPELLANT,

v.

SOMASUNDRA MUDALIAR AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

1902. September 10.

Letters Patent—Art. 15—"*Judgment*"—*Order refusing leave to appeal* in formâ pauperis—*Appeal.*

There is no appeal under article 15 of the Letters Patent, against an order, passed by a single Judge, under section 592 of the Code of Civil Procedure, refusing leave to appeal *in formâ pauperis*. By section 592 a discretion is vested in the Judge to allow or disallow the application, and an order passed in the exercise of such a discretion is not a "judgment" within the meaning of article 15 of the Letters Patent.

Sriramulu v. *Ramasam*, (I.L.R., 22 Mad., 109), *Venkatarama Ayyar* v. *Madalai Ammal*, (I.L.R., 23 Mad., 169), and *Srimantu Raja Durga Naidu* v. *Srimantu Raja Mallikarjuna Naidu*, (I.L.R., 24 Mad., 358), followed.

PETITION for leave to prefer an appeal, *in formâ pauperis* against the decree of the District Court of Tanjore in Appeal Suit No. 205

* Appeal No. 1 of 1902, under section 15 of the Letters Patent, presented against the order of the Honourable Sir Charles Arnold White, Chief Justice, dated 9th January 1902, passed on Civil Miscellaneous Petition No. 39 of 1902, presented to the High Court for leave to appeal *in formâ pauperis* against the decree in Appeal Suit No. 205 of 1901 on the file of the District Court of Tanjore (Original Suit No. 14 of 1900 on the file of the Sub-Court, Negapatam).

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of 1901. The petition came on for hearing in the first instance, before the Chief Justice, who made an order refusing to give the leave asked for. Against that order, petitioner preferred this appeal, under article 15 of the Letters Patent.

V. Krishnasamy Ayyar, for respondent, took the preliminary objection that no appeal lay under article 15.

C. R. Tiruvenkatachariar for appellant.

JUDGMENT.—The respondents take the preliminary objection that no appeal lies under the Letters Patent against an order of a single Judge refusing to allow an appeal *in formâ pauperis*. We think the objection is valid. The use of the words "may be allowed to appeal" in section 592, Civil Procedure Code, implies that a discretion is vested in the Judge to allow or disallow the petition. The exercise of such discretion is not a "judgment," *i.e.*, an adjudication on any right or liability in dispute between the parties to the suit, and unless it is a "judgment" within the meaning of section 15 of the Letters Patent there is no appeal. We think this view is in accordance with the principle underlying the decisions in *Sriramulu* v. *Ramasam*(1), *Venkatarama Ayyar* v. *Madalai Ammal*(2), and *Srimantu Raja Durga Naidu* v. *Srimantu Raja Mallikarjuna Naidu*(3).

We therefore dismiss this appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

1902. September 11.

THOMAS SOUZA (PLAINTIFF—DECREE-HOLDER), APPELLANT,

v.

GULAM MOIDIN BEARI AND ANOTHER (JUDGMENT-DEBTOR), RESPONDENTS.*

Specific Relief Act—I of 1877, s. 9—Decree for possession—Order in execution proceedings—Appeal.

Where a decree for possession of land has been passed in a suit brought under section 9 of the Specific Relief Act, and an order is passed in proceedings in execution of that decree, no appeal lies against that order. For section 9 provides that "no appeal shall lie from any order or decree passed in any suit" under that section, and, by the explanation to section 647 of the Code of Civil Procedure, applications for the execution of decrees are proceedings in suits.

(1) I.L.R., 22 Mad., 109. (2) I.L.R., 23 Mad., 169 at p. 170.
(3) I.L.R., 24 Mad., 358.

* Appeal against Appellate Order No. 2 of 1902 passed by J. W. F. Dumergue, District Judge of South Canara, in Appeal Suit No. 243 of 1901, presented against the order of T. V. Anantan Nair, District Munsif of Mangalore, in Miscellaneous Petition No. 840 of 1901 (Original Suit No. 248 of 1900).

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PETITION, by a purchaser from a judgment-debtor, praying that the property decreed to the judgment-creditor might not be delivered over to the latter until the sugar-cane crop standing thereon, which petitioner had purchased, had been first removed. Counter-petitioner had sued the judgment-debtor under section 9 of the Specific Relief Act to recover possession of the land on which the crop of sugar-cane was standing, and obtained a decree directing the surrender of the land by the judgment-debtor to counter-petitioner. While the suit was pending, the judgment-debtor sold the crop to petitioner, who, after decree, presented this petition. The District Munsif held that petitioner had no right to object to the delivery of the land to the decree-holder, and rejected the petition. Petitioner appealed to the District Court, when it was objected that no appeal lay against the order, which related to the execution of a decree passed under section 9 of the Specific Relief Act. The District Judge held that section 244 applied to all decrees, and that an appeal lay. On the merits he held that as the crop was not in existence when the plaint was filed, and as the decree made no order as to mesne profits, petitioner was entitled to reap the crop. He allowed the appeal and reversed the District Munsif's order.

Against that order the decree-holder preferred this appeal.

P. R. Sundar Ayyara for appellant.

V. Krishnaswami Ayyar and *K. Narayana Rau* for respondents.

JUDGMENT.—We are of opinion that the decree of the District Judge is wrong and must be reversed. The suit was brought under section 9 of the Specific Relief Act (Act I of 1877). By the last clause of that section "no appeal shall lie from any order or decree passed in any suit under this section," etc. According to the explanation to section 647 of the Civil Procedure Code, applications for execution of decrees are proceedings in suits. This, the Privy Council says, in *Thakar Pershad* v. *Sheik Fakirullah*(1), is a mere statement of what was the law. The

(1) L.R., 22 I.A., 44 at p. 50.

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application upon which this decree was passed was an appeal against a decree or order in execution of the decree under section 9 of the Specific Relief Act and therefore there was no appeal.

Again, on the merits it appears to us that the decision is wrong The plaintiff obtained a decree for possession and was entitled to possession as from the date of the decree at least. At that time the crops were standing and the plaintiff was entitled to possession of the land and what was on it. The land was cultivated by a trespasser, who, after the decree, sold the growing crops to the present applicant. We are unable to discover any right either in law or in equity which can entitle the applicant to an order deferring the handing over of the land to the plaintiff until the growing crops have been gathered by the applicant.

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

APPELLATE CIVIL.

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

1902. September 11, 16.

OFFICIAL ASSIGNEE OF MADRAS (APPELLANT),

v.

MARY DALGAIRNS (PETITIONER), RESPONDENT.*

Provident Funds Act—IX of 1897, s. 4—Insolvent Debtors' Act, 11 & 12 Vict., cap. 21, s. 7—Vesting order—Sum due to an insolvent from a Provident Institution—Right of Official Assignee to claim—Construction of statutes—Distinction between enactments affecting vested rights and those regulating procedure.

A member of a Railway Provident Institution who had made compulsory deposits therein became insolvent and the usual vesting order was made under section 7 of the Act for the Relief of Insolvent Debtors. By the rules of that Institution a member is to be paid, on his retirement from service, the sum of money standing to his credit. At the date of the vesting order, the Insolvent had not yet retired from service. Subsequently to the date of the vesting order, but

* Original Side Appeal No. 10 of 1902 presented against the order of the Honorable Mr. Justice Boddam, one of the Commissioners of the Court for the Relief of Insolvent Debtors at Madras, dated 3rd February 1902, made in the matter of the petition and schedule of James E. Dalgairns, an Insolvent Debtor No. 152 of 1896.

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before the retirement of the Insolvent, the Provident Funds Act, 1897, came into force, section 4 of which provides that after the commencement of that Act the Official Assignee shall not be entitled to or claim any such compulsory deposits in any Railway Provident Fund. On a claim being made by the Official Assignee to the amount, on the ground that when the Act came into force the interest of the insolvent in the Fund had become vested in the Official Assignee:

Held, that by section 4 of the Provident Funds Act, all the right and title of the Official Assignee was determined as from the coming into operation of the Act, and that its operation was not limited to cases where the vesting order had been made after its commencement.

The distinction between the construction of enactments affecting vested rights and those which merely affect procedure recognised.

Javanmal Jitmal v. *Muktabai*, (I.L.R., 14 Bom., 516), referred to.

Under section 7 of the Insolvent Debtors Act the right of the insolvent to be paid the sum standing to his credit in the Fund, on his retirement from service, vested in the Official Assignee.

PETITION in insolvency. Petitioner was the widow of one James Dalgairns, who had been an engineering assistant in the employment of the Madras Railway Company, and her petition set forth that the deceased had subscribed in the usual way to the Provident Institution of the Madras Railway Company till November 1897, when he resigned from the service of the Company. On 30th July, 1886, the deceased presented a petition in the Madras Court for the relief of insolvent debtors and was granted his personal discharge on 26th April 1897, he being also ordered to make a monthly payment towards his debts—which he did. On 14th November 1900, the insolvent died, leaving the petitioner, his widow, him surviving. Petitioner applied to the Provident Institution for payment of the amount standing to her late husband's credit, but was referred to the Insolvent Court. On 16th October 1901, the net amount standing to the credit of the insolvent was remitted to the Official Assignee. Petitioner now prayed that this sum might be paid out to her. The rules of the Provident Institution which are material to the question are set out in the judgment.

The Court made the order.

The Official Assignee preferred this appeal.

Mr. *Allan Daly* for appellant.

Mr. *J. H. M. Ryan* for respondent.

JUDGMENT.—This is an appeal from an order of Boddam, J., directing the Official Assignee to pay to the widow of an insolvent a sum of Rs. 1,134.

The insolvent filed his petition on July 30th, 1896, and the usual vesting order under section 7 of the Act (11 and 12 Victoria, Chapter 21) was made. The insolvent had been in the employ of the Madras Railway Company and had contributed in the usual way to the Madras Railway Provident Institution from January 1891 till November 1897 when he retired from the service of the company. The amount in question was paid over by the Railway Company to the Official Assignee in October 1901:

Rule 4 of the Rules of the Institution is as follows:—"The payment by members to the Institution shall be as follows:

"(1) OBLIGATORY.—Every married member, or widower with a child or children dependent on him, not being purely of Asiatic descent, shall subscribe a sum at the rate of $6\frac{1}{4}$ per cent. of the amount of his salary. Every other member shall subscribe a sum at the rate of $3\frac{1}{8}$ per cent. of the amount of his salary.

"(2) VOLUNTARY.—Any member may, on giving not less than one month's notice to the committee of his intention so to do, make deposits in the Provident Institution from the amount of his salary, as he may think proper, and any member who having availed himself of this provision may at any time desire to vary or discontinue the amount of such deposits, may do so on giving not less than one month's notice to the committee, of such intention. All such deposits will be held at the disposal of the depositor, subject to such regulations as to notice of withdrawal and repayment as may be made by the committee, provided that such notice shall not be fixed in excess of one month."

Rule 7 says:—"The Company shall from time to time deduct from any sum payable by them to any member in respect of salary such sum as may be required to pay any subscription due from him to the Institution, and shall from time to time pay over to the committee in India all sums so deducted by them."

Apparently the sum which stood to the credit of the insolvent at the date of the vesting order consisted entirely of obligatory subscriptions, and for the purposes of this judgment, we assume this to have been the case.

Rule 15 says:—"The accounts of the Institution and of the members shall be made up half-yearly to the 30th June and the 31st December; but the said accounts shall be rendered for each calendar year, and as soon as may be after the 31st of December in each year, and the committee shall thereupon render a statement

of his account to each member of the Institution. For the purposes of this rule the investments of the institution shall be valued at the market rates ruling at the close of each half year."

Rule 16 says:—"All amounts standing to the credit of members shall be credited with interest. The rate of interest shall be that from time to time fixed upon by the committee according to the results of the investment of the moneys of the Institution, due allowance being made for the expenses of management of the Institution in fixing this rate of interest."

Rules 19 and 20 provide as follows:—

"19. Except as is by these Rules expressly provided, no member or any person or persons on his behalf, or in respect of his interest in the Institution or the funds thereof, shall be entitled to claim any payment of money to him or them."

"20. On the retirement of any member of the Institution from the service of the Company the committee shall pay to him or his assigns the sum of money standing to his credit in the books of the Institution on the 30th day of June or 31st day of December preceding his retirement, together with interest thereon up to the end of the month last preceding his retirement at the rate applicable to the last preceding half year. They shall also return to him in full the amount of his paid-up subscriptions for the then current half year, together with interest thereon calculated as hereinbefore stated."

Under section 7 of the Insolvency Act, upon the making of the vesting order all the real and personal estate and effects of the petitioner (with certain specified exceptions) and all debts due to him and all his future estate right, title and interest in or to any real or personal estate or effects which may revert, descend or come to him, vest in the Official Assignee. At the time of the making of the vesting order the insolvent was still in the service of the company and the event upon which the contributions made by him to the Institution became repayable, viz., his retirement from the service of the company, had not then taken place. It is not necessary to consider whether when the vesting order was made the amount standing to the credit of the insolvent was a debt due to him from the Institution. At the time the vesting order was made the insolvent at any rate had the right to be paid the amount standing to his credit as and when he retired from the service of the company, and we do not feel the least

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doubt that the effect of section 7 of the Insolvency Act was to vest this right in the Official Assignee as from the date of the filing of the petition. If authority were needed the case of the Shrewsbury *In re The Petition of E. J. S. Shrewsbury*(1) is directly in point.

The question we have to decide really turns upon the construction to be placed upon section 4 of the Provident Funds Act, 1897, (Act IX of 1897). This enactment came into force on March 11th, 1897, *i.e.*, after the making of the vesting order but before the retirement of the insolvent from the service of the Railway company. Section 4 of the Act is as follows:—

"After the commencement of this Act, the compulsory deposits in any Government or Railway Provident Fund shall not be liable to attachment under any decree or order of a Court of Justice in respect of any debt or liability incurred by a subscriber to, or depositor in, such Fund, and neither the Official Assignee, nor a Receiver appointed under Chapter XX of the Code of Civil Procedure, shall be entitled to, or have any claim on, any such compulsory deposit."

It was argued by Mr. Daly on behalf of the Official Assignee that, inasmuch as when the Act came into operation, the interest of the insolvent in the fund in question had passed to the Official Assignee by virtue of the vesting order, the section ought not to be read retrospectively so as to divest a right or title which had already accrued. Mr. Daly relied on the well-known canon of construction which draws a distinction between new enactments which affect vested rights and enactments which merely affect procedure (see for instance *Javanmal Jitmal* v. *Muktabai*(2) and the authorities there referred to). We entirely agree that before we can construe the enactment in question as affecting a right or title which had already accrued, we must be satisfied from the words of the enactment, that it was the intention of the Legislature that existing rights should be affected. In the present case we are so satisfied. In our opinion the Legislature in enacting section 4 intended that all right and title of an Official Assignee to the deposits referred to in the section should be determined as from the coming into operation of the Act. It seems to us that the Legislature did not intend that the operation of the section should

(1) I.L.R., 10 Bom., 313. (2) I.L.R., 14 Bom., 516.

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be limited to cases where the vesting order was made after the coming into operation of the Act. If this had been the intention some such words as, after the commencement of this Act the right, title and interest of an insolvent in compulsory deposits in a Railway Provident Fund shall not vest in the Official Assignee under a vesting order made under section 7 of the Insolvency Act, would have been used. What the section enacts is that the Official Assignee shall not be entitled to or have any claim on, the compulsory deposits.

It appears to have been conceded that if the Official Assignee was not entitled to retain the money in question, the widow was entitled to it.

The appeal is dismissed with costs.

Mr. *H. C. King* for appellant.

Messrs. *Grant & Greatorex* for respondent.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Bhashyam Ayyangar.

1902. September 12.

CHINNA VENKATASAMI (PLAINTIFF), APPELLANT,

v.

PEDDA KONDIAH AND TWO OTHERS (DEFENDANTS NOS. 1 TO 3), RESPONDENTS.*

Contract Act—IX of 1872, *s.* 74—*Penalty—Stipulation that interest shall be chargeable if instalments in repayment of principal be not paid at due dates—Applicability of Act VI of* 1899 *to suits filed prior to its coming into force.*

A stipulation in a bond that the principal sum shall be repaid by instalments on specified dates (no provision being made for interest) and that, on default of such payments of principal being made, interest shall be chargeable as from the date of the bond, is not in the nature of a penalty.

Semble, that the Contract Act Amendment Act of 1899 does not apply to a suit filed prior to the date upon which it came into force.

SUIT by the assignee of a mortgage bond to recover the amount due on the mortgage from the defendants and by the sale of the

* Second Appeal No. 783 of 1901 presented against the decree of Lewis Moore, District Judge of Bellary, in Appeal Suit No. 194 of 1899 presented against the decree of B. Krishna Rao, District Munsif of Penukonda, in Original Suit No. 638 of 1898.

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mortgaged property. The material portions of the bond were the following :—" Mortgage-deed of immoveable property executed and given . . . . on 28th August 1882. We became indebted to you in the sum of Rs. 2,200, in words two thousand two hundred rupees. Particulars of instalments fixed for payment of the said amount :—On 18th August 1883, Rs. 220, 6th August 1884, Rs. 220, 25th August 1885, Rs. 220, 14th August 1886, Rs. 220, 3rd August 1887, Rs. 220, 21st August 1888, Rs. 220, 11th August 1889, Rs. 220, 31st July 1890, Rs. 220, 19th August 1891, Rs. 220, and 8th August 1892, Rs. 220 ; total Rs. 2,200. We shall pay (the same) without fail according to the above instalments. In so paying if we fail to pay for two instalments consecutively and for six months thereafter, we shall pay the whole amount at one time without having anything to do with the future instalments, together with interest from this date at the rate of Re. 1 per cent. per mensem . . . . All the above properties we have mortgaged to you until the said amount is discharged and have retained them in our possession alone. So we shall not alienate the same to others until your debt is paid off. To this effect is this mortgage deed of immoveable property executed out of our free will and consent."

The last four instalments not having been paid, plaintiff (as assignee of the mortgage) brought this suit, by which he claimed Rs. 880, being the amount of the four instalments, and Rs. 1,620, being the amount of interest on the instalments at 1 per cent. per mensem from the date of the bond. The plaint was filed in August 1898. An issue was framed as to whether plaintiff was entitled to interest from the date of the bond. The District Munsif held that the stipulation that interest should be paid from the date of the bond was penal, and he allowed no interest, nor did he award any damages. He decreed in plaintiff's favour for Rs. 805-12-0 (which was the consideration paid by plaintiff for the assignment), and in default of payment he ordered the mortgaged land to be sold. On appeal, the District Judge upheld the finding that the provision as to interest was a stipulation by way of penalty under section 74 of the Contract Act, 1899, but he did not consider he would be justified in refusing to allow any interest. He awarded interest at the rate of 6 per cent. from the date of default up to the date of payment. As to the applicability of the Act of 1899, he said :—"I may note that it has been urged that the provisions of

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the amended section 74 of the Contract Act should not have been applied to this suit as it was instituted in 1898. This, however, is, I think, a mistake. The Act came into force in May 1899, and the suit did not come on for trial till September in that year."

Plaintiff preferred this second appeal, on the ground that interest should have been allowed at the rate of 12 per cent. Interest was claimed, in the memorandum of second appeal, from the date of default.

C. Venkatasubbaramiah for appellant.

JUDGMENT.—In our opinion the stipulation for interest from date of bond if the instalments are not paid as agreed upon is not in the nature of a penalty. It is not a stipulation for a rate of interest higher than one agreed upon, but only that interest shall be chargeable in case instalments are not paid in due time. Nor, even taking the Judge's view that reasonable interest should be awarded as compensation, should we consider the 12 per cent. per annum rate stipulated for as unreasonable as the measure of compensation. We are however not to be understood as endorsing the Judge's view that Act VI of 1899 is applicable to this suit, which was instituted prior to the commencement of that Act. The appeal is allowed and in modification of the decrees of both the lower Courts, we shall decree the plaintiff interest on the principal amount decreed at the rate of 12 per cent. per annum from the 1st February 1891 (which is the date from which interest is claimed in second appeal) till the 13th January 1900, the date fixed in the District Munsif's decree for the payment of the principal and from the latter date interest at 6 per cent. per annum on the aggregate amount until date of realization. The respondents must pay the plaintiff's costs throughout on the amount allowed.

APPELLATE CIVIL.

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

1902. September 17.

IN THE MATTER OF A PLEADER.*

Legal Practitioners Act—XVIII of 1879, *s.* 13—"*Other reasonable cause*" *for suspending a pleader—Writing an anonymous letter to influence.*

A pleader wrote a letter, which he did not sign, to an officer who was conducting an enquiry into a charge of bribery against a Revenue Inspector, the letter containing allegations which were intended to prejudice the mind of the officer in connection with the matter which he was investigating. On a charge being preferred against the pleader under the Legal Practitioners Act:

Held, that these facts showed "other reasonable cause" for suspending the pleader, within the meaning of section 13 (cl. f) of the Act.

In the matter of Purna Chundur Pal Mukhtar, (I.L.R., 27 Calc., 1023), followed.

CHARGE under section 14 of the Legal Practitioners Act. While certain Revenue Inspectors were deciding claims for the remission of land assessment in the District of North Arcot, a complaint of fraud and bribery was made against certain officers, and an enquiry was made by the Sub-Collector into that charge. On the day upon which the parties were summoned to attend this enquiry the Sub-Collector received the following anonymous communication :—

"*Duvi Shari Remission Fraud.*

SIR,—Many of the witnesses summoned in the case will tell the truth. Apparently Sudarsana Chariar, Vedanta Chariar, Appakuti Narasim Chari and Iya Venkata Chariar feel delicacy in disclosing the facts. If they are threatened a little bit, truth will out. The first two held in deposit the contributions collected for the payment of the Revenue Inspector on behalf of the village officers. A huge fraud on the Government.

6th March 1901, VELLORE. } I remain, Sir, One of the witnesses in the case."

The communication bore no signature, and the Collector ascertained that it was in the handwriting of the pleader now charged. A notice was issued to the pleader to explain, and an enquiry was

* Case stated under section 14 of Act XVIII of 1879 by the Sub-Collector of North Arcot through the Collector of North Arcot in his letter dated 11th February 1902, Dis. No. 259-Rev. of 1902, referring for the orders of the High Court the conduct of the defendant herein (Referred Case No. 4 of 1902).

held under section 14 of the Legal Practitioners Act. The pleader then explained that on the morning on which the letter had been written two persons whom he had known since his boyhood had asked him to draft a letter in English, giving him all the facts and expressing the intention of seeing the Sub-Collector, and stating that the letter contained material suggestions which were calculated to help the Sub-Collector in his enquiry and that it was intended that it should be signed before despatch. The pleader complied with the request and contended that his assistance had been merely clerical; that the act had not been done in the discharge of professional duty, and did not come within the Legal Practitioners Act. He cited *In the matter of a First-grade Pleader*(1). The Collector, in forwarding the result of this enquiry (which had been held by another Sub-Collector), submitted that the charge against the pleader was that he had written an anonymous petition in order to influence the Sub-Collector in a revenue enquiry which he was holding. The recommendation was that the pleader's certificate be suspended for a month.

Sivasami Ayyar for the Pleadership Examination Board.

C. Sankaran Nayar and *V. V. Srinivasa Ayyangar* for the pleader.

ORDER.—On a careful consideration of the evidence we think it is clear that the pleader meant that the letter should reach the hands of the Sub-Collector as an anonymous letter and we think he aggravated his original offence by attempting to make out that he intended the letter to be signed by his clients, and that he thought it was going to be so signed before it was despatched to the Sub-Collector.

On the other hand, the pleader's conduct in making no attempt to conceal the fact that the letter was written and sent by him, although it purports to have been written by "one of the witnesses in the case," seems to show that he entirely failed to appreciate the impropriety of his act.

The evidence establishes that the pleader wrote a letter, which he did not sign, to an officer who was conducting an inquiry into a charge of bribery against a Revenue Inspector in which letter he made allegations which were intended to prejudice the mind of the officer in connection with the matter which he was investigating.

(1) I.L.R., 24 Mad., 17.

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We are prepared to accept the interpretation of clause (*f*) of section 13 of the Legal Practitioners Act (XVIII of 1879) which was adopted by the Calcutta High Court in *In the Matter of Purna Chundur Pal Mukhtar*(1) and we think the facts in the present case show "other reasonable cause" for suspending or dismissing a pleader within the meaning of this clause.

In all the circumstances we think a suspension of the certificate for one month will meet the requirements of the case and we make an order accordingly.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1902. September 17.

NETI RAMA JOGIAH AND THREE OTHERS (PLAINTIFFS), APPELLANTS,

v.

VENKATACHARULU AND THREE OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 539—Suit for declaration that the defendants were not dharmakartas of certain temples and for the appointment of trustees—No claim for temple property—Specific Relief Act—I of 1877, s. 42—Maintainability.

A suit for the appointment of new trustees to a temple on the ground that the defendants are not the lawful trustees and that the trusteeships are therefore vacant, is a suit under section 539 (*a*) of the Code of Civil Procedure, being comprised in the words "whenever the direction of the Court is deemed necessary for the administration of such trust."

Bishen Chand Esawut v. *Syed Nadir Hossein*, (L.R., 15 I.A., 10), relied on.

Such a suit is not invalid under section 42 of the Specific Relief Act, by reason of the fact that no consequential relief is claimed, even if there be temple properties in the possession of the defendants as dharmakartas. Where a suit is maintainable under section 539 of the Code of Civil Procedure and the plaint seeks the relief specified in that section, section 42 of the Specific Relief Act does not apply.

Srinivasa Ayyangar v. *Srinivasa Swami*, (I.L.R., 16 Mad., 31), distinguished.

New trustees appointed under clause (*a*) of section 539 will be entitled to

(1) I.L.R., 27 Calc., 1023.

* Appeal Suit No. 3 of 1901 presented against the decree of J. H. Munro, District Judge of Godavari, in Original Suit No. 33 of 1900.

demand possession of the temple properties from the defendants in the suit whose title to administer the trust has been negatived by the decree, and, if such possession be not given, will be entitled to bring a suit to eject them from the temple and its endowments.

SUIT, brought under section 539 of the Code of Civil Procedure, for a declaration that the defendants were not dharmakartas of certain temples, and to have two trustees appointed for the due administration of those temples. Separate written statements were filed, in one of which it was pleaded that moveable and immoveable properties attached to the temples were in the possession of second defendant, and that plaintiffs were entitled to pray for consequential relief, and, not having done so, the suit was not maintainable under section 42 of the Specific Relief Act. An issue was framed on this point, and another as to whether the suit was maintainable under section 539 of the Code of Civil Procedure. The District Judge dealt with the latter issue as follows:—

"The case in the plaint is that up to the decision in Appeal Suit No. 495 of 1887 on the file of the Sub-Court of Cocanada the suit temple had two trustees, that after that date and till 1894 there was only one trustee who was the father of first defendant, that in 1894 this trustee died, upon which the defendants trespassed upon the office on the strength of an illegal appointment by the late trustee of first defendant as his successor and arrogated to themselves the functions of dharmakartas which they had no right to exercise. Paragraph 8 of the plaint contains some vague allegations of mismanagement and in paragraph 9 it is stated that the trespassers are Vaishnavaites and deadly foes of the Sivite creed. No issue as to the alleged mismanagement was taken though there was a full discussion at the time of settlement of issues. The real object of the suit is clearly to eject the defendants who are alleged to be trespassers. The facts are very similar to those in the case of *Srinivasa Ayyangar* v. *Srinivasa Swami*(1) and the prayers in the plaint are in effect the same. In *Jugalkishore* v. *Lakshmandas*(2) which is relied upon by the plaintiff's pleader the defendant was sued as a trustee and denied that he was a trustee. The only ground on which it was sought to remove the defendant was mismanagement of the trust property. It was held that though the defendant was not appointed a trustee yet by taking charge of

(1) I.L.R., 16 Mad., 31. (2) I.L.R., 23 Bom., 659.

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the endowment and purporting to manage it as temple property, he made himself a constructive trustee and was liable as such to the beneficiaries. It is therefore argued that in the present suit the defendants are also constructive trustees and that section 539, Civil Procedure Code, is applicable. The same might be argued in the case of every trespasser and it is settled law, that section 539 does not apply to suits brought against trespassers."

He held that the suit was not maintainable under section 539 of the Code of Civil Procedure and dismissed it.

Plaintiffs preferred this appeal.

V. Krishnaswami Ayyar for appellants.

T. V. Seshagiri Ayyar for respondents.

JUDGMENT.—The plaintiffs instituted this suit under section 539 of the Civil Procedure Code, after obtaining the sanction of the Collector, for the appointment of new trustees to a certain public temple on the ground that the defendants who are [illegible] in management of the temple are not the lawful trustees, [illegible] trusteeships are therefore vacant.

Certain allegations were no doubt made in the plaint [illegible]NTS), defendants were guilty of malversation, but no such i[illegible] raised. [illegible] *defend-*

The substantial question therefore for determination in the case is whether the defendants are the lawful trustees of the temple as claimed by them. If they are so, there is an end of the suit, but if they are not, then, there is a vacancy in the office of one or both of the trusteeships, and the plaintiffs, as persons interested in the institution, pray for an order of Court directing the appointment of new trustees for the due administration of the trusts of the temple.

In our opinion such a suit is comprised in the words of the section, viz., "or whenever the direction of the Court is deemed necessary for the administration of such trust," and the suit therefore falls under section 539 (*a*) of the Civil Procedure Code. In support of this view we may refer to the opinion of the Judicial Committee of the Privy Council in *Bishen Chand Esawut* v. *Syed Nadir Hossein*(1) in which Sir Barnes Peacock in delivering the judgment of the Committee stated "If there had been any objection that he (*i.e.*, the plaintiff) was illegally substituted as

(1) L.R., 15 I.A., 10.

NETI RAMA JOGIAH v. VENKATA-CHARULU.

trustee, an application might have been made by any person interested in the performance of the trusts to have him removed and a new trustee appointed by the Court under the Code of 1877." As pointed reference is made to the Code of 1877 in which for the first time section 539 was introduced, there having been no section corresponding to it in the Procedure Code of 1859, it is quite clear that the provision referred to by the Privy Council is section 539. The respondent's (defendant's) vakil seeks to support the decree of the District Judge on the ground that the suit should be dismissed under section 42, Specific Relief Act, 1877, inasmuch as there is no prayer for recovery of possession of the temple and its property from the defendants by the new trustees who may be appointed by the Court, and in support of this contention he relies on *Strinivasa Ayyangar* v. *Strinivasa Swami*(1).

That case related to a religious mutt, and, after deciding that th[illegible] "The[illegible]s one that could not be brought under section 539, Suit No. 49[illegible]arding the suit as one that could be brought under suit temp[illegible] law, apart from section 539, held that the plaintiff there wa[illegible] to seek relief by praying for delivery of possession to that in[illegible]of the mutt who should be appointed by the Court as the [illegible]sor of the deceased head of the mutt.

In our opinion that decision is inapplicable to the present case, which we hold to be one maintainable under section 539, and in which the plaintiffs ask for the relief specified in clause (*a*) thereof. In our opinion, therefore, section 42 of the Specific Relief Act, is no bar to the maintainability of the suit.

If new trustees are appointed by the Court under clause (*a*) they will be entitled to demand possession from the defendants whose title to administer the trust is negatived by the decree and if the defendants choose not to comply with the demand, the new trustees will be entitled to bring a suit under the ordinary law to eject them from the temple and its endowments.

We therefore set aside the decree appealed against and remand the suit for disposal according to law with reference to the above observations.

Costs in this Court are to be costs in the suit.

(1) I.L.R., 16 Mad., 31.

APPELLATE CRIMINAL.

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

1902. September 17, 25.

CHEKUTTY AND TWO OTHERS (ACCUSED), PETITIONERS,

v.

EMPEROR, RESPONDENT.*

Criminal Procedure Code—Act V of 1898, s. 235—"Same transaction"—Kidnapping of child and assault, at a later date, on mother—Conviction—Validity.

An accused was charged and tried at one trial with the offences of kidnapping, wrongful confinement and assault, and convicted. The case for the prosecution was that the accused had kidnapped and wrongfully confined a boy, and that when the boy's mother, a day or two afterwards, went to the house of the accused and asked that the boy might be allowed to return to her, the accused assaulted the mother. The conviction was upheld by the Sessions Court. On a revision petition being preferred in the High Court:

Held, that the charge of assault ought to have been brought separately and tried separately. The kidnapping and the assault were not committed in one series of acts so connected together as to form one transaction. The offence of kidnapping is complete when the minor is actually taken from lawful guardianship, and it is not an offence continuing as long as the minor is kept out of such guardianship. Even assuming that on the facts of this case the process of "taking" or "enticing" was going on at the time of the alleged assault on the mother, it was doubtful whether the assault was one of a series of acts so connected together as to form the same transaction, and the charge of assault should have been brought and tried separately.

CHARGES against first accused of kidnapping, wrongful confinement and assault, under sections 363, 343 and 352 of the Indian Penal Code; against second and third accused of abetment of wrongful confinement and assault. The charge against first accused was that he kidnapped and wrongfully confined a boy who was in his service, and that when the boy's mother came, a day or two afterwards, and asked that the boy might be allowed to return to her, first accused assaulted her. The Special Assistant Magistrate of Malabar convicted first accused of all the three offences with which he was charged. He also convicted the other two accused. The

* Criminal Revision Case No. 264 of 1902, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of N. S. Brodie, Sessions Judge of South Malabar, in Criminal Appeal No. 34 of 1902, confirming the finding and sentences passed on the petitioners by A. R. L. Totteham, Special Assistant Magistrate of Malabar, in Criminal Case No. 6 of 1902.

accused appealed to the acting Sessions Judge, who upheld the convictions and sentences. The accused now preferred this revision petition.

Dr. *Swaminatha* for petitioner.

The Acting Public Prosecutor in support of the conviction.

Sir ARNOLD WHITE, C.J.—In this case the first accused was charged with kidnapping (section 363, Indian Penal Code), wrongful confinement (section 343) and assault (section 352) and the second and third accused were charged with abetment of wrongful confinement and abetment of assault. The case against the first accused was that he kidnapped and wrongfully confined a boy who was in his service as a cowherd, and that, on the boy's mother, a day or two afterwards, coming to the house of the first accused and asking that the boy should be allowed to return to her, he assaulted the mother. The first accused was charged with three distinct offences and tried at one trial for the three offences. The question is, were the three offences committed in one series of acts so connected together as to form the same transaction within the meaning of section 235 of the Code of Criminal Procedure. If they were not, the charge was bad and the trial was bad. No question arises with regard to the charges of kidnapping and wrongful confinement. The question is, were the kidnapping of the boy and the assault on the mother committed in one series of acts so connected together as to form the same transaction. In my opinion they were not. In support of the conviction it was argued that the offence of kidnapping was continuous and that the assault on the mother having been committed during the continuance of the kidnapping the two offences were committed in one series of acts so connected together as to form the same transaction. It has recently been held by a Full Bench of the Calcutta High Court in *Nemai Chattoraj* v. *Queen-Empress*(1) that the offence of kidnapping from lawful guardianship is complete when the minor is actually taken from lawful guardianship and that it is not an offence continuing as long as the minor is kept out of such guardianship. The Madras case (*Regina* v. *Samia Kaundan*(2)) as the Chief Justice of the Calcutta High Court points out in the case just referred to, was a case of kidnapping out of British India and as, when the accused intervened, the boy had not been actually taken out of British

(1) I.L.R., 27 Calc., 1041. (2) I.L.R., 1 Mad., 173.

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India the process of taking was regarded as continuing. I agree with the view of the Calcutta High Court, but even assuming that, on the facts of the present case, the right view is that the process of "taking" or "enticing" the boy was going on at the time of the alleged assault on the mother, I should feel considerable doubt as to whether the assault on the mother was one of a series of acts so connected together as to form the same transaction.

I think the charge of assault ought to have been brought separately and tried separately. The Magistrate, in general terms, finds the three accused guilty of the offences with which they were charged and sentences the first accused to two years' rigorous imprisonment and the second and third accused to nine months' rigorous imprisonment each, and the Sessions Judge finds that the three charges are supported by the facts and dismisses the appeal.

In this state of things it seems to me that the proper order for us to make is to set aside the convictions and to order the retrial of the three accused.

MOORE, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Moore.

1902. September 26, 30.

ZEMINDARNI OF NIDADAVOLE (PLAINTIFF), APPELLANT,

v.

SAGIRAZU KRISHNAM RAZU AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Rent Recovery Act—VIII of 1865, s. 11, cl. 4—Sanction by Deputy Collector of enhanced rent—Cancellation of sanction by Collector—Validity—Regulation II of 1803, s. 9—Regulation VII of 1828, s. 3—Powers of supervision vested in Collector—Tender of patta within fasli—Order sanctioning enhanced rent passed after termination of fasli—Effect on patta.

The general powers of supervision given to a Collector by section 9 of Regulation II of 1803, and section 3 of Regulation VII of 1828, include the power to set aside an order of a Deputy Collector passed under section 11, clause 4, of the Rent Recovery Act, sanctioning an increase in the consolidated rent payable by tenants.

* Second Appeal No. 142 of 1901, presented against the decree of J. H. Munro, District Judge of Godavari, in Appeal Suit No. 360 of 1899, presented against the decision of N. S. Somasundaram, Deputy Collector, General Duties, Narasapur, in Summary Suit No. 6 of 1898 (*vide* Second Appeal Nos. 143 to 457 of 1901).

ZEMINDARNI OF NIDADAVOLE v. SAGIRAZU KRISHNAM RAZU.

A landholder must tender patta to his tenant within the fasli to which it relates. Pattas were tendered to tenants prior to 1st July 1898 in respect of fasli 1307, which ends on 30th June 1898. In those pattas the landholder claimed a rent which was enhanced at the rate of one rupee per acre. The enhancement was justified on the ground (among others) that the Government had added a corresponding increase to the water-rate and that the Deputy Collector had, under section 11, clause 4, of the Rent Recovery Act, sanctioned the enhanced rent. Such an order had, in fact, been passed, but it had been cancelled by the Collector, who remanded the matter to the Deputy Collector to make enquiry and to pass a fresh order, without retrospective effect. The Deputy Collector passed a fresh order on 29th August 1898—nearly two months after the close of the fasli 1307, for which the pattas had been tendered. That order sanctioned an enhancement of 2 annas 3 pies per acre. On suits being filed to enforce acceptance of pattas containing enhanced rent at the rate of one rupee per acre:

Held, that the Collector had power to cancel the order sanctioning the enhancement at the rate of one rupee per acre, which, in consequence, could not be enforced; and that an enhancement of even 2 annas 3 pies could not be claimed, as the pattas were bound to be and had been tendered prior to 30th June 1898, in respect of fasli 1307, which ended on that date, and the tenants were not bound to accept pattas in which an enhanced rate not sanctioned by the Deputy Collector till 29th August was charged.

Re[illegible] to enforce acceptance of pattas under (Madras) Act VIII of 1865 for fasli 1307. Plaintiff, the Zemindarni of Nidadavole, had tendered, before 1st July 1898, pattas for fasli 1307 to about 00 tenants occupying 14 villages, the rent stated in the pattas being enhanced to the extent of Re. 1 per acre on irrigated lands. Fasli 1307 ended on 30th June 1898. The tenants refused to accept the pattas, objecting to this enhancement, and raising other grounds in justification of their refusal. Issues were raised, on which the Deputy Collector held that there was an implied contract between the tenants and the landholder that the rents should not be raised, and that, in consequence, the landholder was not, on general grounds, entitled to enhance the rent. The landholder, however, also claimed the right to enhance for the present fasli 1307, on the ground that Government had, in 1894, passed an order raising the rate, throughout the district, for fasli 1304, for water taken from the anicut. On this point the Deputy Collector held that the enhanced rate could not be inserted in the pattas without the sanction of the Collector under section 11 of the Rent Recovery Act. The fact was that application to sanction an enhanced rate of Re. 1

per acre had been made by the landholder to the Deputy Collector, who, on 23rd October 1894, passed an order, under section 11, clause 4, of the Act, granting the application for fasli 1304. That order was, however, on 24th July 1896, cancelled by the Collector, who remanded the application for fresh enquiry after notice to both sides. The Collector further ordered that the order to be passed on the application was to have effect only from the date of the application. An enhancement at the rate of 2 annas 3 pies was ultimately sanctioned on 29th October 1898. The Deputy Collector doubted if this sanction was legal, and decreed that the pattas should be amended by striking off the enhancement asked for.

The District Judge, on appeal, referring to the last-mentioned sanction, said :—"On the 29th October 1898, a fresh sanction to raise the wet rates by As. 2-3 per acre was accorded. This sanction, however, does not affect the present pattas, being passed after the expiry of fasli 1307, and the plaintiff's vakil is unable to support the position that retrospective effect can be given to the sanction. The Deputy Collector who tried these suits amended the pattas by striking out the increase of Re. 1 per acre in the wet rates on the grounds that there was no sanction by the Collector for the increase, and that there was an implied contract as to the rates subsisting up to fasli 1304. The contentions for the plaintiff [illegible] appeal are that the first sanction is still subsisting, the Collec[illegible] having no power to revoke it, that no implied contract has be[illegible] made out, that apart from the Collector's sanction the plaintiff [illegible] entitled to enhance the rents on what are called general groun[illegible] and that if the rates claimed by plaintiff are not allowed vara[illegible] rates should be decreed."

He held that the Collector had power to cancel the sanction; also, that the case fell under section 11 of the Act, and that before increasing the rent by Re. 1 per acre the landholder was bound to obtain the Collector's sanction; and that it had not been obtained. He upheld the finding that there was an implied contract that the rates previously paid should be adhered to. He dismissed the appeals.

Plaintiff preferred this second appeal.

P. R. Sundara Ayyar for appellant.

V. Krishnasami Ayyar for respondent.

JUDGMENT.—These are a batch of second appeals from a decision of the District Judge of Godavari confirming a decision

of the Deputy Collector in a number of suits to enforce acceptance of pattas under Act VIII of 1865 (Madras).

A number of objections have been raised to the judgment of the District Judge, of which the more important relate to the question whether it can be held that the sanction of the Collector has been obtained by the plaintiff under section 11, clause IV, Act VIII of 1865 to the increased demand made in the pattas tendered by him to the defendant.

It appears that in 1894, Government having passed an order raising the water-rate charged throughout the Gódávari district for the use of anicut water for fasli 1304 (1894-95), the agent of the Zemindarni of Baharuzalli applied to the Deputy Collector for sanction to enhance the water-rate payable by her tenants by Re. 1 per acre and that he by an order, dated the 23rd October 1894, under section 11, clause 4, Act VIII of 1865, sanctioned the raising of the consolidated rent payable by the tenants as requested. This order having been brought to the notice of the Collector he cancelled it on the 24th July 1896 (exhibit Id). The two main reasons given by the Collector for setting aside the [illegible]rder of the Deputy Collector are that it was passed without any [illegible]tice having been sent to the tenants and that as Government [illegible]subsequently cancelled their notification enhancing the water-[illegible]or fasli 1304 and postponed the enhanced rate to fasli 1305, [illegible]Deputy Collector's order passed with reference to fasli 1304 [illegible]be held to have become void. It is now urged here that the [illegible]tor had no power to cancel the order of the Deputy Collector. [illegible]annot hold this to be a valid contention. We have no doubt [illegible]general powers of supervision given to a Collector by [illegible]Regulation II of 1803, and section 3, Regulation VII of [illegible]owered Mr. Brodie to set aside the order of the Deputy Coll[illegible]in this case. It is clear that the provisions of section 70, Act V[illegible] of 1865, do not apply as the order passed by the Deputy Collector under section 11 was not a judgment of a Collector or an order passed by him after decree and relating to execution. The Collector concluded his order of the 24th July 1896 by a direction to the Deputy Collector to restore the application of the Zemindarni to his file and dispose of it after hearing both parties, and pointed out to him that any order so passed by him would have no retrospective effect.

The Deputy Collector accordingly enquired into the matter and eventually, on the 29th August 1898, passed an order (exhibit D6) to the effect that the ryots were to pay an enhanced rent of 2 annas 3 pies for every acre that they held. The pattas now tendered are for fasli 1307 and the order of the Deputy Collector was passed almost two months after the close of that fasli. We are decidedly of opinion that the plaintiff cannot, in the present suits, claim to be entitled to charge the tenants the enhanced rate approved of by the Deputy Collector in this order. The question that we have to decide in these suits is whether the pattas tendered by the plaintiff to the tenants are proper ones. It has been held by the High Court in a number of decisions that pattas must be tendered within the fasli to which they relate. The present pattas had therefore to be tendered before the 1st July 1898 and they were so tendered. It would clearly be impossible to hold that a tenant was bound on the 30th June to accept a patta in which an enhanced rate not sanctioned by the Deputy Collector till the 29th of August was charged. The Deputy Collector could not have passed any order having retrospective effect and his order does not purport to have any such effect. It is therefore clear that plaintiff cannot enhance the rent payable by the defendants fasli 1307 on the strength of any order that has been passed Collector under section 11, clause 4 of Act VIII of 1865.

Certain other questions arising out of these orders of the re officials have been discussed at the hearing of these appeals. urged that there is nothing in the terms of section 11, clause authorize the Collector to sanction an additional rent in the now under consideration and that the order of the Deput of the 29th August 1898 is illegal and irregular on the ction; order. We do not consider it advisable to give any op before it respect to these contentions now. It is open to any one und to ve by the Deputy Collector's order to apply to the Collector to set that order cancelled or modified. It is further contended that as it has not been shown that there was any express or implied contract between the Zemindarni and the tenants as to the rents to be paid, it is open to the plaintiff to demand that the rent be paid in kind according to the *varam* under the provisions of section 11, clause 3 of the Act. We agree with both the lower Courts that an implied contract has been clearly proved to have subsisted between the

landlord and the tenants for a series of years as to the rent to be paid, except in so far as the question as to the right of the Zemindarni to charge enhanced rates in consequence of the levy of increased water-rate by Government is concerned. Such being the case, the contention now advanced cannot be sustained. The claim of the plaintiff to charge enhanced rent in consequence of the increased water-rate is one that must be disallowed for fasli 1307 for the reasons already given, and the question whether it will be open to the landlord to levy an enhanced rate in subsequent faslis is one with respect to which we offer no opinion at present.

These second appeals must be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

MARIYIL RAMAN NAIR (FIRST DEFENDANT), APPELLANT,

1902. September 29.

v.

refi. NARAYANAN NAMBUDIRIPAD AND ANOTHER (PLAINTIFF, NINETEENTH DEFENDANT), RESPONDENTS.*

ar Law—Suit by one of two urulans to recover property demised on kanom—on-joinder of the only other urulan as co-plaintiff—Joinder as defendant—vidence of adverse acts—Maintainability of suit.

e of two urulans sued to redeem property which had been demised to the n kanom. He did not join the other urulan as a co-plaintiff, but im as a defendant. The other urulan had granted a renewal of the plaintiff in his suit ignored that renewal and contended that it . On objection being raised that the suit was not maintainable by e non-joinder of the other urulan as a co-plaintiff:

hat the suit was maintainable. In the circumstances the plaintiff *Cr al Pro.* have joined the other urulan, nor could it be held that he was bound to ha e consulted him before the suit was filed, or asked him to join in bringing it.

Savitri Antarjanam v. *Raman Nambudri*, (I.L.R., 24 Mad., 296), distinguished and doubted.

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* Second Appeals Nos. 77 and 78 of 1901, presented against the decree of K. Kristna Row, Subordinate Judge of South Malabar at Calicut, in Appeal Suits Nos. 250 and 279 of 1900 presented against the decree of V. Kelu Eradi, District Munsif of Kutnad, in Original Suit No. 217 of 1899.

MARIYIL RAMAN NAIR v. NARAYANAN NAMBUDIRIPAD.

SUIT to recover immoveable property. Plaintiff and defendant No. 19 were the two urulans of the property now sued for. Plaintiff sued alone, without joining defendant No. 19 as a co-plaintiff, to recover the property, which had been demised on kanom to the karnavan of defendants Nos. 1 to 18. These defendants pleaded that defendant No. 19 had given them a renewal of the kanom and had taken the renewal fees, and that the plaintiff was estopped from challenging the validity of that renewal. An issue was framed as to whether plaintiff was entitled, singly, to maintain the suit. The District Munsif held that he was and decreed in plaintiff's favour. The Subordinate Judge, on appeal, held that defendant No. 19 had all along been acting adversely to the interest of the Devaswom, and that it would not have been possible to institute the suit with him as a co-plaintiff.

He upheld the District Munsif's decision.

First defendant preferred this second appeal.

J. L. Rosario for appellant.

P. R. Sundara Ayyar for first respondent.

K. P. Govinda Menon for third respondent.

JUDGMENT.—It is urged that the plaintiff's suit should have been dismissed on the ground that he had not consulted his co-urulan, the nineteenth defendant, or asked him to join as co-plaintiff before filing his plaint and reference is made to *Savitri Antarjanam* v. *Raman Nambudri*(1). In the present case it is shown that the nineteenth defendant had granted a renewal of the kanom and the plaintiff sued to redeem the prior kanom ignoring this renewal his plea being in fact that the renewal was invalid. Under these circumstances the plaintiff could not have joined the nineteenth defendant with him as a co-plaintiff. Supposing before the case it is impossible to hold that he should have found him before filing the suit or asked him to join in the suit that it. On this ground we distinguish the present case from that of *Savitri Antarjanam* v. *Raman Nambudri*(1). If we were unable to do this we should be obliged to refer the question dealt with in this decision to a Full Bench as we are disposed to agree with the view taken in *Pyarimohun Bose* v. *Kedanath Roy*(2) and *Biri Singh* v. *Nawal Singh*(3). The renewal granted by the

(1) I.L.R., 24 Mad., 296. (2) I.L.R., 26 Calc., 409.
(3) I.L.R., 24 All., 226.

nineteenth defendant having been shown not to be *bonâ fide* and valid it cannot be assumed that at the time of the execution of the renewed kanom there was an adjustment of rent up to that date binding on the Devaswom. These second appeals are dismissed with costs.

MARIYIL RAMAN NAIR v. NARAYANAN NAMBUDIRIPAD.

APPELLATE CRIMINAL.

Before Mr. Justice Davies and Mr. Justice Benson.

IN RE BALAMBAL (SECOND ACCUSED), PETITIONER.

1902. September 30.

Code—Act XLV of 1860, *s.* 498—*"Enticing away" a woman—Charge of abetment against the woman enticed—Validity.*

e a man has been convicted of enticing away a woman, under section e Indian Penal Code, the woman who was enticed away by him cannot be an abettor.

her a woman could be convicted of abetting the taking away of herself he meaning of section 498.—*Quære.*

CE (against first accused) of enticing away a married (second accused) under section 498 of the Indian Penal and (against second accused) of abetment of that offence sections 498 and 109 of the Indian Penal Code. The Subtrate of Gingee convicted both accused, sentencing first 1 to six months' rigorous imprisonment and to pay a fine 100, with one month's further rigorous imprisonment in , and sentencing second accused to three months' simple nt. This reference was made by the District Magistrate d that as the second accused was the woman whom first charged with enticing away, the second accused could ished as an abettor.

blic Prosecutor in support of the reference.

Criminal p MENT.—Whether a woman could be convicted of abetting Second king away" of herself within the meaning of section 498, Indian Penal Code, we need not now decide, as that is not the offence charged against her, but we are of opinion that when a man

* (Criminal Revision Case No. 36 of 1902.) Case referred for the orders of the High Court under section 438 of the Code of Criminal Procedure by E. A. Elwin, District Magistrate of South Arcot, in his letter, dated 25th July 1902, Reference on Criminal Revision Case No. 30 of 1902.

In re BALAMBAL.

is convicted, as in this case, of "*enticing away*" a woman under section 498, Indian Penal Code, the woman cannot be guilty as an abettor.

We set aside the conviction of Balambal on a charge of abetting the enticing away of herself, and direct that her bail bond be discharged.

APPELLATE CRIMINAL.

Before Mr. Justice Davies and Mr. Justice Benson.

1902. October 7.

SINGARAJU NAGABHUSHANAM (ACCUSED), PETITIONER.*

Penal Code—Act XLV of 1860, s. 500—Defamation—True statement that ant had been convicted of theft and sent to jail—Conviction—Vali

An accused, who was the trustee of a temple, was convicted of def the alleged defamatory statement being that the complainant, who perfo worship in a temple, had been convicted and sent to jail for the theft belonging to the temple. At the time when the statement was made, an ment was in question in connection with the temple:

Held, on revision, that the accused was justified in making the st either in the interest of the temple, or because the statement was no mor publication of the result of proceedings in a Court of Justice.

CHARGE of defamation under section 500 of the Indian Penal The complainant was the priest performing the worship temples of Agasthyswara Swamy and Ramalingeswara Swa Pedana. The alleged defamatory matter was written on a f card, which was sent to and received by complainant in t course of post. The Magistrate found that the signa card was that of the accused. The writing state years previously the complainant had been sent to jail tion with a case of theft of idols in the temple of Rama Swamy. Complainant admitted that this was true. Th trate held, however, that this was immaterial. He convic accused, imposing a fine of Rs. 25 with an alternative o one month's rigorous imprisonment.

* Criminal Revision Petition No. 298 of 1902 presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the conviction and sentence passed on the petitioner (accused) by K. V. Srinivasan, Head-Quarters Deputy Magistrate of Kistna, in Criminal Case No. 7 of 1902.

SINGARAJU NAGABHUSHANAM.

The accused preferred this Criminal Revision Petition.

P. Nagabhushanam for petitioner.

K. Sreenivasa Ayyangar for complainant.

DAVIES, J.—I am unable to see wherein the defamation consists. The complainant had, as a matter of fact, been convicted of theft and sent to jail and that theft was of property belonging to the very temple the appointment to the "archakaship" of which was in question. There was no harm in the accused, who is the trustee of the temple, publishing that fact in order to forestall the complainant from setting up his rights in regard to a joint "archakaship" because it was in the interests of the temple that the trustee so acted. The conviction must be set aside and the fine, if levied, be refunded.

BENSON, J.—The statement alleged to be defamatory is that the complainant had gone to jail for having carried away certain idols. That statement was true, and the alleged defamatory statement was no more than the publication of the result of proceedings in a Court of Justice, which is specially declared to be no defamation by exception 4 to section 499 of the Indian Penal Code.

The conviction must be reversed and the fine, if levied, refunded.

APPELLATE CRIMINAL.

Before Mr. Justice Davies and Mr. Justice Benson.

1902. October 7.

MEYYAN AND ANOTHER (ACCUSED),

v.

EMPEROR (RESPONDENT).*

Criminal Procedure Code—Act V of 1898, ss. 391, 407—Sentence of whipping by Second-class Magistrate—Appeal—Application for postponement of sentence till hearing of appeal—Refusal—Validity.

When a Second-class Magistrate passes a sentence of whipping only, without imprisonment, he has no power to postpone the execution of the sentence pending

* Case referred (Criminal Revision Case No. 447 of 1902) for the orders of the High Court in accordance with the proceedings of this Court, dated 9th September 1902, No. 1756 J, by A. G. Cardew, District Magistrate of Madura.

MEYYAN v. EMPEROR.

an appeal by the accused. It is only when whipping is added to imprisonment in an appealable case that the whipping may, and ought to, be postponed under section 391 of the Criminal Procedure Code.

SENTENCE of whipping passed by the Second-class Magistrate of Sivaganga. The Magistrate refused to allow time for an appeal to be preferred, and the sentence of whipping was executed. Upon the appeal being heard, the sentence was quashed. The District Magistrate made this reference to the High Court as to whether the execution of a sentence of whipping, when it is the sole punishment, may be postponed to allow time for an appeal to be preferred.

ORDER.—In our opinion the refusal of the Second-class Magistrate to postpone the sentence of whipping pending the intended appeal of the accused was the only order he could legally pass. The Code makes no provision whereby a Magistrate imposing a sentence of whipping only can suspend its execution, nor does it provide for the detention of a person so sentenced to allow of his appealing, nor for his re-arrest to undergo the whipping if the sentence is confirmed on appeal. It is only when whipping is added to imprisonment in an appealable case that whipping may, and ought to, be postponed (section 391, Criminal Procedure Code).

No doubt this state of the law, in effect, deprives persons sentenced by a Second-class Magistrate to whipping only, of the right of appeal which section 407, Criminal Procedure Code, gives them and we agree with the District Magistrate that such a result is unsatisfactory. It can, however, only be corrected by the Legislature. The difficulty does not arise in the case of First-class Magistrates, as the Code gives no right of appeal against a sentence of whipping only by such Magistrates (section 413 of the Criminal Procedure Code).

APPELLATE CRIMINAL.

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

GUZZALA HANUMAN (PRISONER), APPELLANT,

v.

EMPEROR, RESPONDENT.*

1902. October 15.

Penal Code—Act XLV of 1860, *ss.* 395, 411—*Charges of dacoity and receiving stolen property—Charge to jury—Possession of stolen property—Misdirection.*

On the trial of an accused, before a Judge and jury at a Court of Session, for dacoity and receiving stolen property, the Judge, in his charge to the jury, directed them that the fact of a stolen shirt having been found in possession of the accused two months after the dacoity, was sufficient to justify them in convicting the accused of the dacoity:

Held, on appeal, that this was a misdirection. Whether the possession of the stolen property was recent enough to warrant a conviction for the substantive offence was a matter entirely for the jury and should not have been put to them in the positive way which the Judge adopted.

CHARGES of dacoity, under section 395, and of receiving stolen property under section 411 of the Indian Penal Code. The Sessions Judge, in the course of his charge to the jury, gave the following direction:—

"This is a simple case. On 31st January of this year a dacoity took place at Sanganakal in the house where the clerks of the District Court were staying. Prosecution witnesses Nos. 1 and 2 are two of the clerks who were there. The first of them lost, among other things, a flannel shirt. This shirt is identified both by the clerk and the man who made it for him (prosecution third witness), and also the tailor (prosecution fourth witness), who cut the shirt from the cloth. Two months afterwards, in connection with the investigation of another dacoity at Halvi, the Yemmiganur Inspector (prosecution fifth witness), searched the houses of Korachas and also surrounded certain date topes where a wandering gang of Korachas was encamped. Four out of ten wandering Korachas were captured. One of these is the prisoner before the Court. Upon him was found the identical shirt lost by the clerk in the

* Criminal Appeal No. 532 of 1902, presented against the sentence of J. J. Cotton, Sessions Judge of Bellary Division, in Case No. 45 of the Calendar for 1902.

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dacoity. Two Inspectors (prosecution witnesses Nos. 5 and 6), who were present at the arrest of the accused prove that he was actually wearing the tell-tale garment. The possession of a dacoited article within so short a time after the commission of the dacoity is evidence of dacoity against the accused unless he can prove that he honestly came by it."

The jury convicted the accused on both charges and the Judge sentenced him to five years' rigorous imprisonment (the prisoner admitting a previous conviction).

The accused preferred this appeal but was not represented.

The Public Prosecutor in support of the conviction.

JUDGMENT.—There was a clear misdirection to the jury in the Judge's directing them that the finding of the stolen shirt with the accused two months after the dacoity was "so short" a time as to justify them in convicting the accused of the dacoity itself. Whether the possession of the stolen property was recent enough to warrant a conviction for the substantive offence was a matter entirely for the jury, and should not have been put to them in the positive way which the Judge adopted. The jury have not only convicted the accused of being in possession of stolen property under section 411, Indian Penal Code, but have also found him guilty of dacoity itself. This is manifestly a contradictory finding for if a man steals an article, he cannot also be convicted of receiving it, and the verdict of the jury as it is, cannot stand. We think the jury primarily intended to convict the accused of the offence under section 411, Indian Penal Code, and their conviction of the offence of dacoity as well was due to the misdirection pointed out above. We therefore set aside the verdict of guilty of dacoity and confirm the verdict of guilty of the offence under section 411, Indian Penal Code. In lieu of the sentence inflicted by the Judge, we sentence the prisoner to two years' rigorous imprisonment under sections 411 and 75 of the Indian Penal Code.

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice.

KANNOOKARAN KUNHAMAD AND OTHERS (PETITIONERS),

v.

EMPEROR, RESPONDENT.*

1902. October 17.

Criminal Procedure Code—Act V of 1898, s. 106—Order for security to keep the peace on convictions for offences not necessarily involving a breach of the peace—Validity.

Certain accused were convicted of theft, of mischief and of being members of an unlawful assembly. They were sentenced to imprisonment and were further required to give security to keep the peace. There was no finding that a breach of the peace had been committed by them:

Held, on revision, that the order requiring them to give security for keeping the peace must be set aside, as none of the offences for which they had been convicted necessarily involved a breach of the peace.

Whether such an order might be made in a case in which a person is not accused of an offence involving a breach of the peace, but there is nevertheless an express finding that a breach has been committed.—*Quære.*

ORDER requiring accused to give security for keeping the peace. Petitioners were convicted of theft, of mischief and of being members of an unlawful assembly. The Joint Magistrate of Malabar, before whom they were tried, sentenced them to different terms of imprisonment, and ordered them to furnish security to keep the peace for one year under section 106 of the Code of Criminal Procedure. Petitioners appealed to the Acting Sessions Judge, who upheld the convictions, the sentences and the order. Petitioners preferred this criminal revision petition.

Ryru Nambiar for petitioners.

ORDER.—In this case the accused were convicted of theft (section 329 of the Indian Penal Code), of mischief (section 426 of the Indian Penal Code) and of being members of an unlawful assembly (section 143 of the Indian Penal Code). None of these offences necessarily involve a breach of the peace. I express no opinion as to whether in a case in which a person is not accused of

* Criminal Revision Case No. 231 of 1902, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of A. M. Slight, Sessions Judge of North Malabar, in Criminal Appeal No. 3 of 1902, confirming the finding and sentence of M. J. Murphy, Joint Magistrate of Malabar, in Calendar Case No. 8 of 1902.

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an offence involving a breach of the peace, or of taking unlawful measures with the evident intention of committing the same, but in which there is nevertheless an express finding that a breach of the peace has been committed or unlawful measures taken with the evident intention of committing the same, the accused could be called upon to give security to keep the peace under section 106 of the Code of Criminal Procedure. There are no such findings in the present case. So much of the sentence as requires the accused to give security for keeping the peace must be set aside.

APPELLATE CRIMINAL.

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

1902. October 28.

EMPEROR, COMPLAINANT,

v.

VENKANNA PRABHU AND FOURTEEN OTHERS (ACCUSED).*

Forest Act—(Madras) Act V of 1882, s. 21 (a)—"Clearing"—Removal of trees or shrubs—Conviction where no evidence of such removal—Validity.

The word "clearing" as it is used in section 21 (*a*) of the (Madras) Forest Act of 1882, means something in the nature of the removal of trees or shrubs. Certain accused were convicted of an offence under the section, but there was no evidence on the part of the prosecution to show that there had been any removal of trees or shrubs by the accused, or that cultivation of the land in question could not have been carried on without such removal:

Held, that there was no evidence that the accused had committed an act prohibited by section 21.

CONVICTIONS, under section 21 (*a*) of the (Madras) Forest Act, 1882, for making a "fresh clearing," as prohibited by section 7, on reserved forest land. The convictions were confirmed by the General Duty Deputy Magistrate. The case was referred to the High Court by the Sessions Judge of South Canara, from whose letter of reference it appeared that the accused admitted that they had cultivated the land in question, but maintained that it had been cultivated previously; also that there was no evidence on the

* Case referred No. 89 of 1902 (Criminal Revision Case No. 326 of 1902) 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 his letter, dated 14th July 1902, No. 2269 of 1902.

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part of the prosecution that the accused had removed any trees or shrubs from the land.

The Acting Public Prosecutor in support of the reference.

ORDER.—Both the lower Courts appear to have based their decisions on the assumption that the mere cultivation of the land in question involved a "clearing" within the meaning of section 21 (*a*) of the Madras Forest Act, 1882, and that the only point for consideration was whether what had been done by the accused was "fresh." It seems to us that the word "clearing" means something in the nature of the removal of trees or shrubs. The provision is a penal one and must be strictly construed. There is no evidence that there was any removal of trees or shrubs by the accused or that cultivation of the land in question could not be carried on without such removal. In our judgment there is no evidence that the accused committed an act prohibited by section 21.

The conviction and sentence must be set aside and the fine, if paid, must be refunded.

APPELLATE CRIMINAL.

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

1902. October 28.

BELAGAL RAMACHARLU (SECOND DEFENDANT), PETITIONER,

v.

EMPEROR, RESPONDENT.*

Criminal Procedure Code—Act V of 1898, ss. 112, 118, 144, 145—Notice to give security for three months—Order to give security for twelve months—Validity—Discretion to proceed under s. 107 or ss. 144 and 145.

Where a notice is issued under section 112 of the Code of Criminal Procedure to a defendant to show cause why he should not give security to be of good behaviour for three months, the Magistrate has no power to order security to be given for a longer period.

Where a defendant is found by the Magistrate to be in possession of land about which a dispute occurs, the Magistrate is not bound to act under sections

* Criminal Revision Case No. 400 of 1902, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the proceedings of B. C. Smith, Head Assistant Magistrate of Hospet, dated 3rd June 1902, in Miscellaneous Case No. 3 of 1902.

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144 and 145, but has a discretion to proceed either under section 107 or under sections 144 and 145 of the Code.

Dolegobind Chowdhry v. *Dhanu Khan*, (I.L.R., 25 Calc., 559), distinguished.

ORDER to give security to keep the peace. The Head Assistant Magistrate of Hospet ordered two defendants to execute a bond for Rs. 100, with one surety each for a like sum, to keep the peace for a year. The notice which had been issued to the defendants called on them to show cause why they should not give security to be of good behaviour for three months. Second defendant filed this criminal revision petition, contending that the order was wrong: and that having regard to the finding of the Magistrate that the petitioner was in actual possession of the lands over which the dispute arose, the Magistrate should, if at all, have taken security only from the first defendant, or otherwise protected the petitioner's possession under section 145 of the Code of Criminal Procedure.

T. S. Krishna Ayyar for petitioner.

The Acting Public Prosecutor in support of the order.

ORDER.—The notice under section 112, Criminal Procedure Code, was to the petitioner to show cause why he should not give security to be of good behaviour for three months, but the order afterwards issued under section 118 binds the parties for a year.

Section 118 expressly provides that "no person shall be ordered to give security . . . . for a period longer than that specified in the order made under section 112." The Magistrate had no power to make an order for more than three months, the term in the notice issued under section 112.

We therefore revise the Magistrate's order by substituting three months for one year.

It is urged that the proper course was for the Magistrate to have acted under sections 144, 145, Criminal Procedure Code, and reliance is placed on the case of *Dolegobind Chowdhry* v. *Dhanu Khan*(1).

The facts in that case are clearly distinguishable from those in the present case, but even were it otherwise we are not prepared to say that we should take the same view. We think the Magistrate has a discretion to proceed under section 107 or sections 144, 145, Criminal Procedure Code.

(1) I.L.R., 25 Calc., 559.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar, Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

REFERENCE UNDER STAMP ACT, SECTION 61 (1).*

1902. November 4.

Stamp Act—I of 1879, s. 7—Instrument relating to "several distinct matters"—Consideration for lease being rent payable each month and one month's rent payable in advance to be repaid at end of term.

Where the consideration for a lease consists partly of rent to be paid each month and partly of a sum equal to a month's rent paid in advance and repayable at the end of the lease, the instrument relates to only one matter, namely, the lease, and is not chargeable with duty as an instrument "dealing with two distinct matters."

REFERENCE under section 61 (1) of the Stamp Act of 1899. Three documents were forwarded, under section 88 of the Act, by the Registrar of the Presidency Court of Small Causes to the Collector of Madras.

The documents were as follows:—

(1) "Rental agreement executed on 17th October 1896 corresponding to 3rd Arpici of Durmuki year to Neela Boyi Ammal, wife of Sukataka Ganesa Row, residing in Krishnasami temple street, Muthyalpet, Madras, by Muthiyalu Pattar residing in the said town. As I want one room upstairs in your house, door No. 219 in the eastern row of Lingi Chetty Street, Muthyalpet, the rent per mensem settled therefor is Rs. 1-8-0 (one rupee and eight annas). The advance paid for this is Rs. 1-8-0. This sum of Rs. 1-8-0 shall remain with you. The said rent shall be paid within the 5th of each month either to you or to your order by me or by my heirs. In case of your requiring the room, I shall, on receiving a month's previous notice, vacate your room and put you in possession of it and receive the advance of Rs. 1-8-0 paid by me. If I do not do so, you may take legal steps. To this effect have I executed the rental agreement with my free will and consent."

* Referred Case No. 11 of 1902, stated under section 61 (1), Act II of 1899, by J. Twigg, Collector of Madras, and Commissioner of Income-tax, in his letter, dated 23rd July 1902, No. 310-G.L., referring for revision by the High Court of his decision regarding the insufficiency of stamps on the three documents forwarded to him by the Registrar of the Court of Small Causes, Madras, under section 38 of the said Act.

REFERENCE UNDER STAMP ACT.

(2) "Rental agreement executed on 23rd January 1893 to S. Ponnusami Pillai of Puduvai residing at door No. 33, eastern row of Strotten Muthia Mudali Street, 2nd Police Division, Peddunaikenpet, Madras, by us two: 1. Scenivasalu Naidu and 2. Venkatakrishna Aiyar residing at door No. 24, Solayappan Street, Sanjeeviroyen Pettai, attached to Police H. Division, Washermanpet, of the said town. Having settled at a monthly rent of Rs. 7 the house, door No. 24, eastern row of Solayappan Street, Sanjeeviroyen Pettai, attached to the said Washermanpet, the advance paid is Rs. 7. Within the 10th of every month, either we or our heirs shall pay (the rent) without default either to you or to your order, on the said date. If you should require the said house, we shall, on having one month's previous notice, vacate the said house, settle the arrears of rent, receive the said advance and deliver possession of the said house with the key to you. To this effect have we executed the rental agreement with our free will and consent."

(3) "Rental agreement, dated 12th December 1900, executed by M. Sadasiva Selet, residing in premises No. 445, Mint Street, Peddu Naick's Pettah, Madras, in favour of Rottela Venkatachela Chetti, residing in premises No. 87, Narayana Mudaly Street, Peddu Naick's Pettah, Madras. I have arranged to pay a rent of Rs. 5-8-0 (five rupees and eight annas) per mensem for my keeping carriage and horse in the stable bearing N. 2/12 F, situate to the north of the building bearing door No. 12 in Neeli Ponna Pillay Street *alias* Veerappen Street in Peddu Naick's Pettah, Madras, and I have paid for this to you Rs. 5-8-0 (five rupees and eight annas), as an advance for one month, and taken possession of the stable. I or my heirs shall therefore pay (rent therefor) to you or to your order or to your heirs within the 5th of each month from this date. In default, should the rent accrue for two months, you can take possession of the stable without giving notice and without going to the Court. Further, in case you require the stable or in case I do not require it, I shall pay to you the rent due up to the date of my occupancy within 30 days from the date of notice in writing issued by each other, vacate and deliver the stable to you and take back the amount advanced by me. To this effect, is this rental agreement executed and given with my consent." A case was stated for the opinion of the High Court as to the sufficiency of the stamps on these documents.

The reference came on in due course. REFERENCE UNDER STAMP ACT.

C. Venkatasubramiah for the plaintiff in the suit in the Small Cause Court.

The Court made the following

DECLARATION.—In the cases 1 and 2 referred to by the Collector we find that the duty levied by the Court of Small Causes is correct. We cannot accept the Collector's suggestion that the sum equal to one month's rent paid in advance is to be regarded as money lent on mortgage, and the instrument regarded as dealing with two distinct matters under section 7 of Act I of 1879.

The instrument in each of these cases relates only to one matter, viz., the lease, though the consideration consists partly of rent to be paid each month, and partly of a sum equal to a month's rent paid in advance and to be repaid at the end of the lease. See the decision in *Reference under Stamp Act*(1).

The instruments are chargeable under article 39 (*b*), schedule I of Act I of 1879.

In case 3 referred to by the Collector we declare that the instrument is chargeable under article 35 (*a*), IV and 35 (*c*), schedule I of Act II of 1899, with a duty of Rs. 1-8-0.

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice.

ABDUL AZEEZ SAHIB (ACCUSED), PETITIONER, 1902. December 8.

v.

CUDDAPAH MUNICIPALITY (COMPLAINANT), RESPONDENT.*

District Municipalities Act—(*Madras*) *Act IV of* 1884 *as amended by* (*Madras*) *Act III of* 1897, *s.* 269—*Money due as tax, fee, toll or other payment—Money due on toll-contract—Applicability of section.*

Money due under a contract entered into with a Municipality for the right to collect tolls in consideration of a money payment does not fall within any of the provisions of section 269 of the District Municipalities Act, 1884, and a contractor

(1) I.L.R., 25 Mad., 3.

* Criminal Revision Case No. 423 of 1902, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of the Cuddapah Bench Magistrate's Court, dated 23rd October 1901, in Calendar Case No. 128 of 1900.

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who fails to pay what is due under such a contract cannot be convicted and fined under that section.

CHARGE of failure to pay toll kists due to the Municipality of Cuddapah, amounting to Rs. 426-0-0. The charge was preferred by the Chairman of the Cuddapah Municipality, under sections 269, 103 and 111 of the Madras District Municipalities Act of 1884. The accused was tried summarily by the Town Bench and found guilty and fined 4 annas in addition to the amount still remaining due (a portion having since been paid). The accused preferred this criminal revision petition, on the ground that the amount, which was due under a toll contract, was not a tax, fee or toll or other payment due to the Municipal Council within the meaning of section 269 of the Act of 1884 as amended by the Act of 1897.

Mr. *A. S. Cowdell* for petitioner.

The Public Prosecutor in support of the conviction.

ORDER.—The sum claimed by the Municipality from the accused is money due under a contract between the Municipality and the accused.

In my judgment the money due does not fall within any of the provisions of section 269 of Act IV of 1884.

The Public Prosecutor has argued that it is "rent" within the meaning of that section. I am clearly of opinion that it is not. He has also contended that it is a "toll." The fact that the accused has had assigned to him the right to collect the tolls, in consideration of a money payment made by him to the Municipality, does not make the money payable by the accused to the Municipality under his contract a "toll" within the meaning of the section.

If authority were needed, *In re Jagu Santram*(1) is a case in point.

The conviction is bad and must be set aside and the fine, if paid, must be refunded.

(1) I.L.R., 22 Bom., 709.

APPELLATE CRIMINAL.

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

KALIMUTHU AND TWO OTHERS, ACCUSED,

v.

EMPEROR, RESPONDENT.*

1902. December 8.

Criminal Procedure Code—Act V of 1898, *s.* 435 (4)—*Refusal by Sessions Judge to commit for trial—Subsequent commitment by District Magistrate after taking up the case* suo motu—*Legality.*

A Second-class Magistrate, after enquiring into a charge of murder, discharged the accused. A revision petition was then presented to the Sessions Judge, requesting that the accused might be committed for trial at the Sessions. The Sessions Judge dismissed the petition, holding that the Magistrate's reasons for discharging the accused were good. At a subsequent date, the District Magistrate took up the case *suo motu* and directed the commitment of the accused for trial at the Sessions Court on a charge of murder. On reference being made to the High Court for orders:

Held, that the commitment that was made under the District Magistrate's order was invalid and must be set aside. Under clause 4 of section 435 it was not competent to the District Magistrate to entertain an application for the commitment being ordered when the Sessions Judge had refused such an order. Nor could he act *suo motu*. The reason for the prohibition in the section was to avoid a conflict between the orders of two District authorities having co-ordinate powers, and that reason applied equally to cases in which the authorities acted *suo motu*.

COMMITMENT of accused for trial. The Second-class Magistrate of Mudukulattur held a preliminary enquiry in his Register Case No. 5 of 1901, with regard to the case of three persons who were charged with having committed murder. In the result, namely, on 24th February 1902, the Magistrate discharged the accused. On 3rd April 1902, the complainant filed a revision petition in the Sessions Court, requesting that Court to direct the committal of the accused to the Sessions, but the Sessions Judge dismissed the petition, holding that the Magistrate's reasons for discharging the accused were good. On 30th April 1902, the District Magistrate took up the case *suo motu* and, on 31st May 1902, directed the commitment of the accused for trial on a charge of murder at the

* Case referred No. 126 of 1902 (Criminal Revision Case No. 448 of 1902) for the orders of the High Court, under section 438 of the Code of Criminal Procedure, by C. G. Spencer, Sessions Judge of Madura, in his letter, dated 18th September 1902, No. 6003 of 24th September 1902.

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Sessions Court. The Sessions Judge now directed this reference to be made for the orders of the High Court.

The Public Prosecutor in support of the order of commitment.

ORDER.—No doubt the District Magistrate acted in ignorance of the order passed by the Sessions Judge, but that does not make the District Magistrate's order legal, if, under the recently enacted clause (4) of section 435, Code of Criminal Procedure, it was too late for him to act. Under that clause it was certainly not competent to the District Magistrate to entertain an application for the commitment being ordered when the Sessions Judge had refused such an order. The only question then is whether the District Magistrate could act *suo motu*. We must hold that he could not, for otherwise the salutory prohibition now enacted would be rendered nugatory. It could not have been intended that what the District Magistrate might not do on an application could yet be done by him by his dispensing with an application. The reason for the prohibition is the avoidance of a conflict between the orders of two District authorities having co-ordinate powers in the matter, and that reason applies equally to cases when they act *suo motu*. In this view the commitment that was made under the District Magistrate's order was invalid and we accordingly set it aside under section 215, Code of Criminal Procedure.

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice.

1902. December 10.

SAMI AYYA (ACCUSED), PETITIONER,

v.

EMPEROR, RESPONDENT.*

Criminal Procedure Code—Act V of 1898, s. 423—Power to "reverse the finding and sentence"—Reversal by Deputy Magistrate of an order acquitting accused on a charge of theft—Validity.

A Deputy Magistrate has no power, under section 423 of the Code of Criminal Procedure, to reverse an order acquitting an accused person of a charge of theft.

* Criminal Revision Case No. 484 of 1902, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of S. Ramu Ayyar, First-class Magistrate of Pattukkottai Division, in Criminal Appeal No. 67 of 1902, presented against the findings and sentences of A. Muktichidambara Mudaliar, Stationary Second-class Magistrate of Pattukkottai, in Calendar Case No. 322 of 1902.

SAMI AYYA v. EMPEROR.

The words "reverse the finding and sentence" in clause 1 (*b*) of that section mean reverse the finding upon which a conviction is based, and do not empower the appellate tribunal (or at any rate an appellate tribunal other than the High Court) to reverse or set aside an acquittal.

Queen-Empress v. *Jahanulla*, (I.L.R., 23 Calc., 975), explained.

CHARGES of being members of an unlawful assembly, rioting, hurt and theft. The facts material to the point decided are set out in the judgment. The accused were convicted, by the Second-class Magistrate, on all the charges except that of theft. On this charge he acquitted them. The accused appealed against that conviction to the Deputy Magistrate, who committed them to the Sessions on a charge of dacoity. Against that order, first accused preferred this criminal revision petition.

T. Rangachariar for petitioner.

The Public Prosecutor for the Crown.

ORDER.—In this case the accused were charged with being members of an unlawful assembly, rioting, hurt and theft. The Second-class Magistrate acquitted them on the charge of theft on the ground that they had acted without dishonest intention. He convicted them on the other charges. The accused appealed. On appeal, the Deputy Magistrate was of opinion that on the facts as found by the Second-class Magistrate the offence of theft must be held to have been committed, and that the offence committed by the accused amounted to dacoity, and he committed them to Sessions.

One of the facts as found by the Second-class Magistrate was that the accused had acted without dishonest intention. The finding of the Deputy Magistrate, in the face of this, that the accused must be held to have committed theft, cannot possibly be supported. The Public Prosecutor, in fact, did not attempt to support it.

A further point taken on behalf of the accused was that it was not competent for the Deputy Magistrate to reverse the acquittal on the charge of theft. In effect, no doubt, the Deputy Magistrate reversed the acquittal on the ground of theft, since, so long as the acquittal on the charge of theft stood, a necessary ingredient of the offence of dacoity was wanting and a committal to Sessions on a charge of dacoity would have been clearly wrong.

I am of opinion that, under section 423, Criminal Procedure Code, the Deputy Magistrate had no power to reverse the acquittal on the charge of theft. It seems to me the words "reverse the finding and sentence" in clause 1 (*b*) mean reverse the finding upon

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which a conviction is based, and do not empower the appellate tribunal (or at any rate an appellate tribunal other than the High Court) to reverse or set aside an acquittal. The case of *Queen-Empress* v. *Jahandlla*(1) to which my attention has been called by the Public Prosecutor is distinguishable on the ground that the appellate tribunal in that case (the High Court) was a tribunal which had jurisdiction to set aside an acquittal.

The order of the Deputy Magistrate must be set aside.

The Public Prosecutor has urged that the sentences are inadequate and has asked that, as a Court of Revision, I should enhance the sentences. The sentences are no doubt light, but I do not think they are so clearly inadequate as to call for the interference of this Court.

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice.

1902. December 10.

KARUPPANA SERVAGARAN AND ANOTHER, PETITIONERS,

v.

SINNA GOUNDEN AND ANOTHER, RESPONDENTS.*

Criminal Procedure Code —Act V of 1898, *s.* 195 (*b*)—*Sanction for prosecution—Appeal against order according sanction—Disposal of appeal after expiration of six months from order according sanction—Application for extension of time—"Good cause."*

Sanction was accorded for a prosecution, and an appeal was preferred against the order, which was not disposed of until after the expiration of six months from the date of the order. Upon an application being made for an extension of time for the prosecution of the accused:

Held, that good cause had been shown for the extension.

PETITION for an extension of time for the prosecution of the accused. Sanction was granted on 17th March 1902; an appeal was preferred by the accused against the order according sanction,

(1) I.L.R., 23 Calc., 975.

* Criminal Miscellaneous Petition No. 227 of 1902, presented under section 195 of the Code of Criminal Procedure, praying the High Court to order extension of time for prosecution of the respondents, sanctioned by the order of G. Kothundaramanjulu Naidu, District Munsif of Udamalpet, dated 17th March 1902, passed in Civil Miscellaneous Petition No. 33 of 1902 (Original Suit No. 256 of 1901).

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and that appeal was disposed of on 19th September, being two days after the expiration of the six months during which the prosecution should have been commenced. An extension of time was now applied for.

T. R. Venkatarama Sastri for petitioners.

ORDER.—Sanction for prosecution was granted on 17th March 1902. The six months during which the sanction remained in force [section 195 (*b*), Criminal Procedure Code] expired on 17th September 1902. The parties against whom the sanction was granted appealed from the order granting the sanction, but this appeal was not disposed of till 19th September, two days after the expiration of the six months.

Following the decision of this Court in *Ramudu Chetty* v. *Rungasawmy Chetty*(1) I hold that good cause has been shown for extending the time and I extend it to 10th January 1903.

APPELLATE CRIMINAL.

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

1902. December 11.

SUBUDHI RANTHO AND FIFTEEN OTHERS (PETITIONERS)

v.

BALARAMA PUDI (COUNTER-PETITIONER).*

Penal Code—Act XLV of 1860, *s.* 424—*Dishonest removal by tenants of crops—Ryots holding on varam tenure—Crops in possession of ryots- No taking out of possession—Offence.*

If ryots holding land on varam tenure remove crops for the purpose of protecting them from injury or damage owing to delay or refusal on the part of the Zemindar to perform his part in the harvesting or division, such a removal would not be dishonest within the meaning of section 424 of the Indian Penal Code. But where it is proved that the crops have been removed dishonestly, or

(1) Crl. Mis. Petition No. 78 of 1901 (unreported).

* Criminal Revision Case No. 78 of 1902, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of R. Govinda Row Naidu, General Deputy Magistrate of Gunsur, in Criminal Appeal No. 24 of 1901, presented against the finding and sentence passed by Upendra Patnaik, Second-class Magistrate of Aska, in Criminal Case No. 71 of 1901.

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fraudulently, an offence is committed under section 424, even though the Zemindar, under the terms of the tenancy, acquires no property in the share due to him until the ryots have delivered it to him.

CHARGES of theft and of being members of an unlawful assembly, against nineteen tenants of the Zemindar of Chinna Kemedi. The facts as found by the Second-class Magistrate were as follows:—

"The Zemindar of Chinna Kemedi is entitled as landlord to a share of the produce of the village of Kullangi and the defendants Nos. 1 to 19 as tenants fully admit the title of the Zemindar. The Zemindar either takes the share of the produce directly from the tenants or leases it out to a third man for a money rent. For Fasli 1310 he leased the village to one Sukkuru Narusa Subudhi and others. The renters were in enjoyment of the lease for 9 months of the fasli but were not obeyed by the tenants for the rest of the fasli. The tenants cut the paddy crop and heaped it as they liked contrary to custom prevailing in all mustajary villages in the zemindari and tried to cause loss to the mustagers or renters. The renters finding their authority set at naught by the tenants relinquished their lease to the Zemindar. There was no lease executed except an order from the Zemindar to the ryots to give the landlord's share to the renters, and the Zemindar had to accept the relinquishment and sent his own servants, (1 P.W.), Balam Padhi, being one of them, to look after the crop. The 1st P.W. went to the village and finding every thing in disorder, put seals of the Zemindar on all the paddy heaps as a sign that either party should not tamper with them. Then again Budumkayala Balakrishnamma Subudhi was sent by the Zemindar with a similar order to the tenants and he asked the tenants to thresh the crop, but they refused to do so, saying that they wrote a registered letter to the Zemindar about the matter and that they would not act as he wanted them to do. The renter went away and represented to the Zemindar that the tenants did not obey him. He also relinquished the village, as he says. The tenants (defendants Nos. 1 to 19) threshed the paddy at last on 20th April last and carried it away. The other defendants, it is said, directed them to thresh the paddy and carry it away."

The Magistrate also found that certain allegations made by the accused against the Zemindar in petitions sent to the Collector and the police, were not true and contained statements that were false; also that the accused were responsible for delay which had occurred in threshing the paddy; also that their action in carrying away the paddy was not *bonâ fide*. He convicted fifteen of the accused and sentenced them to pay fines, with imprisonment in default. The accused appealed to the General Deputy Magistrate of Gunsur, who dismissed the appeals and confirmed the sentences.

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The accused preferred this criminal revision petition.

T. Rangachariar and *V. Ramesam* for petitioners.

ORDER.—This is not the case of a farm labourer or cultivator for wages, nor that of a person entitled to the crops jointly with others as partners. It is the case of an ordinary ryot in a zemindari holding on a varam tenure. Until the delivery by the tenant to the Zemindar of the share of the crop payable to the latter, the possession of the whole crop, inclusive of such share, is clearly with the tenant. This being so, the removal of even the whole crop by the tenant is not a taking of anything out of the possession of the Zemindar. Consequently the first element in the offence of theft is wanting. But the removal, if dishonest or fraudulent, constitutes an offence under section 424 of the Penal Code, even if, as contended for the petitioners, the Zemindar acquires no property in the share due to him until delivery, a point on which it is unnecessary for us to express an opinion in the present case. None of the unreported cases to which our attention has been drawn conflict with this view. If the removal was for the purpose of protecting the ryot from injury or damage to the crops owing to the Zemindar's delay or refusal to perform his part with reference to the harvesting and division of the crop, such removal would of course not be dishonest. But in this case it has been proved that the crops were removed dishonestly and we are not prepared to say that that finding is not well grounded. The result is that we alter the conviction from theft under section 379, Indian Penal Code, into one under section 424 of the Penal Code, leaving the conviction under section 143 to stand. We see no reason to interfere with the sentences.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Moore.

1902. September 1.

RANGASAMY NAIKEN (PLAINTIFF), APPELLANT,

v.

JELLI BODI NAIKEN BY HIS MOTHER AND GUARDIAN KOMARAMMAL AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

Mortgage—Suit by first mortgagee on mortgage—Failure to join subsequent mortgagee—Decree—Sale in execution of decree—Purchase by first mortgagee of mortgagor's undivided interest in mortgaged property—Subsequent suit for partition and possession—Right of second mortgagee to redeem.

In 1886, two defendants mortgaged certain property to plaintiff. In 1891, the same defendants executed a second mortgage over the same property in favour of the present third defendant. In 1894, plaintiff brought a suit on his mortgage document against the mortgagors, but he omitted to make the present third defendant a party, though the latter was in possession, at the time, as mortgagee under his document of 1891. Plaintiff obtained a decree and the undivided share of first defendant in the mortgaged property was sold at a Court auction, and was purchased by plaintiff, who now brought the present suit for partition and for the recovery of first defendant's share. Third defendant contended that he was entitled to redeem plaintiff:

Held, that plaintiff was not entitled to obtain possession without paying off the third defendant (second mortgagee), and it was immaterial whether plaintiff's failure to join the second mortgagee as a party to the previous suit was wilful or due to ignorance of the fact that a second mortgage existed.

SUIT for partition. Plaintiff had purchased, at a Court auction, the undivided share of first defendant in items 1 and 2 of the family properties of defendants Nos. 1 and 2, who were jointly interested in items 1 to 4 of the property which formed the subject-matter of the suit. The Court sale was held in execution of a decree obtained by plaintiff in Original Suit No. 232 of 1894, in which he sued on a mortgage deed dated 22nd October 1886, executed in plaintiff's favour by defendants Nos. 1 and 2, who admitted plaintiff's claim. On 25th August 1891, defendants Nos. 1 and 2 executed a second mortgage in favour of the present third defendant. Plaintiff now admitted the genuineness of this mortgage to third defendant,

* Second Appeal No. 598 of 1901, presented against the decree of F. H. Hamnett, District Judge of Coimbatore, in Appeal Suit No. 117 of 1900, presented against the decree of T. Sadasiva Ayyar, District Munsif of Coimbatore, in Original Suit No. 238 of 1899.

but he had omitted to make third defendant a party to his Original Suit No. 232 of 1894, though third defendant was in possession, as mortgagee, under his document of 1891, at the time. The contention now put forward by third defendant was that he, as subsequent mortgagee, was entitled to redeem plaintiff's mortgage of 1886, and issues were raised on that point. The District Munsif held that third defendant was entitled to redeem plaintiff's mortgage and gave judgment for plaintiff that, in the event of third defendant failing to redeem plaintiff's mortgage by paying the amount of it, with interest and costs within a month, plaintiff should recover possession in execution of one-half share in items 1 and 2, the said properties to be divided by metes and bounds in two equal shares. Plaintiff appealed to the District Judge, who, following *Venkata Somayazulu* v. *Kannam Dhora*(1) upheld the Munsif's decree and dismissed the appeal.

Against that decree, plaintiff preferred this second appeal.

S. Kasturiranga Ayyangar for appellant.

T. R. Krishnaswami Ayyar for third respondent.

JUDGMENT.—The case is exactly on all fours with that of *Venkata Somayazulu v. Kannam Dhora*(1). The plaintiff clearly could not obtain possession without paying off the second mortgagee who was in possession and the plaintiff's suit for possession might have been dismissed on that ground as the plaintiff did not offer to redeem. The second mortgagee, however, was willing to pay off the plaintiff's prior mortgage as he might have done if he had been made a party to the suit brought by the plaintiff on his mortgage. The second mortgagee is clearly not liable to suffer, because the plaintiff failed to make him a party to that suit, and it makes no difference to the second mortgagee whether the plaintiff's failure was wilful or due merely to ignorance of the existence of the second mortgage.

As to the amount which the second mortgagee has to pay we agree with the lower Courts in holding that it is the amount he would have had to pay if he had been made a party to the plaintiff's suit, as he ought to have been. He clearly cannot be made liable for more, because the plaintiff in ignorance of the second mortgage paid an excessive price for the equity of redemption.

The second appeal fails and is dismissed with costs.

(1) I.L.R., 5 Mad. 184.

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If the money has not been already deposited the time for the second mortgagee paying it is extended to two months from this date.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Moore.

1902, September 1, 30.

AKATTI MOIDIN KUTTY AND TWO OTHERS (PLAINTIFFS), APPELLANTS,

v.

CHIRAYIL AMBU AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Mortgage—Priority according to date of possession by two purchasers of the mortgaged property.

On 7th October 1890, the proprietor of certain land mortgaged it to plaintiff; and on 30th October 1893, he also mortgaged it to first defendant. In 1895, first defendant sued on his mortgage, obtained a decree, got the property sold and purchased it himself, obtaining possession in July 1897. Plaintiff also sued, in 1897, on his mortgage and also obtained a decree and purchased the property at public auction, and obtained possession in November 1898. On the present suit being brought by plaintiff to recover possession:

Held, that as between the two purchasers the question of priority must be determined, not by reference to the date of the mortgage documents, but according to the dates of the sales and recovery of possession under them; and that, in consequence, plaintiff's suit, which was one to oust the second defendant from possession, must be dismissed. Any rights which plaintiff might have on the strength of his mortgage must be enforced in another suit.

SUIT to recover possession of land. The property in question belonged, originally, to one Raman Nambiar, who, in 1888, hypothecated it (with other property) to P. A. Suppi. On 3rd October 1890, Raman Nambiar paid off that debt by borrowing from and hypothecating the same property (with another paramba) to Unnaman Nambiar. The document witnessing this hypothecation was filed as exhibit III. By a bond, dated 7th October 1890 (exhibit C), Raman Nambiar hypothecated the property to plaintiff. On 30th October 1893, Raman Nambiar again executed a bond in favour of Unnaman Nambiar (exhibit IV), by which

* Second Appeal No. 501 of 1901, presented against the decree of M. J. Murphy, District Judge of North Malabar, in Appeal Suit No. 154 of 1900, presented against the decree of K. Imbichunni Nair, District Munsif of Cannanore, in Original Suit No. 531 of 1899.

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he hypothecated the same property as was comprised in exhibit III, subject to the rights which had been created by the last mentioned document. In 1895, Unnaman Nambiar obtained a decree in Original Suit No. 20 of 1895, which was upheld on appeal for the sale of the hypothecated property. This decree was assigned to first defendant, and in execution of it the hypothecated property (which included that now sued for) was sold, and first defendant purchased it in March 1897 and obtained possession in July 1897. Plaintiff sued on his bond in Original Suit No. 300 of 1897, obtained a decree, purchased the property at public auction, and obtained possession on 2nd November 1898. In October 1899, plaintiff instituted the present suit to recover possession of the property. In November 1899, first defendant transferred his claim to second defendant. An issue was raised as to which party had priority of claim. The District Munsif held that the defendants should surrender the property unless plaintiff be paid the amount of his decree. An appeal was preferred by second defendant to the District Judge, who upheld the decision on the ground that exhibit IV, by reason of its connection with exhibit III, had priority over exhibit C.

Plaintiff preferred this second appeal.

J. L. Rosario for second and third appellants.

V. Ryru Nambiar for first respondent.

JUDGMENT.—Without giving an opinion as to whether the finding of the District Judge that the mortgage document exhibit IV (dated 30th October 1893) has priority over exhibit C (dated 7th October 1890) is correct or not, it is clear that the decision of the District Judge must be upheld on the following ground. It is shown that the first defendant, suing on his mortgage exhibit IV in Original Suit No. 20 of 1895 obtained a decree, had the property sold and got possession in July 1897. The plaintiff, subsequently suing on exhibit C in Original Suit No. 300 of 1897, got a decree and recovered possession on the 2nd November 1898. The question therefore as between the two purchasers has to be decided in favour of the purchaser who first obtained possession. Priority must be determined not by reference to the dates of the mortgage documents but according to the dates of the sales and recovery of possession under them. In the present case the first defendant and his assignee the second defendant must be held to have priority over the plaintiff as regards possession, and such being the case the plaintiff's

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suit to oust the second defendant from possession should have been dismissed. Such rights, if any, as the plaintiff may have on the strength of his mortgage must be enforced in another suit. What he asks for here is possession, and that he is clearly not entitled to (Reference may be made to the decisions in *Nanack Chand* v. *Teluckdye Koer*(1), *Dirgopal Lal* v. *Bolakee*(2) and *Venkatanarsammah* v. *Ramiah*(3)).

This second appeal must be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1902. October 3.

RAMASWAMI NAIK AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

THAYAMMAL AND TWO OTHERS (DEFENDANTS NOS. 1, 7 AND 8), RESPONDENTS.*

Transfer of Property Act—IV of 1882, *s. 111—Landlord and tenant—Determination of tenancy—Commencement of occupation of dwelling house—Profession by tenant to hold adversely to landlord—No determination of tenancy—Hindu Law—Suit by presumptive reversionary heirs for decree declaring alienations by Hindu widow not binding except for life interest—Maintainability—Limitation Act XV of* 1877, *sched. II, art.* 120.

Where a tenant enters into occupation of a dwelling house as a tenant, the tenancy, in the absence of evidence to the contrary, will be presumed to be one from month to month; and until it has been legally determined in one of the modes specified in section 111 of the Transfer of Property Act, limitation does not run against the landlord though the tenant may, in fact, profess to hold the property adversely to the landlord.

Srinivasa Ayyar v. *Muthusami Pillai*, (I.L.R., 24 Mad., 246), and *Seshamma Shettati* v. *Chickaya Hegade*, (I.L.R., 25 Mad., 507), followed.

Assuming that a presumptive reversionary heir may be given a decree declaring that he is entitled to succeed, on the death of a widow, to property alleged to form part of her husband's estate, which property is in the possession of persons who claim it as their own, adversely to the widow, the suit praying for such a

(1) I.L.R., 5 Calc., 265. (2) I.L.R., 5 Calc., 269.
(3) I.L.R., 2 Mad., 108.

* Second Appeal No. 1140 of 1900, presented against the decree of T. M. Rangachariar, Subordinate Judge of Madura (West), in Appeal Suit No. 14 of 1900, presented against the decree of V. Swaminatha Ayyar, District Munsif of Tirumangalam, in Original Suit No. 117 of 1899.

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declaration must be brought within the period prescribed by article 120 of schedule II to the Limitation Act. Article 125 does not apply to such a suit.

SUIT for a declaration. Plaintiffs sued as reversioners for a declaration that certain alleged alienations of property were not binding on the reversioners after the death of the life-tenant. The alienations were alleged to have been made by a Hindu widow (first defendant) in favour of persons who were all impleaded as defendants. Of these, all compromised the suit except defendants seven and eight. The subject-matter of the suit, so far as it concerned defendants seven and eight, was a house situated in Madura. It was not alleged that the widow had alienated this house, but it was contended that it had belonged to her husband, and that it had been occupied by defendants seven and eight and an uncle of theirs since and prior to 1875. Plaintiffs claimed that these defendants had entered into occupation of the premises as tenants of the first defendant's husband. Defendants seven and eight denied the alleged tenancy and, at any rate, pleaded that they had occupied the house during the past 35 years in their own right. The District Munsif found on the evidence that seventh and eighth defendants commenced their occupation of the house as tenants of first defendant's husband, but he did not consider that the circumstances of the case warranted the presumption that they had up to the present time continued their occupation in the capacity of tenants. He thought that defendants seven and eight had enjoyed the house in their own right, at all events from and after the year 1882, if not before. Accordingly he dismissed the suit. The Subordinate Judge, on appeal, agreed with the Munsif's findings and confirmed that decree.

Plaintiffs preferred this second appeal.

P. R. Sundara Ayyar for appellants.

T. Rangachariar for second and third respondents.

JUDGMENT.—Both Courts find that defendants seven and eight originally came into possession of the house as tenants of the husband of the first defendant. In the absence of any evidence to the contrary, the house being a dwelling house, the tenancy must be presumed to be one from month to month, and until the tenancy has been legally determined in one of the modes specified in section 111, Transfer of Property Act, there is no law of limitation running against the landlord or his representative in interest, though the tenant may in fact profess to hold the

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property adversely to the landlord (*Srinivasa Ayyar* v. *Muthusami Pillai*(1) and *Seshamma Shettati* v. *Chickaya Hegade*(2)).

Apart from the title as owner set up by defendants seven and eight the question is whether a declaratory decree of the kind sought for in this case in respect of the house which it is not alleged was alienated by the widow, the first defendant, could be given to the presumptive reversionary heir and if so whether the suit has been brought within the period prescribed by article 120 of the Limitation Act, *i.e.*, within six years from the time when the cause of action for such declaratory suit accrued, article 125, which prescribes a period of twelve years, being inapplicable to such a suit.

Assuming, without deciding, that such a suit could be brought we are clearly of opinion that it has not been brought within the time prescribed. All the circumstances found by the Courts below indicate that the cause of action for such a declaratory suit arose much more than six years before the suit was brought in 1899, if not before the death of the husband of the first defendant in 1886. On this ground we dismiss the second appeal with costs.

APPELLATE CIVIL.

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

1902. October 8.

SOUNDARA PANDIA THEVAN AND TWO OTHERS (PLAINTIFFS), APPELLANTS,

v.

VELATHIAPPA THEVAN AND FOUR OTHERS (DEFENDANTS NOS. 1 TO 3, FIFTH DEFENDANT'S REPRESENTATIVE AND SIXTH DEFENDANT), RESPONDENTS.*

Village officers—Madras Hereditary Village Offices Act—III of 1895, *s.* 3, *cl.* 3—*Suit for lands forming emoluments of the office of Ambalam—"Head of the village"—Office in a "Proprietary estate"—Office in Inam village—Grant confirmed by Government—Jurisdiction of Civil Court to entertain suit.*

A suit was brought to recover lands which formed the emoluments of the office of Ambalam in a certain village. It was found on the evidence that the holding of the office of Ambalagar in that village did not constitute the holder the head of the village. On the question being raised as to whether the suit was cognizable by a Civil Court:

Held, that the office fell within the meaning of clause 3 of section 3 of Madras Act III of 1895, inasmuch as it was not one of the offices therein exempted, and was an office in a "Proprietary Estate," namely, an Inam village the grant of which had been confirmed by Government. The suit was, therefore, not cognizable by a Civil Court.

(1) I.L.R., 24 Mad., 246. (2) I.L.R., 25 Mad., 507.

* Second Appeal, No. 105 of 1901, presented against the decree of H. Moberly, District Judge of Madura, in Appeal Suit No. 412 of 1899, presented against the decree of D. K. Viraswamy, District Munsif of Paramakudy, in Original Suit No. 16 of 1899.

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SUIT for land. Plaintiffs alleged that defendants Nos. 1 to 5 were illegally occupying the land. Defendant No. 6 was the undivided step-brother of plaintiffs and was equally entitled to the land, but had been impleaded as a defendant, as he had refused to join plaintiffs in instituting the suit. Defendants Nos. 1, 2 and 5 claimed the land; defendant No. 3 remained *ex parte*, and defendant No. 4 admitted plaintiffs' claim. The District Munsif recorded in his judgment that the lands were admittedly Ambalam meras lands. Defendants claimed that a suit for possession of such lands was not maintainable in a Civil Court. The District Munsif, however, held that it was, and passed a decree in favour of plaintiffs and defendant No. 6. He relied on section 13, sub-section 1, proviso 2, of Madras Act III of 1895. The District Judge, on appeal, referred to the fact that the land in question formed the emoluments of the office of Ambalam in the village of Arambacottai, and referred the following two points to the District Munsif, for evidence and findings:—(1) Whether the office of Ambalam in the village of Arambacottai falls under the class of "heads of villages" referred to in section 2 of Madras Act II of 1894; and (2) whether Arambacottai is an Inam village, the grant of which was made or confirmed by the British Government. Further evidence was taken, and findings were returned as to the duties performed by the Ambalam of Arambacottai. On these, the District Judge held that this Ambalagar had not enjoyed the powers or performed the duties conferred on "heads of villages" by Regulation XI of 1806. He held, in consequence, that the suit was not maintainable in a Civil Court.

Plaintiffs preferred this appeal.

T. Runga Ramanuja Chariar for appellants.

T. V. Seshagiri Ayyar for first and fourth respondents.

JUDGMENT.—As it has been found that the holding of the office of Ambalagar in the suit village does not constitute the holder the head of a village, no question under clause (2) of

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section 3 of Madras Act III of 1895 can arise. The office, however, clearly falls under clause (3) of that section inasmuch as it is not one of the offices exempted therein and is an office in a "Proprietary Estate," that is, an Inam village the grant of which has been confirmed by Government (section 4 (*d*) of Madras Act II of 1894). The suit was, therefore, not cognizable by a Civil Court and was rightly dismissed by the District Judge. The second appeal is dismissed with costs.

APPELLATE CIVIL.

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

1902. November 6.

KAMATCHI AMMAL (PLAINTIFF), APPELLANT,

v.

SUNDARAM AYYAR (DEFENDANT), RESPONDENT.*

Receiver—Suit against Receiver to recover amount not recovered by Receiver owing to alleged negligence—Necessity for leave of the Court.

When a party feels aggrieved at the conduct of a Receiver, he should seek redress against the Receiver in the proceeding in which he was appointed. If separate proceedings be taken against him, either in that Court or elsewhere, they should be with the leave of the Court under whose authority the Receiver was acting.

SUIT for a sum of money which the defendant, as Receiver in Original Suit No. 53 of 1893 in the Madura (West) Subordinate Court had, as plaintiff alleged, failed to collect, owing to negligence. Plaintiff alleged that a debt had become barred by limitation and claimed that defendant, as Receiver, was bound to recoup it, with interest. The first issue raised the question whether the suit was maintainable without the sanction of the Court. The District Munsif, citing *Miller* v. *Ram Ranjan Chakravarti*(1), held that the suit was not maintainable without the sanction of the Madura (West) Subordinate Court. He also held that the suit was barred by limitation. He dismissed it. On appeal, the Subordinate

* Second Appeal No. 870 of 1901, presented against the decree of T. Varada Rao, Subordinate Judge of Madura (East), in Appeal Suit No. 36 of 1900, presented against the decree of A. Narayanan Nambiar, District Munsif of Madura, in Original Suit No. 609 of 1899.

(1) I.L.R., 10 Calc., 1014.

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Judge disagreed with the District Munsif as to the necessity for leave, but, as he agreed with him on the question of limitation, he dismissed the appeal.

Plaintiff preferred this second appeal.

P. R. Sundara Ayyar and *K. N. Ayya* for appellant.

P. S. Sivaswami Ayyar for respondent.

JUDGMENT.—Though the litigation has come to an end and the property has been handed over by the Receiver to the Party entitled there is no allegation that the Receiver has been discharged from his office by the Court and we must proceed on the assumption that he is still accountable to the Court as Receiver.

As a Receiver is but an officer of the Court, acting within the limits of the authority assigned to him for and on behalf of the Court it follows that, ordinarily, the party feeling aggrieved by his conduct as Receiver should seek redress against him in the very proceeding in which he was appointed as Receiver and that any separate proceedings taken against him either in that Court or elsewhere should be with the leave of the Court under whose authority the Receiver was acting (*Searle* v. *Choate*(1), *Miller* v. *Ram Ranjan Chakravarti*(2) and *Kabilaso Koer* v. *Raghu Nath Sakan Singh*(3)). The case strongly relied on by the appellant's Vakil (*Aston* v. *Heron*(4)) itself lays down the general principles which warrant the above conclusions.

In the present case, as no leave was obtained the suit must fail and it is not necessary for us to consider what article of the Limitation Act is applicable to suits of this kind if brought with the leave of the Court.

We may add that if suits of this kind could be brought without the leave of the Court there would be considerable difficulty in satisfactorily applying the law of limitation.

We dismiss the second appeal with costs.

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(1) L.R., 25 Ch.D., 723.
(2) I.L.R., 10 Calc., 1014.
(3) I.L.R., 18 Calc., 481.
(4) 2 M. & K., 396.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Bhashyam Ayyangar.

1902. November 7, 10.

KOCHAPPA AND ANOTHER (COUNTER-PETITIONERS NOS. 2 AND 3), APPELLANTS,

v.

SACHI DEVI AND ANOTHER (PETITIONERS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 493—Disobedience to injunction issued by District Court—Powers of District Court—Contempt of Court—Court of Record.

A District Court is not a Court of Record, and, as such, has no inherent power to commit for contempt. The jurisdiction which a District Court has to commit in case of disobedience to an injunction is conferred by section 493 of the Code of Civil Procedure, but the powers conferred by that section are only exercisable when the Court is set in motion by a party who deems himself aggrieved.

COMMITTAL by District Court for disobedience of injunction. The facts are sufficiently set out in the judgment of the High Court. The District Judge directed each of the appellants to be imprisoned for three months.

This appeal was accordingly preferred.

Mr. *C. Krishnan* for appellants.

K. Narayana Rau for respondents.

JUDGMENT.—The plaintiffs obtained a temporary injunction restraining the defendants from cutting certain crops. It is found that the defendants, in breach of the terms of the injunction, and after service upon them of the order, cut the crops. The District Judge, *suo motu*, and without any application by the plaintiffs, issued notice to the defendants to show cause why they should not be committed, and afterwards, also without any application by the plaintiffs, although they took part in the enquiry which led to the commitment, made an order committing the defendants to prison for three months for contempt. In making this order he purported to act as a Court of Record and to exercise a power

* Appeal against order No. 82 of 1902, presented against the order of J. W. F. Dumergue, District Judge of South Canara, passed in the proceedings of that Court, dated 18th July 1902, in the matter of Miscellaneous Petition No. 23 of 1902 (Appeal Suit No. 5 of 1902).

inherent in the District Court as a Court of Record. A Court which is not a Court of Record has no inherent power to commit for contempt. A District Court is not a Court of Record. The jurisdiction of a District Court to commit in this matter is conferred by section 493 of the Code of Civil Procedure. Under this section the Court may, in case of disobedience, enforce an injunction by attachment of property or by imprisonment of the party disobeying. It is clear that the powers conferred by this section are only exercisable when the Court is set in motion by a party who deems himself aggrieved.

The object of paragraph 3 of the section is to provide a mode of enforcing an injunction. It is not to be assumed that the use of the word 'disobedience' in the paragraph entitles the Court to treat a breach of the terms of an injunction as an offence, and to punish such offence of its own motion.

The appeal is allowed with costs and the order of commitment is set aside.

APPELLATE CIVIL.

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

1902. November 7.

SABAPATHY CHETTY (PLAINTIFF), APPELLANT,

v.

RENGAPPA NAICKAN (SECOND DEFENDANT), RESPONDENT.*

Revenue Recovery Act—II of 1864—Person aggrieved by sale—Date of cause of action—Confirmation of sale and not sale proceedings.

Until a sale, held under the provisions of the Revenue Recovery Act, is confirmed, the rights of persons whose interests may be affected by the sale cannot be injured so as to give them a right of action as aggrieved persons, within the meaning of section 59 of the Act. Such a cause of action arises only when the sale has been confirmed.

Venkata v. Chengadu, &c., (I.L.R., 12 Mad., 168), distinguished.

SUIT to recover possession of land by cancelling a revenue sale on the ground of material irregularity. The sale had been held on 19th August 1898, and the suit was brought on 17th January

* Second Appeal No. 891 of 1901, presented against the decree of H. Moberly, District Judge of Madura, in Appeal Suit No. 309 of 1900, presented against the decree of V. Swaminatha Ayyar, District Munsif of Tirumangalam, in Original Suit No. 31 of 1900.

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1900. The District Munsif passed a decree setting aside the sale as prayed. The second defendant appealed. The District Judge, considering whether the sale had been brought in time, held that it had not. He decided that the cause of action arose on 20th August 1898. He held that as the suit had not been brought within six months of that date, it was not cognizable by a Civil Court. He allowed the appeal and dismissed the suit.

Plaintiff preferred this second appeal.

K. Srinivasa Ayyangar for appellant.

R. Kuppuswami Ayyar for respondent.

JUDGMENT.—We do not think that the District Judge was right in holding that the day on which the property was put up for sale and knocked down was the date on which the plaintiff's cause of action arose. The provisions of section 38 of the Act (II of 1864) which were first enacted as an amendment by Act III of 1884 show that until confirmation by the Collector the sale proceedings are incomplete, and are liable to be set aside or confirmed by the Collector, either on the application of the parties or of his own motion. It is the confirmation of the sale which gives to the purchaser the right to possession and to have the lands registered in his name. Until the sale proceedings have been confirmed it cannot properly be said that the rights of persons whose interests will be affected by the sale are injured so as to give them a right of suit as persons aggrieved within the meaning of section 59 of the Act. To hold otherwise would lead to the unreasonable result that a party would be obliged to take futile proceedings before the expiry of six months from the sale in order to protect himself against the possible action of the revenue authorities in connection with the sale at some subsequent time. For example, in the present case, the sale was set aside by the Deputy Collector (who was entitled to confirm or set it aside under the law) on the 16th December 1898, *i.e.*, before the expiry of six months from the date of the sale (19th August 1898). It was not until long after the expiry of the six months that the Collector reversed the Deputy Collector's order and confirmed the sale. If the view adopted by the District Judge and urged for the respondent were correct, the present plaintiff should have brought a suit as an aggrieved party within six months of the sale, though he had obtained satisfaction and got the sale set aside by applying to the Deputy Collector and had no further grievance. It is scarcely necessary to say that the

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Legislature could not have intended the taking of such futile proceedings, and the only reasonable view is that in cases like the present there is no grievance giving a right to sue until there is an order confirming the sale.

The decision in *Venkata* v. *Chengalu*(1) was in regard to a sale that took place before the provisions of the present section 38 were enacted and when the law made no provision for the confirmation of sales by the Collector and when therefore the sale was complete as soon as it was held. That decision has no bearing on the present case. We set aside the decree of the District Judge and remand the appeal for decision on the merits. Costs in this Court will abide the result.

APPELLATE CIVIL.

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

VAIKUNTAM AMMANGAR (PLAINTIFF), APPELLANT,

v.

KALLIPIRAM AYYANGAR (DEFENDANT), RESPONDENT.*

1902. November 21, 25.

Hindu Law—Legitimate marriage expenses—Ceremonies of Griha Pravesam and Ruthusanti—Contract Act—IX of 1872, s. 69—Person interested in making payment—Cost of daughter's marriage expenses defrayed by widowed mother—Claim against brother of the widow's late husband.

The ceremonies of "Griha Pravesam" and "Ruthusanti" are essentially connected with the disposal in marriage of a girl of the Brahmin caste and form a part of the marriage ceremonies.

A Hindu widow performed these ceremonies for her daughter and sued to recover their cost from her late husband's undivided brother. In a previous case between the same parties it had been decided that the defendant was liable to be charged with the expenses of the marriage of the plaintiff's daughter:

Held, that plaintiff was entitled to recover the cost of these two ceremonies. The expenses were legitimate marriage expenses, and plaintiff had the right to sue as she was the person who was interested in making the payment which the defendant (under the decision referred to) was bound to make.

SUIT to recover Rs. 587-8-7, being the amount (with interest) expended by plaintiff in defraying the cost of certain ceremonies

(1) I.L.R., 12 Mad., 168.

* Second Appeal No. 1004 of 1901, presented against the decree of J. Hewetson, District Judge of Tinnevelly, in Appeal Suit No. 188 of 1900, presented against the decree of T. Streenevasa Ayyangar, District Munsif of Srivaikuntam, in Original Suit No. 359 of 1898.

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connected with the marriage of her daughter. The ceremonies in question were those known as the Griha Pravesam, Deepavali, Therukkartigai, Ruthusnanam and Ruthusanti. Plaintiff was a Hindu widow, and defendant was her husband's undivided brother. The District Munsif considered that the cost of the five ceremonies was Rs. 205-8-0 and he found that the cost of the Griha Pravesam was Rs. 15 and that of the Ruthusanti Rs. 140. He decreed in plaintiff's favour for Rs. 205-8-0. The District Judge, on appeal, regarded these ceremonies (which had taken place after the marriage and before the girl had gone to her husband's house) as different from marriage ceremonies. He said they were not referred to in the shastras and were only the results of custom. He agreed with the District Munsif's assessment of their cost, but held that plaintiff had no legal claim, and dismissed the suit.

Plaintiff preferred this second appeal.

T. R. Venkatarama Sastri for appellant.

A. K. Sundaram Ayyar for respondent.

JUDGMENT.—That the defendant was liable to be charged with the expenses for the marriage of the plaintiff's daughter was decided in the previous case (*Vaikuntam Ammangar* v. *Kallipiram Ayyangar*(1)). So the only question before us is whether the expenses herein claimed, which were subsequently incurred, are legitimate marriage expenses. Upon the authorities it is perfectly clear that the ceremonies of *Griha Pravesam* and *Ruthusanti* are essentially connected with the disposal in marriage of a girl of the Brahmin caste and invariably form a part of the marriage ceremonies. The circumstance that all the ceremonies are not now conducted consecutively as of old, does not affect the liability to pay for them by the person responsible in law to meet the charges connected with the girl's disposal in marriage, who in this case is the defendant. The amount allowed by the Munsif which the Judge also considers proper was Rs. 15 for the *Griha Pravesam* and Rs. 140 for the *Ruthusanti* and we allow the plaintiff these sums, or Rs 155 in all.

It is not shown that the three other items claimed are legitimate expenses under the law. The fact that such expenses are usually incurred will not make them legally binding on the defendant. We must therefore disallow them *in toto*. It is

(1) I.L.R., 23 Mad., 512.

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objected that the plaintiff has not the right to sue, but as she is the person who was interested in making the payment which the defendant was bound to make, she was entitled to sue under section 69 of the Indian Contract Act as laid down in the former case.

We reverse the decree of the District Judge and in modification of the Munsif's decree award to the plaintiff Rs. 155 with costs on that amount throughout.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

PARAMEN CHETTY (DEFENDANT), APPELLANT,

v.

SUNDARARAJA NAICK AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

1902. December 1.

Malicious prosecution—Final judgment delivered in lifetime of defendant.—Subsequent death of defendant—Right of defendant's legal representative to prosecute appeal against decree.

In a suit for damages for malicious prosecution, the District Munsif decreed in plaintiff's favour, and gave damages. Defendant appealed to the District Judge, who confirmed the decree and dismissed the appeal. Defendant preferred a second appeal, but died before it was heard. The appeal was prosecuted by defendant's legal representative, when it was objected that inasmuch as the cause of action for damages for malicious prosecution could not survive after the death of the defendant, his legal representative was not entitled to prosecute the appeal:

Held, that the legal representative was entitled to prosecute the appeal.

SUIT for damages for malicious prosecution. Plaintiff succeeded in the District Munsif's Court, and the District Court dismissed an appeal by defendant from the District Munsif's decree.

Defendant preferred this second appeal, but died before the appeal came on for hearing.

* Second Appeal No. 119 of 1901, presented against the decree of T. Varada Rao, Subordinate Judge of Madura (East), in Appeal Suit No. 83 of 1900, presented against the decree of V. K. Desikachari, District Munsif of Periyakulam, in Original Suit No. 26 of 1899.

PARAMEN CHETTY v. SUNDARARAJA NAICK.

V. Krishnaswami Ayyar, for the second respondent, took the preliminary objection that the legal representative of the defendant was not entitled to prosecute the appeal, inasmuch as the cause of action for damages could not survive the death of the defendant.

P. R. Sundara Ayyar and *K. Srinivasa Ayyangar* for appellant.

K. Kuppuswami Ayyar for first respondent.

JUDGMENT.—A preliminary objection is taken by the respondent that this appeal preferred by the defendant cannot be prosecuted by his legal representative inasmuch as the cause of action for damages for malicious prosecution cannot survive after the death of the defendant. The final judgment having been given against the defendant during his lifetime and the cause of action having merged in the decree, the legal representative of the defendant is entitled to prosecute the appeal in order to get rid of the decree, which otherwise must be satisfied out of the estate of the deceased. We agree with the majority of the Judges who decided the case (*Gopal* v. *Ramchandra*(1)) that the right to prosecute the appeal which had been preferred by the defendant in a case similar to the present case survives on the death of the defendant to his legal representatives.

We therefore overrule the objection. On the merits we find that both Courts held that there was no reasonable and probable cause, and that finding is, in our opinion, fully supported by the inference to be drawn from exhibit B.

We dismiss the second appeal with costs.

(1) I.L.R., 26 Bom., 597.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1902. December 8.

VENGAPAYYAN (CLAIMANT), APPELLANT, IN APPEAL AGAINST ORDER No. 13 OF 1902, AND

MAHALINGA BHAT (CLAIMANT), APPELLANT, IN APPEAL AGAINST ORDER No. 14 OF 1902,

v.

KARIMPANAKAL PARVATI AND TWO OTHERS (DECREE-HOLDERS), RESPONDENTS, IN BOTH THE APPEALS.*

Civil Procedure Code—Act XIV of 1882, *s.* 244—*Execution proceedings—Question raised as to whether improvements attached in execution were property of deceased judgment-debtor or of his representatives in their own right.*

A question as to whether improvements on land attached in execution of a decree are property of a deceased judgment-debtor which has come to the hands of his representatives as such or belong to the representatives in their own right, can be and ought to be decided under section 244 (*c*), and not by separate suit.

CLAIMS under sections 244 and 278 of the Code of Civil Procedure. The claim was made in Original Suit No. 51 of 1893 in which a decree had been obtained against one Narayana Payan, since deceased. One of the questions which arose for determination was whether the improvements on the property belonged exclusively to the deceased Narayana Payan or to the whole family jointly. The Acting District Judge dismissed the petition, and ordered the property to be sold in due course.

Petitioner preferred this appeal.

J. L. Rosario for appellant.

V. Ryru Nambiar for respondents.

JUDGMENT.—We overrule the preliminary objection. The appellants were joined as legal representatives of the deceased judgment-debtor, and the question raised in execution proceedings is whether the improvements on the land which were attached in execution are the property of the deceased which has come into the hands of his representatives as such, or whether they belong to appellants in their own right. With reference to section 234, Civil

* Appeals against the orders Nos. 13 and 14 of 1902, presented against the orders of N. S. Brodie, District Judge of North Malabar, dated the 6th December 1901, on Civil Miscellaneous Petitions Nos. 494 and 375 of 1901.

VENGAPAYYAN v. KARIMPANAKAL PARVATI.

Procedure Code, this question can be, and ought to be, decided only under section 244 (*c*) and not by separate suit (*Chowdry Wapad Ali* v. *Mussamut Jumma*(1)). The cases cited by the respondent (*Ramanathan Chettiar* v. *Levvai Marakayar*(2), *Kayyamkot Kunhacha* v. *Kayyamkot Kannan*(3)) have no bearing on the question.

On the merits, we find no sufficient ground for differing from the District Judge's conclusion that the improvements were the self-acquisition of the deceased member of the family and as such is liable in the hands of the appellants to satisfy the decree.

The appeals are dismissed with costs.

APPELLATE CIVIL.

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

1902. December 9.

SESHAGIRI ROW (PLAINTIFF), APPELLANT,

v.

NAWAB ASKUR JUNG AFTAB DOWLA (DEFENDANT), RESPONDENT.*

Letters Patent—Art. 15—Order on a plaintiff to give security for defendant's costs—Judgment—Appeal.

An order, passed on the Original Side of the Madras High Court, on a plaintiff to give security for the costs of a suit, under section 380 of the Code of Civil Procedure, is a judgment, within the meaning of article 15 of the Letters Patent, and an appeal lies therefrom.

The term "judgment," in that article, includes any order which determines some right or liability of the parties before the Court.

ORDER on a plaintiff to furnish security for costs. Plaintiff instituted a suit on the Original Side of the High Court, Madras, whereupon the defendant applied on a Judge's summons for an order on plaintiff to give security for the defendant's costs of the suit. The learned Judge made the order.

Plaintiff preferred this appeal.

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(1) 11 B.L.R., 149. (2) I.L.R., 23 Mad., 195.
(3) S.A. No. 455 of 1900 (unreported).

* Original Side Appeal No. 37 of 1902 presented against the judgment of Mr. Justice Boddam in Original Suit No. 97 of 1902.

SESHAGIRI ROW v. NAWAB ASKUR JUNG AFTAB DOWLA.

The Advocate-General (Hon'ble Mr. J. P. Wallis), for respondent, took the preliminary objection that no appeal lay.

Mr. *Allan Daly* for appellant.

JUDGMENT.—We are unable to accept the learned Advocate-General's contention that no appeal lies. We consider the order in appeal was a "Judgment" within the meaning of article 15 of the Letters Patent of this Court, inasmuch as it adjudicated on the liability of the plaintiff to furnish security under section 380 of the Code of Civil Procedure. It is not easy to reconcile the language employed in the various cases upon the point, but all the cases where it has been held that an appeal lies proceed on the same principle, namely, that the term "Judgment" includes any order which determines some right or liability of the parties before the Court.

Passing to the merits, we are of opinion that the plaintiff has shown that he was a resident of Madras at the time the suit was instituted and for several years previously. He has categorically given the various places in which he has resided in Madras during the past eight years, and his statements have not been contradicted as they easily could have been had they been untrue. His residence in Madras is corroborated by the fact that he contracted for the purchase of property in Madras, two years prior to his bringing this suit. The learned Judge seems to have proceeded on the view that if the particulars in the plaint were true, it would be unlikely that the plaintiff could have resided in Madras, but we think it is premature to enter into the merits of the plaint, which may be exaggerated or unfounded. Our decision on the facts as they are before us must be that the plaintiff has established that he is a resident of Madras. We accordingly reverse the order of the learned Judge requiring security from the plaintiff and charging him with the costs of the application. The respondent must pay the appellant the costs of this appeal. The costs in the Original Court will be costs in the cause.

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

Mr. *James Short*—Solicitor for respondent.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar.

1902. December 22.

IBRAHI ROWTHEN (PLAINTIFF), PETITIONER,

v.

SANGARAM SHETTY AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Provincial Small Cause Courts Act—IX of 1887, sched. 2, cl. 35 (k)—Jurisdiction to award defendant damages for attachment on insufficient grounds—Civil Procedure Code—Act XIV of 1882, s. 491—Applicability to Small Cause Courts.

A Court of Small Causes has jurisdiction to award damages, under section 491 of the Civil Procedure Code, to a defendant whose property has been attached on insufficient grounds.

PETITION to revise a decree passed by a Court of Small Causes. Petitioner was the plaintiff in the Court of Small Causes, and had sued two defendants, the present counter-petitioners, for Rs. 29-13-6. Second defendant admitted owing Rs. 16-2-0 of the sum claimed, but also set up a claim for Rs. 50, as damages as against plaintiff, contending that plaintiff had applied for attachment before judgment on insufficient grounds. First defendant denied any liability. The District Munsif framed an issue on the question whether second defendant was entitled to the damages claimed, and, in the result, gave plaintiff a decree as against second defendant for Rs. 16-2-0, and ordered plaintiff to pay Rs. 25 to second defendant by way of damages.

Plaintiff preferred this revision petition.

A. S. Balasubrahmania Ayyar for petitioner.

H. Raghavendra Rau for respondent.

JUDGMENT.—There are no grounds for revising the decree of the District Munsif on the merits. As regards the award of compensation to the defendant under section 491 for the plaintiff having obtained attachment before judgment of moveable properties on insufficient grounds, the Court did not act without jurisdiction, section 491 being made applicable to Small Cause Courts and clause 35 (*k*) of the second schedule to the Provincial Small Causes Courts Act, 1887, being limited, so far as Chapter XXXIV of the Civil

* Civil Rivision Petition No. 258 of 1902 presented under section 25 of Act IX of 1887 praying the High Court to revise the decree of S. Mahadeva Sastriar, District Munsif of Karur, in Small Cause Suit No. 157 of 1902.

Procedure Code is concerned to compensation for improper *arrest*. There are no grounds for revision of the award of compensation on the merits either in respect of the award itself or of the amount awarded.

The petition is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Bhashyam Ayyangar.

SUNDARI AMMAL (PLAINTIFF), APPELLANT,

1902. December 19.

v.

SUBRAMANIA AYYAR (DEFENDANT), RESPONDENT.*

Hindu Law—Liability of father to get his daughter married.

Under the Hindu Law, a father is under no legal obligation to get his daughter married.

Vaikuntam Ammangar v. Kallipiram Ayyangar, (I.L.R., 23 Mad., 512), explained.

Where a wife expended money on her daughter's marriage and then sued her husband for the amount so expended:

Held, that she was not entitled to recover.

SUIT by a wife against her husband for the amount spent by her on their daughter's marriage. The District Munsif refused to give plaintiff a decree on this claim, but he allowed the cost of maintenance. Plaintiff appealed to the District Judge, who agreed with the Munsif that the defendant was not under an obligation which could be legally enforced to get his daughter married. He also found that defendant had not agreed to pay the expenses of a marriage arranged by the mother.

Plaintiff preferred this second appeal.

K. R. Subrahmania Sastri for appellant.

P. S. Sivaswami Ayyar for respondent.

JUDGMENT.—That the father is under no legal obligation to marry his daughter is practically concluded by the dictum in

* Second Appeal No. 1401 of 1901, presented against the decree of J. H. Munro, District Judge of Tanjore, in Appeal Suit No. 540 of 1900, presented against the decree of T. R. Kuppusami Ayyangar, District Munsif of Tiruvalur, in Original Suit No. 586 of 1898.

SUNDARI AMMAL v. SUBRAMANIA AYYAR.

Namasivayam Pillay v. *Annammai Ammal*(1) and by the opinion of a Division Bench of this Court in *Seshammal* v. *Munisami Mudaliar*(2). The decision in *Vaikuntam Ammangar* v. *Kallipiram Ayyangar*(3) in no way departs from that view, but distinguishes between the case of a father and that of a person succeeding to the father by survivorship or inheritance.

The suit was not really one on contract nor could the plaintiff have sued on the alleged contract.

The second appeal fails and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1902, November 25.

BOJA REDDI (DEFENDANT), APPELLANT,

v.

PERUMAL REDDI AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Malicious prosecution—Reasonable and probable cause—Conviction of plaintiff by Court of First Instance and acquittal on appeal—Maintainability of suit for malicious prosecution.

In a claim for compensation for malicious prosecution, it does not follow that the suit will not lie, where the plaintiff has been convicted by a competent Court, and has been acquitted on appeal. The true principle is that the suit will lie if the plaintiff was ultimately acquitted on appeal by reason of the original conviction having proceeded on evidence which was known by the complainant to be false or on the wilful suppression by him of material information.

SUIT for damages for malicious prosecution. The facts of the case, so far as they are material to the point decided, are set out in the judgment. The District Munsif decreed in plaintiffs' favour, and assessed the damages at Re. 1. Plaintiffs appealed to the District Judge, who increased the damages to Rs. 75.

(1) 4 M.H.C.R., 339. (2) Refd. Case No. 40 of 1896 (unreported).
(3) I.L.R., 23 Mad., 512.

* Second Appeals Nos. 1137 and 1138 of 1901, presented against the decrees of H. G. Joseph, District Judge of Trichinopoly, in Appeal Suits Nos. 149 and 142 of 1900, presented against the decree of C. Ranga Row, District Munsif of Ariyalur, in Original Suit No. 657 of 1899.

BOJA REDDI v. PERUMAL REDDI.

Defendant preferred this second appeal.

N. T. Shamanna for appellant.

Mr. *D. Chamier* for respondents.

The arguments are set out in the judgment.

JUDGMENT.—We think that the Courts below have not correctly understood these cases and that their decrees cannot be supported.

The plaintiffs sued the defendant for damages for his having maliciously prosecuted the plaintiffs and their men for offences under sections 22 and 24 of the Cattle Trespass Act, 1871.

The complaint under section 22 was that, when the plaintiffs' cattle which trespassed on the defendant's land were being taken to the pound, the plaintiffs and their men unlawfully rescued them and the complaint under section 24 was that subsequently on the same day, while the defendant's cattle were returning home from pasture, the plaintiffs and their men unlawfully seized and impounded them.

The Sub-Magistrate who tried the two cases convicted the plaintiffs, but on appeal the Deputy Magistrate reversed the convictions and acquitted the plaintiffs.

The principal issue framed in the present suit was whether the criminal prosecution was made without reasonable and probable cause and maliciously.

The District Munsif without recording a finding as to what the facts proved are, or how they showed that the complaint was made without reasonable and probable cause and with malice, contents himself with saying that "viewing the circumstances of this case in the light of the observations made by the learned Judges in *Hall* v. *Venkatakrishna*(1) I am inclined to think that the necessary points have been made out in this case against the defendant to make him liable to the plaintiffs in damages. I find the first issue in favour of the plaintiffs and give a decree for nominal damages assessed at Re. 1.

Against this decree both the plaintiffs and the defendant appealed. The District Judge in dismissing the defendant's appeal says that "all that is urged for appellant (defendant) is that there is no proof that the charges which were found by the lower Court to be false were also malicious." As regards the question of malice he came to the conclusion that in view of the long-standing

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

enmity between the parties and the nature of the charges as disclosed in the judgments of the Deputy Magistrate, the complaints must have been wantonly false and must therefore be presumed to have been made maliciously. He allowed the plaintiffs' cross-appeal and increased the damages to Rs. 75.

Against both these decrees the defendant now appeals.

The principal points urged are that the plaintiffs have adduced no evidence whatever to show absence of reasonable and probable cause for the complaint, and that in view of the conviction of the plaintiffs by the Sub-Magistrate the defendant cannot be held to have acted without reasonable and probable cause though the convictions were reversed and the plaintiffs acquitted by the Appellate Court.

It is undoubted that the onus is on the plaintiffs to show affirmatively absence of reasonable and probable cause as well as malice. Though the District Judge finds malice he has not addressed himself to the consideration of the principal question, viz., whether the plaintiffs have shown that the complaint was made without reasonable and probable cause. We, however, think it unnecessary to call for a finding on this point as we have been referred to all the evidence adduced by the plaintiffs in the case and, accepting it as true, there is no evidence whatever on which it could be legally found that the defendant had no reasonable or probable cause for his complaint.

As regards the contention that the conviction of the plaintiffs by the Sub-Magistrate is a bar to the present suit, reference was made to the case (*Parimi Bapirazu* v. *Chinna Venkayya*(1)) and the case (*Jadubar Singh* v. *Sheo Saran Singh*(2)).

They cannot be regarded as authorities in support of the position that in no case will a suit for damages for malicious prosecution be maintained if the plaintiff has been convicted by a competent Court though the conviction has afterwards been set aside and the plaintiff acquitted in appeal. We think that the true principle is, as stated by Pollock at page 605 of his 'Treatise on the Law of Torts, 6th Edition,' that the action will lie if the plaintiff was ultimately acquitted on appeal by reason of the original conviction having proceeded on evidence known by the

(1) 3 M.H.C.R., 238.

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

complainant to be false or on the wilful suppression by him of material information.

On reference to the appellate judgments, exhibits A and B, of the Deputy Magistrate in the present case we do not find that the acquittal proceeded on either of such grounds and, that being so, we are of opinion that it cannot legally be held that the defendant made the complaint without reasonable and probable cause. We therefore allow both the second appeals, and, reversing the decrees of the Courts below, dismiss the suit with costs throughout.

APPELLATE CIVIL.

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

ANGAMMAL AND ANOTHER, MINORS BY THEIR FATHER AND NEXT FRIEND POKURU GURUMURTHY (PLAINTIFFS), APPELLANTS,

v.

VENKATA REDDY AND TEN OTHERS (DEFENDANTS), RESPONDENTS.*

1902. August 15. September 8. October 7.

Hindu Law—Degradation of daughter on account of incontinence—Effect on her right to inherit the stridhanam property of her mother.

Under the Hindu Law, the degradation of a daughter on account of incontinence does not put an end to her right to inherit the stridhanam property of her mother:

Semble, that the same rule is applicable when the question involved is the right of inheritance to the property of the father.

SUIT to recover possession of property. The property in question had been purchased in the name of one Chenchammal, out of her stridhanam. Chenchammal was the wife of one Venkiah Bathadu, and she had two daughters, namely, Kamatchi Ammal and Sinammal, and four sons. The daughters were married, but, as the learned Judge on the Original Side found, had both, in the lifetime of their mother, left their husbands' houses and had both lived in adultery, and were both outcasted. Sinammal lived with Gurumurthi Bathadu, and, as a result of this intercourse, the two

* Original Side Appeal No. 40 of 1901 against the decree of Mr. Justice Boddam in Original Suit No. 88 of 1901.

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plaintiffs (now minors) were born. Gurumurthi Bathadu brought the present suit on their behalf to recover the property in question, as property purchased out of the stridhanam of the grandmother, Chenchammal. The defendants had purchased the property at a Court auction. It was contended on behalf of the minor plaintiffs that they, as the daughters of Sinammal, were the only persons entitled to inherit their grandmother's stridhanam property as their mother had purchased Kamatchi Ammal's share. It appeared that the brothers of Sinammal had sold the property to one Ramakrishniah, it being assumed that Sinammal and Kamatchi Ammal had lost their right to inherit it by reason of the fact that they had been outcasted for adultery. The sale to Ramakrishniah was a *bonâ fide* one. Ramakrishniah subsequently mortgaged the property to defendants Nos. 1 to 6, who obtained a decree on the mortgage, in execution of which the property was sold and purchased by the said defendants Nos. 1 to 6.

The Judge held that the property never became the property of Sinammal and Kamatchi Ammal. He relied on *Subbaraya Pillai* v. *Ramasami Pillai*(1).

In the result he dismissed the suit.

Plaintiffs preferred this appeal.

P. R. Sundara Ayyar and *P. M. Sivagnana Mudaliar* for appellants.

Mr. *J. H. M. Ryan* for respondents.

JUDGMENT.—The facts of this case are fully set out in the judgment of Boddam, J. The learned Judge decided the first and second issues against the plaintiffs on the ground that the adultery of Kamatchi Ammal and Sinammal divested their rights of inheritance. We are unable to adopt this view. Referring to the case of *Subbaraya Pillai* v. *Ramasami Pillai*(1), the learned Judge observes that it is there laid down that adultery is, under the Hindu Law, sufficient by itself to divest the right of inheritance. We do not find anything in the judgment in this case which supports this general proposition. The question there involved was the right of inheritance of the step-son of a deceased Hindu widow who had been guilty of adultery and had been degraded. It was held that the step-son was entitled to inherit as the sapinda of the widow's late husband. The question in the present case is—did Kamatchi

(1) I.L.R., 23 Mad., 171.

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Ammal and Sinammal lose their right of inheritance to the stridhanam property of their mother by reason of their having led unchaste lives and having been degraded. For the purposes of this case we assume that the daughters had been 'degraded' on account of their incontinence; but the evidence as to this is not clear.

In dealing with this question Mr. Mayne observes:—"Chastity has been held not to be an essential, where a female claims as heir to the property of a woman. I know of no native authority on the point. On the other hand, want of chastity, causing a woman to become degraded and outcaste, has been held to sever the tie of kindred between herself and her own natural family and *a fortrori* between herself and her husband's family, so that if she dies leaving property acquired by her while degraded and outcaste none but those who had fallen into a similar position would claim to be her heirs. If this principle is sound the converse of the proposition ought equally to apply if a degraded female was claiming as heir to one who was undegraded."

With regard to this expression of opinion, if it was intended to apply to the case of a daughter's right to inherit stridhanam property of her mother, it seems to us, with all deference, to be open to exception.

In the present case it is not a question of a widow being excluded from inheritance by incontinence. The question is,—are the widows' heiresses to the stridhanam property excluded by their incontinence. The only authority directly in point is a Full Bench decision of the Allahabad High Court, where it was held that unchastity in a woman did not incapacitate her from inheriting stridhanam. The same view was taken by this Court with regard to the right of inheritance of a female other than a widow on the ground that the texts which lay down that Hindu females are debarred from inheriting by unchastity are confined in their application to the widow (*Kojiyadu* v. *Lakshmi*(1)). This view has also prevailed in Bombay (*Advyapa* v. *Rudrava*(2)). The Judges there observe (page 122):—"If, as is the fact, there be neither text nor case which shows that according to the law as it prevails

(1) I.L.R., 5 Mad., 149. The unchastity in this case was in 1868, *i.e.*, before the succession opened out, not, as stated in the opening lines of the report, in 1878.

(2) I.L.R., 4 Bom., 104.

in Western India a daughter is, by her incontinence, debarred from succession to the estate of her father, we do not think that the analogy derivable from the case of the widow would justify us in imposing such a disqualification upon the daughter."

The Madras cases of *Tara Munnee Dossea* v. *Motee Buneanee*(1) and *Sivasanyu* v. *Minal*(2) and *Venkataramayyar* v. *Kothandaramayyar*(3) have no direct bearing on the point. They are decisions to the effect that where there is competition between a degraded and an undegraded heir of a degraded woman the former has the preference. The *ratio decidendi* of these cases would appear to be that the degradation of the woman from whom the inheritance is claimed severs the tie of kinship between her and an undegraded heir, but this does not necessarily involve the converse proposition that the heiress' degradation puts an end to her right of inheritance. Moreover, in *Subbaraya Pillai* v. *Ramasami Pillai*(4) the view of the Judges was that the "broad proposition that degradation of a woman in consequence of her unchastity entails in the eye of the law cessation of the tie of kindred between her and the members of her natural family" did not appear to be sustainable. With regard to the decision of the Calcutta High Court in *Ramananda* v. *Radkishori Barmani*(5) it is to be observed (1) the decision is based on the Dayabhagu, as the leading authority in the Bengal school of Hindu Law and (2) the question involved was the right to inherit the property of the father, not, as in the case before us, the right to inherit the stridhanam property of the mother.

In our judgment, the degradation of a daughter on account of incontinence does not put an end to her right to inherit the stridhanam property of her mother.

This is all that it is necessary to decide for the purposes of this case. The balance of authority, however, seems to support the view that the same rule is applicable when the question involved is the right of inheritance to the property of the father.

With regard to the fifth and sixth issues the facts as found by the learned Judge are that the mother Chenchammal prior to her death in 1893 handed the title-deeds to Ramakrishniah (the defendants' mortgagor) with the request that he would dispose of the properties,

(1) VII S.D.A., 273. (2) I.L.R., 12 Mad., 277.
(3) I.L.R., 13 Mad., 135. (4) I.L.R., 23 Mad., 171.
(5) I.L.R., 22 Calc., 347.

so that each of the sons might have some share of the proceeds. The father remained in possession of the property till his death in 1895. Then the sons took possession, the title-deeds remaining in the possession of Ramakrishniah. In 1896 Ramakrishniah bought the property from the sons and in 1897 mortgaged it to the defendants.

With reference to the fifth issue the Judge observes:—"I am satisfied that they (the defendants) became mortgagees and purchasers in good faith and for consideration, that they had notice that Sinammal and Kamatchi Ammal existed as the daughters of Chenchammal. I have no doubt, also, that they knew that they had left their husbands' houses and were living in adultery and were outcasted but they were under the impression, which apparently was the opinion held by Sinammal and Kamatchi Ammal at that time, that all the rights they ever had were entirely done away with by their conduct, and they purchased this property believing that the title was perfectly good and valid, they having taken a mortgage in the first instance and purchasing the property in the second place at Court auction." This, as it seems to us, cannot be read as a finding that the defendants, either as mortgagees or purchasers, had no notice of the interest of Kamatchi Ammal and Sinammal. They had notice of the existence of the daughters but they were under a misconception as to the daughters' rights. Then, can it be said that on the principles enunciated in section 41 of the Transfer of Property Act, the daughters or their representatives are now estopped from bringing forward their claim? We think not. There was clearly no express consent on the part of the daughters, and in our judgment the evidence does not show that there was any implied consent on their part to Ramakrishniah being the ostensible owner of the property. The title-deeds were handed to Ramakrishniah by the mother during her lifetime. As a matter of fact, Ramakrishniah never held himself out as ostensible owner on the strength of his being in possession of the title-deeds. He was under the impression that the sons had a title to convey and he bought from them. In our view of the law the sons had no title to convey because the daughters had not lost their right of inheritance.

We think the plaintiffs are entitled to judgment and we accordingly allow the appeal with costs here and in the Court of First Instance. The plaintiffs are entitled to mesne profit at the

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rate of Rs. 20 a month for three years prior to plaint and from date of plaint till delivery of possession.

Messrs. *Branson & Branson*—Solicitors for respondents.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

1902. October 6, 7.

NARAYANA ROW (THIRD DEFENDANT), APPELLANT,

v.

DHARMACHAR (PLAINTIFF), RESPONDENT.*

Specific Relief Act—I of 1877*—Amendment Act—XII of* 1891, *s.* 9*—Possession as title against all but true owner—Effect of Specific Relief Act even where suit is brought more than six months after dispossession.*

Possession is, under the Indian, as under the English law, good title against all but the true owner. Section 9 of the Specific Relief Act is in no way inconsistent with the position that as against a wrong-doer, prior possession of the plaintiff, in an action of ejectment, is sufficient title, even if the suit be brought more than six months after the act of dispossession complained of and that the wrong-doer cannot successfully resist the suit by showing that the title and right to possession are in a third person.

The only effect of section 9 of the Specific Relief Act is that a person who has been dispossessed otherwise than in due course of law and who brings a summary suit within the time prescribed by that section, is entitled to be reinstated even if the defendant by whom he was dispossessed be the true owner or a person authorized by or claiming under him. But a decree passed in such a suit will not have the force of *res judicata* on the question of title.

Nisa Chand Gaita v. *Kanchiram Bagani*, (I.L.R., 26 Calc., 579), dissented from.

SUIT to establish title to and recover possession of a house. The following statement of facts material to the decision is taken from the judgment of the High Court:—

The facts found by the lower Appellate Court and which, in second appeal, we have to accept are, that the uncle of the plaintiff one Jayachar was in possession of the site mentioned in the plaint since 1888, that he let defendants Nos. 1 and 2 into possession of the same in 1892 under a lease for a term of five years, that the third

* Second Appeal No. 679 of 1901, presented against the decree of Leslie C. Miller, District Judge of Salem, in Appeal Suit No. 225 of 1899, presented against the decree of A. Sreenivasa Ayyangar, District Munsif of Krishnagiri, in Original Suit No. 659 of 1898.

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defendant, the appellant in this Court, obtained possession of the same from the first and second defendants and that Jayachar died in 1898, shortly before the institution of this suit, leaving a will devising the site to the plaintiff and admitting in the description of the site that it had all along been the plaintiff's property and that he Jayachar held it only as the plaintiff's agent. The District Judge also finds that the case of the third defendant that the site belongs to him and that his agent allowed defendants Nos. 1 and 2 to enter into possession thereof is false, but that he obtained possession from the first and second defendants during the term of the lease under which they had been let into possession by the plaintiff's uncle. On the footing that up to the date of his death or, at any rate, until the third defendant obtained possession of the site from the first and second defendants, Jayachar was in possession of the site, through his tenants, defendants Nos. 1 and 2, either on his own behalf or as agent of the plaintiff, and in the former case, the plaintiff derives title to possession under the will of Jayachar. The District Judge decreed in favour of the plaintiff and reversed the Munsif's decree, which dismissed the plaintiff's suit on the ground that the plaintiff did not establish his title to the site.

Third defendant preferred this second appeal.

Mr. *Joseph Satya Nadar* and *T. Natesa Ayyar* for appellant.

P. S. Sivaswami Ayyar for respondent.

JUDGMENT.—The appellant's counsel contends that the decree of the District Judge cannot be supported as he does not find that the plaintiff has made out his title, that the possession which he finds in favour of Jayachar, assuming that such possession will enure to the benefit of the plaintiff, not being for the statutory period, can give the plaintiff no title by prescription and that therefore the District Munsif's decree ought to be restored, notwithstanding that both the Courts have found that the third defendant has failed to establish title in himself.

The District Munsif found that neither the plaintiff nor the third defendant was the owner of the site, but that one Srinivasa Row was the owner, and that on his death his sons have become entitled to the same as his heirs. If, as found both by the District Munsif and the District Judge, Jayachar was in possession since 1888, it must be presumed that he was the owner thereof, and that if he had held such possession on behalf of and as agent for the plaintiff, the plaintiff must be presumed to be the owner

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(section 110 of the Indian Evidence Act). Though this presumption is rebuttable and, as found by the District Munsif, it has been rebutted, it is unnecessary to call upon the District Judge to submit a finding as to whether or not he concurs in the finding of the District Munsif that Srinivasa Row's sons are the owners of the site; for even in the view that they were the owners at the date of this suit the District Judge was right in holding that Jayachar's possession, whether it was on his own behalf or as the plaintiff's agent, was sufficient to entitle the plaintiff to recover the site from the third defendant who has established no title to the same nor possession prior to that of Jayachar and who, by wrong, obtained possession of the site from the first and second defendants as if they had been let into possession by himself and they had surrendered the same to him, and who has been withholding possession of the site from Jayachar and the plaintiff since and subsequent to the determination of the lease under which the first and second defendants were holding under Jayachar. In the language of modern English authorities, possession is good title against all but the true owner and a person in peaceable possession of land has, as against every one but the true owner, an interest capable of being inherited, devised or conveyed (*Asher* v. *Whitlock*(1)). As observed by Subramania Ayyar, J., in *Mustapha Sahib* v. *Santha Pillai*(2) the above principle of law is "so firmly established as to render a lengthened discussion about it quite superfluous". There is nothing in the Indian law which militates against this principle and with all respect, we are wholly unable to concur in the view taken by the Calcutta High Court in *Nisa Chand Gaita* v. *Kanchiram Bagani*(3) that previous possession for any time short of the statutory period will not entitle a plaintiff to a decree for recovery of possession in a suit brought more than six months after dispossession, even if the defendant could not establish any title to the disputed land. In our opinion section 9 of the Specific Relief Act, corresponding to section 15 of Act XIV of 1859, is in no way inconsistent with the position that as against a wrong-doer, prior possession of the plaintiff in an action of ejectment, is sufficient title, even if the suit be brought more than six months after the act of dispossession

(1) L.R., 1 Q.B., 1 at p. 6.
(2) I.L.R., 23 Mad., 179 at p. 183.
(3) I.L.R., 26 Calc., 579.

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complained of and that the wrong-doer cannot successfully resist the suit by showing that the title and right to possession are in a third person. A plea of *jus tertii* is no defence unless the defendant can show that the act complained of was done by the authority of the true owner (*Graham* v. *Peat*(1), *Chambers* v. *Donaldson*(2)) and it is immaterial however short or recent the plaintiff's possession was (*Catteris* v. *Cowper*(3), *Doe d. Hughes* v. *Dyeball* (4)). The only effect of section 9 of the Specific Relief Act is that if a summary suit be brought within the time prescribed by that section, the plaintiff therein who was dispossessed otherwise than in due course of law will be entitled to be reinstated even if the defendant who thus dispossessed him be the true owner or a person authorised by or claiming under him, but a decree in such a suit will not have the force of *res judicata* on the question of title.

The rule of English law that possession is good title against all but the true owner was adopted and enforced by the Judicial Committee of the Privy Council in the Indian cases *Sundar* v. *Parbati*(5) and *Ismail Ariff* v. *Mahomed Ghous*(6). In *Sundar* v. *Parbati*(5) the Judicial Committee observed that the Chief Justice of the Allahabad High Court was right in his statement of the law that according to the import of the authorities cited by him "possession is a good title against all the world except the person who can show a better title. By reason of his possession such person has an interest which can be sold or devised". But their Lordships being of opinion that the Chief Justice erred in not applying that law to the facts of that case held that the widows of a deceased Hindu had a possessory title or interest in his estate, notwithstanding that a preferable title might exist in others through the deceased devisee of their husband and that the estate being jointly held by the widows, though for a time short of the statutory period after the death of the devisee, was partible between the widows and that either widow might maintain a suit for partition against the other.

In *Ismail Ariff* v. *Mahomed Ghous*(6) it was held that possession of land was sufficient evidence of right as owner as against a person who had no title whatever, and that the plaintiff was

(1) 1 East., 244.
(2) 11 East., 65.
(3) 4 Taunt., 547.
(4) 1 Moo. and M. 346.
(5) I.L.R., 12 All., 51 at p. 56.
(6) I.L.R., 20 Calc., 834.

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entitled to obtain a declaratory decree and an injunction restraining the wrong-doer from interfering with his possession.

The principle underlying the rule of law in question seems to be that acquisition of title by operation of the law of limitation being a lawful mode of acquiring title, the person in peaceable possession is entitled to maintain such possession against all but the true owner and that therefore a third party who has no better title than the person in possession has no right to invade upon the possession of the latter and interrupt or arrest his lawful acquisition of title by his continuing to remain in possession for the statutory period. It is the true owner alone that is entitled to assert his title as against the person wrongfully in possession, and prevent such wrongful possession ripening into prescriptive title. But a third party who without deriving title under the true owner and without his authority, interrupts such possession before it has ripened into prescriptive title, is a trespasser, not only against the true owner, but also against the party actually in possession; and, subject to the law of limitation, either of them is entitled to maintain a suit in ejectment against such intruder as a trespasser.

As the second appeal fails on this ground, it is unnecessary to consider the other ground on which also the decision of the District Judge is based. The second appeal is therefore dismissed with costs.

APPELLATE CIVIL.

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

1902. September 4. December 17.

G. VEERASWAMY (PLAINTIFF), APPELLANT,

v.

MANAGER, PITTAPUR ESTATE (DEFENDANT), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *s.* 588 (28)—*Appeal against order remanding case for disposal—Decision by Sub-Collector in summary suit under Rent Recovery Act—Remand by District Court—Appeal—Rent Recovery Act—VIII of* 1865, *s.* 69—"*Judgment.*"

In a summary suit under the Rent Recovery Act, the Sub-Collector held a pattah to be improper and released certain property from attachment. On an appeal being preferred, the District Judge reversed the finding of the Sub-Collector and remanded the case under section 562 of the Code of Civil Procedure, for disposal according to law. Plaintiff appealed to the High Court against the order of remand, when it was objected that no appeal lay:

Held, that an appeal lay. It was competent to the District Judge to make the order of remand under section 562 of the Code of Civil Procedure. The adjudication by the Collector was a formal expression of an adjudication on a right claimed, within the meaning of the definition of a decree contained in section 2 of the Code of Civil Procedure. It was also a formal expression of a right claimed in a Civil Court.

* Appeal against Order No. 9 of 1902, presented against the order of remand by F. H. Hamnett, District Judge of Godavari, in Appeal Suit No. 59 of 1901, presented against the decision of P. S. P. Rice, Sub-Collector of Godavari, in Summary Suit No. 17 of 1900.

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SUMMARY suit to set aside a distraint under section 41 of the Rent Recovery Act. The Sub-Collector held that the pattah which the Zamindar had tendered to his tenant was improper, and directed the release of the plaintiff's property from attachment. Defendant appealed to the District Judge, who reversed the finding of the Sub-Collector and remanded the suit under section 562 of the Code of Civil Procedure for disposal on its merits. Against that order of remand, plaintiff preferred this appeal.

K. Subramaniya Sastri for appellant.

V. C. Desikachariar for respondent.

JUDGMENT.—This is an appeal from an order of the District Judge reversing a finding of the Sub-Collector in proceedings under Act VIII of 1865 and remanding the suit for disposal on the merits. The order purports to have been made under section 562 of the Code of Civil Procedure.

A preliminary objection has been taken that no appeal lies. In support of the objection it has been argued that the adjudication by the Sub-Collector was not a "decree" within the meaning of section 562 of the Code, that this being so, the order of remand cannot be taken to have been made under that section, and that inasmuch as section 588 (28) of the Code only gives a right of appeal when the order is made under section 562, if the order was not under that section, no appeal would lie.

We are of opinion that it was competent for the District Judge to make the order under section 562.

No doubt section 69 of Act VIII of 1865 uses the word "Judgment" but we think the judgment or adjudication by the Sub-Collector in the present case is a formal expression of an adjudication upon a right claimed within the meaning of the definition of "decree" contained in section 2 of the Code. We also think it is a formal expression . . . upon a right claimed in a Civil Court.

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In *Kotappa* v. *Venkataramiah*(1), this Court considered this last point with reference to the right of second appeal conferred by section 584 of the Code and held that for the purposes of that section an adjudication by the Collector in proceedings under Act VIII of 1865 amounted to a decree as defined by the Code. As pointed out by the Judicial Committee in the case of *Nilmoni Singh Deo* v. *Taranath Mukerjee*(2), there is a distinction between Civil Courts and Rent Courts; but a Rent Court is a Civil Court in the sense that it decides a civil question between persons seeking their civil rights.

There is nothing in section 4 of the Code which is inconsistent with the view above expressed.

To say that the adjudication in question in the present case is a decree within the meaning of section 546 of the Code does not affect any special procedure prescribed by Act VIII of 1865. Moreover section 4-A, a comparatively recent enactment, clearly contemplates Revenue Courts being governed by the provisions of the Code of Civil Procedure.

We think the preliminary objection fails and must be overruled.

On the merits, in our judgment, the question of the propriety of the pattah cannot be satisfactorily determined until there have been findings on the other issues in the case. On this ground, we think the order of remand ought not to be interfered with.

The appeal is dismissed. The costs of this appeal will abide the result of the suit.

(1) S.A. No. 1050 of 1899 (unreported).

(2) I.L.R., 9 Calc., 295.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Moore.

NARAYANA RAJA (PLAINTIFF), APPELLANT,

v.

RAMACHANDRA RAJA AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

1902. October 3, 7.

Revenue Recovery Act (Madras)—II of 1864, ss. 5, 25, 44—Sale of property of a defaulter for arrears of revenue—Regulation XXVI of 1802, s. 3—Register of transfer—Act I of 1890, s. 6 (3) (4)—"Entire estate" of defaulter—Lands held under different pattahs—Sale of land comprised in one pattah—No arrears of revenue due—Subsequent sale of same land for arrears of revenue due on other land held under different pattah—Validity.

First defendant held lands under two separate pattahs, in two different villages. The land situated in one of the villages was, in 1897, sold at a court sale in execution of a decree, and was purchased by plaintiff. At the date of this sale no arrears of revenue were due in respect of any of first defendant's lands situate in either village. At a date subsequent to plaintiff's purchase at the court sale, the same land was again sold to second defendant, for arrears of revenue. These arrears were not due in respect of the land which was sold, but had accrued due on the other land belonging to first defendant, which was situated in the other village and comprised in the other pattah. Plaintiff had not applied to the Collector of the District for a transfer of the pattah of the lands which he had purchased at the court sale. Plaintiff now sued for a declaration that the sale to second defendant for arrears of revenue was invalid:

Held, that plaintiff was entitled to the declaration.

Per MOORE, J.—Inasmuch as plaintiff had failed to obtain a transfer of pattah into his own name after his purchase, the transfer by court sale from first defendant to plaintiff would not, under section 3 of Regulation XXVI of 1802, have relieved first defendant or the land from liability for land revenue due by first defendant in respect of those particular lands. But these lands were not liable for revenue due by first defendant in respect of land situated in the other village. Having regard to section 6 (3) (4) of Act I of 1890, the "movable and immovable property of a defaulter" referred to in section 5 of Act II of 1865, must be taken to mean the interest of the defaulter in the land. Inasmuch as the interest of the first defendant in the lands in question had already been sold to plaintiff, practically nothing remained to be sold to the second defendant at the subsequent revenue sale.

* Second Appeal No. 819 of 1900, presented against the decree of J. Hewetson, District Judge of Tinnevelly, in Appeal Suit No. 242 of 1899, presented against the decree of S. Ramasamy Ayyangar, District Munsif of Srivilliputtur, in Original Suit No. 696 of 1898.

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Per DAVIES, J.—The land which plaintiff had bought at the court sale was not liable to be sold under the Revenue Recovery Act, because, at the time of sale, there were no arrears of revenue due upon it, and it then ceased to form part of the defaulter's property. The land which, under sections 3, 4, 5 and 25 of the Revenue Recovery Act, is liable to be sold for arrears of revenue, must either be the land upon which the revenue is due, or land which is the property of the defaulter. The land in question was of neither description. The term "entire estates" as used in section 3 of Regulation XXVI of 1802, when used with reference to a single person, must be read as meaning the "entire estate" and, before section 3 of the Regulation can apply, the "estate" must be such as had "revenue due to Government" upon it. A pattah represents an entire estate, and land held under another pattah forms another estate.

SUIT for a declaration that a sale of land for arrears of revenue was invalid. The plaint set forth that the land in question, which had originally belonged to first defendant and others, was situated in the village of Alagapuri; that plaintiff had purchased it at a court sale held in execution of the decree in Original Suit No. 140 of 1896; that he had obtained delivery of the land and had been in possession ever since. It also alleged that there were no arrears of revenue due for fasli 1306 by first defendant in respect of pattah No. 191, which comprised the land in question, but that the land had, notwithstanding, been sold by Government for the arrears of revenue due in respect of other lands in first defendant's holding under pattah No. 292 in the village of Sammandhapuram. This sale was to second defendant. Defendants Nos. 1 and 2 remained *ex parte*, third defendant alone defending the suit. By his written statement this defendant pleaded that the sale of the land by Government for the recovery of the arrears of revenue due from the registered holder was legal under the provisions of the Revenue Recovery Act (II of 1864), even though the arrears had accrued in respect of other lands in his holding. It was also pleaded that plaintiff had had an opportunity to pay the arrears, as one having an interest in the land, and that he had no cause of action against the Secretary of State. Before the District Munsif it was not denied that first defendant was the holder of the two separate pattahs referred to in the plaint, and it was conceded that no arrears were due under pattah No. 191, which comprised the land in question, situated in Alagapuri village, and that the arrears to recover which the land had been sold were due in respect of pattah No. 292 situated in Sammandhapuram village. The District Munsif held that the arrears of revenue, though relating to lands in a different village held under a different pattah, was a first

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charge on the land in question, and that, in consequence, the sale to second defendant was good as against plaintiff. He dismissed the suit, and the District Judge, on appeal, upheld that decision.

Plaintiff preferred this second appeal.

R. Subrahmania Ayyar for appellant.

The Acting Government Pleader for third respondent.

MOORE, J.—No evidence has been placed on record in this case, but it is admitted that the first defendant had lands in two separate villages, Alagapuri and Sammandhapuram for which he held separate pattahs. It is further admitted that no arrears of revenue were due on the lands in Alagapuri at the date of either the court sale or the sale on account of arrears of revenue of those lands. The acting Government Pleader further states that, although the information at his disposal is not such as to enable him to make any positive statement as to the facts, he is prepared to admit, for the purpose of argument, that at the date of the court sale no arrears on account of land revenue were due by the first defendant in any village.

The lands entered in the pattah held by the first defendant in Alagapuri village were, on the 25th June 189-, sold in execution of the decree in Original Suit No. 140 of 1896 on the file of the District Munsif of Srivilliputtur and purchased by the plaintiff. Subsequently, in November or December 1897, the same land was sold on account of arrears of revenue due by the first defendant and purchased by the second defendant. The plaintiff sues for a declaration that this sale is invalid. Both the lower Courts have decided against him and he has consequently filed this second appeal here. It is not alleged that the plaintiff, on the strength of the sale certificate granted to him, applied to the Collector for transfer of the pattah for the lands in Alagapuri to his name. Section 3, Regulation XXVI of 1802, lays down that no transfer of land which is not registered shall exempt the person in whose name the entire estates are registered from paying the revenue due to Government from such land. From this provision of law it is clear that, as pointed out by Collett, J., in *Mangamma* v. *Timmapaiya*(1) (a decision under this Regulation), as against Government and for the purpose of exemption from liability to revenue, a transfer without change of registry is not valid. It

(1) 3 M.H.C.R., 134, at p. 136.

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follows therefore that the transfer by court sale of the lands in Alagapuri from the first defendant to the plaintiff did not relieve the first defendant or the lands from liability on account of land revenue due by him for those lands inasmuch as there was no change of registry regarding them in the Collector's office.

The further question, however, that has to be considered is whether the lands in Alagapuri village which had been bought at a court sale by the plaintiff remained liable on account of revenue arrears due by the first defendant not on them but on other lands in a different village. Section 5, Act II of 1864 (Madras), no doubt provides that all the movable and immovable property of a defaulter, wherever it is to be found, can be proceeded against, in order to recover arrears of land revenue due by him; but the question to be decided is whether, after the purchase of the Alagapuri lands in court sale by the plaintiff, they can be held to have remained the property of the defaulter. At the hearing of this second appeal I was inclined to hold that, as the pattah of the Alagapuri lands had not been transferred, they still remained the property of the pattahdar in so far, at all events, as liability for Government revenue was concerned, but having since then considered the provisions of section 6, sub-sections (3) and (4) of Act I of 1890, I am of opinion that this view is incorrect, and that all that was sold at the revenue sale at which the second defendant was the purchaser was the interest of the defaulter in the land and that interest was then, in consequence of the prior sale at Court auction and purchase by the first defendant, practically nothing.

The decrees of both the lower Courts should be reversed and the plaintiff given a decree as prayed for with costs throughout.

DAVIES, J.—My view is that the land the plaintiff had bought in the court sale was not liable to be sold under the Revenue Recovery Act, because at the time of sale (1) there were no arrears of revenue due upon it, and (2) it then ceased to form part of the defaulter's property. Reading sections 3, 4, 5 and 25 of the Act together it seems to me clear that the land which is liable to be sold for arrears of revenue must either be the land upon which the revenue is due or that it must be land which is the property of the defaulter. It is admitted that the land sold in this case did not comply with either of these conditions. Section 3 of Regulation XXVI of 1802, which runs as follows: "Transfers of land made by individual persons without being so registered in the registers

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of the Collectors shall not be valid in the Courts of *Adalat;* and such transfers of land, being unregistered, shall not exempt the persons in whose names the entire estates are registered from paying the revenue due to Government from such lands," has been relied on, in this Court, in support of the judgments of the Courts below. The construction now wished to be placed upon that section is that the words "entire estates" mean all the estates of the individual, but they will not, in my opinion, bear that interpretation. The plural "estates" has reference to the plural "persons" and when used with reference to one person must be read in the singular, "estate". Now the word "estate" means the "land" (the words are also used as synonymous in section 25 of the Act), and the land must be such land as had "revenue due to Government" upon it, before section 3 of the Regulation can be made applicable to it. The land bought by the plaintiff was held by the first defendant, the defaulter, under a separate pattah in another village and had no connexion whatever with the revenue which was due to Government. A pattah represents a whole or entire estate, as held by this Court in *Secretary of State for India* v. *Narayanan*(1). Land held under another pattah must therefore be deemed to form another estate. In no case has it been held that a holding means all holdings from Government under different pattahs in different places. So that what the plaintiff bought was a separate estate distinct from that on which revenue was due; and as no revenue was due on that estate, the plaintiff's purchase was not subject to the payment of revenue due on other land, on (as it would appear) the fiction that what the plaintiff purchased was still the defaulter's property, when in fact it was not. I therefore agree with my learned colleague in reversing the decrees of both the lower Courts and decreeing the plaintiff's claim with costs throughout.

(1) I.L.R., 8 Mad., 131.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1902. December 3, 4, 5.

JAMBU CHETTY AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

PALANIAPPA CHETTIAR (PLAINTIFF), RESPONDENT.*

Negotiable Instruments Act—XXVI of 1881, ss. 1, 94—Local usage—Applicability of Act to Natives of India—Notice of dishonour to drawer where drawee has failed to accept—Acceptance of hundi as conditional or absolute payment.

In a suit for the amount due on account of goods sold and delivered and money lent, the defence was that plaintiff had accepted hundis in discharge of the debt and was, in consequence, debarred from suing on the original consideration and that his remedy, if he had one, was on the hundis. It was also contended that the hundis had been accepted as cash payment, in consideration of a discount of 2½ per cent. and that, in consequence, plaintiff had no cause of action either on the original debt or upon the hundis, as he had taken the risk of the latter being dishonoured by the drawee:

Held, that it is a question of fact, with regard to promissory notes or bills or hundis, whether the parties intended them to operate as absolute or conditional payment, and the presumption is that the effect of giving and taking a note or bill is that the debt is conditionally paid.

Held also, on the evidence, that plaintiff had accepted the hundis unconditionally, and was, in consequence, precluded from suing on the original debt.

Section 94 of the Negotiable Instruments Act recognises that the person to whom notice of dishonour is given should be informed, not only that the instrument has been dishonoured and in what way, but also that he will be held liable thereon. So, where a drawee of a bill of exchange does not accept it, though the drawer is primarily liable, the payee should give notice of dishonour to the drawer.

The provisions of the Negotiable Instruments Act are strictly applicable to natives. Where any local usage is relied on under section 1 of the Act, it should be alleged and established by the party who relies upon it.

SUIT to recover Rs. 5,421-14-10, being the balance alleged to be due on account of goods sold and delivered and money lent by plaintiff to first defendant. Liability was admitted by first defendant to the extent of Rs. 521-3-9, and objection was taken by him to debits of Rs. 1,547-4-9, Rs. 1,500-0-0, Rs. 1,765-8-3, and Rs. 1,100-0-0, in respect of certain hundis. These hundis had been drawn by first defendant in plaintiff's favour, but had been

* Appeal Suit No. 86 of 1901 presented against the decree of T. M. Rangachariar, Subordinate Judge of Madura (West), in Original Suit No. 14 of 1900.

dishonoured by the drawee at Rangoon. The Subordinate Judge overruled these objections and decreed in plaintiff's favour. The facts are more fully set out in the judgment of the High Court.

Defendants preferred this appeal.

V. Krishnaswami Ayyar and *S. Srinivasa Ayyar* for appellants.

P. S. Sivaswami Ayyar for respondent.

JUDGMENT.—This is an action for the recovery of the sum of Rs. 5,421-14-10, being the balance alleged to be due on accounts for goods sold and sums lent from time to time by the plaintiff to the first defendant. The first defendant admitted his liability only to the extent of Rs. 521-3-9 and objected, among other items, to his having been debited by the plaintiff with the several sums of Rs. 1,547-4-9, Rs. 1,500-0-0, Rs. 1,765-8-3, and Rs. 1,100-0-0, being the amounts of four hundis drawn by the first defendant in favour of the plaintiff, which were dishonoured by the drawee at Rangoon. The Subordinate Judge overruled the defendant's objection and gave a decree in favour of the plaintiff as sued for. The defendants appeal against that decree and urge in support of their appeal that the plaintiff having accepted the hundis in discharge of the debt due to him, he cannot sue upon the consideration for the hundis, and that his remedy, if any, is upon the hundis. Apparently the first defendant contended in the Court below that the hundis had not only been accepted in discharge of the debt, but that the same were accepted as cash payment in consideration of a discount of 2½ per cent. on the amount of the hundis, and that therefore the plaintiff had no cause of action against him either on the original debt or upon the hundis, he, the plaintiff, having taken the risk of their being dishonoured by the drawee.

Upon the evidence in the case, we are clearly of opinion that the first defendant has entirely failed to establish that the hundis were treated and accepted as cash payment. As we understand the learned pleader for the appellants, his contention in this court is only that the hundis were taken as absolute payment and that the plaintiff cannot therefore sue upon the original consideration. He argues that, unlike a promissory note, the giving of a bill or hundi *primâ facie* operates as absolute payment of the debt, and that the onus is upon the party affirming the contrary to show that the parties intended it to operate only as a conditional

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payment. We think that there is no distinction in this respect between a note and a bill, and no authority has been cited to us in support of such a distinction.

Whether it be a note or a bill, it is a question of fact in either case, whether the parties intended the same as absolute or conditional payment, and the presumption is that the effect of giving and taking a note or bill is that the debt is conditionally paid. As stated by the Master of the Rolls in *In re Romer and Haslam*(1), "it is perfectly well-known law, which is acted upon in every form of mercantile business, that the giving of a negotiable security by a debtor to his creditor operates as a conditional payment only, and not as a satisfaction of the debt, unless the parties agree so to treat it."

It is next urged that the evidence in the case shows that the parties intended the hundis to operate as absolute payment of the debt, and in support of this contention reliance is chiefly placed upon the plaintiff having been allowed a discount of $2\frac{1}{2}$ per cent. upon the amount of the hundis in addition to interest from the date of the hundis, at the current rate prevailing in Rangoon, which, it is shown, was higher than the local current rate. The first defendant in his written statement expressly relied upon this circumstance in support of this contention, and on this point also cross-examined the plaintiff's sixth witness, who was the plaintiff's agent at that time. The witness stated that discount was allowed to cover risks in connection with the realization of the hundis and that it is allowed in every case. The evidence given by the first defendant on this point was that for cashing Rangoon hundis the highest discount is $\frac{3}{4}$ per cent., but that he consented to pay $2\frac{1}{2}$ per cent., in regard to the hundis in question, because the plaintiff was to have the risk in case Kadai Rowoothen (the drawee) proved insolvent. There was no cross-examination of the first defendant on this point, nor was any explanation elicited in the re-examination of the plaintiff's sixth witness. The allowing of $\frac{3}{4}$ per cent. discount may be regarded as a reasonable compensation, for the trouble to be taken in realizing at Rangoon the amount of a hundi drawn and given in Madura; but $2\frac{1}{2}$ per cent. cannot reasonably be regarded merely as such compensation, and it clearly shows that the plaintiff

(1) [1893] L.R., 2 Q.B., 296.

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calculated upon making a clear profit of about 2 per cent. by taking the bill in discharge of the debt, without at the same time running any real risk, inasmuch as he would have his remedy against the first defendant, upon the bills, if the same were dishonoured at Rangoon. And it is fairly certain that the plaintiff's action would have been based upon the hundis, but for his having been probably advised that such action would be sure to fail for want of due notice of dishonour.

The inference to be drawn from the comparatively high rate of discount is strengthened by the evidence of the plaintiff's sixth and third witnesses. The former says that the first defendant sometimes paid the plaintiff's firm in cash and sometimes by a bill the amount of which was credited to him in the plaintiff's account.

If the bill were dishonoured the first defendant would pay the amount of the bill or he would be debited with the amount thereof, and the plaintiff's account clearly shows that the first defendant was first credited with the amounts of the four hundis in question, and afterwards debited with the same after the plaintiff failed to realize them. The evidence of this witness as to the interview he had with the first defendant at Madura after he received information of the hundis having been dishonoured, and the evidence of the third witness as to what passed between him and the first defendant at Rangoon in reference to these hundis after they had been dishonoured when the first defendant went to Rangoon, clearly go to show that the plaintiff accepted the hundis unconditionally, with the intention of enforcing his remedies thereunder, if the same should be dishonoured, and not with the intention of suing the first defendant upon the original consideration.

We cannot accede to the appellant's contention that the fact of the plaintiff having negotiated two of the hundis shows that the hundis were given and taken as absolute payment; nor can we accede to the respondent's contention that the giving by the first defendant of certain bundles of cloth to the plaintiff as collateral security for the hundis, the bundles of cloth being deliverable to the drawee only after the hundis were honoured by him, is inconsistent with the hundis having been accepted as absolute payment. The negotiation of the hundis is equally consistent with their having been given and taken as absolute payment or as conditional payment; and as, at the commencement of the action, the two

hundis were not outstanding in the hands of third parties, but were in the plaintiff's possession, who was thus in a position to hand over the bills to the defendant, he could bring an action on the consideration, if the bills in this case, were taken as conditional payment (*Davis* v. *Reilly*(1)).

The giving of additional security for the hundis is a circumstance not inconsistent with their having been accepted as absolute payment but rather tends to confirm the inference that they were given and taken as such. For these reasons, the conclusion we have come to is that the four hundis in question were accepted as absolute payment of the debt and that the plaintiff, therefore, cannot sue upon the original debt. Even in the view that they were given and taken as conditional payment of the debt, the plaintiff cannot maintain this action, as he was guilty of laches in respect of the same, and they must therefore be treated as absolute payments, and as between the first defendant, the debtor, and the plaintiff, the creditor, the debt is discharged.

We cannot accede to the respondent's contention that inasmuch as the drawee did not accept the bills and the first defendant, the drawer, therefore was primarily liable, the plaintiff was under no obligation to give notice of dishonour to the first defendant. Section 94 of the Negotiable Instruments Act, 1881, recognises that the person to whom notice of dishonour is given, should be informed not only that the instrument has been dishonoured, and in what way, but also "that he will be held liable thereon."

Upon the evidence of the plaintiff's sixth and third witnesses, we hold that notice of dishonour was not given either in express terms or by reasonable intendment by informing the first defendant that he would be held liable thereon, and we also hold that such imperfect notice as was given was not given within a reasonable time after dishonour (*vide* sections 105 and 106, Negotiable Instruments Act, also *Jambu Ramaswamy Bhagavathar* v. *Sundararaja Chetti*(2)). The result, therefore, is that the plaintiff cannot sue the first defendant for the debt any more than on the bills. The respondent's pleader relies upon paragraph 12 of the judgment of the Subordinate Judge and on clauses (*a*), (*c*) and (*g*) of section 98 of the Negotiable Instruments Act, and contends that no notice

(1) [1898] L.R., 1 Q.B., 1.

(2) I.L.R., 26 Mad., 239.

of dishonour was necessary. If the plaintiff relied upon any of these three exceptions to the general rule as to the necessity of giving notice of dishonour, he ought to have made the necessary averments in the pleadings and established the same. Neither in the pleadings nor in the issues has he relied either generally or specially upon all or any of these three exceptions, and we cannot permit him to raise them now as each of them involves questions of fact which can be satisfactorily tried only by framing additional issues. We may also add that the evidence to which our attention has been drawn is far from making out clearly any of these exceptions. In the view, however, which we have taken of the main question involved in the case, viz., that the bills were given and taken as absolute payment, it becomes unnecessary to remit such additional issues for trial even if we were otherwise disposed to do so.

The Subordinate Judge's view that the provisions of the Negotiable Instruments Act are not, or at any rate ought not to be, strictly applied to natives, is manifestly unsound and untenable. If any local usage relating to bills and notes in an oriental language—the operation of which usage is saved by section 1, though such usage may be at variance with the Act—be relied upon, such usage should be alleged and established by the party relying upon it.

The appeal, therefore, is allowed with costs, and the decree appealed from varied accordingly.

Both parties agree that the plaintiff should have a decree for Rs. 521-3-9, the amount admitted by the defendants in the Court below, with interest at 6 per cent. from date of plaint till payment.

Each party will pay and receive proportionate costs in the Court below.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Bhashyam Ayyangar.

1902. November 3, 4.

ADMINISTRATOR-GENERAL OF MADRAS, THE, (FIRST DEFENDANT), APPELLANT,

v.

SIMPSON AND THREE OTHERS (PLAINTIFFS), RESPONDENTS.*

Succession Act—X of 1865, s. 105—Bequest to charitable uses by a testator leaving a widow him surviving—Validity—"Nearer relative" than a nephew or niece.

By section 105 of the Indian Succession Act, no man having a nephew or niece or any "nearer relative" shall have power to bequeath any property to charitable uses, except by will executed not less than twelve months before his death and deposited as by the section is provided. A testator by his will bequeathed property to charitable uses, and died two days thereafter leaving a widow him surviving. On a question being raised as to the validity of the bequest:

Held, that the bequest was valid. The term "relative" in section 105 of the Succession Act refers to kindred only, as set forth in the table of consanguinity annexed to section 24 of the Act, and has no application to any relationship by marriage.

SUIT for a declaration as to the rights of the respective parties under the will of the late Captain John Fair. By that will, which bore date the 23rd of January 1874, the testator, after bequeathing to his wife, Eliza Fair, various personal effects made the following bequest, among others:—

"I also bequeath to the Treasurer, or Treasurers, for the time being, of the Friend-in-Need Society, at Madras aforesaid, the sum of Rs. 8,000 (rupees eight thousand) such legacy to be paid in precedence of the other pecuniary legacies hereby bequeathed (other than the legacy lastly hereinbefore bequeathed) out of such part of my personal estate not specifically bequeathed, as the law permits to be appropriated by will to charitable purposes, upon trust to invest the said sum of Rs. 8,000 (rupees eight thousand) in or upon a promissory note or security or promissory notes or securities, of the Government of India and to apply the income from time to time arising from such promissory note or security,

* Original Side Appeal No. 4 of 1902 against the decree of Mr. Justice Boddam in Civil Suit No. 33 of 1901.

or promissory notes, or securities, to the general purposes of the said Friend-in-Need Society."

The testator died on 25th January 1874, and probate of the will was granted to the plaintiffs. The testator's widow, Eliza Fair died, intestate, in 1899, and in 1900, Letters of administration to her estate and effects were granted to the first defendant, the Administrator-General of Madras. The plaint stated that the Friend-in-Need Society was a Society incorporated under Act XXI of 1860, and that a question had arisen, with others, as to whether the bequest to the Friend-in-Need Society was valid. The learned Judge held that it was. It was contended that the bequest to this charity (as well as another bequest to another charity) was void, under section 105 of the Succession Act, by reason of the fact that the testator had left a brother as well as his widow him surviving. The fourth defendant was impleaded as representing the estate of the person who was alleged to have been the brother of the testator, now deceased. The learned Judge held that it had not been proved that this person was the brother of the testator. With regard to the widow, he said:—

"It is however argued that as he left a widow, the bequests are void. This turns upon the construction to be put upon the words of section 105 of the Succession Act. The words of the section are as follows: 'No man having a nephew or niece or any nearer relative shall have power to bequeath any property to religious or charitable uses except by a will executed not less than twelve months before his death and deposited within six months of its execution in some place provided by law for the safe custody of the Wills of living persons.' If within the meaning of this section a widow is a 'nearer relative' than a nephew or niece there is no doubt that the bequests are void as the Will was made only two days before the testator's death. It is suggested that the word 'relative' has not the same meaning as 'kindred' in section 24 and section 80 (*a*) is referred to as showing that where the word relation is used it is intended that the wife should take because in a case of intestacy under section 26 the wife takes. I am of opinion that there is no such distinction as is contended for. Section 24 has annexed to it a table of kindred showing the degrees computed as far as the 6th. This section uses the word relative as synonymous with kindred, and throughout the Act I have been unable to find any occasion where it is used in a sense other than as meaning kin by blood.

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A wife is no relative and in Part V of the Act, which deals with the distribution of an intestate's property, the widow is kept entirely distinct from his relations, as for instance in section 41 coupled with section 34. I am therefore of opinion that the bequests to the charities named in the Will are not void under section 105."

The Administrator-General preferred this appeal.

Mr. *Allan Daly* for appellant.

The Advocate-General for second respondent.

Mr. *J. H. M. Ryan* for fourth respondent.

Mr. *A. S. Cowdell* for first and second respondents.

JUDGMENT.—The only point urged in support of this appeal is that the two bequests in favour of the Sailor's Home and the Friend-in-Need Society are void under section 105 of the Indian Succession Act on the ground that the testator left a widow him surviving and that the widow was a nearer relative of the testator than a nephew or niece. We are clearly of opinion that the term "relative" in section 105 refers to kindred only as set forth in the table of consanguinity annexed to section 24 of the Act, and has no application to any relationship by marriage. The use of the word 'nearer' immediately before the term relative in section 105 is in our opinion conclusive on the point. For while comparative nearness can be predicated as between persons referred to in the table of consanguinity above mentioned, that cannot be done as between the widow on the one hand and any of the kindred of the testator on the other. It is scarcely necessary to add that the learned Counsel for the appellant has not been able to suggest any principle or criterion for determining whether a widow is or is not a nearer relative than a nephew or niece within the meaning of section 105. Neither section 80 of the Indian Succession Act nor section 25 (1) of the Indian Contract Act, to which our attention was drawn by the learned Counsel, can be relied on as throwing light on the meaning of the term relative in section 105. The appeal therefore fails and is dismissed with costs.

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

Messrs. *King & Josselyn*—Solicitors for fourth respondent.

Messrs. *Barclay, Orr, David & Brightwell*—Solicitors for first and second respondents.

Mr. *Earnest Barclay*—Solicitor for third respondent.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

PARAMESWARAM MUMBANNOO, P. A., AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

KRISHNAN TENGAL, C. I., AND EIGHT OTHERS (DEFENDANTS), RESPONDENTS.*

1902. October 21, 22.

Limitation Act—XV of 1877, sch. II, art. 144—Suit to recover land—Claim that defendants were holding over as yearly tenants on expiration of lease—Previous suit on another lease—Claim by tenants as permanent lessees—Dismissal of suit except as to rent—Payment of rent since—Limitation—Prescriptive right as permanent lessees.

Plaintiffs sued on behalf of their devasom for land, basing their claim on a lease of 1862, for four years, and alleging that the defendants had been holding over as tenants and paying rent as such, since the expiration of that term in 1866. In 1881, plaintiffs' devasom had sued to eject the defendants from the same land, basing their suit on an alleged lease of 1865. The defence was set up by the predecessor of the present defendants Nos. 4 to 7 that he was a permanent tenant at a fixed rent. That suit was dismissed on the ground that the alleged lease of 1865 had not been proved, but the plaintiffs obtained a decree for the rent which the then defendant admitted to be due by him as a permanent tenant:

Held, that even assuming that the defendants had held over as yearly tenants, after the expiration of the alleged lease of 1862, such tenancy must have been determined prior to plaintiffs' suit in 1881. The possession of the defendants, subsequently to that suit was therefore, according to the plaintiffs' case, that of trespassers claiming a permanent right of tenancy. The payment of rent under the decree in the suit of 1881, and subsequently at the same rate, could be construed only, so far as the defendants were concerned, as payment by them of the rent admitted by them to be due as permanent tenants, and not as a renewal of the alleged lease of 1862, with a variation of the amount of rent. Inasmuch as the defendants had set up their adverse possession at a time when, according to plaintiffs' case their yearly tenancy had been determined, and such adverse possession had continued down to the date of the present suit, namely, for a period of more than twelve years, the defendants had acquired, by prescription, a right to hold possession as permanent tenants at that rent.

Seshamma Shettati v. *Chickaya Hegade*, (I.L.R., 25 Mad., 507 at p. 513), referred to.

SUIT for land. Plaintiffs sued on behalf of the Tiruvengad devasom to recover certain land which they alleged belonged to the

* Appeal Suit No. 134 of 1900 presented against the decree of A. Thompson District Judge of North Malabar, in Original Suit No. 18 of 1899.

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devasom and was leased to the karnavan of the third defendant's tarwad in 1862, for four years. The facts are set out, sufficiently for the purposes of the point decided, in the judgment of the High Court. The District Judge refused to allow the claim and passed a decree for payment of a small sum of money as against defendants Nos. 3 and 4.

Plaintiffs preferred this appeal.

Mr. *K. Brown*, *T. R. Ramachandra Ayyar* and *V. Ryru Nambiar* for appellants.

Mr. *C. Krishnan* for fourth defendant.

Hon. Mr. *C. Sankaran Nayar* for seventh respondent.

J. L. Rosario for fifth and sixth respondents.

C. V. Anantakrishna Ayyar for tenth respondent.

JUDGMENT.—We think that the plaintiffs' suit is barred by limitation.

In Original Suit No. 3 of 1881 the plaintiffs' devasom sued to eject the defendants Nos. 4 to 7 from the same land that the plaintiffs' devasom now seek to recover. That suit was based on an alleged lease of 1865. The predecessor of defendants Nos. 4 to 7 pleaded that he was a permanent tenant at a certain fixed rent. The plaintiffs' suit in ejectment was dismissed on the ground that the alleged lease was not proved but they got a decree for the rent which the defendant admitted to be due by him as a permanent tenant. The present suit is based on an alleged lease of 1862 for a term of four years, and it is contended by plaintiffs that subsequent to 1866 the defendants must be held to be holding over as tenants paying rent from year to year under the lease of 1862. Assuming that from the expiry of the lease of 1862 the defendants were holding over as yearly tenants under the alleged lease of 1862 such tenancy, according to the plaintiffs' case, must have been determined prior to the institution of Original Suit No. 3 of 1881, in which the plaintiffs sued to eject the defendants, who, if the lease of 1865 was either not true in fact or was invalid in law for want of registration, must be regarded as having been holding over, after 1866, under the lease of 1862. The defendants' possession, at any rate subsequent to that suit, was therefore, according to the plaintiffs' case, that of mere trespassers claiming a permanent right of occupancy. The payment of rent under the decree in Original Suit No. 3 of 1881 and the subsequent payment of rent at the same rate can be construed only, so far as defendants are

concerned, as payment by them of the rent admitted by them to be due as permanent tenants and not as a renewal of the alleged lease of 1862, with a variation only of the amount of rent. The adverse possession of the defendants having been set up by them at a time when, according to the plaintiffs' case their yearly tenancy had been determined and such adverse possession having continued down to the date of the present suit, that is for much more than 12 years, the defendants have acquired by prescription a right to hold possession as permanent tenants at that rent (*Seshamma Shettati* v. *Chickaya Hegade*(1)).

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The appeal must therefore be dismissed with costs payable to respondents Nos. 4 and 5 and 6 and 7 according to their respective interests. Separate costs for each set of printed papers for respondents.

APPELLATE CIVIL.

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

GOVERDHANA DOSS, R. S. M. (THIRD DEFENDANT), APPELLANT,

v.

VEERASAMI CHETTI, G., AND TWO OTHERS (PLAINTIFF AND SECOND DEFENDANT), RESPONDENTS.*

1902. September 8, 9. October 7.

Transfer of Property Act—IV of 1882, *s.* 74—*Mortgage of property—Subsequent mortgage to same mortgagee—Third mortgage with possession—Decree obtained by first mortgagee—Usufructuary mortgagee not a party—Subsequent suit by first mortgagee against usufructuary mortgagee for amount of decree.*

The owner of land mortgaged it to plaintiffs, and, at a subsequent date, gave plaintiffs a second mortgage over it. At a still later date, the mortgagor gave a further usufructuary mortgage over it to the predecessor in title of the third defendant. Plaintiffs then sued the mortgagors on their two mortgages, obtained a decree and brought the property to sale, when it was purchased by the second plaintiff, the undivided brother of the first plaintiff. The third defendant was not made a party to this suit. Plaintiffs now sued the mortgagors as well as the third defendant, and prayed that the third defendant might be decreed to pay

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(1) I.L.R., 25 Mad., 507 at p. 513, where *Budesah* v. *Hanmanta*, (I.L.R., 21 Bom., 509), is considered.

* Original Side Appeal No. 28 of 1901 against the decree of Mr. Justice Boddam in Civil Suit No. 158 of 1900.

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them the amount of their decree, and that, in default, it be declared that the third defendant be absolutely debarred of his right to redeem the prior mortgage, and that he be ordered to surrender possession of the property to plaintiffs:

Held, that the right of the third defendant was not affected by either the decree or the sale; the only effect of the sale being to transfer to the purchaser (the first mortgagee) the equity of redemption of the mortgagor. *Also*, that the only right that the third defendant had now was that which he could have claimed to exercise if he had been a party to the suit on the prior mortgage, namely, a right to redeem that mortgage with the view of enforcing his own mortgage.

Muhammad Usan Rowthan v. *Abdula*, (I.L.R., 24 Mad., 71 at pp. 174, 175), followed.

SUIT for foreclosure. The following statement of facts is taken from the judgment of the High Court:—

"The father of the first and second defendants mortgaged the plaint property to the plaintiffs on the 30th December 1893 and subsequently, on the 12th August 1895, granted a second mortgage on the same property to the same persons. On the 19th December 1895 the father of the first and second defendants granted a further usufructuary mortgage to a person whose rights have subsequently been transferred to the third defendant and put him in possession. After the death of the father of the first and second defendants the first and second plaintiffs brought a suit on their two mortgages against the first and second defendants and having obtained a decree brought the property to sale, when it was purchased by the second plaintiff, the undivided brother of the first plaintiff. The third defendant was not a party to the suit. The plaintiffs now sue praying that the third defendant may be ordered to pay them the amount of the decree in the suit in execution of which they brought the property to sale and that in default of such payment it be declared that the third defendant is absolutely debarred of his right to redeem the prior mortgage and that he also be directed to surrender possession of the property to the plaintiffs. Mr. Justice Boddam has passed a decree directing that unless the third defendant on or before the 1st February 1902 redeems the plaintiffs' mortgages by paying them Rs. 7,480 and interest, he be absolutely debarred of his right to redeem those mortgages. The third defendant appeals."

T. V. Seshagiri Ayyar for appellant.

P. R. Sundara Ayyar for respondents.

JUDGMENT [after stating the facts as already set out].—It is clear that the first mortgagee having obtained a decree on his

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prior mortgages without having joined the third defendant, a puisne mortgagee, as a party and having in execution purchased the mortgaged property, the right of the puisne mortgagee, under section 74 of the Transfer of Property Act, to redeem the first mortgage, is not affected by either the decree or sale. The only effect of the sale is to transfer to the purchaser (first mortgagee) the equity of redemption of the mortgagor. The third defendant not having been made a party to the decree cannot now be in a worse position than he would have been, if he had been made a party. It also, of course, equally follows that he cannot be in a better position than he would have been as a party to the suit. For the third defendant (appellant) it is urged that what Mr. Justice Boddam should have done was to pass a decree for sale of the property. In support of this contention reliance is placed on the decisions in *Narayanasami Naidu* v. *Narayana Rau*(1) and *Rangayya Chettiar* v. *Parthasarathi Naickar*(2). We, however, are of opinion that these decisions must be distinguished from the case now under consideration for the reasons given in the judgment in *Muhammad Usan Rowthan* v. *Abdula*(3). As is there pointed out, the only right which the puisne mortgagee (third defendant) could have claimed to exercise if he had been joined in the suit on the first mortgage was the right to redeem that mortgage with the view of enforcing his own mortgage. That right, and no other, it must be held, remains to him now and it is only on the supposition that the property exceeds in value the amount secured by the first mortgagee that the puisne mortgagee has any actual interest in the property (*Muhammad Usan Rowthan* v. *Abdula*(3)). In a case very similar to the present one, Sir C. Sargent, C.J., held that the first mortgagee, when he bought the estate in execution of the decree in a suit brought by him against the mortgagor, in which a puisne mortgagee was not joined as a party, bought the estate as it stood at the date of his mortgage, free from all subsequent incumbrances, subject to the right of the puisne mortgagee to redeem him if he so desired as in *Mohan Manor* v. *Togu Uka*(4) and that decision has been followed in a recent case, also on all fours with that now under consideration in *Desai Lallubhai Jethabhai* v. *Mundas Kuberdas*(5). In this latter decision it is pointed

(1) I.L.R., 17 Mad., 62.
(2) I.L.R., 20 Mad., 120.
(3) I.L.R., 24 Mad., 171 at pp. 174, 175.
(4) I.L.R., 10 Bom., 224.
(5) I.L.R., 20 Bom., 390.

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out that the prior Bombay decisions, which had been pronounced before the Transfer of Property Act was passed, were in accordance with section 75 of that Act. There is, no doubt, a conflict of authority as to the rights of the puisne mortgagee in a case such as the present and it would be impossible to reconcile the decisions of the several High Courts, but having duly considered those decisions we are of opinion that the recent ruling of our own Court already referred to in *Muhammad Usan Rowthan* v. *Abdula*(1) should be followed and that it should be held that the only right that the third defendant has now is that which he would have claimed to exercise if he had been a party to the suit on the prior mortgage, namely, a right to redeem that mortgage with the view of enforcing his own mortgage. The second mortgagee is, in short, entitled to redeem the first mortgage, but without prejudice to the right of the first mortgagee as purchaser of the equity of redemption to redeem the second mortgage after the second mortgagee has redeemed the first mortgage. We accordingly dismiss this appeal with costs. The time allowed to the third defendant to redeem will be extended to within six months from this date.

APPELLATE CIVIL.

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

1902. November 12, 25.

LAKSHMINARANAPPA AND SEVEN OTHERS (DEFENDANTS NOS. 2 TO 9), APPELLANTS,

v.

MELOTHRAMAN NAIR (PLAINTIFF), RESPONDENT.*

Landlord and tenant—Lease by tenant-for-life—Rent payable during month—Death of tenant-for-life prior to end of month—Claim by assignee of tenant-for-life for rent—Apportionment.

A tenant-for-life leased immoveable property to tenants at a rent which was payable in half-yearly instalments. Four days before an instalment was due, the tenant-for-life died, and the assignee of his interest sued the tenants for the rent:

(1) I.L.R., 24 Mad., 171 at pp. 174, 175.

* Second Appeal No. 941 of 1901, presented against the decree of G. W. F. Dumergue, District Judge of South Canara, in Appeal Suit No. 75 of 1900, presented against the decree of T. V. Anantan Nair, District Munsif of Kasaragod, in Original Suit No. 249 of 1899.

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Held, that he was entitled to recover.

Per SUBRAHMANIA AYYAR, J.—In the absence of a specific rule applicable to cases like this, in India, the Courts are entitled to follow the broad and just principle underlying the English Statute law, which culminated in the Apportionment Act of 1870, and hold that, as a matter of equity and good conscience, the assignee of the tenant-for-life was entitled to an apportionment of the rent due up to the date of the death of the tenant-for-life.

Per DAVIES, J.—The assignee of the tenant-for-life was entitled to recover on the ground that the half-yearly instalment had fallen due prior to the death of the tenant-for-life, though the right to sue for it might not have accrued until four days after.

SUIT for arrears of rent. In 1893, certain fields and gardens were leased by the late Kumara Varma Mootharsu, who had a life interest in them at a yearly rent, to one Venkataramanaya, the manager of the defendants' family. The rent was payable in two instalments in the months of Tulam and Minam every year. One Palmangalthaya then purchased the right to receive the rent due to the Mootharsu in a court sale, and subsequently assigned his right to recover the rent payable in Tulam 1071 to plaintiff, who now sued for that rent. The principal defence was that the Mootharsu had died on the 26th Tulam, and that the rent now sued for, had consequently not become due, as payment of it could be deferred till the last day of Tulam 1071. The District Munsif held that the instalment of rent payable in Tulam 1071 fell due, not before, but after the death of Mootharsu, and that, in consequence, plaintiff, as assignee of Palmangalthaya, had no right to collect it. He dismissed the suit. Plaintiff appealed to the District Judge, who held that although rent was not payable until the 30th Tulam, the right to it accrued to the Mootharsu until the 26th Tulam, the day of his death. He held that that right had vested in the plaintiff, who was entitled to recover the rent from the defendants for the period of six months less four days.

Defendants Nos. 2 to 9 preferred this second appeal.

P. R. Sundara Ayyar for appellants.

K. Narayana Rau for respondents.

SUBRAHMANIA AYYAR, J.—The only point raised for determination in this case is whether, as held by the lower Appellate Court, the plaintiff (respondent), as the assignee of the rent due to the late Sthani, a limited owner of the property under the lease granted by him to the manager of the family of the defendants (appellants), is entitled to so much of the rent for the Malabar year

1071, as is apportionable for that period of the year during which the Sthani was alive.

In support of the plaintiff, it was urged that, though the Sthani died on the 26th of the month of Tulam, yet, as the instalment of rent to which the dispute relates had become lawfully payable from the first of Tulam, it should, for purposes like the present, be treated as if it had actually become due in his life-time. No doubt in *Earl of Stafford* v. *Lady Wentworth*(1) it was laid down that, when a tenant-for-life made leases for years reserving the rent at Lady day and Michaelmas day and died on Michaelmas day at 12 o'clock noon, the representatives of the lessor were entitled to the rent. The principle of that decision, however, was that the lessor having had no power to lease for a term beyond his life, the lessee's election to defer payment to the last instant of the particular rent day was taken away by the determination of the lease at the moment of the lessor's death. But here the parties proceed on the footing that the circumstances in which the lease was granted render it binding upon the succeeding Sthanis also, and the question is whether the plaintiff is entitled to recover in proportion to the period during which the Sthani was alive, even though the instalment did not fall due till some days after his death. It is true, as urged for the defendant, that according to the English Common Law, there was no apportionment in respect of time, but as pointed out in 'Copinger on Rents,' page 574, Courts of Equity always distinctly admitted of an apportionment in respect of time. In one of the earliest cases on the point, *Paget* v. *Gee*(2), which Lord Eldon followed in *Hawkins* v. *Kelly*(3), Lord Hardwicke, after observing that the case was new, that no precedent was cited, but that the case was so strong that he would make it a precedent, held that, on the death of a tenant in tail, the rent should be apportioned between the executors of the tenant in tail and the remainder man. In support of this conclusion, he relied on the grounds and reasons of the Statute 11, Geo. 11, c. 19, the earliest English Statute with reference to the subject of apportionment of rent in respect of time. It seems to me, therefore, that in the absence of a specific rule applicable to cases like the present in this country, we are entitled to follow the broad and just principle

(1) Precedents in Chancery, 555. (2) Ambler, 198.
(3) 8 Ves., 308.

underlying the English Statute Law culminating in the Apportionment Act of 1870 (the first section whereof lays down in comprehensive terms that all rents, annuities, dividends and other periodical payments in the nature of income shall, like interest on money lent, be considered as accruing from day to day and shall be apportionable in respect of time accordingly), and hold that, as a matter of equity and good conscience, the plaintiff in this case is entitled to the apportionment made by the decree of the lower Appellate Court, more especially as the Legislature in this country has itself, from time to time, enacted provisions resting on the same principle so far as the application of that principle was called for by the subject in hand, *e.g.*, the Indian Succession Act, section 300; the Indian Probate and Administration Act, section 120; and the Indian Transfer of Property Act, section 36.

On these grounds I agree in the conclusion arrived at by the lower Appellate Court and would dismiss this second appeal with costs.

DAVIES, J.—I agree with my learned colleague that the second appeal should be dismissed with costs, but on the ground that the six months' rent had fallen due before the date of the late Sthani's death. That rent was due in the month of Tulam. If on the first of that month the tenant had paid the rent, it would have been a valid discharge. The plaintiff's assignor was therefore entitled to the rent on the first of Tulam, that is, before the late Sthani's death though his right to sue for it may not have accrued till the end of the month. The right to a thing often accrues before the right to sue for it does. No question of apportionment therefore arises, and I should be reluctant to apply the Statute of Law of England to the subject, when that Statute Law has not been made applicable to India, as its adoption here would have very far reaching consequences.

PRIVY COUNCIL.

P.C.*
1903.
May 5, 6, 7,
25.

ANNAMALAI CHETTY (PLAINTIFF),

v.

MURUGASA CHETTY AND ANOTHER (DEFENDANTS).

[On appeal from the High Court of Judicature at Madras.]

Jurisdiction—Foreigner carrying on business by agent—Civil Procedure Code (Act XIV of 1882), *s.* 17—*Suit in Court in British India on judgment of French Court—Effect of order in insolvency of French Court—Business carried on by managing member of joint family.*

Quære, whether a non-resident foreigner can, by carrying on business within the jurisdiction of a British Court in India by an agent, subject himself to the jurisdiction of the Court under section 17 of the Code of Civil Procedure (Act XIV of 1882).

Girdhar Damodar v. *Kassiyar Hiragar*, (I.L.R., 17 Bom., 662), distinguished.

In this case it was found by the Judicial Committee on the evidence that the agency was not proved, the alleged agent being merely the manager of joint family property, of which the defendant owned a share; and they held that such a person is not the agent of the members of the family so as to make them liable to be sued as if they were the principals of the manager. The relation of such persons resembles that of trustee and *cestui que trust*, rather than that of principal and agent, or of partners.

The defendant was a French subject and had been adjudicated an insolvent by the Court at Pondicherry.

Quære, whether a suit brought against him in a British Court in India on a judgment of the Pondicherry Court obtained after the order of adjudication in insolvency took effect was barred by the proceedings in insolvency, as held in *Quelin* v. *Moisson* ((1827) 1 Knapp. P.C., 265). The High Court held that the suit was so barred; but in the view of the case taken by the Judicial Committee it was not necessary to decide the point.

APPEAL from a judgment and decree (26th January 1900) of the High Court at Madras which reversed a decree (8th November 1898) of the District Court of South Arcot, and dismissed the appellant's suit with costs.

The suit was brought to recover a sum of money due on a decree of the French Court at Pondicherry. The facts of the case are sufficiently set out in the report of the appeal to the High Court in I.L.R., 23 Mad., 458.

* *Present:* Lord MACNAGHTEN, Lord LINDLEY, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.

The questions which arose in the case are shown by the issues settled by the District Judge which were as follows:—

1. "Is this Court prevented from entertaining the suit by reason of the cause of action not having arisen, and defendant not being resident or carrying on business within its jurisdiction?

2. Did or did not the defendant reside or carry on business within the jurisdiction of this Court on the date when the cause of action arose?

3. Was the French judgment, on which the suit has been brought, according to French law null and void on the date of suit, and is the present claim based on the French judgment, therefore, not sustainable in this Court?

4. Is it open to the defendant to raise the contention in this suit that the promissory note, on which the French judgment was passed, was obtained from the defendant by the plaintiff fraudulently?

5. And, if so, was the promissory note obtained by the plaintiff from the defendant fraudulently?

6. What is the relief, if any, that the plaintiff is entitled to?"

On these issues the District Judge held as to (1) and (2) that the first defendant was carrying on business at Cuddalore, within the meaning of section 17 of the Civil Procedure Code (Act XIV of 1882), at the date of the suit, and was therefore subject to the jurisdiction of the Court in which the suit had been filed. On issue (3) he held that "at the date of suit the French judgment was not null and void." On issues (4) and (5) he held that it was not competent for him to go behind the French judgment and investigate the questions involved in those issues, and he would not allow evidence on them to be gone into. The District Judge gave a decree for the full amount claimed with costs against the first defendant.

From this decision the first defendant appealed to the High Court. The appeal was heard by a Division Bench of that Court (SUBRAHMANIA AYYAR and DAVIES, JJ.) who reversed the decision of the District Judge and dismissed the suit. The judgment will be found reported in I.L.R., 23 Mad., at p. 470.

On this appeal, *Cohen*, *K. C.*, and *J. M. Parikh*, for the appellant, contended that, under section 17 of the Code of Civil Procedure (Act XIV of 1882), the District Court had rightly decided that it had jurisdiction to entertain the suit. There

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was sufficient evidence of the respondent's residence and carrying on business within the jurisdiction of the Court to satisfy the District Judge as to his jurisdiction. To bring the respondent within section 17, it was not necessary for him to carry on business personally; that he did so by an agent was sufficient. Kandasami was shown to be the manager of a business in which the respondent had a share and which was carried on by Kandasami within the jurisdiction of the Court in which the suit was brought. These circumstances, combined with the fact that neither the respondent nor Kandasami had been called as a witness, were, it was submitted, sufficient to justify the District Judge in holding that he had jurisdiction. The respondent should have come forward and denied on oath that he carried on business within the jurisdiction. Reference was made to *Girdhar Damodar* v. *Kassigar Hiragar*(1), *Muthaya Chetti* v. *Allan*(2), section 17 of the Civil Procedure Code of 1882, and clause 12 of the Letters Patent of the High Court. The respondent moreover had acquiesced in the jurisdiction of the Court, and by the proceedings he himself had taken in the District Court he was estopped from now setting up any objection as to its jurisdiction. *Venkata Viraragava Ayyangar* v. *Krishnasami Ayyangar*(3), and section 20 of the Civil Procedure Code were referred to.

It was also contended that the adjudication of insolvency in the French Court at Pondicherry only temporarily suspended the creditors' right of action against the debtor, but did not operate as a discharge of the insolvent's debts. Such a discharge was only created and the remedies of the creditor taken away, where a concordat or composition was agreed upon by the creditors and confirmed by the Court, which was not the case here. Reference was made to Dicey's 'Conflict of Laws,' page 451; Story's 'Conflict of Laws,' pages 337, 338, 339; *Ellis* v. *McHenry*(4); *Phillips* v. *Eyre*(5); the Code Français de Commerce of 1838, as amended by the law of 1889, article 443; Dalloz's 'Jurisprudence Generale,' Supplement, Vol. VIII, page 254, section 8, page 327, verse 398 and page 498, verse 1073; Massi's 'Droit Commercial,' Vol. II, pages 347, 392, 395, 396; and Goviand's 'French Commercial Law,' pages 399, 400, 416, 424, 668, 670.

(1) I.L.R., 17 Bom., 662 at p. 666. (2) I.L.R., 4 Mad., 209.
(3) I.L.R., 6 Mad., 344. (4) (1871) L.R., 6 C.P., 228 at p. 234.
(5) (1870) L.R., 6 Q B., 1 at pp. 28, 29, 30.

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A party to a contract made and to be performed in England is not discharged from liability under the contract by an order in bankruptcy under the law of a foreign country in which he is domiciled: *Gibbs* v. *La Société Industrielle et Commerciale des metaux*(1). The case of *Quelin* v. *Moisson*(2) was relied on by the respondent as deciding the effect of the order in insolvency in his favour. But that case, it was submitted, was not an authority for the proposition that by French law bankruptcy discharges or extinguishes the insolvent's debts. It stated the opinion of two French advocates that if, by the order in bankruptcy, such debts were extinguished, and not merely the creditors' remedies suspended, then no action would lie for them. At most, that case only decided that, under the French law then (in 1827) prevailing, insolvency effected a discharge of the insolvent's debts. The onus of showing that such was the law now was on the respondent, and there was no evidence in which it could be found that that was the effect of the insolvency. A question of foreign law was a question of fact to be decided by evidence in each case. The law should have been shown by the evidence of experts (*Colville* v. *Gordon*(3)). As to the admissibility and relevancy of French law books as showing what the law is, sections 38 and 57 of the Evidence Act (I of 1872) were referred to and it was contended they were not relevant. The question as to the effect of the order in insolvency was raised for the first time in the High Court, and under the Civil Procedure Code the case should have been sent back to the First Court for the decision of that question before it was determined by the Appellate Court.

Dicey, K. C., and *W. C. Bonnerjee*, for the respondent Murugasa Chetty, contended that the District Court had entertained the suit wrongly and without jurisdiction. There was no evidence to show that the respondent was at the time of the institution of the suit subject to the jurisdiction of the Court in which it was brought. The onus of proving this was on the appellant. The respondent was a French subject domiciled in Pondicherry, and section 17 of the Civil Procedure Code was not intended to, and did not, apply to, such a person. Even assuming there was a joint business in which the respondent had a share, he could not at the date of suit

(1) (1890) L.R., 25 Q.B.D., 399 at p. 411. (2) (1827) 1 Knapp. P.C., 265.
(3) (1854) 5 De. G.M. & G., 278.

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have been considered as carrying it on within the meaning of section 17 of the Civil Procedure Code; it must have been carried on by the syndics in bankruptcy at the time the plaint was filed. Section 20 of the Civil Procedure Code has no reference to this case: acquiescence cannot give jurisdiction to a Court, if it has not jurisdiction to entertain a suit. *Ledyard* v. *Bull*(1) was referred to. By his appearance to the summons the appellant did not consent to the jurisdiction: he objected to it in his written statement following the procedure laid down in the Civil Procedure Code. The case of *Girdhar Damodar* v. *Kassigar Hirayar*(2), though it may be correctly decided as to a British subject, did not apply in this case where the respondent was a foreigner, and not carrying on business personally. A person other than a British subject cannot, by carrying on business by an agent, subject himself to the jurisdiction of the Court in the district where such business was carried on (*Kessowji Damodar Jairam* v. *Khimji Jairam*(3)). To show that the respondent was not a person subject to the jurisdiction of the District Court, reference was also made to Westlake's 'International Law,' 3rd edition, page 152, section 134; *Holliott* v. *Ogden*(4); *Solomons* v. *Ross*(5); *Jollet* v. *Deponthien*(6); *Russell* v. *Cambefort*(7); and *St. Gobani Chauny and Cirey Co.* v. *Hoyermann's Agency*(8). The word "debtor" must not be construed in such a sense as to foreigners as to give jurisdiction more than ordinarily extensive, whatever might be the interpretation if the respondent were a British subject. Maxwell on 'the Interpretation of Statutes,' 3rd edition, page 204; *Ex-parte Blain*(9); *Ex-parte Pearson*(10); and *Cooke* v. *Vogoler Company*(11) per Lord Halsbury, L. C., were referred to.

As to proof of French law and procedure in such cases *Alivon* v. *Furnival*(12) was referred to. As to the power of the Government of India to legislate for foreigners, reference was made to Ilbert's 'Government of India,' page 451; Civil Procedure Code

(1) (1886) L.R., 13 I.A., 134; I.L.R., 9 All., 191.
(2) I.L.R., 17 Bom., 662 at p. 666. (3) I.L.R., 12 Bom., 507.
(4) (1789) 1 H. Blackstone, 124 at p. 131. (5) (1764) 1 H. Blackstone, 131 note.
(6) (1769) 1 H. Blackstone, 132 note. (7) (1889) L.R., 23 Q.B.D., 526 at p. 528.
(8) L.R., (1893), 2 Q.B., 96 at p. 101.
(9) (1879) L.R., 12 Ch.D., 522 at pp. 526, 528.
(10) L.R., (1892), 2 Q.B., 263 at p. 268. (11) L.R., (1901), A.C., 102 at p. 110.
(12) (1834) 1 Cr. M. & R., 277.

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(Act XIV of 1882), section 1; and the General Clauses Consolidation Acts (I of 1868 and X of 1897).

It was also contended that the order in insolvency operated by French law as a discharge of all the respondent's liabilities, and the appellant was not entitled to maintain a suit against him, but must come in under the insolvency proceedings as in fact he had done. In this view the French judgment sued upon was at the date of the suit void under French law. The case of *Quelin* v. *Moisson*(1) decided by the Privy Council in 1827 was relied upon, as deciding this point on the French Bankruptcy Law in favour of the respondent. That law was founded on three enactments, one of 1807, another amending the law in 1838, and a rule of 24th March 1889; and reference was made to the Code Français Commercial, 1838, chapter I, sections 443, 446. To show what was the French law on the subject, French Statutes and Law Books were, it was submitted, relevant, and they could be taken judicial notice of by the Court. Sections 38, 57 and 84 of the Evidence Act (I of 1872) were referred to.

Cohen, K. C., in reply contended that foreigners were not excluded from the jurisdiction of the Courts of a country, when they actually subjected themselves to the jurisdiction by carrying on business within it, as it was submitted the respondent in this case had done. Section 10 of the Civil Procedure Code (Act XIV of 1882) enacting that no person shall by reason of birth be exempted from the jurisdiction of the Courts, was referred to. And as to the power of the Government of India to legislate for foreigners, reference was made to Ilbert's 'Government of India,' page 301; and the Indian Councils Act, 21 and 22 Vict., c. 67, section 22.

On the 25th May 1903 the judgment of their Lordships was delivered by LORD LINDLEY.

JUDGMENT.—The plaintiff and the defendant in the action which has given rise to this appeal are French subjects living and trading in Pondicherry. The plaintiff sued the defendant Murugasa Chetty in Pondicherry on a promissory note, and on the 20th March 1896 the plaintiff obtained judgment by default for Rs. 13,968 with interest and costs. Execution proceedings were taken

(1) (1827) 1 Knapp. P.C., 265.

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in Pondicherry on this judgment, but nothing was recovered. On the 20th July 1896 the defendant's firm was declared insolvent, at the instance of other creditors, by the Pondicherry Court; and on the 23rd September the insolvency was declared to have effect retrospectively from the 8th January 1896, which was anterior to the plaintiff's judgment and indeed to the commencement of the action in which it was obtained. In the insolvency proceedings Syndics were appointed as usual, and the plaintiff applied for payment out of the estate; but it does not appear that he obtained payment of any dividend.

On the 8th October 1896 this action was commenced in the District Court of South Arcot, which is in the Madras Presidency, and near Pondicherry. The action was by the same plaintiff against the same defendant, Murugasa Chetty, and was based on the judgment already obtained against him in Pondicherry. The Receiver appointed by the Court in Pondicherry was also made a defendant to represent the Syndics.

In order to get over any difficulty which might arise as to the jurisdiction of the Arcot Court to entertain the action, the plaintiff described the defendant Murugasa Chetty as residing in British Indian Territory, *i.e.*, Cuddalore and other places, and as having houses of business and carrying on business there. The defendant put in an appearance to this action and a statement and supplemental statement of defence, denying these allegations and denying the jurisdiction of the Court to entertain the action. He also impeached the validity of the promissory note and judgment by default, and, lastly, he relied on the insolvency proceedings as a defence to the action even if the Court had jurisdiction to entertain it.

The Receiver was also allowed to appear and put in a defence, which he did. He denied the jurisdiction of the Court to entertain the action; and he further relied on the insolvency proceedings as invalidating the judgment, and also as furnishing a defence to the action upon it, if still in force, and if the Arcot Court had any jurisdiction to entertain the action.

The following issues were settled:—

I. Is this Court prevented from entertaining the suit by reason of the cause of action not having arisen and defendant not being resident or carrying on business within its jurisdiction?

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II. Did or did not the defendant reside or carry on business within the jurisdiction of this Court on the date when cause of action arose?

III. Was the French judgment on which the suit has been brought according to French law null and void on the date of suit and is the present claim based on the French judgment, therefore, not sustainable in this Court?

IV. Is it open to the defendant to raise the contention in this suit that the promissory note on which the French judgment was passed was obtained from the defendant by the plaintiff fraudulently?

V. And, if so, was the promissory note obtained by the plaintiff from the defendant fraudulently?

VI. What is the relief, if any, that the plaintiff is entitled to?

The parties were directed to file all the documents they relied on; and French law books might be filed at the hearing.

Considerable evidence was adduced on both sides upon the question of carrying on business in British Indian territory, but there was no evidence worth mentioning that the defendant ever resided in British India; nor was there any evidence that the cause of action arose from any transaction which took place therein. It was proved that the defendant had relatives and a share of property in British India, and that a cousin named Kandasami Chetty managed this property and paid money to the defendant. On the other hand, there was no evidence worth mentioning to support the defendant's charges of fraud by which he sought to impeach the promissory note and judgment sued upon, and this part of the case was subsequently abandoned by the defendant's counsel.

The insolvency proceedings in Pondicherry were all put in evidence, but no opinion appears to have been obtained from any expert in French law as to the legal effect of those proceedings either on the judgment recovered by the plaintiff in Pondicherry before they in fact commenced, or on the discharge of the defendant from liability to pay the judgment debt.

The District Judge states that the only issues really contested before him were the first and second; no argument was put forward on the third, but he looked up the French law as best he could in the Code Napoleon and he came to the conclusion that the judgment sued upon was not null and void when the action in the

Arcot Court was commenced, and he therefore found the third issue for the plaintiff. He decided that it was not competent for him to go behind the French judgment, and this disposed of the fourth and fifth issues. He found however as a fact that the defendant did carry on business in British India, viz., in Cuddalore, where the action was commenced, and he accordingly gave judgment for the plaintiff with costs.

The defendant appealed from this decision to the High Court at Madras which reversed the judgment and dismissed the action with costs, on the ground, first, that it was not proved that the defendant did in fact carry on business in British India when the action was commenced; and on the further ground that the insolvency proceedings were a bar to the action. They came to this conclusion on the authority of a decision of this Board in 1827, viz., *Quelin* v. *Moisson*(1).

In both Courts in India it was apparently assumed that the question of jurisdiction turned on section 17 of the Code of Civil Procedure, and that although the defendant was a foreigner, and although the cause of action arose in a foreign country, and although the defendant did not personally reside within the local limits of the jurisdiction of any Court in British India, and was not even temporarily in Arcot when sued there, yet he could be sued in the Arcot Court if he carried on business through an agent in the local limits of that Court's jurisdiction.

This assumption appears to their Lordships to require more attention than it has received.

Their Lordships see no reason for doubting the correctness of the decision of the case of *Girdhar Damodar* v. *Kassigar Hiragar*(2) where the defendant was a native of Cutch and the cause of action arose within the local limits of the jurisdiction of the British Indian Court in which the action was brought. But that case does not cover the present one.

It is not, however, necessary to pursue this matter, for it is admitted by all parties and it is plain that this appeal must fail unless their Lordships agree with the District Judge in coming to the conclusion that at the time of the commencement of this suit, viz., on the 8th October 1896, the defendant was by his agent carrying on business in Cuddalore or some other place within the

(1) (1827) 1 Knapp. P.C., 265.

(2) (1893) I.L.R., 17 Bom., 662 at p. 666.

jurisdiction of the Court. The burden of proving this is clearly on the plaintiff; he has given evidence himself and called witnesses, and his and their evidence, until carefully examined, seems sufficient to establish such trading, especially as the defendant was within reach and was not called to deny or explain their statements. This omission was naturally made the most of by the appellant's counsel. But it must be remembered that the defendant was a bankrupt and in great difficulties, and was naturally very reluctant to expose himself to a long and hostile cross-examination. After carefully considering the evidence their Lordships have come to the conclusion that the District Judge fell into the error of treating Kandasami Chetty as the agent of the defendant. This mistake is clearly pointed out by the High Court. Kandasami Chetty's acts and his payments to the defendant are all attributable to his being the manager of joint family property, of which the defendant had a share; and their Lordships entirely concur with the High Court in holding that such a person is not the agent of the members of the family so as to make them liable to be sued as if they were the principals of the manager. The relation of such persons is not that of principal or agent, or of partners; it is much more like that of trustee and *cestui que trust*. Those witnesses who say they saw the defendant trading in Cuddalore do not speak of the critical time. An attempt was made to show that the joint property was divided long ago, and that Kandasami Chetty was not acting as manager of family property in which the defendant had an interest. But this attempt failed, for although some money was divided, the rest of the joint property was not decreed to be partitioned until 1897.

In short, the moment the error of treating Kandasami Chetty as the defendant's agent is corrected, the rest of the evidence all crumbles away.

This conclusion renders it unnecessary to consider the effect of the defendant's insolvency either on the validity of the judgment sued on or on the insolvency affording a defence to the action if the judgment is still in force. *Quelin* v. *Moisson*(1) goes far to show that the insolvency would afford a defence; but their Lordships might have thought it right not to decide this point in the absence of evidence of persons skilled in French law.

(1) (1827) 1 Knapp. P.C., 265.

ANNAMALAI CHETTY v. MURUGASA CHETTY.

Their Lordships will humbly advise His Majesty to dismiss the appeal and the appellant must pay the costs of the respondent Murugasa Chetty, the other respondent not having appeared.

Appeal dismissed.

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

Solicitors for the respondent: Messrs. *Lawford, Waterhouse and Lawford.*

APPELLATE CRIMINAL—FULL BENCH.

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

1902. November 6. December 9. 1903. February 20.

VIJIARAGHAVA CHARIAR (THIRD ACCUSED), PETITIONER,

v.

EMPEROR (COMPLAINANT), COUNTER-PETITIONER.*

Indian Penal Code—Act XLV of 1860, ss. 153, 296—Wantonly giving provocation with intent to cause riot—Disturbing a religious assembly—Religious procession on highway—Legality—Chanting hymns by ordinary worshippers.

By a decree in a civil suit, the Tengalai sect in a certain district were declared entitled to hold certain offices connected with a temple, and as such office-holders it was their duty to recite certain hymns in processions. The rights of the Vadagalai sect as ordinary worshippers were not affected by the decree, but the Vadagalais were ordered not to interfere with the Tengalais in the recital of the hymns otherwise than as ordinary worshippers. Subsequently to this decree, a religious procession was being conducted along a public highway. The Tengalais walked in front, chanting the hymns. In the rear, at such a distance that the Tengalais were not likely to hear them, the Vadagalais followed, also chanting hymns. A complaint was in consequence laid by a member of the Tengalai sect, charging the Vadagalais (1) with wantonly giving provocation with intent to cause riot and (2) with voluntarily disturbing an assembly lawfully engaged in religious worship:

Held, that neither offence had been committed.

Per DAVIES, J. (without deciding whether religious processions in public streets in India are "lawful" or not).—The Vadagalais had not exceeded their rights as ordinary worshippers and had not intended to provoke a breach of the peace, and were consequently not guilty of an offence under section 153. Moreover, no "disturbance" had been proved within the meaning of section 296.

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* Criminal Revision Case No. 292 of 1902, presented under sections 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the judgment of A. C. Tate, Sessions Judge of Chingleput, in Criminal Appeals Nos. 22 to 24 of 1902, presented against the conviction and sentence passed by S. Russell, Joint Magistrate of Chingleput, in Criminal Case No. 253 of 1901.

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Per SUBRAHMANIA AYYAR, J.—The object of section 296 of the Indian Penal Code presumably is to secure freedom from molestation when people meet for the performance of acts in a quiet spot vested for the time in the assembly exclusively; and not when they engage in worship in an unquiet place open to all the public as a thoroughfare. The user of a highway for religious worship is altogether wanting in lawfulness. There is no peculiar right known to the law as a right of procession. Though the law accords to members of a procession no recognition in their collective capacity, yet the fact that a number of persons use a highway together for some common purpose does not detract in any way from such use being lawful; but as the circumstances attending a procession may, in consequence of their being inconsistent with the paramount idea of passage be of such a character as to render the user by the processionists otherwise than lawful and as carrying on worship on a highway is of that character, it cannot be affirmed that the Tengalais on the occasion in question constituted an assembly engaged in worship lawfully, within the meaning of section 296 of the Indian Penal Code.

Per BENSON, J.—The contention that the Tengalais were not "lawfully" engaged in religious worship because they were engaged in it on a highway, could not be accepted. There is nothing illegal, in India (where highways have from time immemorial been used for the passing of religious processions), in a procession or assembly engaging in worship while passing along a highway. If it were necessary to refer the origin of the use of highways for religious processions to a dedication of the highway to such use, such a dedication could reasonably be presumed, history, literature and tradition showing that such processions have formed a feature of the national life from the earliest times, and it being unreasonable to suppose that a dedicator would make a reservation against religious processions, which would be wholly opposed to the sentiment of the community. A religious procession is entitled to the special protection given by the Penal Code to assemblies engaged in religious worship. In the present case, however, no "disturbance" had been proved, and consequently no offence had been committed.

Per BHASHYAM AYYANGAR, J. (at the first hearing, the Chief Justice dissenting).—Inasmuch as the Vadagalais had acted as ordinary worshippers, which they were not prohibited from doing under the decree, the act complained of was not illegal within the meaning of sections 153 and 43 of the Indian Penal Code. With regard to the charge under section 296, the accused had not been shown, on the facts as found, to have voluntarily caused disturbance to an assembly lawfully engaged in the performance of religious worship. No assembly can be so "lawfully engaged" (within the meaning of that section), on a highway, unless it be established or can be reasonably presumed that the dedication of the highway was subject to such user. User of a highway as a place of worship is not the legitimate user of it as a highway. The conviction was wrong on this ground and on the ground that in fact no disturbance had been proved.

CHARGES of wantonly giving provocation with intent to cause riot and of voluntarily disturbing an assembly lawfully engaged in religious worship. Fifteen persons were charged as aforesaid under sections 153 and 296, respectively, of the Indian Penal

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Code, and one other, namely, the eleventh accused, was charged with abetment of those offences. The Joint Magistrate convicted the third and seventh accused on both charges, and he convicted the eleventh accused of abetment. He imposed a fine of Rs. 100 on each accused, with fifteen days' simple imprisonment in default of payment. The convictions and sentences were confirmed, on appeal, by the Sessions Judge.

The facts as well as the material portions of the prayer in Original Suit No. 295 of 1886, as well as of the decree in that suit, are set out and explained in the judgments of the High Court.

The third accused preferred this criminal revision petition.

V. Krishnaswamy Ayyar for petitioner.

The Advocate-General, the Public Prosecutor and *K. Narayana Rau* in support of conviction.

Sir ARNOLD WHITE, C.J.—These are petitions against convictions for offences under sections 153 and 296 of the Indian Penal Code. It appears that on the occasion of the festival of Vedanta Desikar, the god of the Velakadi Kovil temple is taken in procession through the public streets to the gate of the temple of another deity, a distance of some two miles. It is customary for the Tengalai goshti or assembly to march in front of the god singing a Tamil chant known as the Prabandham, which is a portion of the ritual in which the Vadagalai inhabitants of Conjeeveram as well as the Tengalai inhabitants are entitled to take part, the latter in the capacity of office-holders and as worshippers, the former only in the capacity of worshippers. It is also customary for the Vadagalais to form a goshti behind the god, forming part of the procession and chanting the Sanskrit Vedam. On the occasion in question a body of Vadagalais interposed themselves behind the god and between the god and the goshti engaged in chanting the Sanskrit Vedam and took part in the procession, chanting a different portion of the Prabandham from that which was being chanted by the Tengalais who were marching in front of the god. There is no evidence that the Tengalais in front could hear the actual words which were being chanted by the Vadagalais behind, but there is evidence that they could hear that Tamil, and not Sanskrit, was being chanted. Certain of the Tengalais left their part of the procession and approached the Vadagalais requesting them to desist. This the latter declined to do. There was no actual disturbance as the police were in attendance, but the police evidence

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is to the effect that if the police had not been present there would have been a riot. The Vadagalais admit that the introduction into the procession of a separate goshti for the purpose of reciting the Prabandham is an innovation. On the other hand, the Tengalais concede, as I understand the case, that the Vadagalais are entitled to join forces with the goshti which marches in front of the god for the purpose of taking part in the procession and chanting the Prabandham. Their right to do this, in the capacity of worshippers, and of worshippers only, as contradistinguished from office-holders, appears to have been established by the judgment of this Court in Second Appeal No. 1423 of 1899, Original Suit No. 295 of 1886, instituted in the District Munsif's Court of Chingleput. In the suit of 1886 the Tengalais claimed a declaration of their exclusive right to the Thodakkam and Adhyapakam miras in question, and asked for an injunction restraining the Vadagalais from reciting the Thodakkam, Mantram and Prabandham either jointly with the Tengalais or separately in procession within the temple and outside the Prakaram. The decree declared the exclusive rights of the Tengalais to the Adhyapakam miras with the exception of the Thodakkam, one of the rights of the Adhyapakam miras being declared to be the exclusive right of reciting the usual Tamil Prabandhams in the temple of Deepaprakasaswami at Velakadi Kovil and in the shrines attached to it. It was also declared that the Tengalais were entitled to discharge the duties on all occasions on which the ceremony was performed, as well at the time of procession as at services in the temple and its shrines. The terms of the injunction were that the Vadagalais were to be restrained from interfering with the Tengalais in the recital of the Mantram and Prabandham otherwise than as ordinary worshippers. The effect of this, I take it, is to recognize a right in the Vadagalais in their capacity as worshippers, as distinguished from the "exclusive rights" to be enjoyed by the Tengalais as office-holders, which are referred to in paragraph 4 of the decree.

The question therefore comes to this.—In acting as they did on the occasion in question did the Vadagalais exceed the limits of their right as "ordinary worshippers" which is recognized by the decree—in other words, did they, as between themselves and the Tengalais, do that which was illegal in the sense that it amounted to a breach of the terms of the injunction to which I

have referred. Mr. Krishnaswami Aiyar laid much stress upon the fact that in the suit of 1886 the Court did not allow the injunction to go in the terms asked for by the Tengalais, viz., that the Vadagalais should be restrained from reciting the Prabandham jointly with the Tengalais, or separately in procession within the temple and outside the Prakaram. Now the effect of the decree in the suit of 1886, as I understand it, is that the Vadagalais are entitled to recite the Prabandham either jointly with the Tengalais or separately, either within the temple, or without, if, in so doing, they do not interfere with the Tengalais in their recital of the Prabandham, except in so far as interference is necessarily involved in the exercise by the Vadagalais of their rights as ordinary worshippers. Now, first, was there interference? On the facts found I think there was. If the Vadagalais had been content to form a separate Vadagalai goshti for the purpose of chanting the Prabandham at the rear of the procession, it might have been otherwise. But by interposing themselves immediately behind the god they formed an integral part of the procession. Admittedly this was an innovation. It seems to me that by so interposing themselves and by chanting a different portion of the Prabandham from that in which the Tengalais were engaged in front, in such circumstances that what they were doing came to the knowledge of the Tengalais in front, the Vadagalais interfered with the Tengalais in the recital of the Prabandham. I do not lose sight of the fact that this took place in the public highway. The Vadagalais have of course as much right to use the public highway for the purposes of a religious procession as have the Tengalais. Paragraph 6 of the decree must no doubt be read by the light of paragraph 5; but, so reading it, I am of opinion that the effect is to restrain the Vadagalais generally, that is to say, whether the procession takes place within the temple or its shrines or without. If this is so, the ordinary rights enjoyed by Tengalais and Vadagalais alike as members of the public, as between themselves and in connection with the matters of controversy which are incessantly arising between them, are governed by the decisions by which the Courts have from time to time attempted to define their respective rights.

Then, assuming there was interference, was the interference only that which was necessarily involved in the exercise by the Vadagalais of their rights as worshippers?

The learned Vakil who appeared for the petitioners was unable to inform me whether the taking part in the procession was part and parcel of the ritual of worship or not. If it is not, the Vadagalais cannot claim the benefit of the limitation imposed on the scope of the injunction by the words "otherwise than as ordinary worshippers." Assuming it is, it was open to the Vadagalais to follow the course hitherto adopted—to which as I understand no exception would, or could, have been taken by the Tengalais, viz., to fall in with them in front of the god and join with them in the chanting of the Prabandham. This has hitherto been regarded as a proper and sufficient method of discharging their religious obligations (if any) as "ordinary worshippers" so far as taking part in the procession is concerned. It seems to me that in attempting to assert a right to form a *goshti* of their own for the purpose of the independent recitation of the Tamil Prabandham in a procession in which the Tengalais were engaged in exercise of their rights as office-holders in reciting the Prabandham, they went beyond their rights as "ordinary worshippers." In a second appeal which came before this Court in 1882 (Second Appeal No. 969 of 1882) this Court upheld a judgment by the Munsif declaring the right of defendants to recite the same or different texts separately, provided that they followed at a reasonable distance behind the plaintiffs' *goshti* so as not to interfere with the plaintiffs' recitation. So far as the facts of that particular case were concerned, there may be no reason to question the soundness of the decision, but it affords one no assistance for the purpose of determining whether, on the facts of the case now before the Court, the Vadagalais were within their legal rights in acting as they did. If, as in my view it was, the action of the Vadagalais was "illegal," I find no difficulty in holding that they acted malignantly or wantonly within the meaning of the section.

On the facts found in connection with the making of Mr. Scott's order—which was issued in connection with a different ceremony—I do not think it can be said that the Vadagalais acted under the *bonâ fide* belief that the authorities had sanctioned the innovation which they sought to introduce. The evidence shows that provocation was in fact given and I think it must be taken that the Vadagalais knew that such provocation would be likely to cause a riot.

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I also think there was "disturbance" within the meaning of this word as used in section 296, Indian Penal Code, and that the Tengalais were lawfully engaged in the performance of a religious ceremony notwithstanding the fact that the ceremony was being conducted in a public highway.

BHASHYAM AYYANGAR, J.—The main facts on which the decision of this case rests are not in dispute and an accurate statement of those facts coupled with a critical examination of the prayers in Original Suit No. 295 of 1886 and of the decree therein is sufficient in my opinion to show that the conviction of the third, seventh and eleventh accused by the Joint Magistrate which has been upheld in appeal by the Sessions Judge must be set aside as being bad in law.

During the celebrated annual festival at Conjeeveram in June 1901, in connection with the big temple there—which festival commencing on the 30th or 31st May extended over 10 days—, a festival in connection with another smaller temple which is independent of the big one and under the management of separate trustees, took place on the ninth day of the former. This minor festival consisted in the idol of Vedanta Desikar, the deity of the smaller temple, being taken in procession through the public streets over a distance of nearly two miles to the entrance of the big temple and then brought back. The idol was preceded at a short distance by a congregation (goshti) of the Tengalai Vaishnava inhabitants of Conjeeveram, whose exclusive right to the office of Adhyapaka miras in the said temple has been definitively established by the decree in the said Original Suit No. 295 of 1886. They were discharging the duties of that office, to which emoluments are attached, by reciting the Prabandham, after first reciting for a few minutes the Tengalai Mantram. Between them and the idol, in the procession, there was a passing crowd of devotees and worshippers. Behind the idol, at a distance of about 180 feet from the Tengalai goshti in front, marched a congregation of some Brahmin Vadagalai inhabitants of Conjeeveram reciting the Prabandham. Between this goshti and the idol, there was likewise a passing crowd of worshippers. This goshti in turn was followed by another goshti of some other Vadagalai Brahmins of Conjeeveram reciting the Vedas. The Prabandham is the sacred literature in Tamil consisting of 4,000 stanzas, and the Vedas, the sacred literature in Sanskrit. These two are common to both the Tengalai and the Vadagalai

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sects. The Tengalai Mantram (in Sanskrit), however, which is short and immediately precedes the recitation of the Prabandham, is peculiar to the Tengalais, just as the corresponding Vadagalai Mantram (also in Sanskrit) is peculiar to the Vadagalai sect, each being addressed to the respective founders of the two rival sects.

It appears from the evidence of the second prosecution witness—who was Police Inspector in Conjeeveram from 1889 to 1900—that for sometime after 1889, the Tengalais and Vadagalais used to form one goshti jointly reciting the Prabandham in front of the deity, but this having led to a quarrel which resulted in a criminal prosecution and the conviction of some of the Vadagalais in connection with a festival of the big temple, they, since that time, used to form a separate goshti behind the idol and go in procession reciting the Vedas in connection with the festivals of both the big and the smaller temples. But during the annual festival in June 1901, on the occasion in question, some of the Vadagalais for the first time, formed themselves into another separate goshti, reciting the Prabandham and followed the idol of Vedanta Desikar when it was taken in procession to the big temple as above described. This new goshti marched between the idol and the old goshti of Vadagalais reciting the Vedas behind the idol. Two of the Tengalais brought this, as an innovation, to the notice of the then Inspector of Police, the third witness for the prosecution, and asked him to prohibit the Vadagalais from reciting the Prabandham. There being no disturbance or rioting, the Inspector of Police did not interfere in the matter. It appears from his evidence that when he was accompanying the Tengalai goshti he could hear only a 'confused noise of reciting,' that he could not distinguish whether it was Sanskrit or Tamil, that the two Vadagalai goshtis were visible from where the Tengalai goshti was going and that the Tengalais had out-posts to tell them what was going on.

Five or six days prior to this, in connection with the third day festival of the *big temple*, one of the Vadagalai Brahmins, who joined the Tengalai goshti reciting the Prabandham in front of the god, appears to have been arrested, in consequence of which the remaining Vadagalais had to withdraw from that goshti and when this matter was brought to the notice of the District Magistrate who was then present at Conjeeveram and it was represented to him that the Tengalais would not allow the Vadagalais to join with them and recite the Prabandham in peace, the District Magistrate

arranged that the Vadagalais should form a separate goshti behind the idol and recite the Prabandham there, so as to avoid any breach of the peace 'by the Vadagalais and the Tengalais being close together' by forming one goshti and reciting the Prabandham. This arrangement was, after some reluctance on the part of the Vadagalais to forego the honour of being in the procession in *front* of the deity along with the Tengalais, at last adopted at the procession on the morning of the fourth day of the festival in the presence of the District Magistrate himself and was since then continued throughout the remaining days of the festival of the *big temple*.

The dispute now in question arose on the adoption by the Vadagalais of the same arrangement in the procession in connection with the festival of the *smaller temple* also. The complainant in the case, a leader of the Tengalai party, preferred this complaint to the Joint Magistrate of Chingleput accusing several Vadagalais and one of the trustees of the smaller temple—a weaver by caste—who accompanied the procession in question, of the offences defined by sections 143, 153, 296 and 298 of the Indian Penal Code. The charges under sections 143 and 298 were not at all made out, but the Joint Magistrate convicted the third and seventh accused under sections 153 and 296, Indian Penal Code, and the eleventh accused, the trustee, as abettor of those offences and sentenced each of them to a fine of Rs. 100 and the convictions and the sentences were upheld by the Sessions Judge in appeal.

Upon the above facts, it would, of course, be impossible to sustain the conviction unless the same be warranted by the decree in the said Original Suit No. 295 of 1886. That was a suit brought on behalf of the Tengalai Brahmin inhabitants of Conjeeveram against two sections of the Brahmin Vadagalai inhabitants therein, and the Sudra trustees of the smaller temple, to establish the exclusive right of the Tengalai Brahmins to the office of Adhyapaka miras (including the Thodakkam) in the temple and to recover arrears of the emoluments of the office. One section of the Vadagalais and the trustees denied the existence of any such office in the temple, while the other section of the Vadagalais claimed the office exclusively for themselves. The prayer in the plaint, so far as it has a bearing upon the present case, was as follows:—

"(6) Plaintiffs pray for a decree declaring the exclusive right of the plaintiffs and the Brahmins of their sect to the Thodakkam,

Adhyapaka miras in question, for an injunction restraining the Thathachars and other Brahmins of the Vadagalai sect from reciting the Thodakkam, Mantram and Prabandham referred to in the plaint, either *jointly* with the plaintiffs' sect or *separately*, or any other Mantram or Prabandham in the *sannadhis* referred to in the plaint, during the daily and special puja and festivals and in procession within the temple and outside the Prakaram," etc. (The italics are mine.)

The District Munsif in paragraph 36 (2) of his judgment, after adverting to the injunction prayed for restraining the defendants from reciting the Thodakkam, Mantram and Prabandham "either jointly with the plaintiffs or separately" or any other Mantram or Prabandham in the temple during the daily and special puja and festivals and in processions within the temple and outside it, states as follows:—

"Clearly the plaintiffs cannot have such an injunction. The defendants may be ordered not to interfere with the plaintiffs in the recital of the Mantram and the Prabandham otherwise than as ordinary worshippers."

The reservation of the right of the Vadagalais as "ordinary worshippers" is explained as follows in paragraph 35 of the judgment:—"It is not denied by the plaintiffs that the Vadagalais are entitled to recite the Prabandham in the temples in dispute as ordinary worshippers. Nor have the plaintiffs any right to deny to the Vadagalais their privilege of reciting the Prabandhams as ordinary worshippers." It will be observed that there is no reference here to their reciting the Prabandham as ordinary worshippers only in *conjunction* with the Tengalai goshti or office-holders. The material portion of the decree runs as follows:—

"I declare that—

(1) The Adhyapaka miras, except Thodakkam of the plaint Deepaprakasaswami temples and the shrines, including Vedanta Desikar's shrine attached to the said temple, belongs exclusively to the Tengalai sect residing at Conjeeveram.

* * * *

(4) The rights of the Adhyapaka miras are—

(i) the exclusive right of chanting the Mantram "Sri Sailesa Dayapatram,"

(ii) the exclusive right of reciting the usual Tamil Prabandhams in the temple of Deepaprakasaswami at

Velakadi Koil and in the shrines, including the *Samadhi* of Vedanta Desikar, attached to it;

(5) The Tengalais are entitled to discharge the duties on all occasions, in which the ceremony is performed, as well at the time of procession as at services in the said temple and its shrines.

(6) I order that an injunction be issued to the Vadagalais and Thathachars, defendants, enjoining them to abstain from interfering with the Tengalais in the recital of the Mantram and Prabandham, otherwise than as ordinary worshippers."

There was a similar dispute between the Tengalai and Vadagalai Brahmins of Conjeeveram, in regard to the office of Thodakkam and Adhyapaka miras in the *big temple*, which had previously been decided in 1882, on substantially the same lines (*Krishnasami* v. *Krishnama*(1)).

The conviction under section 153, Indian Penal Code, can be upheld only if the accused in forming themselves into a separate goshti on the highway and reciting the Prabandham, behind the idol, when it was taken in procession on the day in question, acted "illegally," "malignantly or wantonly" and thus gave provocation to the Tengalai goshti, intending or knowing it to be likely that such provocation would cause the offence of rioting to be committed. Having regard to the antecedent relations between the two rival sects, there can be no doubt that if the action of the Vadagalais was illegal, they ought to have known that it was likely to provoke the Tengalais and to lead to a breach of the peace. The two questions, therefore, which have to be considered in connection with the charge under section 153, Indian Penal Code, are (i) whether the Vadagalais acted "illegally" in forming themselves into a separate goshti and reciting the Prabandham on the above occasion and (ii) whether such action was "wanton" or "malignant."

Both the Joint Magistrate and the Sessions Judge apparently assume that the injunction extends to processions outside the temple and also to the Vadagalais reciting the Prabandham *separately* and that the decree permits the Vadagalais only to *join* the Tengalai goshti and recite the Prabandham along with them. The Joint Magistrate in construing that portion of the decree

(1) I.L.R., 5 Mad., 313.

which restrains the Vadagalais from interfering with the Tengalais, in the recital of the Mantram and the Prabandham, otherwise than as ordinary worshippers, says that the words "ordinary worshippers" "must be construed very literally and that can only be by assuming that what is meant is that the Vadagalais, if they *join* at all in the Tamil recitation can do so only by *joining* with the Tengalai goshti and singing with them." (The italics are mine.) The Sessions Judge also concurs in this view and holds that if the Vadagalais wish to recite the Prabandham they must go along with the Tengalais and recite, as ordinary worshippers, the same portion of the Prabandham that the Tengalais are reciting and that they cannot be regarded as reciting the Prabandham as ordinary worshippers if they form a separate goshti of their own in a different part of the procession and recite a different portion of the Prabandham as they are proved to have done in the present case. This view proceeds altogether on a misconstruction of the decree in question and a misapprehension of the expression "ordinary worshippers" occurring therein. A breach of an injunction contained in a decree of a competent Civil Court, is no doubt "illegal" (section 43, Indian Penal Code) but it must be clearly made out that the act complained of is prohibited by the decree; and this is specially so, when, as in the present case, it is sought to bind by the decree persons who were not actually parties thereto, but were only constructively represented therein. It will be seen from the extracts given above that the plaintiffs in Original Suit No. 295 of 1886 prayed for an injunction restraining the Vadagalais from reciting the Prabandham either *jointly* with the plaintiffs' sect or *separately*, during the daily and special puja and festivals and in processions within the temple and outside the temple, but that the decree only declared the exclusive right of the Tengalais to discharge the duties of the office of Adhyapaka miras, on all occasions in which the ceremony is performed, as well at the time of procession as at services in the said temple and its shrines and enjoined the Vadagalais to abstain from interfering with the Tengalais in the recital of the Mantram and the Prabandham, otherwise than as ordinary worshippers. (The italics above are mine.) It seems to me, therefore, perfectly clear that the plaintiffs' prayer that the Vadagalais be restrained from reciting the Prabandham separately—either individually or in a goshti—was not granted and must, therefore, under explanation III to section 13, Criminal

Procedure Code, be taken to have been refused. As regards the other prayer, *i.e.*, that the defendants be restrained from reciting the Prabandham jointly with the plaintiffs, that was granted only with a substantial qualification, viz., that as ordinary worshippers they may interfere and join with the Tengalais in the recital of the Mantram and the Prabandham and such qualification was engrafted upon the injunction notwithstanding that the exclusive right of the Tengalais to the office of Adhyapaka miras was established and declared by the decree. The office-holders, therefore, in a body or goshti, chant the Prabandham in discharge of their duties in the performance of the services and are exclusively entitled to the emoluments appertaining to that office. Instead of the Vadagalais, whose right to the office (except to that of Thodakkam) was negatived by the decree, being absolutely restrained from *interfering* with the Tengalais by joining them and jointly chanting the Prabandham with them, while the latter were discharging the functions of their office, the decree unfortunately allowed them to *interfere* as ordinary worshippers, thereby implying that they might take part in the discharge by the Tengalais of the functions of their office of Adhyapaka miras, but merely as ordinary worshippers or volunteers, not entitled to a distributive share along with the office-holders in the emoluments of the office. The office-holders, as may have been expected, naturally resent such intrusion and the complainant at the conclusion of his evidence in the present case states as follows:—

"The Vadagalais can join our goshti with our permission. If we don't give permission, they cannot come. If they join as ordinary worshippers we should not object; but they must not repeat anything that we don't."

The result therefore has been that when, at the beginning, the Vadagalais used to form one goshti with the Tengalais there were, as might have been expected, breaches of the peace, and in consequence the Vadagalais used to form a separate goshti behind, chanting the Vedas or Sanskrit prayers. But on the occasion in question they also formed another goshti chanting separately the Prabandham. This goshti being separate from the Tengalai goshti in front of the idol, and at a distance of about 180 feet each goshti would not hear what was being recited by the other and the evidence is that, at the same time, the two goshtis were chanting different stanzas of the Prabandham. There is nothing

whatever in the decree to prevent the Vadagalais of Conjeeveram, either individually or in a goshti, from reciting the Prabandham separately from and quite independently of the office-holders. Whether they do so jointly with, as apparently permitted by the decree, or separately from the Tengalai goshti of office-holders, in either case, they do so and can do so only as ordinary worshippers who can claim no share in the emoluments attached to the office of Adhyapaka miras. If, as admitted, they have committed no breach of the injunction, by forming themselves into a separate goshti and reciting the *Vedas*, while the Tengalai goshti in front of the idol was chanting the Prabandham, it is difficult to conceive how the Vadagalais contravene the terms of the injunction by forming themselves into a separate goshti and reciting the *Prabandham*. Both the Joint Magistrate and the Sessions Judge seem to consider that the Vadagalais cannot be regarded as "ordinary worshippers" unless they interfere with the Tengalai goshti and join it in reciting the Prabandham. This is based altogether on a misapprehension of that expression in the decree. The Brahmin Tengalai inhabitants of Conjeeveram have an interest in the temple, not only as worshippers or devotees like the Vadagalais, but also as office-holders of the Adhyapaka miras. The expression "ordinary worshipper" is used in the decree as it was already used by the High Court in *Krishnasami* v. *Krishnama*(1) in the sense of a person who is interested in the temple as a mere worshipper or devotee as distinguished from one entitled to any office therein and carrying on worship in discharge of the functions of that office. The Vadagalai Brahmins, who either individually or in a body recite the Prabandham, the Vedas or any other hymns, do so only as "ordinary worshippers" and they can be neither more nor less than such when they recite the Vedas or the Prabandham separately from the Tengalai goshti.

On the grounds, therefore, that the extravagant prayer made in the plaint—that the Vadagalais should be restrained from reciting the Prabandham *separately* from the Tengalai goshti—was not granted, that within the meaning of the decree, the Vadagalais in reciting the Prabandham separately from the Tengalai goshti interfere with the Tengalai goshti, if it is an interference at all, only as ordinary worshippers—in which capacity they are

(1) I.L.R., 5 Mad., 313.

permitted by the decree to interfere with the Tengalais in the recitation of the Prabandham—, and that there is nothing whatever in the decree to warrant the assumption that the Vadagalais can, as ordinary worshippers, recite the Prabandham only by *joining the Tengalai goshti* and reciting the Prabandham along with them, —I am decidedly of opinion that the act complained of is not illegal within the meaning of sections 153 and 43 of the Indian Penal Code (see also *Queen Empress* v. *Kahanji*(1)).

I am also of opinion that the action of the Vadagalais cannot be regarded as "malignant" or "wanton" within the meaning of section 153, having regard to the fact that such action was in pursuance of the arrangement which was introduced by the District Magistrate about the same time, in connection with the processions of the idol of the *big temple*, in view to avoid friction between the two sects and consequent breach of the peace. Technically no doubt the District Magistrate's sanction had reference only to the processions connected with the *big temple* and it could not be relied upon as a *bar* to the prosecution if the action of the accused, in reference to the procession of the deity of the *smaller temple*, were otherwise illegal. But it has an important bearing on the question as to whether the action of the accused in forming a separate goshti and reciting the Prabandham—which is not repugnant to the Tengalais—was "malignant" or "wanton." The rival sects interested in both the temples are the same and their respective rights, so far as the question under consideration is concerned, are identical in respect of both the temples and the same have been declared and settled in substantially the same terms, though by decrees passed in two different suits. The action of the District Magistrate who was present at the spot on the occasion of the annual festival of the big temple was, in my opinion, very proper and eminently calculated to preserve peace between the rival sects and he rightly declined to change the arrangement introduced by him. The Vadagalais must therefore be regarded as having acted in perfect good faith and not "malignantly" or "wantonly," when during the same festival, though in connection with the *smaller temple*, the deity of which was being taken in procession to the *big temple*, they adopted the same arrangement of forming a separate goshti behind the idol, reciting the Prabandham.

(1) I.L.R., 18 Bom., 758.

The question, however, not having been raised, I do not pause to consider whether paragraph 5 of the decree can rightly and reasonably be construed as in any degree granting the prayer in the plaint as to processions *outside* the temple—especially as neither the local authority in whom the public streets are vested nor the owner of the freehold in the soil thereof was represented in the suit.

The conviction under section 296, Indian Penal Code, is equally unsustainable. The Joint Magistrate says that though the two goshtis were a considerable way apart and the Tengalais in front could hear little or nothing of what was going on in the rear, beyond perceiving that the Vadagalais were chanting in Tamil, yet he must hold that the worship by the Tengalais was disturbed, because the fact that two or three of the Tengalais went back and remonstrated with the Vadagalais shows that their mind was disturbed. The Sessions Judge, too, finds that there was a disturbance because "the assembly of persons lawfully engaged in the performance of religious worship is the unit and the assembly is said to be disturbed when some particular members of it are disturbed" and "one of the Tengalais actually went back and took down the names of some members of the Vadagalai goshti on a piece of paper." In my opinion, the facts as thus found cannot legally amount to voluntarily causing disturbance to an assembly lawfully engaged in the performance of religious worship or religious ceremonies and I presume that the Joint Magistrate and Sessions Judge would not have convicted the accused under section 296 but for their having arrived at the conclusion with reference to the charge under section 153, that the action of the Vadagalais in forming themselves into a separate goshti reciting the Prabandham was illegal, being in contravention of the decree in Original Suit No. 295 of 1886. If their action was not illegal there is no more reason, under the circumstances (see section 79, Indian Penal Code), for convicting the accused of the offence under section 296 than there would be for convicting the Tengalais for disturbing the Vadagalai goshti, which, like the Tengalai goshti, was engaged in the performance of religious worship. In a recent case before this Court (Criminal Revision Case No. 151 of 1902) in which, in connection with a procession relating to the big temple, a Vadagalai Brahmin was convicted under section 296, but the conviction was quashed by a Bench of

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this Court, of which I was one of the members, in revision, on the ground that the facts as found by the Magistrate did not amount to a disturbance within the meaning of section 296, it was observed that " in the decision of such sectarian disputes and cases, public streets or highways cannot in law be regarded as temples or places of worship belonging, or dedicated for the time being to the votaries or the communities concerned, simply because a customary religious procession is passing over a public street or highway " and I adhere to the opinion therein expressed. Within the meaning of section 296, Indian Penal Code, no assembly can, in my opinion, be lawfully engaged in the performance of religious worship or religious ceremonies on a *highway* unless it be established or can be reasonably presumed that the dedication of the highway was subject to such restriction and user. Otherwise persons riding on horses or driving in vehicles at the time and thereby effectually disturbing the worship by interrupting or suspending the same will be liable to conviction under section 296, Indian Penal Code. In a country where there are so many rival sects and religions intolerant of one another, it will be impossible to presume a dedication of a highway by members of one sect or religion for religious processions or worship to be conducted on such highway by followers of other rival sects and religions. If it be asked what the ancient common law of India was as to the use of public streets and highways by different races, castes and outcastes and as to their use for religious and other processions by various sects, the answer would obviously be one which, according to the law as administered by the British Courts, could not be tolerated for a moment. Using the highway as a place of worship is not the legitimate user of it as a highway " for the purpose of using it in order to pass and re-pass or for any reasonable or usual mode of using the highway as a highway " (*Harrison* v. *Duke of Rutland*(1), *Hickman* v. *Maisey*(2): " see also Dicey's 'Constitutional Law' (Fourth Edition) at p. 430), and the conversion of the highway, though but temporarily, into a place of sectarian worship, amounts, in law to a trespass upon the freehold in the soil of the highway and in cases in which there is a statutory vesting of the highway in a local authority also to a trespass upon the

(1) L.R., [1893], 1 Q.B., 142 at p. 146.
(2) L.R., [1900], 1 Q.B., 752 at pp. 755, 757, 758.

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highway itself (*Harrison* v. *Duke of Rutland*(1), *Hickman* v. *Maisey*(2), *Reg.* v. *Pratt*(3), *Reg.* v. *Graham and Burns*(4), and *Rex.* v. *Carlile*(5)). It does not follow that the use of a highway for a purpose which does not amount to an indictable offence is necessarily lawful. If the user is for a purpose which amounts to a trespass (civil) on the freehold in the soil, it is unlawful, as was held both in *Harrison* v. *Duke of Rutland*(1), and *Hickman* v. *Maisey*(2). The two recent English cases are very instructive on the question of what constitutes a reasonable use of a highway as such and the principles therein enunciated will have an important bearing on the decision of questions that often arise in this country as to the user of a highway by particular sects for religious, devotional and similar purposes. No doubt in every country and particularly in this country highways are by sufferance used for purposes which are decidedly in excess of their legitimate and reasonable use as a highway—especially when such use has been customary—and the same is tolerated and no notice is taken of the trespass thus committed on the highway and the freehold in the soil, so long at any rate as such use of the highway does not cause any special or serious inconvenience or obstruction. *In Ex parte Lewis*(6), Wills, J., in holding that " a claim on the part of persons so minded to assemble in any numbers and for so long a time as they pleased to remain assembled upon a highway (Trafalgar Sq.) to the detriment of others having equal rights, is in its nature irreconcilable with the right of free passage " and that there is " no authority whatever in favour of it " observed as follows:—

" Things are done every day in every part of the kingdom without let or hindrance, which there is not and cannot be a legal right to do and not infrequently are submitted to with a good grace because they are in their nature incapable, by whatever amount of user, of growing into a right." The remarks of Wills, J., apply with peculiar force in this country to a large and increasing class of religious, sectarian and other similar processions, to preaching on highways and to the common use of public streets and highways by occupants of houses abutting on the same, for various purposes connected with the weaving and other industries and for drying

(1) L.R., [1893], 1 Q.B., at pp. 146, 147, 151.
(2) L.R., [1900], 1 Q.B., 755. (3) 4 E. & B., 860; 24 L.J., (M.C.), 113.
(4) [1888], 4 Times Law Rep., 212 at p. 226.
(5) 6 C. and P., 636. (6) L.R., 21 Q.B.D., 191 at p. 197.

paddy and other grains and for similar purposes. But doing a thing by sufferance is one thing and claiming it as lawful and invoking the aid of the executive authority to do it, as of right, is quite another thing.

On the grounds, therefore, that there was neither in law, nor in fact, any disturbance of the Tengalai goshti, that if the Tengalai goshti can be lawfully regarded as engaged in the performance of religious worship or religious ceremonies, on the highway, on the occasion in question, the Vadagalai goshti was equally lawfully engaged in the performance of religious worship on the same occasion, but that in my opinion neither assembly can be regarded as lawfully engaged in the performance of religious worship on a highway which it is not alleged or shown was dedicated as a highway subject to such restriction and user, I think the conviction under section 296, Indian Penal Code, should also be quashed.

So far as the conviction of the eleventh accused as an abettor is concerned, it is, in my opinion, clearly wrong. The case against him is simply that as the Sudra trustee of the temple, "he was a man in authority" and "was conducting the procession and that he made no attempt to stop the formation of the separate goshti, but rather encouraged it." The Sessions Judge in appeal says nothing specially about the eleventh accused. In my opinion the conviction of the eleventh accused as an abettor is in any event entirely unwarranted and ought to be set aside.

In consequence of this difference of opinion, the case was referred to a Full Bench constituted as above.

T. V. Seshagiri Ayyar for petitioner.

The Advocate-General, the Public Prosecutor and *K. Narayana Rau* in support of the conviction. The Court delivered the following judgments:—

SUBRAHMANIA AYYAR, J.—It is necessary first to consider the charges against the third and seventh accused, whom the eleventh accused has been charged with abetting.

Taking up the charge under section 153 of the Indian Penal Code, the question on which practically the case turns is whether the recitation by the two accused during the procession in question of Prabandhams or Tamil hymns, was illegal, not on the ground that it was against any usage of the institution, but with reference to the decision in Original Suit No. 295 of 1886, in the District

Munsif's Court of Conjeeveram. That decision only declared that the Tengalais were entitled to the office of Adhyapakam, and in that capacity, as usual, to recite the Prabandham on all the prescribed occasions of worship, without let or hindrance by the Vadagalais. It did not in the least affect the rights of the Vadagalais as ordinary worshippers. Having regard to the fact that that suit was entirely in relation to an office, it must, even if the decision had been silent as to the rights of the Vadagalais as ordinary worshippers, not office-holders, be taken that such rights were left untouched; but the decision is not silent on the matter. It, in express terms, refers to and preserves the rights of the Vadagalais as ordinary worshippers, to recite the Prabandhams even in the company of and jointly with the office-holders whose duty it is to recite them on such occasions. The attempt on behalf of the prosecution to construe this reference in the decision to the right of the Vadagalais to so join in the recitation, as a declaration that the Vadagalais are disentitled from reciting except in conjunction with the office-holders, is on the face of it untenable. The Tengalais, as Adhyapakars, are subject to a duty to recite Prabandhams, the performance of such duty entitling them to the emoluments of the office. They cannot, in consequence of their being Adhyapakars, claim an exclusive right to recite them and as the recitation of Prabandhams is a recognised form of worship both with the Vadagalais and the Tengalais, every Vadagalai must *primâ facie* be held entitled to recite them by way of worship otherwise than in conjunction with the office-holders. No doubt, if the Vadagalais join the office-holders in the recitation on occasions of worship, it stands to reason that they should do so without in any manner interfering with the due recitation by the office-holders. In such circumstances the office-holders would be entitled to insist that the Vadagalais should recite only those hymns which they themselves were reciting, as otherwise they would be interfered with in the due discharge of their duties. But there is nothing to prevent a Vadagalai by himself or Vadagalais in a body reciting the Prabandhams separately from the office-holders and in doing so reciting verses different from those which the Adhyapakars may be reciting, provided that that is done without interference with the Adhyapakars.

Such being the rights of the Vadagalais, did the accused on the occasion in question interfere with the office-holders by the

recitation complained of? Clearly not. Admittedly, the parties were at that time at a distance of 150 feet from each other. Between them stood the body of tom-tom beaters doing their part of the work and those who carried the idol, as well as the motley crowd which assembles at these festivals. Having regard to the bustle and confusion inevitable on such occasions, it is impossible for the office-holders to have heard anything of the recitation by the accused. This is almost conclusively proved by the fact that the office-holders had to send out persons to ascertain whether any recitation by the Vadagalais was taking place. It must consequently be held that the accused did not interfere with the office holders, by reciting Prabandhams as they did and that they were not therefore guilty of any illegal act so as to bring them within the purview of section 153.

The charge under section 296 of the Indian Penal Code may now be examined. Presumably the object of the section is to secure freedom from molestation when people meet for the performance of acts which ordinarily take place in some quiet spot vested for the time in the assembly exclusively; and one cannot but feel serious doubts as to whether that section was intended to secure to persons who choose to engage in worship in an unquiet place open to all the public as a thoroughfare the immunity from disturbance due to those who meet to worship in a church, a mosque, or temple or other place appropriate for such a purpose.

Turning to the language of the provision, it is clear that the persons assembled are given a right in their collective capacity. What is thereby constituted an offence has no necessary reference to the individuals forming the assembly and a disturbance punishable under the section may result from acts which involve no violation of their personal rights. The precise point for determination is whether the Tengalais on the occasion in question were an assembly lawfully engaged in religious worship within the meaning of the section, and having regard to the fact that they were then on a highway, an affirmative answer to the question would assume that a procession on a highway has a specific legal character and that the members of the procession have a right to use a highway as a place of religious worship.

Are these assumptions well founded? In the discussion of these questions it is scarcely necessary to point out that we should not proceed on the supposition that processions are social phenomena

peculiar to this country and consequently that the rule to be laid down in cases like the present must necessarily be different from what prevails in other countries, inasmuch as such a supposition would be incorrect. In the words of the judgment in *In the matter of Frazee* "It has been customary from time immemorial in all free countries and in most civilized countries for people who are assembled for common purposes to parade together by day or reasonable hours at night with banners and other paraphernalia and with music of various kinds. These processions for political, religious and social demonstrations are resorted to for the express purpose of keeping up unity of feeling and enthusiasm and frequently to produce some effect on the public mind by the spectacle of union and numbers. They are a natural product and exponent of common aims and are valuable factors in furthering them."(1)

With these prefatory remarks let us proceed to examine what are the fundamental legal principles underlying the use of a highway by processions. Such principles, it is obvious, must be essentially the same as those on which the analogous so called right of the public to use public places for holding meetings must rest, and which have been most carefully examined by Professor Dicey. His observations apply with equal force here. The learned author thus points out the fallacies of the ordinary conceptions on the subject:—"The notion that there is such a thing as a right of meeting in public places arises from more than one confusion or erroneous assumption. The right of public meeting—the right of all men to come together in a place where they may lawfully be for any lawful purpose . . . . . is confounded with the totally different alleged right of every man to use for the purpose of holding a meeting any place which in any sense is open to the public. The two rights, did they both exist, are essentially different and in many countries are regulated by totally different rules. It is assumed, again that squares, streets or roads which every man may lawfully use are necessarily available for the holding of a meeting. The assumption is false. A crowd blocking up a highway will probably be a nuisance in the legal, no less than in the popular, sense of the term, for they both interfere with the ordinary citizen's right to use the locality in the way permitted to him by law" (Dicey's 'Law of the Constitution,' 4th edition,

(1) 63 Michigan 396; 6 American State Reports, p. 311 at p. 315.

page 430). The learned author's exposition of the true legal aspect of meetings in those places is as follows:—"The right of assembling is nothing more than a result of the view taken by the Courts as to individual liberty of person and individual liberty of speech. There is no special law allowing *A*, *B*, and *C* to meet together either in the open air or elsewhere for a lawful purpose, but the right of *A* to go where he pleases so that he does not commit a trespass and to say what he likes to *B* so that his talk is not libellous or seditious, the right of *B* to do the like, and the existence of the same rights of *C*, *D*, *E*, and *F* and so on *ad infinitum* leads to the consequence that *A*, *B*, *C*, *D* and a thousand or ten thousand other persons may (as a general rule) meet together in a place where otherwise they each have a right to be for a lawful purpose in a lawful manner" (*Ibid* p. 258). Interference with a lawful meeting will therefore not be, to use the words of the same writer "an invasion of a public right, but an attack on the individual rights of *A* and *B*, and must generally resolve itself into a number of assaults on definite persons, members of the meeting. A wrong-doer who disperses a crowd is not indicted or sued for breaking up a meeting, but is liable (if at all) to a prosecution or an action for assaulting *A*, a definite member of the crowd."

Another learned writer, Mr. Justice Collett, in his comments on the Indian Penal Code, takes the same view and in addition puts processions on a highway on precisely the same footing as public meetings. His observations are as follows:—"It may be convenient here just to notice the popular error that there is some such a right as to hold a meeting in a public place or to move in procession along public streets. There can, in truth, be no such right other than or apart from that of each individual to pass and re-pass in a public place and therefore no right of public meeting or procession (however lawful the purpose) in any sense paramount to general convenience . . . . Apart from all express law there can *ex natura rei* be no such right as to hold meetings or to move in procession in public places" (Commentaries on the Indian Penal Code, pages 235, 236).

Before passing to another authority bearing on the present question, it is perhaps well to point out that the alleged right of procession must not be confounded with a reasonable interruption limited as to time such as that caused by fairs and markets, subject to which interruption a dedication of a highway may lawfully be

made. The alleged right of procession suggests a right on the part of as many of His Majesty's subjects as may be so disposed, to occupy a highway whenever and so often as they may wish for a procession, or possibly for more than one procession to be conducted by persons of conflicting views and sympathies, beliefs and opinions. That such a right cannot be rested on dedication as at present known to the law follows from what was said by Wills and Grantham, JJ., *In Ex parte Lewis*(1) with reference to the alleged right of meeting. The learned Judges say: "We were informed by Mr. Lewis that there was no statute conferring or recognising such rights. He alleged that they rested upon dedication. It is, however, a species of dedication at present unknown to the law and of which there is no trace in our law books. The only dedication in the legal sense that we are aware of is that of a public right of passage of which the legal description is a right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and re-pass without let or hindrance."

Upon the authorities I have thus referred to it is perfectly clear that, in the eye of the law, a procession as such has not any specific legal character and that the only rights claimable by those constituting a procession on a highway are what appertain to them as individuals using the highway. Such right is to pass and re-pass, allowing these words the largest possible construction with due reference to all the exigencies of the public. No doubt, many acts may be done on a highway by persons using it which, though not strictly passing and re-passing, would yet be in the nature of incidents to such passing and re-passing. Though it would not be easy to enumerate them exhaustively and precisely, yet there can be no difficulty generally in drawing the line between what is so incidental and what is not, for nothing can be treated as so incidental which is inconsistent with, in the words of Collins, L. J., "the paramount idea that the right of the public is that of passage" (*Hickman* v. *Maisey*(2)). But in no view can it be held that the doing of anything so altogether foreign to that paramount idea as the carrying on of religious worship on a highway is a proper incident to the right of passage even according to the most extended notions that can reasonably be entertained of that right. Though ordinarily it would, no doubt, be difficult to hold that

(1) L.R., 21 Q.B.D., 191 at p. 197. (2) L.R., [1900], 1 Q.B., 752 at p. 757.

persons passing along a highway appropriate it for purposes of worship merely by doing such equivocal acts as singing hymns and the like, yet this case presents no difficulty, inasmuch as here the prosecution case itself is that what the Tengalais were doing on the occasion in question did constitute religious worship and it is impossible to avoid the conclusion that such user of the highway was altogether wanting in lawfulness.

The soundness of this view is supported not only by decisions in cases where the question of lawfulness arose with reference to the owner of the freehold, but also by decisions in cases where such question arose with reference to the liability of those who were bound to maintain a highway in a proper state of repair but who had neglected to do so. *Stinson* v. *City of Gardiner*(1) is a leading decision on the point. The law as to the proper use of a highway was there laid down in the following terms:—"All persons have the right to pass and re-pass upon public roads so long as they violate no laws for the common good or for the protection of individuals. Within these restrictions they are entitled to the use of the highway for the purposes of travel whether the object of that travel is business or pleasure, whether they pass on foot, with carriages or in the various modes which each individual may choose to adopt. Any part of the highway may be used by the traveller and in such direction as may suit his convenience or taste provided he therein conforms to all laws and well-settled rules connected with such use. Children are not restricted in passing and re-passing upon the streets and roads more than adults. And the same rules are to be applied equally to all in regulating the use of highways for the objects designed." And notwithstanding the broad view thus taken of the law it was held that "when children appropriate a part of the road for their sports and cease to use it as a way for travel, the town or city through which the way passes is not responsible for injuries which may be received by any of the children so engaged, although the injuries may take place through a defect in the road." And as at the trial of the case the Judge had refused to instruct the jury that if the plaintiff, a child, had, at the time of the accident, been using the highway as a play-ground, and not as a traveller, she could not

(1) 42 Maine, 248; 66 American Decisions, 281, cited in 'Beven on Negligence,' p. 431.

recover, a new trial was granted on the ground that if, as alleged, she had been using the road as a play-ground and not as a traveller, the use for purposes of travel must be regarded as entirely suspended and that she had been using the ground for an object altogether different from that contemplated by the statute which imposed on the city the liability to maintain the road in repair. Precisely the same decision was given in *Blodgett* v. *City of Boston*(1). And in *McCarthy* v. *Portland*(2) it was held that a person using a highway wholly for the purpose of horse-racing could not recover for injuries happening to him, because the town did not afford him and his horse a safer and more perfect track. In *Vosburg* v. *Moak*(3), also cited in 'Beven,' page 126, it was held that where a number of persons were playing a game of cricket on a highway and the ball hit a passer-by, not only the particular individual who sent the ball, but all the persons engaged in the play were liable in damages as joint tort-feasors, inasmuch as they combined in using the highway for a purpose foreign to the appropriate user of the same.

Compare *Truro Corporation* v. *Row*(4) where the mere fact of the defendant marking off a part of the foreshore for depositing oysters dredged by him in deep water, and claiming property in the oysters deposited therein was held to have rendered his user of the foreshore in excess of the right accorded to every subject to use the foreshore for the purpose of fishing.

To guard against any misconceptions arising with reference to the view adopted by me, I would observe that, upon the principles already expounded, processions *per se* are quite unobjectionable and that, as rightly decided in the American Case of *S.* v. *Hughes* (cited in a note to 'Russell on Crimes', 6th edition, vol. I, page 787) "a peaceable procession in the streets of a town if lawful and if the streets are not obstructed more than is ordinarily the case under such circumstances is not an indictable offence on the part of the members composing it." The cases of *Parthasarathi* v. *Chinnakrishna*(5), *Muthialu Chetty* v. *Bapun Saib*(6), *Sundram Chetti* v. *The Queen*(7) cannot, in my opinion, be taken to lay down anything more.

(1) 8 Allen, 241, cited in the note to the above case in 66 American cases, at p. 284. (2) Cited in the same note.
(3) 1 Cushing, 453; 48 American Decisions, 613. (4) L.R., [1902], 2 K.B., 709.
(5) I.L.R., 5 Mad., 305. (6) I.L.R., 2 Mad., 140. (7) I.L.R., 6 Mad., 203.

I may further observe that even when the members of a procession transgress the limit of lawful user of a highway as by setting up an untenable right to carry on worship there, they are not necessarily guilty of a common nuisance, for to be indictable there must be much more than a user not lawful. Though authority may scarcely be necessary for such an obvious proposition I may quote a few lines from *Fairbanks* v. *Kerr*(1) as there allusion is made, by way of an illustration, to the very user in question here. Agnew, J., said: "A street may not be used in strictness of law for public speaking, even preaching or public worship, but it does not follow that every one who speaks or preaches in the street or who happens to collect a crowd there by other means is, therefore, guilty of the indictable offence of nuisance. His act may become a nuisance by his obstruction of the public highway, but it will not do to say it is a nuisance *per se*." This statement, which I adopt as perfectly correct, must be sufficient to repel the idea that every user of a highway, such as that in question here, could be interfered with without reference to the question of a real nuisance having been caused thereby (as to some of the considerations governing the determination of which see *Original Hartpool Collieries' Co.* v. *Gibb*(2) and *Attorney-General* v. *Sheffield Gas Consumers' Co.*(3). So long as that is not the case the authorities should and would treat the matter in the spirit in which Cozens-Hardy, J., viewed the case of the clergymen who set up a right to deliver sermons to the public on the foreshore. Though upon the authority of *Blundell* v. *Caterall*(4) where it was held that, according to the common law, the public at large having the right to go on the foreshore for two purposes only, viz., navigation, commerce, etc., and for fishing, they could not go there for the purpose of bathing, the right set up by the clergymen was negatived, yet an injunction against him was refused for reasons thus humourously expressed by the learned Judge:—"There are persons who derive satisfaction from listening to the addresses of the defendant, and the defendant derives satisfaction from delivering these addresses. I cannot conceive why they should be deprived of their innocent pleasure." [*Llandudno Urban District Council* v. *Wood*(5).]

(1) 70 Pennsylvania St., 86; 10 American Rep., 664, at p. 669.
(2) L.R., 5 Ch.D., 713 at p. 721.
(3) 3 De. G.M. & G., 304 at p. 330.
(4) 5 B. and Ald., 268; 24 R.R., 353.
(5) L.R., [1899], 1 Ch., 705.

But it is one thing thus to take an indulgent view of the matter, and quite another to treat the members of a religious procession on a highway as an assembly lawfully engaged in worship there for the purpose of fixing criminal responsibility on others under section 296 of the Indian Penal Code, on the extraordinary ground that they were similarly engaged there and in the teeth of the rule that all His Majesty's subjects have in respect of the highway equal rights.

My conclusions on this part of the subject may be put shortly thus: There is no peculiar right known to the law as a right of procession; though the law accords to members of a procession no recognition in their collective capacity, yet the fact that a number of persons use a highway together for some common purpose does not detract in any way from such use being lawful; but as the circumstances attending a procession may, in consequence of their being inconsistent with the paramount idea of passage already referred to, be of such a character as to render the user by the processionists otherwise than lawful and as carrying on worship on a highway is of that character, it cannot be affirmed that the Tengalais on the occasion in question constituted an assembly engaged in worship lawfully within the meaning of section 296 of the Indian Penal Code.

The result is that the charges against the third and seventh accused under both sections fail and with them those against the eleventh as abettor.

Before concluding it seems but right to observe that one specially objectionable feature of this case is that the accused have been convicted and punished for acting in obedience to, or, at all events, in the spirit of the District Magistrate's order passed in connection with a festival in the principal temple of the place, which was going on at the same time, whereby the Vadagalais were prohibited from joining the Tengalais in the recitation, but were allowed to recite separately—an order evincing judgment and discretion, inasmuch as whilst it prevented collisions between these rival sects, it secured to them both the opportunity of worshipping peaceably.

I would, therefore, reverse their conviction, set aside the sentences passed on them, and acquit them. The fines, if levied, should be refunded.

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DAVIES, J.—Taking the facts to be as found, namely, that the Vadagalais joined the procession in a separate goshti or group and recited one portion of the Prabandham in Tamil, while the Tengalais in front were reciting another portion also in Tamil, and that this action of the Vadagalais was an innovation, it seems to me that they committed neither of the offences charged against them or any other offence.

To constitute an offence under section 153 of the Penal Code the Vadagalais must have been acting illegally and also with the intention of provoking a riot. On the first point the case for the prosecution is that the Vadagalais were acting illegally in that they were disobeying the injunction of a Civil Court. But on reading the judgment and decree of the Civil Court referred to, I can find no injunction prohibiting the Vadagalais from doing what they did. On the contrary I find that the particular prayer of the Tengalais that the Vadagalais should not be allowed to recite the Prabandham either jointly with or separately from the Tengalais, that is, that the Vadagalais should not be allowed to recite the Prabandham at all, was expressly refused. While the exclusive right of the Tengalais to the emoluments attached to the performance of the service of recitation was declared the right of the Vadagalais to recite the Prabandham "as ordinary worshippers" was recognized and was reserved to them. No attempt was made to define their rights as ordinary worshippers. It was not laid down that they must worship singly or by twos or by threes and not in a large group, nor that they must march together with the Tengalais and not separately, nor that they might not utter Tamil—these being matters of ritual which are beyond the province of a Civil Court to determine. Therefore, it cannot be said that the Vadagalais in the present instance exceeded their rights as ordinary worshippers and consequently they did not act "malignantly or wantonly by doing anything which is illegal." Of course, if they, being five or more, had attempted to enforce their rights by means of criminal force or show of criminal force, they would have been amenable to the criminal law, but they did nothing of the kind here. Now comes the second point, that is, whether they were intending to provoke a breach of the peace, and in regard to this I must also hold them to be innocent. By separating themselves from the Tengalais and going far behind them with the idol between, they were only following the directions

of the District Magistrate in respect to a similar procession carried on at about the same time and place for the express purpose of preventing a breach of the peace. So that the conviction for the offence under section 153 of the Penal Code entirely fails.

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As to the other offence under section 296 of the Penal Code, disturbing a religious assembly, the case for the prosecution is that the recital by the Vadagalais disturbed the recital by the Tengalais by, it would seem, the noise it made, but the facts show that this could not have been the case. In the first place a certain amount of noise is of the essence of these street processions of a deity. It is not alleged that whatever the noise was that the Vadagalais made it drowned all other noises, and from the evidence it would appear that it did not reach the ears of the Tengalais, who were well away in advance, so long as they remained there. It was only by some of the Tengalais coming back to where the Vadagalais were reciting that it was known they were reciting and in Tamil. If they had been reciting in Sanskrit, however loudly, the Tengalais could have had no objection, because the right of the Vadagalais to form a separate group reciting in Sanskrit is admitted. So that the head and front of the Vadagalais offending even in the eyes of the Tengalais was really nothing more than their reciting in Tamil instead of in Sanskrit. This could not have been a "disturbance" of the worship of the Tengalais within the meaning of section 296 of the Penal Code, unless it prevented the Tengalais from performing their part of the worship which it never did. The conviction under this section, therefore, in my opinion, also fails. I wish to offer no opinion as to whether religious processions in public streets in India are "lawful" or not, as from my point of view the decision of the question is unnecessary for the disposal of this case. I would quash both the convictions and acquit the three accused. The fines inflicted on them, if levied, must be refunded.

I should add that the whole proceedings in the Criminal Courts have been taken upon the erroneous view that the sole right of the Tengalais was a sole right to worship instead of a sole right to the emoluments attaching to the worship.

BENSON, J.—With regard to the charge under section 153, Indian Penal Code, the two questions for decision are, firstly, whether the action of the accused Vadagalais in forming a

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separate group (goshti) behind the idol, and there singing the Tamil hymn (Prabandham) was in contravention of the injunction contained in the decree of the Civil Court, and, secondly, whether it was "wanton" or "malignant." If their action was in contravention of the decree, it was "illegal" within the meaning of that word as defined in section 43, Indian Penal Code, and having regard to the previous disputes between the two sects, there can be little doubt that it was also "wanton" and "malignant" unless the accused *bonâ fide* believed that they were acting in accordance with the orders of the District Magistrate, who, as Magistrate, had the power to regulate the processions in such a way as to prevent a breach of the public peace. If their action was not "illegal," no offence under section 153 could have been committed. If it was "illegal," it must also appear that it was "wanton" or "malignant" in order to justify the conviction. On both points I am of opinion that the decision must be in favour of the accused. The decree established the exclusive right of the Tengalais as office-holders and to the enjoyment of the emoluments of the office, and it restrained the Vadagalais from interfering with the Tengalais by reciting the hymns as office-holders, though it expressly preserved the right of the Vadagalais to recite the hymns as "ordinary worshippers." The exact order or ritual to be followed by "ordinary worshippers" is naturally not defined in the decree, but there is nothing in it to prevent a Vadagalai, or a group of Vadagalais from reciting the hymns as ordinary worshippers in any part of the procession, provided that they do not do it in such a way as to interfere with the office-holders discharging their duty as such. In the present case there was no such interference, and, therefore, no illegality in the action of the Vadagalais, and no offence under section 153. Even if the action of the Vadagalais was illegal, it would, I think, be difficult to say that it was "wanton" or "malignant," since it was in accordance with the orders of the District Magistrate in regard to the kindred processions to the big temple which had been going on for the previous four days—orders which the District Magistrate issued with a view to preventing the rival sects coming into collision and which were carried out under his own supervision and were successful in achieving the object aimed at. No special order was issued as regards the procession out of which the present prosecution arose, but the circumstances were so similar to those connected

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with the big temple processions as to raise a strong presumption in favour of the *bona fides* of the accused, a presumption which is not rebutted by the evidence or by other circumstances connected with the procession.

As regards the offence under section 296, Indian Penal Code, viz., "voluntarily causing disturbance to an assembly lawfully engaged in the performance of religious worship and ceremonies," I cannot accept the contention that the Tengalais were not "lawfully" engaged in religious worship because they were engaged in it on a highway. No doubt a highway is primarily intended for the use of individuals passing and re-passing along it in pursuit of their ordinary avocations, but in every country, and especially in India, highways have, from time immemorial, been used for the passing and re-passing of processions as well as of individuals and there is nothing illegal in a procession or assembly engaging in worship while passing along a highway, any more than in an individual doing so. No doubt, if a religious, or any other procession, interferes with the ordinary use of the highway by persons not members of the procession, the procession may be prohibited or controlled by the proper authorities, and I take it that no Court would convict a person under this section on an allegation that he voluntarily disturbed a religious procession if he could show that he was only using the road in the ordinary way and with due regard to the rights of others equally entitled to use it. But, subject to such control and the rights of others entitled to use the highway, there is, in my judgment, nothing illegal in a procession engaging in worship on a highway. In a case referred to in a note to 'Russell on Crimes,' page 787, sixth edition, it was held that "a peaceable procession in the streets of a town, if lawful, and if the streets are not obstructed more than is ordinarily the case under such circumstances, is not an indictable offence on the part of the members composing it."

The same view was accepted as beyond dispute by Turner, C.J., and Muttusami Ayyar, J., in the case of *Parthasarathi* v. *Chinnakrishna*(1) where it was stated that persons of whatever sect "are entitled to conduct religious processions through the public streets, so that they do not interfere with the ordinary use of such streets by the public and subject to such directions as the Magistrate may

(1) I.L.R., 5 Mad., 305.

lawfully give to prevent obstructions of the thoroughfare or breaches of the public peace." This passage was referred to with approval in the recent case of *Shadagopachari* v. *Rama Row*(1) in both of which the dispute was between the same rival sects as in the present case.

Again, in the case of *Muthialu Chetti* v. *Bapun Saib*(2) Turner, C.J., and Muttusami Ayyar, J., said: "It is a right recognized by law that persons may, for a lawful purpose, whether civil or religious, use a common highway by parading it attended by music so that they do not obstruct the use of it by other persons." Again in the Salem Full Bench Case *Sundram* v. *The Queen*(3) Turner, C.J., reaffirmed in no uncertain terms the right to go in procession through the public streets subject to the control of the Magistrate, and referred to previous decisions of this Court in support of his view, and Innes, J., said: "I entirely concur with the Chief Justice in his exposition of the law relating to processions which is in accordance with the decisions of this and of the late Sadr Court for many years past."

Lord Esher, M.R., has well expressed the necessity for caution in restricting the use of highway by a too narrow reference to their primary purpose as a means of merely passing and re-passing. Referring to the judgment in *Reg.* v. *Pratt*(4) he says: "I must observe that I think that if the language of Erle, J., and of Crompton, J., in *Reg.* v. *Pratt*(4), were construed too largely, the effect might be to interfere with the universal usage as regards highways in this country in a way which would be mischievous, and would derogate from the reasonable exercise of the rights of the public. Construed too strictly, it might imply that the public could do absolutely nothing but pass or re-pass on the highway, and that to do anything else whatever upon it would be a trespass. I do not think that this is so. Highways are, no doubt, dedicated *primâ facie* for the purpose of passage; but things are done upon them by every body which are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser" (*Harrison* v. *Duke of Rutland*(5)).

(1) I.L.R., 26 Mad., 376.
(2) I.L.R., 2 Mad., 140.
(3) I.L.R., 6 Mad., 203.
(4) 4 E. & B., 860.
(5) L.R., [1893], 1 Q.B., 146.

This passage is referred to with approval by Collins, L.J., in *Hickman* v. *Maisey*(1) and he adds "now primarily the purpose for which a highway is dedicated is that of passage as is shown by the case of *Dovaston* v. *Payne*(2) and, although in modern times a reasonable extension has been given to the use of the highway as such, the authorities show that the primary purpose of the dedication must always be kept in view. The right of the public to pass and re-pass on a highway is subject to all those reasonable extensions which may, from time to time, be recognised as necessary to its exercise in accordance with the enlarged notions of people in a country becoming more populous and highly civilized, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage."

With these remarks I entirely agree. The practice of using the public highways for religious processions has existed in India for thousands of years. History, literature and tradition all tell us that religious processions to the village shrines formed a feature of the national life from the very earliest times. That alone is sufficient to raise a presumption that it is lawful and to throw on those who allege it to be unlawful the onus of showing that it is forbidden by law, but this it admittedly is not. The law recognizes the use of the highway by processions as lawful, and gives the Magistrate and superior officers of Police power to direct the conduct of assemblies and processions through the public streets and to regulate the use of music in connection with them, and to prevent obstructions on the occasion of such assemblies and processions (Madras Police Act XXIV of 1859, section 49). The law recognizes religious processions as lawful just as much as it recognizes other processions. If it were necessary to refer the origin of the use of highways for religious processions to a dedication of the highway to such use, I should find no difficulty in presuming such a dedication, for it is unreasonable to suppose that the dedicator would make a reservation against religious processions which would be wholly opposed to the sentiment of the community, and of which we can find no trace in the history or customary law of the country. It is more reasonable to suppose that he would dedicate the highway to the purposes for which, in accordance with the custom of the country, it would be required by the people. The penal

(1) L.R., 1900], 1 Q.B., 757.
(2) 2 H.Bl., 527.

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law of India extends a special protection against voluntary disturbance to all assemblies lawfully engaged in religious worship. A procession is but an assembly in motion and if it is a religious procession, it is, in my judgment, entitled to the special protection given by the Penal Code to assemblies lawfully engaged in religious worship.

It may, or may not, be desirable to declare that religious processions on highways are unlawful, and that the processionists are trespassers, but this must be done, if at all, by the Legislature, not by the Courts.

I think, then, that it cannot be said that the Tengalais were not lawfully engaged in religious worship within the meaning of section 296, but I am of opinion that the other element required to constitute the offence, viz., "disturbance" has not been made out. No doubt, the Courts below have both held that there was "disturbance," but it is clear that this finding was based on the supposed illegality of the Vadagalais' action. That action, however, as we have seen, was not, in fact, illegal, and, that being so, it was not, in my judgment, of such a character as to cause any disturbance within the meaning of the section.

For these reasons I concur with my learned brothers in holding that the convictions must be reversed, and the fines, if levied, refunded.

APPELLATE CIVIL—FULL BENCH.

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

DHARMAKARTA OF TINNANORE TEMPLE (PLAINTIFF), APPELLANT,

v.

LUCHIMI DOSS (DEFENDANT), RESPONDENT.*

1903. March 2, 10.

Rent Recovery Act (Madras)—Act VIII of 1865, ss. 3, 80—Tender of patta and process to recover rent by holder of jaghir before registration as jaghirdar—Validity—"Proceedings."

The holder of a jaghir is entitled to tender a patta under the Rent Recovery Act and to proceed under that Act for the recovery of rent before he is registered as jaghirdar under Regulation XXVI of 1802.

The word "proceedings" in section 80 of the Rent Recovery Act does not include tender of patta. The "proceedings" referred to in that section are limited to summary proceedings for arrears of rent.

Subbu v. *Vasanthappan*, (I.L.R., 8 Mad., 351), approved.

QUESTIONS referred to a Full Bench. The facts and the questions raised appear from the following Order of reference :—

This is a suit by a tenant to set aside a distraint made by the landlord (defendant) for the rent for fasli 1309. The adoptive father of the defendant was the registered jaghirdar and died on the 29th May 1900. The defendant tendered a patta to the plaintiff for fasli 1309 on the 23rd June 1900, *i.e.*, seven days before the expiry of the fasli. The defendant had not at that time got his name registered by the Collector in the place of his father. He got it registered on the 29th August 1900. The distraint was on the 11th September 1900. The present suit was instituted on the 8th October 1900.

One of the questions in the case is whether the defendant was entitled to tender a patta before he was registered as jaghirdar. In *Valamarama* v. *Virappa*(1), *Ayyappa* v. *Venkata Krishnama Razu*(2), and *Raghava Reddy* v. *Kanni Gramani*(3), it was held that a

* Second Appeal No. 3 of 1902, presented against the decree of A. C. Tate, District Judge of Chingleput, in Appeal Suit No. 60 of 1901, confirming the decision of S. M. V. Woosman Sahib Bahadur, Deputy Collector of Saidapet, in Summary Suit No. 213 of 1900.

(1) I.L.R., 5 Mad., 145. (2) I.L.R., 15 Mad., 484.

(3) I.L.R., 23 Mad., 221.

person entitled to zamindari property could not tender a patta unless he was the registered holder.

In *Subbu* v. *Vasanthappan*(1), it was held that an inamdar was entitled to proceed under the Rent Recovery Act (VIII of 1865) even though he was not registered as inamdar.

We can find no real distinction in principle between zamindars and the other classes of land-holders (including inamdars and jaghirdars) mentioned in paragraph 2 of section 1 of the Act in so far as their power to proceed under the Act for rents due to them is concerned.

The decision in *Valamarama* v. *Virappa*(2), and those following it are, in our opinion, in direct conflict with that in *Subbu* v. *Vasanthappan*(1). The language in the latter case would seem to imply a dissent from *Valamarama* v. *Virappa*(2), on the authority of the Privy Council case *Vizianagaram Maharaja* v. *Suryanarayana*(3).

We therefore refer to the Full Bench the following questions:—(1) whether the holder of a jaghir is entitled to tender a patta under Madras Act VIII of 1865 or to proceed under the Act for the recovery of rent before he is registered as jaghirdar under Regulation XXVI of 1802; and (2) whether the word "proceedings" in section 80 of Madras Act VIII of 1865 includes tender of patta or is restricted to proceedings subsequent to the tender of patta taken under the Act to enforce the terms of a tenancy.

Reference may be made to the cases of *Vencataswara Yethiappa Naicker* v. *Alagoo Moothoo Servagaren* (4) and *Syed Ali Saib* v. *Zamindar of Salur*(5).

The case came on for hearing in due course before the Full Bench.

T. Rungachariar for appellant.

V. C. Seshachariar for respondent.

The Court delivered the following

OPINION.—(1) There is no enactment which in terms requires a "land-holder" to be registered before he can exercise the powers conferred by Act VIII of 1865.

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(1) I.L.R., 8. Mad., 351. (2) I.L.R., 5 Mad., 145.
(3) I.L.R., 9 Mad., 307 at p. 316. (4) 8 M.I.A., 327 at p. 337.
(5) 3 M.H.C.R., 5.

Section 1 of the Act enumerates two classes of persons who, for the purposes of the Act, are included in the term "land-holders." The enumeration of the persons in clause (2) concludes with the words "and all other registered holders of land in proprietary right." It has been argued that these words have the effect of limiting the application of the words of clause 1 to cases where the persons therein enumerated have been registered. We do not think the section can be so construed. Assuming on the true construction of the section that the words of limitation qualify the words of clause (2), they cannot be taken to qualify the class of persons enumerated in clause (1). The word "Jaghirdars," as used in sections 1 and 3 of the Act is not confined to registered jaghirdars.

We think the case of *Subbu* v. *Vasanthappan*(1) was rightly decided and that in principle no distinction can be drawn between zamindars and the other land-holders enumerated in clause (1) of section 1. The principle of this decision, viz., that non-registration by the Collector does not affect title, was acted on by the Privy Council in *Vizianagaram Maharaja* v. *Suryanarayana*(2) confirming a decision of this Court as to the validity of an alienation although unregistered which proceeded upon the same grounds as the decision in *Subbu* v. *Vasanthappan*(1).

With regard to the cases in which a different view has been taken, the Courts appear either to have considered *Valamarama* v. *Virappa*(3) a binding authority notwithstanding the decision in *Subbu* v. *Vasanthappan*(1), or to have distinguished the case from *Subbu* v. *Vasanthappan*(1) on the facts.

Our answer therefore to the first question referred to us is in the affirmative.

(2) We are clearly of opinion that the word "proceedings" in section 80 of the Act of 1865 does not include tender of patta. The "proceedings" in the section are, by the express terms of the section, limited to summary proceedings for arrears of rent.

The case came on for disposal in due course, when the Court (SUBRAHMANIA AYYAR and BENSON, JJ.) delivered the following

JUDGMENT.—Under the ruling of the Full Bench it is not necessary for the respondent to have been registered as holder of the jaghir. Following the view taken in *Venkatachariar* v. *Eswara*

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(1) I.L.R., 8 Mad., 351. (2) I.L.R., 9 Mad., 307 at p. 316.
(3) I.L.R., 5 Mad., 145.

DHARMA-KARTA OF TINNANORE TEMPLE v. LUCHIMI DOSS,

Doss(1) as to the construction of the agreement relied on, we find that there is no ground for this second appeal and we dismiss it with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

1902. July 22.

IN THE MATTER OF GOVINDU AND ANOTHER, PRISONERS.*

Criminal Procedure Code—Act V of 1898, ss. 195, 233 to 239—Joinder of offences and accused—Preliminary enquiry—Power of Sessions Court to try offenders separately where jointly committed for trial—s. 195—Sanction to prosecute—Notice to accused—Necessity.

The sections of the Code of Criminal Procedure which relate to joinder of charges (including section 239) refer to the trial of the accused. The ruling in *Subrahmania Ayyar* v. *Emperor*, (I.L.R., 25 Mad., 61), cannot be extended to a preliminary enquiry held by the Magistrate committing a case to a Sessions Court, so as to render the commitment itself illegal because there was misjoinder of offences or of offenders. In such a case, the Sessions Judge, if he considers it necessary, can frame charges against and try the accused separately.

There is no hard and fast rule that notice must be given in all cases to an accused person before sanction is accorded for his prosecution.

REFERENCE to the High Court for orders. It appeared from the letter of reference that two police constables had been committed to the Sessions Court of Kistna, by the Head-quarters Deputy Magistrate, for trial for an offence punishable under section 193 of the Indian Penal Code. The alleged false statements were made before the Bandar Bench Magistrates in a criminal case. An application for sanction to prosecute the two constables under section 211 of the Indian Penal Code was thereupon made to the Stationary Sub-Magistrate of Bandar, but was rejected on the ground that the falsity of the statements was not apparent from a perusal of the record in the Bench case, and, under the Ruling in *In the matter of the petition of Jai Prakash Lal*(2) the Sub-Magistrate was precluded from travelling beyond that record.

* Criminal Revision Case No. 272 of 1902. Case referred No. 82 of 1902 for the orders of the High Court, under section 438 of the Code of Criminal Procedure, by J. H. Robertson, Acting Sessions Judge of Kistna in his letter, dated 20th June 1902.

(1) Second Appeal No. 689 of 1901 (unreported).

(2) I.L.R., 6 All., 29.

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Subsequently, under instructions from the Head-quarters Deputy Magistrate, the Sub-Magistrate held a preliminary enquiry under section 476 of the Code of Criminal Procedure, and sent the constables before the Deputy Magistrate to be tried for an offence under section 211. The Deputy Magistrate held that the facts did not disclose the commission of an offence under section 211, but one under section 193, and that as the accused were entitled to a separate trial, he could not himself deal with them except by commencing proceedings afresh. This, however, for reasons which he recorded, he refused to do, and, instead, committed the accused to the Court of Session on a joint charge. One question referred was whether this joint committal was legal, having regard to section 239 of the Code of Criminal Procedure; and to the Ruling in *Subrahmania Ayyar* v. *King-Emperor*(1). A second question had reference to the sanction. It appeared that up to the time of committal to the Court of Session, the sanction accorded related to an offence under section 211 of the Indian Penal Code, and that no sanction had been accorded for an offence under section 193. Subsequently to the committal, however, the Public Prosecutor moved the Stationary Sub-Magistrate to accord sanction under the latter section, which he did. Objection was taken to this sanction, as it had been accorded without notice to the accused (*Pampapati Sastri* v. *Subba Sastri*(2)).

The parties are not represented.

BHASHYAM AYYANGAR, J.—I do not think that there are proper grounds for quashing the order of commitment and directing fresh enquiry separately against the two accused. So far as the question of sanction is concerned I do not think there is any validity in the objection. Apart from the sanction which has been obtained since the order of commitment (which sanction under the Ruling in *Pampapati Sastri* v. *Subba Sastri*(2) cannot, I think, be held to be invalid by the Court which has to try the accused merely because the sanction was obtained without giving notice to the accused), the accused are not entitled to plead that they cannot be tried and convicted in the absence of a sanction under section 195, Criminal Procedure Code, for their being prosecuted for the offence of giving false evidence. The case was sent to the Committing Magistrate under section 476, Criminal Procedure

(1) I.L.R., 25 Mad., 61. (2) I.L.R., 23 Mad., 210.

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Code, on the same facts as those on which they have been charged by the Committing Magistrate with an offence under section 193, Indian Penal Code, instead of section 211, Indian Penal Code, the section mentioned by the Magistrate while sending the case under section 476, Criminal Procedure Code. The Committing Magistrate, who was bound to proceed according to law, was authorized to commit the case to the Sessions Court under section 347, Criminal Procedure Code, charging the accused with the offence which, according to law, they were guilty of on the facts with reference to which proceedings were taken against them under section 476, Criminal Procedure Code (*vide* also section 195 (5), section 230 and section 537 (*b*), Criminal Procedure Code). As regards the question of misjoinder it is quite clear that in the case of an offence under section 193, Indian Penal Code, the two accused cannot be tried jointly but ought to be charged and tried separately. The Sessions Judge ought to frame separate charges against them and try them separately just as if there had been two commitments, I do not think that the commitment should be quashed as illegal because the Magistrate held proceedings against the two accused jointly. The sections of the Criminal Procedure Code relating to joinder of charges, viz., 233, &c., and including section 239, refer to the trial of the accused. The ruling of the Privy Council in *Subrahmania Ayyar* v. *King-Emperor*(1) followed recently by the High Court of Calcutta in *Gobind Koeri* v. *Emperor*(2) cannot, I think, be extended to preliminary enquiries held by Magistrates committing a case to the Sessions Court so as to render the commitment itself illegal, because there was misjoinder of offences or of offenders in the preliminary enquiry.

MOORE, J.—I agree. When the case came before him the Sessions Judge, if he considered that the accused persons should be tried separately, should have framed charges accordingly and gone on with the trial. The Criminal Procedure Code gives him full powers to do this. There is no hard-and-fast rule that notice must be given in all cases to an accused person before sanction is granted. The committal is not irregular and the Sessions Judge should proceed to try the case.

(1) I.L.R., 25 Mad., 61.

(2) I.L.R., 29 Calc., 385.

APPELLATE CIVIL.

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

PALANISAMI COWNDAN (PLAINTIFF), APPELLANT,

v.

THONDAMA COWNDAN (DEFENDANT), RESPONDENT.*

1902. December 18.

Civil Procedure Code—Act XIV of 1882, *ss.* 25, 191 (2)—*Suit commenced in a District Court—Issues settled by District Judge—Case transferred to Sub-Court by High Court—Decision by Sub-Judge—Appeal to and decision of District Judge—Validity of decision in appeal and of transfer by High Court.*

A suit was instituted in a District Court, and issues were settled by the District Judge. The suit was then transferred by the High Court to the Court of the Subordinate Judge, who decided the case; an appeal was then preferred to and was heard by the District Court, though the Judge who heard the appeal was not the Judge who had settled the issues. On a second appeal being preferred to the High Court:

Held, (1) that the District Court had jurisdiction to hear the appeal, section 17 of the Madras Civil Courts having no application;

(2) that the High Court had jurisdiction under sections 25 and 191 (2) of the Code of Civil Procedure to make the transfer to the Subordinate Judge, though the case was in part heard.

THE facts of the case appear from the head-note and judgment.

V. Krishnaswami Ayyar for appellant.

The Advocate-General for respondent.

JUDGMENT.—Two points have been raised on behalf of the appellant: first, that the District Court had no jurisdiction to hear the appeal; second, that there was no jurisdiction to make the order of transfer from the District Court to the Sub-Court.

As regards the first point, the suit was instituted in the District Court and issues were settled by the District Court. The suit was then transferred to the Sub-Court by order of the High Court. The appeal from the decree of the Sub-Court was heard by the District Court. The Judge who heard the appeal was not the Judge who settled the issues. This being so it is clear that section 17 of the Civil Courts Act has no application and the District Court had jurisdiction to hear the appeal.

* Second Appeal No. 1336 of 1901, presented against the decree of V. A. Brodie, District Judge of Coimbatore, in Appeal Suit No. 188 of 1901, presented against the decree of W. Gopalachariar, Subordinate Judge of Coimbatore, in Original Suit No. 1 of 1900.

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As regards the second point, the High Court has power under section 25 of the Code of Civil Procedure to transfer a pending suit. There is no reason why the word 'pending' should not be construed in its ordinary sense. Section 191 (2) of the Code of Civil Procedure clearly contemplates the transfer of a suit under section 25 after the case has been, in part, heard. There was jurisdiction to order the transfer.

The second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar

1903. January 29.

BAVU SAHIB (FIRST COUNTER-PETITIONER), PETITIONER,

v.

THE DISTRICT JUDGE OF MADURA, RESPONDENT.*

Legal Practitioners Act—XVIII of 1879, as amended by Act XI of 1896, s. 36—Application to have persons declared as touts—Hearing on affidavits—Validity—Operation of order limited to Sessions District.

Where application is made to a Court to declare persons to be touts, under section 36 of the Legal Practitioners Act, it is desirable that the Court should hear oral evidence, though it is open to the Court to act on affidavits.

The operation of such an order is limited to the Judge's own Court and Courts subordinate to him.

APPLICATION that certain persons should be declared to be touts, under section 36 of the Legal Practitioners Act (XVIII of 1879, as amended by Act XI of 1896). Application was made to the District Court of Madura that 19 persons should be declared touts. The District Judge acted on affidavits and passed the following order with reference to 16 of the persons referred to:—"The District Judge orders that the marginally-noted persons be declared touts, that a copy of these proceedings be kept hung up in the District Court and in the Subordinate Court of Madura, East and West, and in the District Munsifs' Courts of Madura and

* Civil Miscellaneous Petition No. 937 of 1902, presented under section 15 Charter Act, praying the High Court to set aside the order of H. Moberly, District Judge of Madura, in proceedings, dated 2nd May 1902, No. 3558, declaring the petitioner to be a law tout under section 36 of the Legal Practitioners Act.

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Tirumangalam, that a copy of this be sent to the District Magistrate, Madura, for publication in the District Gazette in view to copies being sent to the local Criminal Courts. Ordered further that these persons declared to be touts be excluded from the precincts of the respective Courts. No. 14 is exempted, his statement that he is a gumastah is confirmed by a Vakil."

Mr. *C. Krishnan* for petitioner.

JUDGMENT.—Notice was issued to the District Judge, but the Government Pleader does not appear. Objection is taken by the petitioners to the action of the District Judge on the ground that he acted on affidavits. We think that it was open to the District Judge, under sections 194, 195 and 647, Civil Procedure Code, to act upon affidavits filed in support of the application made by the Vakils to have the petitioners declared to be law touts; though in a matter of this kind we think it would have been more regular and satisfactory to have examined the deponents in Court as witnesses. We observe, however, that no objection was taken before the District Judge on this score, nor did the petitioners even apply, as they might have done, to have the deponents examined or cross-examined in Court. We must therefore disallow this objection. We, however, observe that the District Judge acted in excess of his jurisdiction in extending the operation of his order to the Criminal Courts in the District other than his own Sessions Court. Section 36 of the Legal Practitioners Act only gives him jurisdiction in his own Court and in Courts subordinate to him. Under section 17 (1) and (5) of the Criminal Procedure Code neither the District Magistrate nor the other Magistrates are subordinate to the Sessions Judge except so far as is expressly provided by the Criminal Procedure Code.

We must therefore, under section 622, Civil Procedure Code, cancel so much of the order as relates to the Courts of the District and other Magistrates.

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

1903. February 9.

RAMAKRISHNA REDDI (FIRST PRISONER), APPELLANT,

v.

EMPEROR, RESPONDENT.*

Criminal Procedure Code—Act V of 1898, ss. 269 (3), 309—Sessions Judge sitting with jury—Charges of theft and administering drug—Opinion of only two jurors taken as assessors on second charge—Validity.

At the trial of an accused, before a Sessions Judge and a jury, for theft in a building (an offence triable by a jury) and for administering a noxious substance (an offence triable by assessors), the Judge took the verdict of the jury on the former charge, and took the opinion of only two of them (as assessors) on the latter :

Held, that, under sections 269 (3) and 309 of the Code of Criminal Procedure, the Judge should have taken the opinion of all the jury as assessors, on the latter charge, and that his failure to do so was not an "omission" or "irregularity" to which section 537 applied.

CONVICTIONS for theft in a building and for administering a stupefying substance with intent to facilitate the commission of an offence. Accused No. 1 was charged and tried as aforesaid, under sections 380 and 328 of the Indian Penal Code, before the Sessions Judge sitting with a jury. Accused Nos. 2 and 3 were charged with abetment of theft, under sections 109 and 379. The Judge directed the jury on the charge of theft, and they returned an unanimous verdict of guilty against first accused on the substantive offence, and against the accused Nos. 2 and 3 on the charge of abetment. The Judge then dealt with the charge against first accused under section 328. He took the opinion of two of the jurors, as assessors, on this charge. Their opinion was that the first accused was guilty. The Judge agreed, and sentenced first accused, under sections 380 and 328, to five years' rigorous imprisonment. He sentenced the other two accused to two years' rigorous imprisonment.

All the accused appealed.

The Public Prosecutor in support of the conviction.

* Criminal Appeal No. 775 of 1902 presented against the sentence and conviction of S. Gopala Chariar, Acting Sessions Judge of Cuddapah, in Case No. 60 of the Calendar for 1902.

RAMAKRISHNA REDDI *v.* EMPEROR.

JUDGMENT.—As regards the offence of theft with which all the accused were charged, the jury were properly directed by the learned Judge and the appeals of the second and third accused have already been dismissed. With regard to the charge under section 328, Indian Penal Code, the Judge only took the opinion of two of the jurors, as assessors. He ought undoubtedly, under the provisons of sections 269(3) and 309 of the Code of Criminal Procedure, to have taken the opinion of all the jurors as assessors. We do not feel satisfied that his failure to do this can be treated as an "omission" or "irregularity" to which section 537 of the Code of Criminal Procedure applies. We accordingly set aside the conviction under section 328, Indian Penal Code. The Judge passed one sentence in respect of both offences. We modify the sentence by sentencing the accused to four years' rigorous imprisonment under section 380 of the Indian Penal Code.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar.

1903. February 13, 16.

SOMAYYA, PETITIONER,

v.

SUBBAMMA, RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, ss. 103, 108 and 558—Application to restore— Prevented by sufficient cause from appearing—Power of Court to restore where sufficient cause not shown.

The affirmative provisions in sections 103, 108 and 558 of the Code of Civil Procedure that a plaintiff or appellant (as the case may be) may prove that he was "prevented by sufficient cause" from appearing or attending when his suit or appeal was called on and dismissed, do not imply the negative, namely, that an application for restoration cannot be granted unless sufficient cause is shown. The effect of the enactments is that, if sufficient cause is shown, restoration is made obligatory on the Courts, there being no discretion in the matter; whereas, in other cases the merits of the applicant's case will form an important element for consideration when the Court is asked to exercise its discretion.

* Civil Miscellaneous Petition No. 954 of 1902 presented under section 558 of the Code of Civil Procedure for the re-admission, on the file of the High Court, of Civil Revision Petition No. 123 of 1902 dismissed for default of prosecution on the 13th August 1902 (Small Cause Suit No. 745 of 1901 on the file of the Court of the District Munsif of Ellore).

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APPLICATION under section 558 of the Code of Civil Procedure to re-admit an appeal, dismissed for default of prosecution. On Civil Revision Petition No. 123 of 1902 coming on for hearing before the High Court on the 13th August 1902 and the vakil for the petitioner representing that he was not furnished with funds to purchase printed papers and the petitioner himself not appearing in person, the petition was dismissed. Subsequently, the petitioner alleged by affidavit that, being informed by his pleader at Ellore that he (petitioner) should furnish necessary funds to his vakil at Madras with regard to the above petition, he immediately sent money direct to the vakil at Madras which reached him on the 15th August 1902 (two days after the dismissal of the petition). The petitioner further alleged that he lived at an out-of-the-way place, where the delivery of letters was not regular and, consequently, the vakil at Madras got the money order and instructions late. The respondent's vakil contended that the facts disclosed in the petitioner's affidavit, or otherwise ascertained on reference to the record, did not establish that the petitioner or his vakil was prevented from any sufficient cause from attending when the petition was called on for hearing and, that being so, that the Court had no discretion to restore the petition to file for any other cause.

T. V. Vaidyanadha Ayyar for petitioner.

V. Ramesam for counter-petitioner.

JUDGMENT.—This application for setting aside the order dismissing Civil Revision Petition No. 123 of 1902 for default of prosecution is opposed by the respondent. The case was called on in due course on the 13th August 1902, but was dismissed for default as the petitioner's vakil represented that he had not been furnished with the necessary funds for purchasing printed papers and as the party did not appear in person. The respondent's vakil contends that the facts disclosed in the petitioner's affidavit, or otherwise ascertained on referenee to the record, do not establish that the petitioner or his vakil was prevented by any sufficient cause from attending when the petition was called on for hearing and, that being so, the Court has no discretion to restore the petition to file for any other cause. It is certainly difficult to hold upon the facts that the party or his vakil was prevented by a sufficient cause from appearing when the case was called on, on the 13th August; but I cannot accede to the contention that the Court has no power for just and sufficient cause to restore the petition to file

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even if it is not established that the party or his vakil was prevented by sufficient cause from attending. As I read section 103, Civil Procedure Code, which relates to original suits and section 558 which relates to appeals, the Court *is bound* in the former case to restore a suit to the file if the party was prevented by any sufficient cause from appearing, whatever may be the merits of the suit, and, in the latter case, the Court *may*, but it is not bound to, re-admit the appeal even if non-apperance was due to inevitable cause. I see no warrant, whatever, for importing by way of addition either into sections 103 and 108 or sections 558 and 560, Civil Procedure Code, negative words to the effect that the Court shall not set aside an order of dismissal or decree passed *ex parte*, if the party or his vakil was not prevented by sufficient cause from appearing [see Hardcastle's 'Construction of Statutes,' third edition, pages 262, 263]. No doubt statutory enactments, although expressed in affirmative language, may sometimes be construed as having a negative implied; but such implication must be a necessary and reasonable one (see pages 264, 265). There is nothing in any of the above sections of the code to imply that the application for restoration cannot be granted unless there was sufficient cause which prevented the appearance, though, if there was such a cause, it is made *obligatory* on the Courts in the case of original suits to set aside the order of dismissal or decree passed *ex parte*, as the case may be. Such a narrow construction of the sections would lead to most startling results and serious consequences, which certainly could not have been intended by the Legislature. A suit may be dismissed for default of appearance, because, in the opinion of the Judge, the vakalat authorizing the vakil to appear for the absent party is invalid or has been exhausted, or the vakil is not entitled to practise in his Court, or the person who appears as plaintiff or defendant in the case is not the real party but personates such party. There can be no appeal against such an order (*Gilkinson* v. *Subrahmania Ayyar*(1)), and a revision petition under section 622, Civil Procedure Code, can rarely, if ever, be of any avail, nor can a review be applied for to the successor of the Judge who passed the order except on the ground of the discovery of new and important matter or evidence (section 624, Civil Procedure Code); and, if an

(1) I.L.R., 22 Mad., 221.

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application for review be made to the Judge who passed the order but is rejected by him or his successor, there can be no appeal against the order so rejecting it. In such cases the applicant's remedy can only be, in my opinion, to apply, under section 103, Civil Procedure Code, for an order to set aside the dismissal. But, according to the contention of the respondent's vakil, he can have no such remedy, for the petitioner does not pretend that he did not appear, and therefore he does not profess to establish that there was a sufficient cause which prevented him or his vakil from appearing. His very grievance is that the appearance of his vakil ought to have been recognized by the Judge, the vakalat being, in law, a valid and subsisting one or that he himself appeared, and that the Judge was wrong in holding that the person who actually appeared before him was not the applicant, but some one who personated him. If, under the sections already referred to, an order dismissing a suit or appeal for default or a decree *ex parte* can be set aside only if it be established that the applicant was prevented by sufficient cause from appearing, it would follow that an application for restoration can be made only on alleging such a ground and on no other; but we find that the sections provide only generally that an application may be made for setting aside an order of dismissal for default of appearance or a decree passed *ex parte* against a defendant or respondent. I take this provision to mean that the application may be based upon any ground which would be a just and proper one for granting the application and not that the application can be based upon one ground only, viz., that the applicant was prevented by sufficient cause from appearing. In the instances already given and other similar instances which might be mentioned, the party aggrieved can only apply, under section 103, either to the Judge who passed the order or decree or to his successor, and, if his application is not granted, he has a right of appeal, under clauses 8, 9 and 27 of section 588, Civil Procedure Code.

The construction contended for on behalf of the respondent is not only not warranted by the grammatical interpretation of the sections but is also one which would unduly hamper the judicial discretion of Courts in restoring to file, for just and sufficient cause, cases which have been dismissed for default or disposed of *ex parte*. Besides the instances already referred to and similar ones, there may be cases in which, without any default or blame on the part

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of a suitor, the suit or appeal may have been dismissed for default of appearance of his vakil, next friend or guardian *ad litem*, as the case may be, and the non-appearance of such vakil, next friend or guardian may be due to their negligence or they may fail to prove that they were prevented by sufficient cause from appearing when the case was called on. It would be impossible to lay down a hard and fast rule that a party who, under the law, can engage as his pleader only a person who has been enrolled as a pleader by the Court or that an infant who can appear only by a next friend or a guardian *ad litem* appointed by the Court must necessarily suffer for the non-appearance of his pleader, next friend or guardian and seek his redress, if any, only against him. It may be that the party who has thus suffered is only able to obtain a decree for nominal damages or a fruitless decree for substantial and adequate damages against such pleader, next friend or guardian, and in the majority of cases it will be impracticable to establish before the Court in which he sues for damages, which may happen to be a Court of Small Causes, that he could ultimately have succeeded in the suit or appeal which was pending in the High Court or some other tribunal and which has been dismissed for default. And in a large class of suits in which the claim is not a mere pecuniary one, compensation by way of damages will be no remedy at all. The Courts have sufficient disciplinary jurisdiction over pleaders as such, as well as over next friends and guardians *ad litem* of infants, and ample power to subject parties to terms as to costs when relieving them on reasonable and proper grounds from the serious and in some cases irreparable consequences of refusing to restore to file cases which have been dismissed for default or in which decrees were passed *ex parte*. The distinction is that when appearance was prevented by a sufficient cause the Court has no discretion in the matter under the code and must restore the case to file whatever may *primâ facie* be the merits of the suit or the defence thereto; whereas in other cases when there may be other just and reasonable cause for restoring a case to file, the merits of the applicant's case will form a very important element in the exercise by the Court of its judicial discretion.

Applying these principles to the present case I should be disposed to hold that there was a reasonable excuse for the petitioner's delay in remitting the necessary funds to his vakil at Madras, which remittance in fact reached him two days after the dismissal of the

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petition, and to restore the revision petition to file if there were really any merits in the revision petition, or he would be subjected to any serious hardship if the application were refused. But it is far from apparent that upon the merits the decree passed against him is unjust or contrary to law. Moreover it is merely a decree for a sum of about Rs. 48; nor is it clear upon the face of the plaint that the suit is one which is excepted from the jurisdiction of a Court of Small Causes.

For the above reasons I dismiss the petition with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1903. February 2, 3.

GOPALA CHETTI (PLAINTIFF), APPELLANT,

v.

SUBBIER (DEFENDANT No. 2), RESPONDENT. *

Civil Procedure Code—Act XIV of 1882, *s.* 148—Ex parte *decree against two defendants—Application by one defendant only to set aside the decree—Defence peculiar to that defendant—Order of Court setting aside entire decree as against both—Validity.*

First defendant had executed a promissory note in plaintiff's favour. Plaintiff now sued first defendant on the note, as the maker, and he joined the first defendant's nephew as second defendant on the ground that the note was for a debt binding on the family, including second defendant. Neither defendant appeared and the District Munsif passed a decree *ex parte* against both. Later, the second defendant alone applied under section 108 of the Code of Civil Procedure that the *ex parte* decree might be set aside. The Munsif accordingly set it aside *in toto* as against both defendants. When appealing against the final decree, plaintiff took the objection that the order was contrary to law, and claimed that the decree should not have been set aside as against first defendant and asked to have it restored:

Held, that the decree should be restored as against first defendant; whatever doubt might exist in a case in which the decree sought to be set aside under section 108 proceeds on a ground common to the applicant and another defendant who has not applied under that section, the decree should not have been set aside *in toto* in a case like this where the defence of the second defendant was peculiar to him. *Mahomed Hamidula* v. *Tohurennissa Bibi*, (I.L.R., 25 Calc., 155), commented on.

* Second Appeal No. 1088 of 1901 presented against the decree of A. C. Tate, District Judge of Chingleput, in Appeal Suit No. 83 of 1900, presented against the decree of J. S. Gnaniyar Nadar, District Munsif of Trivellore, in Original Suit No. 641 of 1899.

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THE facts appear from the head-note and from the judgment.

P. S. Sivaswami Ayyar for appellant.

K. R. Krishnaswami Ayyangar for respondent.

JUDGMENT.—The appellant sued on a promissory note made by the first defendant alone and joined the undivided nephew of the first defendant as a party (second defendant) to the suit, on the ground that the promissory note was for a debt binding on the family including the second defendant.

Neither defendant appeared and the District Munsif, on the 25th August 1899, passed a decree *ex parte* against both the defendants, which, as properly construed, means that the first defendant, the maker of the note, is personally liable for the sum sued for, and that the plaintiff is entitled to recover the amount decreed also from the interest of the second defendant in the joint family property. This decree proceeds on the footing that the debt was incurred for a family purpose. The second defendant alone applied under section 108, Civil Procedure Code, alleging that he was not duly served with a summons, and praying that the decree passed against him *ex parte* might be set aside. The District Munsif set aside the decree *in toto*, that is, as against both the defendants. There being no appeal against such an order it is open to the appellant in appealing against the final decree in the case to object to such order as contrary to law and he accordingly contends that the decree passed *ex parte* should be restored as against the first defendant. In our opinion the contention is well founded under the circumstances of the case. There is no contention as to the making of the note and the consideration therefor. That being so, the contention of the second defendant that the debt was one not binding upon him, is a defence peculiar to him, and not one common to him and the first defendant. We are, therefore, clearly of opinion that the District Munsif was not warranted by law in setting aside the decree as against the first defendant, as the correctness of the decree does not depend on the character of the debt. If the decision in *Mahomed Hamidula* v. *Tohurennissa Bibi*(1) relied upon by the District Judge, really means that, if an application made by any one defendant under section 108 of the Civil Procedure Code be granted, the whole decree must be set aside in favour of all other defendants, whether *ex parte* or not and whether they applied

(1) I.L.R., 25 Calc., 155.

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under section 108 or not, we are with great respect unable to concur. But having regard to the decision of the same Bench in a subsequent case (*Monomohini Chowdhurani* v. *Nara Narayan Roy Choudhri*(1)), we are inclined to think that such is not the effect of that decision.

Whatever doubt may exist in a case in which the decree sought to be set aside under section 108 proceeds on a ground common to the applicant and another defendant, who has not applied under that section, we entertain no doubt in a case like the present in which the decree does not proceed on a ground common to both the defendants (*Bhura Mal* v. *Har Kishan Dos*(2)). The District Munsif, in his revised decree, held that the debt was not binding on the second defendant and passed a decree against him merely as the legal representative of the first defendant, the first defendant having died subsequent to the order setting aside the decree *ex parte*. As, in our opinion, the decree passed *ex parte* against the first defendant ought not to have been set aside, we reverse the decree of the lower Appellate Court and the revised decree of the District Munsif, dated 2nd February 1900, and restore his original decree, so far as it directs the first defendant to pay the amount decreed with interest and costs.

The effect of this will be that the decree against the first defendant is one which was passed during his life-time and it will have to be executed against his legal representative under section 234, Civil Procedure Code. In this view, the decision of this Court in *Ramanayya* v. *Rangappayya*(3) as to the effect of attachment before judgment in a case in which the defendant, being an undivided member of a Hindu family dies before judgment, has no application to the present case.

In executing the decree under section 234, the question as to whether by reason of the attachment pending suit the share of the deceased judgment-debtor should also be regarded as assets of the deceased in the hands of second defendant will have to be decided.

As the appellant has failed as against the second defendant, he must pay his costs throughout, but he will be entitled to recover his costs throughout from the estate of the first defendant.

(1) 4 Calc. W.N., 456. (2) I.L.R., 24 All., 383.
(3) I.L.R., 17 Mad., 144.

APPELLATE CRIMINAL.

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

ADAMS (ACCUSED), PETITIONER,

v.

EMPEROR (COUNTER-PETITIONER).*

1903. February 23. March 19.

Extradition Act—XXI of 1879, *ss.* 4 *and* 6—*Criminal Procedure Code, s.* 4—*Indian Penal Code, s.* 40—*Offence—Jurisdiction of Magistrate in Mysore to try and convict an European British subject for an act amounting to an offence under the Mysore law, but not an offence under the Indian Penal Code.*

An European British subject was charged and tried before, and convicted by, a First-class Magistrate and Justice of the Peace appointed, under the Extradition Act, 1879, in and for the territories of Mysore. The act for which he was so tried and convicted (namely being in possession of mining materials) constituted an offence under the Mysore Mines Regulation, but was not an offence under the Indian Penal Code. It was contended, in revision, in the Madras High Court that the conviction was wrong on the ground that a Justice of the Peace appointed under the Extradition Act has no authority to deal with an offence committed by an European British subject against a law of the Mysore State :

Held, that the Magistrate had power to try the accused, or to commit him for trial in the Madras High Court.

Per Sir ARNOLD WHITE, C.J.—Section 8 of the Act of 1879 extending to European British subjects in states in India in alliance with His Majesty the law relating to offences and to criminal procedure for the time being in force in British India ought not to be read so as to restrict the powers of the Governor-General which are declared by section 4 and which may be delegated to his officers under section 6. The word "offences" as used in section 6 of the Act of 1879 is not restricted to offences as defined by section 40 of the Indian Penal Code. Nor is it restricted to any definition of "offence" to be found in the Code of Criminal Procedure, although, as a matter of fact, the present definition of "offence" in the Code of Procedure [section 4 (o)], which is the same as that contained in the General Clauses Act, is sufficiently wide to include the wrongful act with which the accused in the present case was charged.

CHARGE of being in unlawful possession of mining materials, under the Mysore Mines Regulation (III of 1897). The second accused, who was an European British subject, was tried and found guilty by a Magistrate, whose position was that of a

* Criminal Revision Case No. 429 of 1902 against the conviction and sentence by R. B. Plumer, First-class Magistrate and Justice of the Peace in Mysore Kolar Gold Fields, in Criminal Case No. 198 of 1902–1903.

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First-class Magistrate and Justice of the Peace, and who had been appointed, under section 6 of the Foreign Jurisdiction and Extradition Act, 1879, in and for the territories of Mysore. The act for which the accused was charged and committed constituted an offence under the Mysore Regulation already referred to, but it did not amount to an offence under the Indian Penal Code The Magistrate imposed a small fine.

The accused preferred this criminal revision petition.

Mr. Barton for accused.—By Regulation I of 1886, section 1, practically the whole of the chapter relating to European British subjects has been excluded from application in Mysore. [He referred to *Government of Mysore* v. *Fuller*(1). If a Justice of the Peace in Mysore tries a case as Justice of the Peace, an appeal lies to the High Court. But a Justice of the Peace has no jurisdiction to try an European British subject, as a Justice of the Peace, and convict him under a special Act of a foreign country. One country cannot enforce the criminal law of another; and the Courts of British India cannot enforce the criminal laws of a Native State. [He referred to Story's 'Conflict of Laws,' sixth edition, chapter 16, pages 812 and 814.] The trial by Mr. Plumer (the Magistrate who convicted the accused) was, in effect, a trial by a British Indian Court, though the actual trial took place in Mysore. [He referred to Dicey's 'Conflict of Laws,' edition of 1897, page 220.] The Magistrate's jurisdiction was conferred by the Extradition Act (XXI of 1879). The preamble and section 6 (under which Justices are appointed) show that Magistrates can only administer the law of British India. Section 8 relates only to acts which are offences in British India, and section 11 shows that it was not contemplated that a foreign statute should be enforced. [He referred to the definitions of an offence in section 4 of the Criminal Procedure Code and section 40 of the Indian Penal Code, as explained by sections 41 and 42.] Section 188 of the Criminal Procedure Code really re-enacts sections 9 and 10 of the Extradition Act, which were repealed by section 10 of the Criminal Procedure Code of 1882. So, if section 188 is read in its place, namely, after section 8 of the Extradition Act, the word "offence" must mean an offence punishable under the law in force

(1) 5 Mysore Rep., 281; and Mayne's 'Crl. Law of India,' 260.

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in British India. The definition of stolen property in section 410, Indian Penal Code, expressly includes property found within or without British India; yet it was held *in Empress* v. *Moorga Chetty*(1) that the Bombay High Court had no jurisdiction to deal with the case as the Indian Penal Code was not in force in the place where the property was found. [He also cited *Queen-Empress* v. *Natwarai*(2) and *Queen-Empress* v. *Ganpatroo Rámchandra*(3).]

The Acting Public Prosecutor (Hon'ble Mr. *Sankara Nair*) in support of the conviction.—The rules of English law having been found unworkable, many exceptions have been made, which are set out in Wharton, paras. 15 and 811. [He also referred to Ilbert's 'Government of India,' page 108.] The rights of the Governor-General in Council were not created by the Extradition Act, but only regulated by it. See Ilbert, page 458. This jurisdiction is referred to in the Extradition Act as existing when the Act was passed. The jurisdiction which exists over British subjects in Mysore is set out in Mayne's 'Criminal Law,' page 259. If the Extradition Act is construed in the light of the fact that the Governor-General may delegate a jurisdiction which has all along been vested in him, section 6 will be found to have nothing to do with section 8. The jurisdiction is not created by section 8. And even if section 8 had not been enacted, the Governor-General could, under section 6, have delegated the powers of a First-class Magistrate—such as are defined in sections 446 and 447 of the Criminal Procedure Code. Section 8 enables Courts in British India to try European British subjects or native Indian subjects for offences under the Penal Code in Mysore. The result is that the Mysore authorities frame the offence, and the persons who offend are tried by the Governor-General in Council, or the Justice whom he appoints. Section 9 (now section 188 of the Criminal Procedure Code) provides the mode in which a British subject may be dealt with for committing offences out of British India and refers to all offences; then, section 4 of the Criminal Procedure Code defines an offence. That section 8 of the Extradition Act does not give the jurisdiction to the Justices is shown by the fact that that section also refers to all native Indian

(1) I.L.R., 5 Bom., 338. (2) I.L.R., 16 Bom., 178.
(3) I.L.R., 19 Bom., 105.

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subjects of His Majesty. Such subjects must in any case be governed by the Mysore laws. The real question is not the liability to conviction, but the machinery by which that liability is to be ascertained. [He also referred to articles 17 and 18 of the Instrument of Transfer of the Mysore Territories, dated March 1st, 1881, reproduced in Aitcheson's 'Treaties,' Volume VIII, third edition (1892). [These are sufficiently set out in the judgments.] He also referred to the decisions in *Rex* v. *Churchley*(1), *Rex* v. *Ryder*(2) and *Empress* v. *Moorga Chetty*(3) (where the act had been committed in Mauritius), and to *Queen-Empress* v. *Natwarai*(4) where the accused was a subject of a Native State to which the Extradition Act did not apply.] Appellate jurisdiction has been conferred on the High Court, by notification, in the case of European British subjects, being Christians, and the Statute of Geo. III, as well as the Charter Act, confer jurisdiction on the High Court.

Mr. *Barton* replied.

SIR ARNOLD WHITE, C.J.—The question raised in this case is whether a Justice of the Peace appointed under secton 6 of the Foreign Jurisdiction and Extradition Act, 1879, has power to try an European British subject for an offence against the provisions of the Mysore Mines Regulation, 1897. The Regulation in question is a legislative enactment of the Mysore State, and certain offences created by the Regulation are offences against the law of Mysore but not offences which come within any of the provisions of the Indian Penal Code.

Section 4 of the Act of 1879 empowers the Governor-General in Council to exercise any power or jurisdiction which he for the time being has within any country or place beyond the limits of British India and to delegate the same to any servant of the British Indian Government in such manner and to such extent as he may from time to time think fit. Section 6 empowers the Governor-General in Council to appoint any European British subject to be a Justice of the Peace in or for any such country or place. The section further provides that every such Justice of the Peace shall have, in proceedings against European British subjects, all the powers conferred by the Code of Criminal Procedure on

(1) Madras Sessions Case No. 13 of 1901 (unreported).
(2) Crl. App. No. 345 of 1901 (unreported).
(3) I.L.R., 5 Bom., 338. (4) I.L.R., 16 Bom., 178.

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Magistrates of the first class who are Justices of the Peace and European British subjects.

The question whether a Justice of the Peace appointed under the Act of 1879 has authority to deal with an offence committed by a European British subject against a law of the Mysore State cannot be determined with reference to the provisions of the Procedure Code. The question involves wider considerations. The first question is, has the Governor-General in Council power and jurisdiction to deal with such an offence? If the answer to this question is in the affirmative, the second question is, is there any legislative enactment which precludes the officer appointed under section 6 of the Act of 1879 from exercising the power and jurisdiction of the Governor-General in Council? As pointed out by Sir Courtney Ilbert in his book on the 'Government of India' (page 452), the Governor-General in Council has, in his executive capacity, extra-territorial powers far wider than those which may be exercised by the Indian Legislature. . . . .

With reference to section 6 of the Act of 1879, the learned writer observes: "The powers and jurisdiction referred to in this section are recognized and confirmed by, but are not derived from, the Indian Legislature. That Legislature gives them its support to the extent of its powers and could, to that extent, restrict as well as regulate their exercise. The support is useful as far as it goes, because the Indian Legislature has power to bind the British Indian Courts, and can regulate the mutual relations of British Indian and extra-territorial Courts and provide for their mutual co-operation. But the jurisdiction exists irrespectively of the support, and, in order to cut down and restrict the range of powers transcending the sphere of the Indian Legislature, much clearer words would appear to be required than are contained in the Act of 1879."

It is of course a well-settled principle of international law that a person in a country is amenable to the criminal laws of that country, whether native-born or a stranger. See Wheaton on 'International Law,' sections 84, 113. The principle is thus stated by Pollock, B., in *Queen* v. *Ganz*(1): "Whatever rights, civil or otherwise, a man may have which may be affected by his domicile, it is and must be perfectly clear by the law of all nations

(1) L.R., 9 Q.B.D., 93 at p. 100.

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that each person who is within the jurisdiction of the particular country in which he commits a crime is subject to that jurisdiction; otherwise the criminal law could not be administered according to any civilized method. That has been the law from very far back; it is recognized by the earliest writers upon law; it has been adopted again and again in treaties and dealings between this country and other countries, and is to be found stated in all the text-books on the subject, and in all cases in which the matter has been discussed."

Where a question arises as between the Courts of a protecting and a protected state the general rule may only be applicable subject to qualifications, and the operation of the general rule can, of course, in all cases be controlled by treaty or agreement.

In dealing generally with the question of the jurisdiction exercisable by the Court of a protecting state within the territories of a protected state, the learned author, already quoted, remarks that this jurisdiction "may extend to all or any of the subjects, either of the protecting state or of the protected state, and, subject to certain limitations, to persons not belonging to either of these categories. The extent to which, and the cases in which, the jurisdiction is exercised over particular classes of persons are to be determined by agreement between the state which exercises the jurisdiction and the state within whose territories the jurisdiction is exercised, and, in the absence of express agreement, are to be inferred from usage and from the circumstances of the case."

As regards Mysore, the agreement between the state which exercises the jurisdiction and the state within whose territories the jurisdiction is exercised is to be found in the Instrument, dated March 1st, 1881, and known as the Instrument of Transfer, which defines the conditions subject to which the British Government entrusted to the Maharajah the government of the territories of Mysore. Article 17 of the Instrument of Transfer provides that plenary criminal jurisdiction over European British subjects in Mysore territories shall continue to be vested in the Governor-General in Council and the Maharajah of Mysore shall exercise only such jurisdiction in respect to European British subjects as may from time to time be delegated to him by the Governor-General in Council. It is clear that the Mysore Courts have no criminal jurisdiction over European British subjects except such as may be delegated to them by the Governor-General, and this view

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has been adopted by the Chief Court of Mysore (*Government of Mysore* v. *Fuller*(1)). The Magistrates and Police of Mysore have authority to arrest European British offenders, but the Mysore Courts have no jurisdiction to inquire into or try a charge against such offenders. See notification, April 7th, 1886, set out in Mayne's 'Criminal Law of India,' page 260.

It would seem that the words "plenary criminal jurisdiction" —as used in article 17—mean jurisdiction to administer the criminal law with reference to British subjects. (This appears to be the sense in which the word "jurisdiction" is used later on in the same article.) The question of legislation is dealt with in a separate article, article 19. But, assuming the word "jurisdiction" in article 19 includes jurisdiction to legislate in criminal matters as well as jurisdiction to administer the criminal law, so far as European British subjects are concerned, it is to be observed that the words of the article are "plenary criminal jurisdiction", not "exclusive criminal jurisdiction". If the words are capable of a construction which would not derogate from the ordinary principle that a man in a country is amenable to the laws of that country, I think that construction should be adopted. No doubt the effect of the article is to reserve to the Governor-General the right to administer the criminal law so far as European British subjects are concerned, but having regard to the fact that the legislative enactments of the Mysore State do not become operative till they have received the assent of the Governor-General, I do not think its effect is to place European British subjects in Mysore outside the scope of the legislative powers of the Maharajah in regard to criminal matters. Further, I see no good reason for construing the words "plenary criminal jurisdiction" so as to restrict their application to cases of offences which are offences against the law of British India for the time being. It seems to me that "plenary criminal jurisdiction" includes jurisdiction in the case of offences committed by European British subjects against the law of the State of Mysore. In the case of such offences it is open to the Governor-General in Council, in exercise of the power reserved by article 17 of the Instrument of Transfer, to delegate the jurisdiction to the Maharajah of Mysore, or, in exercise of the powers given by

(1) 5 Mysore Reports, 281, cited in Mayne's 'Criminal Law of India,' 260.

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section 6 of the Act of 1879, to delegate the jurisdiction to a duly appointed officer.

The next question is—is there any legislative enactment which limits the jurisdiction of a Justice of the Peace in the case of proceedings against British subjects to cases where the offence charged is an offence against the law of British India for the time being? I think not. Section 8 of the Act of 1879 extends to European British subjects in states in India in alliance with His Majesty the law relating to offences and to criminal procedure for the time being in force in British India. This section, as distinguished from section 4, is enactment and not declaration. It is an entirely independent provision and ought not, in my opinion, to be read so as to restrict the powers of the Governor-General which are declared by section 4 and which may be delegated to his officers under section 6. It is by virtue of section 8 that an European British subject can be tried in Mysore for an offence against the Indian Penal Code. The law which is extended to European British subjects in Mysore by virtue of section 8 is not so extended to the exclusion of all other law. This is clearly not the case so far as Native Indian subjects of His Majesty, referred to in paragraph (*b*) of the section, are concerned (for it cannot be said that the effect of the section is to render Native Indian subjects not amenable to the law of Mysore), and why should a different construction be adopted in the case of European British subjects referred to in paragraph (*a*)? I do not think it can have been intended, by a side-wind, to bring about a state of things in which an European British subject can be tried in Mysore for an offence against the Indian Penal Code and for no other offence. The operation of section 11 of the Act of 1879 is expressly limited to offences against the law of a "foreign" state when the act done would, if done in British India, have been an offence against the Indian Penal Code. There is no such limitation in section 6. I am of opinion that the word "offences" as used in section 6 of the Act of 1879 is not restricted to offences as defined by section 40 of the Indian Penal Code. I am also of opinion that it is not restricted to any definition of "offence" to be found in the Code of Criminal Procedure, although, as a matter of fact, the present definition of "offence" in the Code of Procedure [see section 4 (*o*)] which is the same as that contained in the General Clauses Act, is

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sufficiently wide to include the wrongful act with which the accused in the present case were charged. Although the point does not arise in the present case, I am of opinion that where a person is charged with an offence against the Mysore Mines Regulation, 1897, a Justice of the Peace, appointed under the Act of 1879, has jurisdiction to commit for trial to this Court under the powers conferred by section 6 of the Act and the notification of the Government of India, dated July 21st, 1881.

I think the revision petition should be dismissed.

BENSON, J.—The accused has been found guilty of the unlawful possession in Mysore of mining materials, an offence punishable under the Mysore Mines Regulation (III of 1897), and has been sentenced to pay a small fine by Mr. Plumer who is a First-class Magistrate and a Justice of the Peace appointed under section 6 of the Foreign Jurisdiction and Extradition Act, 1879, in and for the territories of Mysore.

The accused is an European British subject and the act for which he has been punished is not an offence against the laws of British India.

The questions for decision are whether an European British subject is punishable for an act committed in Mysore which is not an offence against the laws of British India though it is an offence against the laws of Mysore, and whether, if the act is punishable, Mr. Plumer has jurisdiction to deal with it.

I answered both questions in the affirmative in the case of *Rex* v. *Churchley*(1) in these words:—"By the Act of Rendition in 1881, paragraph 17, it was provided that 'plenary criminal jurisdiction' over European British subjects in Mysore should continue to vest in the Governor-General in Council. By section 4 of the Foreign Jurisdiction and Extradition Act (XXI of 1879), the Governor-General in Council may exercise any power or jurisdiction which he has for the time being within any country or place beyond the limits of British India or may delegate the same to any servant of the British Indian Government. Under section 6 he has delegated to Justices of the Peace appointed by him certain of those powers; that is to say, he has directed that, in proceedings against European British subjects, the Justice of the Peace shall have, within the area for which he is appointed, all the powers conferred

(1) Mad. Sessions Case No. 13 of 1901 (unreported).

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by the Criminal Procedure Code on Magistrates of the first class who are Justices of the Peace and European British subjects. Such Magistrates have power under the Criminal Procedure Code to try, or commit for trial, European British subjects who, within their jurisdiction, commit any offence. The word 'offence' in the Criminal Procedure Code means any act or omission made punishable by any law for the time being in force. The law may be the Penal Code, or it may be any special or local law, *i.e.*, a law limited to a particular place only. The act now charged against the accused is an offence under the Mysore law (approved by the Governor-General in Council), and has been committed within the jurisdiction of the Committing Magistrate. The fact that it is not an offence elsewhere makes no difference. If an act is an offence within the local jurisdiction of a Magistrate he may try an offender for it, even though it be no offence in any other locality. The misapprehension lies in supposing that an act cannot be an offence in one locality unless it is an offence elsewhere also. The Justice of the Peace with jurisdiction at the Kolar Gold Fields has jurisdiction to try or enquire into offences committed there by an European British subject against any law in force there, and, if he thinks the case is a proper one to commit to a Court of Session for trial, he is required to commit it to this Court (Notification of the Government of India, Foreign Department, Judicial, No. 159, I.J., 21st July 1881)."

A Bench of this Court, however, in Criminal Appeal No. 345 of 1901 (unreported) having taken a different view, it becomes necessary to consider more fully what the law is.

The first question, viz., whether an European British subject is punishable for an act done in Mysore when such act is not an offence against the laws of British India though it is an offence against the laws of Mysore, is one of some difficulty, and I can find no reported case of this, or of any other, High Court which deals with the question. Sir Courtney Ilbert in his 'Government of India' and Mr. Lee Warner in his 'Protected Princes of India' have dealt at great length with the question of British jurisdiction and the position of European British subjects in Native states, but neither of them throws any light on the question how far an European British subject is answerable for an act which, though not an offence against the law of British India, is punishable by the law of the Native state. I cannot find that the former touches

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on the matter at all. The latter merely observes that it "leaves room for discussion", and adds "two propositions may with confidence be laid down. The British subject is not deprived of his rights of protection by residence out of the British possessions, and he may invoke the assistance of the Political officer to secure the privileges of just and civilized treatment which are his birthright. The protected prince on his side cannot reasonably object to a provision embodied in the Turkish Capitulations of 1675 and confirmed by treaty in 1809, whereby if any Englishman happens to commit a crime, 'the Governors in our sacred dominions shall not proceed to the cause until the Ambassador or Consul shall be present.' The judicial systems of the various states differ, and upon the case being so reported to the British Agent, the paramount power would issue such special directions as might be required" (page 354). In the absence, then, of any specific authority, it is necessary to decide the question by reference to the legislative powers of the Mysore Government, and the immunities enjoyed by European British subjects in regard to criminal jurisdiction in Mysore.

The general principal of international law is that every person who is found within a foreign state is subject to, and is punishable by, its law. The English lawyers base this rule on the principle that a person who enters a state becomes entitled to the protection of its law, and is, therefore, bound to render it obedience. It is, perhaps sufficient to say, in the words of Baron Pollock, "Otherwise the criminal law could not be administered according to any civilized method" (*Queen.* v. *Ganz*(1)). The state to which the accused belongs can only demand that he be fairly tried under the Municipal law of the *forum*, provided such law is in conformity with those sanctions of justice which all civilized nations hold in common, and does not contravene some special right acquired by treaty by the country whose aid is invoked [Taylor's 'International Public Law,' 1901, page 242].

Such is, very briefly, the ordinary law as between two states which are independent of each other, but the relationship is liable to be modified by treaty, that is, by agreement between the states,

With regard to Mysore, we know that the government of that country was taken over in 1831 by the British Indian Government

(1) L.R., 9 Q.B.D., 93 at p. 100.

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by an Act of State, and, in accordance with the terms of a previous treaty, was administered by the Indian Government until 1881 when its administration was by an Act of State again transferred to a Native ruler. The "conditions" under which the government of the country was transferred to the Maharajah are recorded in a formal 'Instrument of Transfer,' dated 1st March 1881, and signed by the Viceroy and Governor-General. It is, I take it, by reference primarily to the terms of this document that we must determine what are the legislative powers of the Government of Mysore, and how far, and by what machinery, penal laws passed by that Government can affect European British subjects.

"The jurisdiction exercisable by the Courts of a protecting state within the territories of a protected state may extend to all or any of the subjects, either of the protecting state or of the protected state, and, subject to certain limitations, to persons not belonging to either of these categories. The extent to which, and the circumstances in which, the jurisdiction is exercised over particular classes of persons are to be determined by agreement between the state which exercises the jurisdiction and the state within whose territories the jurisdiction is exercised, and in the absence of express agreement, are to be inferred from usage or from the circumstances of the case." (Ilbert's 'Government of India,' page 459, and Sir H. S. Maine's Minute No. 22—1—37 there quoted.)

The Instrument of Transfer will be found printed *in extenso* at page 450 of Rice's 'Mysore,' Volume I, and at page 481 of Volume 8 of Aitchison's 'Treaties,' third edition. Paragraph 17 runs as follows:—

"Plenary criminal jurisdiction over European British subjects in the said territories shall continue to be vested in the Governor-General in Council, and the Maharajah of Mysore shall exercise only such jurisdiction in respect to European British subjects as may from time to time be delegated to him by the Governor-General in Council."

One contention on behalf of the accussd is that the words "plenary criminal jurisdiction" include the exclusive power to *legislate* in criminal matters; but I do not think that this is so. I do not think that the article has any reference to legislation. *That* is dealt with by article 19, which runs:—"All laws in force and rules having the force of law in the said territories when the Maharajah Chamarajendra Wodiar Bahadur is placed in possession

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thereof, as shown in the schedule hereto annexed, shall be maintained and efficiently administered, and except with the previous consent of the Governor-General in Council, the Maharajah of Mysore shall not repeal or modify such laws, or pass any laws or rules inconsistent therewith".

This article assumes that the Maharajah shall have power to legislate, subject to the restriction specified in the article. These restrictions have no reference to European British subjects. The only article which refers to European British subjects is article 17, and in that article I think that "jurisdiction" has its ordinary meaning, viz., authority to apply the law, not to make the law,—(*that* is legislation),—but to enquire into, and try, alleged offences. That is the sense in which the word is ordinarily used, *e.g.*, "The sovereign of a country, acting through the Courts thereof, has jurisdiction over (*i.e.*, has a right to adjudicate upon) any matter with regard to which", etc. (Dicey's 'Conflict of Laws,' page 1). That is also the sense in which the Government of India has construed the word as used in Mysore Regulation I of 1886, which introduced the Indian Criminal Procedure Code into Mysore, but provided that nothing therein should "be deemed to confer any jurisdiction in proceedings against European British subjects." The Governor-General in Council by notification No. 20, dated 7th April 1886, directed that "the expression 'jurisdiction' in section 1 of the Regulation shall be held to mean jurisdiction to enquire into or try a charge" (see also the recent Privy Council case *Muhammad Yusuf-ud-Din* v. *Queen-Empress*(1)). It would, no doubt, be open to us to hold that in an instrument defining the powers of a state the words "criminal jurisdiction" mean "power to legislate as well as to adjudicate upon criminal matters," and this view receives considerable support from the fact that in article 9 of the same instrument the word "jurisdiction" is used in this wider sense. In that article the Maharajah agreed to grant such lands as might be required for cantonments and "to renounce all jurisdiction within the lands so granted." In pursuance of that agreement the Maharajah a few days later signed a grant to the British Government of the lands forming the Civil and Military Station of Bangalore and "renounced the exercise of all jurisdiction in the lands so assigned." Since that time the

(1) I.L.R., 25 Calc., 20.

Maharajah has retained the bare sovereignty of those lands, and what may, perhaps, be called the reversionary interest in the jurisdiction assigned, but all the actual powers of government, including taxation and legislation, have, in fact, been exercised by the British Government. It is to be observed that the word "jurisdiction" in this article is used with reference to a local area; and the requirements of the matter dealt with, as well as the usage of the two contracting parties since 1881, show that it includes power to legislate as well as to administer the law. But these arguments do not equally apply to the word "jurisdiction" in article 17. There the word is applied to a class of persons, not to a local area, and the object in view, viz., the protection of those persons against oppression by improper criminal laws, could be attained equally well by vesting the administration of the criminal law, *qua* such persons, in the Governor-General in Council, as by vesting in him the exclusive right to legislate for such persons in criminal matters, especially as no law could be passed by the Maharajah without his consent under article 19.

It would seem, then, that we are not bound to construe "jurisdiction" in article 17 in the same way as in article 19, and if we look at the whole scope and arrangement of the Instrument of Transfer, and at the action of the contracting parties since 1881, there appears to be good reason for holding that they intended "jurisdiction" in article 17 to be used in the narrower sense of the right to administer the law, rather than the right to make it. In the Instrument of Transfer a variety of miscellaneous matters are dealt with in the first fifteen articles of the Instrument. In the 16th, the Maharajah of Mysore is required to arrest and hand over to the British Government any person in his territory who is accused of having committed an offence in British India. Then comes the 17th article which says that plenary criminal jurisdiction over European British subjects shall continue to be vested in the Governor-General in Council and the Maharajah shall exercise only such jurisdiction in respect of European British subjects as may from time to time be delegated to him by the Governor-General in Council. It is difficult to suppose that the delegation of jurisdiction here contemplated refers to legislative power, though the words apply naturally enough to the right to adjudicate upon charges made against European British subjects. After the 17th article comes the 18th article which deals with a wholly alien subject,

viz., the manufacture of salt and opium, and then the 19th article deals with the laws in force and the legislative powers of the Maharajah already referred to. Thus it will be seen that the only provisions which concern jurisdiction over European British subjects do not occur in the article which deals with the legislative powers of the Maharajah, nor even in an article in juxtaposition thereto, but in an article separated therefrom by independent matter, and immediately following an article dealing with the kindred right of the British Government to adjudicate upon offences committed in British India by persons found in Mysore. As I read the instrument article 16 secures to the British Government the right to obtain the surrender of, and to adjudicate upon, all persons in Mysore, who are accused of having committed offences in British India; article 17 secures to the British Government the right to adjudicate upon European British subjects who are accused of having committed an offence even in Mysore; and article 19 alone regulates the legislative powers of the Maharajah. Admittedly there is nothing in article 19 to specially restrict those powers in regard to European British subjects.

There is also good reason to think that the high contracting parties have understood article 17 in the restricted sense I have indicated. The gold mining industry is essentially an European industry, and the Mines Regulation was passed for the purpose mainly of regulating work on the mines, and for ensuring the responsibility of managers and superior officers in regard to precaution against accidents, reporting them, and so forth. Almost all the managers and superior officers are European British subjects, and it was mainly to bring them under control that the Regulation was passed in 1897. It was assented to by the Governor-General in Council, but though nearly five years have elapsed since then, the Governor-General in Council has taken no step by notification, or otherwise, so far as I can ascertain, to specifically extend its operation to European British subjects, but it has been treated by all parties as a law applicable to them. The strong inference is that both the Government of Mysore and the Governor-General in Council regarded the regulation, when passed by the Mysore Government with the assent of the Governor-General in Council, as applicable, *proprio vigore*, to European British subjects, but this could only be so if article 17 was understood as not limiting

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the legislative powers of the Maharajah. A similar argument may be drawn from other regulations of the Mysore Government, such as those relating to Forests, Excise and Municipalities, the penal clauses of which would naturally be applicable to European British subjects. We have not been referred to any case in which the penal sections of such regulations have been extended to European British subjects by the Government of India. The inference is that they apply *proprio vigore*. It would appear, therefore, that there is nothing in the Instrument of Transfer to render the Mines Regulation inoperative in the case of European British subjects.

It is, however, argued that section 8 of the Foreign Jurisdiction and Extradition Act, XXI of 1879, excludes the application of any penal laws save those of British India to European British subjects in Native states. There is, in my judgment, no warrant for this contention. Section 8 enacts that the law relating to offences and to criminal procedure for the time being in force in British India, shall . . . extend (*a*) to all European British subjects in the dominions of princes and states in India in alliance with Her Majesty, and (*b*) to all Native Indian subjects of Her Majesty in any place beyond the limits of British India. It will be observed that, so far as this section is concerned, natives of British India anywhere outside British India, and European British subjects in Native states in India, are on exactly the same footing. The law of offences in force in British India extends to both; but that does not prevent other laws also being applicable. The section does not exclude other laws. It would, for instance, be absurd to suppose that this section could be pleaded as a protection by a native of British India who was charged in France with an offence against the penal laws of France. For the same reason this section cannot be pleaded by an European British subject if he is charged in a Native state by a Court competent to try him for an offence committed against the law of the state. It is admitted that section 8 has never been held to prevent the Mysore Magistrates from trying natives of British India for offences committed in Mysore against the laws in force in Mysore. It is also admitted that the Mysore Magistrates have no jurisdiction to try European British subjects for any offence, whether against the laws of British India or of Mysore. This is in consequence of the restriction imposed by article 17 of the

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Instrument of Transfer (*Government of Mysore* v. *Fuller*(1)). The gold mining industry, as already observed, is essentially an European industry and there are many other Mysore Regulations also to which Europeans would naturally be amenable, such, for instance, as the Excise and Municipal Regulations. It would be strange, indeed, if there was no *forum* for the trial of European British subjects for offences against these various laws. The Mysore Magistrates have no jurisdiction; and the next question is whether Mr. Plumer, who is a Justice of the Peace appointed by the Governor-General in Council, has jurisdiction.

By the common law of England the Courts in England have no jurisdiction over a British subject in respect of offences committed by him in other countries. The reasons appear to have been because such an act could not be said to be done "against the peace of the King's realm, his crown and dignity", and also because the Courts could only try an offence by means of a Jury *de vicineto*, that is, drawn from the locality in which the offence was committed. But by statutes passed from time to time the English Courts were empowered to try certain specified offences committed abroad by British subjects, and when commercial factories and settlements came to be established, from the 16th century onwards, in partly civilized countries, the right of the British Government to exercise civil and criminal jurisdiction by means of local Courts within the limits of such factories and settlements, came to be gradually recognized by treaty, usage, or sufferance, and these tribunals have received parliamentary sanction by a series of Foreign Jurisdiction Acts, the latest of which is that of 1890 (53 and 54 Vict., c. 37). In like manner the Indian Courts, which are creatures of statute, were at first essentially Courts of local jurisdiction, but gradually obtained a considerable extra-territorial jurisdiction, the extent and limits of which are fully examined by Sir Courtney Ilbert in his 'Government of India,' page 442, *et seq*. But the Governor-General in Council has, in his executive capacity, extra-territorial powers far wider than those which may be exercised by the Indian Legislature. In the words of Sir Courtney Ilbert, "By successive Charters and Acts extensive powers of sovereignty have been delegated by the English Crown, first, to the East India Company, and afterwards

(1) 5 Mysore Reports, 281, cited in Mayne's 'Crl. Law of India,' 260.

to the Governor-General in Council as its successor. The Governor-General in Council is the representative in India of the British Crown, and as such can exercise, under delegated authority, the powers incidental to sovereignty with reference both to British India and to neighbouring territories, subject to the restrictions imposed by parliamentary legislation and to the control exercised by the Crown through the Secretary of State for India. Thus he can make treaties and conventions with the rulers not only of Native States within the boundaries of what is usually treated as India, but also of adjoining states which are commonly treated as extra-Indian, such as Afghanistan and Nepaul, and can acquire and exercise within the territories of such states powers of legislation and jurisdiction similar to those which are exercised by the Crown in foreign countries in accordance with the Foreign Jurisdiction Acts and the orders in Council under them, and extending to persons who are not subjects of the Crown. The existence of these powers is declared, and their exercise is to some extent regulated, by the Foreign Jurisdiction and Extradition Act, 1879" (' Government of India,' page 452).

This Act is an Act of the Governor-General's Legislative Council, which is expressly empowered by the Government of India Act, 1865 (28 and 29 Vict., c. 17) to make laws and regulations for all British subjects within the dominions of princes and states in alliance with His Majesty. Thus the powers conferred by this Act in regard to European British subjects have for] their basis the authority of the Governor-General in Council, *i.e.*, the British Indian Government, acting through its Legislature, and also of the British Crown acting through Parliament, which has delegated its authority in this matter to the Indian Legislature.

The preamble of the Act recites that "by treaty, capitulation, agreement, grant, usage, sufferance and other lawful means, the Governor-General of India in Council has power and jurisdiction within divers places beyond the limits of British India." We have seen that by terms of article 17 of the Instrument of Transfer it was agreed that "plenary criminal jurisdiction" over European British subjects in Mysore should continue to be vested in the Governor-General in Council. By section 4 of the Act of 1879 the Governor-General in Council may exercise any power or jurisdiction which he, for the time being, has within any country or place beyond the limits of British India, and may delegate

the same to any servant of the British Indian Government, in such manner, and to such extent, as the Governor-General in Council from time to time thinks fit. This authority has recently been confirmed by an order in Council known as "The Indian (Foreign Jurisdiction) Order in Council, 1902," which directs that the Governor-General in Council may, on His Majesty's behalf, exercise any power or jurisdiction which His Majesty or the Governor-General of India in Council, for the time being, has within the limits specified in the order, and may delegate the same, as already stated, and the order confirms all existing appointments and delegations (*Gazette of India*, 13th September 1902, p. 667).

Under section 6 of the Act of 1879, the Governor-General in Council has appointed Mr. Plumer to be a Justice of the Peace, and by virtue of section 6 Mr. Plumer is thereupon invested in proceedings against European British subjects with "all the powers conferred by the Code of Criminal Procedure on Magistrates of the first class who are Justices of the Peace, and European British subjects." Such Magistrates have power, under the Criminal Procedure Code, to try or commit for trial, European British subjects who within their jurisdiction commit any offence. The word "offence" in the Criminal Procedure Code means any act or omission made punishable by any law for the time being in force. The law may be the Penal Code, or it may be any other law. All that is necessary is that it should be a law in force in the locality where the Magistrate has jurisdiction. We have seen that the Mines Regulation is in force in Mysore, *i.e.*, in the locality where Mr. Plumer has criminal jurisdiction. The fact that it is not in force in British India makes no difference as regards any one who offends against its provisions in the locality where it is in force.

It is argued that the British Government would not execute foreign law in a foreign state, and that, if it did, it might be called upon to execute an unreasonable law, such as that which, in some states, has, in the past, made cow-killing a capital offence. In regard to this, it seems enough to say that no such law could be passed in Mysore without the approval of the Governor-General in Council and subject to such exemptions as he might impose. If in any other state a British Magistrate were called on to execute an unreasonable law not sanctioned by his Government, he would, no doubt, seek the instructions of his Government, and be guided

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by them. In the State of Mysore, at all events, the objection seems to be of no practical importance.

The whole argument and conclusion may be briefly stated as follows:—

The accused has offended against a law passed by the Ruler of Mysore in the exercise of his legislative powers as sovereign, acknowledged by the British Government in the Instrument of Transfer. The accused would, therefore, by the laws of nations, be ordinarily punishable by the Ruler of Mysore, or by the Magistrate to whom the Ruler might delegate his authority. But the accused is an European British subject, and by the Instrument of Transfer, criminal jurisdiction over such subjects is reserved to the Governor-General in Council. The validity of such a reservation, and the power to delegate its exercise, are acknowledged and confirmed both by the Indian Legislature, in the Foreign Jurisdiction Act, 1879, and by the British Legislature in the Foreign Jurisdiction Act, 1890, and the Indian Order in Council, 1902, made thereunder. The Governor-General in Council, acting under section 6 of the Act of 1879, has appointed Mr. Plumer to be a Justice of the Peace in and for the territories of Mysore, and that section enacts that thereupon he is invested in proceedings against European British subjects with all the powers conferred by the Code of Criminal Procedure on Magistrates of the first class who are Justices of the Peace, that is, among other things, with powers to try and commit for trial any European British subject who commits any offence, that is, does any act punishable by any law in force within his local jurisdiction. He, therefore, has power to try (or to commit for trial) the accused in this case who is charged with having offended against the Mysore Mines Regulation. Mr. Plumer's jurisdiction is derived from the Governor-General in Council, who appointed him to be a Justice of the Peace, and who, acting through his Legislative Council, declared in section 6 of the Act the powers to be exercised by Mr. Plumer as a Justice of the Peace, and thereby delegated to him the powers specified in that section.

The Governor-General in Council himself derived jurisdiction from the Act of State whereby the Government of India, in pursuance of a previous treaty, assumed the Government of Mysore in 1831, and from the Ruler of Mysore by agreement with him in 1831 and in 1881, and that jurisdiction, and the power to delegate it, are acknowledged and confirmed both by the Indian Legislature in the Act of 1879, and by the order of His Majesty in Council issued under the authority of the British Legislature in the Act of 1890.

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For these reasons, I am of opinion that Mr. Plumer had jurisdiction to convict the accused in the case before us. If he had jurisdiction there is no ground for revision.

DAVIES, J.—I am not prepared to differ from the conclusion arrived at by my two learned colleagues.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

SUBRAHMANYAM (PLAINTIFF), APPELLANT,

v.

VENKAMMA AND OTHERS (DEFENDANTS), RESPONDENTS.*

1903. February 11, 12, 18.

Hindu Law—Adoption by widow—Consent of sapinda—Exercise of discretion—Effect of representation by widow that her husband had given authority when none had in fact been given—Effect of asking consent of one of two sapindas of equal degree.

Where a widow obtains the assent of a sapinda to an adoption by representing that her late husband had authorized it when in fact he had not, such assent is inefficacious in law. The assent of a sapinda to an adoption to be made by the widow of a deceased kinsman should be given by him in the exercise of his discretion as to whether the adoption ought or ought not to be made by a widow who has not received her husband's authority to make the adoption.

A widow whose late husband had died without giving her authority to adopt a son, applied for such authority to one of two sapindas of equal degree, who were divided as between themselves and who were both divided from the deceased. This sapinda (who was the senior) gave his assent to the adoption. The other was not asked. On a suit being brought for a declaration that the adoption was invalid, it was argued that though the assent of the other sapinda had not been asked for at or about the time of the adoption, it must be taken that his assent had been applied for and refused, inasmuch as the circumstances and the attitude he had assumed showed that he would have refused to give it:

* Appeal No. 114 of 1901 presented against the decree of W. C. Holmes, District Judge of Kistna, in Original Suit No. 12 of 1900.

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Held, that the adoption was invalid. If it was the widow's duty to seek the assent of both sapindas, she could not be regarded as having discharged her duty, because, in her opinion, such an application would have been made in vain. The object of enjoining a widow to seek and act under the guidance of her husband's sapindas would be defeated if she should omit to give an opportunity to the sapindas concerned to advise her against making an adoption or against adopting a particular boy. If such an assent had been applied for and had been refused, and the adoption had then been made on the assent of one sapinda, the Court would have been in a position to decide whether consent had been withheld properly or improperly and capriciously. But it was clear that in this case the widow had been determined to ignore the other sapinda, and not to care for his advice or even to give him an opportunity to advise her.

There is nothing improper in a sapinda proposing to give his assent to a widow adopting his own son, if such son be the nearest sapinda, and refusing to give his assent to her adopting a stranger or a distant sapinda, if there be no reasonable objection to the adoption of his own son.

In the case of an undivided family, it may be that the assent of the senior sapinda, having the status of managing member, will be equivalent to the assent of the family and will be sufficient. But this consideration has no application to cases where the assent has to be sought from divided kinsmen, especially when they are divided as between themselves.

SUIT for a declaration that an adoption by first defendant of second defendant was invalid. Plaintiff and third defendant were divided brothers, and the late Ramayya was their father's cousin. Ramayya had died issueless some twenty years prior to the present suit, leaving his widow, first defendant, and no undivided member of his family him surviving. Plaintiff alleged that first defendant had not been authorized by her late husband or by any of the gnatis to make any adoption, but that she was setting up an alleged adoption of the second defendant, the effect of which would be to interfere with plaintiff's right to inherit property. He prayed for a declaration that the so-called adoption was invalid and would not affect the heirs of the late Ramayya. The first and second defendants pleaded that the late Ramayya had, when he was ill, some time previous to his death, given first defendant authority to adopt a boy from the gnatis; that the widow had obtained the further permission of third defendant (who, as plaintiff's elder brother, was the nearest gnati of the deceased), and other gnatis, and had accordingly adopted the second defendant. They contended that the adoption was valid; and their statement was supported by third defendant, plaintiff's elder brother. A deed of authority given by third defendant, filed as exhibit III, was in the following terms: "Deed authorizing adoption executed on the 19th April 1900 in

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favour of Jonnalagadda Venkamma, wife of the late Ramayya, Brahman . . . . Your husband late Ramayya is the grandson of my divided junior paternal grandfather. He died having no male or female issue. Both during his lifetime as well as at the time of his death, he felt sorry for his having had no issue and had expressed his opinion by telling you and myself and other gnatis that a boy should be adopted for him and the family be perpetuated. In pursuance of that authority you have also sought authority from me, a *Sannihitha Gnathi* for adopting a boy to your said husband. So I also agree out of my free will to your adopting a suitable boy as foster-son to your husband from the *Gnathis* or *Sagothras*, accordingly, when necessary, for achievement of the object of yourself as well as your husband, and you are hereby authorized (to do accordingly). This deed authorizing adoption is executed and given with consent. (Signed) Narasimham [third defendant]."

The District Judge believed the evidence that a form of adoption had been gone through on the day following the execution of this deed. He found that the defence had not proved that the widow had received authority from her late husband, but he held that the authority given by the third defendant was an independent one; that it was *bonâ fide;* that plaintiff and third defendant were the two nearest gnatis to the deceased Ramayya, and that it would have been useless for the widow to seek authority from plaintiff, who probably wanted one of his own sons to be adopted and would have refused to give authority. The evidence of the first defendant showed that she had not applied to plaintiff for his consent; the Judge considered that in the circumstances the authority from third defendant was sufficient to enable the widow to adopt. He upheld the adoption and dismissed the suit with costs.

Plaintiff preferred this appeal.

T. V. Seshagiri Ayyar for appellant.

V. Krishnaswami Ayyar and *K. Subrahmania Sastri* for first and second respondents.

JUDGMENT.—This is a suit to obtain a declaration that the adoption of the second defendant by the first defendant—the widow of one Ramayya—is invalid on the grounds that the first defendant had no authority from her husband to make the adoption and that the alleged assent of the third defendant alone to the adoption is invalid and insufficient in law. The plaintiff and the

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third defendant are divided brothers, being the nearest existing cousins of the deceased Ramayya, who died issueless about 20 years ago, leaving him surviving no undivided member of his family. The second defendant, who is the son of a remote *gnati* of the deceased, was, shortly before the institution of this suit, adopted by the first defendant, who purported to adopt him in pursuance of her husband's oral authority and of the assent of the third defendant and some other *gnatis*. The District Judge disbelieved the evidence as to the oral authority given by the husband, but upheld the adoption on the grounds that, according to the proper construction of the document (exhibit III) executed by the third defendant signifying his assent to the adoption, his consent was one given independently of the alleged authority of the husband, that such assent was not proved to have been given from corrupt motives and that the assent of the third defendant alone was sufficient in law inasmuch as "it would have been useless for the widow to have sought also the assent of the plaintiff who probably wanted one of his own sons to be adopted by her."

Notwithstanding the attempt made before us by the respondent's pleader, to impugn the finding of the District Judge as to the alleged authority from the husband, we are quite satisfied that his finding is correct and that the oral evidence in support of the alleged authority is altogether untrustworthy. We also agree with the District Judge that the evidence is by no means sufficient to establish that the third defendant's assent was procured for a pecuniary consideration.

The two questions which have been chiefly argued at length before us are (1) whether the third defendant's assent is not null and void as having been given on a representation made by the widow that she had her husband's authority to make the adoption and (2) whether the assent of the third defendant alone is sufficient in law, either absolutely or under the circumstances of the case.

The principle of law applicable to the determination of the first question, as laid down by the Judicial Committee of the Privy Council in *Sri Raghunadha* v. *Sri Brozo Kishoro*(1) and in *Karunabdhi Ganesha Ratnamaiyar* v. *Gopala Ratnamaiyar*(2) and followed by this Court in *Venkatalakshmamma* v. *Narasayya*(3), is

(1) L.R., 3 I.A., 154. (2) L.R., 7 I.A., 173.
(3) I.L.R., 8 Mad., 545.

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that the assent of a sapinda to an adoption to be made by the widow of a deceased kinsman should be one given by him in the exercise of his discretion as to whether the adoption ought or ought not to be made by a widow not having her husband's authority to make the adoption and that, therefore, a sapinda's consent obtained by the widow upon a representation that she had received authority to adopt from her husband, when no such authority has in fact been given, is inefficacious in law. Applying this principle to the present case, the third defendant's assent would undoubtedly be inefficacious if it could be regarded as having been influenced by the widow's allegation of authority from her husband.

We are quite unable to concur with the District Judge in construing exhibit III as the according of an independent assent by the third defendant, whether the husband had given permission or not. On the contrary the document expressly recites that in asking the third defendant to give his assent also, the widow's proposal to him was to make an adoption in pursuance of her husband's authority given to her in the presence of the third defendant and other *gnatis*. The learned pleader for the respondents seeks to distinguish the present case from the cases above referred to, on the ground that, if no authority had been given by the husband, as alleged, the third defendant while giving his assent must have known perfectly well that no such authority had been given, and the widow's representation, if any, that such authority was given, being one which must have been false to his knowledge, could not have influenced the exercise of his discretion in according his assent. Assuming that the alleged authority of the husband was false to the third defendant's knowledge, the soundness of this contention must be accepted and the case would thus be clearly distinguishable. In the present case, no doubt, the third defendant has given direct evidence in support of the alleged oral authority of the husband and he also stated in exhibit III that the husband's authority was given in his presence. Though we concur with the District Judge in distrusting his evidence, it does not, however, necessarily follow from this circumstance that the third defendant himself really disbelieved the widow's representation, if any, that she had her husband's authority to adopt. It may be that, believing the representation to be true, he supported the widow by falsely stating and giving evidence that he himself was present when the alleged authority was given. But upon the whole evidence in this case, we are

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satisfied that he knew as well as the first defendant did, that the husband had given no authority whatever but that the two, acting in collusion against the plaintiff, invented the husband's authority—which the third defendant was to support by his evidence—with a view to neutralizing the absence of the assent of his brother (the plaintiff) and thus avoid the risk—by no means an improbable one—of the adoption being upset on the ground that the third defendant's assent alone was insufficient. We cannot, therefore, hold that the third defendant's assent, if otherwise sufficient, is invalidated by the widow having falsely set up her husband's authority.

In approaching the consideration of the second contention relied on in support of the appeal, we have to be guided chiefly by the decisions of this Court in *Parasara Bhattar* v. *Ranga Raja Bhattar*(1) and *Venkatakrishnamma* v. *Annapurnamma*(2). We may at the outset dispose of the assent alleged to have been obtained by the widow from a number of her husband's distant *gnatis*, with the remark that such of them as have been examined as witnesses in the case deny having given any such assent and that even assuming it to have been given, such assent can be of no avail as the first defendant herself in her evidence states that she obtained their oral assent to the adoption by representing it to each of them that she had her husband's authority.

In *Parasara Bhattar* v. *Ranga Raja Bhattar*(1) as in the present case, the adoption was made with the assent of only one of two sapindas of equal degree, who were divided between themselves and both divided from the deceased. In upholding the adoption on the ground that the non-assenting sapinda withheld his assent on improper grounds, this Court laid down the law applicable to the case as follows:—(pp. 206-207)—" . . . . and where the only surviving members of the family are divided from the deceased husband for whose benefit it is desired to make the adoption, and also from each other and equally distant from the deceased, there seems nothing in principle to throw doubt upon the sufficiency of the assent of some of them, when *bonâ fide* given, if it be shown that the consent of the others is refused from interested or improper motives or without a fair exercise of discretion. In the present case the assent of both sapindas was sought and plaintiff's

(1) I.L.R., 2 Mad., 202.

(2) I.L.R., 23 Mad., 486.

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assent to a second adoption was not absolutely withheld, but it was coupled with a condition that the widow should adopt his third son. In Suit No. 156 of 1869, he had stated that this boy was already given in adoption in another family. That assertion is found now to have been false (see *Srirangaraja Bhattar* v. *Parasara Bhattar*(1)), but the widow, upon the ground stated, refused to make an adoption which might turn out to be invalid. It is clear that plaintiff's assent was subsequently withheld from purely interested motives, and the evidence shows that the assent of the seventh witness for plaintiff—who belongs to a branch of the family senior to that of plaintiff and who is at least equally entitled with the plaintiff to succeed to the reversion—was given with complete good faith and in the exercise of a deliberate discretion."

It will be observed that in the above case the non-assenting sapinda was applied to, by the widow, for his assent, but that he refused to give his assent unless she would adopt his own son, whom, according to his sworn deposition previously given in a Court of Justice, he had already given in adoption to a third party and that the widow refused to make an adoption which might turn out to be invalid. In the present case, it is clear from the evidence of the first defendant herself that she never applied to the plaintiff for his consent. She says that she expressed a desire about five years ago to adopt the second defendant and that the plaintiff then said he would give his own boy in adoption, who being then ten or 14 years old was, in her opinion, too old to be adopted. Though according to her own statement, she went to the houses of all the *gnatis*, shortly before the adoption, she did not go to the plaintiff's house to obtain his assent. The plaintiff and some of the *gnatis* on hearing that the first defendant was going to adopt the second defendant, sent to her, about 10 days before the adoption, the following letter, by registered post—which, however, being refused by her was returned to the plaintiff by the Post Office :—" It is learnt from rumours you give rise to, that having fallen into evil ways and contrary to law and without authority or sanction from your husband or the nearest *gnatis*, and on the evil advice of Venkatappayya, you are going to adopt his son. Any adoption made in the said manner is not at all valid. Even if you should

(1) Appeal Suit No. 51 of 1879 (unreported).

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do so, our right of heirship cannot be lost. It is clear that you have no good intention in making this adoption, but only the evil intention of allowing the property to go into other's possession; such adoption will be caused to be set aside by a Court. So understand." The plaintiff in his evidence says that he never asked the first defendant to adopt his son and that she never asked him for his assent for her making an adoption.

The learned pleader for the respondent urges first, that the assent of the third defendant alone is sufficient in law, especially as he is the plaintiff's senior in age, and secondly, that even assuming that under ordinary circumstances the widow should have also sought for the plaintiff's assent, she need not have done so in the present case, as it was certain that he was hostile to her adopting the second defendant and would, therefore, have refused his assent, even if applied to. Having regard to the deliberate dicta of the Privy Council in the Ramnad Case(1), *Sri Raghunadha* v. *Sri Brozo Kishoro*(2) and *Valloo* v. *Sooryah*(3)—in the first two of which the Judicial Committee disapproved of the proposition of Mr. Justice Holloway that the assent of any single sapinda would be sufficient—and the decisions of this Court in *Arundadi Ammal* v. *Kuppammal*(4), *Parasara Bhattar* v. *Ranga Raja Bhattar*(5) and *Venkatakrishnamma* v. *Annapurnamma*(6), it is too late in the day to contend that the assent of the third defendant alone, ignoring the plaintiff, would be sufficient. As regards the third defendant's seniority that is quite immaterial. In an undivided family, no doubt, the senior in age having the status of managing member of the family, it may be that his assent alone, if given *bonâ fide*, will be sufficient and be equivalent to the assent of the family. But this consideration does not apply to cases where the assent has to be sought from divided kinsmen—especially when they are also divided as between themselves. Adverting to cases in which the deceased husband died a separated member and there is no father-in-law alive, the Judicial Committee in the Guntur case (*Venkatakrishna Rao* v. *Rama Lakshmi*(7) explained their dictum in the Ramnad Case(1) as follows:—

(1) 12 M.I.A., 397.
(2) L.R., 3 I.A., 154.
(3) L.R., 4 I.A., 113.
(4) 3 M.H.C.R., 283.
(5) I.L.R., 2 Mad., 202.
(6) I.L.R., 23 Mad., 486.
(7) I.L.R., 1 Mad., 174 at pp. 190–1.

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"All which this Committee in the former case intended to lay down was, that there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that sapinda, but upon a fair consideration, by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband." The expression 'family council' in the above extract is no doubt rather too general and comprehensive. It is not probable that it was intended to include the whole circle of sapindas and samanodakas or to imply that they should assemble. The presumptive reversionary heir or heirs are the nearest of kin to the deceased husband and as such the natural advisers of the widow; and if his or their assent be obtained and the same be given *bonâ fide* and not from any corrupt motive, that would be sufficient authority on which she could act and it would not be necessary that she should seek the assent of remoter reversionary heirs. The two cases of *Parasara Bhattar* v. *Ranga Raja Bhattar*(1) and *Venkatakrishnamma* v. *Annapurnamma*(2) evidently proceed on this view, though it does not appear from the report whether or not there were remoter reversionary heirs in existence. If the presumptive reversionary heir or heirs withhold his or their assent from improper motives, the widow may validly act upon the assent given *bonâ fide* by remoter reversionary heirs. Adverting to cases in which a majority give or withhold assent and a minority withhold or give assent, Mr. Justice Subrahmania Ayyar in his judgment (concurred in by Moore, J.) in *Venkatakrishnamma* v. *Annapurnamma*(2) observed as follows:—(at page 488) "It should, at the same time, be borne in mind that a mere numerical majority, whether in favour of or against an adoption, will not by itself determine the question. Adoption being a proper act it will be presumed that, when the majority give their assent, such assent was given on *bonâ fide* grounds. If, however, it be shown that the majority give or withhold their assent from improper considerations, such assent or dissent will be of no avail to the party relying on it." In the above case, there were four reversionary heirs of equal degree, three of whom gave assent, but the fourth withheld his assent, without communicating to the

(1) I.L.R., 2 Mad., 202.
(2) I.L.R., 23 Mad., 486.

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widow, either at the time he was asked to assent or subsequently, what the reasons for his refusal were and the adoption was upheld on the ground that the sapinda who refused "to give his reasons for the opinion why an heir by adoption should not be substituted, while other sapindas decide in favour of such substitution cannot be held to exercise properly the discretion confided to him. His opinion against the adoption must be put entirely out of consideration as capricious or prompted by undue considerations."

In both the above cases, the widow had sought the advice and assent of all the presumptive reversionary heirs and the adoption was upheld, though one of the two in the first case withheld his assent—but on an improper ground—and one of the four, in the latter case, withheld his assent—but without giving any advice or reason. In the present case, it is argued that though the plaintiff's assent was not sought for, at or about the time of the adoption, yet inasmuch as he would have refused to give his assent, it must be taken that his assent was applied for and refused. It is however impossible to accede to this argument. If it was her duty to seek the assent, not only of the third defendant, but also of his brother (the plaintiff), she cannot be regarded as having discharged her duty because, in her opinion, she would have made an application to the plaintiff but in vain. The very object of enjoining a widow to seek and act under the advice of her husband's sapindas will be defeated if she does not give an opportunity to the sapindas concerned to advise her against making an adoption or against adopting a particular boy. It may be that if the sapinda who is supposed to be opposed to the adoption be consulted, his advice against the adoption will be effective upon the widow or it may be that the widow's explanation will induce him to change his mind and give his assent. Whether the deponent was conscious of it or not, we think there is much truth and force in the following statement of the plaintiff in his deposition:—"I was not asked to give consent to the adoption. I cannot say what I would have done if I had been asked." In answer to questions put to the plaintiff as to the allusion made in his notice (exhibit I already referred to) to the first defendant having fallen into evil ways, he stated as follows:—"The minor's (second defendant's) natural father was familiar with the first defendant and so I wrote as I did in the letter. I suspected her conduct." It would have been perfectly

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legitimate on the part of the plaintiff to dissuade the widow from adopting the second defendant if he had reason to believe that such adoption would lead to scandal and bring disrepute on the family. If she had applied to him for his assent and he had withheld the same, with or without assigning reasons and she had nevertheless made the adoption relying on the assent of the third defendant alone, we should have been in a position to decide whether the plaintiff had withheld his assent properly or improperly and capriciously. But it is clear from the action of the first defendant in refusing to receive the letter which was sent to her by registered post, that she was determined to ignore him and not care for his advice or even give him an opportunity to advise her. The plaintiff says in his evidence that he never asked the first defendant to adopt one of his sons. But, assuming, as the first defendant says, that some five years before the adoption the plaintiff wanted her to take one of his sons in adoption, there is nothing improper in a sapinda proposing to give his assent to the widow adopting his own son, if such son be the nearest sapinda, and refusing to give his assent to her adopting a stranger or a distant sapinda, if there be no reasonable objection to the adoption of his own son—as for instance in the case of *Parasara Bhattar* v. *Runga Raja Bhattar*(1).

For the above reasons the adoption of the second defendant made by the first defendant with the assent of the third defendant alone is invalid. The appeal is therefore allowed and, in reversal of the decree of the lower Court, judgment is given for the plaintiff with costs throughout, declaring the adoption of the second defendant by the first defendant to be invalid.

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(1) I.L.R., 2 Mad., 202.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1903. March 17.

RAMAN NAIDU (THIRD DEFENDANT), APPELLANT,

v.

BHASSOORI SANYASI AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 4, 5 AND 6), RESPONDENTS.*

Revenue Recovery Act (Madras)—Act II of 1864, s. 59—Suit by person aggrieved by proceedings under the Act—Limitation—Wrongful sale by Revenue officer of property—Application of section.

Section 59 of the Revenue Recovery Act, which provides that nothing in that Act shall prevent parties deeming themselves aggrieved by any proceedings under the Act from applying to the Civil Court for redress, applies to a suit to cancel a revenue sale on the ground that a Revenue officer wrongfully sold the property in collusion with the purchaser. Such a suit must therefore be brought within the period of limitation specially provided by that section.

SUIT to cancel a revenue sale of land and to recover the land. The sale was held on 14th June 1897 and was confirmed on 14th July 1897, and the present suit was filed on 13th July 1898, on the ground that the sale had been brought about by fraud on the part of the Revenue Inspector and third defendant, the purchaser.

The District Judge found that fraud had been proved, and set aside the sale.

Plaintiff preferred this appeal on the ground that the suit was barred by section 59 of the Revenue Recovery Act, 1864, which provides that a Civil Court shall not take cognizance of any suit instituted by persons deeming themselves aggrieved by proceedings under the Act unless such suit be instituted within six months from the time at which the cause of action arose.

P. R. Sundara Ayyar for appellant.

V. Krishnaswamy Ayyar for first respondent.

JUDGMENT.—In this case, the revenue sale was held on the 14th June 1897 and was confirmed on the 14th July 1897. The present suit for redress on the ground that the sale was brought about by fraud on the part of the Revenue Inspector and the third defendant was brought on the 13th July 1898.

* Second Appeal No. 1174 of 1900, presented against the decree of J. H. Robertson, District Judge of Vizagapatam, in Appeal Suit No. 278 of 1899, presented against the decree of R. Hanumantha Row, District Munsif of Razam, in Original Suit No. 253 of 1898.

The District Judge found that the fraud alleged was proved, and set aside the sale.

The appellant appeals on the ground that the suit not having been brought within six months from the date of confirmation of sale was barred by section 59 of the Madras Revenue Recovery Act, 1864. We think that the appeal is well founded.

It is contended for the respondent that, as a tender of the arrear was made before the sale took place and was fraudulently not accepted, there was no default in payment of the revenue and the Revenue officers had no jurisdiction to proceed under the Act, and that therefore the provisions of the Act, including section 59, had no application and the only law of limitation is the general law, article 12 of schedule 2 of the Limitation Act, which allows one year.

Under section 6 of the Limitation Act, any period of limitation prescribed by special or local law is not affected by anything contained in that Act (*Venkata* v. *Chengadu*(1)). The only question therefore is whether section 59 applies to a suit for redress sought upon the facts stated above. The facts alleged as the ground for impeaching the sale do not show that the Revenue officer had no jurisdiction to proceed under Act II of 1864, and to bring the property to sale, as in the case of *Raman* v. *Chandan*(2), but that he ought not to have exercised his jurisdiction to sell as the arrears were tendered in due time and he ought to have abstained from selling the property.

The suit is one for obtaining redress because the Revenue officer, instead of stopping the sale, wrongfully sold the property in collusion with the purchaser. This is clearly a suit which falls within the terms of section 59, and to which the special period of limitation prescribed in that section applies.

We set aside the decree of the lower Appellate Court and dismiss the suit with costs throughout.

(1) I.L.R., 12 Mad., 168. (2) I.L.R., 15 Mad., 219.

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

1903. February 10, 11.

RAYAN KUTTI (PRISONER), APPELLANT,

v.

EMPEROR, RESPONDENT.*

Penal Code—Act XLV of 1860, *ss.* 211, 182—*Instituting false complaint—Giving false information—Criminal Procedure Code—Act V of* 1898, *s.* 531—*Proceedings in wrong place.*

The word "charges" as it is used in section 211 of the Indian Penal Code, means something different from "gives information." The words "false charge," as there used, must be construed with reference to the words which speak of the institution of proceedings :

Semble, the true test is ;—Does the person who makes the statement which is alleged to constitute the charge, do so with the intention and object of setting the criminal law in motion against the person against whom the statement is directed ? Such object and intention may be inferred from the language of the statement and the circumstances in which it is made.

A petition was presented with the object (as the High Court held from its terms) of bringing to the knowledge of the authorities certain matters regarding which the petitioner had received information, in order that there might not be a repetition of an alleged tutoring of witnesses, and not with the object that the authorities should institute criminal proceedings :

Held, that the petition did not amount to a "charge" within the meaning of section 211 of the Indian Penal Code.

To constitute an offence under section 182, it must be shown that the person giving the information knew or believed it to be false, or that the circumstances in which the information was given were such that the only reasonable inference is that the person giving the information knew or believed it to be false. The fact that an information is shown to be false does not cast upon the party who is charged with an offence under the section the burden of showing that, when he made it, he believed it to be true. The prosecution must make out that the only reasonable inference was that he must have known or believed it to be false.

Section 531 of the Code of Criminal Procedure applies to a case where a Magistrate who has authority to commit a case for trial, does so, but has not territorial jurisdiction in the place where the offence to be tried is alleged to have been committed.

CHARGE of preferring a false complaint under section 211 of the Indian Penal Code. The accused was charged with preferring a

* Criminal Appeal No. 731 of 1902 presented against the sentence of N. S. Brodie, Sessions Judge of South Malabar, in Calendar Case No. 77 of 1902.

false complaint of fabricating false evidence against the Station-House officer of Malappuram. The alleged complaint was contained in a petition which was presented to the Sub-Magistrate, Manjeri, in the following terms :—"The petition presented by Pookatan Rayan Kutti, the elder brother of Pookatan Ali, the accused in the above case, on reasons shown below :—In the above case, the said Ali and others are arrested and they are in the sub-jail. At the time when the said Ali and Koya were arrested, one of the complainants had gone to Madras. Excepting him Ali and Koya were shown to the rest of them at the Malappuram Station House and they were also tutored. The man who had gone to Madras returned lately, and, in order to show to him and tutor him, he was also brought by the Malappuram head constable to the Manjeri sub-jail on Sunday, the day before yesterday, the 13th of this month ; and he was also shown and tutored. The Assistant Collector of Malappuram and the Assistant Superintendent have seen him brought to Manjeri to show him the prisoners as stated in paragraph 3. It is a matter of great grievance and also contrary to law, to fabricate evidence by bringing persons to whom the said Ali and Koya were unknown, and showing them the said Ali and Koya and tutoring them and making them say that they know the said persons by sight. On making enquiries to the persons who are in the sub-jail and others, it will be known that the above allegations are true. Prays, therefore, that the Court may be pleased to make enquiries, to find out the truth of the above allegations and to take the necessary steps in this matter. (Signed) Rayan Kutti, 15th April 1902."

The Police Inspector filed a petition before the Special Assistant Magistrate of Malabar, asking that the accused might be sent under section 476 of the Criminal Procedure Code for trial to the nearest First-class Magistrate. The Special Assistant Magistrate considered there was a strong *prima facie* case of preferring a false complaint, and sent the accused in custody to the Head Assistant Magistrate, Palghat Division, for trial. The last-mentioned Magistrate committed the accused to the Sessions at South Malabar on a charge of having instituted a false complaint under section 211 of the Penal Code. The assessors were of opinion that the charge of preferring a false complaint under section 211, clause (2), had been made out, and that opinion was concurred in by the District Judge who said :—"The accused does not venture to maintain that

RAYAN KUTTI v. EMPEROR.

he saw what happened, although that is the only inference which can be drawn from the terms of his complaint. He now pleads only that he heard this from some persons whose names he could not mention in the lower Court and who have now dwindled into one man." He convicted and sentenced the accused. The accused preferred this appeal on the grounds among others, that the Judge had not found that the statements in the petition were false to the knowledge of the accused; that the petition was not a complaint, and that no offence had been made out under section 211 (2). The ground was also relied on that the order passed by the Special Assistant Magistrate of Malabar sending the accused for trial to the Head Assistant Magistrate, Palghat Division, was invalid, and that in consequence the committal by the last-named Magistrate was also invalid.

The accused preferred this appeal.

Dr. *Swaminathan*, for appellant, argued that the conviction ought to be quashed as the commitment to the Sessions was invalid. The Head Assistant Magistrate of Palghat, who committed the case, would ordinarily have had jurisdiction under section 177, Criminal Procedure Code, only if the alleged offence had been committed within the limits of his local jurisdiction. Admittedly the alleged offence took place outside his local jurisdiction, and the proceeding under section 476 of the Special Assistant Magistrate, which, if valid, would have conferred jurisdiction on the committing Magistrate, were invalid, as the matter did not come before the Special Assistant Magistrate in the course of a judicial proceeding. As regards the merits of the case, he contended that exhibit A did not amount to preferring a charge or instituting criminal proceedings within the meaning of section 211, Indian Penal Code, and cited *Raghavendra* v. *Kashinath Bhat*(1). Finally he contended that the conviction could not be sustained, even under section 182, as there was absolutely nothing to indicate that the accused knew the contents of A to be false, or that the petition was not put in *bonâ fide* and in furtherance of justice.

The Public Prosecutor, in support of the conviction, contended that the accused was properly convicted under section 211 for falsely charging a person of having committed an offence knowing that there was no just or lawful ground for such charge.

(1) I.L.R., 19 Bom., 717.

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JUDGMENT.—Objection has been taken to the legality of the conviction in this case, on the ground that the order of commitment was invalid and that consequently the Sessions Judge has no jurisdiction to try the case.

A First-class Magistrate made an order under section 476 of the Code of Criminal Procedure sending the case for enquiry to the nearest First-class Magistrate, who committed the accused to Sessions. The Magistrate to whom the case was sent had not territorial jurisdiction over the place in which the offence was alleged to have been committed. This being so, it was argued that it was not competent for him to take cognizance of it and that the order of commitment made by him was invalid. Section 531 of the Criminal Procedure Code provides that no order of a Criminal Court shall be set aside merely on the ground that the proceedings in which the order was made took place in a wrong local area unless the error in fact occasioned a failure of justice. Section 531 applies to a case where the Magistrate has authority to commit, but has not territorial jurisdiction in the place where the offence is alleged to have been committed. *Queen-Empress* v. *Abbi Reddi*(1), *Queen-Empress* v. *James Ingle*(2) and *Queen-Empress* v. *Fazl Azim*(3).

We are satisfied in the present case that no failure of justice has, in fact, been occasioned by the order of commitment having been made by a Magistrate who had not territorial jurisdiction in the place where the offence is alleged to have been committed.

The objection is overruled.

As regards the merits, the Public Prosecutor concedes that a conviction on the charge actually preferred, viz., the institution of criminal proceedings knowing that there was no just or lawful ground for such charge cannot be supported. He has contended, however, that the accused was properly convicted under section 211 for falsely charging a person of having committed an offence knowing that there was no just or lawful ground for such charge.

Now it is obvious that the word "charges," as used in the section, means something different from "gives information." We think, the words "falsely charges" must be construed with reference to the words which speak of the institution of proceedings. The true test seems to be, does the person who makes the statement

(1) I.L.R., 17 Mad., 402. (2) I.L.R., 16 Bom., 203.
(3) I.L.R., 17 All., 36.

RAYAN KUTTI v. EMPEROR.

which is alleged to constitute the "charge" do so with the intention and object of setting the criminal law in motion against the person against whom the statement is directed. Such object and intention may be inferred from the language of the statement and the circumstances in which it is made. Applying this test to the present case we are clearly of opinion that the petition which is said to constitute the "charge" is not a charge within the meaning of section 211. There is no statement in the petition that the accused had seen the "tutoring" of the witness to which he refers. In fact, in his subsequent deposition, he stated expressly that he was not in a position to prove the statements which he had made.

The language of the petition makes it clear that the intention of the accused was to bring to the knowledge of the authorities certain matters as to which he had received information, in order that there might not be a repetition of the alleged "tutoring," and that it was not his object or intention that the authorities should institute criminal proceedings against the constable in question. We are of opinion that the petition does not amount to a charge within the meaning of section 211, and that the conviction under that section cannot be upheld. There remains the question, whether we can, in exercise of the powers conferred by section 237 of the Code of Criminal Procedure, convict the accused of an offence under section 182 of the Indian Penal Code. To constitute an offence under that section it must be shown that the person giving the information knew or believed it to be false or that the circumstances in which the information was given were such that the only reasonable inference is that the person giving the information knew or believed it to be false. It cannot be said that this has been shown in the present case. The fact that the information is shown to be false does not cast upon the party who is charged with an offence under this section, the burden of showing that when he made it he believed it to be true. The prosecution must make out that the circumstances were such that the only reasonable inference was that he must have known or believed it to be false. The evidence in the present case does not establish this, and there are circumstances in the case which make us think it not unlikely that at the time the information was given the accused believed the information to be true.

The conviction and sentence must be set aside and the accused set at liberty. The fine, if paid, must be refunded.

APPELLATE CIVIL.

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

AKAYI KUNHI (PLAINTIFF), APPELLANT,

v.

AYISSA BI (DEFENDANT), RESPONDENT.*

1903. March 3.

Civil Procedure Code—Act XIV of 1882, s. 13, expl. II—Matter which might and ought to have been made ground of attack in former suit.

On a sale of land by plaintiff to defendant, part of the purchase money was paid and a mortgage was given by the defendant in plaintiff's favour for the balance of the purchase money, which balance amounted to Rs. 100. Plaintiff sued on his mortgage, but that suit was dismissed by reason of its being unregistered. Plaintiff now brought the present suit for the amount, framing his claim as for the enforcement of a lien for unpaid purchase money:

Held, that the suit was barred by explanation II of section 13 of the Code of Civil Procedure. Plaintiff might have sued, in his former suit, on the basis of his lien for balance of unpaid purchase money, and he ought to have done so to avoid the necessity for a second suit in the event of the mortgage being held invalid for want of registration.

Kameswar Pershad v. *Rajkumari Ruttan Koer*, (I.L.R., 20 Calc., 85), followed.

SUIT for balance of purchase money. The plaintiff had purchased certain property at an execution sale and had assigned his right to the defendant for Rs. 500, Rs. 400 of which had been paid. Plaintiff alleged that the defendant agreed to pay the balance of Rs. 100 in two months and in default to pay two per cent. interest per mensem, and that defendant had executed a panayom deed containing the above stipulations. His plaint recited that he had brought a suit on the panayom deed, which was dismissed on the ground that the deed had not been registered. He now claimed to have a charge on the property for the balance of purchase money and sought to recover it by sale of the property. Amongst other defences it was pleaded that the suit was barred by sections 13 and 43 of the Code of Civil Procedure. The additional District Munsif held that plaintiff (by section 55, sub-section (4), clause (*b*) of the Transfer of Property Act) had a lien on the property for the balance of the purchase money and that the plaintiff's suit

* Second Appeal No. 1462 of 1901, presented against the decree of K. Krishna Rau, Subordinate Judge of South Malabar at Calicut, in Appeal Suit No. 955 of 1900, presented against the decree of P. P. Raman Menon, Additional District Munsif of Calicut, in Original Suit No. 279 of 1900.

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was not barred by sections 13 and 14 of the Code of Civil Procedure.

On appeal, the Sub-Judge of South Malabar held that, as the panayom deed was unregistered, the plaintiff had no lien over the property for the balance of the purchase money and that the plaintiff's suit was barred by sections 13 and 43 of the Code of Civil Procedure. He reversed the decree of the lower Court.

Plaintiff preferred this second appeal.

P. R. Sundara Ayyar for appellant.

J. L. Rosario for respondent.

JUDGMENT.—We think that the case is one to which section 13, explanation II, Civil Procedure Code, as interpreted by the Privy Council in *Kameswar Pershad* v. *Rajkumari Ruttan Koer*(1), clearly applies. It is not suggested that the plaintiff might not have sued for the money in the former suit on the basis of his lien for balance of unpaid purchase money under the general law; and there is no reason why he should not have done so. He "ought" therefore to have then based the suit on this ground as well as on the mortgage sued on, so as to avoid the necessity for a second suit in the event of the mortgage being held invalid for want of registration as the plaintiff ought to have known that it would be.

The facts to be proved in the present suit were among facts which had necessarily to be proved in the former suit.

The second appeal fails and is dismissed with costs.

(1) I.L.R., 20 Calc., 79 at p. 85.

APPELLATE CIVIL—FULL BENCH.

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

PINAPATI MRUTYUMJAYA AND OTHERS (DEFENDANTS), APPELLANTS,

v.

PINAPATI JANAKAMMA AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

1903. February 20, 27.

Civil Procedure Code—Act XIV of 1882, s. 26—Joinder of plaintiffs—Right claimed in the alternative.

The widow and the adopted son of a deceased person joined as plaintiffs in a suit to recover money payable by the defendants to the deceased. The money was undoubtedly due to one or other of them and they were agreed that either should take it. The widow joined as plaintiff because the right of the other plaintiff to sue as adopted son was questioned:

Held, that the suit was not bad for misjoinder of plaintiffs.

Fakirapa v. *Rudrapa*, (I.L.R., 16 Bom., 119), followed; *Lingammal* v. *Chinna Venkatammal*, (I.L.R., 6 Mad., 239), explained.

QUESTION referred to a Full Bench. The case first came before the Chief Justice, and Subrahmania Ayyar, J., who made the following

ORDER OF REFERENCE TO A FULL BENCH.—We refer to a Full Bench the question whether the present suit is bad for misjoinder of plaintiffs.

There is an apparent conflict between the authorities. See *Lingammal* v. *Chinna Venkatammal*(1), *Fakirapa* v. *Rudrapa*(2) and *Haramoni Dassi* v. *Harichurn Chowdhry*(3).

The facts, so far as they related to the question referred, were thus stated by the Sub-Judge:—

"The first plaintiff is the widow of Neelagriva Sastri, while the second plaintiff is the one adopted by the first plaintiff as son of her husband. As the factum and validity of the adoption are disputed by the reversioners, both have joined in bringing this suit. Defendants contend that the suit is bad for misjoinder of plaintiffs,

* Second Appeal No. 1357 of 1901 presented against the decree of I. L. Narayana Rao, Subordinate Judge of Kistna, in Appeal Suit No. 428 of 1900, presented against the decree of S. A. Swaminadha Sastri, District Munsif of Gudivada, in Original Suit No. 98 of 1896.

(1) I.L.R., 6 Mad., 239. (2) I.L.R., 16 Bom., 119. (3) I.L.R., 22 Calc., 833.

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and rely upon the decision in *Lingammal* v. *Chinna Venkatammal*(1). That case is distinguishable from the present case. There, the relief sought for in respect of one plaintiff is different from the relief claimed by the other. The plaintiff and the second defendant in that case were the co-widows of a deceased person. First plaintiff adopted the second plaintiff. If the adoption were to fail, first plaintiff, as one of the two widows, would be entitled to recover one-half of the suit property. On the other hand, if the adoption were to be established, the second plaintiff, as the adopted son of the deceased, would be entitled to recover the whole estate. In the present case, the adoption is set up by both the plaintiffs, and whether it stands or fails, the whole of the suit amount is recoverable by either of them. Here, the infringement of right by the defendants constitutes the cause of action in its restricted sense. The cause of action is the same in respect of both the plaintiffs whose interests are not antagonistic. In the Madras case above referred to, their Lordships found the cause of action to be different, and observed that the words 'in the alternative' used in section 26, Civil Procedure Code, apply 'to cases in which there is a doubt as to who is the person entitled to sue upon the cause of action as in the case cited in the work already quoted as an illustration, viz., that of a sale to an agent in which there may arise a difficulty as to whether the principal or the agent should sue; to cases where parties have different and conflicting interests in the same subject-matter, and an act is committed which gives the same cause of action to either party according to the eventual determination of the Court as to which of the two is entitled to recover.' This passage quoted from the Madras case clearly indicates that, in the opinion of their Lordships, the present suit instituted by the adoptive mother and the adopted son and based upon the same cause of action is sustainable. The cases of *Fakirapa* v. *Rudrapa*(2) and *Haramoni Dassi* v. *Hari Churn Chowdhry*(3) are on all fours with the present case and enable the plaintiffs to maintain this suit under section 26, Civil Procedure Code."

The case came on in due course before the Full Bench constituted as above.

V. Ramesam for appellants.

P. Nagabhushanam for respondent.

(1) I.L.R., 6 Mad., 239. (2) I.L.R., 16 Bom., 119.
(3) I.L.R., 22 Calc., 833.

PINAPATI MRUTYUM-JAYA v. PINAPATI JANAKAMMA.

JUDGMENT.—This is a suit for the recovery of money received by the defendants and payable by them to the owner of a certain share. The first plaintiff is the widow of the last admitted owner and the second plaintiff is her adopted son. There is no contest as between them, and it is because of objection taken by the defendants to the title of the second plaintiff as adopted son that they join as plaintiffs to get the money, which is undoubtedly due to one of them, and they are agreed that either shall take it. We are unable to say that in such a case there is a different "cause of action" for each within the meaning of section 26 of the Civil Procedure Code, and there was, therefore, no misjoinder, which is our answer to the question. We consider the present case is on all fours with that in *Fakirapa* v. *Rudrapa*(1), and our view agrees in principle with that in *Haramoni Dassi* v. *Harichurn Chowdhry*(2) and that view is not in conflict with the decision in *Lingammal* v. *Chinna Venkatammal*(3) when examined. There the alternative claim of the widow was really on a different cause of action from that of the adopted son. The claim of the adopted son was that of an exclusive owner, while the widow's claim was that of a co-owner, with one of the defendants.

APPELLATE CIVIL—FULL BENCH.

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

KARATTOLE EDAMANA AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

UNNI KANNAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

1903. February 24. April 8.

Malabar Law—Suit by one of two co-uralans for redemption of mortgage without allegation or proof that the other had been asked to join plaintiff in the suit—Maintainability of suit.

One of two co-uralans may bring a suit to redeem a mortgage without averring or proving that the other uralan had been asked to join as a plaintiff in the suit. *Savitri Antharjanam* v. *Raman Nambudri*, (I.L.R., 24 Mad., 296), distinguished.

(1) I.L.R., 16 Bom., 119. (2) I.L.R., 22 Calc., 833.
(3) I.L.R., 6 Mad., 239.

* Second Appeals Nos. 1385 and 1386 of 1901 presented against the decree of K. Krishna Rao, Subordinate Judge of South Malabar at Calicut, in Appeal Suit No. 943 of 1900 presented against the decree of V. Ramasastri, District Munsif of Betutnad, in Original Suit No. 481 of 1899.

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THE Subordinate Judge set out the facts of the case in the following judgment on appeal from the District Munsif's order dismissing the suit:—

"This is an appeal arising out of a suit brought by two members who belong to a Nambudri illom which is one of the two houses possessing the uraima-right of a certain devaswam. The other house is another Nambudri illom to which the defendants Nos. 21 to 24 belong. The twenty-fourth defendant is a woman, and the defendants Nos. 21 to 23 are her minor daughters. Plaintiffs' suit was for redemption of a land belonging to the said devaswam, and which had been demised to the tarwad of defendants Nos. 1 to 17. The District Munsif dismissed the suit on the ground that it was unsustainable, because the plaintiffs did not consult and did not bring it with the consent of the other uralan (now represented by the twenty-fourth defendant). Plaintiffs appeal on the ground that the twenty-fourth defendant is a woman and did not join in the management of the devaswam and was therefore not entitled to be consulted. The chief question for decision in this appeal is whether the District Munsif is wrong in dismissing the suit on the ground stated. I think he is not. It has been distinctly held by the High Court that when there are two uralans for a devaswam, one of them cannot sue on behalf of the devaswam without consulting the other uralan and without joining him as a plaintiff, if he or she consents to it. (See *Savitri Antarjanam* v. *Raman Nambudri*(1), and *Puramathan Somayajipad* v. *Sankara Menon*(2)). This principle has been applied to this very temple in an appeal which was decided in Appeal Suit No. 421 of 1900 by Rao Bahadur A. Venkataramana Pai, Subordinate Judge. The fact that the twenty-fourth defendant is a woman does not alter the case a bit. The uralan whose non-joinder as a plaintiff in the case happened in *Savitri Antarjanam* v. *Raman Nambudri*(1) was a woman also. If, as the plaintiffs say, the twenty-fourth defendant did not usually take part in the affairs of the devaswam, that will not deprive her of her right to be consulted in such an important step as filing a suit like this. She did not refuse to join as a plaintiff, and her omission in the list of the plaintiffs will not be cured by herself and her children being made defendants. The District Munsif's decree is therefore right, and this appeal must be dismissed with costs."

(1) I.L.R., 24 Mad., 296. (2) I.L.R., 23 Mad., 82.

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The plaintiff preferred this second appeal. The case first came before Subrahmania Ayyar and Bhashyam Ayyangar, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.—For the reasons stated in the decision in Second Appeals Nos. 77 and 78 of 1901 (1) for doubting the correctness of the decision of this Court in *Savitri Antarjanam* v. *Raman Nambudri*(2), we refer for the decision of a Full Bench the following question which arises in these two second appeals:—

Whether one of two co-uralans without averring in the plaint that the other uralan was asked to join the former as co-plaintiff and that he refused to do so, may bring a suit to redeem a mortgage made by the predecessors in title of the two uralans, the other uralan being made party-defendant along with the mortgagees.

JUDGMENT IN SECOND APPEALS NOS. 77 AND 78 1901.—It is urged that the plaintiff's suit should havebeen dismissed on the ground that he had not consulted his co-uralan, the nineteenth defendant, or asked him to join him as co-plaintiff before filing his plaint and reference is made to *Savitri Antarjanam* v. *Raman Nambudri*(2). In the present case it is shown that the nineteenth defendant had granted a renewed kanom and the plaintiff sued to redeem the prior kanom ignoring this renewal, his plea being in fact that the renewal was invalid. Under these circumstances, the plaintiff could not have joined the nineteenth defendant with him as co-plaintiff. Such being the case, it is impossible to hold that he should have consulted him before filing the suit or asked him to join in bringing it. On this ground, we distinguish the present case from that dealt with in the decision of *Savitri Antarjanam* v. *Raman Nambudri*(2). If we were not able to do this we should be obliged to refer the question dealt with in this decision to a Full Bench as we are disposed to agree with the view taken in the judgments in *Pyari Mohun Bose* v. *Kedarnath Roy*(3) and in *Biri Singh* v. *Nawal Singh*(4). The renewal granted by the nineteenth defendant having been shown not to be *bonâ fide* and valid, it cannot be presumed that at the time of the execution of the renewed kanom there was an adjustment of rent up to that date

(1) I.L.R., 26 Mad., 461. (2) I.L.R., 24 Mad., 296.
(3) I.L.R., 26 Calc., 409. (4) I.L.R., 24 All., 226.

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binding on the devaswam. These second appeals are dismissed with costs.

The case came on in due course before the Full Bench constituted as above :—

P. R. Sundara Ayyar and *C. V. Anantakrishna Ayyar* for appellants (plaintiffs).

The decision of the lower Courts is wrong. Under the present law no suit ought to be dismissed for non-joinder of parties. Courts have the fullest power in the matter of adding parties. [They referred to sections 26 to 32 of the Code of Civil Procedure.]

The plaintiff and the twenty-fourth defendant are the co-contractees, and it is settled now that one of such persons may sue, making the other a defendant. The decision to the contrary in *Dwarka Nath Mitter* v. *Tara Prosunna Roy*(1) has been overruled by a Full Bench of that Court—*vide Pyari Mohun Bose* v. *Kedarnath Roy*(2). The Allahabad High Court has followed the Calcutta Full Bench case (*Biri Singh* v. *Nawal Singh*(3)). The Madras High Court also has followed the Calcutta Full Bench case (*vide* judgment of Bhashyam Ayyangar and Moore, JJ., in *Mariyil Raman Nair* v. *Narayanan Nambudiripad*(4), mentioned in the order of reference to a Full Bench in this case). If the plaintiff does not join the other party also as co-plaintiff, he will be punished by being ordered to pay his costs. In such cases, one of such persons has the right to institute suits, making the other a co-defendant. The decree, however, would be passed in favour of both these persons, whether both are plaintiffs, or one is plaintiff and the other a defendant. The present case is distinguishable from *Parameswaran* v. *Shanyaran*(5) and *Puramathan Somayaji Pad* v. *Sankara Menon*(6) inasmuch as the present is a suit to redeem a mortgage, whereas the others were suits in ejectment. Under section 91 of the Transfer of Property Act, any person interested in the property is entitled to redeem, but he has to make all persons interested parties to the suit under section 85. Neither section 91 of the Transfer of Property Act nor the Full Bench decision in *Pyari Mohun Bose* v. *Kedarnath Roy*(2) was brought to the notice of the Court in the case of *Savitri Antarjanam* v. *Raman Nambudri*(7).

(1) I.L.R., 17 Calc., 160.
(2) I.L.R., 26 Calc., 409.
(3) I.L.R., 24 All., 226.
(4) I.L.R., 26 Mad., 461.
(5) I.L.R., 14 Mad., 489.
(6) I.L.R., 23 Mad., 82.
(7) I.L.R., 24 Mad., 296

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V. Ryru Nambiar for the respondent (twenty-fourth defendant) and *B. Govindan Nambiar* for the other respondents (defendants) submitted that the appellants' contention was opposed to the current of decisions in this Presidency. If one of two uralans were allowed to bring suits as of right, without consulting the other uralan, he would be ignoring the very existence of the other uralan. The decision in *Savitri Antarjanam* v. *Raman Nambudri*(1) was sound. If the rule there laid down were not upheld, and if every uralan were allowed to bring suits of his own accord, litigation would be fostered. They also relied on *Teramath* v. *Lakshmi*(2). The case of *Pyari Mohun Bose* v. *Kedarnath Roy*(3) was referred to in *Puramathan Somayaji Pad* v. *Sankara Menon*(4). The case of *Savitri Antarjanam* v. *Raman Nambudri*(1) was a suit for redemption. They contended that suits for redemption did not stand on any exceptional footing, and that section 91 of the Transfer of Property Act did not apply as plaintiff could not be said to be a "person interested" within the meaning of that section. The whole devaswam would be the "person interested." Unless the matter were discussed among all the uralans and at least a majority consented no suit could be brought.

The appellant was not called upon to reply.

The Court delivered the following

OPINION.—We are of opinion that the answer to the question referred must be that one of two co-uralans may bring a suit to redeem a mortgage without averring or proving that the other uralan was asked to join as plaintiff in the suit.

It would be impossible to hold otherwise in the face of sections 91 and 85 of the Transfer of Property Act.

These sections were apparently not considered when *Savitri Antarjanam* v. *Raman Nambudri*(1) was decided.

The case came on for final disposal before Subrahmania Ayyar and Bhashyam Ayyangar, JJ., who delivered the following

JUDGMENT.—Following the opinion of the Full Bench we reverse the decree of the lower Appellate Court, which proceeds on a preliminary point, and remand the appeal for disposal according to law. The costs of this second appeal will be costs in the case.

(1) I.L.R., 24 Mad., 296.
(2) I.L.R., 6 Mad., 270.
(3) I.L.R., 26 Calc., 409.
(4) I.L.R., 23 Mad., 82.

APPELLATE CIVIL—FULL BENCH.

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

1903. April 28. July 14.

ACHUTA BHATTA (FIRST DEFENDANT), APPELLANT,

v.

MANJUNATHAYYA AND ANOTHER (PLAINTIFF AND SECOND DEFENDANT), RESPONDENTS.*

Fees—Civil Rules of Practice—Rule 282—Rules framed under Legal Practitioners Act—XVIII of 1879—Rule 35—Vakil's fee in suit for declaration.

A suit for a declaration of right in respect of immoveable property is not a suit in which "the subject-matter of the claim does not admit of valuation" within the meaning of Rule 35 of the rules framed under the Legal Practitioners Act. Such a suit falls within Rule 31, and the fee to be allowed to a vakil engaged therein is limited to a sum not exceeding the maximum fee allowable in a suit for the possession of the same property.

QUESTION referred to a Full Bench. The point raised is set out by Subrahmania Ayyar and Moore, JJ. (before whom the case first came) in the following

ORDER OF REFERENCE TO A FULL BENCH.—We see no reason to hold either that the suit is barred or that the plaintiff is not entitled to a declaration. It is urged that the vakil's fee allowed by the District Judge in appeal (Rs. 250) is excessive. As to this we agree. It is, however, further urged that as this is a suit for a declaration in respect to immoveable property, which, according to the plaint, is valued at Rs. 255, no fee higher than an *ad valorem* fee on that amount can be allowed, and we are referred to the decision of a Bench of this Court in *Shri Vibhudapriya Thirthswami* v. *Sherabettu Mangeshaya*(1) where this view appears to have been taken. As doubts are entertained as to whether Rule 35 of the rules framed by the High Court under the Legal Practitioners Act (Rule 282 of the Civil Rules of Practice, 1902) can be held to be subject to the proviso that in a suit for a declaration with reference to immoveable property no higher fee can be allowed than would be passed in the case of a suit for the recovery of possession of the same property, we refer the following question to a Full Bench:—"In a case for a declaration with respect to immoveable property is the fee to be allowed to a vakil limited to a sum not exceeding the maximum fee allowable in a suit for the possession of the same property?"

* Second Appeal No. 1461 of 1901, presented against the decree of J. W. F. Dumergue, District Judge of South Canara, in Appeal Suit No. 205 of 1900, presented against the decree of C. Krishnasami Row, District Munsif of Udipi, in Original Suit No. 219 of 1900.

(1) Second Appeal No. 1214 of 1901 (unreported).

Rule 35 of the rules framed under the Legal Practitioners Act is as follows:—"In cases in which the subject-matter of the claim does not admit of valuation, the Court, or in the case of the High Court, the taxing officer, shall fix a reasonable fee, regard being had to the time occupied in the preparation and hearing of the case and the nature of the questions raised thereon."

Rules 31 and 32 contain scales of fees, varying with the amount or value of the claim.

Rule 33 is as follows:—The words "the amount or value of the claim" in Rules 31 and 32 mean the value as set forth in the plaint or memorandum of appeal, and, where Court fees are payable *ad valorem*, the value on which such Court fees are paid.

The prayer in the plaint was as follows:—Plaintiff prays for judgment against the defendants: (1) for a declaration that plaintiff is entitled to the Kudtala of plaint lands described below, as being in his possession and enjoyment to the exclusion of the first defendant, the lands being valued for the jurisdiction of the Court, Rs. 250; and (2) for such further or other relief as the plaintiff may be found entitled to under the circumstances of the case together with costs of the suit with interest thereon, Rs. 5.

The case came on in due course before the Full Bench constituted as above.

C. Ramachandra Rau Saheb for appellant.

K. Narayana Rau for first respondent.

JUDGMENT.—We are of opinion that a suit for a declaration of right in respect of immoveable property is not a suit in which "the subject-matter of the claim does not admit of valuation" within the meaning of article 35 of the rules framed under the Legal Practitioners Act. Such a suit falls within article 31 and a reference to Rule 33 which defines the expression "the amount or value of the claim" occurring in Rules 31 and 32, clearly shows that Rule 31 is not confined to cases in which Court-fees are payable *ad valorem*. Our answer to the question referred is in the affirmative.

APPELLATE CRIMINAL—FULL BENCH.

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

1903. February 17, 18, 24.

EROMA VARIAR AND ANOTHER (PETITIONERS)

v.

EMPEROR.*

Criminal Procedure Code—Act V of 1898, ss. 195 (7), 407 (2)—Court to which appeals ordinarily lie—Refusal to accord sanction—Appeal to Magistrate who has been directed and empowered to hear appeals under section 407 (2).

A Magistrate who has been directed and empowered to hear appeals under the provisions of section 407 (2) of the Code of Criminal Procedure is not the "Court to which appeals ordinarily lie" within the meaning and for the purposes of section 195 (7) of the Code. (BENSON, J., dissenting.)

QUESTION referred to a Full Bench. In Criminal Revision Case No. 539 of 1902, an application was made, by an Inspector of Police, to the Acting Stationary Second-class Magistrate of Walluvanad, for sanction to prosecute Mahadevapandal Variath Eroma Variar and Chakkunkuth Veeran, for an offence under section 211, Indian Penal Code. The Magistrate refused to accord sanction. The Inspector of Police then appealed to the Special Assistant Magistrate of Malabar, who set aside the order of the Sub-Magistrate and granted sanction.

In Criminal Revision Case No. 251 of 1902, Kovilakathillath Krishnan Thangal applied to the Stationary Second-class Magistrate of Kottayam Kasba for sanction to prosecute Kunnath Agnisarman *alias* Kunhumbu Potuval and others under sections 211, 195 and 196 of the Indian Penal Code. The Magistrate refused to accord sanction. An appeal was preferred to the Acting Joint Magistrate of Tellicherry, who accorded sanction.

Against both of these orders, the persons whose prosecution had been sanctioned filed these petitions.

* Criminal Revision Case No. 539 of 1902, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of A. R. L. Tottenham, Special Assistant Magistrate of Malabar, in Criminal Appeal No. 128 of 1902, presented against the order of P. S. Velayudham, Stationary Second-class Magistrate of Walluvanad, in Miscellaneous Case No. 14 of 1902. Criminal Miscellaneous Petition No. 251 of 1902 praying the High Court to revise the order of the Joint Magistrate of Tellicherry.

Mr. *P. K. Nambyar* for petitioners in Criminal Revision Case No. 539 of 1902.

The Public Prosecutor for the Crown.

J. L. Rosario for petitioners in Criminal Revision Case No. 251 of 1902.

Mr. *T. Richmond* for the counter-petitioner.

A ground (among others) upon which revision was asked was that the Joint Magistrate (in Criminal Revision Case No. 251 of 1902) had no jurisdiction to admit and hear the appeal and grant the sanction as the Stationary Second-class Magistrate was not subordinate to him within the meaning of section 195 of the Code of Criminal Procedure.

The case came first before the Chief Justice and Subrahmania Ayyar, J., who made the following

ORDER OF REFERENCE TO A FULL BENCH.—The respondent has raised a preliminary objection that this revision petition cannot be entertained and he has relied on sub-section (5) of section 439 of the Code of Criminal Procedure. For the purpose of dealing with this preliminary objection we assume an appeal lies under section 195 (6) from the order of the Joint Magistrate granting the sanction. Section 439 (5) only provides that revision proceedings shall not be entertained at the instance of the party. It does not preclude the Court from entertaining such proceedings if, apart from the application, the case is one which appears to require the exercise of revisional jurisdiction.

We refer to a Full Bench the question whether a Magistrate who has been directed and empowered to hear appeals under the provisions of section 407 (2) of the Criminal Procedure Code is "the Court to which appeals . . . . ordinarily lie" within the meaning and for the purposes of section 195 (7) of the Code. The case of *Queen-Empress* v. *Subbaraya Pillai*(1) was decided under the Code of 1882. In the present Code the word "may" has been substituted for "shall" in section 407 (2). The Calcutta High Court has held that a Magistrate authorized to hear appeals under section 407 is not the Court to which appeals "ordinarily lie"—(*Sadhu Lall* v. *Ramchurn Pasi*(2)).

(1) I.L.R., 18 Mad., 487. (2) 7 Calc. W.N., 114.

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The case came on in due course before the Full Bench constituted as above; when the Court delivered the following opinions:—

Sir ARNOLD WHITE, C.J.—Section 407 (1) of the Code of Criminal Procedure provides that "any person . . . . may appeal to the District Magistrate." Sub-section (2) provides that the District Magistrate may direct that any appeal under the section or any class of such appeals [*i.e.*, appeals which by the express words of sub-section (1) are appeals to the District Magistrate] shall be heard by any Magistrate of the first class subordinate to the District Magistrate and empowered by the local Government to hear appeals and thereupon such appeals or class of appeals may be presented to such Subordinate Magistrate, or, if already presented to the District Magistrate, may be transferred to the Subordinate Magistrate. The section also gives power to the District Magistrate to withdraw from the Subordinate Magistrate any appeal or class of appeals which have been presented or transferred. It seems to me that on the true construction of this section the District Magistrate is "the Court to which appeals ordinarily lie" within the meaning and for the purposes of section 195 (7) of the Code. Section 407 (1) in express terms gives a right of appeal to the District Magistrate. The exercise of the power given to the District Magistrate to direct that appeals under the section shall be heard by a Subordinate Magistrate and the power to present an appeal to the Subordinate Magistrate in pursuance of a direction given by the District Magistrate do not constitute the Sub-divisional Magistrate the Court to which appeals under the section "ordinarily lie." The appeal only lies to one Court, viz., the District Magistrate and consequently section 195 (7) (*a*), "where such appeals lie to more than one Court," etc., has no application.

I think the sections in question were rightly construed by the Calcutta High Court in *Sadhu Lall* v. *Ramchurn Pasi*(1). The case of *Queen-Empress* v. *Subbaraya Pillai*(2) may be distinguished on the ground that under the Code of 1882, which was in force when that case was decided, the section ran "such appeal or class of appeals, 'shall' (not, as now, 'may') be presented to such Subordinate Magistrate," etc. It is to be observed that the corresponding

(1) 7 Calc. W.N., 114. (2) I.L.R., 18 Mad., 487.

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section of the Code of 1872 (section 266) gives in express terms a right of appeal either to the District Magistrate or to the Sub-divisional Magistrate. The words giving a right of appeal to the Sub-divisional Magistrate were omitted in the Code of 1882. Under the Code of 1872 the Sub-divisional Magistrate exercised an independent appellate jurisdiction. Now he merely exercises a delegated jurisdiction in pursuance of directions given by the District Magistrate.

I think the answer to the question which has been referred to us should be that a Magistrate who has been directed and empowered to hear appeals under the provisions of section 407 (2) of the Criminal Procedure Code is *not* "the Court to which appeals ordinarily lie" within the meaning and for the purposes of section 195 (7) of the Code.

DAVIES, J.—I concur with the learned Chief Justice.

BENSON, J.—Under section 407 (1), Criminal Procedure Code, appeals from Second-and Third-class Magistrates lie to the District Magistrate, but, under the second clause of the section, the District Magistrate may direct that any class of such appeals shall be heard by any Magistrate of the first class subordinate to him who has been empowered by the local Government to hear such appeals. The Code of 1882 enacted that when such an order had been made the appeals "shall be presented to such Subordinate Magistrate" and this Court held that such Subordinate Magistrate was the Court to which appeals ordinarily lay for the purposes of section 195 (7), Criminal Procedure Code (*Queen-Empress* v. *Subbaraya Pillai*(1)). In the present Criminal Procedure Code the word "shall" has been altered into "may" be presented, and the question for consideration is whether such Subordinate Magistrate can still be considered to be the Magistrate to whom such appeals "ordinarily lie" for the purposes of section 195 (7), Criminal Procedure Code, or whether the District Magistrate is the Magistrate to whom such appeals ordinarily lie.

I understand that the District Magistrate has, in accordance with the universal or almost universal, practice in this Presidency, issued a general order under section 407 (2), Criminal Procedure Code, that all appeals from Second-and Third-class Magistrates within the local jurisdiction of the Sub-divisional Magistrate shall

(1) I.L.R., 18 Mad., 487.

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be heard by that Magistrate. When such an order has been issued the section provides that the appeals may be presented to the Sub-divisional Magistrate and they may also, apparently, be presented to the District Magistrate, who in such case would transfer them to the Sub-divisional Magistrate, unless for some special reason he was willing to hear the appeal himself. The universal, or almost universal, practice in this Presidency has, for the last thirty years, been to present such appeals to the Sub-divisional Magistrate, and the practice has not varied under the Codes of 1872, 1882 and 1898. The language of section 407 is not, it is true, very happy, but when all appeals of a certain class may be, and in practice are, presented to a certain Court, and must be heard by that Court, I do not think it is a great strain on the language to hold that such appeals may be said ordinarily to lie to such Court.

As to the meaning of the word "presented," it may be noticed that there is no section which authorizes an appeal by Government against an acquittal except section 417, and there the right of appeal is given by simply saying that the Government may direct the Public Prosecutor to "present an appeal."

What the section means is that an appeal by Government against an acquittal shall lie to the High Court and may be presented by the Public Prosecutor, etc., but the section merely says that the Public Prosecutor "may present an appeal to the High Court." The words "may present" are here held to necessarily imply that an appeal "shall lie" to the High Court. Having regard to this language and to the long-continued and universal practice in this Presidency, I think that the words "may be presented" in section 407 (2), as in section 417, may be construed to mean "shall lie and may be presented to."

If this interpretation is accepted, then appeals against sentences by Second-and Third-class Magistrates lie to a District Magistrate under section 407 (1), and also lie to the Sub-divisional Magistrate under section 407 (2), provided the District Magistrate has taken action under clause (2). When appeals against convictions lie to more than one Court, then section 195 (7) (*a*) provides that an appeal under section 195 shall lie to the Court of inferior jurisdiction, that is, to the Sub-divisional Magistrate.

I do not think that there is anything in the successive changes made in the language of the Code to militate against this

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interpretation. The Code of 1872 (section 266) directed that appeals against convictions by Second-and Third-class Magistrates should lie to the District Magistrate or to a Magistrate of the first class who had been specially empowered by Government to hear such appeals. The Code of 1882, as I read it, and as it was interpreted by this Court in *Queen-Empress* v. *Subbaraya Pillai*(1) directed that they should lie to the District Magistrate or to the Sub-divisional First-class Magistrate in cases where, as in this Presidency, the District Magistrate had issued the necessary orders for that end and the Code of 1898, though it altered "shall" into "may" in section 407 (2), and thus provided two alternative Courts of appeal, yet retained the former law for the purposes of section 195 by explaining that an appeal under that section lay to the inferior of the two Courts.

It may be added that this view is supported by strong considerations of convenience. It would be a hardship to oblige all persons appealing under section 195 to have to resort to the District Magistrate instead of the Sub-divisional Magistrate who is near at hand, and delay in the disposal of such cases and administrative inconvenience would result if the District Magistrate were obliged to hear all such appeals himself, or even to receive all such appeals himself and then transfer them, as he would do in pratically all cases, to the Sub-divisional Magistrate.

I would answer the reference in the affirmative.

Criminal Revision Case No. 251 of 1902 came on for hearing in due course before the Chief Justice and Subrahmania Ayyar, J., who passed the following

ORDER.—According to the ruling of the Full Bench, the order granting the sanction must be set aside.

(1) I.L.R., 18 Mad., 487.

APPELLATE CIVIL.

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

1903. January 23, 29. February 5, 6, 27. March 9.

MADHWA SIDHANTA ONAHINI NIDHI (PLAINTIFFS), APPELLANTS,

v.

VENKATARAMANJULU NAIDU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Mortgage—Bond and rental agreement executed on same date and identical in many terms—Effect—One and the same transaction—Obligations to be gathered from both—"Damdupat" Rule—Inapplicability to cases governed by Transfer of Property Act.

By an instrument described as a "possessory mortgage debt bond" which recited that the house described in it was put in the possession of the mortgagee, the mortgagors undertook to clear the mortgage debt by paying Rs. 65-10-0 before the 25th of each month, namely, Rs. 35 for principal and Rs. 30-10-0 for interest, and authorised the mortgagee to let the house, and credit the rent towards the aforesaid principal and interest. The bond further provided that in case the rent derivable from the house should fall short of the amounts payable every month, the mortgagors would themselves pay them on the due dates, and that, in default, they would pay compound interest. In case the amounts payable should not be paid for five months, the mortgagees were to recover the debt from the mortgagors. On the same day the mortgagors, by a separate agreement, rented the house from the mortgagees at a rental of Rs. 30-10-0 per mensem, payable by the 25th of each month with compound interest on the amount of rent; in default at the same rate as that payable under the mortgage bond in case of interest being in default. The lessees also agreed to vacate and deliver up the house to the lessors, or to those who obtained an order from the lessors, within thirty days of being required so to do. Default having been made, the mortgagees sued for the amount due, and, in default, for sale of the mortgaged property:

Held, that the two instruments were executed as parts of one and the same transaction and that the intention was that the rights and obligations of the parties were to be gathered from the provisions of both. Taking the two together, it was clear that the transaction was one entirely of mortgage, with an express covenant to pay the principal and interest in instalments and conferring a power on the mortgagee to take possession of the property mortgaged and apply the usufruct in the discharge of the interest and principal. *Juggeewundas v. Ramdas*, (2 M.I.A., 487), followed.

Also that the clause in the rental agreement as to delivery of the house when required, left no room for doubt that the arrangement was one not binding the

* Original Side Appeal No. 14 of 1902, presented against the decree of Mr. Justice Boddam in Original Suit No. 57 of 1901.

mortgagee to enter into possession and liquidate his debt by the usufruct; and the express covenant to pay precluded the mortgage from being taken as a purely usufructuary mortgage as defined by the Transfer of Property Act:

Held, further, that the "Damdupat Rule" is inapplicable to cases of mortgage governed by the Transfer of Property Act. *Ram Kanye v. Cally Churn*, (I.L.R., 21 Calc., 841), referred to.

SUIT on a mortgage. The facts, as well as the material portions of the documents, are sufficiently set out in the judgment. Rule 28 of the plaintiffs' society provided: "That if interest due on debts taken from the Nidhi shall fall into arrear for five months, the Secretary shall cause a notice of demand to be served on debtors, which will be charged for at the rate of two annas. And if the demand be not complied with by the end of the following month, proceedings shall forthwith be taken for the recovery of the dues. In the case of loans on jewels, they shall be sold under the provisions of the Contract Act."

The learned Judge, sitting on the Original Side, held that the consideration referred to in the mortgage bond, was given by the plaintiffs to the defendants Nos. 1 to 3; that the mortgage, so far as it was concerned was binding on the defendants Nos. 6 and 7. He said:—"I think the mortgage document purported to be nothing else than a usufructuary mortgage. Possession was given to the plaintiffs according to the deed and no one suggests that they (plaintiffs) did not take possession of it. They chose to let it under a rental agreement to defendants Nos. 1 to 3 and they allowed them to retain possession under that rental agreement all these years, though they were in default from the first. There is no doubt that the premises were worth that rent. We know that because a larger amount was paid for many years by a gentleman who occupied a portion of it. The plaintiffs made no effort to get the rent or to retake possession of the land and let it to others. They did not use their best endeavours to get rent. Therefore they are not entitled to claim any interest as against the defendants Nos. 4 to 9. The mortgage itself gives them no right at all to recover for interest or principal by proceeding against the property. Therefore they have no right to recover in this action which is an action to recover the money as against the defendants Nos. 1 to 7 personally and as against the property by sale. The utmost they could have claimed is to recover rent from the defendants who were their tenants under the rental agreement. They have not

done so. This action is an action based solely on the mortgage and the plaintiffs' Vakil has entirely repudiated the idea that the plaintiffs make any claim at all in this action under the rental agreement, and I do not think therefore that I should be justified in giving them a decree at all."

He considered that the defendants, other than Nos. 1 to 3 and the property, were not liable for the interest on the mortgage amount; and that the defendants, other than Nos. 1 to 3, were not personally liable. In the result, he said:—"The seventh issue is 'To what relief, if any, are the plaintiffs entitled.' If in this action I should think of giving a decree for the plaintiffs, I should certainly do so against defendants Nos. 1 to 3 for the amount of the rent due, together with any compound int[illegible] payable under rule 19 limited by rule 28. But as I ha[illegible] I do not see my way in this action, which is so[illegible] mortgage instrument, to give any such decree. There come to the conclusion that the suit must be dismissed, an[illegible] be dismissed with costs."

Plaintiffs preferred this appeal.

S. Subrahmania Ayyar for appellant.

T. V. Seshagiri Ayyar for eighth respondent.

Sundaram Sastri and *Kumaraswami* for sixth and seventh respondents.

JUDGMENT.—This is a suit brought by a registered Fund called Madhwa Sidhanta Onahini Nidhi, Limited, for the recovery of Rs. 9,054-3-7 stated to be the balance of principal and interest due under a mortgage of the 1st November 1887 granted in favour of the Nidhi by two brothers Venkataramanjulu Naidu and Venkatarangam Naidu and by a son of the former Venkata-narasimhulu Naidu, defendants Nos. 1 to 3, in the suit and members of an undivided Hindu family and for the sale of the mortgaged property. The said Venkatarangam Naidu's sons are impleaded as defendants Nos. 4 to 7, two of them having been minors at the date of the mortgage and the other two having been born subsequently to that date. The eighth defendant is the representative of one Varadappa Chetti, deceased, to whom the property comprised in the mortgage to the plaintiff was mortgaged by the first two defendants on the 15th May 1889, for the sum of Rs. 3,000. The ninth defendant, Govindappa Razu, is the holder of a third mortgage.

BODDAM, J., who tried the suit, found that the mortgage sued on was executed under circumstances binding upon all the members of the said family but dismissed the suit on the ground that, upon the proper construction of the instruments (exhibits A and F) which passed between the parties, the plaintiff was not entitled to sue for the mortgage money or to ask for the sale of the property.

The plaintiffs appeal, and the contesting respondents are only the sixth, seventh and the eighth defendants. The finding of the learned Judge as to the binding character of the mortgage was not impeached in the argument before us. In proceeding to consider the questions which arise for determination, it is necessary to set out the material portions of those instruments. After describing the situation, etc., of the property mortgaged, viz., a house and ground, and reciting that the property was put in the possession of the mortgagee and explaining how the mortgage amount of Rs. 3,500 was made up, the instrument (exhibit A) which describes itself as a "possessory mortgage debt bond" runs, so far as is necessary for the present purpose, thus:—"For clearing off this debt we bind ourselves to pay to you or to those who may obtain your order, before the 25th of every month Rs. 65-10-0, viz., Rs. 35 for principal and Rs. 30-10-0, being the interest accruing at 14 annas per 100 per mensem. You should let out the aforesaid house for rent and the rent derivable therefrom should be credited every month towards the aforesaid principal and interest. In case the rent derivable from the said house should fall short of the amounts to be paid to you every month, or if no rent should be derived therefrom, we bind ourselves to pay otherwise the amount due for principal and interest, before the 25th of every month. Should we fail so to pay we bind ourselves to pay, as per rule 19 of the aforesaid Nidhi, compound interest at 2 pies per rupee for the amount of interest due for each month. In case we don't pay the amount payable by us for five months on the whole, you shall recover the debt from us as per rule 28 of the aforesaid Nidhi . . . . Counter-interest should be allowed for Rs. 25, or any multiple of Rs. 25, which is paid as per rule 19 of the aforesaid Nidhi."

The provisions of exhibit F are these:—"As we have taken out from you on rent at Rs. 30-10-0 for each month house No. 16 on the northern row of Venkatesa Naidu's street attached to

Triplicane, we or our heirs bind ourselves to pay to you or to those who may obtain your order before the 25th of every month the aforesaid Rs. 30-10-0. If we make default in so paying, we bind ourselves to pay compound interest at 2 pies per rupee per month on the amount of each month in which default is made. If perhaps you require the aforesaid house and bungalow we bind ourselves to deliver it over with the key to you or to those who may obtain your order, after vacating it, within thirty days of your communicating the same."

What transpired under these instruments is as follows:—Notwithstanding the recital in exhibit A that possession was given to the plaintiff, actual possession remained with the mortgagors and this was the footing on which the mortgage of the contesting respondent (eighth defendant) was made (see exhibit VIII). The mortgagors made payments to the mortgagee but neither punctually at the times stated nor in the sums specified in the instruments and the total amount thus paid was Rs. 2,638-11-9 between the years 1887 and 1900, which was appropriated by the mortgagee for interest. Though, in consequence, of the failure of the mortgagors to act up regularly to the terms of their contract they were more than once called upon to quit and deliver possession of the house and ground to the plaintiff, the demand was not complied with. No legal proceedings were, however, taken by the Nidhi against the defendants prior to the institution of this suit and the Nidhi was never allowed to enter into and hold actual possession. The present claim, after credit being given to the payments made to the Nidhi, is for Rs. 3,500 for principal and Rs. 5,548-3-7 for interest, inclusive of compound interest.

Upon these facts, the main points which arise for determination are whether the present suit for the recovery of the mortgage amount and for sale of the mortgaged property in default of payment, is maintainable and whether what is called the *Damdupat* rule is applicable to the case.

The answer to the first question depends on the proper view to be taken of the rights of the parties with reference to the provisions of the instruments quoted above. Notwithstanding that exhibit A alone purports to be the mortgage, while exhibit F purports to be a lease from the mortgagee to the mortgagors of the property mortgaged, was it the intention of the parties that the two instruments should be read together and the character of the transaction determined with reference to the provisions of both; or was it their intention that the instruments should be taken separately and each treated as constituting a distinct and independent transaction? In cases like the present it is, of course, the intention of the parties, irrespective of the mere form of instruments executed between them, that determines their rights (compare *Altaf Ali Khan* v. *Lalta Prasad*(1) and *Jafar Husen* v. *Ranjit Singh*(2)). Now, turning to the instruments and the circumstances of their execution, though no express reference is made in either instrument to the other, yet, it is obvious, that there is an intimate connection between them. They were executed and registered on the same day; the sum of Rs. 30-10-0 made payable as rent under the agreement is the exact sum payable as interest under the mortgage; the date on which the interest is made payable, is the date on which the rent is payable; on default of payment on the due date the interest under the mortgage was to carry compound interest at the rate of 2 pies per rupee per mensem, and the rent if unpaid before that date was also to carry the same rate of interest; lastly, the term used for the interest of 2 pies upon the rent in exhibit F is the same as that used in exhibit A for the interest upon interest, viz., "Thudarvaddi" (compound interest) an expression not appropriate in exhibit F except upon the view that what is spoken of as rent in the agreement was in the contemplation of the parties only interest—and it would not have been viewed as interest, but as principal had exhibit F been an entirely distinct transaction. These striking identities in the provisions of the two instruments clearly point to the view that what purports to be the mortgage is not distinct from what purports to be the lease, that the two instruments were executed as parts of one and the same transaction and that the intention was that the rights and obligations of the parties were to be gathered from the provisions of both. Taking the two together it is clear that the transaction was one entirely of mortgage with an express covenant to pay the principal and interest in instalments, and conferring a power on the mortgagee to take possession of the property mortgaged and apply the usufruct in the discharge of the interest and principal.

(1) I.L.R., 19 All., 496. (2) I.L.R., 21 All., 4.

In this view, the case is completely governed by *Juggeewundas* v. *Ramdas*(1) cited for the plaintiff. The provisions of the deed in question there were: "the profit (or interest) of this money is settled for 12 annas, on these conditions, that the holders of the mortgage are to receive in redemption the whole of the produce of the said village, about Rs. 3,000 or Rs. 3,200, and, after allowing for interest, the remainder will go for liquidating the principal and they shall continue so to receive and appropriate the annual produce until the whole of their demand be liquidated. The risk of collecting the income and of any deficiency in the revenue is on our heads, and we do further declare that the holders of the said mortgage shall station a Mehta (or clerk) of their own in the said village for the purpose of making the collections and we, the mortgagors, so long as this property remains in mortgage, do agree to give him a monthly salary of five rupees and his daily food, so long as we can afford to do so." It was found that the mortgagees had entered into possession by appointing a Mehta and that he collected the incomes for some years and paid them over to the mortgagees, but that subsequently he allowed the mortgagors to receive the rent. The proper construction of the contract as well as the effect of the conduct of the mortgagees in allowing the mortgagors to receive the rent, as between the mortgagee and the mortgagors and as between the mortgagee and persons who stood in the position of puisne incumbrancers is dealt with by the Judicial Committee in the following passage of the judgment:— "If this is a binding contract . . . . binding him (the mortgagee) to apply the rents and profits to the payment of the debt, he might be considered as having forfeited his right to payment in having allowed the mortgagors themselves to take possession of the rents and profits during some of the years during which his Mehta was in possession. But their Lordships are of opinion that this is not the true construction of the deed, but that it is merely a power to satisfy himself just as an English mortgagee may by taking possession of the rents and profits of the estate; and, if an English mortgagee chooses to forego the benefit of receiving the rents and profits and permits the mortgagor to take them, it would have no effect as between him and the mortgagor; he would have a full right to recover his debt by reason of the

(1) 2 M.I.A., 487.

mortgage. The only effect would be when some subsequent incumbrancer came in and he had notice of that claim. In that case, the rule and law of England would be that if after notice he permits the mortgagor to receive the rents and profits he exposes himself to the claim of the second incumbrancer and that is the principle which their Lordships think ought to be applied in the present case."

Now, from what has already been said, it will be seen that the language of the mortgage in the present case is much more express than that of the mortgage in the above case inasmuch as here there is a covenant to pay in unmistakeable terms and the words in exhibit F "If perhaps you require the aforesaid house and bungalow, we bind ourselves to deliver it over with the key to you or to those who may obtain your order after vacating it within thirty days of your communicating the same," leave no room for doubt that the arrangement was one not binding the mortgagee to enter into possession and liquidate his debt by the usufruct. These circumstances make the case the more favourable to the present mortgagee. The express covenant to pay precludes the mortgage being taken as a purely usufructuary mortgage as defined by the Transfer of Property Act (see *Ramayya* v. *Guruva*(1)), and the Nidhi not being a mortgagee bound to enter into possession it was, of course, as open to it to refrain from taking legal proceedings to eject the mortgagors, as to avoid piecemeal litigation in respect of the amount of each instalment of principal and interest as it became due and to pursue the preferable course of enforcing its rights in the form it has now adopted. The liability of the mortgagors to repay the debt to the Nidhi is therefore too clear for further discussion. The question as between the mortgagee and the puisne incumbrancers also is equally clear, since the former, not having taken possession of the mortgaged property, there is no scope for the application of the rule as to a mortgagee in possession being liable to account for the consequences of his wilful default and the doctrine of notice to which frequent reference was made in the argument.

It only remains to deal with the contention that the *Damdupat* rule is applicable here. In the circumstances of this case, it is not necessary to express any opinion upon the general question

(1) I.L.R., 14 Mad., 282.

whether the rule has ever been in force within the limits of the ordinary original jurisdiction of this Court. Assuming that it has been, the point to be determined is whether its operation has been affected by the enactment of the Indian Contract Act or of the Transfer of Property Act. That the former enactment could not be held to have touched the rule in any way is obvious. Of course, section 37 of that Act as to the duty of every promisor to perform his promise is an enactment of the most general character, applicable to all kinds of contracts while the *Damdupat* rule relates only to one description of contracts, viz., those involving payment of interest. Even if there were any apparent conflict between the provisions of the said section and the Hindu Law rule in question such conflict could not be held to affect the latter according to the well-established principles of construction governing cases of such conflict. In point of fact, however, there is no sort of conflict between that section and the rule, since the application of the latter would be covered by the words "unless such performance is excused under the provisions of any other law," in the section.

But, as to the effect of the provisions of the Transfer of Property Act relating to mortgages, upon the rule under consideration, the matter rests on a different footing. Under sections 86 and 88 thereof the mortgagee is entitled to a decree for interest, such interest being made up as contracted for. Compare *Muhammad Imam Ali* v. *Sirdar Hussain*(1). If the amount of interest thus due exceeds the principal, the application of the *Damdupat* rule will clearly derogate from the said provisions of the Act. Now, with reference to these provisions which relate solely to mortgages carrying interest the *Damdupat* rule governing all classes of contracts carrying interest may, we think, well be considered to be an anterior general rule which must give way in favour of the later special rule introduced by statute—*Specialia derogant generalibus*. Section 2, clause (*a*) of the Act, in no way precludes the adoption of this view. No doubt, section 13 of the Statute 37 Geo. III, cap. 142, which, it has been held, warrants the application of the *Damdupat* rule within the original jurisdiction of the High Courts of Calcutta and Bombay is not among the enactments expressly repealed by the Transfer of

(1) L.R., 25 I.A., 161.

Property Act; and if the direction contained in that section to the effect that all matters of contract and dealing between party and party should, where the defendant or both the parties are Hindus, be determined according to the Hindu Law and Usage, is to be construed as an importation bodily of every rule of the Hindu Law of Contract into the statute itself, sections 86 and 88 of the Transfer of Property Act must be construed so as not to conflict with such earlier enactment. But such a construction of the section in question of the English statute is impossible. It only lays down that the law applicable to particular classes of cases is the Hindu Law; and it is not as rules enacted by the Legislature as parts of the statute but as mere rules of Hindu Law that they could have operation in the cases contemplated by the statute.

If, however, the correct view should be that as between the rule of the *Damdupat* and the provisions of the Transfer of Property Act relating to interest to be allowed on mortgages, the former is a special law inasmuch as it applies to contracts by Hindus only and the latter a general law comprising, as it does, mortgages by Hindus as well as others—even then it must be held that the one is abrogated by the other. For, though merely because the provisions of a general Act are not consistent with an earlier rule applicable to special cases only, the former should not be held to repeal the latter by implication, yet such a repeal would follow if it appeared that the earlier rule was present to the mind of the Legislature when it enacted the later general provision inconsistent with it and that the later provision was enacted in circumstances which raise an inference that no exception in favour of the earlier rule was intended (Maxwell on 'Interpretation of Statutes,' third edition, page 250). That such was the case here is made perfectly clear by the concluding words of section 2 and by section 129 of the Act in question. For they show that the question how far the rules of Hindu Law should be saved from being affected by each provision of the Transfer of Property Act inconsistent with those rules, was distinctly before the Legislature and that it decided to save the rules of Hindu Law only in so far as they fell within the purview of the two saving provisions just mentioned.

The *Damdupat* rule not being one so saved, cannot but be held to have been abrogated in respect of mortgages governed by the Transfer of Property Act.

It is scarcely necessary to say that a different view would involve the startling conclusion that the rule of Hindu Law, which requires no writing in the case of a sale, mortgage, lease or exchange of immoveable property whatever the value of it, is still in force within the ordinary original jurisdiction of the High Courts of Calcutta, Bombay and Madras and render the provisions of the Transfer of Property Act in so far as they require these descriptions of transfers to be effected by writing registered, inapplicable within those limits—a view which no one has yet ventured to suggest.

The conclusion that the *Damdupat* rule is inapplicable to cases of mortgage governed by the Transfer of Property Act is not inconsistent with any of the authorities to which our attention was drawn in the argument since, except in *Ram Kanye* v. *Cally Churn*(1) the present question did not arise, the mortgages having been anterior to the passing of the Transfer of Property Act, and though in *Ram Kanye* v. *Cally Churn*(1) the mortgage was subsequent, the effect of the Act upon the *Damdupat* rule was neither suggested nor considered.

That rule cannot, therefore, be applied in this case and the plaintiffs are entitled to all the interest even if the amount thereof should exceed the principal.

The appeal must be allowed and the decree of the learned Judge reversed, the terms of the decree to be settled on an account being filed by the plaintiff and the eighth defendant.

The case having stood over for the account to be filed—On March 9th, the Court delivered the following further judgment:—The amount due to the plaintiff up to this date is Rs. 8,852-12-0 for principal and interest. There will be a mortgage decree for this amount with costs throughout, including advances made to the guardian of the minor defendants payable on the 15th July next with interest on the principal sum of Rs. 3,500, at 10½ per cent. per annum from this date, to the said date and thereafter at 6 per cent. per annum on the whole amount then due to date of realization. If the mortgaged property is found insufficient there will be a personal decree against the defendants Nos. 1 to 3 and against the family assets in the hands of defendants Nos. 4 to 7 for the balance. If there is any surplus in the sale-proceeds after

(1) I.L.R., 21 Calc., 841.

payment to the plaintiff, the amount will be applied in the discharge of the eighth defendant's mortgage amounting, with principal and interest on this date, to Rs. 6,107 as agreed.

APPELLATE CIVIL.

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

KRISTNASAWMY MUDALIAR (PLAINTIFF), APPELLANT,

v.

OFFICIAL ASSIGNEE OF MADRAS (CLAIMANT), RESPONDENT.*

1903. January 22. February 5.

Civil Procedure Code—Act XIV of 1882, *ss.* 268, 483—*Attachment of money before judgment—Decree—Subsequent insolvency of judgment-debtor—Claim of Official Assignee—Priority of Official Assignee.*

The effect of an attachment under the Code of Civil Procedure is to prevent alienation. It does not confer title. An order of attachment under section 268 only operates so as to give the judgment-creditor certain rights in execution. It does not operate, when those rights are not exercised before the presentation of a petition in insolvency, so as to create in favour of the judgment-creditor a title which prevails against that of the Official Assignee, under the vesting order in insolvency made after the order of attachment.

The plaintiff in a suit obtained an order for attachment before judgment of a sum of money belonging to the defendant. In due course a decree was obtained, and subsequently to the decree the judgment-debtor was declared an insolvent. The Official Assignee then preferred a claim to the money under attachment, contending that the attachment was of no effect as against him, and asking that it might be set aside:

Held, that the Official Assignee was entitled to the order asked for.

CLAIM petition. On 6th February 1900, the plaintiff in the suit obtained an order under section 483 of the Code of Civil Procedure for the attachment before judgment of a sum of Rs. 40,000 which had been deposited with Messrs. Parry & Co. by the defendant in the suit as security for the performance of his duties as dubash, and a further order under section 268 of the Code restraining the defendant from receiving that sum from Messrs. Parry & Co. and Messrs. Parry & Co. from paying it to the defendant.

*Original Side Appeal No. 20 of 1902, presented against the order of Mr. Justice Boddam in Claim in Civil Suit No. 18 of 1900, dated the 11th March 1902.

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On 25th July 1900, the plaintiff in the suit obtained a decree for over Rs. 12,000. On 18th February 1901, the defendant in the suit was adjudicated an insolvent on his own petition and a vesting order was made in due course vesting his estate in the Official Assignee, who now presented this petition. He claimed that the attachment was of no effect as against him. The learned Judge passed the following order :—I am of opinion that an attachment by a prohibitory order until the permanent order of the Court does not create a charge or lien on the property attached —nor does it affect the devolution of the property attached by process of law. The property, though attached before judgment, passed to the Official Assignee under section 7 of the Insolvency Act, and I must therefore allow the claim of the Official Assignee with costs.

Against that order the plaintiff (attaching creditor) preferred this appeal.

C. V. Anantakrishna Ayyar for the appellant :—The question is whether a creditor who obtained a decree against the debtor, having previously obtained an order from the Court attaching before judgment money belonging to the debtor in the hands of third persons, is entitled to any priority as against the Official Assignee, the debtor having been declared insolvent after the date of the decree. The learned Judge has held that the money attached vested in the Official Assignee for the benefit of all the creditors of the insolvent and that the attaching decree-holder was not entitled to any priority. The sections of the Indian Insolvency Act (11 & 12 Vict., c. 21) that are important in this connection are sections 11, 40 and 49. [The Chief Justice referred to the English Bankruptcy Act.] The Bankruptcy Act of 1883, section 45, no doubt, says that the execution must be completed before the insolvency intervenes. That provision is new, and was enacted to overrule many decisions to the contrary that had been passed by the English Courts prior to its enactment. It had been held under the Bankruptcy Act of 1869 that a decree-holder who had obtained a garnishee order was in the position of a secured creditor and had a charge on the moneys attached (*Ex parte Joselyne In re Watts*(1)). Even under the earlier Bankruptcy Act 1 & 2 Vict., c. 110, it was held that a decree-holder who had attached property had

(1) L.R., 8 Ch.D., 327.

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certain rights with reference to that property, which could not be defeated by the subsequent insolvency of the debtor (*Woodland* v. *Fuller*(1)). This Act was very similar to the Indian Insolvency Act. English Courts have considered the nature of the rights of the trustee in bankruptcy. The trustee has only the rights which the bankrupt had, and he takes the property subject to the equities to which they were subject in the hands of the bankrupt. He is in the position of a "gratuitous alienee" (*Fleeming* v. *Howden*(2) and *In re Atkinson*(3)). I first submit that the attachment creates a charge for the debt. Even if a charge is not created, the attaching creditor has an equity to have his debts first satisfied out of the attached property. Under the old Civil Procedure Code (Act VIII of 1859), section 270, the first attaching decree-holder had a right to have his whole debt satisfied first. Though that right has been taken away by the present Code, section 295, yet it is only in favour of decree-holders who apply for execution in the same Court before assets are realized. The respondent, in the present case, cannot claim under that section. That an attachment creates certain vested rights in favour of the attaching decreeholder has been decided by the Privy Council in cases where a money decree is passed against an undivided member of a family governed by Mitakshara law, and his share is attached. In such cases that coparcener's death will not pass the whole property by survivorship to the others free from this debt, which would be the case if there were no attachment (*Suraj Bunsi Koer* v. *Sheo Persad Singh*(4) and *Deendyal Lal* v. *Jugdeep Narain Singh*(5)). I submit that attachment in the present case has a similar effect. The law of insolvency is not more rigid than the law of survivorship. The attaching creditor has a right to redeem which an ordinary creditor has not. (Section 91 of the Transfer of Property Act.) Coming to the Indian case law, there are no similar cases in Madras. The decisions in *Sadayappa* v. *Ponnama*(6) and *Ramanayya* v. *Rangappayya*(7) are not to the point, as there the insolvency intervened prior to the decree. In Calcutta, the earliest

(1) 11 Ad. & Ell., 859.
(2) L.R., 1 Scotch and Divorce Appeal Cases, 372 at p. 382.
(3) 2 De. Gex. M. & G., 140.
(4) I.L.R., 5 Calc., 148.
(5) I.L.R., 3 Calc., 198.
(6) I.L.R., 8 Mad., 554.
(7) I.L.R., 17 Mad., 144.

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case on the point is *Ananda Chandra Pal* v. *Panchilal Sarma*(1). That is a case exactly on all fours with the present case. The decision is not based on the special provision of Act VIII of 1859, section 270.

[*The Chief Justice.*—The latest case in Calcutta is against you.] The case of *Frederick Peacock* v. *Madan Gopal*(2) is against me. But the attaching creditor was unrepresented there, and I submit that too much importance was attached to the dicta of the Privy Council in *Moti Lal* v. *Karra Buldin*(3), that attachment does not confer title. The point was not necessary for the decision of the case, and in reality there is no decision on this point. The decision of the case went on the doctrine of *lis pendens*. The reasons given by the majority of the Judges in *Shib Kristo Shaha Chowdhry* v. *Miller*(4) is in my favour, for the rights of the attaching creditor who obtains a decree prior to vesting order are protected. The reasoning in *Howatson* v. *Durrant*(5) is also in my favour.

Mr. *Daly*, for the Official Assignee, referred to the decisions in *Sadayappa* v. *Ponnama*(6) and *Ramanayya* v. *Rangappayya*(7), and to the decision of the Calcutta High Court in *Soobul Chunder Law* v. *Russick Lall Mitter*(8). If the appellant's contention were correct, attachment before judgment should give the same priority to the creditor who obtained decree after the vesting order. He contended that reasons given in *Soobul Chunder Law* v. *Russick Lall Mitter*(8) and *Frederick Peacock* v. *Madan Gopal*(2) were convincing, and that the whole policy of the Insolvency Act was to distribute the assets among the creditors rateably. The Privy Council decision in *Moti Lal* v. *Karra Buldin*(3) also decided the question in favour of the Official Assignee's right.

C. V. Anantakrishna Ayyar, in reply, contended that the decision of the Privy Council in *Moti Lal* v. *Karra Buldin*(3) did not govern the present case, which was, he submitted, governed by the decision of the Privy Council in *Suraj Bunsi Koer* v. *Sheo Persad Singh*(9), the observations at page 174 being

(1) 5 B.L.R., 691.
(2) I.L.R., 29 Calc., 428.
(3) I.L.R., 25 Calc., 179.
(4) I.L.R., 10 Calc., 150.
(5) I.L.R., 27 Calc., 351.
(6) I.L.R., 8 Mad., 554.
(7) I.L.R., 17 Mad., 144.
(8) I.L.R., 15 Calc., 202.
(9) I.L.R., 5 Calc., 148.

decisive of the present question. He submitted that the charge created by the attachment was not defeated by the subsequent insolvency of the judgment-debtor, and that the Official Assignee took subject to the charge in favour of the appellant.

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JUDGMENT.—This is an appeal from an order of Boddam, J., allowing the claim of the Official Assignee of the estate of one Ragavulu Naidu, an insolvent, as against an attaching creditor of the insolvent. The material dates are these: On 6th February 1900, the creditor obtained an order under section 483 of the Code of Civil Procedure attaching before judgment a sum of Rs. 40,000, which had been deposited with Messrs. Parry & Co., by the insolvent as security for the performance of his duties as a dubash, and a further order under section 268 of the Code of Civil Procedure restraining the insolvent from receiving this sum of Rs. 40,000 from Messrs. Parry & Co., and restraining Messrs. Parry & Co. from paying it to the insolvent. On 25th July 1900, the creditor obtained a decree against the insolvent for Rs. 12,000 odd. On 18th February 1901, an order of adjudication in insolvency was made on the petition of the insolvent and an order was subsequently made under section 7 of the Insolvency Act, vesting his estate in the Official Assignee. Section 490 of the Code of Civil Procedure provides that when property is attached before judgment and a decree is given in favour of the plaintiff, it is not necessary to re-attach the property in execution of the decree. The case, therefore, stands upon the same footing as if the creditor had obtained his decree and had afterwards obtained an order of attachment before the adjudication. The question for determination is, does the order of attachment operate so as to give the attaching creditor priority over the other creditors in the insolvency. In one sense no doubt the process of attachment is complete, that is, the creditor has done all that the Code requires him to do to give him the rights of an attaching creditor. In the sense in which, for the purposes of the present English Bankruptcy law, an attachment is deemed to be complete, so as to give the attaching creditor a good title as against a trustee in bankruptcy the attachment is not complete. Under section 45 of the Bankruptcy Act, 1883, the attachment of a debt is only completed by the receipt of the debt. On behalf of the attaching creditor reliance was placed upon the decision of the Court of Appeal in *Ex parte*

Joselyne In re Watts(1), where it was held that a judgment-creditor who had obtained a garnishee order nisi attaching debts due to the judgment debtor before the filing of a liquidation petition was a secured creditor within section 16 (5) of the Act of 1869 and his title to the attached debts prevailed over that of the trustee. The law as laid down in the case referred to was altered by the Act of 1883 and it may be observed that the English Act of 1849 and most of the bankruptcy statutes prior to that of 1869 contained a provision which deprived execution-creditors of the benefit of their execution if they had not realized by seizure and sale before the adjudication. (See Williams on 'Bankruptcy,' 6th Edition, 45.) The English decisions, however, are only useful by way of analogy. The question really has to be decided with reference to the provisions of the Code of Civil Procedure and of the Insolvency Act which is in force in this country (1 & 2 Vict., c. 110). First, it is to be observed that there is nothing in any of the provisions of the Code, which, in terms, makes the attaching creditor a secured creditor or creates any charge or lien in his favour over the property attached. The order of attachment merely restrains the debtor's creditor from paying to the debtor the money attached, and restrains the debtor from receiving the same. (See Form 139 of Schedule IV of the Code of Civil Procedure.)

The order does not purport to deal with any question of title as between the debtor and the party in whose hands the debt alleged to be due to the debtor is attached or as between the debtor and any party in whom his estate may afterwards become vested by operation of law. In other words, attachment prevents alienation, it does not confer title. (See the judgment of the Privy Council in the case of *Moti Lal* v. *Karra Buldin*(2).) *Primâ facie*, on the making of a vesting order under section 7 of the Insolvency Act the right to recover a debt due to the debtor vests in the Official Assignee as part of the insolvent's estate. It is for the attaching creditor to show that, under the provisions of the Code of Civil Procedure, the order of attachment operates so as to prevent this right from vesting. In our judgment the making of an order of attachment in favour of a judgment-creditor obtained under section 268 of the Code of Civil Procedure only operates so as to give the

(1) L.R., 8 Ch.D., 327. (2) I.L.R., 25 Calc., 179.

judgment-creditor certain rights in execution. It does not operate, when these rights are not exercised before the presentation of a petition in insolvency, so as to create in favour of the judgment-creditor a title which prevails against that of the Official Assignee under a vesting order in insolvency made after the order of attachment. As regards the authorities, the precise point does not appear to have been decided by this Court. In the case of *Sadayappa* v. *Ponnama*(1) where the vesting order was after attachment but before decree, it was held that the title of the Official Assignee prevailed. In that case the Judges observe that there is a material difference between an order of attachment under the Code of Civil Procedure and a writ of *fi fa* in that the latter is an order for sale, while the former is a step which may or may not be accompanied by an order for sale. On principle it seems difficult to draw any distinction between *Sadayappa* v. *Ponnama*(1) and the present case, since it cannot be contended that the decree in the present case, *qua* decree, constituted the judgment-creditor a secured creditor or gave him any charge or lien over the property of the judgment-debtor. In the case of *Viraraghava* v. *Parasurama*(2) a judgment-creditor had obtained an order for the sale of the attached property before the vesting order was made, and the question involved was the right of another judgment-creditor to rateable distribution of the proceeds of the sale to be held in execution of the attachment already made. It was held that rateable distribution could be ordered upon the ground that the Official Assignee having applied to the District Court to stay the sale and not having appealed against an order dismissing his application, there was no further question between the Official Assignee and the judgment-creditors and the pendency of the proceedings in insolvency was no reason for refusing rateable distribution as between the judgment-creditors. The case turned upon the rights of the judgment-creditors *inter se*, not upon the rights of a judgment-creditor who had obtained an order of attachment as against the Official Assignee. The case is also distinguishable from the present case on the ground that the attaching creditor had obtained an order for sale before the adjudication in insolvency.

The point was considered in an elaborate judgment of the Allahabad High Court in which it was held that the Official

(1) I.L.R., 8 Mad., 554. (2) I.L.R., 15 Mad., 372.

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Assignee was entitled, under a vesting order, to possession of an insolvent's estate, even when the estate had been attached in execution of a decree and an order for sale had been made (*Sarkies* v. *Mussumat Bundho Bace*(1)). In *Ananda Chandra Pal* v. *Panchilal Sarma*(2), a Full Bench of the Calcutta High Court held that, when a creditor had obtained a decree and an order of attachment before the vesting order was made, the vesting order passed the property to the Official Assignee subject to being divested by a sale of the attached property in execution of the decree. In three subsequent cases, *Shib Kristo Shaha Chowdhry* v. *Miller*(3), *Soobul Chunder Law* v. *Russick Lall Mitter*(4) and *Frederick Peacock* v. *Madan Gopal*(5), the Calcutta High Court have declined to follow this decision. In *Shib Kristo Shaha Chowdhry* v. *Miller*(3), the point was only decided by a majority of 3 to 2, but, in the other two cases, the Court was unanimous. The case of *Miller* v. *Lukhimani Debi*(6), has now been overruled by the decision of the Full Bench in the case of *Frederick Peacock* v. *Madan Gopal*(5). As pointed out by the Chief Justice in his judgment in the latter case there is a marked distinction between the language of section 270 of the Act of 1859, the enactment in force when *Ananda Chandra Pal* v. *Panchilal Sarma*(2) was decided and section 295 of the present Code of Civil Procedure. Under section 270 of the Code of 1859 a creditor obtaining an attachment was entitled to be first paid out of the proceeds of the sale notwithstanding a subsequent attachment. Section 295 of the present Code provides for rateable distribution amongst creditors when more persons than one have, prior to realization in execution of a decree, applied for execution of decrees against the same judgment-debtor.

The amendments of the law of procedure in this country, as well as of the law of bankruptcy in England, have been based upon the principle that so far as possible the creditors should be treated *pari passu*, and that nothing short of actual realization of the debt due should give rights of priority.

If, under the provisions of the present Code, an attaching creditor does not obtain a charge or lien on the attached property

(1) 1 N.W.P.H.C.R., 81.
(2) 5 B.L.R., 691.
(3) I.L.R., 10 Calc., 150.
(4) I.L.R., 15 Calc., 202.
(5) I.L.R., 29 Calc., 428.
(6) I.L.R., 28 Calc., 419.

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no question, as it seems to us, of the property vesting subject to any equity in favour of the attaching creditor really arises.

We think the decision of Boddam, J., was right and we dismiss this appeal with costs.

Mr. *A. E. Rencontre*, Solicitor for respondent.

APPELLATE CIVIL.

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

SURYANARAYANA AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

VENKATARAMANA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1902, July 31. August 1. 1903. March 11, 12, 13.

Hindu Law—Adoption—Authority of husband to his wife to adopt—Adoption in pursuance of it—Death of son so adopted—Subsequent adoption by widow with assent of some sapindas—Validity.

A husband authorized his wife to adopt a son and died. The widow adopted a son in pursuance of that authority but the son also died. The widow adopted a second time. Both adoptions were made with the assent of some sapindas; but the assent to the second adoption was of questionable validity:

Held, that the husband's authority was not exhausted by the first adoption, and held good for the second adoption also, which was valid for that reason, independently of the assent of the sapindas:

Semble, that where some sapindas signed a document assenting to an adoption by a widow of "any boy at any time" which was not acted on for nine years, during which period circumstances materially changed, the assent so given would not be valid.

SUIT for a declaration that the adoption of first defendant by second defendant was invalid, and that the deed executed by the latter, conferring her husband's property on the former, was null and void.

Kannepalli Venkata Narasu, the husband of the second defendant, died without issue in 1861. On the strength of an authority given by him to adopt a son, his widow adopted, in 1885, her sister's son. The boy died within a year. On 9th February 1889 she obtained assent of the late K. Chelamayya Sastri and Dakshinamurti Somayajulu, two of her kinsmen, to adopt another son, and accordingly adopted the first defendant on 10th June 1898. The

* Appeal Suit No. 216 of 1900, presented against the decree of V. Venugopal Chetty, District Judge of Ganjám at Berhampur, in Original Suit No. 23 of 1899.

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plaintiffs Nos. 1 to 6 were the sons of one K. Lakshmi Narasu, a kinsman of deceased Venkata Narasu, while plaintiffs Nos. 7 and 8 were the sons of another kinsman, K. Venkanna.

These plaintiffs questioned the validity of first defendant's adoption and sought to have it set aside on the ground that (1) the authority given by K. Chelamayya Sastri and Dakshinamurti was insufficient and did not validate the adoption as it was given by a very remote kinsman during the life-time of nearer kinsmen; (2) the said authority was not sought and given *bonâ fide;* (3) the adoption was made while the second defendant (the adoptive mother) was under pollution; and (4) the ceremonies necessary for a valid adoption were not performed.

Defendants pleaded that the second defendant's husband had given her authority to adopt and she had accordingly done so. On his decease she, the second defendant, desired to adopt another son and sought the assent of the father of plaintiffs Nos. 1 to 6 and plaintiffs Nos. 7 and 8, but they withheld their assent from currupt motives. Second defendant, however, obtained the assent of the two sapindas already mentioned. It was also said that another sapinda, K. Ramavadhanulu, had also assented. In pursuance of the authority from her husband and from these sapindas, second defendant had made the adoption, with the necessary ceremonies.

The District Judge found that the husband of second defendant did authorise his wife to adopt a son to him; but that that authority did not validate the present adoption as it ceased to operate as soon as the first adoption had been effected; that second defendant did seek the assent of Venkanna and Lakshminarasu, but they refused to give it; that the assent given by the other three sapindas already mentioned had been given *bonâ fide* and was legal and valid: that first defendant had been duly adopted by second defendant, that the usual ceremony had been performed, and lastly, that the assent of the sapindas mentioned was sufficient. He held the adoption to be valid and dismissed the suit.

The written assent of the sapindas was filed as exhibit IV which was as follows: Document of permission for adoption executed, on the 9th day of February 1889, by Dakshinamurti Somayajulu and Chalamayya, these two Brahmins in favour of Venkataratnamma, widow of late Kannepalle Venkatnarasaya, Brahmin. You having, in accordance with your husband's permission, adopted before, that is to say, in the year 1885, a

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boy named and the boy having died, as you have requested us to give permission for adoption again in order to perpetuate the family, we have approved of it and have hereby given you permission. Therefore, you should adopt any boy at any time you please and perpetuate the family. This is the document of permission executed with our free will. (Signed) K. D. SOMAYAJULU and KANNEPALLI CHALAMAYYA, (and witnessed).

The case first came on for hearing before Davies and Moore, JJ.

P. S. Sivaswami Ayyar and *V. Ramesam* for appellants.

V. Krishnaswamy Ayyar, *P. R. Sundara Ayyar* and *K. Subrahmania Sastri* for respondents.

The Court called for findings in the following

ORDER.—We find no authority for the proposition of the appellants' vakil that the assent of the deceased husband's kindred required for the adoption must be the assent of the nearest sapindas. What we have to consider is whether, in the circumstances of this family, there was any assent of the sapindas which could be considered as sufficient. For this purpose we require to know how many sapindas there were alive at the time the authority to adopt (exhibit IV) was executed and how many at the actual time of adoption. We also require a finding as to when the two persons who gave their written consent to the adoption in exhibit IV died, and, if the third person Ramavadhanulu, who attested the deed of adoption, assented to the adoption before it took place and, if so, when.

The District Judge returned findings as follows:—(1) That there were 31 sapindas living at the time of execution of exhibit IV and 34 were living at the time of the actual adoption. (2) That D. Somayajulu died in 1893, and Challamayya Sastri in 1896. (3) That Ramavadhanulu who attested the deed of adoption did not assent to the adoption before it took place.

The case came on for hearing in due course before the Court constituted as above.

P. S. Sivaswami Ayyar and *V. Ramesam* for appellants.

T. V. Seshagiri Ayyar (for *V. Krishnaswamy Ayyar*), *P. R. Sundara Ayyar* and *K. Subrahmania Sastri* for respondents.

JUDGMENT.—The question is as to the validity of the adoption in 1898 of the first defendant by the second defendant on behalf of her husband who died in 1861. This was a second adoption, a prior adoption having been made in 1885, but the son then adopted

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died shortly afterwards. Both adoptions were made on the authority of the second defendant's husband, together with the assent of some of his sapindas, on each occasion.

We have no hesitation in agreeing with the District Judge in finding that the second defendant's husband did authorise his wife to adopt to him. The authority as proved by the witnesses was in general terms requiring her to adopt so as to continue his line and to provide for his spiritual benefit. He did not indicate any particular person for adoption either by name or otherwise and placed no restrictions whatever on his wife's discretion.

Such being the case, the first question is whether the authority so given was exhausted by the first adoption, or whether on the death of the son then adopted, the authority of the husband survived so as to enable the widow to make the present—that is a second—adoption.

We are not aware of any judicial decision which would bind us to hold that the husband's authority in circumstances like the present is so completely worked out by the first adoption as to prevent the widow from acting upon it when necessity arises for a fresh adoption, the estate being still vested in her, and being liable to be divested by such adoption. We are of opinion that the husband's authority held good for the second adoption also. The object and purpose of the authority given by the husband was to perpetuate his family as well as to secure his spiritual benefit and it would be unreasonable to hold that an accident such as the early death of the boy first adopted should be allowed to frustrate the fulfilment of his object and to preclude the widow from making another adoption in the absence of any legal impediment to her doing so. When the general intention of a Hindu to be represented by an adopted son is clear, as in this case, there seems no reason why effect should not be given to such intention, if it is possible to do so without contravening the law. Each case must be decided on its own merits, without applying too strict a rule of construction in regard to powers of this description.

We are supported in our view by the decision of Sir Thomas Strange in *Veeraperumal Pillai* v. *Narrain Pillai*(1) where a widow was held entitled to adopt a boy in furtherance of her husband's general intention in lieu of another indicated by him but who was not available: the same principle has been adopted by the Bombay High Court in *Lakshmibai* v. *Raja*(2) where, the boy who was

(1) 1 Strange's notes of cases, 78. (2) I.L.R., 22 Bom., 996.

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indicated for adoption not being available, the adoption of another was upheld.

It would appear from the note 3 at page 14 of Morley's 'Digest' that "instances have occurred in which a widow has made a second adoption on the failure of the first by death in fulfilment of a single injunction or authority from her husband, the object of such injunction being unattained unless the child live." Another instance of the husband's general intention being acted on by the widow without disapproval even where the husband did not directly give authority for the adoption, is to be found in the case of *Ramasawmi Ayyen* v. *Venkatarama Ayyen*(1). So that the practice of the community has been in accordance with our view of the law.

The cases in Calcutta to which our attention has been drawn adopt what appears to us to be too artificial a rule of construction in that they practically disregard the question of intention in such cases.

We must, therefore, hold that the adoption in dispute in this case was valid, apart from the assent of the sapindas which was also relied on. In this view, it is not necessary for us to enter into a discussion as to the validity of that assent, but we may state that our conclusion is that that assent was not valid for several reasons, the most important of which is that it was too general in its nature—"any boy at any time,"—and was not acted on for nine years, during which circumstances had materially changed, one of them being that two out of three assenting sapindas and two dissenting sapindas had died in the meantime.

The appeal is therefore dismissed with costs.

(1) L.R., 6 I.A., 196.

APPELLATE CIVIL—FULL BENCH.

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

1902. September 29. December 23. 1903. January 20.

RAJAH OF VIZIANAGRAM BY COLLECTOR AND GUARDIAN (PLAINTIFF), APPELLANT, IN BOTH CASES,

v.

RAJAH SETRUCHERLA SOMASEKHARARAZ (DEFENDANT), RESPONDENT, IN APPEAL SUIT No. 187 OF 1900,

RAMABHADRARAZ BAHADUR (DEFENDANT), RESPONDENT, IN APPEAL SUIT No. 188 OF 1900.*

Hindu Law—Payment by one of several co-sharers owning estate subject to revenue to save sale—Charge on share of co-sharers—Contribution—Transfer of Property Act—IV of 1882, *ss.* 82, 100—*Revenue Recovery Act—II of* 1864, *ss.* 2, 32, 42—*Civil Procedure Code—Act XIV of* 1882, *s.* 501—*Statutory application of general principle of equity to particular cases—Limitation Act—XV of* 1877, *sched. II, arts.* 132, 99, 61.

Where one of two or more co-sharers owning an estate subject to the payment of revenue to Government pays the whole revenue in order to save, and so does save, the estate from liability to be sold by Government for realizing

* Appeal Suits Nos. 187 and 188 of 1900, presented against the decree of J. H. Robertson, District Judge of Vizagapatam, in Original Suits Nos. 3 and 4 of 1900.

S.A. 788 *of* 1901.—The judgment in this case, which was delivered by BENSON and BHASHYAM AYYANGAR, JJ., on 11th November 1902, was as follows:—

The plaint is not drawn up with sufficient clearness to disclose exactly the cause of action on which the suit is based, nor does it appear clearly that the property over which the plaintiff claims a charge was purchased subject to a pre-existing mortgage which the plaintiff undertook to discharge. In Original Suit No. 22 of 1893, the plaintiff relying upon his title as purchaser sued to eject the defendant but it was held by the Court of Appeal that the defendant was the real purchaser, and that the sale-deed was taken only nominally in plaintiff's name. The finding therein being conclusive in the present suit, the plaintiff now sues to recover the sum of Rs. 311-5-6 as a charge upon the said property on the ground that he paid the principal of that sum, partly on the 21st May 1892 and partly on the 15th March 1893, to one Krishna Pathan in discharge of a mortgage, on the said property, made to him by the plaintiff himself on the 16th April 1888; and as appears from paragraph 3 of the District Munsif's revised judgment, the plaintiff's case seems to be that Krishna Pathan's mortgage is connected with the discharge of the original mortgage subject to which the property in question was bought for the defendant in the name of the plaintiff. This however is not clearly stated in the plaint nor established by evidence. The defendant, however, in her deposition admits that the mortgage in favour of Krishna Pathan was made for her benefit and with her consent and her plea was that the said mortgage was discharged by the plaintiff with her own money

the arrears of revenue, he is by operation of law entitled to a charge upon the share of each of his co-sharers for the realization of the latter's share of the revenue, as between the co-sharers. *Seshagiri* v. *Pichu*, (I.L.R., 11 Mad., 452), followed; *Achut Ramchandra Pai* v. *Hari Kamti*, (I.L.R., 11 Bom., 318); *Kinu Ram Das* v. *Mozaffer Hosain Shaha*, (I.L.R., 14 Calc., 809); and *Seth Chitor Mal* v. *Shib Lal*, (I.L.R., 14 All., 273), dissented from.

Per BHASHYAM AYYANGAR, J. (at the first hearing).—That the suit was governed by article 132 of schedule II to the Limitation Act in so far as it related to the enforcement of a charge. Assuming that the plaintiff had no charge on the defendant's share of the estate, the article applicable would be article 61 or article 99, but not article 120.

Though a claim for contribution generally arises in cases where the party seeking contribution has himself paid the amount in respect of which contribution is sought, and though, in the present case, the arrear of revenue had not been paid to Government by the plaintiff, but had been realized by the Collector under the Revenue Recovery Act from the income of the plaintiff's share after it had been registered as a separate estate, plaintiff's right to claim contribution was not affected. Nor did that fact affect the application of article 99 or article 61 of schedule II of the Limitation Act, in both of which the person bringing the suit is referred to as having 'paid' the amount sought to be recovered.

and that therefore he is not entitled to recover it from her. Both the Courts below concur in finding that her plea is false and that the plaintiff discharged Krishna Pathan's mortgage with his own money and they passed a decree in his favour for recovery of the same as a charge upon the property, the claim to recover it as a debt being dismissed as barred by the law of Limitation.

The only question for determination therefore in this appeal is whether the plaintiff has acquired a charge upon the property by his having discharged the mortgage-debt to Krishna Pathan. That mortgage having been made by the plaintiff with the consent of the defendant and for her benefit, it was a valid incumbrance on the property, as against the defendant, and the plaintiff having made himself liable, at the defendant's request, for the debt contracted from Krishna Pathan, he cannot be regarded as having paid Krishna Pathan's debt officiously or as a mere volunteer. As between himself and the defendant, the latter was bound to discharge the same and she not having done so, the plaintiff discharged the obligation he was under to Krishna Pathan and by such payment relieved the property, for the benefit of the defendant, from Krishna Pathan's incumbrance. Under these circumstances, the decision of the Privy Council in *Bhagavati Prasad* v. *Radha Kishen*(1) is a clear authority that the plaintiff is entitled in equity to have it declared that the amount claimed by him is a charge upon the property.

In that case, in execution of a money-decree, the judgment-debtor's property was attached and brought to sale and the same was by desire of the judgment-debtor (Bir Bhaddar) and for his benefit, purchased benami by Nandan Tewarri (his agent) who, by hypothecating the property to one Sarju Prasad raised a loan and paid the same into Court to complete the purchase. Sarju Prasad brought a suit on the mortgage bond against Nandan Tewarri, the ostensible purchaser and in execution of the decree which he obtained on the mortgage, became the purchaser of the mortgaged property. In a suit subsequently brought

(1) I.L.R., 15 All., 304.

In such a case, it is but just that all should contribute in proportion towards a benefit obtained by all.

It is immaterial whether the party seeking contribution made the payment voluntarily or involuntarily, namely, by payment to avert coercive process against his property or by the seizure of his property under process of law for realization of the amount. In either case he has been damnified and the parties against whom he seeks contribution have been benefited to that extent.

QUESTION referred to a Full Bench. The case came in the first instance before Bhashyam Ayyangar and Moore, JJ.

Hon. Mr. *C. Sankaran Nayar* and *T. Rangachariar* for appellant.

The Advocate-General (Hon. Mr. *J. P. Wallis*) and *K. Subramania Sastri* for respondent.

Their Lordships made the following

ORDER OF REFERENCE TO A FULL BENCH.—Whether in a case in which one of two or more co-sharers owning an estate subject to the payment of revenue to Government pays the whole revenue in order to save and so does save the estate from liability

against Sarju Prasad, by Bir Bhaddar, it was however held by the Indian Courts that Sarju Prasad was aware that Nandan Tewarri was only a benami purchaser and that therefore the mortgage which he obtained from him, the decree thereon and the sale in execution thereof were invalid as against Bir Bhaddar. Sarju Prasad therefore brought a suit against Bir Bhaddar and Nandan Tewarri for the recovery of the amount lent by him to Nandan Tewarri on the mortgage executed by the latter and claimed to enforce payment of the same also as an equitable charge upon the property in the hands of Bir Bhaddar, even if the mortgage as such was not binding upon him. On appeal by Sarju Prasad, the Judicial Committee of the Privy Council in giving a decree in his favour stated as follows (at page 309) :—"After the judgment in the former suit it might be difficult to hold that the deed executed by Nandan Tewarri was a valid hypothecation of the property and it is not necessary to decide that question. The facts admitted by Bir Bhaddar and also found by the Court in the former suit between these parties are sufficient to show that the appellant (the representative of Sarju Prasad) is entitled in equity to have it declared that the sums claimed with interest are a charge upon the property." It will be observed that the Privy Council considered it unnecessary to decide whether the mortgage as such was or was not binding upon Bir Bhaddar inasmuch as it had been decided by the High Court in a previous litigation between the same parties that the mortgage and the sale in enforcement thereof were invalid as against Bir Bhaddar. Their Lordships, however, came to the conclusion that quite independently of the charge created by the mortgage, Sarju Prasad was entitled in equity to a charge against the property in the hands of Bir Bhaddar for whom his agent Nandan Tewarri purchased the property by means of the loan advanced to him for that very purpose by Sarju Prasad. The plaintiff's claim in the present case to an equitable charge is even stronger inasmuch as the incumbrance which was discharged by the plaintiff under an obligation which he entered into at the request of the defendant was according to her own admission binding upon her.

The second appeal therefore fails and is dismissed with costs.

to be sold by Government for realizing the arrears of revenue he is by operation of law entitled to a charge upon the share of each of his co-sharers, for the realization of the latter's share of the revenue, as between the co-sharers?

The grounds on which the case was referred, together with facts out of which the case arose, are fully set out in the following judgments :—

BHASHYAM AYYANGAR, J.—The permanently-settled estate of Merangi in the district of Vizagapatam was registered in the Collector's office in the name of one Jagannadha Razu as its sole proprietor. A suit was brought for its partition by three of his co-parceners, including the present defendant, which was unsuccessfully resisted by Jagannadha Razu on the ground that it was an impartible estate. Both the Indian Courts and finally the Judicial Committee of the Privy Council, by its decree in 1891, (*Jagannadha Razu* v. *Ramabhadra Razu*(1)) held that the estate was partible and directed its partition into four equal shares.

On the 23rd October 1893, the late Maharajah of Vizianagram, the testator under whom the plaintiff claims, purchased from Jagannadha Razu his undivided one-fourth share in the estate, which purchase became absolute in the events that followed. There was no delivery of possession to the purchaser and on the 5th May 1894, the Collector, in execution of the decree of the Privy Council, effected a partition of Merangi, dividing it into four estates, each separately assessed and registered, and the estate of Chinna Merangi was allotted to Jagannadha Razu's share which, as aforesaid, had been sold to the late Maharajah of Vizianagram. Out of the purchase money the vendee paid revenue due to Government up to the end of October 1893 in respect of the entire estate which, prior to the partition, was in the sole possession of Jagannadha Razu. For subsequent arrears of revenue upon the entire estate until the date of partition, viz., the 5th May 1894, the Collector, on 5th September 1894, attached the estate of Chinna Merangi only, which at that time was in the possession of Jagannadha Razu, the other three shares having been, on the 5th May 1894, delivered respectively to the plaintiffs in the partition suit. The arrears amounting to Rs. 13,273-2-5 for which the attachment was made

(1) I.L.R., 14 Mad., 237.

having accrued upon the whole estate before it was divided and separately registered, it was competent to the Collector to realize such arrears by attachment of the whole or any portion of the estate and he selected Chinna Merangi, which had fallen to the share of Jagannadha Razu, probably because he thought it was equitable to do so, as Jagannadha Razu continued in possession of the whole estate until the date of partition. Instead of bringing Chinna Merangi to sale, the Collector, under the provisions of the Madras Revenue Recovery Act (II of 1864), realized the arrears from the current income by continuing in the management of the estate until the 19th January 1898, when the same was delivered to the plaintiff in execution of the decree in Original Suit No. 34 of 1894 which had been brought by the late Maharajah of Vizianagram against Jagannadha Razu and his sons to enforce the sale-deed of 1893 by recovering possession of Chinna Merangi, which, in the partition of May 1894, had fallen to the share of Jagannadha Razu, the vendor.

The present suit was brought on the 19th December 1899 to recover from the defendant by way of contribution the sum of Rs. 4,284–6–10, being his one-fourth share of the arrears which had been realized from the income of Chinna Merangi alone, and the plaintiff seeks to recover the said amount both personally from the defendant and by enforcing it as a charge upon the defendant's share in the estate.

The defendant pleaded *inter alia* that the suit was barred by limitation under article 99 of the second schedule to Act XV of 1877 and also by section 43 of the Code of Civil Procedure and that the plaintiff acquired no charge upon defendant's share in the estate.

The District Judge dismissed the plaintiff's suit on the ground that the defendant's plea of limitation was well founded as, in his opinion, it was established by exhibit C that the whole of the arrears for which Chinna Merangi had been attached, was realized before November 1896. He did not specially consider the question as to whether the plaintiff has a charge upon the share of the defendant, evidently because in his opinion article 99 would be applicable, not only to the enforcement of the personal obligation, but also to the enforcement of the charge, if any.

The question of limitation alone has been argued before us and the points chiefly relied upon in support of the appeal are—

(i) that the plaintiff has by law a charge;

(ii) that, if so, in so far as the plaintiff seeks to recover the amount claimed by enforcing the charge, the suit is governed by article 132 and not by article 99 or any other article;

(iii) that even if it should be held that the plaintiff has no charge in so far as the plaintiff seeks to recover the amount personally from the defendant, the suit is governed by article 120 and not by article 99;

(iv) that even if article 99 were applicable, the suit is not barred either in whole or in part, inasmuch as it is clear from exhibits D and E that a portion of the arrears in question consisting of two items on account of interest, viz., Rs. 364–1–3 and Rs. 781–10–3 were credited to Government from the income of Chinna Merangi on the 11th January 1898, which is within three years of the date of the suit.

It is impossible to decide the preliminary question of limitation without determining the plaintiff's right to claim contribution from the defendant, which forms the subject of the fifth issue, on which the Judge has recorded no finding. If there had been no sale by Jagannadha Razu of his share and the present suit had been brought by Jagannadha Razu himself, it is clear that he could not have maintained it. A co-sharer who is in possession of the entire estate and pays the revenue due to Government upon the estate cannot claim contribution from his co-sharers unless the income derived by him from the estate fall short of the amount of revenue paid to Government (*Dakhina Mohan Roy* v. *Saroda Mohan Roy*(1)), and in any event he can maintain no such suit if he holds and enjoys the entire estate as sole owner of the property to the wrongful exclusion of his co-sharers (*Achut Ramchandra Pai* v. *Hari Kamti*(2)). Though the plaintiff claims a fourth of the estate under Jagannadha Razu, he cannot be regarded as bringing this suit as the representative in interest of Jagannadha Razu. He became the owner of the one-fourth share on the 23rd October 1893 and the arrear of revenue on the entire estate which was realised by Government from the plaintiff's share only accrued due between the 30th October and the 5th May 1894, when the four shares were divided and separately assessed. During this intervening

(1) I.L.R., 21 Calc., 142. (2) I.L.R., 11 Bom., 313 at p. 319.

period the plaintiff, the defendant and two other co-sharers were co-owners or tenants in common of the estate; the estate, however, was not in the possession of any of them, but continued in the exclusive possession of Jagannadha Razu, who, in spite of the terms of the sale-deed, did not put the late Maharajah of Vizianagram into possession of certain specified villages, which, until partition of the estates should be effected by the Collector, was to be enjoyed by the vendee in lieu of the undivided one-fourth share conveyed to him by Jagannadha Razu. Jagannadha Razu having thus been in possession of the whole estate until the 5th May, he ought to have paid the arrears of revenue in question from the income of the estate or have otherwise accounted for the income to the four co-sharers.

The arrear of revenue was a charge upon the entire estate and as between the plaintiff, the defendant and the two other sharers, the charge, as a burden upon the estate, had to be borne equally, without prejudice, however, to the right of each co-sharer to hold Jagannadha Razu accountable to him for the mesne profits of his share during the said period. If the Collector had realized the whole amount of the arrears of revenue from the share of the defendant instead of from that of the plaintiff, it is clear that the latter could not successfully resist the defendant's claim for contribution, and, if so, it follows that the plaintiff, from whose share alone the arrear was realized by the Collector, is equally entitled to claim contribution from the defendant since the plaintiff is not responsible for the wrongful act of Jagannadha Razu in excluding his co-sharers from possession and making default in the payment of revenue due to Government and also because, as already stated, the plaintiff cannot be regarded as bringing this suit as the representative in interest of Jagannadha Razu.

Whether the plaintiff is equitably estopped from claiming contribution for all or any of the reasons mentioned in paragraphs 5 and 7 of the written statement, forms the subject-matter of the sixth issue, and the Judge has recorded no finding on this issue.

The plea that the suit is barred by section 43 of the Civil Procedure Code by reason of the plaintiff not having joined this defendant as a party defendant in Original Suit No. 34 of 1894 and included this claim also therein, is manifestly untenable (see judgment in *Dampanaboyina Gangi* v. *Addala Ramasami*(1)).

(1) I.L.R., 25 Mad., 736.

The claim for contribution generally arises in cases where the party seeking contribution has himself *paid* the amount in respect of which contribution is sought. In the present case, however, the arrear of revenue was not paid to Government by the plaintiff with his own hand, but was realized by the Collector under the Revenue Recovery Act from the income of plaintiff's share after it was registered as a separate estate. In my opinion this makes no difference, either in regard to the plaintiff's right to claim contribution or even as to the application of article 99 or 61 of the second schedule to Act XV of 1877, in both of which the person bringing the suit is referred to as having 'paid' the amount sought to be recovered. Bearing in mind that in cases in which the right to contribution exists under law the principle on which it rests is that "both in law and equity contribution is bottomed and fixed on general principles of justice and does not spring from contract . . . . and the reason given in the books is *in equali jure* the law requires equality. One shall not bear the burden in case of the rest" (*per* Lord C. B. Eyre in *Swain* v. *Wall*(1), see also *Dering* v. *Earl of Winchelsea*(2), also *per* Lord Redesdale in *Sterling* v. *Forester*(3)), and that the claim has its foundation in the clearest principles of natural justice, for as all are equally bound and are equally relieved, it seems but just that in such a case all should contribute in proportion towards a benefit obtained by all, upon the maxim *Qui sentit commodum sentire debet et onus*' (Story's 'Equity Jurisprudence,' section 493), it is perfectly immaterial whether the party seeking contribution made the payment voluntarily or involuntarily, *i.e.*, whether he made the payment and thus averted any coercive process against his property or, without making such payment, suffered his property to be seized under process of law for the purpose of the amount being realized from its income or by its sale. In either case, he has been damnified to the extent to which the payment made by him or the amount realised from his property exceeds his share of the liability, as between him and the party or parties from whom he seeks contribution and the latter have been to that extent benefited. I am glad to be fortified in this opinion by the judgment of Pollock, C.B., in *Rodgers* v. *Maw*(4). In that case the plaintiff and the defendant

(1) 1 Ch. Rep., 149.
(2) 1 R.R., 41.
(3) 3 Bligh, 590; 22 R.R., 76.
(4) 15 M. & W., 444.

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were partners and they dissolved the partnership, the plaintiff agreeing to take all the debts of the firm upon himself and to release the defendant from liability and the defendant giving him a bond for a certain sum payable by instalments. The plaintiff failed to pay a debt due from the firm whereupon the creditors sued the defendant and obtained judgment and issued a *fi-fa* under which the Sheriff seized and sold the defendant's goods and out of the proceeds paid the debt. In an action by the plaintiff upon the defendant's bond it was held that the defendant was entitled to set off as *money paid* the sum so paid by the Sheriff. Pollock, C.B., in distinguishing the case from *Moore* v. *Pyrke*(1) observed as follows:—"The present case is not precisely the same. Here the defendant's goods were taken not under a distress but under writ of *fi-fa*, which directs the Sheriff to make of the defendant's goods in that action '*so much money*' and the Sheriff has so done; he has made money of the defendant's goods and therewith has paid the claim in the action . . . . We cannot see upon what principle a man may not set off money paid by the produce of his goods as well as money paid indirectly without any sale of his goods." In my opinion the word 'paid' occurring in articles 61 and 99 of Act XV of 1877 will, without any undue stretching, include payments made or derived either out of the sale-proceeds or income of the property of the person seeking contribution, just as under section 20 of the Limitation Act, the receipt by a mortgagee of the produce of land mortgaged to him is a payment made to him by the debtor for the purposes of that section. The learned pleader for the appellant relied on the cases of *Fuckoruddeen Mahomed Ahsan* v. *Mohima Chunder Chowdhry*(2) and *Pattabhiramayya Naidu* v. *Ramayya Naidu*(3) in support of his argument that neither article 61 nor article 99 was applicable to this case and that therefore the suit is governed by article 120 in so far as the personal remedy sought is concerned. In the former case, in execution of a joint decree for money against the plaintiff and defendant, the decree-holder attached the plaintiff's properly alone and realised the decree amount by sale of the property. The plaintiff's suit for contribution was resisted on the ground that it was barred by article 100 of Act IX of 1871, corresponding to

(1) 11 East, 52. (2) I.L.R., 4 Calc., 529.
(3) I.L.R., 20 Mad., 23.

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article 99 of Act XV of 1877. Mitter, J., dealt with this plea as follows:—"The date from which limitation begins to run is three years from the date of the plaintiff's advance in excess of his own share. In the present case nothing was paid by the plaintiff. Therefore, it is a question whether that article or article 118 (corresponding to 120 of Act XV of 1877) applies to this case . . . . However, without expressing any decided opinion on this point and assuming that article 100 applies, we think that the plaintiff was not bound absolutely by the statement made in his plaint that his cause of action arose on the date of the auction-sale. Upon the facts stated in the plaint it is clear that the cause of action in the present suit arose when the sale-proceeds were taken out of Court by the decree-holder. We think, therefore, that the lower Courts are not right in holding that the plaintiff's claim is barred, without ascertaining the date when the sale-proceeds were paid to the decree-holder . . . . The decree of the lower Courts must be set aside and the case remanded to the Court of First Instance for trial." Notwithstanding the expression of a doubt in this judgment as to the applicability of article 99 of Act XV of 1877 to a case in which the amount in respect of which contribution is sought was realized by attachment and sale of the property of the person seeking contribution, the case was decided and remanded on the footing that that article governed the case. In the latter case *Pattabhiramayya Naidu* v. *Ramayya Naidu*(1) there was a decree for rent amounting to Rs. 4,000 and odd against a number of the tenants jointly, but the decree was executed against one of them alone by attaching his property and realising Rs. 2,650 by sale thereof. The share payable by the plaintiff was only Rs. 183; he sued the co-tenants for contribution and they pleaded limitation. It was held, on second appeal, that article 99 was inapplicable, because the whole of the amount due under the joint decree was not realized from the plaintiff but only a portion thereof, though such portion was far in excess of his share of the liability. The learned Judges who decided that case expressed their concurrence in the view taken by the Calcutta High Court that the three years' period of limitation under article 61 should be reckoned, not from the date of the sale, but from the date when the sale-proceeds were drawn by the decree-holder from Court. As

(1) I.L.R., 20 Mad., 23.

to the applicability of article 61 they expressed their doubt in the following terms:—"It may be doubted whether article 61 is applicable to the present case, where there was no payment by plaintiffs but where their property was seized and sold by the Court and the proceeds paid by the Court to the decree-holder." However, as the sale-proceeds had been drawn within three years from the date of the suit and if article 61 were inapplicable to the case, article 120, which prescribes a period of six years, would govern the case, the suit would be in time under either article, and it therefore became unnecessary to decide whether or not article 61 could be applied. I am unable to share in the doubt expressed in the above two cases as to the applicability of article 99 or 61, as the case may be, to a case in which the amount was realized by sequestration or sale of the property of the person seeking contribution, and I cannot accede to the contention that, assuming that the plaintiff has no charge upon the defendant's share of the estate, the article applicable to the case is article 120 and not 61 or 99.

I shall now proceed to consider whether the plaintiff has such a charge and, if so, whether in so far as he seeks to enforce the charge the article applicable is article 132 or whether, as contended on behalf of the respondent, the enforcement of the claim both personally against the defendant and against the property charged with the claim is governed by the three years' rule of limitation prescribed by article 61 or 99 as the case may be.

The question of charge was mainly argued on both sides with reference to the decisions of the Indian High Courts reported in *Seshagiri* v. *Pichu*(1), *Achut Ramchandra Pai* v. *Hari Kamti*(2), *Kinu Ram Das* v. *Mozaffer Hosain Shaha*(3), *Seth Chitor Mal* v. *Shib Lal*(4), and the English cases of *In re Leslie*, *Leslie* v. *French*(5), *Falcke* v. *Scottish Imperial Insurance Company*(6) and *Strutt* v. *Tippett*(7) and section 35 of the Madras Revenue Recovery Act (II of 1864) as amended by Madras Act I of 1897.

The statutory charge recognized or created by section 35 of Act II of 1864 is inapplicable to the case, at any rate for the reason that it gives a charge only over the land "which has been or is about to be attached" and which is released or saved therefrom by payment

(1) I.L.R., 11 Mad., 452.
(2) I.L.R., 11 Bom., 318.
(3) I.L.R., 14 Calc., 809.
(4) I.L.R., 14 All., 273.
(5) L.R., 23 Ch.D., 552.
(6) L.R., 34 Ch.D., 234.
(7) 62 L.T. Rep. N.S., 475.

made by the party seeking to be re-imbursed either in whole or by way of contribution, while in the present case, it was not the defendant's land, over which the charge is now claimed, that was or was about to be attached but the land of the plaintiff himself, and that after it had been separated.

The question, therefore, which was chiefly argued was whether, apart from the provisions of section 35 of the Revenue Recovery Act, the plaintiff has, under the general principles of law, a charge over the defendant's share by reason that it was equally liable with the plaintiff's share to pay the arrear of revenue which accrued due to Government between 31st October 1893 and 5th May 1894.

The principle of law applicable to the case was fully discussed by a Full Bench of the Calcutta High Court in *Kinu Ram Das* v. *Mozaffer Hosain Shaha*(1) and it was held by a majority of three Judges against two that a co-sharer who has paid the whole revenue and thus saved the estate, does not by reason of such payment acquire a charge on the share of his defaulting co-sharer. In that case the decision of the same Court in *Enayet Hosscin* v. *Muddunmoonee Shahoon*(2), which recognized such charge on the authority of a dictum of the Privy Council in *Nugender Chunder Ghose* v. *Kaminee Dossee*(3) was overruled and the dictum of the Privy Council was explained and distinguished.

The same question had already come under the consideration of the Bombay High Court in *Achut Ramchandra Pai* v. *Hari Kamti*(4), and, following the decision in *Enayet Hossein* v. *Muddunmoonee Shahoon*(2), the dictum of the Privy Council in *Nugender Chunder Ghose* v. *Kaminee Dossee*(3) and some other Calcutta cases (*Ram Dutt Singh* v. *Horakh Narain Singh*(5), *Nobin Chunder Roy* v. *Rup Lall Das*(6)) in spite of the doubt expressed in *Kristo Mohinee Dossee* v. *Kaliprosono Ghose*(7), it was there held that payment of assessment by a part owner is a payment made by a person entitled to pay it who does so under circumstances which make it necessary in order to save the estate for himself and co-owners and "in either view of such payment, he becomes equitably entitled to a charge on the whole estate as against the other co-sharers and if this be so, the mere circumstance that he

(1) I.L.R., 14 Calc., 809.
(2) 14 B.L.R., 155.
(3) 11 M.I.A., 241 at p. 258.
(4) I.L.R., 11 Bom., 318.
(5) I.L.R., 6 Calc., 549.
(6) I.L.R., 9 Calc., 377.
(7) I.L.R., 8 Calc., 402.

has no existing charge on their shares at the time of such payment would appear to be no sufficient reason in equity, justice and good conscience for not allowing him to realize the payment from the shares of his co-owners for their respective quotas." The suit, however, was dismissed as upon the facts it was held that the plaintiff was not entitled to contribution.

In *Seshagiri* v. *Pichu*(1) the revenue due on certain lands comprised in a ryotwari patta fell into arrears and subsequently thereto the plaintiff and defendant No. 4 each bought a portion of the lands. After this the portion in the plaintiff's possession was alone attached for the arrears and he paid the whole amount to prevent a sale and sued to recover the proportionate share of revenue in respect of the portion purchased by the fourth defendant, claiming payment of the same as a charge upon such portion. It was held, following the decision of the minority in *Kinu Ram Das* v. *Mozaffer Hosain Shaha*(2) and dissenting from the view of the majority, that the plaintiff was entitled to a decree for contribution against defendant No. 4 and to a charge on the land in his possession.

The question was also subsequently considered by a Full Bench of the Allahabad High Court in *Seth Chitor Mal* v. *Shib Lal*(3) in which the majority (Mahmood, J., dissenting) concurred in the Full Bench decision of the Calcutta High Court. Both in the Calcutta and Allahabad decisions the provisions of the various enactments in force in those provinces relating to the recovery of arrears of revenue, which are much more complicated than the corresponding enactments in force in this Presidency, were critically examined and the English law was also fully discussed.

So far at any rate as this Presidency is concerned, in determining the question now under consideration, I attach no value to the circumstance that section 35 of the Madras Revenue Recovery Act creates a charge only in favour of a "*bonâ fide* mortgagee or other incumbrancer" or any person not being in possession of the estate, but *bonâ fide* claiming an interest therein adverse to the defaulter, but that no similar provision is made in favour of a co-sharer. Nor am I convinced by the reasoning of Wilson, J., in *Kinuram Das* v. *Mozaffer Husain Shaha*(2) or of Edge, C.J., in *Seth Chitor Mal* v. *Shib Lal*(3) that it would be contrary to the policy

(1) I.L.R., 11 Mad., 452. (2) I.L.R., 14 Calc., 809.
(3) I.L.R., 14 All., 273.

of legislative enactments in those provinces to recognize an equitable charge in favour of a co-sharer even if such charge should exist under general principles of law. The maxim "*expressio unius est exclusio alterius*" is wholly inapplicable in dealing with questions of this kind with reference to special or local enactments not professing to be a codification of any particular branch of law. On this point I cannot do better than quote the following passage from Maxwell's 'Interpretation of Statutes' (3rd edition at pages 437—39) which is fully supported by common sense and the authorities therein referred to :—"Provisions sometimes found in statutes enacting imperfectly or for particular cases only that which was already and more widely the law, have occasionally furnished ground for the contention that an intention to alter the general law was to be inferred from the partial or limited enactment; resting on the maxim, *expressio unius est exclusio alterius*. But the maxim is inapplicable in such cases. The only inference which a Court can draw from such superfluous provisions (which generally find a place in Acts to meet unfounded objections and idle doubts) is that the Legislature was either ignorant or unmindful of the real state of the law, or that it acted under the influence of excessive caution; and if the law be different from what the Legislature supposed it to be, the implication arising from the statute, it has been said, cannot operate as a negation of its existence and any legislation founded on such a mistake has not the effect of making that law which the Legislature erroneously assumed to be so. Thus, when in contending that debts due by corporate bodies were subject to foreign attachment in the Mayor's Court, the express statutory exemptions of the East India Company and of the Bank of England were relied upon as supplying the inference that corporate bodies were deemed by the Legislature to be subject to that process, the judicial answer was that it was more reasonable to hold that the two great corporations prevailed on Parliament to prevent all question as to themselves by direct enactment, than to hold that Parliament by such special enactment meant to determine the question in all other cases adversely to corporations. A local act which, in imposing wharfage dues for the maintenance of a harbour on certain articles, expressly exempted the Crown from liability in respect of coals imported for the use of royal packets; and the provisions in turnpike Acts which exempted from toll carriages and horses attending the Queen, or going or returning

from such attendance were not suffered to effect the more extensive exemptions which the Crown enjoys by virtue of its prerogative." The will of the Legislature as expressed in a statute is of course supreme and to the extent to which rights have been created or declared by a statute they must take effect whether the same be consistent or inconsistent with the common law of the land or with notions of justice, equity and good conscience and in either case, whether the Legislature was aware or was ignorant of the common or equity law. An instance is afforded by section 35 of Madras Act II of 1864 which gives a charge in favour of the mortgagee of the land for payment of revenue made by him, which charge, however, is to take priority over other charges, only according to the date at which such payment was made, though under general law such payment will take priority according to the date of his mortgage. The Legislature has thus, though probably unconsciously and apparently in ignorance of his rights under the general law, deprived him of the priority which he would otherwise have had.

As far as there is any indication by the Legislature of its policy, if any, in the matter, I may refer to section 31, clause 4 of Madras Act IV of 1897 which runs as follows :—" A co-owner or a person who in good faith deems himself to be owner or co-owner making such payment shall acquire a charge on such estate or Government land for the amount so paid by him with interest thereon at the rate of 9 per cent. per annum ; provided that in the case of a co-owner such charge shall extend only to so much of the amount paid as is due in respect of the shares of the other co-owners in such estate or Government land." The payment here referred to is payment of public revenue on account of expenses of survey and demarcation. And if in determining whether or not it is just and equitable that a co-owner should have such a charge in the matter of the payment of public revenue, it is legitimate to import the element of public policy, I may add that the existence of such a charge in favour of a co-owner will by giving him greater security for the realization of the contribution due to him from the defaulting co-owner, indirectly strengthen the security which the Crown possesses under the law for collection of land revenue.

The question having been fully discussed *pro* and *con* in the leading Indian cases above referred to, I am relieved from the necessity of travelling over more or less the same ground and shall content myself with stating my own reasons for adopting the

conclusion arrived at in the Madras and Bombay cases and by the dissenting Judges in the Calcutta and Allahabad Full Bench cases in so far as such conclusion involves the proposition, which is all that arises in the present case, that where one of two or more co-sharers in a revenue-paying estate pays the whole revenue in order to save and so does save the estate, he is entitled to a charge upon the share of each of his co-sharers to the extent of the latter's share of the revenue.

The true principle applicable to the case has been well pointed out by Kernan, J., in the following terms in *Seshagiri* v. *Pichu*(1) :— " The lands of defendant No. 4 and of the plaintiff are both liable to a common burden, neither of them can get his land free from the claim for the revenue without paying the amount due on the whole lands. It would be against equity and good conscience that the common burden should be thrown exclusively on either lot of land or on either of the parties . . . . I wish to add that *Harbert's* case(2) is an authority that in case of persons liable to payment of a common burden affecting their lands the lands of one alone shall not be liable. In that case it is said 'when two or more are bound on a recognisance or statute, each is bound in the whole, yet the land of one only shall not be excluded.' Further it is said 'so it appears by those cases that when land shall be charged by any lien the charge ought to be equal and one alone should not bear all the burden and the law on this point is grounded in great equity.' Under section 2 of Madras Act II of 1864, it is expressly declared that 'the land, the buildings upon it and its products shall be regarded as the security for the public revenue' due on the land and taking that along with section 42, it is clear that public revenue forms the first charge upon the land, *i.e.*, upon the whole and every portion of the estate."

From the Full Bench decisions of the Calcutta and Allahabad High Courts I gather that there are sections corresponding to section 42 in the Revenue law in force in those provinces, but whether there is an express section corresponding to section 2 of the Madras Act, I am not aware. It appears to me that sufficient attention was not paid in those cases to the fact that the amount in respect of which contribution was sought by one co-owner against another, formed by law a charge upon the lands belonging

(1) I.L.R., 11 Mad., 452 at p. 454.

(2) 3 Co., 12, 13.

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to the co-owners. This element, in my opinion, materially simplifies the determination of the question and distinguishes the case from the decision of a single Judge in *Thanikachella* v. *Shudachella*(1). In this latter case one of two joint farmers of a mittah paid the whole of the rent due to the Mittahdar and brought a suit for contribution against the co-farmer and it was held that by reason of such payment he acquired no charge upon the share of the co-farmer in the leasehold and that the suit was therefore barred by limitation, having been brought more than three years after date of payment. Mr. Justice Parker distinguished it from the case of *Seshagiri* v. *Pichu*(2) really on the ground that the amount in respect of which contribution was sought was not public revenue under the Revenue Recovery Act but only rent under Madras Act VIII of 1865. Under the law in force in this Presidency rent due to a proprietor, unlike revenue due to Government, forms no charge upon the holding. According to the view taken in the Calcutta and Allahabad Full Bench cases by the *dissentiente* Judges, even in such a case the party seeking contribution would have a charge on the principle of salvage. It is, however, unnecessary to consider in this case whether such view is sound or not. The learned Chief Justice in the Allahabad case concludes his judgment as follows :—(pp. 299 and 300)." Justice, equity and good conscience are captivating terms; but before a Judge applies what may appear to him at first sight to be in accordance with justice, equity and good conscience, he must be careful to see that his views are based on sound general principles, and are not in conflict with the intentions of the Legislature or with sound principles recognised by authority. In my opinion justice, equity and good conscience do not require us in India to go so far afield as the Irish Courts, in order there to seek for, and thence to import into India, novel principles of equity based on unsound analogy, and rejected as unsound by Judges of such authority as Bowen and Fry, L., JJ., and not followed by such an authority as the late Lord Justice Cotton in *Falcke* v. *Scottish Imperial Insurance Company*(3) and which, further, are at variance with the Transfer of Property Act, 1882, of the Indian Legislature, and with the policy of the Government as disclosed in its legislative enactments."

(1) I.L.R., 15 Mad., 258. (2) I.L.R., 11 Mad., 452 at p. 454.
(3) L.R., 34 Ch.D., 234.

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No doubt, as held by the House of Lords in the recent case of *Ruabon Steamship Company* v. *The London Assurance*(1), there is no general principle of law that where one person gets some advantage from the act of another, a right of contribution towards the expense for that act arises on behalf of the person who has done it. In that very case, in which the right of contribution was negatived, the Lord Chancellor put it on the ground that in that case there was no debt for which both the parties were bound to some third person or a common obligation binding both parties to equality of payment or sacrifice in respect of such obligation. But when once the right of contribution is established, as in the present case, it certainly cannot be an inequitable or violent stretch of such right to make it a charge against the co-owner's share, at any rate in certain classes of cases and as against him. In the Allahabad Full Bench case the contention was that the charge should prevail as against a prior mortgagee and in fact against a purchaser in execution of a decree founded on such prior mortgage; and I suspect that the judgment of the Chief Justice is principally directed to negativing the claim of priority of charge.

As between competitors for priority of charge I am inclined to think that unless the parties who are immediately concerned do not make the necessary payment, though an appeal is made to them for the purpose, a later incumbrancer who makes the payment can acquire no priority of charge in respect of such payment, but that a person occupying the position of a part owner is under no obligation to communicate with mortgagees and that if the payment be made by him honestly and *bonâ fide* and not by the mortgagee, to save the estate from being sold for arrears of revenue he will acquire a priority of charge over such mortgagee as held in the dissenting judgment of Mahmood, J. I refrain, however, from expressing any decided opinion on this point, as no such question of priority arises in the present suit and all that has to be decided in this appeal is whether the plaintiff has, as against the defendant and any one claiming under him since the date of payment, a charge against his share in the estate.

If " justice, equity and good conscience do require us in India to go so far afield " as the English Courts " in order there to seek

(1) L.R. [1900] A.C., 6.

for-and thence to import into India principles of equity," we can certainly be pardoned "to go so far afield as the Irish Courts" for the same purpose. We in India are not absolutely bound by the decisions of either set of Courts, as we are by the decisions of the Judicial Committee of the Privy Council; but without resorting to the decisions of the Irish Courts, I say with all deference, that the lien contended for in the present case is not importing into India any novel principle of equity based on unsound analogy and rejected as unsound by Judges of such eminence as Bowen and Fry, L.JJ., and not followed by an equally eminent Judge as the late Lord Justice Cotton in *Falcke* v. *Scottish Imperial Insurance Company*(1), nor is it at all at variance with the Transfer of Property Act of the Indian Legislature and with the policy of the Government as disclosed in its legislative enactments, at any rate such of them as are in force in this Presidency.

The English cases relating to liens for expenditure upon the property of another are collected by Fisher in his work on 'Mortgages' (5th edition) in paragraphs 520–530 and there is an admirable summary and critical review of the English and Indian law on the subject by Dr. Rash Behari Ghose in his valuable treatise on 'Mortgages' (3rd edition, pages 150–175). A reference to these will show that there is nothing novel in the lien contended for in the present case. As regards the two English cases principally relied upon in the Calcutta and Allahabad Full Bench cases, as negativing the lien, I venture to state, with all deference, that neither of those cases is an authority for the position that a part-owner acquires no lien upon the property of his co-owner, when the common debt which the former discharged was itself a charge and a burden equally upon the share of both. In *In re Leslie, Leslie* v. *French*(2) Fry, L.J., in dealing with the payment of premiums on a policy of Life Insurance by a stranger or part-owner, formulated that a lien may be created upon the moneys secured by a policy, by payment of premiums in the following cases (page 560):—

"*First*.—By contract with a beneficial owner of the policy.

Secondly.—By reason of the right of trustees to an indemnity out of their trust property for money expended by them in its preservation.

(1) L.R., 34 Ch.D., 234.

(2) L.R., 23 Ch.D., 552.

Thirdly.—By subrogation to this right of trustees to some person who may at their request have advanced money for the preservation of the property.

Fourthly.—By reason of the right vested in mortgagees, or other persons having a charge upon the policy, to add to their charge any moneys which have been paid by them to preserve the property."

Later on (at page 561) he added that except in the above four cases no lien is created by the payment of premiums by a mere stranger or part-owner. It will be observed that Fry, L.J., made such positive statement only with reference to the payment of premiums on a policy of insurance. But I very much doubt whether even in regard to that class of cases Fry, L.J., was sufficiently guarded in making such a sweeping and positive statement. In *Strutt* v. *Tippett*(1) Lindley, L.J., in dealing with payments, by a stranger, of premiums on a life policy, referred as follows to such statement of the law by Fry, L.J. (at page 477):—"I have come to the conclusion that, upon the documents, any right to a lien was excluded by the terms. Apart from that I have some doubt if there would not be a lien. I am too cautious to indulge in general propositions, and I am doubtful if the propositions in *In re Leslie, Leslie* v. *French*(2) are exhaustive. Fry, L.J., there, after enumerating cases in which a lien is created, says:—'I am further of opinion that, except under the circumstances to which I have referred, no lien is created by the payment of the premiums by a mere stranger or by a part-owner.' In this case the plaintiffs are mere strangers. I do not, however, regard the plaintiffs' claim to a lien as necessarily excluded by the propositions in *In re Leslie, Leslie* v. *French*(2). If an owner of onerous property agrees with me to indemnify me or my property from the burdens on the onerous property which may fall on me or my property, and the owner makes default, and I or my property have to bear those burdens, I am inclined to think that I should have, as against the owner of the onerous property, a lien on it for the money expended by me in bearing that burden which as between him and me he ought to bear. I should, in the case supposed, have preserved the onerous property for him under circumstances which entitled me to it at his expense, and I do not

(1) 62 L.T. Rep. (N.S.), 475.

(2) L.R., 23 Ch.D., 552.

think that in such a case my sole remedy is by an action for damages against him; the existence of such personal remedy would not, I think, exclude such lien. I am not aware of any decision inconsistent with this view and the principles on which many cases of equitable lien depend seem to me to support a lien in such a case."

The above remarks of Lindley, L.J., which were made with reference to payments made by a stranger will apply with greater force to payments made by a part-owner. In *In re Leslie, Leslie* v. *French*(1) Fry, L.J., admits that it is well established that if a tenant for life renews lease-holds and dies before the expiration of the renewed term, his estate is entitled to a lien on the interests in remainder proportionate to the unexpired portion of the renewed term. But he distinguishes the same from the case before him on the ground that the equities governing the relation of tenant for life and remainder-men are peculiar. Conceding that the case before him was not analogous to the relation of tenant for life and remainder-men, certainly the equities governing the relation of co-owners of an estate subject to an indivisible assessment payable to Government under the stringent rules of the revenue law in force in India and in the interests of the public, realisable summarily under the drastic measures of such law, are even more peculiar than those between a tenant for life and remainder-men.

In *Falcke* v. *Scottish Imperial Insurance Company*(2) the Court of Appeal held that payment of premiums on a policy of Life Insurance by the assured in his character of owner of the equity of redemption could not give him a lien in priority to the mortgage debt and that the fact that the policy has been preserved by such payment did not give him a right to have the premiums repaid nor give him lien on the policy for it, and an opinion was expressed that the maritime doctrine of salvage had no application to the payment of premiums on a policy. Cotton, L.J., in the course of his judgment, stated that if there had been circumstances leading to the conclusion that there was a request by the mortgagee of the policy that the premium should be paid by the mortgagor then there would be a claim against the mortgagee or his representative for the money and that he would not say that there might not be a lien on the policy. Bowen, L.J., lays down as follows the

(1) L.R., 23 Ch.D., 552. (2) L.R., 34 Ch.D., 234.

principles of law applicable to the case before him, pointing out the distinction between the maritime law of salvage and the right claimed in that case (*Falcke* v. *Scottish Imperial Insurance Company*(1)) :—"The general principle is beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will. There is an exception to this proposition in the maritime law. I mention it because the word 'salvage' has been used from time to time throughout the argument and some analogy is sought to be established between salvage and the right claimed by the respondents. With regard to salvage, and contribution, the maritime law differs from the common law. It has been so from the time of the Roman law downwards. The maritime law, for the purposes of public policy and for the advantage of trade, imposes in these cases a liability upon the thing saved, a liability which is a special consequence arising out of the character of mercantile enterprises, the nature of sea perils and the fact that the thing saved was saved under great distress and exceptional circumstances. No similar doctrine applies to things lost upon land, nor to anything except ships or goods in peril at sea." Fry, L.J., expressed himself as follows as to the application of the doctrine of salvage to cases not connected with the perils of the sea (page 254) :—"I would make only one other observation. We have heard a great deal on both sides of what has been called the doctrine of salvage. I, like Vice-Chancellor Kindersley, exceedingly doubt whether that word can with any propriety be applied to cases of this description. With regard to salvage in the case of ships and maritime perils we know its meaning. It appears that the expression 'salvage moneys' as we are informed by one of the learned Counsel for the appellant, and I dare say he is quite right, first occurs in the report of the case of *In re Tharp*(2) which was before Lord St. Leonards in 1852, where he seems to have used the expression as one familiar to the Irish Courts in certain cases. I certainly wish that the

(1) L.R., 34 Ch.D., 234 at pp. 248-9. (2) 2 Sm. & Giff., 578, n.

expression had remained on the other side of the channel where it seems to have arisen. I doubt whether any doctrine which is expressed by the word 'salvage' applies to cases of this description." The learned Chief Justice in the Allahabad High Court evidently refers to the above observations of Bowen and Fry, L.JJ., when he says that 'the doctrine, which apparently had its origin in the Courts in Ireland, that a charge upon land may arise on the principle of Maritime Civil salvage has been satisfactorily exploded as a principle of equity" (page 298).

Notwithstanding the supposed 'recent protest' by two eminent English Judges as to the use of the expression 'salvage lien' to cases other than 'Maritime Civil salvage,' Lord Macnaghten in delivering the judgment of their Lordships of the Privy Council in a later case (*Dakhina Mohan Roy* v. *Saroda Mohan Roy*(1)), referred to the claim of a person, to be repaid, by the proprietor whose title was established under the final decree in the case, the amount spent by him in paying the Government revenue of the land while he was in possession under the decree of the Original Court subsequently reversed on appeal, as being "in the nature of salvage."

As regards the objection that the upholding of the lien in question is at variance with the policy of the Government as disclosed in its Legislative enactments, I have already stated that even assuming it to be so, so far as the Upper and Lower Provinces of Bengal are concerned—though I am by no means convinced, that it is so—it certainly is not at variance with the corresponding enactments in force in this Presidency. The learned Chief Justice (in the Allahabad case, *Seth Chitor Mal* v. *Shib Lal*(2)), further states that such lien is also at variance with the Transfer of Property Act. If this were really so, there would certainly be an end of the matter and no one could seriously support the lien. With all respect I must say that the very reverse is the conclusion to be drawn from the provisions of the Transfer of Property Act. The appeal has not been argued, as it ought to have been, with reference to sections 82 and 100 of the Transfer of Property Act. These two sections throw a flood of light on the question under consideration if they are not decisive of the same in favour of the appellant's position. So far

(1) I.L.R., 21 Calc., 142. (2) I.L.R., 14 All., 273.

as it bears on the present question, section 82 provides that where several properties of several owners are mortgaged to secure one debt such properties are in the absence of a contract to the contrary liable to contribute rateably to the debt secured by the mortgage. This is simply a reproduction of the English law as laid down in Fisher's 'Law of Mortgages' (5th edition, paragraph 1347, at page 644). Section 100, after defining what a 'charge on immovable property' is, extends the provisions contained in the preceding sections as to a *mortgagor*, to the *owner* of the property subject to the charge. The right of contribution secured by section 82 is only a 'real' right by way of charge on the several properties which were subject to the mortgage and not a claim '*in personam*' (*Baldeo Sahai* v. *Baij Nath*(1)), and the charge thus created is made subject to any incumbrance to which the property was already subject at the date of the mortgage. And this right of contribution is extended by section 100 to properties subject to a 'charge' whether such charge be created by act of parties or by operation of law. By virtue of section 2 of the Madras Revenue Recovery Act the land is made security for the payment of revenue due thereon to Government and thus by operation of law the Crown has a charge on the entire land for the revenue due thereon. The direct application of sections 82 and 100 of the Transfer of Property Act to the question arising in this case depends upon the right interpretation of the phrase "*several* properties of *several* owners" occurring in section 82. Does it denote only separate plots respectively owned by separate owners in severalty or also distinct shares severally owned by two or more co-owners as tenants in common by unity of possession? On principle it is difficult to suggest any distinction between the two in this respect. If the wider interpretation of the expression be the correct one, the present question will be directly governed by the terms of sections 82 and 100. The question of interpretation not having, as far as I am aware, been judicially considered in any case and not having been argued before us in the present case, I refrain from expressing any decided opinion on the point either way. In *Danappa* v. *Yannappa*(2), recently decided by the Bombay High Court, in which, on a mortgage executed by several members of an undivided family, a suit was brought against them after

(1) I.L.R., 13 All., 371. (2) I.L.R., 26 Bom., 379.

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they had become divided and a decree for sale obtained; it was assumed that one of the brothers who discharged the decree debt acquired *under section* 82 a charge upon the share of his divided brother in the mortgaged property and that such charge passed to a vendee under the brother who so discharged the debt along with his own share in the mortgaged property.

Even if the expression in question cannot grammatically apply to properties not owned separately or in severalty but as co-owners with unity of possession, the principle of the section—which is borrowed from the English law—is equally applicable to the present case in which the property belonged in undivided several shares to four co-owners as tenants in common, subject to a common burden or charge for revenue due to Government, the whole of which was realized from the plaintiff's share.

I may also advert to section 95 of the Transfer of Property Act—also based upon the English law—which provides for an analogous charge in favour of one of several mortgagors redeeming the mortgage, on the share of each of the other co-mortgagors. But such charge being restricted to cases in which the redeeming mortgagor obtains *possession* of the mortgaged property, that section does not bear so directly upon the present question as do sections 82 and 100. I do not, however, rest my decision on the doctrine of subrogation, on which apparently Muttusami Ayyar, J., based his decision in *Seshagiri* v. *Pichu*(1) on the authority of *Gokul Doss Gopal Doss* v. *Rambu Seochand*(2) which, in my opinion, is inapplicable to the case and proceeds altogether upon a different principle. Whether the prerogative first charge in favour of the Crown as security for the public revenue is one that rests upon the common law of the land, which is simply reproduced in section 2 of the Madras Revenue Recovery Act or is one created by statute, is immaterial. In either case, it is a charge by operation of law in favour of the Crown only and ceases when the revenue upon the land ceases to be public revenue and is converted by assignment in favour of a subject, into rent or private property. The charge upon the land therefore cannot run with the revenue and accompany its assignment in favour of the subject. The lien in question rests upon an equitable doctrine, which also underlies sections 82 and 100 of the Transfer of Property Act, if not in terms covered

(1) I.L.R., 11 Mad., 452. (2) L.R., 11 I.A., 136.

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by it, and does not rest upon the doctrine of subrogation. This equitable doctrine was fully recognized in the following dictum of their Lordships of the Judicial Committee in *Nugender Chunder Ghose* v. *Kamince Dossee*(1):—"Considering that the payment of the revenue by the mortgagee will prevent the *Talook* from being sold, their Lordships would, if that were the sole question for their consideration, find it difficult to come to any other conclusion than that the person who had such an interest in the *Talook* as entitled him to pay the revenue due to the Government, and did actually pay it, was thereby entitled to a charge on the *Talook* as against all persons interested therein for the amount of the money so paid. But their Lordships are of opinion that this is not the form in which the question comes before them, and that what they have to decide is not whether such a charge originally existed, or whether it does now subsist, but whether the appellants can enforce such a charge in the present suit." I fully concur in the view taken by the dissenting Judges in the Calcutta and Allahabad Full Bench cases and also by Sargent, C.J., in the *Achut Ramchandra Pai* v. *Hari Kamti*(2) that this dictum was intended by their Lordships to be applied only to a mortgagee who, prior to the payment of revenue made by him, had a charge upon the land as mortgagee, but that the principle indicated by the dictum is that any person who had such an interest in the land as entitled him to pay the revenue due to Government, and did actually pay it, was thereby entitled to a charge on the land, as against all persons interested therein, for the amount of the money so paid. Certainly a co-sharer has at least such an interest in the land liable to be sold for realization of the public revenue, as a mortgagee of the land has, and is as much entitled as a mortgagee to pay the revenue due to Government and thus save the land from being sold.

If, as in India, there be in England landed property held by two or more co-sharers, subject to the payment of an indivisible revenue to the Crown, which revenue, by operation of law, forms the first charge upon the land, and one of them alone pays such revenue and saves the estate from liability to be sold by the Crown, I have little doubt that, without calling in aid the principle of Maritime Civil salvage or the decision of the Irish Courts, such

(1) 11 M.I.A., 241 at pp. 258, 259. (2) I.L.R., 11 Bom., 313 at p. 318.

person will be able to establish his lien or charge on the shares of his co-sharers on the authority of several cases in the Chancery Courts and the English equitable doctrine adopted in section 82 of the Transfer of Property Act, and I see nothing in the judgments of Fry, Bowen and Cotton, L.JJ., in *In re Leslie, Leslie* v. *French*(1) and *Falcke* v. *Scottish Imperial Insurance Company*(2) to lead one to the conclusion that those eminent Judges would take a contrary view and question his right to such lien or charge.

If the contention of a co-sharer were that the right of contribution against him could be enforced only against his share in the property which was saved from sale or destruction and not personally against him, there would be more equity in such position and more authority to support it. Freeman in his work on 'Co-tenancy and Partition' states the law, at any rate as it obtains in America, as follows (paragraph 176):—"One of the acts that either part-owner may do, without special authority from the others, is to redeem the whole property from a prior sale made *in solido* for the gross amount of taxes due thereon. While the other co-tenants may participate in the benefit of the redemption, the act of their companion is not binding on them so far as to impose upon them a personal obligation to reimburse him for their proportion of the amount necessarily expended in effecting the redemption. The amount thus expended may, no doubt, be asserted as a lien against the joint property. But beyond this, the co-tenant has no means of enforcing contribution; because the other co-tenants had the right to abandon their interest in the lands, and to forfeit all claims to it, by non-payment of the tax liens against it." And again (paragraph 263):—"The purchase of an outstanding title, the removal of a tax or other lien or incumbrance, and the payment of a sum of money for the preservation of the common property, or for the protection or assertion of some common right or the redress of some common injury, are all spoken of, in general terms, as affording a ground for contribution in favour of one co-tenant and against another. In no instance, however, have we found that either of these matters has been successfully employed as an affirmative cause of action on which to base a personal judgment against a non-contributing co-tenant, in the absence of a previous authorization or a subsequent ratification of the transaction out of which the claim for reimbursement arose . . . . If instead of purchasing some title, he has discharged a valid lien or other claim against the property, he may assert such claim or lien to the extent of compelling an equitable contribution . . . . But we think all claims by one co-tenant against another, arising out of the common property, and disconnected alike from any agreement between the parties, and from any circumstances which clearly establish that one must necessarily have been authorized to act for the other, must, in their assertion, be limited to the declaration and enforcement of a lien against the property. If a different rule prevailed, every part-owner would constantly incur the hazard of being required to pay, for the removal of incumbrances, sums in excess of the value of the estate." It is, however, not contended on behalf of the respondent in the present case, that, if the plaintiff is entitled to claim contribution, the defendant is not personally liable therefor and that he is entitled only to enforce the charge upon the property. So far as revenue due to Government is concerned, in addition to its forming the first charge on the land, the several co-sharers of the estate are also jointly and severally under a personal obligation to Government to pay the revenue and having regard to the various decisions of the Courts in this very class of cases and analogous cases, all of which fall under sections 69 and 70 of the Indian Contract Act, no such contention can now be successfully raised. It may also be mentioned that, under section 35 of the Madras Revenue Recovery Act, the mortgagee or other incumbrancer upon the estate who pays the Government revenue, not only acquires a charge upon the land which was saved by such payment but can also recover the same as a debt from the defaulter.

(1) L.R., 23 Ch.D., 552. (2) L.R., 31 Ch.D., 234

The point next to be considered is whether the plaintiff is entitled to the benefit of the twelve years' period of limitation provided by article 132 of Act XV of 1877 to enforce his charge. It is contended on behalf of the respondent that as article 99, which prescribes only a period of three years, specially provides for a suit for contribution by a sharer in a joint estate who has paid the revenue due from himself and his co-sharers, that alone should be applied, even for the enforcement of the plaintiff's charge upon the defendant's share in the estate, if he has such charge, and not the general article 132 relating to enforcement of payment of money

charged upon immoveable property. The decision of this Court in *Natesan Chetti* v. *Soundararaja Ayyangar*(1) has no analogy to the present case. That turned upon the construction of article 111 which provides a period of three years for a suit by a vendor of immoveable property to enforce his *lien* for unpaid purchase money. It will be observed that the suit for which a three years' period is prescribed by article 111 is specifically a suit to enforce the vendor's charge for unpaid purchase money and it was held, dissenting from a decision of the Bombay High Court, that article 132 cannot be applied to such a suit. That decision would have been in point if article 99, like article 111, had described the contribution suit as one by a sharer to enforce his lien or charge upon the shares of his co-sharers. Whatever doubt might have existed at one time as to the scope and right construction of article 132 of Act XV of 1877 and upon the wording of the corresponding article in Act IX of 1871, (see *Lallubhai* v. *Naran*(2), *Davani Ammal* v. *Ratna Chetti*(3), *Raghubar Dayal* v. *Lachmin Shankar*(4), *Shib Lal* v. *Ganga Prasad*(5), *Muhammad Zaki* v. *Chatku*(6)), it has now been definitively settled by the decision of the Privy Council in *Ramdin* v. *Kalka Prasad*(7)—which no doubt is in apparent conflict with the decision of the Court of appeal in *Sutton* v. *Sutton*(8) upon the corresponding section of the English Statute of Limitations (37 and 38 Vict., c. 57, s. 8),—that the personal liability upon an instrument charging a debt upon immoveable property must be enforced within three or six years according as the instrument is unregistered or registered and that the claim to realize the money by sale of the property upon which it is charged is governed by the twelve years' period of Limitation under article 132 (*Miller* v. *Runga Nath Moulick*(9), *Khemji Bhagvandas Gujar* v. *Rama*(10), *Seshayya* v. *Annamma*(11), *Rathnasami* v. *Subramanya*(12). The principle of the said decision of the Privy Council is that according to the general scheme of the second schedule to the Indian Limitation Act, which in this matter differs from the scheme of the English Limitation Statutes, in respect of one and the same

(1) I.L.R., 21 Mad., 141.
(2) I.L.R., 6 Bom., 719.
(3) I.L.R., 6 Mad., 417.
(4) I.L.R., 5 All., 461.
(5) I.L.R., 6 All., 551 at p. 556.
(6) I.L.R., 7 All., 120.
(7) I.L.R., 7 All., 502.
(8) L.R., 22 Ch.D., 511.
(9) I.L.R., 12 Calc., 389 at p. 395.
(10) I.L.R., 10 Bom., 519 at p. 525.
(11) I.L.R., 10 Mad., 100.
(12) I.L.R., 11 Mad., 56.

suit the period of limitation varies according as the remedy is 'real' or 'personal' and this can be illustrated by referring to several articles. Thus, article 81 prescribes a period of three years for a suit by a surety against the principal debtor. It cannot be contended that if the surety seeks to enforce in such a suit a security by way of charge on immoveable property which the creditor had against the principal debtor and which under section 141 of the Indian Contract Act enures to the benefit of the surety, the period of limitation will only be three years for that remedy, and not the twelve years prescribed by article 132. The same remark will apply to a suit apparently falling under article 83 or 110 when the contract of indemnity sued upon or the arrear of rent sued for is secured by a charge on immoveable property. Similarly, in the case of articles 115, 116 and others which may be pointed out. Likewise in the case of a suit for contribution by a sharer who is entitled to enforce the same personally against a co-sharer and also as a charge by operation of law against the share of the co-sharer, the former remedy will be governed by article 61 or 99 as the case may be and the latter remedy by article 132. It has been expressly decided or assumed in more cases than one that a suit to enforce a charge for share of Government revenue against the estate of a co-sharer is governed by article 132 and not by article 99 or 120, *Ram Dutt Singh* v. *Horakh Narain Singh*(1), *Ibn Husain* v. *Ramdai*(2), *Thanikachella* v. *Shudachella*(3).

The only remaining point for consideration in connection with the question of limitation is whether the personal remedy against the defendant is either in whole or in part barred by the law of limitation. If neither article 99 nor 61 be applicable to the suit, it will no doubt follow that the plaintiff will have the benefit of the general article 120 prescribing a period of six years and in that case it is clear that the claim is not barred at all. The only ground urged against the applicability of article 61 or 99 is that the word "paid" occurring therein cannot include an involuntary payment by sequestration of the plaintiff's property and receipt by the Crown of the income therefrom in liquidation of the arrears of revenue. For the reasons already given I am unable to accede to this contention. The question, however, as to whether the case

(1) I.L.R., 6 Calc., 549.
(2) I.L.R., 12 All., 110.
(3) I.L.R., 15 Mad., 253.

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is governed by article 61 or by article 99 presents no small difficulty and I confess that it is perplexing. If the Judge's finding that the whole amount of arrears was or must have been realised before November 1896 can be sustained, the personal remedy will be wholly barred whether article 61 or 99 is applied. But it is pointed out on the strength of certain entries in exhibits D and E that a portion of the arrear being interest on the principal amount of arrears of revenue was received and credited only within three years before date of suit and that therefore the personal remedy is not barred at all or at any rate, as to such portion of the amount. If the entry in the first column of article 99 be strictly and literally construed as relating to a suit for contribution which can only be brought after the whole revenue had been paid, as was assumed in *Pattabhiramayya Naidu* v. *Ramayya Naidu*(1), the starting point for computing the limitation for the suit would be the time when the plaintiff made payment in excess of his share, which admittedly was long before three years and in this view the suit would be wholly barred under article 99 though a portion of such payment may have been made within three years.

Such strictly grammatical and literal interpretation of article 99 however leads to anomalous if not absurd consequences. In that view, there being only one starting point of limitation the claim would be either wholly barred or not at all. If the bulk of his payment in excess of his share had taken place, either once for all or on different occasions, long before three years, and the remaining fragment of the entire amount is paid within three years, is it to be held that the suit is not barred at all under article 99? On the contrary if only a trivial amount in excess of his share had been paid more than three years before date of suit, but the remaining amount which forms the bulk of the payment is paid either once for all or on different occasions, all within three years before date of suit, is it to be held that the whole claim is barred by limitation? Under the general law the party seeking contribution has a cause of action to enforce contribution, at any rate as a personal obligation, as soon as he has made any payment in excess of his share and he need not wait till he makes the whole payment, if he means or is able to do so (*Davies* v. *Humphreys*(2)). In fact he may be unable to pay the whole amount of revenue and

(1) I.L.R., 20 Mad., 23. (2) 6 M. and W., 153.

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only a portion thereof in excess of his share may have been paid by or collected from him. It certainly cannot be contended that he will have no right to claim contribution in respect of such excess whether it falls short of making up the entire sum by an insignificant amount or by a considerable amount. Under the general law, therefore, each time that an amount is paid by or levied from him in excess of his share he has a right of suit for contribution in respect of such payment and when he brings the suit after making several such payments he really unites several causes of action in one and the same suit under section 45, Civil Procedure Code, and the law of limitation under article 99 will apply separately to each of such causes of action from the date of the respective payments and the claim for contribution in respect of such payments as were made more than three years before date of suit would be barred by limitation. The suit for contribution could be brought either before or after the *whole* amount of revenue had been paid (*Davies* v. *Humphreys*(1)), but under section 43, Civil Procedure Code, the plaintiff will have to include in the suit the whole of his claim for contribution in respect of all the payments made by him *prior* to the date of the suit. If the suit contemplated by article 99 were one in which the cause of action or right of suit arises only if and when the whole amount has been paid, the Legislature surely would have provided in the third column that the starting point for limitation was the completion of such payment and not the time when payment was made in excess of his share which may have been long before such completion. There is however no authority under general law for the position that a suit for contribution by a sharer against his co-sharer can only be brought if and when he has paid the whole of the reveuue due to Government upon the estate and it is extremely unlikely that the Legislature would provide limitation for a suit unknown to the law. For these reasons I am strongly inclined to depart from the strictly literal and grammatical interpretation of article 99 and read it as if between the words "has paid" and "the whole amount" in the two places in which they occur, the words "on account of" were inserted and thus avoid the repugnance and absurdity that would otherwise result (Hardcastle, 'Interpretation of Statutory and Constitutional Law,' second edition, pages 99–109, also per

(1) 6 M. and W., 153.

Sir Arnold White, C.J., in *Sankara Narayana Vadhyar* v. *Sankara Narayana Iyer*(1)). Reading it in this manner the whole article becomes perfectly intelligible and whether the suit is brought before or after the whole amount has been paid it will be barred in respect of such payments, if any, as were made more than three years before date of suit and not barred in respect of those made within three years.

It is not clear to my mind that the present case is strictly governed by article 99 and not by article 61. The latter is the general article applicable to suits for money payable to the plaintiff for money paid for the defendant and articles 69, 81, 82, 99, 100 and 107 are articles applicable to certain special kinds of suits comprised in the general class described in article 71. Having regard to the first portion of article 99 which relates to a suit for contribution by a joint judgment-debtor, the latter portion relating to co-shares of a joint estate probably refers to that definite class of joint estates which are registered in the Collector's office in the names of two or more co-sharers. If that be the right construction of article 99, the present case will fall under article 61, for during the period in respect of which the arrears in question accrued, the estate was registered solely in the name of Jagannadha Raz and not in the names of the plaintiff, the defendant and the two other co-sharers or any of them. And under this article also the plaintiff's claim will be barred in respect of payments made more than three years prior to date of suit. The result, therefore, will be the same whether in respect of the personal remedy the suit is governed by article 61 or by article 99 as interpreted above.

Before finally disposing of the appeal, the District Judge should be called upon to return findings on the fourth, sixth and seventh issues in the case and also to try and return his finding on the following issue:—"Whether any and what sums were credited by the Collector within three years before the date of this suit towards the arrear of revenue in question from the income of the plaintiff's estate during the time that it was under the management of the Collector under the provisions of Madras Act II of 1864 and whether any and what amounts were so credited more than three years before date of this suit but

(1) I.L.R., 25 Mad., 342 at p. 348.

subsequent to the death of the late Maharajah of Vizianagram." The date of the death of the Maharajah of the Vizianagram does not appear from the pleadings in the case. In respect of payments, if any, made subsequent to his death, the plaintiff will have the benefit of section 7 of the Indian Limitation Act, though such payments were made more than three years before date of suit. Parties will be at liberty to adduce fresh evidence on the new issue and such additional evidence as the Judge may think fit to permit on the three other issues above referred to.

Since writing the above I have had the advantage of reading the recent decision of the Bombay High Court in *Shivrao Narayan* v. *Pundlik Bhaire*(1) which appeared in the June part of the I.L.R., Bombay series. The Division Bench (Jenkins, C.J., and Crowe, J.) which heard that case dissents from the *dictum* of Sir Charles Sargent in *Achut Ramchandra Pai* v. *Hari Kamti*(2) quoted by me with approval, and adopts the conclusion arrived at by the majority in the Calcutta and Allahabad Full Bench cases already referred to. But the learned Judges add nothing new to the reasoning on which the above Calcutta and Allahabad Full Bench cases proceed and I see no reason to depart from the decision of this Court in *Seshagiri* v. *Pichu*(3) and to change the conclusion I have come to on a review of the English and Indian decisions bearing on the question.

My learned colleague, however, is not prepared to follow the decision of this Court in *Seshagiri* v. *Pichu*(3) and to concur with me in the view I take that the plaintiff has, by operation of law, a charge upon the defendant's share in the estate in respect of the amount he claims from him by way of contribution. He accordingly proposes that the question may be referred to a Full Bench for decision.

Before therefore actually deciding this question in this appeal and remitting the proposed issue to the District Judge, I agree with my learned colleague that the question be referred for the opinion of a Full Bench.

IN APPEAL No. 188 OF 1900.

This appeal is governed by the judgment in Appeal No. 187 of 1900 and the issues therein will also have to be remitted for

(1) I.L.R., 26 Bom., 437. (2) I.L.R., 11 Bom., 313 at p. 318.
(3) I.L.R., 11 Mad., 452 at p. 453.

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trial to the District Judge in this suit, and for the reasons therein given I concur with my learned colleague that the question of law which has been referred to the Full Bench in that appeal be referred to the Full Bench in this appeal also, before the issues are remitted for trial.

MOORE, J.—The facts of this case are fully given in the judgment of my learned colleague and I need not repeat them. At the hearing of this appeal an important question has been raised which it is necessary to adjudicate on in order to determine whether the plaintiff's claim is barred by limitation. That question is whether, when one of several co-sharers in an estate pays the land revenue due on the estate and saves it from sale, he, by reason of such payment, acquires a charge on the share of his defaulting co-sharer. It is admitted that the provisions of the Revenue Recovery Act do not give a co-sharer a charge on the estate in the case now under consideration (*vide* section 35, Act II of 1864 (Madras) as amended by section 1, Act I of 1897 (Madras)). No doubt, as pointed out by Wilson, J., in the case of *Kinu Ram Das* v. *Mozaffer Hosain Shaha*(1), no strong inference can be drawn from an enactment such as a Revenue Recovery Act either for or against the principle now contended for on behalf of the plaintiff but, on the other hand, it cannot be looked upon as a matter of no importance that the local Legislature when very recently engaged in amending this Act should have refrained from giving a co-sharer by legislative enactment the right now contended for. I shall later on refer to this matter again. It appears to be clear that under English law a co-sharer in a case similar to the present one would not by his payment acquire a charge on the share of his co-sharer. As to this reference may be made to the judgments in *In re Leslie, Leslie* v. *French*(2) and *Falcke* v. *Scottish Imperial Insurance Company*(3). All the High Courts with the exception of Madras are against the principle now contended for. In Calcutta, no doubt, the course of decisions was for some years in favour of the right of a co-sharer to a charge. These decisions are commented on by Wilson, J., in the judgment in *Kinu Ram Das* v. *Mozaffer Hosain Shaha*(1) to which I have already referred (*vide* pages 827-829).

(1) I.L.R., 14 Calc., 809 at p. 830. (2) L.R., 23 Ch.D., 552.
(3) L.R., 34 Ch.D., 234.

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As is there pointed out, most of these decisions were based on certain observations of their Lordships of the Privy Council in *Nugender Chunder Ghose* v. *Kaminee Dossee*(1), but those observations did not amount to more than a *dictum* and could not be held to be applicable to any case but the one then actually before their Lordships, *i.e.*, the case of a mortgage. In 1887, by a Full Bench judgment, the Calcutta High Court finally decided against the right of a co-sharer to a charge (*Kinu Ram Das* v. *Mozaffer Hosain Shaha*(2)). A Full Bench of the Allahabad High Court has arrived at a similar decision (*Seth Chitor Mal* v. *Shib Lal*(3)). In 1886 Sir Charles Sargent, the Chief Justice of Bombay, expressed an opinion on this subject which is in accordance with the view taken by the Calcutta High Court up to the Full Bench decision of 1887 (in *Achut Ramchandra Pai* v. *Hari Kamti*(4)), but his remarks cannot be held to be more than *obiter dicta* and the Bombay High Court has now in a decision which has been reported since this case was argued before us followed the judgments of the Calcutta and Allahabad High Courts (*Shivrao Narayan* v. *Pundlik Bhaire*(5)). A different view has no doubt been taken by our own Court (*Seshagiri* v. *Pichu*(6)). The state of the decisions being as I have thus briefly shown, I regret that I am unable to concur with my learned colleague in the view that he has taken of this question. To quote the words of Edge, C.J., in the decision to which I have already referred "Justice, equity and good conscience are captivating terms; but before a Judge applies what may appear to him at first sight to be in accordance with justice, equity and good conscience, he must be careful to see that his views are based on sound general principles and are not in conflict with the intentions of the Legislature or with sound principles recognized by authority (*Seth Chitor Mal* v. *Shib Lal*(3)). If, in the present case, I, sitting as a member of a Bench of two Judges, were to acquiesce in the adoption of the principle now contended for on behalf of the plaintiff, I should have to refuse to be guided by the decisions of the English Courts of law, of the High Courts of Calcutta, Allahabad and Bombay and also by what I believe to be the intention of the Legislature.

(1) 11 M.I.A., 241. (2) I.L.R., 14 Calc., 809 at p. 830.
(3) I.L.R., 14 All., 273 at p. 299. (4) I.L.R., 11 Bom., 313.
(5) I.L.R., 26 Bom., 437. (6) I.L.R., 11 Mad., 452.

This I am not prepared to do. As to the intention of the Legislature in this matter I entirely concur in the observations of Wilson, J., to be found at page 832 of the judgment of the Calcutta Full Bench (*Kinu Ram Das* v. *Mozaffer Hosain Shaha*(1)). As the view taken by my learned colleague, with which I am unable to concur, is in accordance with the decision of this Court reported at *Seshagiri* v. *Pichu*(2), I am of opinion that the question should be referred to a Full Bench for decision.

I agree with Mr. Justice Bhashyam Ayyangar on the other questions raised in these appeals (187 and 188) as set out in his judgment and also as regards the issues that he proposes to send down to the District Judge for trial.

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

Hon. Mr. *C. Sankaran Nayar* and *T. Rangachariar* for appellant.

The Advocate-General (Hon. Mr. *J. P. Wallis*) and *K. Subrahmania Sastri* for respondent.

The Court delivered the following judgments:—

SUBRAHMANIA AIYAR, J.—In the argument before us it was contended that section 100 of the Transfer of Property Act read with section 82 gave the appellant the charge claimed.

The point is to my mind not quite free from doubt. I think it unnecessary to decide it as I am decidedly of opinion that the appellant is entitled to the charge claimed, as a matter of justice, equity and good conscience.

Almost everything that could be urged in support of this view will be found referred to and discussed ably, either by Mitter, J., in the Calcutta Full Bench case or by Mahmood, J., in the Allahabad Full Bench case or by my learned colleague Bhashyam Ayyangar, J., in his very exhaustive judgment in the present case.

Whilst refraining from stating in my own words their arguments on the point, as I, by doing so, should be taking up time unprofitably, I think I ought not to omit to observe that this case convinces me that there is far less likelihood of any unsound rule being laid down in this country in consequence of the supposed deceptive character of the phrase "justice, equity and good

(1) I.L.R., 14 Calc., 809 at p. 830. (2) I.L.R., 11 Mad., 452.

conscience," than there is of Judges refusing to accept a sound rule from, I say with all deference, what is little short of a prejudice to that time-honoured phrase, introduced of old by wise legislators and universally accepted as words compendiously denoting those ultimate principles of what is right and proper, fair and reasonable, and good and expedient,—principles which Judges here, as elsewhere, cannot help resorting to in dealing with the difficult questions, not directly governed by existing precedents, which often arise in the course of the administration of justice.

It is quite true that for the enunciation of such principles, we mainly and generally look to English decisions and text books of repute. But I fail to see why we are precluded from, when necessary, considering and following rules laid down in the sister island of Ireland, where the same system of common law and equity is administered by a judiciary neither less able nor less learned than that in England, if such rules appear to us to be the best suited to the conditions and requirements of this country. In order to show that the view adopted in *Seshagiri* v. *Pichu*(1) and since then more than once followed in this Court, is not a pseudo-equitable doctrine peculiar to Ireland, but true equity accepted and enforced as such without any reference to any analogy that may or may not be furnished by the principle of maritime salvage lien, in jurisdictions remote from Ireland, but administering the same common law and equity, I may also draw attention to what is alluded to in the passage cited by Bhashyam Ayyangar, J., from Freeman on co-tenancy, and quote a fuller statement by another writer of the law on this point in those parts of the United States where it has arisen. In page 265 of Sheldon on 'Subrogation' (2nd edition) it is pointed out that "one tenant in common upon redeeming the estate from a *tax* sale, though he will not acquire an absolute title, yet, if his payment were necessary for the protection of his own estate, may hold the estate under his *tax* title until they pay or tender to him their proportion of the taxes." Though there are several decisions supporting this statement of the law, for the present purpose it is sufficient to quote the observations of Shipley, C.J., in the early case of *Walker* v. *Eaton*(2) decided in 1849, as showing that the doctrine has all along been rested in America only on broad grounds of justice and equity. The learned Judge

(1) I.L.R., 11 Mad., 452. (2) 50 Am. Decisions, 637.

says :—"If one who may be obliged to redeem the share of a co-tenant to relieve his own share from incumbrance, could have no right to retain the share of such co-tenant as security and to obtain a re-imbursement of the amount equitably chargeable to it, he might utterly fail to obtain compensation. And yet his co-tenant, without making any payment, might be entitled to the full possession and benefit of his share of the land, discharged from the incumbrance. The law cannot justly be charged with such results as produced by conformity to its provisions. The principle is well established and is of frequent application in the redemption of mortgages, that one having a legal interest in an estate under incumbrance, may redeem the whole estate when necessary to redeem his own share or to relieve his own title from incumbrance even against the pleasure of a co-tenant or other owner, and may be regarded as the assignee of the incumbrance upon the other shares or interests, and may obtain possession of them to secure a re-imbursement of the amount equitably chargeable to them.

"A sale made for the payment of taxes is but an incumbrance upon the estate so long as the right to redeem exists. The purchaser receives and holds the title as security for money paid; and such a title is in principle a mortgage although it does not exist in a form to be included in our statute provisions respecting mortgages. By the application of this principle to cases of this kind complete justice may be done to all interested in the land and without it such a result would fail to be accomplished" (see at page 640).

The force of this reasoning, in so far as it bears upon the fairness and propriety of our upholding the existence of a lien in the circumstances of the case, is not weakened by the fact that there is no personal right of contribution in such cases in America. From what I have said, it will be apparent that I would follow the decision in *Seshagiri* v. *Pichu*(1) even if I were satisfied that that decision was unwarranted by the trend of English authorities cited for the respondent, which I think, however, is open to doubt. Assuming those authorities are really opposed to the view I am here following, that we are not to be governed by them is manifest from the decision of the Judicial Committee in *Bhagwati Prasad* v.

(1) I.L.R., 11 Mad., 452.

Radha Kishen(1) referred to and followed by Benson and Bhashyam Ayyangar, JJ., in *Subbammal* v. *Muthu Pathu*(2) in this Court. There, to put the facts quite briefly, S advanced money to N, agent of B, for purchasing certain immovable property for B and N executed in favour of S a hypothecation for the money, on the property purchased. Treating, for special reasons, the hypothecation as invalid, the Judicial Committee held that S was in equity entitled to a charge upon the property for the money lent. After stating the facts which, it will be seen, raised a case much weaker than the present, and in fact an extreme case, their Lordships' decision is expressed in one single sentence, implying that the matter admitted of no question or controversy. They said :—"The facts admitted by Bir Bhadder and also found by the Court in the former suit between these parties are sufficient to show that the appellant, as the representative of Sarju Prasad, is entitled in equity to have it declared that the sums claimed with interest are a charge upon the property." Having before me this decision which no ingenuity can explain away, I feel no hesitation in declining to accept the view now adopted by the other High Courts on this question as sound.

It is thus clear to me that the decision in *Seshagiri* v. *Pichu*(3) did not create any new law, but was simply an application to the class of cases of which the present is a type of a general principle which is firmly established in equity jurisprudence and of which sections 82 and 95 of the Transfer of Property Act, section 32 of Act II of 1864, and section 501 of the Code of Civil Procedure, are but instances of statutory application to particular descriptions of cases with such qualifications as in each case were deemed necessary.

My answer to the question referred is therefore in the affirmative.

DAVIES, J.—Were the matter "*res integra*" I should be inclined to adopt the view taken by the other High Courts in India, though there is much to be said on both sides of this really difficult question. But as the decisions of this Court have been uniform that a charge is created upon the land by payments such as this, I am not prepared to differ from my learned colleagues in again upholding the same opinion.

(1) I.L.R., 15 All., 304.
(2) S.A. No. 788 of 1901 (see p. 686 *supra* (footnote)).
(3) I.L.R., 11 Mad., 452.

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BENSON, J.—I have no hesitation in answering the question referred to us in the affirmative. Under section 2 of Madras Act II of 1864 it is expressly declared that "the land, the buildings upon it and its products shall be regarded as the security for the public revenue," due on the land, and section 42 shows that it is a first charge on every portion of the estate. Bearing this in mind, it seems to me clear that the principles of equity on which sections 82 and 100 of the Transfer of Property Act are based, if not the very words of those sections, are applicable to the case before us, and that this is so, is placed beyond all doubt, by the language of the Privy Council in *Nugender Chunder Ghose* v. *Kaminee Dossee*(1) and *Bhagwati Prasad* v. *Radha Kishen*(2) quoted a few days ago by Sir Bhashyam Ayyangar and myself in deciding *Subbammal* v. *Muthu Pathu*(3). If it were necessary, I should have no difficulty in holding that the words "by operation of law" in section 100 of the Transfer of Property Act, are more extensive than the words "by law" and that a charge created "by operation of law" includes a charge created directly by the provisions of an Act, as in the case before us, as well as other charges created indirectly as a legal consequence of certain conditions. Apart, however, from the Transfer of Property Act, I think that the principle laid down in this Court by Kernan, J., in *Seshagiri* v. *Pichu*(4) fourteen years ago and ever since followed, so far as I am aware, by the Courts in this Presidency, is amply supported by the decisions of the Privy Council to which I have referred. I can see no danger, but a great deal of justice and equity in following that principle in determining the question referred for our decision.

I would answer it in the affirmative.

The case came on for final disposal on 20th January 1903 before Benson and Bhashyam Ayyangar, JJ., who made the following

ORDER.—Following the opinion of the Full Bench we hold that the claim forms a charge on the defendant's share in the estate and that its inforcement as a charge is not barred by limitation. But before finally deciding the appeals, including the question as to the extent to which the personal remedy is or is not barred by limitation, we direct the District Judge to return findings on the fourth, sixth and seventh issues in the case, and also on the following issue :—

"Whether any and what sums" were credited by the Collector within three years before the date of this suit towards the arrear of revenue in question from the income of the plaintiff's estate during the time that it was under the management of the Collector under the provisions of Madras Act II of 1864 and whether any and what amounts were so credited more than three years before the date of this suit, but subsequent to the death of the late Maharajah of Vizianagram.

The findings should be returned within two months from this date. Further evidence may be taken on the additional issue now sent down, and if the Judge thinks fit also on the three original issues.

(1) 11 M.I.A., 241 at p. 258. (2) I.L.R., 15 All., 304.
(3) S.A. No. 788 of 1901 (see p. 686 *supra* (footnote)).
(4) I.L.R., 11 Mad., 452.

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APPELLATE CIVIL—FULL BENCH.

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

KELU NEDUNGADI AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

KRISHNAN NAIR AND OTHERS (DEFENDANTS), RESPONDENTS.*

1903.* March 5. July 13.

Malabar law—Suit to redeem kanom—Failure to prove "special exigency" less than twelve years having expired—Maintainability of suit—"Avasyamayi Chodikambole"—"Avasyamayi Varumbole."

By the custom of Malabar, a kanom enures for twelve years unless the parties to it have by express contract provided for its redemption at an earlier date. A kanom deed contained thevern acular words "Avasyamayi Chodikambole," "Avasyamayi Varumbole." On the question being referred to a Full Bench whether these words meant "on demand," or whether they meant "on demand based on some special exigency" :

Held, that the words did not impose on a jenmi the obligation of proving "some special exigency" as a condition precedent to his right to recover "on demand" before twelve years have elapsed.

Mahomed v. *Ali Koya*, (I.L.R., 14 Mad., 76), dissented from.

* Second Appeal No. 1563 of 1901, presented against the decree of A. Venkataramana Pai, District Judge of South Malabar at Calicut, in Appeal Suit No. 240 of 1901, presented against the decree of R. A. Krishnaswami Ayyar, District Munsif of Calicut, in Original Suit No. 560 of 1900.

QUESTION referred to a Full Bench. The suit was for the redemption a kanom, and an issue was raised as to whether the suit was premature. On this issue the District Munsif said:—The second defendant's vakil argued that according to the wording in exhibit B, the kychit, the plaintiffs are not entitled to institute the present suit for redemption at this stage as the usual period of twelve years has not expired. The second defendant's vakil also relied on the language of exhibit I (the kanom deed) which is slightly different from the language employed in exhibit B. The words used in exhibit B are "*Avasyamayi Chodikambole*, whereas the words used in exhibit I are *Avasyamayi Varumbole*." He then considered the decided cases, and decided that the plaintiffs were entitled to institute the suit, and that the suit was not premature. He decreed in plaintiffs' favour and fixed the value of improvements at Rs. 308-1-1. Plaintiffs appealed against the award of compensation for improvements; and defendants filed a memorandum of objections against the District Munsif's finding that plaintiffs were entitled to sue.

The Acting District Judge dealt with the latter point as follows:—"The plaint kanom of 1893 is evidenced by the kanom deed (exhibit I) and its counterpart or kychit (exhibit B). By the custom of the country a kanom enures for twelve years unless the parties have by express contract provided for its redemption at an earlier date. In the present case the stipulation is that the land should be surrendered whenever the lessor has necessity for the land and demands its surrender. The lessor in his kanom deed I says that 'whenever I have necessity' the lessee should surrender the land and the lessee in his kychit (exhibit B) says that he should surrender the land whenever the lessor demands it. The two documents are but parts of the same instrument and must be read together. The two expressions referred to constitute but one stipulation, namely, the stipulation providing for the surrender of the land whenever the lessor has necessity and demands it. Each expression taken separately would be inconsistent with the effect of the other. If the land had been intended to be surrendered on demand without reference to the landlord's having necessity for it, the expression in exhibit I would be without effect —but treating the two expressions as parts of one and the same agreement effect is given to both. This being so, the ruling in

Mahomed v. *Ali Koya*(1) applies. There, their Lordships have ruled 'that in the absence of any special exigency the suit is premature and must be dismissed.' In this case the plaintiffs have not even alleged, much less proved, any special necessity and therefore their suit must fail." He dismissed plaintiffs' appeal, and allowed the defendants' memorandum of objections, reversed the decree and dismissed the suit.

Plaintiffs preferred this second appeal when their Lordships (Subrahmania Ayyar and Benson, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.—The question is as to the construction of the words "Avasyamayi Chodikambole" in exhibit B and "Avasyamayi Varumbole" in exhibit I. Do they mean nothing more than "on demand" or do they mean "on demand based on some special exigency" on the part of the plaintiffs.

The decisions in cases which turned on words identical or substantially similar are not uniform.

In the case of *Mahomed* v. *Ali Koya*(1) and in the unreported case therein referred to, the latter view was adopted, while in *Vaderi Kunnath Bappoo* v. *Kayante Akath Ayissa*(2) and *Koyassan Kuti* v. *Perumal Tirumala*(3), the former view was taken.

The question is one of considerable practical importance in Malabar and we resolve to refer it for the decision of a Full Bench.

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

K. P. Govinda Menon for appellants.

C. V. Anantakrishna Ayyar for second respondent.

OPINION.—We are of opinion that the Malayalam words mentioned in the order of reference do not impose on a jenmi the obligation of proving "some special exigency" as a condition precedent to his right to recover "on demand" before twelve years.

We think *Vaderi Kunnath Bappoo* v. *Kayante Akath Ayissa*(2) was rightly decided and we dissent from the decision in *Mahomed* v. *Ali Koya*(1) that "special exigency" must be proved.

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(1) I.L.R., 14 Mad., 76. (2) S.A. No. 1665 of 1898 (unreported).
(3) S.A. No. 269 of 1899 (unreported).

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1902. November 24, 25.

KASTURI GOPALA AYYANGAR AND OTHERS (DEFENDANTS NOS. 8 TO 11 AND 14), APPELLANTS,

v.

ANANTARAM THIVARI AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 1 TO 7 AND 12, 13, 15 AND 16), RESPONDENTS.*

Land Revenue—Assignment of—Direction by Government to holder on ryotwari tenure to pay crop assessment to charity in lieu of direct payment by Government— Effect—Rights of trustees of charity—Limitation Act—XV of 1877, arts. 110, 120.

Prior to 1863, Government had been paying from the public treasury Rs. 233-5-3 to the trustees of a charity (of which the plaintiffs in this suit were the present trustees). In that year, Government, in lieu of this payment in cash, directed the predecessor of defendants Nos. 1 to 4, who was the holder, on ryotwari tenure, of over 5 velis of land, to pay the first crop assessment payable on the land, amounting to Rs. 233-5-3, to the trustees of the mutt, instead of to the Government, and obtained from him an agreement that he would do so, and the promise appeared to have been performed. In 1893, the assessment for the first crop was raised, the net increase being payable to Government direct. In 1898, the trustees brought the present suit to recover the sums due for faslis 1303 to 1306 inclusive personally from defendants Nos. 1 to 4 and as a charge on the land in question:

Held, that Government had not assigned the revenue in question to the plaintiffs as inam and *semble* had not ever parted with its rights to such revenue. Assuming the plaintiffs were assignees of Government, they could not proceed under sections 2 and 42 of the Revenue Recovery Act, but had only a personal claim against the persons who, but for the assignment, would have been liable to pay the revenue to Government. This claim was not a claim for rent under the Rent Recovery Act falling within article 110 of the Limitation Act and consequently it fell within article 120.

SUIT for money and for a charge on land to secure payment of it. The facts material to the decision are set out in the judgment. (Exhibit D), which is there referred to, was as follows :—"To Her Majesty's Government. Before muchilika executed by Govinda Rao Bheema Rao Sooriya Vamsi, Mirasidar of Perumpuliyoor,

* Second Appeal No. 1139 of 1900, presented against the decree of K. Ramachendra Ayyar, Subordinate Judge of Negapatam, in Appeal Suit No. 450 of 1899, presented against the decree of R. Annaswamy Ayyar, District Munsif of Tiruvadi, in Original Suit No. 75 of 1898.

attached to the said taluk. Pursuant to the Board's order, dated 22nd July of the current year, communicating that Government has, by its order, dated 18th idem, sanctioned a land inam instead of the cash allowance hitherto paid by Government to mutt, etc., whereas I have agreed to pay to Mukunda Brahmachari's mutt entered under the head of mutt and choultry in Rozamanyam, the assessment of Rs. 242-1-8 on 5 velis 0 mahs and 9 gulis of nunja in the said village, the miras whereof is registered in my name as No. 61, out of the lands assigned in lieu of the cash allowance hitherto paid by Government to Jagannatha Rau, head of the said mutt, less Rs. 8-12-5 the watchman's fees, that is to say, the balance of Rs. (233-5-3) two hundred and thirty-three annas five and pies three; I shall, from fasli 73 current, duly pay this amount in full to Jagannatha Rau, head of the said mutt, for the upkeep of the charities in the said mutt just as it was being paid up to date by Government and obtain receipt. Thus I have executed this muchilika with my consent. (Signed) Srinivasa Aiyangar, Agent, holding a power-of-attorney, from the said Govinda Rao Bheema Rao Sooriya Vamsi."

The District Munsif gave a personal decree against defendants Nos. 1 to 4, but, in other respects, dismissed the suit. The Subordinate Judge affirmed the Munsif's decree against defendants Nos. 1 to 4 and further declared the amount to be a charge on the land.

Defendants Nos. 8 to 11 and 14 preferred this second appeal.

P. S. Sivaswami Ayyar for appellants.

T. V. Seshagiri Ayyar for first and second respondents.

V. Ramesam for seventh respondent.

JUDGMENT.—Until 1863 the Government was paying from the public treasury in cash Rs. 233-5-3 to the trustees of a charitable mutt, of which the plaintiffs are the present trustees. In 1863 the Government, in lieu of this cash payment, directed the predecessor of defendants Nos. 1 to 4, who was the holder on ryotwari tenure of 5 and odd velis of land to pay the first crop assessment payable on the land amounting to Rs. 233-5-3 to the trustees of the mutt instead of to the Government revenue officers and obtained from him an agreement (exhibit D) that he would do so and from that time the trustees were apparently collecting the said amount, and the Government was collecting the second crop assessment on the land amounting to Rs. 120 as well as the whole of the

land-cess and village-cess from defendants Nos. 1 to 4 and their predecessors. In 1893, at the time of the revision of the Tanjore assessment, the assessment for the first crop was raised to Rs. 299-8-0, the difference (Rs. 66-6-9) between that and the former assessment being payable to Government direct.

The plaintiffs bring this suit to recover Rs. 709-8-6, being the amount payable under the arrangement made in 1863 in respect of faslis 1303 to 1306 inclusive. They seek to recover this both personally from defendants Nos. 1 to 4 and as a charge on the said 5 and odd velis of land, portions of which land have now passed into the hands of defendants Nos. 6 to 16.

The District Munsif gave a personal decree against defendants Nos. 1 to 4 only and dismissed the suit in other respects.

On appeal by the plaintiffs to the Subordinate Judge he held that the plaintiffs were entitled to a charge on the land and gave a decree against all the defendants to that effect, affirming also the personal decree against defendants Nos. 1 to 4.

This second appeal is made by defendants Nos. 8 to 11 and 14 alone. The principal contentions raised by them are that the plaintiffs, even if entitled to maintain the suit, have no charge on the land, and that, if so, the period of limitation applicable is 3 years, the suit being one for rent and is therefore barred except as against the second defendant who has given an acknowledgment of liability which saves the bar as against him.

In support of the Subordinate Judge's judgment the learned pleader for the first and second respondents relies on the decision of this Court in *Krishnasami* v. *Venkatarama*(1). In the absence of the necessary materials bearing on the question, some of which are referred to in exhibit D, we are unable to express a definite opinion on the point but we are inclined to agree with the view there taken by Mr. Justice Shepherd, viz., that by the similar arrangement made in that case in 1863, the Government did not part with its right to the revenue and the fact that a portion of the public revenue was temporarily appropriated by Government to a demand against the public treasury did not deprive such portion of its character as public revenue. It is clear that the Government revenue was not assigned to the trustees as inamdars in respect of the holding, and the very fact that the Government did not direct

(1) I.L.R., 13 Mad., 319.

the ryot to execute the muchilika (exhibit D) in favour of the plaintiffs' mutt, but took it in its own favour clearly indicates that there was no transfer of the rights of Government to the plaintiffs and it would probably be open to Government at any time to substitute any other arrangement for that in 1863. In this view, whenever the ryot fails to pay the said assessment to the trustees of the mutt the latter should bring the matter to the notice of the revenue authorities and it would be competent to them to realize the arrear under Act II of 1864 (Madras) and pay it over to the trustees. This view, however, was not put forward either in the pleadings or in the Courts below, and defendants Nos. 1 to 4 have not appealed to the lower Appellate Court and have not taken any part in bringing this second appeal. The case has, therefore, to be disposed of on the footing that the plaintiffs were assignees from Government of the said annual amount of Rs. 233-5-4 entitled to sue in their own names. In this view it is clear that the amount which they now seek to recover is not public revenue, but an income due to the mutt, though the right of the mutt to such income originated in a grant or arrangement made by Government. Sections 2 and 42 of the Revenue Recovery Act are applicable only to public revenue and not to the realization of sums due to an institution like the plaintiffs' mutt. The plaintiffs can, therefore, enforce their claim only as a personal one against the holders of the land for the time being who, if there had been no assignment in favour of the plaintiffs, would have been obliged to pay the amount in question as land revenue to Government according to their respective shares. In the view that the plaintiffs have not been constituted inamdars, so as to create the relation of landholder and ryot between themselves and the pattadars the claim made by the plaintiffs cannot be regarded as one for rent either for the purposes of the Rent Recovery Act or for the purposes of article 110 of schedule II of the Indian Limitation Act, 1877. There being no special article applicable to a claim such as the present, it falls under the general article 120 which prescribes six years from the date of the cause of action, and the claim, therefore, as a personal one, is not barred. As only some of the defendants have preferred this second appeal, viz., defendants Nos. 8 to 11 and 14, the decree appealed against will stand so far as the other defendants are concerned. The ninth defendant was a purchaser of a part of the land in revenue auction sale, and no part of the sum

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claimed in the plaint accrued due subsequent to his purchase. The eleventh defendant is only a mortgagee and as such is not liable for the Government revenue and therefore for the plaintiffs' claim. As regards defendants Nos. 8, 10 and 14 they were no doubt in possession of portions of the land during fasli 1306 and as such would be personally liable to pay severally the revenue falling due on their respective portions, but as the plaintiffs have obtained a decree which has become final in the Original Court personally against defendants Nos. 1 to 4 in respect of all the lands for the whole of fasli 1306, the plaintiffs cannot obtain a further decree against defendants Nos. 8, 10 and 14 for a portion of the same amount. The second appeal, as regards all the appellants, is therefore allowed. The plaintiffs will pay the costs of the appellants in this and in the lower Appellate Court. The decree of the lower Appellate Court will be modified accordingly and affirmed in other respects.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1902. December 23.

PATHUMMABI AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

VITTIL UMMACHABI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Muhammadan law—Alienations by widow—Validity.

According to the Muhammadan law, the widowed mother is not the legal guardian of the property of her minor children, and cannot do any act relating to their property so as to bind them, and a sale or mortgage by her cannot, as such, bind the minor children. Though she may be a co-heir with her minor children, in respect of the property dealt with by her, the Muhammadan law (unlike the Hindu law) does not constitute the senior co-heir the managing co-parcener, entitled to administer and manage the estate until partition. Alienations by such a widow cannot, therefore, be upheld by extending to Muhammadans the principle of Hindu law applicable to the acts of a guardian or managing member of a family.

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* Second Appeal No. 577 of 1901, presented against the decree of K. Krishna Rao, Subordinate Judge of South Malabar at Calicut, in Appeal Suit No. 661 of 1900, presented against the decree of A. Sreenivasa Ayyangar, District Munsif of Calicut, in Original Suit No. 815 of 1899 on the file of the Principal District Munsif of Calicut.

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Under the Muhammadan law the estate of a deceased person must be applied to the payment of his funeral expenses and debts before the heirs can make partition of it. In this respect it is analogous to and even stricter than the Hindu law. The creditors have the right to sue such of the heirs as have taken the estate, but they are entitled to have recourse to a single heir only in a case where all the effects are in the hands of that heir.

SUIT to recover a share in the estate of the plaintiff's late father. The deceased died leaving three widows (defendants Nos. 1, 2 and 3), two daughters (plaintiff and fifth defendant) and a son (fourth defendant) him surviving. The principal question raised was as to the validity of certain alienations by the first defendant. Of the various items of the estate of the deceased, items Nos. 5, 6, 7, 8 and 18 had been sold by first defendant in discharge of debts due by her late husband, item No. 11 partly in discharge of such a debt, and items Nos. 15 and 16 had been redeemed by the mortgagors on payment of the mortgage amount to the first defendant. The facts are fully set out in the judgment. Both the lower Courts held that the alienations made by the first defendant were *bonâ fide* and binding on the plaintiff and disallowed the plaintiff's claim for a share in the properties so alienated.

Plaintiff preferred this second appeal.

P. R. Sundara Ayyar for appellant.

V. Ryru Nambiar for respondents Nos. 2, 7, 9, 11 and 14.

JUDGMENT.—This is a suit brought by the plaintiff, a minor, to recover her $\frac{7}{32}$ share in the estate of her father, Kunhutti Haji, who died in 1894, leaving him surviving three widows (defendants Nos. 1, 2 and 3), two daughters (plaintiff and fifth defendant) and a son (fourth defendant). The remaining defendants have been impleaded as being in possession of portions of the estate of the deceased, claiming under alienations made by the first defendant.

Both the Courts below held that the alienations made by the first defendant were *bonâ fide* and binding on the plaintiff and disallowed the plaintiff's claims for a share in the properties so alienated. Hence this second appeal is preferred claiming a share therein on the ground that it was not competent to the first defendant to alienate the plaintiff's share in those properties.

So far as the second and third defendants are concerned, they are entitled each to $\frac{1}{24}$ share and in pursuance of an arrangement made by mediators shortly after the death of the husband a sum of Rs. 100 was paid to defendants Nos. 2 and 3 (exhibit XXIV) and item No. 10 allotted to the second defendant (exhibit I) in

satisfaction of their shares and of some debt due to the second defendant from the husband's estate. It is not alleged or shown that the properties thus given over to them were in excess of their legitimate shares and the property in the possession of these defendants cannot therefore be regarded as obtained under alienations made by the first defendant which the plaintiff, her daughter, can question.

The ninth and tenth defendants are the brothers of Kunhutti Haji and are in possession of items Nos. 5, 6 and 7, and the seventh defendant is Kunhutti's step-mother and is in possession of item No. 8 on behalf of her two children (not parties to this suit). These are not entitled to any shares in the estate of Kunhutti Haji, but they were co-heirs with him and certain others in the estate of his father Kuttiali Haji. Kunhutti Haji and his elder brother alienated a portion of their father's estate and the share due to the ninth, tenth and seventh defendants in the sale-proceeds had not been paid to them and, on this account, Kunhutti Haji was, at the time of his death, indebted to the ninth and tenth defendants in the sum of Rs. 100 (exhibit II) and to the seventh defendant in the sum of Rs. 50 (exhibit XVIII). Shortly after his death the first defendant sold the items of property above mentioned to those defendants in discharge of the debts due to them.

The eighth defendant is apparently in occupation of item No. 8, the same having been assigned to him by Kunhutti Haji on a kanom for Rs. 10.

The eleventh defendant is in possession of item No. 1 which was sold to him by the first defendant (under exhibit III) in consideration of his having, at her request, discharged a debt of Rs. 100 due under a decree against her husband and his brothers, the said amount of Rs. 100 having been settled by mediators as the share of the decree-debt chargeable against Kunhutti Haji's estate. The twelfth defendant is in possession of item No. 18, the same having been sold to him (exhibit VI) by the first defendant in discharge of a debt of Rs. 50 due to him from her husband.

The thirteenth defendant is in possession of item No. 11 which was sold to him (under exhibit IV) by the first defendant in discharge of a debt of Rs. 25 due to him from her husband and in consideration of a further sum of Rs. 50 paid by him to her.

It appears that a sale-deed (exhibit VIII) in respect of this item for the same amount was obtained by this third defendant from Kunhutti Haji who, however, died before the document was registered and the sum of Rs. 50 paid.

The fourteenth defendant is in possession of items Nos. 3 and 4 which were sold to him (under exhibit V) by the first defendant for a sum of Rs. 85.

The eighteenth defendant is in possession of item No. 15 which he had mortgaged to Kunhutti Haji and which subsequent to the latter's death he redeemed (under exhibit XIX) from the first defendant on payment to her of the sum of Rs. 15, the full amount due on the mortgage.

The nineteenth defendant is in possession of item No. 16 which he had mortgaged to Kunhutti Haji (exhibit X) and which subsequent to his death he redeemed (under exhibit XI) from the first defendant on payment to her of the sum of Rs. 100, the full amount due on the mortgage.

The sixteenth defendant is in possession of item No. 19 which appears to have been held by Kunhutti Haji on Verum-pattom right, which right seems to have been assigned to this defendant by the first defendant after her husband's death.

It will thus be seen that items Nos. 5, 6, 7, 8 and 18 have been sold by the first defendant in discharge of debts due by her husband, item No. 11 partly in discharge of such a debt and items Nos. 3 and 4 for a purpose as to which there is no evidence and that items Nos 15 and 16 were redeemed by the mortgagors on payment of the mortgage amount to the first defendant.

In our opinion, the Courts below were practically guided by the principles of Hindu law in deciding whether the alienations made by the first defendant were binding upon her minor daughter instead of applying the principles of Muhammadan law. According to the Muhammadan law the mother is not the legal guardian of the property of her minor children and cannot do any act relating to their property so as to bind them (*Seta Ram* v. *Amir Begam*(1), *Baba* v. *Shivappa*(2) and *Moyna Bibi* v. *Banku Behan Biswas*(3)), and a sale or mortgage made by her cannot as such bind the minor children (*cf. Nizam-ud-din Shah* v. *Ananda Prasad*(4)).

(1) I.L.R., 8 All., 324 at p. 338.
(2) I.L.R., 20 Bom., 199 at p. 201.
(3) I.L.R., 29 Calc., 473.
(4) I.L.R., 18 All., 373.

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No doubt, as in this case, the mother may be a co-heir with her minor children, in respect of the property dealt with by her. But unlike the Hindu law, the Muhammadan law does not constitute the senior co-heir the managing co-parcener, who will be entitled to administer and manage the estate until partition. It is, therefore, not possible to uphold the alienations in question by extending to Muhammadans the principle of Hindu law applicable to the acts of a guardian or managing member of a family.

Under the Muhammadan law, the estate of a deceased person must be applied to the payment of his funeral expenses and debts, before the heirs can make partition of it. In this respect it is analogous to and in fact stricter than the Hindu law. The creditors have the right to sue such of the heirs as have taken the estate, "but they are entitled to have recourse to a single heir only in a case where all the effects are in the hands of that heir" and the reason given is that although any one of them (the heirs) may act as plaintiff in a cause on behalf of the others, yet he cannot act as a defendant on their behalf unless *the whole of the effects are in his possession* (*Hamir Singh* v. *Musammat Zakia*(1), *Davalava* v. *Bhimaji Dhondo*(2)).

In *Hamir Singh* v. *Mussama Lakia*(1), however, the sale which took place in execution of a decree obtained against the widows alone of the deceased debtor, as his legal representatives, was held not binding upon the minor daughter of one of the widows on the ground that the daughter herself, and not the widows, was in possession, and the sale-deed was executed on her behalf by a person who had no legal right to represent her.

In the present case it is found and admitted that the mother, the first defendant, who now supports the plaintiff's cause was in sole *de facto* possession of the entire inheritance and that the sales were mostly made *bonâ fide* in discharge of debts due by the deceased husband, which would be binding on all the heirs. It has been held in more cases than one that when a decree is obtained against the widow for debts due from her husband and property is sold to satisfy the decree debt, the sale would bind the other heirs, though they have not been made parties to the suit (*Khurshet Bibi* v. *Keso Vinayek*(3), *Devalava* v. *Bhimaji Dhondo*(2)), and in *Hasan*

(1) I.L.R., 1 All., 57 at p. 59. (2) I.L.R., 20 Bom., 338 at p. 345.
(3) I.L.R., 12 Bom., 101.

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Ali v. *Mehdi Husain*(1), a sale made by one of the co-heirs, who was in possession of the whole estate, for the discharge of the debts of the deceased and for other purposes, was upheld even when no decree had been obtained by the creditors in respect of those debts. The soundness of this decision, so far as it upholds a sale made for family purposes other than the discharge of debts due by the deceased, may be open to question under the Muhammadan law. If the creditor of the deceased can seek his relief against one of several co-heirs in a case when all the effects of the deceased are in the hands of that heir, it can make no difference whether the heir meets the demand by a *bonâ fide* voluntary sale or the property is brought to sale in execution of a decree obtained against him.

The sale of item No. 11, however, was only in part (*i.e.*, to the extent of Rs. 25) in discharge of a debt due by the deceased husband, the remaining sum of Rs. 50 having been paid to the first defendant. The fact that the deceased husband himself executed a sale-deed which was not registered can make no difference. The plaintiff will, therefore, be entitled to her share in this item on payment of her share in the debt of Rs. 25 due to the thirteenth defendant from her deceased father. The plaintiff will also be entitled to her share in items Nos. 3 and 4 which were not sold in discharge of debts due by the deceased. Both these defendants (Nos. 13 and 14) however claim compensation for improvements effected by them, which the Courts below have not determined as the suit against them was dismissed. The plaintiff will have to pay her share of the compensation claimed, the amount being, by agreement of parties, left to be determined in execution proceedings.

As regards items Nos. 15 and 16, the mortgagors, the eighteenth and nineteenth defendants, could not legally pay the mortgage-money to the first defendant alone, though she was the plaintiff's mother and co-heir. The plaintiff will, therefore, be entitled to recover her share in these two items in default of the eighteenth and nineteenth defendants paying her within six months her share of the mortgage amount.

As regards item No. 19 the plaintiff will also be entitled to her share therein.

(1) I.L.R., 1 All., 533.

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The second appeal therefore is allowed as above indicated as against respondents Nos. 13, 14, 16, 18 and 19, but without costs—and the decree of the lower Court varied accordingly—and it is dismissed with costs as against the other respondents.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1902. November 27.

KATTAYAT PATHUMAYI (FIRST DEFENDANT), APPELLANT,

v.

RAMAN MENON AND ANOTHER (PLAINTIFF AND SECOND DEFENDANT), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 244—Proceedings taken by a purchaser under s. 318—Relating to the discharge or satisfaction of decree—Subsequent proceedings to recover same land from same judgment-debtor—Maintainability.

The decree-holder in a previous suit became the purchaser of certain property which was sold in execution of his decree. He applied, under section 318 of the Code of Civil Procedure, for delivery of the property purchased, but his application was rejected as being barred by limitation. He now brought the present suit to recover possession of the land from the present defendant, who was the judgment-debtor in the previous suit. On the objection being taken that the suit was barred by section 244:

Held, that proceedings taken by the purchaser to obtain possession of the property purchased related to the execution discharge or satisfaction of the decree, within the meaning of section 244, and that the suit must be dismissed.

SUIT for land. The facts, which were not in dispute, are set out in the judgment. The District Munsif dismissed the suit, but his decree was reversed by the Subordinate Judge on appeal.

First defendant preferred this second appeal.

C. V. Anantakrishna Ayyar for appellant.

B. Govindan Nambiar for respondents.

JUDGMENT.—The question which has been raised in this case is a pure question of law, and the facts on which it depends are beyond dispute. The question is as to the right of suit, and we

* Second Appeal No. 901 of 1901, presented against the decree of K. Krishna Rao, Subordinate Judge of South Malabar at Calicut, in Appeal Suit No. 682 of 1900, presented against the decree of F. J. deRozario, District Munsif of Ernad, in Original Suit No. 863 of 1898.

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have, therefore, to decide it, though it was not raised in the Courts below.

The plaintiff was the decree-holder in Original Suit No. 409 of 1880 and became purchaser of the plaint property which was sold in execution of that decree. He applied under section 318, Civil Procedure Code, for delivery of the property purchased, but his application was rejected as barred by limitation, having been made more than three years after the confirmation of the sale and he brings the present suit to recover possession of the land from the defendant who was the judgment-debtor in Original Suit No. 409 of 1880.

The appellant's vakil contends that the suit is barred by section 244, Civil Procedure Code. If the question were not already settled by more decisions than one of this Court and of the Calcutta High Court, we should entertain considerable doubt as to whether proceedings taken by a purchaser to obtain possession of the property purchased could be regarded as "relating to the execution discharge or satisfaction of the decree" within the meaning of section 244, Civil Procedure Code, when such proceedings could not possibly affect the execution discharge or satisfaction of the decree. It has, however, been decided in the cases of *Muttia* v. *Appasami*(1), *Lakshmanan Chettiar* v. *Kannammal*(2), *Madhusudan Das* v. *Gopinda Pria Chowdhurani*(3), and *Kasinatha Ayyar* v. *Uthumansa Rowthan*(4), per Moore, J., that such proceedings between the decree-holder when he is the purchaser, and the judgment-debtor, are proceedings in execution of the decree and relate to its execution.

Following the authority of these cases we allow the second appeal and reversing the decree of the lower Appellate Court restore that of the District Munsif dismissing the suit. As the plea on which the appellant succeeds was not taken in the Courts below, we leave each party to bear his own costs throughout.

(1) I.L.R., 13 Mad., 504.
(2) I.L.R., 24 Mad., 185.
(3) I.L.R., 27 Calc., 34.
(4) I.L.R., 25 Mad., 529.

APPELLATE CIVIL.

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

1902. March 11. April 25. 1903. January 30.

SAPPANI ASARI (PLAINTIFF), APPELLANT,

v.

THE COLLECTOR OF COIMBATORE AND ANOTHER (FIRST AND SECOND DEFENDANTS), RESPONDENTS.*

Darkhast rules—Grants of house-sites—Grant by Tahsildar—Appeal to Divisional officer—Failure to reverse grant—Validity of grant.

By the Darkhast rules, as amended in 1894, an appeal is provided to a Divisional officer from the orders of a Tahsildar in respect of grants of building-sites. A Tahsildar passed an order granting an application for a building-site, and an appeal was preferred therefrom to the Sub-Collector (the Divisional officer). This officer apparently referred the appeal to the Collector, who passed an order annulling the grant. The Collector's order was sent to the Divisional officer, who communicated it to the Tahsildar. On a suit being instituted by the applicant for a declaration of his title to the land:

Held, that he had acquired a good title. The appeal lay to the Sub-Collector, who had exercised no discretion with reference to the question which came before him on appeal. He had not dealt with the appeal, or made any order thereon. No authority had been cited to show that in matters not dealt with by the regulations, the Collector has a revisional power similar to that given to him by the regulations in matters dealt with therein; and that the Collector's order on appeal to the Sub-Collector ought to be regarded as an order made by the Collector in the legal exercise of his revisional powers. The result was that the order of the Tahsildar granting the title had not been legally set aside, and the plaintiff had acquired a good title by virtue of the grant duly made by the Tahsildar.

SUIT for a declaration of plaintiff's title to immoveable property. The first defendant allowed the suit to proceed *ex parte*. The plaint alleged that, under the rules of the Revenue department (Board's Standing Order No. 37) regarding disposal of lands for building purposes, the first defendant applied for a house-site and obtained it from the Tahsildar of Erode on the 9th September 1893. On the strength of this grant the first defendant built a

* Appeal No. 35 of 1902 under article 15 of the Letter's Patent, against the decree of the High Court, dated the 25th April 1902, in Second Appeal No. 1221 of 1900, presented against the decree of F. H. Hamnett, District Judge of Coimbatore, in Appeal Suit No. 225 of 1898, presented against the decree of R. Rajagopala Ayyar, District Munsif of Erode, in Original Suit No. 906 of 1897.

house on the site at a cost of Rs. 200, and after living in it for some time, sold it by a registered deed to one Subbaroya Asari who sold it again to the plaintiff for Rs. 200, also delivering possession of it, on the 5th December 1896. During this interval the original title-deed granted to the first defendant had been cancelled and a fresh one granted to him on the 9th April 1895. But despite these title-deeds in favour of the first defendant, the Tahsildar of Erode had imposed a prohibitive assessment on the house, treating its construction on the site as an unauthorized encroachment on Government land, and, in default of payment of the assessment by the first defendant, had attached and brought the house to sale. It was further alleged in the plaint, that under the title-deeds granted to the first defendant, that defendant, and through him the plaintiff had acquired an indefeasible right to the house, that the Revenue authorities had no right to revoke a title-deed once granted validly and that therefore the assessment imposed by the Collector and the subsequent proceedings adopted by him to realize it, were illegal.

The second defendant by his written statement pleaded *inter alia* that the title-deeds relied on by the plaintiff had been cancelled on appeal; that all title-deeds granted by Tahsildars are subject to cancellation on appeal; that a grantee from the Tahsildar ought not to commence building operations on the site until the time for appeal from the Tahsildar's order has expired or the appeal itself (if preferred) has been decided, and that if he begins to build before that time he does so at his own risk; that the sale to the plaintiff's vendor had been effected during the pendency of the appeal and it was a colourable transaction; that the Revenue authorities have full power to prohibit unauthorized occupation of waste lands by the imposition of penal assessment and recover such assessment by attachment and sale of the occupier's property; and that the suit for a mere declaration was unsustainable.

The following issues were framed:—(1) Had the first defendant acquired an indefeasible right to the house-site under the title-deeds referred to in paragraphs 2 and 5 of the plaint? (2) Had the title-deeds been cancelled on appeal as alleged in paragraph 1 of the written statement and was it competent to the appellate authority to so cancel them? (3) What is the effect, if any, of the cancellation as regards the right of the first defendant to the site in question? (4) Is plaintiff entitled to any, and what decree?

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The District Munsif found the first issue in the affirmative. On the second issue he held that in the circumstances of the case it was not competent to the Collector to cancel the title-deeds granted to the first defendant. On the third issue he held that inasmuch as the first defendant's title to the site had arisen by occupancy and by the permission granted to him unconditionally to occupy it, by an officer competent to grant it, the title could not be divested by the order of the Collector. He cited *Collector of Salem* v. *Rangappa*(1). He passed a decree declaring plaintiff to be entitled to the house and site; that it was not liable to the penal assessment imposed upon it by the second defendant, nor to be attached and sold for the realization of such assessment.

Against that decree the second defendant appealed to the District Judge who said:—"Even admitting that the rules which were in force on the 8th September 1893 do not provide for any appeal from the Tahsildar's order, it is clear that, under section 9 of Regulation 11 of 1802, the Collector had power to control the proceedings of his subordinate, the Tahsildar, and to prevent him from illegally disposing of Government land by an act not authorized by the rules. Now the rules in force on the 9th September 1893, embodied in Board's Proceedings No. 409 of 8th July 1891, clearly lay down that the Tahsildar can only make a house-site grant subject to the following conditions: That the grant must be to a *bonâ fide* applicant. That in the case of a non-pattadar, as the first defendant was, the grant must not exceed 4 cents. That the municipal council should be consulted before the grant was made (*vide* Board's Proceedings, No. 274, dated 25th May 1893). The Collector's first order (exhibit VI, dated 22nd February 1894), cancelled the Tahsildar's first grant, because it was made contrary to the conditions on which the power of making such grants was delegated to him. The Collector found that it was made without consulting the municipality. The Tahsildar in making the grant acted only as an agent of Government and if he exceeded the powers delegated to him he obviously acted in excess of his authority and could not by such act alienate the property of his principal, the Government. Now with regard to the Tahsildar's second grant (exhibit F, dated 9th April 1895), this also is contrary to the second condition men-

(1) I.L.R., 12 Mad., 404.

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tioned above, *i.e.*, it is for an area in excess of 4 cents to a non-pattadar. The Collector also found that it was invalid, inasmuch as the application was, as he says, fraudulently made. No doubt what he means is that it was not made by a *bonâ fide* applicant, *i.e.*, an applicant who wanted the site for a building for his own residence. Now there is a mass of evidence on the record to show that first defendant was not a *bonâ fide* applicant. [He dealt with the evidence.] These are facts all absolutely inconsistent with first defendant's allegation that he was a *bonâ fide* applicant, but as no clear issue was framed on this point and also on the other points mentioned by me which show that the Tahsildar's grants are both in excess of his powers and cannot therefore bind his principal, the Government, I think it right to remand the suit for clear findings, after hearing further evidence, if necessary, on both sides on the following points: Are the Tahsildar's grants to the first defendant by exhibits D and F, both void on the ground that they violated the following conditions under which alone Government authorized him to grant lands as house-sites: (*a*) That the grant should only be made to a *bonâ fide* applicant. (*b*) That it should not exceed 4 cents if made to a non-pattadar. (*c*) That the municipal council should be consulted before the grant is made. Exhibit E has been relied on to show that the municipal council was consulted but this document does not prove this point. It merely shows that the council took it for granted that first defendant had got a title under a darkhast and decided that he might be allowed to build a house on the land. Further evidence should be recorded on this point and the correspondence, if any, between the Tahsildar and the council on the point must be brought on the record."

He ordered the lower Court to take further evidence and record findings on the following issues: "(1) Is plaintiff a *bonâ fide* purchaser for valuable consideration for the ostensible owner? (2) Is plaintiff's suit unsustainable on the ground that he has not prayed to have the order attaching the suit property set aside or on the ground that he has not prayed for consequential relief?"

On the issues, the Munsif found that plaintiff was a *bonâ fide* purchaser and had paid consideration; and that suit was maintainable in its present form. He also found that the grant had been made by the Tahsildar without consulting the municipal

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council and was therefore void, and conferred no title on the applicant.

The District Judge concurred in the finding that the suit was maintainable, but he held that plaintiff was not a *bonâ fide* purchaser who really believed after full enquiry that his vendor had a good title as owner of the land. He also held that the grants made by the Tahsildar were null and void and not binding on the second defendant, inasmuch as they had been made in violation of the rules under which alone the Tahsildar could make such alienations. Consequently, the first defendant and his vendor, from whom the plaintiff purchased, got no title, and plaintiff was not entitled to any relief. He allowed the appeal and dismissed the suit.

Plaintiff preferred this second appeal.

The case first came before Bhashyam Ayyangar and Moore, JJ.

K. Srinivasa Ayyangar, for *P. R. Sundara Ayyar*, for appellant.

The Government Pleader for second respondent.

Their Lordships delivered the following judgments :—

MOORE, J.—When the first title-deed granted to the first defendant for the land to which this suit relates was issued by the Tahsildar (exhibit D, dated 8th September 1893), the rules in force with respect to the grant of house-sites were those embodied in the proceedings of the Board of Revenue, No. 470, of the 15th August 1893. Under paragraph 9 of the Standing Order then in force, it was directed that, when applications were received for house-sites within municipal limits, the municipality concerned should invariably be consulted before the applications were considered. The land in the present case is situated within the Erode municipal limits and the municipality was not consulted. The grant by the Tahsildar was therefore, in my opinion, rightly set aside as having been granted in violation of the orders then in force.

It is urged that although the rules no doubt directed the Tahsildar to consult the municipal council before making the grant, yet that it was open to him either to adopt or reject the opinion of the council and that the grant made by him could not be held to be invalid, merely because he neglected to follow strictly the procedure laid down in the rules. In support of this contention the decision in *Periaroyalu Reddi* v. *Royalu Reddi*(1) is relied on.

(1) I.L.R., 18 Mad., 434.

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It is no doubt the case that it was open to the Tahsildar to accept or reject the opinion given by the municipal council as to the advisability of making the grant, but this does not make the rule requiring him to consult the municipal council an idle formality. The object of the rule no doubt was to give the municipal council an opportunity, if it objected to the grant, of representing the matter to the Collector or Divisional officer and staying the hands of the Tahsildar till the matter could be fully enquired into.

I am further of opinion that the decision in *Periaroyalu Reddi* v. *Royalu Reddi*(1) has no bearing on the question now under discussion. All that was there held was that it was not competent to the civil courts to set aside a grant made by a competent officer under the Darkhast rules merely because certain of the formalities prescribed by those rules have not been observed. Here there is no question of a civil court setting aside a grant because of irregularity in the procedure but of a Collector setting aside an order of his subordinate on the ground that he had committed a grave irregularity. No doubt as to the legality of such action seems to have been entertained by the learned Judges who passed this decision, for they observe "Darkhast rules are departmental and if they are infringed the remedy is also departmental." It is further urged that as under the terms of the Standing Order then in force no provision was made for an appeal from the order of the Tahsildar, the Collector acted *ultra vires* in setting that order aside. I should be inclined to hold that the general powers of supervision over all his subordinates in the Revenue Department given to a Collector by section 9, Regulation II of 1803, and section 3, Regulation VII of 1828, empowered him to set aside the irregular order of the Tahsildar in the present case. Even, however, if it should be held that the provisions of these regulations cannot be deemed to govern the present case, I am decidedly of opinion that the action of the Collector was not *ultra vires*. The power of granting lands in village-sites has been delegated by the Governor in Council to the Tahsildar, but certain rules have been laid down in accordance with which the powers given to him are to be exercised. If he, in direct violation of one of those rules, makes a grant, it must be held that he, in doing so, does not act within the scope of the

(1) I.L.R., 18 Mad., 434.

authority given to him and that the grant irregularly made by him is therefore liable to be cancelled by the Collector, his official superior, to whom he is subordinate in every official act performed by him as Tahsildar. Such it may, I consider, safely be assumed must have been the intention of the Governor in Council when these rules were sanctioned, notwithstanding that there is no explicit provision in them for an appeal from the Tahsildar's order.

The Tahsildar issued a second title-deed (exhibit F) for this land to the first defendant on the 9th April 1895. The grant of the land by him was, however, set aside by the Collector on the 11th December 1895 (exhibit VII). In his order the Collector states that he sets aside the grant as it was obtained fraudulently, but the District Judge is, no doubt, right in holding (paragraph 4 of his judgment) that what was really meant was that the first defendant was not a *bonâ fide* applicant in the sense that that term is used in the Standing Order, inasmuch as he was not an applicant who wanted the site in order to build a house on it in which he intended to reside. That he was not such an applicant is clearly shown by the District Judge. Any doubt that there might be as to the Collector's right to set aside the grant under exhibit D was removed before the date of exhibit F by the proceedings of the Board of Revenue of the 1st February 1894, under which it was directed, with the approval of Government, that the Standing Order should be modified and that an appeal should lie from the Tahsildar's order to the Divisional officer. It is urged that, in the present case, the appeal from the Tahsildar's order was irregularly disposed of, inasmuch as it was adjudicated on not by the Divisional officer —the Sub-Collector—but by the Collector. What it appears took place was as follows:—An appeal (exhibit IV) was presented to the Sub-Collector from the Tahsildar's order. The Sub-Collector instead of disposing of this appeal himself made a reference regarding it to the Collector, his reason for doing so being no doubt that the previous order with respect to the grant of this site had been passed by the Collector. The Collector, on receipt of the Sub-Collector's letter, passed an order (exhibit VII) in which he stated that the grant of the land should be cancelled. This order was communicated to the Sub-Collector who in due course issued a takid or order to the Tahsildar cancelling the grant and issuing further instructions to him in the matter. I do not consider that

there was anything irregular or improper on the part of the Sub-Collector in asking the Collector for his instructions before he disposed of the appeal that had been preferred to him. The final order passed by the Sub-Collector and issued to the Tahsildar to be carried out was no doubt issued by him in accordance with the instructions that he had received from the Collector, but it was all the same, I consider, the order of the Sub-Collector passed on the appeal petition and was consequently, I consider, not issued in violation of the rule as to appeals in cases such as this.

I would, for these reasons, hold that the action of the Revenue authorities in this case was warranted by law and would accordingly dismiss this appeal with costs.

BHASHYAM AYYANGAR, J.—Plaintiff, claiming as purchaser from one Subbaraya Asari, the vendee under the first defendant, sues the Secretary of State for India in Council, the only contesting defendant, to establish his right to the site mentioned in the plaint on which the first defendant erected a building at a cost of nearly Rs. 200. It is alleged that the first defendant obtained a valid title to the site by virtue of a grant made by the Tahsildar of Erode under the Darkhast rules.

The second defendant—who will hereafter be referred to as the defendant—in his written statement contests the plaintiff's suit principally upon the following grounds:—

(i) That the two title-deeds on which first defendant's title rests having been cancelled in appeal are inoperative,

(ii) That the title-deeds were obtained by the first defendant not on his own behalf, but *benami*, on behalf of one Virappasari to whom the land had been previously refused, and

(iii) That the title-deeds purport to convey an extent of more than 4 cents of land and is therefore *ab initio* void, so far as relates to such excess (which appears to be about half a cent).

The undisputed facts on which the decision of the case mainly turns are as follows:—On the 2nd September 1893, the first defendant applied to the Tahsildar of Erode for the grant to him of the plaint site and on the 8th September the Tahsildar granted the site to him and issued to him a title-deed (exhibit D). After conveying the site to the first defendant the title-deeds provide that he should build a house thereon within three months and that, in default of his doing so, he shall forfeit his right to the site. One Vadamalai Asari who had previously applied to the Tahsildar

for the same site and was unsuccessful both before the Tahsildar and before the Divisional officer on appeal (exhibit V, dated 1st September 1893) preferred an appeal to the Collector (exhibit III, dated 21st September 1893) against the order of the Divisional officer refusing to grant to him the site and also against the subsequent action of the Tahsildar in making the grant to the first defendant on the 8th September 1893. The Collector passed the following order on the 22nd February 1894 (exhibit VI). "The whole thing is irregular from beginning to end. It is likely that the land is vested in the municipal council. If so, Revenue officers have no jurisdiction. Even, if not, the present grant is invalid for want of consultation of the council. All orders about the land are set aside and the Tahsildar must take up the matter *de novo*." This order was communicated in due course for information and guidance to the Tahsildar of Erode through the Divisional officer on the 16th March 1894. The Tahsildar issued orders on the 4th April 1894 informing the first defendant and the village officers that, in pursuance of the Collector's order, he had cancelled the title-deed issued to the first defendant on the 8th September 1893 and that he should, if so advised, apply to the municipality for grant of the site. Apparently it was subsequently discovered that the site did not belong to the municipal council but was at the disposal of Government. The municipal council were consulted by the Tahsildar and they signified their approval of the grant of the site [exhibits H and H (1), 18th October 1894]. The Tahsildar thereupon rejected Vadamalai Asari's application and granted the first defendant's application for the site, by his order, dated 20th March 1895 (exhibit XI), which runs as follows:—"Two persons named Vadamalai Asari and Krishnasami Asari apply for this place. The site was granted by the late Tahsildar to Krishnasami Asari and he has built a building also on it. He has no house in this village. It is learnt that Vadamalai Asari has a house in the village. Consequently the said site has been granted to Krishnasami Asari who has no house in this village and who has already erected a building. He should not interfere with the tamarind tree standing on the ridge. As there are more sites vacant in this village, Vadamalai Asari may take another site."

Accordingly, a fresh title-deed was issued to the first defendant on the 9th April 1895 (exhibit F). Vadamalai Asari being dissatisfied with this preferred an appeal to the Sub-Collector of

Coimbatore (the Divisional officer) on the 15th April 1895 (exhibit IV). The Divisional officer apparently referred this appeal to the Collector and on the 11th December 1895, the Collector passed an order (exhibit VII) annulling the grant. The Collector's order was sent to the Divisional officer, who communicated the same to the Tahsildar for information and guidance and submission of the report at the end of the period.

As far as I have been able to ascertain, the Darkhast rules as to the grant of house-sites, bearing upon this case, which were in existence at the time of the first grant (8th September 1893) and of the second grant (9th April 1895) were the following:—

(1) "Unclaimed portions of village-sites not being common lands needed for general use may be granted for building purposes to *bonâ fide* applicants in accordance with a scale fixed or to be fixed by Collectors with reference to the requirements of their districts, subject to the conditions embodied in the title-deed granted under paragraph 6 below. The scale may be drawn up and altered by Collectors at their discretion, but the following is suggested as a guide where no such scale already exists":—

To pattadars paying Rs. 50 and upwards—10 cents; to other pattadars—5 cents; to non-pattadars—4 cents. (Board's Proceedings, dated 8th July 1891, No. 409.)

(2) "Tahsildars and Deputy Tahsildars are authorised to grant house-sites with reference to the prescribed scale. If a larger extent than is allowed in the scale is applied for, the sanction of the Divisional officer should be obtained," etc. (Board's Proceedings, dated 8th July 1891, No. 409.)

(9) "When applications are received for house-sites within municipal limits, the municipality concerned should invariably be consulted before such applications are considered. It is, moreover, beyond the competence of Revenue officers to deal with lands which have become vested in the municipal council." (Board's Proceedings, dated 25th May 1893, No. 274.)

No provision was made for any appeal to a superior officer from the order of a Tahsildar with respect to grants of building-sites until the 1st February 1894, when, with the sanction of Government, the following note was added to rule (2) above:—"From the Tahsildar's or the Deputy Tahsildar's decision an appeal may, however, be made to a Divisional officer if lodged within 30 days and his order thereon will be final. No building

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operations can be commenced on the authority of a grant by a Tahsildar or a Deputy Tahsildar before the expiry of the appeal time prescribed above, and, if an appeal has been lodged within that time, until it has been disposed of (Board's Proceedings, 1st February 1894, No. 51). This is the only change relevant to the present case which took place between the dates of the first and second grants which, it may be mentioned, were made by two different Tahsildars.

The District Munsif decreed the plaintiff's suit, but the District Judge on appeal, after framing and remitting certain additional issues, reversed the decree of the District Munsif and dismissed the plaintiff's suit.

If the first defendant acquired a valid title as against the Crown, either under the first grant (of the 8th September 1893) or the second grant (of the 9th April 1895) made by the Tahsildar of Erode, plaintiff would be entitled to the decree sought for. The District Judge while approaching the consideration of the question from the correct standpoint, *i.e.*, that "the Tahsildar in making the grant acted only as an agent of Government and if he exceeded the powers delegated to him he obviously acted in excess of his authority and could not by such act alienate the property of his principal, the Government," has in my opinion erred in holding that though no appeal was provided by the Darkhast rules as they stood at the date of the first grant, yet the Collector had power under section 9 of Regulation II of 1803 to control the proceedings of his subordinate, the Tahsildar, and that he was therefore entitled to revoke the grant under such power, the grant having been made by the Tahsildar without consulting the municipality. The District Judge evidently overlooked the concluding portion of section 9 of the said regulation which expressly provides that the Collector has such power of superintendence and control only so far as the same may relate to the executive administration of the revenue "*under the regulation now enacted or hereafter to be enacted*" (the italics are mine). I have more fully gone into this question and the legal operation of Darkhast rules in my judgment of the *Secretary of State for India in Council* v. *Kasturi Reddi*(1) and explained that a power conferred by the Governor in Council by an executive act on Tahsildars or Divisional officers in regard

(1) I.L.R., 26 Mad., 268.

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to the disposal of Crown lands, cannot be controlled by the Collector under the said regulation or under Regulation VII of 1828. It is, of course, open to the Governor in Council by an executive act to subject the exercise of such power to the control of a superior authority and if such superior authority revokes a grant made by a subordinate agent, the civil courts cannot question such revocation, however arbitrary or even whimsical the grounds may be on which he revokes the grant. At the time when the first grant was made by the Tahsildar, his grant was final if he had acted within the scope of his authority, and the Collector, therefore, acted *ultra vires* in entertaining an appeal preferred to him by Vadamalai Asari and revoking the grant by his proceedings, dated 22nd February 1894 (exhibit VI), and his revocation as such is altogether inefficacious.

But if the Tahsildar acted in excess of his authority in making the grant, the grant of course would not bind the Crown, though the revocation of the same by the Collector, as an appellate authority, may be inoperative. The District Judge apparently considers that the grant would be void by reason of the Tahsildar not having consulted the municipal council before making the first grant. If the rule had provided that no grant should be made without the previous sanction of the municipality, the grant would, no doubt, be invalid in the absence of such sanction. That would be a delegation by Government of its power under 22 & 23 Vict., cap. 41, not to one officer alone but to him jointly with another body. But if the authority is delegated solely to the Tahsildar and he is enjoined in acting within the scope of his authority to consult the municipal council and either adopt or reject its advice, the grant would be valid as one made within the scope of the authority of the Tahsildar, though he did not observe the regular procedure of consulting the municipal council before making the grant. In *Periaroyalu Reddi* v. *Royalu Reddi*(1) it was held that a grant made under the Darkhast rules was not invalidated by reason that the officer making the grant did not follow the procedure prescribed by the Darkhast rules, as to the publication of the application in the village by beat of tom-tom, etc. Any other view will lead to infinite confusion and convert all Darkhast rules into rules enforceable by civil courts when

(1) I.L.R., 18 Mad., 434.

there is any question as to the validity of a grant or of its revocation by a superior appellate authority. For instance, paragraph 5 of Standing Order No. 15 (new edition) prescribes the procedure to be followed on receipt of application, viz., that it should be referred to the village authorities for report, that the fact of application should forthwith be published in the village by beat of tom-tom and that the Tahsildar should consider the village officer's report, etc. Paragraph 8 prescribes some rules of preference when there are two or more applicants. If an appeal against the Tahsildar's action were provided by the rules, the departmental appellate authority may no doubt set aside the grant by reason of the subordinate officer not having observed the formalities prescribed by the Darkhast rules or for any other reason, notwithstanding that the granting officer acted within the scope of his authority. If no appeal be provided for or if an appeal be not preferred, can a civil court hold that the Tahsildar's grant does not bind the Crown on the ground that by reason of his not having strictly followed the procedure or the rules of preference among applicants he exceeded his authority and acted beyond its scope? If it were competent to a civil court to do so, it would be equally competent to it in the case of a grant which has been confirmed on appeal or superseded by a grant to a rival applicant as entitled to preference to set aside such grant on the ground that the appellate officer also acted in excess of his authority, in confirming a grant made by the Tahsildar without strictly observing the prescribed procedure and the rules of preference or in making a fresh grant, giving preference to a rival applicant. Unless the distinction between so much of the rules as is really in the nature of a power-of-attorney defining the scope of the authority of Darkhast officers and the rest which are really in the nature only of instructions to such officers while exercising the power conferred upon them, is fully recognized and enforced, the entire body of Darkhast rules will become unworkable in civil courts.

The District Judge apparently also holds both the first and second grants to be invalid—firstly, because Krishnasami Asari was not a *bonâ fide* applicant and, secondly, because the site in question is by admeasurement a trifle over 4 cents. The order of the Tahsildar, dated 26th March 1895 (exhibit XI), shows that he considered the first defendant to be a *bonâ fide* applicant. The District Judge for reasons stated by him in paragraph 5 of his

judgment inclines to the opinion that he is not a *bonâ fide* applicant—whatever that expression may mean—and that his object was really to acquire it for his uncle Virappasari whose application for the site had been refused. It is for the officer empowered to make the grant to judge whether the applicant is really in need of a site and his application is a *bonâ fide* one. The Tahsildar certainly acts within the scope of his authority if he considers a particular person to be a *bonâ fide* applicant and grants to him the site applied for and the civil courts cannot define who a *bonâ fide* applicant is and after investigating whether or not a grantee was a *bonâ fide* applicant, hold that the grant does not bind the Crown because the Court, differing from the Darkhast officer, and also it may be from the appellate Darkhast officer, comes to the conclusion that the applicant was not a *bonâ fide* applicant. If the grant was procured by any fraud or misrepresentation on the part of the grantee (sections 17 and 18 of the Contract Act), or in collusion with the Tahsildar, or was the result of a mutual mistake of an essential fact (section 20 of the Contract Act), the grant of course would be invalid and not binding upon the Crown. It is not pleaded or found in this case that there was any such fraud, misrepresentation, collusion, or mistake.

As regards the excess in the area of the site beyond 4 cents, the defendant pleaded that the grant was void only in respect of such *excess*, but, in the opinion of the District Judge, the grant is void in its *entirety*. Here, again, the District Judge has misconstrued the Darkhast rule in holding that the Tahsildar acted beyond the scope of his authority. The rule (No. 1) quoted above does not fix the scale definitely; it leaves it to the discretion of the Collectors to fix the scale with reference to the requirements of their districts and alter the same at their discretion and merely suggests 4 cents in the case of non-pattadars as a guide where no scale already exists. It is not in evidence what the scale was as fixed by the Collector of Coimbatore. Even if no scale had been fixed by the Collector, 4 cents is suggested simply as a guide and it will be unreasonable to hold that a Tahsildar acted beyond the scope of his authority if the site is a trifle over 4 cents, as in this case, or it is subsequently found, by taking a correct measurement, that the extent is slightly over 4 cents.

In my opinion, therefore, the first defendant acquired a valid title to the site under the first grant, and even assuming that he

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did not acquire a valid title under the first grant, the second grant, which was made after consulting the municipal council, is not invalid for either of the reasons given by the District Judge, viz., that the first defendant is not a *bonâ fide* applicant and that the site is in excess of 4 cents.

It has been urged before us in appeal, on behalf of the respondent, that an appeal was preferred in respect of the second grant by Vadamalai Asari to the Divisional officer (exhibit IV, dated 15th April 1895) and that the Collector by his proceedings (exhibit VII, dated 11th December 1895), cancelled the grant. The addition made to rule 2 (of Standing Order No. 37) on the 1st February 1894 providing for an appeal from the Tahsildar's decision to the Divisional officer was in force at the date of the second grant and if the Divisional officer, to whom the appeal was preferred, had annulled the grant, such cancellation would be conclusive and it could not be questioned in a civil court on any ground whatever. But the Divisional officer instead of himself disposing of the appeal, either by confirming or by annulling the grant, referred the same to the Collector requesting "his orders on the house-site darkhast appeal of Vadamalai Asari." It is evident that the Divisional officer must have adopted this step as it was the Collector himself who entertained an appeal by Vadamalai Asari in respect of this very site when it was granted to the first defendant by the Tahsildar in 1893. The Collector cancelled the grant and directed that the first defendant should be ordered to vacate the house and remove the materials from the land within three months and that report should be made whether this order was obeyed.

Under the Darkhast rules above referred to the appeal lies only to the Divisional officer and not to the Collector, unless the latter happens to be in charge of the division. The question now is whether the grant made by the Tahsildar was cancelled by the Divisional officer or by the Collector. The Collector's order was no doubt communicated to the Sub-Collector who communicated the same to the Tahsildar for carrying it out. But if the act of cancellation or revocation was that of the Collector, it cannot be converted into an act of the Divisional officer merely because it was communicated to him and by him to the Tahsildar to be given effect to. It is clear that the Collector himself annulled the grant on both the occasions and that he did so on the assumption that

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under Regulation II of 1803 and VII of 1828, he had general powers of superintendence and control over the action of his subordinate officers in the matter of disposal of lands under the Darkhast rules. The appeal which, under the Darkhast rules, lies to the Divisional officer not being in the nature of a judicial appeal, the Divisional officer may consult and seek the advice of the Collector, or, as for the matter of that, of anybody else and be guided implicitly, if he is so disposed, by such advice in the disposal of the appeal; and if he did so no objection could be taken to it in a civil court. But it would, under the circumstances, be a pure fiction to hold that the appeal was disposed of by the Divisional officer in consultation with the Collector and that the Collector passed the order in question merely by way of communicating to the Sub-Collector his *advice and opinion* in the matter. A fiction of law which is calculated to serve the ends of substantial justice should certainly be welcomed and ought not to be closely scrutinized. But I confess that the theory of a legal fiction—which is opposed to stern truth—does not commend itself to me when it is resorted to not in furtherance of substantial justice, but the very reverse, with the object of invalidating a grant made by a public servant in the discharge of his duty, on the faith of which the grantee and the persons deriving title under him have, wisely or otherwise, long ago erected buildings and whom the Revenue officers seek to eject as trespassers, not in due course of law, but by imposing what is styled a "penal assessment" on the site and attaching the same with the building thereon, under the Revenue Recovery Act, for realizing a crushing penal assessment of Rs. 100 on a plot of 4 cents, as if it were land revenue due to Government by a ryot holding assessed or inam land under Government.

In my opinion, the first defendant had a good title to the site in question under either grant and the plaintiff, claiming under the first defendant, is entitled to the decree sought for.

I would, therefore, allow this appeal and, reversing the decree of the lower Appellate Court, restore that of the District Munsif. The respondent should pay the costs of the appellant both in this and in the lower Appellate Court.

As my learned colleague, however, concurs in the judgment of the lower Appellate Court, the result will be that the decree

appealed against will be affirmed, under section 575 of the Civil Procedure Code, and this appeal dismissed with costs.

Plaintiff preferred this appeal under section 15 of the Letters Patent, and the case came on for hearing before the Court constituted as above.

P. R. Sundara Ayyar for appellant.

The Government Pleader for respondent.

JUDGMENT.—It is not necessary for us to consider the question of the validity of the first grant upon which the plaintiff relies, since we are clearly of opinion that under the second grant to the first defendant the plaintiff had, at the date of the institution of this suit, a good title to the site in question. The grant of the site was duly made by the Tahsildar. Section 9 of Regulation II of 1803 does not apply, since the matter is not governed by any Regulation in force in 1803 or by any Regulation subsequently enacted. The matter is governed by executive orders of Government which direct that the right of appeal from a Tahsildar's order with reference to the grant of a house-site shall be to the Sub-divisional officer (not to the Collector) and that the order of the Sub-divisional officer shall be final. At the time the second grant was made by the Tahsildar, an appeal lay from his decision to a Divisional officer. An appeal from the decision of the Tahsildar was brought to the Sub-Collector. Certain proceedings then took place which are recorded in exhibit VII :—

"PROCEEDINGS of the Collector of Coimbatore, dated 11th December 1895.

"*Read*—letter from the Sub-Collector, dated 20th November 1895, Reference on No. 1632, R.S., of 1895, requesting orders on the house site darkhast appeal of Vadamalai Asari of Karungalpalaiyam."

"*Order Reference on Current No.* 4688, *Rev., of* 1895.

"It is clear that the grant of the land to Krisnasami Asari has been obtained fraudulently in order to evade the Collector's order declining to grant it to Veerappa Asari. Under the circumstances it should be cancelled, and the party now in possession of the

house ordered to vacate it and remove the materials from the land within three months' time. It should be reported whether this order is obeyed.

"2. The Tahsildar showed great want of judgment in failing to stop the buildings as requested by the appellant.

For *Collector*."

"To

THE SUB-COLLECTOR OF COIMBATORE

(with a file of records).

(Copy.)

"Communicated to the Tahsildar of Erode for information and guidance and submission of the report at the end of the period.

"2. A similar neglect of orders should not take place.

"3. The notice should be served at once and sent to this office for record.

Initials———————

Ag. Sub-Collector.

10—12— "

It seems to us impossible to regard these proceedings as a decision by the Sub-Collector on the question raised in the appeal to him. The only order in appeal is that of the Collector and that order was merely communicated by the Sub-Collector to the Tahsildar. The Sub-Collector exercised no discretion with reference to the question which came before him in appeal. In short, he did not deal with the appeal and he made no order thereon. No authority has been referred to, and no argument has been addressed to us, to show that in matters not dealt with by the Regulations, the Collector has a revisional power similar to that given to him by the Regulations in matters dealt with therein; and that the Collector's order on the appeal to the Sub-Collector ought to be regarded as an order made by the Collector in the legal exercise of his revisional powers. It cannot therefore be said that the order of the Tahsildar granting the site has been legally set aside.

This being so we must hold that by virtue of the grant duly made by the Tahsildar, the plaintiff had a good title at the date of the institution of the suit.

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The plaintiff is entitled to a decree declaring his title to the land in question. The decree of the District Court and that of this Court affirming that decree, will be set aside. The decree of the District Munsif will be restored in so far as it declares the plaintiff's title and as to costs. The plaintiff's right to have the decree restored in so far as it relates to other reliefs claimed by him has not been pressed before us. The plaintiff is entitled to his costs in this Court and in the lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1902. April 27, 28. 1903. July 15.

RAMASWAMI AYYAR (PLAINTIFF), APPELLANT,

v.

VYTHINATHA AYYAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *ss.* 13 (*expl. II*), 42, 43—Res judicata—"*Subjects in dispute.*"

The phrase "the subjects in dispute" in section 42 of the Code of Civil Procedure signifies the jural relation between the parties to the suit, for the determination of which the suit is brought. The object of the section is to require the plaintiff to bring forward his whole case as to the matter of litigation on the question of right involved in the suit, and not to require him to unite all the causes of action which he may have against the defendant in respect of the *corpus* or object-matter of the suit.

Though the subject of *res judicata* is dealt with more comprehensively in the present Code than in the former Code, yet sections 42 and 43 are not exhaustive of the law of *res judicata*. That law has been the same under both the old and the new Codes, and it is substantially the same as the English law.

The decision of the Privy Council in *Kameswar Pershad* v. *Rajkumari Ruttun*, (I.L.R., 20 Calc., 79), explained.

Neither of the decisions of the Privy Council in *Woomatara Debia* v. *Unoopoorna Dassee*, (11 B.L.R., 158) and *Kameswar Pershad* v. *Rajkumari*, (I.L.R., 20 Calc., 79), supports the proposition that a plaintiff who seeks to redeem a specific mortgage or to eject on a specific lease, and fails in such suit because the mortgage or lease is not proved, is thereby precluded from seeking to redeem the same property or a

* Second Appeal No. 777 of 1901, presented against the decree of H. G. Joseph, District Judge of Trichinopoly, in Appeal Suit No. 70 of 1899, presented against the decree of A. David Pillai, District Munsif of Srirangam, in Original Suit No. 237 of 1897.

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portion thereof from another specific mortgage or to eject on the strength of his title the person in possession. The real test is whether the cause of action or transaction on which the two suits are based is the same, and not whether the transaction is sought to be established in different modes or by different means.

In a previous suit the present plaintiff, claiming as the legal representative of a deceased mortgagor, sued substantially the same defendants to redeem a usufructuary mortgage alleged to have been executed in 1856 over about 50 cawnies of land. The defendants denied the genuineness of the mortgage and pleaded that 14 out of the 50 cawnies had been usufructuarily mortgaged to them in 1853, and they claimed that these 14 cawnies as well as the remaining 36 had been sold to them subsequently. That suit was dismissed on the ground that the mortgage sued on had not been proved (the question of plaintiff's position as legal representative, which was challenged, not being decided). In 1897, plaintiff brought the present suit to redeem the 14 cawnies on the footing of the mortgage of 1853 which had been pleaded by the defendants in the previous suit:

Held, that the suit was not barred by section 43 or section 13, expl. II, of the Code of Civil Procedure.

Arunachalam Chetty v. *Meyyappa Chetty*, (I.L.R., 21 Mad., 91), and *Ranga-sawmi Pillai* v. *Krishna Pillai*, (I.L.R., 22 Mad., 259), discussed.

Guddappa v. *Tirkappa*, (I.L.R., 25 Bom., 189), dissented from.

SUIT to redeem a mortgage. Plaintiff had, in 1890, instituted a suit against certain defendants, who were substantially the same persons as those who were now impleaded as defendants in the present suit. In that suit, plaintiff claimed, as the daughter's son and legal representative of one Ramien, deceased, to redeem a usufructuary mortgage of about 50 cawnies of land for Rs. 250. The mortgage was alleged to have been executed by Ramien on 18th March 1856. The defendants denied plaintiff's relationship to Ramien as well as the mortgage sued on, and pleaded that 14 out of the 50 cawnies had been usufructuarily mortgaged to them by Ramien for Rs. 500 on 5th February 1853, and that the same had been sold to them subsequently, as well as the remaining 36 and odd cawnies. That suit was dismissed, without the question of plaintiff's relationship to Ramien being decided, on the ground that the mortgage sued on had not been proved. The order of dismissal was upheld on appeal, on grounds which are set out in the judgment. Plaintiff now sued a number of persons who were substantially the same as those who had been sued in the previous suit, and he now sought to redeem the 14 cawnies as land comprised in the mortgage of 5th February 1853, which had been pleaded by the defendants in the previous suit. The District Munsif found that plaintiff was the daughter's son and legal representative of the deceased mortgagor, Ramien, that the sale relied on by the

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defendants was not true, and that the present suit was not barred as *res judicata*. He gave plaintiff a decree for redemption.

The District Judge, on appeal, dismissed the suit on the ground that plaintiff, when he brought the former suit, was aware of the mortgage now sued on. He held that the present suit was barred as *res judicata*.

Plaintiff preferred this second appeal.

V. Krishnaswami Ayyar and *K. Balamukunda Ayyar* for second appellant.

T. V. Seshagiri Ayyar for respondents.

JUDGMENT.—The plaintiff, claiming as the daughter's son and legal representative of one Ramien, deceased, instituted Original Suit No. 26 of 1890 (on the file of the District Munsif's Court at Trichinopoly) for the redemption of a usufructuary mortgage of about 50 cawnies of land for Rs. 250. The mortgage was alleged to have been made by Ramien under an instrument, dated 18th March 1856. The defendants, while denying the plaintiff's relationship to Ramien as well as the mortgage sued upon, pleaded that 14 out of the 50 cawnies had been usufructuarily mortgaged to them by Ramien for Rs. 500 under an instrument, dated 5th February 1853, and that the same had been sold to them subsequently, as also the remaining 36 and odd cawnies.

Without deciding the question of the plaintiff's relationship to Ramien, the suit was dismissed on the ground that the mortgage sued upon was not proved, and was, in fact, fictitious, and the decision was confirmed on appeal. The plaintiff preferred a second appeal and claimed a decree in respect of the 14 cawnies on the footing of the mortgage of the 5th February 1853, which the defendants set up. But the High Court declined to grant such relief on the grounds that the said mortgage was not admitted to be a subsisting mortgage and that the plaintiff not having sued, in the alternative, on that mortgage, no issue could be raised and tried in respect of it, in that suit.

The plaintiff brings the present suit substantially against the same defendants for redeeming the 14 cawnies on the footing of the mortgage of the 5th February 1853. The District Munsif found that the plaintiff was the daughter's son and legal representative of the mortgagor, Ramien, and that the sale relied upon by the defendants was not true, and, holding that the suit was not barred as *res judicata* by the previous suit, he decreed redemption

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in favour of the plaintiff. But the District Judge on appeal dismissed the suit on the ground that when he brought the former suit he was aware of the mortgage now sued upon, and that he was, therefore, barred by the rule of *res judicata* from bringing this suit.

In support of this second appeal which has been preferred against the said decision, it is contended that even assuming that the finding of the District Judge that the plaintiff was aware of the mortgage of 1853 when he instituted the former suit cannot be successfully impugned in second appeal, the present suit is not barred by section 43 or explanation II to section 13 of the Civil Procedure Code. In our opinion this contention is well founded and the case must be remanded for disposal on the merits.

The contention of the learned pleader for the respondents in support of the decision appealed against is twofold: firstly, that, under section 42 and explanation II to section 13 of the Civil Procedure Code, a plaintiff should frame his suit so as to include all causes of action which he may rely upon—in the alternative or otherwise—in support of the relief which he seeks and that if he omits to make any of them a ground of attack in the suit, he will be debarred from maintaining a subsequent suit based on the cause of action so omitted; secondly, that the present suit and the former suit are not, so far as the 14 cawnies in question are concerned, based on different causes of action, but on one and the same cause of action, and that the present claim should, under section 43, also have been included in the former suit and made a ground of attack (under explanation II to section 13, Civil Procedure Code).

The first contention is mainly based on the argument that the phrase "the subjects in dispute" occurring in section 42 connotes the *corpus* or object-matter of the claim and that, therefore, all possible claims to the same should necessarily be offered for decision in the suit. In our opinion the expression "the subjects in dispute" signifies the jural relation between the parties to the suit, for the determination of which the suit is brought. In other words, the object of section 42 is to require the plaintiff to bring forward his whole case as to the matter of litigation on the question of right involved in the suit and not to require him to unite all the causes of action which he may have against the defendant in respect of the *corpus* or object-matter of the suit. This was first clearly laid

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down by the Privy Council in *Pittapur Raja* v. *Suriya Rau*(1) in a case arising under Act VIII of 1859. Referring to section 7 of that Act (corresponding to section 43 of the present Code), their Lordships observed as follows:—"That section does not say that every suit shall include every cause of action or every claim which a party has, but every suit shall include the whole of the claim arising out of the cause of action, meaning the cause of action for which the suit is brought." In that case the plaintiff was the devisee of a certain village and also of a certain share in moveable property belonging to the testatrix. The plaintiff, after having obtained possession of the village and having remained in quiet possession thereof for some time, was dispossessed by the defendant. The plaintiff, therefore, brought a suit against the defendant who denied the will and claimed the property as having devolved upon him; but a decree in ejectment was passed in the plaintiff's favour. He afterwards brought another suit to recover from the same defendant, the share of personal property which had been bequeathed to him under the same will but had been withheld from him. The Judicial Committee, in overruling the plea of *res judicata* which was relied upon as a bar to the second suit, held that the claim in respect of a share in the personalty was not one arising out of the cause of action which existed in consequence of the defendant having improperly turned the plaintiff out of possession of the village and that it was a distinct cause of action altogether and did not at all arise out of the other; and in distinguishing the case of *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum*(2), which was relied upon in support of the plea of *res judicata*, their Lordships observed as follows:—"It is not like the case of the conversion of several things. There the act of conversion of the several things is one cause of action and you cannot bring an action for the conversion of one of the things and a separate action for the conversion of another. The conversion of the whole is one claim and one cause of action."

The above decision was relied upon and followed by the same tribunal in the cases of *Amanat Bibi* v. *Imdad Husain*(3) and *Mahomed Riasat Ali* v. *Mussumat Hasin Banu*(4). In the former case

(1) I.L.R., 8 Mad., 520; (S.C.) L.R., 12 I.A., 116.
(2) 11 Moo. I.A., 551 at p. 553.
(3) L.R., 15 I.A., 106.
(4) L.R., 20 I.A., 155.

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the first suit was brought to recover the land in dispute from the defendant (the talukdar) on the ground that the plaintiff was entitled to the same as under-proprietor. The suit was dismissed on the merits. The second suit was brought to recover the property as proprietor, on paying to the talukdar the arrears of revenue paid by him to Government, treating the same as having been paid on his account. This suit was also dismissed on the ground that a conditional sale by the plaintiff to the talukdar in February 1853 had become absolute about the end of 1853. The third suit was brought to recover the same property on the basis of a mortgage, made to the talukdar in June 1854, alleging that the mortgage debt had been satisfied, but offering to pay any balance that might be found due on taking accounts. Their Lordships of the Privy Council, in overruling the plea of *res judicata* under section 13 of Act X of 1877, and the plea under section 7 of Act VIII of 1859, observed as follows:—"Is that determination a bar to this suit, founded, as the suit is, on a mortgage recognized as subsisting in 1854. The section of the Act of 1877, as amended by the Act of 1879, which is applicable to the case, is in these terms:—'No Court shall try any suit or issue in which the matter directly and substantially in issue having been directly and substantially in issue in a former suit in a Court of competent jurisdiction between the same parties or between parties under whom any of them claim, litigating under the same title, has been heard and finally decided by such Court.' Now what was the question in issue in the former suit? The question was whether the plaintiff was entitled to recover the property which had been transferred by the Government to the talukdar, on re-paying to the talukdar the arrears of revenue which he had paid to Government. The matter in issue in this suit is the respondent's right to redemption under a mortgage deed. It may be difficult to reconcile the position of the talukdar as mortgagee in 1854 with his position as absolute owner in 1853, under a purchase from the mortgagor. But if it be established that the respondent was mortgagor in 1854, with the right of redemption, why should he be barred of his right merely because at an earlier date he may have had no right to the property at all? Then comes the question was the respondent bound to have brought forward his present claim in the former suit? Section 7 of Act VIII of 1859 is in these terms:—'Every suit shall include the whole of the claim arising out of the cause of action, but a plaintiff may relinquish any

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portion of his claim in order to bring the suit within the jurisdiction of any Court. If a plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained.' That section has already been under the consideration of this Board in *Pittapur Raja* v. *Suriya Rau*(1) and the commentary upon it is:—'That section does not say that every suit shall include every cause of action or every claim which the party has, but every suit shall include the whole of the claim arising out of the cause of action—meaning the cause of action for which the suit is brought.' The respondent's present claim certainly did not arise out of the cause of action which was the foundation of the former suit" (*Amanat Bibi* v. *Imdad Husain*(2)).

These decisions were no doubt passed when the old Code of Civil Procedure (Act VIII of 1859) was in force; but an examination of the different sections of the present Code bearing upon this question also leads to the same conclusion. Section 50 (of Act XIV of 1882) which prescribes the essential particulars of a plaint lays down, in clause (*d*), that the plaint must contain a plain and concise statement of the circumstances constituting the cause of action and where and when it arose. Section 42 provides that every suit shall, as far as practicable, be so framed as to afford ground for a final decision upon the subjects in dispute (thus preventing further litigation concerning them). Reading this in the light of the next following section 43 and of section 50, clause (*d*), it is clear that the expression "subjects in dispute," means the cause of action or the subject-matter of litigation, that is, the right which one party claims as against the other and demands the judgment of the Court upon (*Borst* v. *Corey*(3), *Jacobson* v. *Miller*(4)). The penalty for non-compliance with section 42 is provided for partly in section 43 and partly by explanation II to section 13. The former provides that if the plaintiff omits to include a portion of the entire claim which has arisen at the date of the suit, out of the cause of action on which the suit is based, he shall be precluded from suing again in respect of such portion; and the latter provides that the matter of every ground which the plaintiff might and ought to urge in support of the cause of action on which the suit

(1) I.L.R., 8 Mad., 520.
(2) L.R., 15 I.A., 106 at pp. 111 and 112.
(3) 15 New York, 509.
(4) 41 Michigan, 98.

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is founded shall be deemed to be a matter directly and substantially in issue in the suit and decided therein whether such ground was actually relied upon or not in the suit. In other words, section 43 requires that the whole claim which has arisen, at the date of the suit, out of the cause of action, should be included in the suit so as to avoid splitting of a claim or claims arising out of one and the same cause of action. And explanation II to section 13 enjoins that every ground which could and ought to have been urged in support of the claim actually made in the suit shall be deemed to have been adjudicated upon therein, whether it was actually urged or not. This explanation has introduced no innovation in the law of *res judicata*; nor does the Code attempt to define what are the matters which might and ought to be made grounds of defence or attack in every suit commenced by a plaint framed in accordance with sections 42, 43 and 50.

The whole law bearing upon the question now under consideration has been critically examined and elucidated by Scotland, C.J., and Holloway, J., in *Chinniya Mudali* v. *Venkatachella Pillai*(1) and the application of that decision to the case of *Muthumadeva Naik* v. *Sevattamuttumadeva Naik*(2) has been explained by Morgan, C.J., and Holloway, J., in their judgment in that case. The following extracts from the judgments in the two cases are very instructive and may with advantage be quoted here:—Scotland, C.J.—"I take it to be clearly established that there must be not only the same property or subject of demand in dispute, either wholly or in part, between the same parties or their privies; but it must also appear that the identical question of right or title had before been *in judicio* . . . . I take it to be also clear, as a general rule, both on principle and authority, that when a question of right or title has been adjudicated upon in a suit the bar of the judgment cannot be avoided by suing on a new form of claim or on a ground of relief which might have been, but was not, raised or determined in the former suit, if such claim or ground arises out of and depends upon the same right or title as that which was directly in question in the former suit . . . . A decree in a suit by a person claiming as heir or co-parcener could be no bar to a second suit brought to try his right as donee or devisee of the same property, for the question of right would be

(1) 3 M.H.C.R., 320.
(2) 7 M.H.C.R., 160.

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different unless the latter right appeared to have been in question in the first suit, as in the recent case of *Udaiya Tevar* v. *Katama Natchiar*(1) affirmed on appeal to the Privy Council. But a decree in a suit for partition of family property would, in the absence of special circumstances, be, I think, a bar to a second suit for relief on the grounds not before raised, that the co-sharer or one of the co-sharers was illegitimate or had been removed out of the family by adoption or that part of the property was the self-acquisition of the plaintiff, because it would be a second time litigating the question of co-parcenary right which was the immediate object-matter of the first suit (pp. 322–324) . . . . Holloway, J.—The whole case of the parties as to the matter of litigation must be brought forward. Taking the words "matter of litigation" to mean "question of right," which is the only proper sense in question of *res judicata* there is no doubt of the perfect correctness of this opinion and the Vice-Chancellor expressly says that the items of account brought forward by the bill were matters of which an account might have been taken in the suit. The matter of the litigation was—"What sum is due on the transactions between the parties"—and the judgment of the Court on that question was of course *res judicata* both as to items brought forward and items not brought forward. It was simply *Eastmore* v. *Lawes*(2) in equity and the meaning of the rule is not that a decree will bar a man as to matters never raised, if they are matters relating to the external object of the litigation but as to all matters which were relevant and examinable upon the question of right at issue between the parties. In *Hunter* v. *Stewart*(3) Lord Westbury very distinctly confines to the question of right raised, the operation of *res judicata*; . . . . and it (the decision) is also a distinct repelling by the highest English authority of any such rule as has been supposed, that, if any object-matter is brought into question, all possible claims thereto are necessarily offered for decision and that a man is equally barred from any future suit whether he has submitted a particular kind of claim or not" (*Chinniya Mudali* v. *Venkatachella Pillai*(4)).

"The ground of denying the bar by *res judicata* is that he there put his right of inheritance on the ground of sonship by the

(1) 2 M.H.C.R., 131.
(2) 5 Bing., 444.
(3) 8 Jur., 317.
(4) 3 M.H.C.R., 330 at p. 332.

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Pattaba Stri, and that he puts it now upon the ground that he is the eldest son of his father. It appears that this fact was before the Civil Court, which says that the fact is admittedly indifferent and not capable of conferring the status claimed. To allow this ground to be set up now, would therefore be to do what it was sought to do in the Sivaganga case—set up a ground of claim, which the litigant had in the previous case expressly withdrawn by his admission from the cognizance of the Court . . . . The better opinion probably is that he would be barred whether this ground of being heir was brought forward or not. The '*caussa*' in the first suit was 'being heir' and Paulus does not say that a new suit for the same object-matter may be brought because a new basis in fact of the same '*caussa*' is adduced, but where there is a different '*caussa*.' The present case seems to fall within his words '*mutatam actionem opinio petitoris non facit*'" (*Muthumadeva Naik* v. *Sevattamuttumadeva Naik*(1)).

In the original Code of Civil Procedure (Act VIII of 1859) the law of *res judicata* was contained in sections 2 and 7, but they were far from being exhaustive. Section 2 of Act VIII of 1859 was in terms far less comprehensive than the present Code. It simply provided that no Court should take cognizance of any suit brought on a cause of action which (cause of action) had been heard and determined by a Court of competent jurisdiction in a former suit between the same parties. Notwithstanding that the operation of section 2 was in terms restricted to "cause of action," their Lordships of the Privy Council held, in *Krishna Behari Roy* v. *Brojeswari Chowdranee*(2) that "the expression 'cause of action' cannot be taken in its most restricted and literal sense," but that however that may be, "by the general law, wherever a material issue has been tried and determined between the same parties in a proper suit and in a competent Court, ... it cannot be again tried in another suit between them."

The subject of *res judicata* is dealt with in sections 13 and 43 of the present Code, and the expression "cause of action" has been omitted in section 13, by substituting in its place the expression "matter directly and substantially in issue"—an expression which will include not only the cause of action on which the suit is based [*vide* 50 (*d*), Civil Procedure Code], but also all matters which are,

(1) 7 M.H.C.R., 160 at pp. 165 and 166.
(2) L.R., 2 I.A., 283 at p. 285.

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or ought to be, put in issue for the determination of the cause of action.

Section 43, which corresponds to section 7 of the former Code, is also more comprehensive than the latter and provides that a person entitled to more remedies than one in respect of the same cause of action should combine all his remedies in the first suit, unless he obtains the leave of the Court to reserve some of his remedies for a subsequent suit.

Though the subject of *res judicata* is dealt with more comprehensively in the new Code than in the old one, yet sections 13 and 43 of the present Code are not exhaustive of the law of *res judicata*. That law has been the same under both the old and the new Codes, as definitively laid down by the Privy Council in *Kameswar Pershad* v. *Rajkumari Ruttan*(1) and it is substantially the same as the English law. The decisions passed while the old Code was in force are therefore not the less applicable to cases arising under the present law; nor is there any force in the argument urged by the respondent's pleader that the absence of the expression "cause of action" in section 13 denotes a deliberate change introduced by the Legislature, requiring every plaintiff to exhaust in one suit all the causes of action which he may have at the date of the suit in respect of the property or the relief claimed by him and of which he was then aware.

The question was first considered, with reference to the new Code, by a Division Bench of this Court (Innes and Muttusami Ayyar, JJ.) in *Ummatha* v. *Cheria Kunhamed*(2); and it was there held, dissenting from two decisions of the Calcutta High Court (*Denobundhoo Chowdhry* v. *Kristomonee Dossee*(3) and *Bheeka Lall* v. *Bhuggoo Lall*(4)) that there was no difference between the old Code and the new Code and that the dismissal of a former suit which was based on a lease which was not proved was no bar to a subsequent suit brought for the recovery of possession of the same lands on the ground of the plaintiff's title as owner. The same question was again considered in *Allunni* v. *Kunyusha*(5), in which it was held by Muttusami Ayyar and Hutchins, JJ., that "explanation II to section 13 of the Civil Procedure Code of 1877 refers

(1) I.L.R., 20 Calc., 79 at p. 86.
(2) I.L.R., 4 Mad., 308.
(3) I.L.R., 2 Calc., 152.
(4) I.L.R., 3 Calc., 23.
(5) I.L.R., 7 Mad., 264.

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to the title litigated in the former suit as distinguished from the relief claimed. Where several independent grounds of action are available, a party is not bound to unite them all in one suit, though he is bound to bring before the Court all grounds of attack available to him with reference to the title which is made the ground of action." We fully concur in this exposition of explanation II to section 13. In that case the former suit had been brought by the karnavan of a tarwad to resume, from a junior branch, certain lands, which, it was alleged, had been under a special agreement allotted for its maintenance. That suit having been dismissed on the ground that the alleged agreement was not proved, it was held that a subsequent suit brought by the same karnavan to obtain possession of the same property for purposes of management on behalf of the tarwad from a junior branch which was in *de facto* possession of the same, was not barred by the former suit.

A question similar to that arising in the present case was considered in *Kandunni* v. *Katiamma*(1) and it was there held that a former suit brought by the plaintiff against the defendant on a demise of 1856, which he alleged (but did not prove) was a renewal of a prior demise of 1835, was no bar to a subsequent suit brought to recover the same land on the demise of 1835 and on title. (See also *Thandavan* v. *Valliamma*(2).)

We have noticed at length the above decisions of the Privy Council and of this Court, as it was strenuously contended by the learned pleader for the respondents that they should all be regarded as virtually overruled by the comparatively recent decision of the Privy Council in *Kameswar Pershad* v. *Rajkumari Ruttan*(3) and that the later decisions of this High Court in *Arunachalam Chetty* v. *Meyyappa Chetty*(4) and *Rangasami Pillai* v. *Krishna Pillai*(5) are in conflict with the earlier decisions above referred to; and he also relied upon a recent decision of the Bombay High Court in *Guddappa* v. *Tirkappa*(6).

The decision of the Privy Council in 1892 in *Kameswar Pershad* v. *Rajkumari Ruttan*(3) has been misapprehended and misapplied in certain cases. A careful perusal, however, of the judgment of the

(1) I.L.R., 9 Mad., 251.
(2) I.L.R., 15 Mad., 336.
(3) I.L.R., 20 Calc., 79 at p. 86.
(4) I.L.R., 21 Mad., 91.
(5) I.L.R., 22 Mad., 259.
(6) I.L.R., 25 Bom., 189.

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Judicial Committee in that case, clearly shows that that decision in not in conflict with the earlier rulings of the same tribunal is *Pittapur Rajah* v. *Buchi Sittaya Garu*(1) and *Amanat Bibi* v. *Imdad Husain*(2) already referred to, which rulings have been reaffirmed in *Mahomed Riasat Ali* v. *Mussumat Hasin Banu*(3), the judgment in which was given in July 1893, nearly a year later than that in *Kameswar Pershad's* case(4). The ruling in *Kameswar Pershad's* case(4) is, no doubt, liable to be misunderstood if one does not bear in mind the facts of the case which are set forth in the judgment itself and which briefly are as follows :—A Hindu widow in possession of her husband's estate raised a loan of Rs. 61,000, and executed, on the 1st March 1872, a bond in favour of the creditor, hypothecating a portion of her husband's estate as security for the debt. Shortly afterwards, on the 31st August 1872, an agreement was entered into between her and Run Bahadur, the presumptive reversionary heir of her husband, whereby she surrendered to him her interest in her husband's estate on condition that he (Run Bahadur) was to pay her an allowance of Rs. 24,000 for her maintenance and also pay off her liabilities. In 1876 the creditor brought a suit upon the hypothecation bond against the widow and Run Bahadur whom he joined as defendant in the suit on the ground that "the Rani had, under the agreement of 1872, given over to him the whole of the properties, including what was mortgaged under the bonds"; but in that suit no relief was claimed against Run Bahadur personally. The final decree in that suit held the mortgage not to be binding upon the estate, but held the Rani personally liable for the amount due under the bond. After the death of the Rani the creditor instituted a suit in 1887 against Run Bahadur "to have him declared liable under the agreement of the 31st August 1872 to satisfy the decree obtained against the Rani under the bond." Upon these facts their Lordships of the Privy Council, after holding that the suit was barred by the six years' rule of limitation further held that the principle of *res judicata* was also fatal to the suit. Their Lordships, adverting to explanation II to section 13, held that the money having become payable in September 1875, the date named in the bond, the creditor might and ought to have claimed relief

(1) L.R., 12 I.A., 16.
(2) L.R., 15 I.A., 106.
(3) L.R., 20 I.A., 155.
(4) I.L.R., 20 Calc., 79 at p. 86.

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personally against Run Bahadur in the former suit and that, having omitted to do so, he was barred from maintaining the subsequent suit. It is expressly stated in the judgment that he was joined as a defendant in the former suit by reason of the agreement of 1872, and the later suit was also instituted against him in consequence of the stipulation in the same agreement which he had entered into with the Rani, undertaking to pay her debts. It will thus be seen that the claim made in the former suit to enforce the mortgage against Run Bahadur and the claim made in the later suit for the recovery of the mortgage debt personally from Run Bahadur were, whether rightly or wrongly, based upon one and the same transaction, viz., the agreement of the 31st August 1872 entered into between him and the widow. The two suits were, therefore, founded upon the same cause of action, and the claims made in both the suits, so far as Run Bahadur was concerned, arose from that cause of action. It is immaterial to consider whether it would not have been possible to have shaped the former suit, against the widow and Run Bahadur (as the then presumptive reversionary heir) quite independently of, and without any reference to, the agreement of 1872. But, as a matter of fact, the suit was brought against him by reason of the transfer made to him under the agreement of 1872; and it was, therefore, held that it was clearly competent for the creditor to have alleged in that suit itself the personal liability arising under the same agreement, that he ought to have done so and could not be permitted to bring a subsequent suit to enforce such liability. If the attention of the Committee had been drawn to the latter portion of section 43 of the Civil Procedure Code which requires (subject to the exception therein referred to) the joinder, in one suit, of plurality of remedies which a creditor may have in respect of the same cause of action, it is not improbable that the decision might have been based on section 43 rather than on explanation II to section 13, but whichever of the two may be the more appropriate provision the result would be the same. It would also seem from the judgment in this case that even if a ground of attack be relevant and pertinent to the cause of action on which the suit is brought, the matter involved in such a ground will not necessarily be within the purview of explanation II to section 13, if it be so dissimilar to the other grounds of attack that its union with them might lead to confusion. The next case relied on on behalf of the respondents

is *Arunachalam Chetty* v. *Meyyappa Chetty*(1); cf. *Thandavan* v. *Valliamma*(2). No doubt there are certain general observations in the judgment in that case, which lend some support to the arguments advanced by the respondent's pleader on section 52, and the absence of the expression "cause of action" in section 13; but with all deference, we are, for the reasons already stated, unable to concur in them, and after a careful perusal of the judgment we are satisfied that the ground of decision is that the cause of action on which the former suit was based was clearly identical with that in the subsequent suit and that the respective grounds advanced in support of the two suits were only "different means invoked for making out what is manifestly a single and indivisible infringement of the self-same right."

We may here refer to the decision of the Judicial Committee in *Woomatara Debia* v. *Unnopoorna Dassee*(3), which is noticed in the above case and on which the decision is chiefly based. That decision of the Privy Council was passed in 1872 and it gives a clue to the true meaning of explanation II to section 13, Civil Procedure Code, and shows that that explanation is only a compendious statement of the law as it has all along been understood, whatever difficulty there may exist in the application of it to particular cases, in determining the exact scope of the pleadings in the two suits and the question as to whether the two suits are, either in whole or in part, based upon the same cause of action. In that case it was held that the cause of action in both the suits was the dispossession of the plaintiff by the fixing of the boundary complained of and other proceedings under a special Act, the result of which proceeding was to affirm the possession of the defendants and to leave the plaintiff to her remedy by civil suit. In the first suit the plaintiff sought to establish her title by admitting that the land sued for was not included within the limits of her taluk or estate as originally settled and defined, but that she by gradual squatting or encroachment enlarged the boundary of the taluk. Having failed in that suit, she brought a second suit in which she sought to establish her title by contending that "the boundary between my estate and that of the defendant was improperly drawn so as to include in the defendant's holding that which of right

(1) I.L.R., 21 Mad., 91. (2) I.L.R., 15 Mad., 336.
(3) 11 B.L.R., 158.

should have been within my originally settled taluk and as I now claim in that way that which I might have claimed in the former suit, I am not precluded from bringing this second suit." It is therefore clear that both the suits were based upon the same cause of action, viz., the plaintiff's title as owner, the only difference between the two being that in the former she sought to establish her ownership apparently by the operation of the law of limitation and in the latter suit by alleging that it was part of her original estate. This is only an authority for the position that if one is dispossessed of land and he brings a suit to recover possession on the strength of his title, he must establish his title in that very suit by urging and proving all that would go to establish his title and cannot reserve one or more of such grounds for a future suit; and this is what is laid down in explanation II to section 13, Civil Procedure Code. But neither that case nor the decision of the Privy Council in *Kameswar Pershad* v. *Rajkumari Ruttan*(1) nor explanation II to section 13, can be relied on as lending any support to the proposition that a plaintiff who seeks to redeem a specific mortgage or to eject on a specific lease and fails in such suit, because the mortgage or the lease is not proved, is thereby precluded from seeking to redeem the same property or a portion thereof from another specific mortgage or to eject on the strength of his title the person in possession. Every transaction of lease imposes on the lessee the obligation of delivering to the landlord possession of the property at the expiration of the lease, and every transaction of mortgage imposes upon the mortgagee the obligation of re-transferring, after the expiration of the term of mortgage, the property free from all incumbrances created by him (or those claiming under him or under whom he claims) and, if necessary, delivering possession of the same to the mortgagor on discharge of the mortgage debt by payment or otherwise; and such obligation on the part of the lessee or mortgagee (as the case may be) arises from the transaction of lease or mortgage which in respect of such obligation operates as an executory contract. The cause of action, therefore, in a suit based on a lease or mortgage arises *ex contractu* and is based upon a contract. Such a suit, therefore, can be no bar to a subsequent suit, based upon plaintiff's title, against the same defendant as a trespasser, and it is difficult to see on what principle

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

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a suit based on an alleged specific contract, which is found against, can bar a subsequent suit on another and a distinct contract which is established. If the transaction of mortgage on which the subsequent suit is based is really the same as the transaction on which the former suit was based, which (latter) failed because the document by which the mortgage was sought to be established was fabricated, that will, of course, be a bar to the subsequent suit though the plaintiff seeks in it to establish the mortgage by producing the genuine mortgage-deed, or by proving that the mortgage was effected orally. The real test, therefore, is whether the cause of action, or transaction on which the two suits are based, is the same, and not whether the transaction is sought to be established in different modes or by different means. It is clear that in the present case the alleged mortgage of 1856—which, it must be taken, was not true—on which the former suit was brought was, if it had been true, a transaction essentially and in every way different from the mortgage of 1853 on which the present suit is brought. The mortgage of 1856 was of about 50 cawnies of land for Rs. 250 only; the mortgage of 1853, though only of 14 out of the said 50 cawnies, was for Rs. 500, and apparently the term of the two usufructuary mortgages was different. The mere fact that the present suit is based on the jural relation of mortgagor and mortgagee between the plaintiff and the defendants—which was also the jural relation on which the former suit was based, in respect of the lands comprised in the present suit, in addition to other lands—does not show that both the suits are based upon the same cause of action or transaction. The relation of mortgagor and mortgagee is created by act of parties and if such acts are distinct, the relationship will be created by different transactions, each of which will constitute a separate cause of action—though, of course, if the same property be in truth and fact subject to different mortgages in favour of the same defendant, the plaintiff (mortgagor) cannot, from the very nature of the right of redemption, seek redemption, without redeeming all the mortgages and the defendant (mortgagee) ought, under explanation II to section 13, Civil Procedure Code, to insist upon all the mortgages being redeemed, if the suit is brought for the redemption of only one or some of the mortgages (*Sri Gopal* v. *Pirthi Singh*(1)).

(1) L.R., 29 I.A., 118.

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The next case relied upon on behalf of the respondents is the decision of this Court in *Rangasami Pillai* v. *Krishna Pillai*(1). This is probably the only case which lends support to the respondent's plea of *res judicata* founded upon section 43. In that case the plaintiff's former suit to redeem a kanom of Rs. 25 (dated 1859) was dismissed on the ground that he failed to establish the same. In the documents filed in that suit there were certain admissions that the defendants held as kanomdars under the plaintiff. The subsequent suit was brought for the redemption of the same property and the suit was based upon the admissions (of mortgage) contained in the documents above referred to. In second appeal it was held that the second suit was rightly dismissed as the plaintiff was barred from bringing it by section 43, Civil Procedure Code, "as it must be taken that he abandoned or relinquished his claim on the real cause of action when he brought it on a false one. That there was only one cause of action, viz., the right to redeem, is clear, and the plaintiff at the time of bringing his first suit was aware of the extent of the admissions made by the defendants, as they were contained in the documents put in by him (plaintiff) and he could or should have sued in the alternative instead of confining his rights to the specific mortgage which he failed to prove."

The *ratio decidendi* of the decision seems to be that if a plaintiff sues for certain property on a false claim or cause of action, when in reality he has, in fact and law, a true claim and cause of action for the same property, of which he was aware, he must be taken in law to have abandoned or relinquished his true claim and cause of action. Section 43 in terms deals only with claims arising from one and the same cause of action and it only provides against the splitting of a cause of action and there is nothing in it to warrant the inference that all causes of action ought to be included, in the alternative or otherwise, in one and the same suit. If, as held in the above case, there is a statutory waiver of the true cause of action when a suit is brought upon a false cause of action, it can make no difference whether the cause of action is false in the sense that the facts alleged as constituting the cause of action are false, or it is false in the sense that the facts alleged and proved do not in law constitute a cause of action entitling the plaintiff to the

(1) I.L.R., 22 Mad., 259.

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relief sought. It does not appear from the report of the case that any of the previous decisions of this Court or of the decisions of the Privy Council, already referred to were cited to or considered by the Court. The decision is directly opposed to the decision of the Judicial Committee in *Amanat Bibi* v. *Imdad Husain*(1) in which notwithstanding that the two previous suits were brought for the recovery of the same property as was again sought to be recovered in the third suit and notwithstanding that the cause of action on which the second suit, at any rate, was based was found to be false, it was held that there was no bar to the subsequent suit which was based on a different cause of action, and it is also opposed to the later decisions of this Court in *Zamorin of Calicut* v. *Narayanan Mussad*(2) and in *Kutti Ali* v. *Chindan*(3) and the Full Bench decision in *Kaveri Ammall* v. *Sastri Ramier*(4), though it has not been referred to and expressly overruled in any of them. In the first two of these it was held that a previous suit based on a lease which was not proved was no bar to a subsequent suit based on title. In the Full Bench case the cause of action alleged in the former suit was that the plaintiff was entitled to the property on the death of the widow, who had not joined the husband in making the adoption. The cause of action alleged in the subsequent suit was that the plaintiff was entitled to the property on the death of the adopted son. So far as section 43 was pleaded as a bar to the suit, the plea was overruled on the ground that the claim in the subsequent suit was one arising from a cause of action quite different from, and inconsistent with, the cause of action on which the former suit was brought and it could not possibly have been included in that suit as a part of the claim arising from the cause of action on which that suit was in fact brought (see p. 108).

The last decision relied upon on behalf of the respondent is that reported in *Guddappa* v. *Tirkappa*(5). With all respect to the learned Judges who took part in that case we are unable to follow that decision. It proceeds mainly on the footing that explanation II to section 13 of the present Code has introduced a radical change in the law of *res judicata* and it, therefore, discards the various decisions which have been passed when the old Code was

(1) L.R., 15 I.A., 106.
(2) I.L.R., 22 Mad., 323.
(3) I.L.R., 23 Mad., 629.
(4) I.L.R., 26 Mad., 104.
(5) I.L.R., 25 Bom., 189.

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in force and attaches no weight to the several decisions passed under the new Code on the ground that explanation II to section 13, which is not specifically referred to therein, has been overlooked in them. So far as the decision of the Privy Council in *Kameswar Pershad* v. *Rajkumari Ruttan*(1) and the remarks of Lord Westbury in *Rajah Moottoovijaya* v. *Katama Natchiar*(2) are relied upon by the learned Judges in support of their conclusion, the decision seems to proceed on a misapprehension of the rulings of the Privy Council in the said two cases. In the Bombay case the plaintiff brought his former suit, when he was in possession of the property, to obtain a declaration of his title thereto, by right of survivorship as the surviving co-parcener with one Ningappa who died leaving a widow under whom the defendant claimed. This suit was dismissed on the ground that the plaintiff and Ningappa were divided and that, therefore, the property devolved upon the widow by inheritance. The plaintiff was subsequently dispossessed and the second suit was brought to recover possession of the property on the ground that the plaintiff was entitled to the same as reversionary heir on the death of Ningappa's widow and that the alienation made by her in favour of her brother was not binding upon him. There can hardly be any doubt that, if the former suit had been brought on the alleged right of survivorship during the lifetime of the widow, it would not have operated as a bar to the subsequent suit brought after the death of the widow. Can it make any difference that the former suit was, as appears from the report of the case, also brought after the death of the widow? The cause of action which accrues to one by right of survivorship in an undivided family is quite distinct from the cause of action which would accrue to him only as reversionary heir on the death of the deceased's widow. In the former case, the right comes into existence immediately on the death of the undivided member and that in respect of property which was jointly owned by both. In the latter case his right is only as heir to the exclusive and separate property of a divided kinsman, who has died intestate, and if he died leaving a widow, his reversionary right is only a contingent one which would vest only if he survived the widow. The two rights, therefore, spring from totally different causes of action, and unless the rule of law were that a plaintiff is bound to

(1) I.L.R., 20 Calc., 79.
(2) 11 M.I.A., 50 at p. 73.

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unite in the same suit his causes of action in the alternative, as he might have done in the Bombay case, it is impossible to hold that explanation II to section 13 operates as a bar to the subsequent suit.

The second appeal is, therefore, allowed, and, reversing the decree appealed against, the case is remanded to the lower Appellate Court for disposal on the merits. The costs of this second appeal will be costs in the case.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1903. May 1. July 16.

RUNGIAH GOUNDEN & Co. (PETITIONERS), APPELLANTS,

v.

NANJAPPA ROW AND OTHERS (COUNTER-PETITIONERS), RESPONDENTS.*

Limitation Act—XV of 1877, *sched. II, arts.* 178, 179—*Decree for sale of hypothecated property on a certain date in default of payment—Order for stay of execution passed before date fixed for sale—Subsequent application for execution more than three years from date of decree.*

By a decree, dated 10th November 1897, it was provided that, in default of the defendants in the suit paying the sum decreed on or before the 10th May 1898, the hypothecated property should be sold. At the date of the decree another suit was pending in the same Court, in which the decree-holders were defendants and the judgment-debtors plaintiffs. On 27th November 1897, the judgment-debtors applied under section 243 of the Code of Civil Procedure for stay of execution of the decree pending the disposal of the suit in which they were the plaintiffs. On the 31st January 1898, an order was passed staying execution of that decree until the disposal of the other suit. The last-mentioned suit was disposed of on 23rd December 1901, and on 20th March 1902 the decree-holder in the earlier suit applied that the hypothecated properties might be sold:

Held, that the application was not barred by limitation, it being governed by article 178 and not by article 179, inasmuch as no prior application for execution of the decree or to take some step in aid of execution of the decree had been made. Article 179 is not exhaustive of applications for execution of decrees. There are cases to which article 178 may apply.

* Civil Miscellaneous Appeals Nos. 111 and 112 of 1902, presented against the orders of W. E. T. Clarke, Subordinate Judge of Nilgiris, dated 21st July 1902, in Execution Petition No. 418 and in Miscellaneous Petition No. 245 of 1903, respectively, in Original Suit No. 74 of 1896.

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A decree which directs the sale of mortgaged property in default of payment of the mortgage money declared due on or before the date fixed in the decree is not, within the meaning of paragraph 6, column 3, of article 179, a decree directing the payment of the amount to be made at a certain date. If, however, there is also a personal decree against the mortgagor and the application is to execute the decree as such, limitation will run from the date of the decree under paragraph 1, if payment is enforceable under the decree from the date thereof or from a future date under paragraph 6 if payment can be enforced under the decree only on or after such future date fixed in the decree. Neither paragraph 1 nor paragraph 6 can apply to the execution of a mortgage decree, as such, namely, to an application for sale of the mortgaged property which the decree directs to be sold in default of payment of the ascertained amount on or before the day fixed in the decree.

Principles laid down by which the article applicable should be ascertained.

The decision of the Full Bench in *Mallikarjunadu Setti* v. *Lingamurti*, (I.L.R., 25 Mad., 244), in connection with questions relating to limitation, explained.

Muhammad Suleman Khan v. *Muhammad Yar Khan*, (I.L.R., 17 All., 39); *Muhammad Islam* v. *Muhammad Ahsan*, (I.L.R., 16 All., 237); *Thakur Das* v. *Shadi Lal*, (I.L.R., 8 All., 56); *Ali Ahmad* v. *Nasiran Bibi*, (I.L.R., 24 All., 542); and *Ashrafuddin Ahmed* v. *Bepin Behari Mullick*, (I.L.R., 30 Calc., 407), approved and followed.

All applications for the execution of a decree for sale of mortgaged property are not governed by article 178.

Observations as to when article 179 will be applicable.

The true criterion in determining whether article 179 or article 178 applies to a particular application is to ascertain whether any one of the six points of time specified in column 3 of article 179 is applicable to it, and if none of them is applicable it is only then that article 178 will apply.

Under the Limitation Act of 1877, an application cannot be made merely for the purpose of signifying the decree-holder's intention to keep the decree in force.

EXECUTION PETITIONS. The facts material to the decisions are fully set out in the judgment. The Subordinate Judge held that the applications were barred by limitation and dismissed them.

The petitioners preferred these appeals.

The Advocate-General (Hon. Mr. J. P. Wallis), Hon. Mr. *C. Sankaran Nayar* and *S. Kasturiranga Ayyangar* for appellants.

Mr. *A. S. Cowdell* and *P. S. Sivaswami Ayyar* for respondents.

JUDGMENT.—*In A.A.O. No.* 111 *of* 1902.—This is a matter arising in execution of the decree in Original Suit No. 74 of 1896 which was brought by the appellants against the respondents. The decree bears date the 10th November 1897 and the portion of the decree that is now sought to be executed runs as follows:—"That in default of the defendants or any of them paying the sum of Rs. 47,802 with further interest thereon at 7 per cent. per

annum from date of suit to date of payment on or before the 10th May 1898, the hypothecated property hereinafter described or a sufficient portion thereof be sold and that the proceeds of such sale, etc." At the time of the passing of the said decree there was pending in the same Court another suit No. 82 of 1896 which was brought by the respondents Nos. 1 to 3 against the appellants and in which they claimed Rs. 93,973-2-10 from the appellants. On the 27th November 1897 an application was made by respondents Nos. 1 to 3 (defendants) in Original Suit No. 74 under section 243, Civil Procedure Code, for stay of execution of the decree therein pending the disposal of Original Suit No. 82 and after issuing notice to the appellants an order was passed on 31st January 1898 directing stay of execution of the decree in Original Suit No. 74 until the disposal of the said suit No. 82 of 1896. Original Suit No. 82 of 1896 was tried and disposed of by the Sub-Court on 23rd December 1901. Thereupon, the present application (Execution Petition No. 418 of 1902) was made by the appellants on the 20th March 1902 praying for the sale of the hypothecated properties and the Subordinate Judge applying article 179 of schedule II, Indian Limitation Act, held that the application was barred by limitation and dismissed the same.

This was the very first application made for execution and it is admitted that no prior step in aid of execution had ever been taken. If, as held by the Subordinate Judge, the article of the law of limitation applicable to the case were 179 we should be constrained to uphold his decision and hold that the application was barred by limitation and that section 15 of the Limitation Act could not be relied on for saving the application from the bar of limitation as the provision therein made for enlarging the ordinary period of limitation is applicable only to a suit, which word as defined in section 3 of the Act must, for the purpose of limitation, be taken as excluding applications which are made in a suit. It may be that under Act IX of 1871 there was no necessity to extend the provisions of section 16 of the Act (which corresponds to section 15 of the present Act) to applications for execution of decrees, for under that Act though the execution of a decree might have been stayed by injunction or otherwise, the decree-holder might, for the purpose of the law of limitation, simply present a petition signifying his intention to keep the decree in force, and such application, though it was presented during the

continuance of the order staying execution would give him a fresh starting point (*vide* paragraph 4, column 3, article 167, schedule II, Act IX of 1871). Under paragraph 4 of column 3 of article 179 of Act XV of 1877 corresponding to article 167 of Act IX of 1871, the application which would furnish a fresh starting point for limitation must be one made in accordance with law for execution or to take some step in aid of execution of the decree and not one made merely to keep the decree in force. Such being the case it is only reasonable and proper that in computing the period of limitation prescribed for an application for execution of a decree the time during which the attaching decree-holder prosecutes a suit under section 283, Civil Procedure Code, or during which execution of the decree or a portion of it has been stayed by injunction or otherwise should be excluded. But as the law now stands "such course is not authorised" (*Narayana Nambi* v. *Pappi Brahmani*(1)) and it is not always possible to relieve the applicant from the bar of limitation by reviving an application which had been presented before the institution of the suit under section 283 or before the order staying execution. It may be that as in the present case no application had been or could have been presented before the order staying execution. And in cases in which an application had been presented prior to the suit under section 283 or to the order staying execution, it might have terminated in a manner which would make it impossible to revive the same, after the disposal of the suit or the expiration of the order as the case may be.

It has been argued on behalf of the appellants that even under article 179 the application is not barred by limitation, inasmuch as the effect of the order passed under section 243, Civil Procedure Code, staying execution of the decree was to postpone the date fixed for payment from the 10th May 1898 to the date of the decree in Original Suit No. 82, viz., 23rd December 1901, and, reading the decree as thus varied, limitation should be reckoned from the latter date under paragraph 6 of column 3 of article 179. It is impossible to accede to this argument for two reasons. An order relating to the stay of execution cannot be regarded as an order varying the decree either on review (section 623) or under section 206 or under section 210 which are the only sections under

(1) I.L.R., 10 Mad., 22 at p. 24.

which a decree can be altered or varied by the Court which passed the same. An order staying execution is passed not necessarily by the Court which passed the decree, but by the Court executing the decree as a proceeding in execution under section 244, and the order is in reality only one postponing execution and not one varying the decree.

Further, a decree which directs the sale of mortgaged property in default of payment of the mortgage money declared due on or before the date fixed in the decree, is not, within the meaning of paragraph 6, column 3, article 179, a decree directing the payment of the amount to be made at a certain date. If, however, there is also a personal decree against the mortgagor and the application is to execute the decree as such, limitation will run from the date of the decree under paragraph 1 if payment is enforceable under the decree from the date thereof or from a future date under paragraph 6 if payment can be enforced under the decree only on or after such future date fixed in the decree. Neither paragraph 1 nor paragraph 6 can apply to the execution of a mortgage decree as such, *i.e.*, to an application for sale of the mortgaged property which the decree directs to be sold in default of payment of the ascertained amount on or before the day fixed in the decree.

In our opinion the application in question is governed by article 178 and not by article 179, inasmuch as no prior application for execution of the decree or to take some step in aid of execution of the decree had been made, and we cannot accede to the contention on behalf of the respondents that article 179 is exhaustive of applications for execution of decrees and that article 178 cannot be applied to any application for execution of any decree. In construing article 179 one must not lay undue stress upon the entry in the first column, ignoring the entries in the third column. If the various starting points fixed in the third column of any article from which the period of limitation is to be reckoned do not cover all cases falling within the class of suits or applications described in the first column, it will be impossible to hold that the article in question is exhaustive of the class. If the article is inapplicable to certain cases comprised in the class those cases will be governed, in the case of suits, by the residuary article 120 and in the case of applications by the residuary article 178. By way of illustration we may refer to two instances in support of this view. Though the first column of article 10 is

exhaustive of the class of suits to enforce a right of pre-emption yet it was found that neither of the points of time fixed in the third column thereof was applicable to the case of *Batul Begam* v. *Mansur Ali Khan*(1) and the Privy Council held in that case that the article applicable was not article 10, though the suit was one to enforce a right of pre-emption, but the residuary article 120. Similarly, the first column of article 64 is in terms exhaustive of suits for the recovery of money due on accounts stated. But the third column clearly shows that the article is limited to cases in which the accounts are stated in writing signed by the defendant or his agent. It has been held in several reported cases that article 179 is inapplicable to certain applications for execution of decrees and that the appropriate article applicable thereto is 178. In *Muhammad Suleman Khan* v. *Muhammad Yar Khan*(2) in which the decree as originally drawn was incapable of execution it was held that an application made within three years from the time when it was, under section 206, amended (about 12 years after the date of the decree), was governed not by article 179 but by article 178. When a decree is amended under section 206, it will, of course, continue to bear the original date and it was held in that case that the first paragraph of column 3, article 179, can apply only to cases in which the decree is enforceable on its date and as the decree became enforceable only after its amendment under section 206, the right to apply for execution accrued only on that date and that the application was therefore within time under article 178. In *Muhammad Islam* v. *Muhammad Ahsan*(3), the decree was for recovery of possession of immoveable property but only on default being made by the judgment-debtor in the payment year by year of a certain annuity to the decree-holder and it was held that the limitation applicable to an application for the recovery of the property, on default, in execution of such decree was that provided for by article 178. Paragraph 1 of article 179 could not apply, because the property was not recoverable at the date of the decree; nor paragraph 6 because it does not apply to delivery of property moveable or immoveable. We may here refer to section 429 of the Civil Procedure Code which prescribes that when a decree is

(1) L.R., 28 I.A., 248; (S.C.) I.L.R., 24 All., 17.
(2) I.L.R., 17 All., 39. (3) I.L.R., 16 All., 237.

passed against Government, say, for the delivery of land, a time must be fixed in the decree for the delivery and no execution shall issue until after the expiration of three months from the date of the report made by the Court to Government bringing to notice that the decree has not been complied with. If paragraph 1 of article 179 does not apply to the case because the decree is not enforceable on its date, there is no other paragraph which can apply and the application or rather the first application will be governed by article 178 and the three years will be reckoned from the expiration of the three months already referred to. In *Chhedi* v. *Lalu*(1), it was held that paragraph 1 of article 179 is applicable only to cases where there is a decree or order which can at its date be executed but that as the decree in a pre-emption suit is not capable of enforcement until the decree-holder pays into Court the pre-emption price, the first application for execution of such a decree is governed not by article 179 but by article 178, and that limitation commences to run against the decree-holder from the time when the pre-emption price is paid. It may well be doubted whether the decree in a pre-emption suit is not one enforceable at its date, inasmuch as it is perfectly open to the decree-holder to pay the amount into Court on the date of the decree and apply for execution. In *Maruti* v. *Krishna*(2), the decree provided for redemption by the plaintiff on payment within a month and it was held that as it was enforceable from its date, it being open to the plaintiff to pay the decree amount on its date, the application was governed by article 179 and not by article 178.

In the case of a decree for perpetual injunction there may be nothing enforceable at the date of the decree and the disobedience itself may take place more than three years after the date of the decree. None of the paragraphs in the third column of article 179 can apply to the first application for the enforcement of such a decree, under the provisions of section 260, Civil Procedure Code, and the application will be governed by article 178 (*Rajarathnam* v. *Shevalayammal*(3). In *Thakur Das* v. *Shadi Lal*(4), the decree provided that if the judgment-debt was not paid within four months the decree-holder should have the power to recover it by sale of the mortgaged property and it was held that inasmuch as

(1) I.L.R., 24 All., 300.
(2) I.L.R., 23 Bom., 592.
(3) I.L.R., 11 Mad., 103.
(4) I.L.R., 8 All., 56.

the decree provided expressly that the decree-holder might not apply for its execution till after the expiry of four months from its date, the first application made after the expiry of four months and within three years thereafter, though more than three years from date of decree, was governed by article 178 and not by article 179. This decision is directly applicable to the present case and we entirely concur in it. The question was again brought under the consideration of the Allahabad High Court in the recent case of *Ali Ahmad* v. *Naziran Bibi*(1), where, after reviewing all the previous decisions, it was held that an application by the plaintiff-mortgagee for an order absolute under section 87 of the Transfer of Property Act foreclosing the defendant's right of redemption is an application for execution of the decree passed under section 86 of the Act and is governed by article 178 and not by article 179 of the second schedule to the Indian Limitation Act, the time being reckoned from the date fixed by the decree for payment of the mortgage money by the defendant-mortgagor. As to the application of paragraph 1 of the third column to such a case the learned Judges (Bannerjee and Aikman, JJ.) observed as follows:—"Now there can be no doubt that the decree or order referred to in paragraph 1 must be a decree or order which on the date of it is capable of execution and that the *terminus a quo* cannot be a date on which the decree or order is not executable." Referring to the two previous cases of *Chunni Lal* v. *Harnam Das*(2) in which the decree was for the sale of the mortgaged property and *Parmeshri Lal* v. *Mohan Lal*(3), in which the decree was for foreclosure of the mortgage, both of which were relied on in support of the contention that article 179 was applicable, the learned Judges (one of whom took part in the former of the said two cases), who also consulted Mr. Justice Burkitt, who decided the latter case, observed that the only question considered and decided in those cases was whether applications for an order absolute for sale or for foreclosure are or are not applications for execution and as such governed by the period of limitation prescribed for the execution of decrees and not whether the period of limitation applicable thereto was that provided by article 179 or by article 178, and that in both these cases the application was held to be

(1) I.L.R., 24 All., 542.
(2) I.L.R., 20 All., 302.
(3) I.L.R., 20 All., 357.

barred by limitation, reference being made in the judgment to article 179, and that the result would be the same whether article 179 or article 178 applied.

Reference may here be made also to the recent case of *Ashrafuddin Ahmed* v. *Bepin Behari Mullick*(1), which appeared in the Law Reports after judgment in this appeal was reserved. In one of the appeals dealt with in that case, viz., Appeal No. 203 of 1901, the decree sought to be executed was an ordinary decree for money to which a clause was added that "the plaintiff shall not be able to take out execution of the decree until the disposal of the petition for insolvency made by the defendants before the District Judge of Patna." It was held that this clause, amounting only to an order staying execution of the decree till the disposal of the insolvency petition and not to a direction within the meaning of paragraph 6 of article 179, that payment of the amount decreed be made "at a certain date," viz., date of disposal of the insolvency petition, none of the points of time specified in the third column of article 179 was applicable to the case and that the application for execution was therefore governed by article 178, but that nevertheless the application was barred as the right to apply within the meaning of column 3 of article 178, accrued on the date when the insolvency petition was granted by the original Court under section 351, Civil Procedure Code, and not on the date when the receiver was discharged or the insolvency petition was finally disposed of in appeal. The present case is even stronger as to the applicability of article 178 inasmuch as the order staying execution of the decree was passed under a specific provision enacted by section 243 of the Civil Procedure Code.

The learned pleader for the respondents placed strong reliance also upon the passages at pages 288 and 269 in the recent Full Bench decision of this Court in *Mallikarjunadu Setti* v. *Lingamurti*(2) to the effect that an application for an order absolute under section 89 of the Transfer of Property Act is an application for execution of the decree passed under section 88, that it is governed by article 179 of the Limitation Act and that an order thereon is appealable as an order under section 244, Civil Procedure Code. Among the points referred to the Full Bench in that case there was no question as to the period of limitation for an application made under section

(1) I.L.R., 30 Calc., 407.

(2) I.L.R., 25 Mad., 244.

89, Transfer of Property Act, for an order absolute for sale. The High Court of Calcutta has held that such an application is not an application for execution of a decree and that there is no period of limitation applicable thereto. All that was decided in the Full Bench case was that it was an application for execution of the decree and as such it would be governed by the period of limitation prescribed for execution of decrees and reference was casually made to article 179 as that is the one ordinarily applicable to execution of decrees. There was no question raised or argued as to whether article 179 or article 178 was applicable, for the simple reason that no question of limitation was at all involved in the case. To be fastidious it should have been observed that an application for an order absolute for sale is an application for execution of the decree and that for purposes of limitation it would be governed by article 179 or article 178 as the case might be.

Following the decisions quoted above we hold that the present application is governed by article 178 and not by article 179. We are not to be understood as laying down that all applications for the execution of a decree for sale of mortgaged property are governed by article 178. Though, at the date of the original decree, it may not be enforceable, yet if, at the date of the appellate decree, it is enforceable even the first application for sale made after the appellate decree will be governed by article 179, paragraph 2, and not by article 178, the time being reckoned from the date of the appellate decree. If the application in question has been preceded by another application made in accordance with law for execution or to take some step in aid of execution the article applicable will, as a general rule, be 179, paragraph 4, and not article 178. Similarly, if a notice has been issued under section 248, Civil Procedure Code, prior to the application in question, article 179, paragragh 5, will apply. Whether article 179 or article 178 is applicable to a particular application will depend upon the nature and portion of the decree sought to be executed and whether the application that is made is the first application or a subsequent application. The true criterion in determining whether article 179 or 178 applies to a particular application is to ascertain whether any one of the six points of time specified in column 3 of article 179 is applicable to it and if none of them is applicable, it is only then that article 178 will apply. There is, therefore, no force whatever in the argument advanced by the learned pleader

for the respondents that if article 178 is made applicable to the execution of a mortgage decree for sale the decree-holder can make no application at all after three years from the date fixed for sale even if he had made an application within three years from such date. In the view we take of articles 178 and 179, the decree-holder will have the full benefit of article 179 whenever any of the six paragraphs of column 3 thereof can furnish a starting point for his application. It is only when the decree is not enforceable at the date on which it is made, and when the decree-holder will be prejudiced by the application of paragraph 1 of the third column of article 179, that his application may be saved from the bar of limitation by article 178 as in the present case.

In this very case if the present application is held not barred, any subsequent application which the decree-holder may make for execution will be governed by article 179, paragraph 4.

Applying, therefore, article 178 to the case, the only question that remains for consideration is,—when did the decree-holder's right to apply for sale accrue within the meaning of column 3 of article 178. But for the circumstance that respondents Nos. 1 to 3 applied for and obtained an order for stay of execution of the decree before the 10th May 1898, up to which the appellants could not have applied for an order absolute for sale, the decree-holder's right to apply for sale would have accrued on the 10th May 1898 and his present application would be clearly barred and it would be equally so even if the respondents had obtained an order for stay any day subsequent to the 10th May 1898. For if limitation had once begun to run under column 3 of article 178, the subsequent stay of execution would not affect it and for the reasons already stated in reference to article 179 the period during which the execution was stayed under section 243 could not, under the present state of the law, be excluded in computing the period of limitation under article 178. Execution having been stayed prior to the 10th May 1898 the decree-holder's right to apply for sale accrued for the first time only on the disposal of Original Suit No. 82 on the 23rd December 1901. It is impossible to accede to the argument that during the time that execution of the decree was stayed the decree-holder had a right to apply and that his right therefore accrued on the 10th May 1898 notwithstanding that if he had so applied the Court must have summarily rejected the application. In comparing paragraph 4 of article 179 with

paragraph 4 of the corresponding article 167 of Act IX of 1871 we have already pointed out that no application could, under the present law, be made merely for the purpose of signifying the decree-holder's intention to keep the decree in force. That being so, the only application in accordance with law which it was open to the decree-holder to make in the present case was one subsequent to the 23rd December 1901, the date of the decree in Original Suit No. 82.

In support of this view we may refer to the decision of the Bombay High Court in *Kalyanbhai Dipchand* v. *Ghanashamlal Judunathji*(1) in which it was held that an application made by the decree-holder, or rather his representative, after an order staying execution of the decree had expired, to revive an application which had been made by the decree-holder before such order, was governed by article 178 and his right to make such an application by seeking to have his name entered in the original application in the place of the decree-holder could not have accrued on the date of the death of the decree-holder, as the order staying execution was then in force, and that the right accrued only after the expiration of that order.

The appeal is accordingly allowed with costs and the order appealed against is reversed and the case remanded in order that the necessary order may be passed in due course of law to bring the mortgaged property to sale.

A.A.O. No. 112 *of* 1902.—Subsequently to Execution Petition No. 418 of 1902, which was presented on the 20th March 1902, the appellants presented another petition on the 8th July 1902 purporting to be made under section 89 of the Transfer of Property Act and praying for an order absolute for sale. The object of taking this step evidently was to contend (relying upon certain decisions of the Calcutta High Court) that such an application is not governed by the law of limitation, and that after obtaining such an order absolute, which, according to certain decisions of the Calcutta High Court, is the final decree in the case, they might apply for execution of such final decree. In the recent Full Bench decision of this Court the majority held that the decree passed under section 88, Transfer of Property Act, is not a decree *nisi* or a preliminary decree, but the decree in the suit, and that an

(1) I.L.R., 5 Bom., 29.

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application for an order absolute for sale under section 89 is only an application for enforcing the decree under sections 230 and 235 of the Code of Civil Procedure and that, as such, it is subject to the law of limitation prescribed for execution of decrees.

For the reasons stated in the judgment in A.A.O. No. 111 of 1902, it must be held that this application is also governed by article 178 and is not barred by limitation.

The appeal is accordingly allowed and, reversing the order appealed against, the case is remanded for the necessary final order to be passed in due course of law for sale of the mortgaged property. Each party will bear his own costs of this appeal.

APPELLATE CIVIL.

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

1902. November 27, 28. December 9.

VEERASOKKARAJU, MINOR, REPRESENTED BY THE COLLECTOR OF SALEM AS AGENT TO THE COURT OF WARDS (PETITIONER, SECOND DEFENDANT), APPELLANT,

v.

PAPIAH (COUNTER-PETITIONER, PLAINTIFF), RESPONDENT.*

Hindu Law—Rights of unsecured creditors by way of charge or lien on the inheritance—Position of legal representative—Distribution of assets.

The unsecured creditors of a deceased Hindu have no charge or lien on the inheritance. If payments are not made by the heir rateably, it does not follow that he has failed to apply the assets duly. Every payment on account of a debt is perfectly lawful, irrespective of its effect upon the other creditors, and is a due application of the assets within the meaning of section 252 of the Code of Civil Procedure.

There is no analogy between the case of an executor who is governed by the special provisions of the Succession Act and that of a legal representative under the Hindu Law with reference to the question of the distribution of the assets among creditors.

Where property of a deceased remains in the hands of the legal representative, it does not necessarily follow that a creditor is entitled to proceed against it as assets in the hands of the legal representatives. The question to be considered is the real effect of what has been done, and where payments have been made by the legal representative to the extent of the full value of the property of the deceased which has come into his hands, a decree cannot be executed even although he may still have in his possession property which originally belonged to the deceased.

* Civil Miscellaneous Appeal No. 89 of 1902, presented against the order of L. C. Miller, District Judge of Salem, dated the 28th day of February 1902, in Civil Miscellaneous Petition No. 34 of 1901, in Execution Petition No. 46 of 1900, in Original Suit No. 32 of 1898.

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APPLICATION to raise an attachment. The respondent Papiah had obtained a money decree against the appellant, the minor Poligar of Berikai and a ward of the Court of Wards, as the representative of his deceased mother, the decree directing the payment of the judgment-debt out of the assets of the mother in the hands of the appellant. He then attached in execution of the decree certain jewels in the possession of the appellant as the separate properties of the mother, but the appellant, while admitting the liability of the jewels to attachment and sale in execution of the decree, claimed a lien on the sale-proceeds to the extent of Rs. 1,562 as follows:—Rs. 361 paid by himself to redeem two of the jewels which had been pledged by his mother; Rs. 110 lent to the mother for re-making jewel No. 11; Rs. 1,091 paid by him in discharge of debts contracted by the mother. The District Judge held that the contention of the appellant that the assets in his hands must be taken to be what was left after he had satisfied his own claims against the mother's estate was unsound and that as administrator of the estate he would not be entitled to resist creditors executing decrees on the ground that other debts remained to be paid on distribution of the assets, and that it made no difference that the debt was due to himself. He accordingly disallowed the claim.

Against this order the Court of Wards, on behalf of the minor Poligar, preferred this appeal.

T. Subramania Ayyar for the appellant.—The liability of the heir is limited to the extent of the assets not duly applied by him—section 252, Civil Procedure Code (*Joogul Kishore Singh* v. *Kalee Churn Singh*(1), *Kottala Uppi* v. *Shangara Varma*(2) and *Syud Jahur Hossein* v. *Hingum Jan*(3)). The creditor has no lien or charge on the assets and the heir is liable for their value rather than for the specific assets, although the wording of the section is a little uncertain in this respect (*Zaburdust Khan* v. *Inderman*(4), 'Ghose on Mortgage,' pages 185–187 and *Ram Golam*

(1) 25 W.R., 224.
(2) 3 M.H.C.R., 161.
(3) 8 W.R., 161.
(4) (1866) Agra, F.B., 71.

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Dobey v. *Ayma Begum*(1)). The fact that the creditor, who was paid by the heir out of his own funds, was the same that sought to proceed against the assets afterwards in this last-named case, does not affect the principle that, when once the heir has duly accounted for the full value of the assets received by him, his liability to any further debts of the ancestor is at an end. This, though not decided, was also assumed in the Madras and Calcutta cases already quoted. The question then is whether the heir in the present case can be said to have 'duly accounted' for the assets to the extent of Rs. 1,562. In the case of jewels Nos. 7 and 18, they would not be available as assets at all if they had not been redeemed by the payments made by the heir or, rather, the value of the jewels *minus* the debts charged upon them could alone go to make up the assets and it made no difference whether the debts charged upon them and due by the mother were now due to third parties or to the heir. In the case of jewel No. 11, it was made by money contributed by the heir, *i.e.*, this was a debt properly due to the heir for which he could not sue himself and which therefore he could retain out of the assets ('Theobald on Wills,' fifth edition, pages 706–720). The right of retainer of the executor is based on his inability to sue himself and a similar right would accrue, in equity to the heir who laboured under the same disability. The remaining item of Rs. 1,091 represented payments made to other creditors of the mother. Barring the bankruptcy and insolvency laws it has been held that a debtor may pay whichever creditor he pleases. It does not appear why the heir should not do the same. In *Chowdhry Wahed Ali* v. *Mussamut Jumaee*(2) there is an '*obiter dictum*' of their Lordships of the Privy Council, which throws light on the question what may be an undue or improper application of the assets within the meaning of section 252, Civil Procedure Code. This indicates that nothing short of 'waste' would be an improper application so as to make the heir personally liable. Payments made to *bonâ fide* creditors even before the respondent obtained his decree cannot amount to 'a waste of the assets.' Apparently, therefore, sections 234 and 252 of the Civil Procedure Code are not intended to impose a personal responsibility upon the 'representative' for anything short of 'misconduct' such as is implied by 'waste' or other wilful

(1) 12 W.R., 177.

(2) 18 W.R., 185 at p. 188.

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default. In the case of an executor or administrator, sections 327 and 328 of the Indian Succession Act would seem to make him personally liable only for 'waste' or 'wilful default.' This is also the English Law. The liability of the heir under the sections of the Procedure Code does not appear to be larger. In the case of an executor, section 282 of Act X of 1865 casts a duty upon him to apply the residue of the assets after meeting certain charges rateably in payment of debts due to himself and others. It has also been held in such a case that if he pays debts of which he has actual notice otherwise than rateably he will be personally liable for any loss occasioned to a creditor by such improper payments (*Asiatic Banking Corporation* v. *Amadorvieyas* (1)). But this obligation seems to arise by reason of the breach of duty cast on him of inviting claims under section 320 of the Act. Section 320 really provides means by which the executor could protect himself; but if he does not avail himself of them, he runs the risk of incurring a personal liability. It is therefore clear that if the law casts a duty on the executor to make a rateable distribution of the assets to creditors, it also provides the machinery by which he may discharge this duty and protect himself. But in the case of the heir no such duty is cast on him and there is no machinery provided by which to discharge it. The analogy therefore between the position of the executor and that of the heir should stop here. But if the heir is no better than the executor, still, the right of the creditor will be merely to ask that the heir shall share the assets rateably with him in respect of the Rs. 1,091. As regards the Rs. 361 he is entitled to it in any event and as regards the Rs. 110 he can pay himself this amount, since he cannot sue himself.

P. R. Sundara Ayyar for the respondent.—The words of section 252, Civil Procedure Code, are clear. The language of the section, which is plain, show that so long as the assets have not been applied in point of fact but remain with the heir, the creditor can proceed against them. In this case the assets are there and are therefore liable for the debt. The decision in *Ram Golam Dobey* v. *Ayma Begum*(2) is the only one applicable to the case of those quoted on behalf of the appellant and this decision, properly construed, does not go beyond what the section itself says. [As regards

(1) 8 B.H.C.R., 20 at pp. 25 and 26.

(2) 12 W.R., 177.

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(1) 8 B.H.C.R., 20 at pp. 25 and 26.

(2) 12 W.R., 177.

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the duty of the heir to make a rateable distribution of the assets he referred to 'Domat,' Vol. II, p. 107.]

SUBRAHMANIA AYYAR, J.—The decree in execution of which the present question arises was obtained by the respondent on a promissory note against the appellant as the son and heir and legal representative of his mother, the executant of the promissory note, the decree directing payment from the estate of the deceased debtor. The respondent having attached certain jewels of the deceased in the possession of the officers of the Court of Wards who were in charge of the estate of the appellant (a minor), a claim was put forward on behalf of the appellant to the effect that the respondent, as attaching creditor, was entitled to only so much of the sale-proceeds of the jewels as might exceed the sum of Rs. 1,562 due to the appellant made up of Rs. 361 paid after the death of the appellant's mother for the redemption of two of the said jewels from the creditor to whom they had been pledged by her, and of Rs. 1,091 also paid subsequent to the mother's death to certain of her other creditors and Rs. 110 advanced to the mother out of the appellant's own funds sometime before her death). The District Judge, without going into the truth of the alleged payments, held that the claim was not legally sustainable. The questions raised in the argument before us were whether it was the duty of the appellant and those entitled to act on his behalf in the matter to pay his mother's creditors rateably out of the assets left by her; and whether the appellant is entitled to any and what portion of the sale-proceeds of the attached jewels which appear to have been sold with the consent of the parties subject to the decision of the appellant's claim.

It is now settled that unsecured creditors of a Hindu have no charge or lien on the inheritance. No text or other Hindu Law authority has been cited in support of the contention that an heir and representative, such as the appellant was, in applying the ancestor's assets in his hands towards the discharge of the ancestor's debts is bound to pay each and every creditor rateably. Nor is there any statutory provision to that effect. The effect of section 252 of the Civil Procedure Code is only that the representative can be proceeded against personally to the extent to which he has failed to apply the assets duly. It is scarcely necessary to say that it does not follow from this that if payment is not made by the heir rateably he has failed to apply the assets duly. The cases

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cited for the appellant (*Syed Jahur Hossein* v. *Hingum Jan*(1), *Joogul Kishore Singh* v. *Kalee Churn Singh*(2) and *Kottala Uppi* v. *Shangara Varma*(3)), proceed on the clear assumption that every payment on account of a debt is a perfectly lawful payment irrespective of its effect upon the other creditors and would be a due application of the assets within the meaning of the section. That assumption is made for the obvious reason that the principle of distributing among the general body of creditors the whole of the available assets rateably is unknown to the law except where it has been introduced by express legislation. If, in the absence of adequate legislation on the point, we should hold that a legal representative, such as the appellant, is bound to distribute assets coming to his hands rateably only we should be adopting a rule which, though just in the abstract, would yet, as is obvious, be attended with serious difficulties in its practical application. This is a consideration which ought not to be overlooked for, whether it is workable is, in the language of Lord Robertson, in *Janson* v. *Driefontein Consolidated Mines Company, Limited*(4), one of the tests of any legal doctrine.

It is hardly necessary to say that there is no analogy whatever between the case of an executor who is governed by the special provisions of the Indian Succession Act and that of the appellant as a legal representative under the Hindu Law with reference to the question of the distribution of the assets among creditors; nor has the passage cited from 'Domat' (Volume II, page 107) any bearing on the present case as the heir referred to therein seems to be subject a rule peculiar to the Roman Law. In my opinion, therefore, the answer to the question under consideration should be in the negative.

As to the next question, it was urged on behalf of the respondent that as the jewels themselves are still in the hands of the appellant, the respondent is entitled to proceed against them as assets undisposed of, without reference to any payments made by him or on his behalf to other creditors. Now, supposing that the Court of Wards had caused the jewels to be sold by auction and purchased them with the minor's other funds in their

(1) 8 W.R., 161.
(2) 25 W.R., 224.
(3) 3 M.H.C.R., 161.
(4) [1902] A.C., 505.

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hands and paid the sale-proceeds to the mother's creditors, it would have been impossible to contend that the jewels were still undisposed of assets on the ground that they still remained in the possession of the minor. In cases like the present, the thing to be considered is the real effect of what has been done and not whether the property which originally belonged to the deceased is still with the representative. *Ram Golam Dobey* v. *Ayma Begum*(1), relied on by the appellant, is a clear authority in favour of this view. There, Loch and Macpherson, JJ., held that when a defendant, against whom a decree had been passed in his representative capacity, had made payments in satisfaction of the decree to the full value of the property of the deceased which had come or which might have come to his hands, the decree could no longer be executed even though the defendant had still in his possession property which originally belonged to the deceased.

The good sense of the reasoning on which this decision rests, even were the question *res integra* would induce one to adopt the same view. It may be added that the present is eminently a case for raising the presumption that the payment was made on behalf of the appellant as representative of his mother inasmuch as he himself is incapacitated and the persons making the payment are public servants bound to proceed in the matter according to the provisions of section 17 of Regulation V of 1804 with the sanction of the Court of Wards. To hold otherwise would be to unjustly mulct the appellant to the extent of the payments already made.

Apart from this ground, so far as the sum of Rs. 361 said to have been paid for the redemption of the two jewels is concerned, the appellant is, in my opinion, entitled to a lien on those jewels for the amounts so paid. This payment, if true, was not a payment by a mere stranger; it was one made in the course of getting possession of the deceased's assets which the appellant had to dispose of in accordance with the law. In Sheldon on 'Subrogations' it is stated, on the authority of certain decisions in America, (where, under the initial guidance of Chancellor Kent, the doctrine of subrogation derived from the civil law has been developed more fully than in England) that

(1) 12 W.R., 177.

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the wife and children of a deceased who pay valid demands against his estate have been held not to be mere volunteers and may be subrogated (see second edition, page 368). The reason for the application of the principle to such cases would seem to be well expressed in the following passage, quoted by the author referred to, at pages 368 and 369 from a judgment of Thomson, C.J.—"I regard the doctrine as applicable in all cases where a payment has been made under a legitimate and fair effort to protect the ascertained interests of the party paying and where intervening rights are not thereby jeopardized or defeated. Such payments, whatever their effect may be at law in extinguishing the indebtedness to which they apply, will not be so regarded in equity if it is contrary to equity to regard them so."

Here, no right of the respondent has been jeopardized or defeated by the payment made for redeeming the jewels and it is but equitable that creditors, like the respondent, who wish to take advantage of the redemption should do so only subject to the condition of paying what they would have had to pay were they themselves redeeming the property.

In regard to the Rs. 110 said to have been advanced to the mother in her life time the appellant has a right to pay himself out of the assets as he cannot sue himself.

It follows that the appellant is entitled to be paid out of the sale-proceeds the sums which he proves he is entitled to in the view of the law stated above and that the respondent is only entitled to the remainder.

I would, therefore, set aside the order of the District Judge and would remand the case for enquiry into the truth of the allegations made on behalf of the appellant and for disposal on the merits.

Costs in this Court should abide the result.

DAVIES, J.—I concur.

