THE INDIAN LAW REPORTS.

MADRAS SERIES,

CONTAINING

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

REPORTED BY

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JUDGES OF THE HIGH COURT.

1ST JANUARY—31ST DECEMBER 1904.

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CIVIL PROCEDURE CODE—ACT XIV OF 1882—s. 13.—Res judicata—*Previous suit in Munsif's Court in ordinary jurisdiction—Subsequent suit on Small Cause Court Side :*

A decision in a previous suit in a District Munsif's Court in the exercise of its ordinary jurisdiction may operate as *res judicata* in a subsequent suit between the same parties on the small cause side of the Court.

Raja Simhadri Appa Row v. *Ramachandrudu* 63

2. ——————————————————, **ss. 13, 43**—*Suit for land in wrongful possession of defendants—Former suit to recover money alleged to be due on mortgage by sale—Maintainability :*

Plaintiffs sued to recover possession of land which, they alleged, was in the wrongful possession of the defendants. In a former suit plaintiffs had sued certain defendants (two of whom were defendants in the present suit) to recover money alleged to be due under a mortgage by sale of the land. That suit was dismissed on the ground that alleged mortgage was an usufructuary mortgage which contained no covenant to pay, and that, in consequence, no suit for the money or for the sale of the land could be maintained. In the present suit, plaintiffs claimed as mortgagees and complained that the two defendants, though let into possession as tenants, refused to surrender the land and were setting up title :—*Held*, that the suit was not barred by section 43 or by section 13, explanation II of the Code. The rights which were the subject of litigation in the former suit were totally different from those now claimed. *Arunachalam Chetti* v. *Meyyappa Chetti*, (I.L.R., 21 Mad., 91), commented on. *Ramaswami Ayyar* v. *Vythinatha Ayyar*, (I.L.R., 26 Mad., 760), approved and followed.

Veerana Pillai v. *Muthukumara Asary* 102

3. ——————————————————, **s. 17**—*"Place where the contract was made"—Jurisdiction :*

Plaintiff, who resided at Kurnool, filed a suit in the District Court of Kurnool against the defendants, who resided in Madras, for damages. Plaintiff had been consigning goods for sale to the defendants as commission agents and he now complained that they had sold his goods at rates unnecessarily low. The contract of agency had been concluded by postal communications between plaintiff and defendants :—*Held*, that the suit was one arising out of contract within the meaning of section 17 of the Code of Civil Procedure, that, within the meaning of explanation III to that section, the cause of action arose at the place where the contract was made, *i.e.*, at Madras and that clause iii of the explanation was inapplicable to the suit inasmuch as the amount claimed was one payable not in

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performance of the contract, but as damages for its breach. Under the Indian Contract Act, where the proposal and acceptance are made by letters, the contract is made at the time when and at the place where the letter of acceptance is posted, though the contract is voidable at the instance of the acceptor by communication of his *revocation* before the acceptance has come to the knowledge of the proposer.

Kamisetti Subbiah v. *Katha Venkatasawmy* 355

4. ——————————————————, **ss. 28, 46, 53, 578**—*Misjoinder of causes of action—Relief "in respect of the same matter"—Partners—Suit by one of two partners against the other partner and third party—No allegation of collusion—Maintainability :*

A suit was brought in which the following reliefs (as the High Court found) were claimed :—As against first defendant, damages for his breach of contract as an agent of the firm in which first plaintiff and third defendant were partners : and as against third defendant for dissolution of partnership and for damages. First defendant had been sent to conduct the firm's business, as its agent, at S. and on his failure to carry out instructions and to render accounts, it was agreed that third defendant should proceed to S., receive the accounts and collect the firm's assets and that the firm should be wound up in six months. Third defendant, it was alleged, went to S., but acted in collusion with first defendant, wound up the business and collected the firm's assets at S., but failed to render an account thereof or to give first plaintiff his share in them. The other parties to the suit were all impleaded as undivided sons. On its being contended that the case fell within section 28 of the Code of Civil Procedure and that inasmuch as first plaintiff was not in a position to know whether first defendant had or had not handed over the firm's assets to third defendant, he was entitled to sue them jointly or in the alternative :—*Held*, that the suit was not maintainable, the plaint alleging two distinct causes of action as against defendants Nos. 1 and 3, respectively. Even if the words "in respect of the same matter" in section 28, warranted a different construction being placed upon that section than that which the English Courts have placed on the corresponding Rule 4 of Order XVI, it could not be said that the right to relief alleged to exist against first defendant was "in respect of the same matter" as the right to relief alleged to exist as against third defendant : *Held also*, that there was a further objection to the plaint in that the plaintiff was not entitled to sue in his own name in respect of first defendant's breach of contract with the firm, the cause of action not being based on any allegation of collusion by first defendant with third defendant. Such a misjoinder was not a mere irregularity as would be condoned under section 578. A case like the present, in which separate causes of action were alleged against the two defendants, did not come within section 46, which empowers a Court to order that the suit be confined to such of the causes of action as may be conveniently disposed of in one suit. The power given to the Court by section 53 to return a plaint for amendment is only discretionary, and where the Court does not return a plaint which is bad for misjoinder of parties or of causes of action, the defendant is not precluded from raising the objection at the hearing of the suit or on appeal.

Muthappa Chetty v. *Muthu Palani Chetty* 80

5. ——————————————————, **s. 43**—*Suit on muchilika for rent for fasli* 1305—*Previous suit on different muchilika for rent for fasli* 1306—*Maintainability :*

Plaintiff, the inamdar of a village, sued to recover from defendant, one of his mirasidars, arrears of melvaram due for fasli 1305, under a registered muchilika. On its being pleaded, in defence, that plaintiff had already filed a suit in respect of fasli 1306 :—*Held*, that the present suit was barred by section 43 of the Code of Civil Procedure. Though thre were separate muchilikas for the faslis 1306 and 1305, yet there was but one cause of action, namely, the non-payment of rent by a tenant to his landlord.

Shanmugam Pillai v. *Syed Gulam Ghouse* 116

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——————————————————, s. 43—*Suit for money paid on a contract—Breach of contract and failure of consideration—Previous suit for specific performance dismissed—Maintainability of present suit:*

Plaintiff had paid the defendants a sum of money on a contract under which defendants undertook to renew a kanom, and had previously sued the defendants unsuccessfully for specific performance of that contract. Plaintiff now sued to recover the money. On its being contended that the suit was barred by section 43 of the Code of Civil Procedure:—*Held*, that the suit was one for money paid on an existing consideration which had since failed; that this right of action was different from the right on which the suit for specific performance had been brought, and that section 43 did not apply.

Parangodan Nair v. *Perumtoduka Illot Chata* 380

7. ——————————————————, s. 220—*Costs—Discretion of Court—Grounds for depriving successful plaintiff—Misconduct—Suit filed after admission of indebtedness by defendant:*

The discretion given to the Court under section 220 of the Code of Civil Procedure is one which is to be exercised with reference to general principles. Where a plaintiff comes to enforce a legal right and there has been no misconduct on his part, no omission or neglect which would induce the Court to deprive him of his costs, the Court has no discretion and cannot take away the plaintiff's right to costs. The fact that a defendant has, previously to a suit being filed, admitted that the money sued for was due to the plaintiff is not a ground for depriving the plaintiff of his costs.

Kuppuswamy Chetty v. *Zamindar of Kalahasti* 341

8. ——————————————————, s. 234—*Personal decree by one partner against another for dissolution and for a definite sum of money—Death of judgment-debtor—Right of decree-holder to execute—Joinder of undivided brother of deceased—Legality—Hindu Law:*

Petitioner had obtained a decree against his three partners dissolving the partnership and ordering the first defendant to pay him a definite sum of money. Before the decree was executed, first defendant died, and petitioner now sought to execute it, under section 234 of the Code of Civil Procedure, against the widow and undivided brother of first defendant who had been joined as defendants as the legal representatives of the deceased. The first defendant had not been sued in a representative capacity, as managing member of his family, nor was it shown that the business was a family business:—*Held*, that inasmuch as the decree was purely *in personam* against the first defendant, and not a decree against any property represented by him, or one winding up the affairs of the partnership and providing for payment of its debts and for distributing the surplus according to the shares of the partners, petitioner was not entitled to execute it as against the brother by attaching and bringing to sale joint family property which had come to him by survivorship, whether it was ordinary family property or property acquired for the family by the partnership trade. *Held*, further, that execution should proceed only against the widow, who alone was the legal representative of the first defendant, and the brother's name should be removed from the record. Execution should be granted, under section 234, against the widow, as the legal representative of the deceased first defendant. If the deceased had left any separate property it could be attached even in the hands of the fifth defendant, just as it might be attached if it were found in the hands of any stranger.

Veerappa Chettiar v. *Ramaswami Aiyar* 106

9. ——————————————————, s. 269—*Attachment—Causing Court seal to be affixed on door of warehouse—"Actual seizure"—Limitation Act—XV of 1877, sched. II, art. 29:*

A judgment-creditor obtained a warrant of attachment which was executed by affixing it to the outer door of a warehouse in which goods belonging to his judgment-debtors were stored. The door was not broken

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open, nor was physical possession taken of the goods inside:—*Held*, that this, in effect, was actual seizure, within the meaning of section 269 of the Code of Civil Procedure, and that the suit was, in consequence, barred, under article 29 of schedule II to the Limitation Act.

Multan Chand Kanyalal v. *Bank of Madras* 346

10. ——————————————————, ss. 278-281—*"Possession" not restricted to mere tangible or physical possession:*

When a debt which is not secured by a negotiable instrument is attached under section 268 of the Code of Civil Procedure a claim may be preferred by a third party and may be investigated under section 278. An order passed on such a claim, disallowing it, is subject to the operation of section 283 of the Code of Civil Procedure and article 11 of the second schedule to the Limitation Act. The words "possessed" (in section 279) and "possession" (in sections 280 and 281 of the Code of Civil Procedure) are not used in a restricted sense as relating to a mere tangible or physical possession. They include constructive possession, or possession in law, of debts and other intangible property. *Basavayya* v. *Syed Abbas Saheb*, (I.L.R., 24 Mad., 20), dissented from.

Chidambara Patter v. *Ramasamy Patter* 67

11. ——————————————————, s. 283—*Relief "in respect of the same matter"—Joinder of causes of action and parties—Suit against purchasers of different items at invalid sale:*

Where the validity of a sale of land for arrears of rent is in question it is for the landlord who seeks to avail himself of the special procedure by way of distress provided for by the Act to show that the requirements of the Act have been complied with. Insufficient notice of sale is not a mere irregularity curable under sections 36 and 40 of the Rent Recovery Act. The provisions of section 36 cannot be imported into section 40 so as to make the former applicable to a sale of land distrained for arrears of rent. Section 36 introduces an exception to the general rule that, *primâ facie*, non-compliance with the requirements of the Act will vitiate a sale; and this exception is expressly limited to the case of moveable property. The provision in section 18 as to the length of notice is that in fixing the day of sale, not less than seven days must be allowed. If a notice be published on the 16th announcing that a sale will take place on 22nd the sale will be bad, even though it may take place, in fact, on 23rd. A suit against a number of purchasers of different items of land distrained and subsequently sold under the Rent Recovery Act for a declaration that the sale was invalid for want of proper notice is not bad for misjoinder of parties and of causes of action. Though, in a sense, every item sold constitutes a separate sale, the "matter" is the same, the sale being of distrained property, under the same notification and in respect of the same arrears. The proceedings in which the various items are sold are one and the ground on which the validity of the sale is impugned is the same in each case. The same defect vitiates the whole proceeding and is the common ground of attack. The cause of action, namely, the wrongful sale, is the same as against all the defendants. When a suit is brought under section 283 of the Code of Civil Procedure, the attachment (and not the making of the order) constitutes the cause of action; and different purchasers of the attached property may be properly joined as defendants in the same suit.

Dorasamy Pillai v. *Muthusamy Mooppan* 94

12. ——————————————————, s. 287—*Proceedings relating to proclamation of sale—"Order"—Appeal:*

None of the proceedings of a Court under section 287 of the Code of Civil Procedure and the rules framed thereunder in relation to the proclamation of sale is an "order" within section 244 and as such appealable as a "decree." *Sivasami Naickar* v. *Ratnasami Naickar*, (I.L.R., 23 Mad., 568), and *Ganga Prosad* v. *Raj Coomar Singh*, (I.L.R., 30 Calc., 617), dissented from. Proceedings under section 287 are in themselves administrative and

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not judicial, but if and when a sale does take place and it has to be judicially confirmed, objections may be taken to the confirmation of the sale on any of the grounds mentioned in section 311 of the Code, some of which may relate to the contents of the proclamation.

Sivagami Achi v. *Subrahmani Ayyar* 259

13. ——————————————————————, s. 335—*Resistance to purchaser by person other than judgment-debtor—Order intended to become final unless suit instituted—Refusal by Court to make order—Limitation Act—XV of 1877, sched. II, art. 11—Suit by person against whom order relating to possession is passed :*

The order contemplated by section 335 of the Code of Civil Procedure, (when a purchaser has been resisted by any person other than the judgment-debtor), is one which will become final and conclusive unless the party against whom it is passed institutes a suit (within a year, under article 11 of schedule II of the Limitation Act) and obtains an adjudication in his favour. If the Court declines to pass an order under section 335, deeming it best that the purchaser should be referred to a separate to suit enforce his purchase, article 11 has no application.

Meerudin Saib v. *Rahisa Bibi* 25

14. ——————————————————————, s. 407—*Application for leave to sue* in formâ pauperis—*Grounds for dismissing :*

Where application is made for leave to sue *in formâ pauperis*, the Court is not bound to give the leave if the allegations made by the petitioner are such that, if true, they would show a good cause of action.

Sankararama Ayyar v. *Subramania Ayyar* 120

15. ——————————————————————, ss. 407, 408, 409—*Suit in* formâ pauperis :

Sub-section (*c*) of section 407 of the Code of Civil Procedure does not refer solely to a question of jurisdiction. Under it, an applicant must make out that he has a good subsisting *primâ facie* cause of action capable of enforcement. *Kamrakh Nath* v. *Sundar Nath*, (I.L.R., 20 All., 299), followed. Section 409, which provides that "the Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence the applicant is or is not subject to any of the prohibitions specified in section 407," enables the parties to argue the question if they so desire, but does not preclude the Court if no argument is offered, from considering that question.

Amirtham v. *Alwar Manikkam.* 37

16. ——————————————————————, ss. 446, 462—*Next friend—Interest adverse to minor :*

A suit relating to the estate or person of an infant, and for his benefit, has the effect of making him a ward of Court, and no act can be done affecting the property of the minor unless under the express or implied direction of the Court itself. Where a suit, which was being conducted on behalf of a minor was withdrawn without leave being asked for or given to bring another suit, the order passed on the petition for withdrawal was set aside by the High Court, on revision, and the suit restored to the file of the lower Court for disposal according to law. Where a Court finds that a next friend does not do his duty in relation to a suit, it is its duty not to permit him to prejudice the interests of the minor, but to adjourn the suit in order that some one interested in the minor may apply on behalf of the minor for the removal of the next friend and for the appointment of a new next friend, or in order that the minor plaintiff himself may, on coming of age, elect to proceed with the suit or withdraw from it.

Doraswami Pillai v. *Thungasami Pillai* 377

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17. ——————————————————————, s. 502—*Application for money to be delivered to party to suit—Money deposited in another Court of co-ordinate jurisdiction in another suit—Jurisdiction of Court to make order :*

A suit was instituted in the Subordinate Court of Masulipatam by the Medur Rance to recover the Medur estate. The Rance was the natural mother of N who died. The defendant claimed to have adpoted N. Money was, in pursuance of an order of the High Court, paid into the Subordinate Court of Masulipatam to the credit of the suit. The plaintiff died, and A and B were brought on the record as plaintiffs. The suit was subsequently heard and dismissed and an appeal was lodged. The defendant then died, and C was made respondent in the appeal (which was still pending when the present judgment was delivered). The contention of C, as respondent in that appeal, was that he was entitled to the Medur estate jointly with A and B (the appellants). C then instituted a suit in the District Court of Gódávari against A and B for partition of the Medur estate (and also of the Nidadavole estate). The contention of C in this suit was also that he was entitled jointly with A and B. At a subsequent date, the District Court of Gódávari made an order, on the application of A, in the suit pending in that Court, for payment to A (on security being furnished) of one-third of the money which had been paid into the Subordinate Court of Masulipatam as aforesaid to the credit of the suit in that Court:—*Held* (SUBRAHMANIA AYYAR, J., *dissenting*), that the District Judge had no jurisdiction to make the order. Though C was at the most, according to his own case, only entitled to one-third of the properties in question and though it was part of his case that A was entitled to one-third and the parties to the suit were the same, such a state of things did not give jurisdiction to the District Court of Gódávari to deal with money which had been paid into another Court of co-ordinate jurisdiction, in another suit, under the orders of the High Court. Section 502 of the Code of Civil Procedure would seem to apply only when the party making the admission holds the property or other thing which the party in whose favour the order is made seeks to have delivered to him. But even if that section was intended to apply to a case where the property is not so held by the party making the admission, it would not cover a case where the money was held by another Court to the credit of another suit. *Per* SUBRAHMANIA AYYAR, J.—(1) The District Court had power to direct the payment, notwithstanding that the money was not held by any of the parties to the suit, provided the order was otherwise sustainable. (2) Inasmuch as the District Court had the power, it was not precluded from directing the payment by the mere fact that the fund out of which the payment was to be made was in the custody of another Court of co-ordinate jurisdiction (namely the Subordinate Court of Masulipatam), without reference to the circumstances of the litigation in connection with which the money had come into the custody of that Court and to the rights possessed by the parties in that fund. An order by the District Judge under section 502 would be binding on the other parties to the litigation; and the Subordinate Court at Masulipatam would give effect to it as no real conflict could arise, in consequence, between the process of the two Courts in the matter.

Rajah Parthasaradhi Appa Row v. *Rajah Rungiah Appa Row* 168

18. ——————————————————————, ss, 523, 365—*Agreement for arbitration filed in Court—Death of one of the parties—Application by legal representative to be brought on record :*

Where matters in difference have been submitted to arbitration, the submission is, under the law in force in British India, not revocable without just and sufficient cause, even where the submission has not been made a rule of Court. And where the submission has been made a rule of Court and has become the subject of a suit, it can only be revoked by leave of the Court upon good cause being shown. The policy of the Indian Legislature has been not to follow the English common law with regard to references to arbitration. Such contracts are not revocable, in India, at the will of either party, nor will the authority of an arbitrator necessarily be revoked by the death of one of the parties to the arbitration. The question whether a legal representative of a deceased party is or is not

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entitled to enforce the contract to refer depends upon whether the right dealt with in the reference is merely of a personal nature or is one which survives to the legal representative. Where it is one that survives, the proceedings before the arbitrators do not, under section 361, abate by reason of the death of a party. As the right to have partition of joint family property is one which survives to an adopted son, an agreement to refer the partition of such property to arbitrators is not put an end to by the death of a party to it, and if there is any dispute as to who is the legal representative, the Court should (at any rate where the agreement has been filed in Court) proceed under section 367 of the Code of Civil Procedure.

Perumalla Satyanarayana v. *Perumalla Venkata Rangayya* 112

19. ——————————————————————, ss. 525, 540, 620—*Application to file an award—Registration as a suit—Award set aside—Application for revision—Maintainability—Right of appeal from order setting aside award:*

An application was made to file an award in a District Munsif's Court and was registered as a suit. The defendant appeared, and the District Munsif took evidence, whereupon, he refused to file the award and set it aside, being of opinion that the arbitrators had been guilty of misconduct in making the award. The applicant filed a civil revision petition in the High Court:—*Held*, (1) that the order refusing to file the award and setting it aside was a decree, and (2) that an appeal lay against that decree.

Ponnusami Mudali v. *Mandi Sundara Mudali* 255

20. ——————————————————————, ss. 540, 623—*Practice—Review petition followed by appeal—Decision of review petition during pendency of appeal—Position and power of Court of First Instance after an appeal has been filed against its decree:*

A plaintiff sued by an agent who compromised the suit, one of the terms of the compromise being that the agent should withdraw the suit. The agent failed to do this whereupon the defendant brought the compromise to the notice of the Court and the suit was dismissed on 10th September 1901. Plaintiff on the succeeding day applied for a review (alleging fraud and collusion on the part of his agent) and, on 13th December 1901, preferred an appeal to the High Court against the decree dismissing the suit. While that appeal was pending, namely, on 17th March 1902, the Subordinate Judge heard and allowed the review petition, set aside the decree and restored the suit to the file:—*Held*, that the order was *ultra vires*. A pending appeal, without annulling the judgment appealed against, leaves it subsisting as a valid adjudication governing the rights of the parties, but the further litigation and all matters connected with it are transferred to and placed under the control of the Appellate Court. The power of the inferior Court in any way to deal with the litigation is completely in abeyance, except to carry out the decree, which it is the duty of the Court to do, as section 545 of the Code of Civil Procedure provides that the execution of the decree is not stayed by the mere fact that an appeal has been preferred against it. *Held*, also, that an appeal lay against the order of the Subordinate Judge.

Ramanadhan Chetti v. *Narayanan Chetti* 602

21. ——————————————————————, s. 549—*Security for costs—Appeal under Letters Patent in case from mufussil—Power of High Court to order appellant to give security:*

A respondent in an appeal preferred under article 15 of the Letters Patent against the decision of a single Judge of the High Court in a case from the mufussil cannot apply for an order on the appellant to give security for the costs of an appeal. Section 549 of the Civil Procedure Code applies only to appeals preferred to the High Court from subordinate Courts

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subject to its appellate jurisdiction and not to appeals preferred to the High Court, under article 15 of the Letters Patent, from the judgment of one of its own Judges. Nor does section 647 apply to appeals under the Letters Patent so as to extend the provisions of section 549 to such appeals.

Sesha Ayyar v. *Nagarathna Lala* 121

22. ——————————————————————, s. 622—*Sale of property to satisfy order for rateable distribution—Rate varied on appeal—Application for restitution of property sold—Refusal—Appeal—Revision—Restitution:*

Petitioner and counter-petitioners held decrees against the same judgment-debtor. Petitioner having realized a large sum in execution, the District Court held that petitioner and counter-petitioners were each entitled, on a rateable distribution, to about one-half of the entire sum realized. The District Court realized from petitioner the amount ordered to be paid to counter-petitioners, six items of property being attached and sold, counter-petitioners being the purchasers, and the sale being subsequently confirmed. The High Court then decided an appeal which had meanwhile been pending, the result of which was that counter-petitioners were held to be entitled to much less than they had been awarded by the District Court and had received from petitioner. This sum was also less than had been realized by the sale of the six items of property. Petitioner, in consequence, applied to the District Court for restitution of the six items of property which had been sold by the Court and for other relief. The District Court held that the sale could not be set aside as a nullity and that the petitioner was only entitled to receive back the balance which had been paid in excess. On an appeal being preferred to the High Court:—*Held*, (1) that no appeal lay from the order of the District Court. The order was not a decree; the parties were not parties to a suit; and the order was not one from which a special right of appeal was allowed by the Code. The right of appeal must not be assumed to exist in every matter which comes under the consideration of a Judge, but must be given by statute or by some authority equivalent to statute. Nor does section 647 of the Code of Civil Procedure confer any right of appeal not expressly given elsewhere by the Code; (2) that the High Court had no power to revise the order. The District Court had jurisdiction to decide the matter and had done so, though, perhaps, wrongly; (3) that petitioner should have been held entitled to some restitution. The principle which should have been followed was: "The Court in making restitution is bound to restore the parties, so far as they can be restored, to the position which they were in at the time when the Court, by its erroneous action, had displaced them from it." Inasmuch as the property sold had realized more than was due under the Court's order, the sale was illegal at any rate in so far as it was unnecessary; and *Semble*, that it was entirely illegal.

Parasurama Ayyar v. *Seshier* 504

CONSTRUCTION OF DOCUMENT—*Hypothecation bond—Lease of even date to husband of mortgagee—Provision in both instruments that interest under bond should be paid by lessee out of rent—Liability of mortgagor:*

First defendant and his brother (since deceased) executed an instrument of hypothecation to A, the wife of seventh defendant, on consideration that A should pay a creditor of the executants a sum which was due by them to him. The document provided that interest should be paid to A in the following manner:—She was to be paid by her husband the rent payable by her husband to the executants under a lease recited as having been granted to the husband that day. The principal sum was to be repayable within 17 years. The lease was for a term of 28 years, and it, in its turn, referred to the instrument of hypothecation, and provided that the rent payable under it should be paid by the seventh defendant to A (his wife), and that after the debt to A under the hypothecation bond

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had been cleared, the rent should be paid to the lessors (the executants of the hypothecation bond, namely, first defendant and his deceased brother). On a suit being brought by the transferees of A's interest in the hypothecation bond:—*Held*, that the first defendant and the sons of the deceased brother were not liable to the claim. The simultaneous execution of the hypothecation and the lease, the facts that the term of the latter covered the whole period fixed in the hypothecation bond for repayment of the principal, the relationship between the hypothecation creditor and the lessee, (which pointed to their interests being practically identical), and the specific reference in each instrument to the appropriation of the rent to the interest, showed that the transaction between the parties was of a tripartite character, intended to relieve the obligors from any responsibility in respect of interest, and to entitle the obligee to look for liquidation of interest solely to the source pointed out.

Chennapatnam Gopal Row v. *Tadakamalla Narasimha Row* 86

CONSTRUCTION OF STATUTES—*Enactments relating to substantive rights—Effect on pending suits—Enactments relating to procedure—Effect of—:*

It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. An exception to this general rule is where enactments merely affect procedure, but do not extend to rights of action.

Vedavalli Narasiah v. *Mangamma* 538

CONTRACT ACT—IX OF 1872, ss. 4, 5- *Place where contract is made—Proposal and acceptance by letter—Jurisdiction—Civil Procedure Code Act XIV of 1882, s. 17—"Place where the contract was made":*

Plaintiff, who resided at Kurnool, filed a suit in the District Court of Kurnool against the defendants, who resided in Madras, for damages. Plaintiff had been consigning goods for sale to the defendants as commission agents and he now complained that they had sold his goods at rates unnecessarily low. The contract of agency had been concluded by postal communications between plaintiff and defendants:—*Held*, that the suit was one arising out of contract within the meaning of section 17 of the Code of Civil Procedure, that, within the meaning of explanation III to that section, the cause of action arose at the place where the contract was made, *i.e.*, at Madras and that clause iii of the explanation was inapplicable to the suit inasmuch as the amount claimed was one payable not in performance of the contract, but as damages for its breach. Under the Indian Contract Act, where the proposal and acceptance are made by letters, the contract is made at the time when and at the place where the letter of acceptance is posted, though the contract is voidable at the instance of the acceptor by communication of his revocation before the acceptance has come to the knowledge of the proposer.

Kamisetti Subbiah v. *Katha Venkataswamy* 355

2. ——————————, **s. 69**—*Payment by one interested—Decree for land in plaintiff's favour—Land withheld pending appeals—Payment of kist by plaintiff—Suit for amount paid:*

Plaintiff had obtained decrees for possession of certain lands, but, pending an appeal and second appeal, the lands were withheld from him. He, however, paid the kist, and now sued to recover the amount so paid:—*Held*, that he was entitled to recover. It was a payment by one interested in it, which the defendants, as the persons in actual possession, were bound by law to pay.

Chinnasamy Ayyar v. *Rathnasabapathy Pillay* 338

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3. ——————————, **s. 176**—*Suit for sale of property pledged—Pledgee's right to sue for sale—Limitation Act—XV of 1877, sched. II, arts. 57, 120:*

Plaintiff lent money on the pledge of jewels, and sued more than three years and less than six years from the date of the pledge, to recover the amount lent, by sale of the jewels and from defendant personally:—*Held* (*per* SUBRAHMANIA AYYAR and BENSON, JJ.), that plaintiff was entitled to sue for the sale of the property pledged to him notwithstanding that he was also entitled, under section 176 of the Contract Act, to sell the property without reference to the Court. *Held, also*, that the claim to proceed against the property pledged was governed by article 120, and the claim to proceed against the debtor personally was governed by article 57 of schedule II of the Limitation Act. *Per* DAVIES, J.—That the claim to proceed against the debtor personally was governed by article 57 and was barred, but that in so far as the suit was for a sale of the pledged property that was merely an incident in the nature of an accessory to the right to recover the debt, which became barred with the right of suit for that debt. The right of sale, however, remained. *Vitla Kamti* v. *Kalekara*, (I.L.R., 11 Mad., 153), commented on.

Mahalinga Nadar v. *Ganapathi Subbien* 523

4. ——————————, **s. 178**—*Jewel lent on hire—Pledge by hirer to third party*—Bonâ fide *advance of money by third party—Suit by owner for recovery—Liability of third party:*

The owner of a jewel lent it on hire to first defendant, who pledged it with third defendant—the latter acting in good faith. In a suit by the owner against the hirer and the pledgee to recover the jewel:—*Held*, that the pledgee was liable to pay the owner the value of the jewel. *Per* SUBRAHMANIA AYYAR, J.—Sections 178 and 179 of the Indian Contract contemplate mutually exclusive cases. Section 179 refers to certain cases where the pawnor has possession which is necessarily traceable to, and is an incident of, a limited interest he has in the goods pledged. Section 178 refers to cases where a pawnor has a document of title to goods or has possession of goods independently of any interest of his therein, though, as one invested with the symbol of property, he may, notwithstanding the absence of any interest, make a valid transfer of the goods in certain circumstances. Though the pawnor had possession, it was traceable to, and was an incident of, his right as the hirer of the jewel. It was not such possession as is contemplated by section 178.

Naganada Davay v. *Bappu Chetliar* 424

5. ——————————, **ss. 217, 218**—*Lien—Legal Practitioners Act—XVIII of 1879, s. 28—Agreement not filed in Court:*

The Legal Practitioners Act does not enact that no claim by a pleader for professional services rendered or for recovery of out-fees advanced shall be sustainable unless an agreement in writing for the same has been entered into with the client and filed in Court, but only that an agreement, if any, in respect thereto, shall be void unless the same has been reduced to writing and filed in Court. A pleader (as the Court found), at the request of his client disbursed moneys for out-fees in a suit in which he was retained, and took a promissory-note for the amount of the disbursements:—*Held*, that the promissory-note was, within the meaning of section 28 of the Legal Practitioners Act, an agreement respecting the amount of payment for charges incurred or disbursements made by the pleader in respect of the suit in which he had been retained and as it had not been filed in Court as required by the section it was invalid. But that, independently of the promissory-note, the pleader was entitled to recover the out-fees advanced by him, and, under section 217 of the Contract Act, he was entitled to retain the same out of the sums received by him to the credit of his client. *Razi-ud-din* v. *Karim Bakhsh*, (I.L.R., 12 All., 169), and *Sarat Chunder Roy, Chowdhry* v. *Chundra Kanta Roy*, (I.L.R, 25 Calc., 805), commented on.

Subba Pillai v. *Ramasami Ayyar* 513

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6. ———————————, s. 230—*Contract by agent—Principal resident abroad—Presumption of personal liability of agent—Rebutted where contract made in name of principal :*

Plaintiff telegraphed to P. & Co. (who were the managing agents of a company having its registered office in England but carrying on business in India) for a quotation as to the price of sugar. P. & Co. replied in their own name, merely quoting the rate, and plaintiff accepted the offer and forwarded a deposit. On the following day, P. & Co. addressed a letter to plaintiff with which was enclosed a memorandum of sale, which contained all the terms of the contract. The letter and the memorandum bore the name of the company printed at the top and P. & Co. signed both as "managing agents." Delay having occurred in the delivery of sugar, plaintiff instituted the present suit against P. & Co. for the return of the deposit and for damages. P. & Co., in their written statement, pleaded that the suit was not maintainable against them inasmuch as they were merely agents :—*Held*, (1) that the contract, for the alleged breach of which the suit was brought, was that which had been formally reduced to writing in the memorandum of sale ; (2) that the company was resident abroad, and that a presumption, in consequence, arose under section 230 of the Contract Act that the defendants, though the agents of that company, were personally liable under the contract ; (3) that this presumption of law is one which can be rebutted, and is rebutted when the foreign principal is, in writing, made the contracting party, and the contract is made directly in his name.

Tutika Basavarajv. v. *Parry & Co.* 315

COSTS :—*See* "CIVIL PROCEDURE CODE."

COUNSEL—*Appellants as well as respondents have a right to be heard by two Counsel* :—*See* "RELIGIOUS ENDOWMENTS."

COURT FEES ACT—ACT VII OF 1870, s. 7, IV (c)—*Suit for cancellation and delivery of mortgage bond for Rs.* 4,000—*Valuation of relief by plaintiff at Rs.* 50—*Duty of Court to accept plaintiff's valuation in suits of this class :*

Where cases fall under section 7, paragraph IV, clause (*c*) of the Court Fees Act, the plaintiff should make a verified statement in his plaint of the amount at which he values the relief sought. Where this has been done, the Court has no jurisdiction to decline to accept the valuation thus given or to revise it. Such a power of revision is limited to cases provided for by section 9, which relates to an estimate given by the plaintiff of the annual net profits of the land or the market value of the land, house or garden as mentioned in section 7, paragraphs V and VI. Plaintiff sued for the cancellation and delivery up of a mortgage bond for Rs. 4,000, executed in defendant's favour, for which, it was alleged, no consideration had been paid by defendant. The relief claimed was valued in the verified plaint at Rs. 50 :—*Held*, that the Court could not revise the valuation or decline to accept the plaint.

Chinnammal v. *Madarsa Rowther* 480

CRIMINAL PROCEDURE CODE—ACT V OF 1898, s. 123—*Committal to prison for failure to give security to be of good behaviour—"Sentence of imprisonment" :*

When a person is committed to prison under section 123 of the Code of Criminal Procedure for failure to give security to be of good behaviour, he is not undergoing a "sentence of imprisonment" within the meaning of section 397 of the Code.

Emperor v. *Muthukomaran* 525

———————————, s. 195—*Charter Act—Revocation of sanction—Power of High Court :*

Under sub-section (6) of section 195 of the Code of Criminal Procedure a petition by way of appeal lies to the High Court in every case in which a Civil or Criminal Court subordinate to it, within the

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meaning of sub-section (7) (*a*) gives or refuses a sanction, whether in respect of an offence committed before it or of one committed before a Court subordinate to it, and, in the latter case, whether it gives a sanction refused by the Subordinate Court or revokes a sanction accorded by such Court. Under clauses (*b*) and (*c*) of sub-section (1), the sanction may be accorded in the first instance by the Court to which the Court in which the offence was committed is subordinate, even though no application for sanction has been made to the latter Court. For the purposes of clauses (*b*) and (*c*) of sub-section (1), a sanction accorded by the High Court would operate as a sanction accorded by a Court subordinate to it, such as the District Court. An order passed by an Appellate Court is, in law, the order which ought to have been passed by the Subordinate Court, and will, in consequence, have the same efficacy and operation as the order which ought to have been passed by the latter. Section 439 of the Code of Criminal Procedure provides that the High Court, as a Court of revision, may exercise the powers conferred on a Court of Appeal by section 195. In a case in which both the Original Criminal Court and the Appellate Criminal Court refuse sanction, the High Court, as a Court of revision, may call for the record and, if the refusal proceeds on an error of law, it may accord the sanction which ought to have been granted by the Appellate Criminal Court and such sanction will be operative for the purposes of clauses (*b*) and (*c*) of sub-section (1). A plaintiff in a suit applied for attachment before judgment and filed an affidavit in support of that application in which he stated that the defendants intended to alienate their properties with *mala fide* intentions. He did not state in the affidavit that this statement was based on what he had been told. He was, however, orally examined, and then deposed that he had heard that the defendants were intending to alienate property. The petition was dismissed. Thereupon sanction was asked for, the Subordinate Judge according sanction only for an offence under section 199 of the Indian Penal Code, and refusing sanction for offences under sections 193, 196 and 200. The sanction accorded was not based on the oral evidence but on the statement in the affidavit. The defendants appealed (under section 195 of the Code of Criminal Procedure), against the refusal to grant sanction for offences under sections 193, 196 and 200, to the District Judge, who accorded sanction for the prosecution of the petitioner under those sections also :—*Held*, on revision, that the District Judge had not exercised a sound discretion in according the sanction, for although the petitioner had not stated in his affidavit that the statements therein were made on hearsay, he had stated so in his oral evidence and the affidavit was not inconsistent with that evidence. Whether a Village Magistrate is a Magistrate within the meaning of section 197, clause (*a*) of the Code of Civil Procedure, as that expression is defined in the Imperial General Clauses Act—*Quære.*

Palaniappa Chetti v. *Annamalai Chetti* 223

3. ———————————, ss. 195, 196, 197, 215, 436—*Sanction—Notice to accused—Reference to High Court—Revisional powers :*

Section 215 of the Code of Criminal Procedure is not applicable to a case in which a commitment in question has not been made under any one of the four sections therein specified, but has been made under the directions of the High Court under section 526 (1) IV. An order of a Sessions Judge or District Magistrate passed under section 436, directing commitment, may be quashed by the High Court in the exercise of its revisional powers, though not under section 215. But an order passed by the High Court itself under section 526 cannot be so revised. Sanction accorded by Government under section 197 is not null and void for the reason that no notice was given to the accused to show cause why it should not be given. It is a matter left to the discretion of Government whether such opportunity should be given to the person concerned before sanctioning his prosecution. There is a marked distinction between the classes of offences dealt with in section 195, clauses (*b*) and (*c*), and those dealt with in section 197. A Court granting sanction under section 195 (*b*) and (*c*) does so in connection with offences committed in or in relation to any proceeding in such Court, and the Court therefore acts in its judicial capacity in

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granting the sanction on legal evidence. But the Government, in according or withholding sanction, under section 197 (for the prosecution of a public servant in respect of an offence alleged to have been committed by him as such Public servant), acts purely in its executive capacity and the sanction need not be based on legal evidence. The Criminal Procedure Code does not prescribe any particular form for the sanction required by section 197, as it does in the case of a sanction accorded under section 195.

In the matter of Kalagara Bapiah 54

4. ——————————————————— s. 195 (b)—*Power of superior Court to revoke sanction after compliant lodged :*

P obtained sanction from a Stationary Sub-Magistrate to prosecute S for offences under sections 211 and 193, Indian Penal Code, alleged to have been committed before that Magistrate. P did not prefer any complaint in pursuance of the sanction, but the police, relying on it, preferred a charge sheet to the Joint Magistrate against the accused in respect of the alleged offence under section 211. The Joint Magistrate struck the case off his file, giving as his reason for so doing that he *suo motu* quashed the Sub-Magistrate's sanction under section 195 (*b*) of the Code of Criminal Procedure :—*Held*, that the Joint Magistrate's action in striking the case off his file was legal and proper, though the reason given by him for so doing was erroneous and his act in quashing the sanction *ultra vires*. A Joint Magistrate, though authorized under section 407 (2) to entertain appeals preferred by persons convicted on a trial by the Stationary Magistrate is not the Court to which appeals from the Court of the Stationary Magistrate ordinarily lie, within the meaning of section 195 (7). The Court to which the Court of the Stationary Magistrate is, within the meaning of section 195 (6) and (7), subordinate is that of the District Magistrate. *Eroma Variar* v. *Emperor*, (I.L.R., 26 Mad., 656), and *Sadhu Lall* v. *Ram Churn Pasi*, (I.L.R., 30 Calc., 394), followed. The Joint Magistrate could not, therefore, revoke the sanction given by the Stationary Sub-Magistrate, the District Magistrate alone having the power to revoke or grant a sanction given or refused by the Stationary Sub-Magistrate. Nor was it competent to a District Magistrate, under section 407, to direct that applications for revoking or granting a sanction given or refused by a Sub-Magistrate may be presented to the Joint Magistrate. Whether the Court authorized to exercise such a power under sub-section (6) can exercise it *suo motu*, as if it were a Court of revision, where no application has been made to it either to give a sanction which has been refused or to revoke a sanction which has been given.—*Quære*. The course pursued by the police in sending a police report in respect of the offence was contrary to law ; but whether, on the strength of the sanction accorded to P, a police officer or other stranger might have preferred a complaint against S.—*Quære*. The mere fact that a compliant has been made, in pursuance of sanction, will be no bar to a Court competent under sub-section (6) to deal with an application for revoking such sanction, entertaining such application and disposing of it according to law, even if the complaint in pursuance of the sanction has been preferred to itself.

In the matter of Subbamma 124

5. ——————————————————, ss. 199, 238—*Charge of kidnapping and conviction for enticing married woman—No complaint by husband—Legality :*

The provision in section 199 of the Code of Criminal Procedure, that no Court shall take cognizance of an offence under section 498 of the Indian Penal Code except upon a complaint made by the husband of the woman, means a complaint by the husband of an offence under section 498, not any complaint made by the husband. An accused was charged with kidnapping or abducting a woman under section 366, Indian Penal Code, but the Sessions Judge, holding that the prosecution had failed to prove either kidnapping or abduction, convicted the accused, on the evidence, of an offence under section 498. In doing so he purported to act under section

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238 of the Code of Criminal Procedure. The complaint before the Court had been made by the husband, but was only general in terms :—*Held*, that the conviction was bad. *Empress* v. *Kallu*, (I.L.R., 5 All., 233), followed and approved.

Banjara Asari v. *Emperor* 61

6. ——————————————————, s. 250—*Order for Compensation :*

The question whether the discretion given by section 250 of the Code of Criminal Procedure has been rightly exercised, must always depend upon the facts of the particular case. If the false charge is of such a nature that a prosecution is necessary on grounds of public policy, it may well be that a Magistrate would exercise his discretion wrongly if, instead of sanctioning a prosecution, he awarded compensation. If the false charge is one which does not render it necessary on grounds of public policy that a prosecution should be sanctioned, a magistrate who makes an order for compensation cannot be said to exercise his discretion wrongly.

In the matter of Tammi Reddi 59

7. ——————————————————, s. 342—*Examination of accused—Filling gap in prosecution evidence by questioning accused—Charge of defamation—Failure to prove making and publication—Irregularity :*

Eight persons were charged with defamation by making and publishing a certain petition regarding the conduct of the complainant. Though other evidence was adduced by the prosecution, it was not proved that the accused made and published the matter which was alleged to be defamatory. The Magistrate, however, asked the accused if they had signed the petition, and accepted their answers as proving that they had and as relieving the prosecution from proving the making and publication of the alleged defamatory matter by the accused. He convicted the accused :—*Held*, that the convictions must be set aside. A gap in the evidence for the prosecution cannot be filled up by any statement made by the accused in his examination under section 342 of the Code of Criminal Procedure. The omission to prove the making and publication of defamatory matter is more than an irregularity ; it is a defect which vitiates the conviction.

Mohideen Abdul Kadir v. *Emperor* 238

8. ——————————————————, ss. 366, 367—*Mode of delivering judgment and its contents—Judgment written and delivered after conviction of prisoners—Defect vitiating conviction :*

Where a judgment in a criminal trial was written and delivered some days after the prisoners were convicted and sentenced :—*Held*, that this was a violation of sections 366 and 367 of the Code of Criminal Procedure and was more than an irregularity. It was a defect which vitiated the convictions and sentences. *Queen-Empress* v. *Hargobind Singh*, (I.L.R., 14 All., 242), approved.

Bandaru Atchayya v. *Emperor* 237

DISTRICT MUNICIPALITIES ACT (MADRAS) IV OF 1884, ss. 53, 262— *"Income" :*

The word "income" is used in schedule A of the District Municipalities Act (Madras) as meaning "net income" or profits derived from the business, and not the gross income or receipts. By section 262 (2) of the Act, no suit shall be brought in any Court to recover any sum of money collected under the authority of the Act, provided that its provisions have been in substance and effect complied with. A municipality assessed a person under section 53 and schedule A, on his estimated gross income :—

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Held, that the word "income" meant "not income," and consequently the provisions of the Act had not been in substance and effect complied with, and that the Court could entertain a suit to recover the amount of tax paid under the assessment.

Municipal Council of Mangalore v. *The Codial Bail Press* 547

EVIDENCE ACT—I OF 1872, s. 92—"*Contradicting, varying, adding to or subtracting from*"—*Admissibility of oral evidence when question not as between parties to the instrument or their privies*:

Plaintiff sued defendant for a piece of land, alleging that it had been given to her by a relation. The defence was that the property had been purchased by the defendant from M. A document was filed, which purported to be a sale of the land to plaintiff, but defendant contended that the document had been executed in plaintiff's name *benami* for him:—*Held*, that oral evidence was admissible in support of the contention that there had been a gift of the land to plaintiff, the question not arising as between the parties to an instrument or their privies, so as to bring it within the purview of section 92 of the Evidence Act. Though plaintiff and defendant claimed through one and the same person, yet they could not be treated as parties contracting with each other, nor would oral evidence be evidence to vary the terms of any written agreement between them. *Rahiman* v. *Elahi Baksh*, (I.L.R., 28 Calc., 70), commented upon.

Pathammal v. *Syed Kalai Ravuthar* 329

2. ——————————————, **s. 92 (PROVISO 4)**—*Agreement in writing registered—Oral evidence of discharge—Admissibility*:

An usufructuary mortgage deed was executed in favour of S who took possession of the mortgaged land. The deed was registered. S died, and his adopted son brought the present suit to recover a portion of the land so mortgaged, alleging that, during his minority, the first defendant had taken wrongful possession of the property. The first defendant was the heir of the mortgagor. His defence was that the equity of redemption had become vested in himself and another as the heirs of the deceased mortgagor; that he, as a person thus entitled to a moiety of the estate, had entered into an oral agreement with plaintiff's adoptive mother and guardian for the redemption of his share only, and that, in pursuance of that agreement, he had paid her a moiety of the mortgage amount, and redeemed the lands in question as falling to his share:—*Held*, that he was not precluded by section 92 (proviso 4) of the Evidence Act from proving this oral agreement.

Goseti Subbarow v. *Varigonda Narasimham* 368

3. ——————————————, **s. 112**—*Presumption as to paternity applicable only to offspring of married couple—Hindu Law—Illegitimate son—Right to maintenance*:

In a suit by an illegitimate son of a deceased Chetti against the adopted son and brother of his late father for a share in his father's estate, or, in the alternative, for maintenance:—*Held*, that the claim for a share must fail as it was not shown that the deceased had left any separate or self-acquired property. The family of the deceased (consisting of his father and two sons, of whom one was the deceased) was not shown to have had any ancestral property, but it had acquired property by trade in which the father and the two sons were jointly engaged. There being no indication of an intention to the contrary, it must be presumed that the property thus acquired was held by the members of the family as joint property with the incident of the right of survivorship. Inasmuch as the plaintiff's father had predeceased his father and brother, plaintiff could claim no share as against his grandfather and uncle; and, as he was illegitimate, he could not 'represent' his father in the undivided family. *Ramalinga Muppan* v. *Pavadai Goundan*, (I.L.R., 25 Mad., 519), referred to. The fact that in the present case there was a son in existence beside the illegitimate

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son made no difference, in principle, between this case and the cases already decided:—*Held also*, that plaintiff was entitled to maintenance. *An illegitimate member of a family, who is not entitled to inherit*, can be allowed only a compassionate rate of maintenance and cannot claim maintenance on the same principles and on the same scale as disqualified heirs and females who have become members of the family by marriage. But regard should be had to the interest which the deceased father of the illegitimate son had in the joint family property and the position of his mother's family. Arrears of maintenance awarded for a period of nine years prior to the suit. The presumption as to paternity in section 112 of the Indian Evidence Act only arises in connection with the offspring of a married couple. A person claiming as an illegitimate son must establish his alleged paternity in the same manner as any other disputed question of relationship is established.

Gopalasami Chetti v. *Arunachellam Chetti* 32

4. ——————————————, **s. 114 (b)**—*Evidence of accomplice—Necessity for corroboration*:

The case against an accused, who was tried on a charge of murder, depended entirely upon the evidence of the first witness, who deposed that he had worked for accused prior to and at the date of the murder; that the woman whom accused was charged with murdering had also worked for accused, and had become *enceinte* by him; that she had frequently demanded money of accused and at last threatened to disgrace him if he did not pay her; that on the evening of the murder accused obtained a crow-bar from the witness, and, later on, went to where the deceased was sleeping, when the witness heard a cry, and, on secretly approaching the spot, saw accused strike the deceased on the head with a crow-bar; that witness then ran away; that accused called him; that he went to the spot, and accused asked him to put the body in an empty pit some distance off; that witness refused to help, whereupon accused dragged the body to the pit and threw it in; that next morning accused threatened to murder the witness if he mentioned what had happened; that some fifteen days later, after a quarrel with accused, witness ran away and gave information to the brother of the deceased woman and then to the police, who, with some villagers, were taken by witness to the pit, where the body was found and, subsequently, identified. The witness stated that he had not given information earlier because he was afraid. The only evidence adduced in corroboration of any part of this witness' evidence was that the brother and sister of the deceased had heard of the relations between accused and the deceased, that the body was found in the pit, and that death was shown to have been caused, at about the time and place stated by the first witness, by fracture of the skull, which might have been caused by a blow from a crow-bar. On its being contended, on behalf of the accused, that the first witness was an accomplice, or, if not an accomplice in the strict sense of the term, that he was no better than an accomplice and that his evidence should therefore be corroborated in material particulars, and that in the absence of such corroboration the accused should not be convicted:—*Held* (*per* Sir SUBRAHMANIA AYYAR, Offg. C.J., and *per* BHASHYAM AYYANGAR, J., on reference), that the witness was not an accomplice in the crime for which the accused was charged, inasmuch as he had not been concerned in the perpetration of the murder itself. Even assuming that, after the murder had been committed, the witness had assisted in removing the body to the pit, and that he could have been charged with concealment of the body under section 201 of the Penal Code, that was an offence perfectly independent of the murder, and the witness could not rightly be held to be either a guilty associate with the accused in the crime of murder, or liable to be indicted with him jointly. The witness was therefore not an accomplice and the rule of practice as to corroboration had no application to the case. *Per* BODDAM, J.—Even if the witness was not an accomplice, having regard to the fact that he was cognizant of the crime for fifteen days without disclosing it and that he had a cause of quarrel with the accused at the time when he did disclose it, it would be most unsafe to act upon his evidence unless it was corroborated in some material particular connecting the accused with the crime. The rule of practice as to the

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necessity for corroboration of the evidence of an accomplice discussed. *Queen* v. *Chando Chandalinee*, (24 W.R. (Cr.), 55), *Ishan Chandra Chandra* v. *Queen-Empress*, (I.L.R., 21 Calc., 328), and *Ali nuddin* v. *Queen-Empress*, (I.L.R., 23 Calc., 361 at p. 365), discussed.

Ramaswami Gounden v. *Emperor* 271

EXECUTION—*Purchase by decree-holder at sale in execution of his decree—Suit for land and mesne profits—Decree modified in second appeal—Attachment and sale of lands for mesne profits pending appeal—Sale under attachment—Purchase by judgment-creditor and suit to recover lands purchased—Maintainability:*

K obtained a decree against R, on a hypothecation bond, purchased the hypothecated property in execution and assigned his rights under the purchase to the present plaintiff. Plaintiff sued the present defendant and others for the recovery of the lands and obtained a decree for possession and mesne profits. The High Court, in second appeal, held that plaintiff was entitled to recover possession of only three-fourths of the lands and mesne profits of such three-fourths, and that defendant's share in the lands, namely, one-fourth, was affected neither by the decree obtained by K, nor by the execution proceedings under it. While that second appeal was pending, plaintiff had attached other lands belonging to the defendant on account of the mesne profits awarded to him by the decree then under appeal, caused them to be sold and became the purchaser thereof, for Rs. 70, the amount of the total mesne profits being Rs. 100. The present suit was to recover the lands so purchased, and it was contended for the plaintiff that though the decree under which the sale in question had taken place had been modified subsequently, yet, inasmuch as the purchase was for an amount less than the three-fourths of the mesne profits the defendant was bound by the sale:—*Held*, that the plaintiff was not entitled to succeed. The rule is that where a decree-holder purchases at a sale in execution of his decree the purchase is subject to the final result of the litigation between him and his judgment-debtor (though where a third party purchases, the subsequent modification of the decree does not affect *his* rights). The rule still applies where the property is sold for a sum equal to, or less than, that eventually found to be due. The object of the rule is to prevent the interests of judgment-debtors from suffering by sales of their property before their liability is finally determined, and to prevent judgment-creditors from profiting at the expense of their debtors by becoming purchasers in sales pending litigation by way of appeal. Whether a decree-holder-purchaser might, in a suit properly framed, be treated as if he held a charge on what he purchased for what was ultimately found due to him, where the decree was not altogether reversed but only modified—*Quære*. *Baboo Gowree Boyyonath Pershad* v. *Jodha Singh*, (19 Suth., W.R., 416), referred to.

Syed Nathadu Sahib v. *Nallu Mudaly* 98

HINDU LAW—*Adoption—Agreement limiting property to be taken by minor adopted son—Validity:*

A Hindu widow, in pursuance of authority given by her husband, since deceased, adopted plaintiff, a minor. A registered document was executed by the widow on the day of the adoption, wherein the fact of the adoption was recited, and certain terms were set forth as to the manner in which the property of the deceased adoptive father should be enjoyed as between the plaintiff and the widow. By those terms it was declared that, in the event of disagreement between plaintiff and his adoptive mother, the property described in the second schedule should be enjoyed by the latter during her life, and should be taken by the plaintiff after her death. The authority under which the widow adopted had been given orally, and merely enabled her to adopt a son, and made no reference to the manner in which the estate of the deceased should be enjoyed either by the son or the widow. The effect of the arrangement was to vest in the widow, on the contingency mentioned, for her life, about a moiety of the property inherited by her from her husband. The terms embodied in this agreement were consented

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to by the plaintiff's natural father prior to the adoption, and it was in consequence of such consent that the adoption took place and the document was executed. Disagreements arose between plaintiff and the widow and plaintiff, still a minor, sued through his natural father as next friend to recover all the property of his deceased adoptive father:—*Held*, that the provision in the document in favour of the widow was binding on the plaintiff and the widow was entitled to enjoy the property in the second schedule during her life-time.

Visalakshi Ammal v. *Sivaramien* 577

2. ——————*Claim by illegitimate son of a Hindu, by a woman not a Hindu, to maintenance:*

There is no text of Hindu law under which an illegitimate son of a Hindu, by a woman who is not a Hindu, can claim maintenance. Plaintiff, (who sued for maintenance out of the assets of his deceased father, a Sudra), was an illegitimate son, his mother being a Christian:—*Held*, that plaintiff could not be regarded as a Hindu by birth and he was, in consequence, not governed by Hindu law, and was not entitled to maintenance. Under the rules laid down by Hindu law for determining the caste of the offspring of unions between parents belonging to different castes (amongst the four recognized main castes), the Dharma or religious rites applicable to the offspring are those prescribed for the mother's caste. Though an illegitimate child is entitled to claim maintenance from his father under section 488 of the Criminal Procedure Code, such claim can only be enforced during the life-time of the father and the right terminates with his death. Such a statutory right is cumulative and does not deprive persons otherwise entitled to maintenance, by the common law, of their right to enforce payment of maintenance by action brought against the father during his life-time or against his estate after his death. But where persons are not entitled under the common law to claim maintenance from the father, the right conferred by statute can only be enforced by the particular remedy provided by the statute and to the extent provided therein. Plaintiff, therefore, who could only rely on the statutory right, could not seek to enforce it by suit; nor did the right exist after the father's death.

Lingappa Goundan v. *Esudasan* 13

3. ——————*Conveyance by father of immoveable property allotted to him in partition subsequently to the date of the conveyance—Validity—Consideration for conveyance inadequate—Property conveyed the undivided family property of the assignor and his own sons—Purchaser's right limited to a charge on the property to the extent of the consideration paid—Transaction in effect a gift as to part and a sale to as remainder:*

In 1898, R and his brother filed a suit against their father and their two younger brothers for partition. On 18th December 1898, before the decree was passed, R conveyed a house to the present first defendant. The decree was then passed, and by it, the house in question was allotted to R's share. In 1900, a suit was instituted on behalf of R's minor sons against R praying for partition of the properties which had been allotted to R by the decree in the suit of 1898. On October 8th, 1900, R applied to be and was adjudged an insolvent. The present plaintiff was appointed Receiver in the minors' partition suit against R, but as the present first defendant (the alienee of the house in question) had not been made a party to it, the Receiver was authorized to institute the present suit against the present first defendant in order to determine the validity of the conveyance. Though the conveyance had been executed prior to the decree by which the house was actually allotted to R, it was not clear whether the house had not become the separate property of R under an agreement prior to the institution of the suit of 1898:—*Held*, that in any event, every member of an undivided family has a vested interest in joint family property, which interest will be affected by transactions entered into by him in favour of purchasers for value (*Ayyagiri Venkata Ramayya* v. *Ayyagiri Ramayya*

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(I.L.R., 25 Mad., 690)). The conveyance, therefore, could not be held to be inoperative and void by reason that the property conveyed was not vested in the vendor at the date of the conveyance. The validity and operation of the conveyance must be decided on the footing that it was a conveyance of ancestral property made by a Hindu father, the managing member of a joint Hindu family consisting of himself and his minor sons. *Held*, also, that inasmuch as the conveyance purported to have been made only in part for valuable consideration, the estimated value of the house being Rs. 11,000, and the valuable consideration recited in the conveyance being only Rs. 1,000, the conveyance was, in effect, one for value to the extent of Rs. 1,000, and a conveyance by way of gift to the extent of Rs 10,000. In these circumstances, if the property conveyed had been the sole and separate property of R, the conveyance would have been valid and operative in its entirety. But as the property conveyed was the joint property of R and his sons, effect could not be given to the conveyance as if R had been the sole owner of the whole property, or even of a third part thereof. It is not competent to an individual member of a Hindu family to alienate by way of gift his undivided share or any portion thereof; and such an alienation, if made, is void *in toto*. This principle cannot be evaded by the undivided member professing to make an alienation for value when such value is manifestly inadequate and inequitable. In such a case the transaction can be upheld against the family, in respect of the alienor's interest in the joint family property, only to the extent of the value received, and *semble*, that if the conveyance be in respect of a reasonable portion of the joint family property, for the discharge of an antecedent debt (not incurred for an illegal or immoral purpose), the conveyance, as such, will bind the sons also. Under the circumstances of the present case, *held*, that first defendant was not entitled to claim the benefit of the conveyance as such, in respect either of the whole house or R's one-third share therein, which, subsequently to the conveyance, had become vested in the Official Assignee. But as first defendant had paid value to the extent of Rs. 1,000, and that was an antecedent debt of R, binding also on his minor sons, first defendant was entitled to an equitable charge on the whole of the property to the extent of that Rs. 1,000 with interest thereon from the date of the conveyance, and was liable for rent.

Rottala Runganatham Chetty v. *Pulicat Ramasami Chetti* 162

4. ——————*Devolution of stridhanam property of a woman on her sons who are members of undivided family with their father at the time—Estate taken as co-owners or tenants in common:*

When the stridhanam property of a woman devolves on her sons, who, with their father, form an undivided Hindu family at the time of the mother's death, the sons take it as co-owners or tenants in common without benefit of survivorship. The stridhanam property of a woman (with a single exception) primarily descends upon her daughters, and, in default of daughter on the daughters' offspring, females having precedence over male offspring. It is only in default of the daughters' line that sons succeed to their mother's stridhanam. *Venkayamma Garu* v. *Venkataramanayyamma Bahadur Garu*, (I.L.R.,) 25 Mad., 678, explained. In the Mitakshara, no distinction is made between "obstructed" and "unobstructed" heritage in respect of the devolution of stridhanam property. The definitions of "obstructed" and "unobstructed" heritage given therein refer in terms only to the property of a male. In the Hindu Law, the word "ancestor" is not used in the wide sense in which it is used in English Law as nearly equivalent to the "propositus" and as co-relative of "heir." In the Hindu Law it is used only as signifying a direct ascendant in the paternal or maternal line, and, more technically, as signifying the paternal grandfather and his ascendants in the male line. Where, on the death of a maternal uncle, his estate devolves by inheritance on his sister's sons, who at the time are undivided members of a Hindu family governed by the Mitakshara law, they take it as co-owners or tenants in common without benefit of survivorship.

Karuppai Nachiar v. *Sankaranarayanan Chetty* 300

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5. ——————*Father's debt binding on sons even during father's life-time—Alienations for its discharge binding on sons—Nature of mortgage debt—No distinction between mortgage given for antecedent debt and mortgage given for debt then incurred:*

It is established by a uniform course of decisions under the Hindu Law that a debt incurred by the father which is not shown to be illegal or immoral is, even during the life-time of the father, binding on the son's interest in the family property; and that any alienation, voluntary or involuntary, made to discharge the debt is binding on the son. In the case of a mortgage-debt incurred by the father, the debt is the primary obligation and the mortgage is only a collateral security for its discharge. If the debt is binding on the son, its discharge by making an usufructuary mortgage or by enforcing the security by sale is equally binding on the son inasmuch as he is thereby exonerated from liability to discharge the debt of the father by means of other family property. There is no distinction, in principle, between a mortgage given for an antecedent debt and a mortgage given for a debt then incurred, for in either case the debt is binding on the son and the enforcement of the security exonerates the son from the burden of his father's debts.

Chidambara Mudaliar v. *Koothaperumal* 326

6. ——————*Father's liability in respect of acts constituting criminal offence—Liability of sons:*

Where a Hindu father becomes liable for money taken by him and misappropriated under circumstances which constitute the taking itself a criminal offence his minor sons cannot be held liable under the rule of Hindu Law as to the pious duty of a son to pay his father's debts. *Pareman Dass* v. *Bhattu Mahton*, (I.L.R., 24 Calc., 672), and *Mahabir Prasad* v. *Basdeo Singh*, (I.L.R., 6 All., 234), followed. *Natesayya* v. *Ponnusami*, (I.L.R., 16 Mad., 99), distinguished and explained.

McDowell & Co. v. *Rajava Chetty* 71

7. ——————*Husband's debts binding on widow in respect of assets come to her hands as legal representative—Widow's right to reside in husband's house:*

Under the Hindu Law, the maintenance of a wife by her husband is a matter of personal obligation arising from the very existence of the relation and quite independent of the possession by the husband of any property, ancestral or acquired, and his debts take precedence of her claim for maintenance. Where the family consists of only the husband and the wife, all debts which would bind the husband personally will necessarily be binding on the widow in respect of all the assets which have come to her hands as his legal representative. Where a debt has been incurred by the husband only as a surety and not for the benefit of the family, it will be binding on the assets in the hands of the widow just as it will bind the whole of the family property if it devolves upon a son by right of survivorship. Where an undivided Hindu family consists of two or more males, related as father and sons, or otherwise, and one of them dies leaving a widow, she has a right of maintenance against the surviving co-parcener or co-parceners *quoad* the share or interest of her deceased husband in the joint family property which has come by survivorship into the hands of the surviving co-parcener or co-parceners, and though such right does not in itself form a charge upon her husband's share or interest in the joint family property, yet, whenever it becomes necessary to enforce or preserve such right effectually, it may be made a specific charge on a reasonable portion of such joint family property, such portion not exceeding her husband's share or interest therein. Such right may also, in certain cases, be enforced against the transferee of joint family property. *Manilal* v. *Baitara*, (I.L.R., 17 Bom., 398), discussed. The deceased husband of defendant executed a promissory note as a surety, and after his death a decree was obtained against the defendant, his widow, on the promissory note. The decree-holder attached a house which had belonged to the deceased, and in which the widow was residing, brought it to sale and purchased it. On his endeavouring to obtain possession the widow

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resisted on the ground that she had a right of residence in the house during her life-time and could not, therefore, be ejected:—*Held*, that the decree-holder was entitled to be given possession of the house and that the widow had no right of residence therein.

Jayanti Subbiah v. *Alamelu Mangamma* 45

8. ———— *Illegitimate son—Right to maintenance—Evidence Act—I of 1872, s. 112—Presumption as to paternity applicable only to offspring of married couple:*

In a suit by an illegitimate son of a deceased Chetti against the adopted son and brother of his late father for a share in his father's estate, or, in the alternative, for maintenance:—*Held*, that the claim for a share must fail as it was not shown that the deceased had left any separate or self-acquired property. The family of the deceased (consisting of his father and two sons, of whom one was the deceased) was not shown to have had any ancestral property, but it had acquired property by trade in which the father and the two sons were jointly engaged. There being no indication of an intention to the contrary, it must be presumed that the property thus acquired was held by the members of the family as joint property with the incident of the right of survivorship. Inasmuch as the plaintiff's father had predeceased his father and brother, plaintiff could claim no share as against his grandfather and uncle; and, as he was illegitimate, he could not 'represent' his father in the undivided family; *Ramalinga Muppan* v. *Pavadai Goundan*, (I.L.R., 25 Mad., 519), referred to. The fact that in the present case there was a son in existence besides the illegitimate son made no difference, in principle, between this case and the cases already decided. *Held also*, that plaintiff was entitled to maintenance. An illegitimate member of a family, who is not entitled to inherit, can be allowed only a compassionate *rate* of maintenance and cannot claim maintenance on the same principles and on the same scale as disqualified heirs and females who have become members of the family by marriage. But regard should be had to the interest which the deceased father of the illegitimate son had in the joint family property and the position of his mother's family. Arrears of maintenance awarded for a period of nine years prior to the suit. The presumption as to the paternity in section 112 of the Indian Evidence Act only arises in connection with the offspring of a married couple. A person claiming as an illegitimate son must establish his alleged paternity in the same manner as any other disputed question of relationship is established.

Gopalasami Chetti v. *Arunachellam Chetti* 32

9. ———— *Money due by and decree against father—Execution proceedings after death of judgment-debtor against family property in possession of sons refused—Suit by creditor against sons—Decree obtained—Effect of decree against father as creating debt binding on sons—Limitation Act XV of 1877, sched. II, arts. 52, 120—Limitation for suit against son on original debt or on decree:*

Plaintiffs, in 1896, obtained a decree against the father of the present defendants, who died in 1897. Execution of that decree was refused as against the family property in the possession of the defendants. Plaintiffs, in 1899, instituted the present suit against defendants and obtained a decree. Questions having been referred to the Full Bench:—*Held*, (1) that independently of the debt arising from the original transaction, the decree against the father, by its own force created a debt as against him which his sons, according to the Hindu Law, were under an obligation to discharge, unless they showed that the debt was illegal or immoral; (2) that if the suit had been brought on the original cause of action the article of limitation applicable would have been the same as against the father, namely, article 52; but as the suit had been brought on the cause of action arising from the decree against the father the article applicable was 120. Observations by Bhashyam Ayyangar, J., on the obligation of a son, under the Hindu Law, to discharge debts incurred by his father.

Periasami Mudaliar v. *Seetharama Chettiar* 243

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10. ———— *Partial partition—Lessee of shares of some lessors in entire village and of shares of other lessors in portion—Suit for partition as to portion jointly held by lessee and some lessors—Maintainability:*

Plaintiff sued for partition of 100 kulis of land situated in the village of A. This village was, in 1883, in the possession of the second, ninth and tenth defendants and one L as tenants in common and second defendant's share was one-half and the share of the others was one-sixth each. In 1887, the tenth defendant's one-sixth share and interest in the entire village (including the 100 kulis) was attached in execution of a decree against him. His interest in the 100 kulis was sold and purchased by the present first defendant, whilst one-half of his share in the rest of the village was purchased by the decree-holder N. In 1889 and 1891, respectively, N similarly purchased the one-sixth share in the village, including the 100 kulis, of L and of the ninth defendant, respectively. In 1894, N sold the entire interest acquired by him in the village to A, who, in 1897, sold the same in equal moieties to the ninth and tenth defendants. In 1897, plaintiff obtained a lease from second defendant of her one-half share in the entire village, exclusive of the 100 kulis, for a term of twenty-three years, and a similar lease from ninth and tenth defendants of their interest (amounting together to one-half share) in the village, without reservation. Plaintiff now sued for partition of the 100 kulis. His case was that by his leases he had acquired a right to the exclusive possession for twenty-three years of the entire village, exclusive of the 100 kulis, and that in respect of the latter he was entitled to joint possession for the same period with the first and second defendants (the shares of the three being respectively one-third, one-sixth, and one-half), and that as he did not like such joint possession he desired a partition of his one-third share:—*Held*, that plaintiff was entitled to have partition, though he was only lessee for a term of years, and though that partition could only last for the period of his lease. The suit was not one for partial partition inasmuch as plaintiff was not entitled to partition of the rest of the village, to which he was entitled to exclusive possession, under his leases for twenty-three years. The only portion of the village he could demand partition of was the 100 kulis, to which he was only entitled to possession jointly with the first and second defendants.

Ramasami Chetti v. *Alagirisami Chetti* 361

11. ———— *Partition between father and sons—Stipulation that father and junior wife should "hold and enjoy" the father's share—Effect—Construction of gifts to wives under Hindu law:*

The general rule of Hindu law with regard to the construction of gifts by Hindus in favour of their wives is that the wife should not be deemed to take an absolute estate unless it is clear that this was the intention of the donor. By a deed of partition, entered into between a father and his sons by a senior wife, after a recital that the junior wife had no issue up to date, it was declared that the father and his junior wife should hold and enjoy certain of the family properties perpetually from that day forward from generation to generation with powers of alienation by sale, gift, mortgage or otherwise:—*Held*, that the parties intended that the junior wife should acquire an estate in the properties. The fact that she may not have been a co-parcener was immaterial. It was competent for the co-parceners who were entitled to participate in the partition to agree that the share of one of the co-parceners should be held jointly or in common with a party who otherwise would not have been entitled to participate in the partition. *Jogeswar Narain Deo* v. *Ram Chandra Dutt*, (I.L.R., 23 Calc., 670), followed. *Seshayya* v. *Narasamma*, (I.L.R., 22 Mad., 337), distinguished. *Held, also*, that the junior wife took as a tenant in common with her husband and that, after the death of the latter, she was entitled to a moiety of the property.

Muthu Meenakshi Ammal v. *Chendra Sekhara Ayyar* 498

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12. ———— *Sale by father of family lands for expenses of one son's marriage—No assent by other sons—Effect of sale on interest of the other sons :*

A Hindu father sold certain ancestral lands to defray the marriage expenses of one of his four sons. That son and another assented to the sale. On its being contended that the sale was invalid in so far as the shares of the other two sons were concerned, there being no family necessity, and there being no moral or religious obligation on a Hindu father to get his son married, so as to make the sale valid as against the other sons :—*Held*, that there is no authority for the proposition that the omission to perform the ceremony of marriage in the case of a male Brahman entails a forfeiture of his caste or status, and, in consequence, there is no moral or religious obligation on a father to bring about the marriage of his son. The sale of land was therefore invalid in so far as the shares of the other brothers were concerned.

Govindarazulu Narasimham v. *Devarabhotla Venkatanarasayya* 206

13. ———— *Sale in execution of decree—Sale of "right, title and interest" of holder of impartible zemindari and member of joint family governed by Mitakshara law—Subsequent reversal of interpretation of law under which sale was held—Change in nature of interest owned by holder of impartible estate—Change of law whether retrospective—Effect of sale under new interpretation of law :*

In execution of a decree against the holder (by custom of primogeniture) of an impartible zemindari who was a member of a joint family governed by the Mitakshara law, his "right, title and interest" in the estate was sold in 1876. By the law as then interpreted such a holder had only a limited interest, and except for special justifiable causes (of which the debt on which the above decree was obtained was not one) no power of alienation beyond his lifetime. Subsequently this interpretation of the law was reversed by the Judicial Committee in the cases of *Sartaj Kuari* v. *Deoraj Kuari* (L.R., 15 I.A., 51; I.L.R., 10 All., 272) and *Rao Venkata Surya Mahipati* v. *Court of Wards* (L.R., 26 I.A., 83; I.L.R., 22 Mad., 383) which decided that the holder of an impartible estate had an absolute interest in it, and made it alienable unless a custom against alienation were proved. In a suit by a purchaser at the sale against the successor by survivorship to the judgment-debtor for possession of the subject of sale, on the ground that the plaintiff had purchased an absolute interest in it :—*Held*, that the reversal of the previously accepted interpretation of the law did not displace its application to the contract contained in the certificate of sale of 1876, the parties to which were bound by the law as then understood, and that only the life-interest of the then holder passed by the sale.

Abdul Aziz Khan v. *Appayasami Naicker* 131

14. ———— *Suit for partition of property come to plaintiff's father from the father of his adoptive mother—Nature of property so devolved—Plaintiff joint owner with his father :*

In a suit for partition brought by plaintiff against his father, as first defendant, and others, plaintiff sought to recover a share of property which had come to first defendant from the father of the first defendant's adoptive mother :—*Held*, that plaintiff was a joint owner with first defendant in the property, and was entitled to partition of it. *Venkayamma Garu* v. *Venkataramanayyamma Bahadur Garu*, (I.L.R., 25 Mad., 687), and *Karuppai Nachiar* v. *Sankaranarayanan Chetty*, (I.L.R., 27 Mad., 300), followed.

Vythinatha Ayyar v. *Yeggia Narayana Ayyar* 382

15. ———— *Succession to property of deceased—Death caused by murder—Participation in crime by next heir—Effect on right of succession :*

Defendant, the mother of S had been charged, with another accused, with having murdered S. Defendant was acquitted, but the other accused was convicted. Plaintiff, as the next in succession to S (after the defendant)

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now sued for a declaration of his right to the property of S on the ground that the defendant was not entitled to the property, inasmuch as she had, as plaintiff alleged, been a party to the murder. The Subordinate Judge dismissed the suit without trying the question whether the defendant had been a party to the murder :—*Held*, that the question should have been tried. The question whether a Hindu who has been party to a murder is prevented from succeeding to the estate of the person murdered is not answered by the Hindu Law. But the principal that no one shall be allowed to benefit by his own wrongful act is of universal application. If the defendant was a party to the murder her wrongful act, while not preventing the vesting in her of the inheritance, disentitled her to any beneficial interest in it. Such beneficial interest would vest in those who would be entitled to it were the guilty heir out of the way. The text of Yagnavalkya, which is the foundation of the Mitakshara law of inheritance, enunciates but a general rule, the effect of which is liable to be nullified more or less by facts other than the two postulated therein, namely, the demise of a male owner of property without co-parceners and the survival of the relation specified in the text. What such facts are has to be ascertained either with reference to the rules embodied in other Hindu texts or with reference to principles which it is the duty of the Court to follow as a tribunal bound to administer the law of justice, equity and good conscience in cases not provided for specifically.

Vedanayaga Mudaliar v. *Vedammal* 591

16. ———— *Will by member of joint family—Nature of property bequeathed—Self-acquired or family property :*

The question raised in a suit was whether certain property which a Hindu testator had purported to deal with by his will was his self-acquired property or was the family property of the testator and his son and grandson :—*Held*, that the separate property of the testator would be (1) property acquired by his own exertions, (2) without the aid of family funds, (3) which he did not mix with family property with the intention of adding it to the family funds. *Also*, that a statement contained in the will was not evidence on the question whether the property dealt with by the will was or was not self-acquired; nor was the conduct of the testator's son in not objecting to the will; nor was a so-called reference to arbitration by the son and grandson. The fact that the property in the hands of the testator had increased during a long period to a considerable value from a small nucleus of family property was not sufficient to rebut the presumption that it was all family property. *Ramanna* v. *Venkata*, (I.L.R., 11 Mad., 246), distinguished and explained.

Tottempudi Venkataratnam v. *Tottempudi Seshamma* 228

"IMPRISONMENT," SENTENCE OF—. *See* "CRIMINAL PROCEDURE CODE, s. 123."

INCOME :—*See* "DISTRICT MUNICIPALITIES ACT (MADRAS)."

INDIAN COMPANIES ACT—VI OF 1882, s. 156—*Notice to creditors to prove claims—Failure by creditor to prove within time limited—Claimant excluded from benefit of previous distribution :*

A creditor of a company in liquidation failed to bring in his claim by the date announced by the official liquidator for claims to be made. He subsequently applied that his claim might be admitted :—*Held*, that the creditor was not precluded from coming in at a later stage. The only penalty for failure to come in within the time stated in the notice was that prescribed by the latter part of the section, namely, that the claimant would be excluded from the benefit of any distribution made before his debt was proved.

Isack Jesudasen Pillai v. *Diwan Bahadur Ramasamy Chetty* 496

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INDIAN INSOLVENCY ACT—11 AND 12 VICT., CAP. 21, s. 7—*Dismissal of petition after vesting order made—Composition deed made prior to dismissal—Validity:*

Two persons applied at Madras to be declared insolvents and an order was made whereby all their properties vested in the Official Assignee. They then entered into a deed of composition for the benefit of their creditors, four persons being appointed trustees under the deed. The insolvents' petition was subsequently dismissed on its being represented to the Court that the creditors had agreed to the deed of composition and one of the creditors then attached the insolvents' property. In support of this creditor's right to do this it was contended (in a suit brought by one of the trustees under the deed against the creditor) that inasmuch as the deed of composition had been executed after the vesting order and prior to the dismissal of the insolvents' petition, it was inoperative to transfer the property comprised in the deed to the trustees, and that it could not, in consequence, prevail against the attachment:—*Held*, that the provision in section 7 of the Insolvency Act that in case, after the making of any vesting order, the petition should be dismissed, the vesting order shall become null and void, has the effect of re vesting the property in the insolvent retrospectively from the date of the vesting order. Independently, therefore, of section 43 of the Transfer of Property Act the composition deed operated to vest the property in the trustees, and the creditor had no right to attach it. *Ramasami Kottaliar* v. *Murugasa Mudaliar*, (I.L.R., 20 Mad., 452), approved.

Kothandaram Ravuth v. *Murugasa Mudaliar* 7

INJUNCTION:—*Riparian owners—Lands belonging to different owners situated near tank common to both—Ordinary overflow through channel between boundaries—Portion of overflow customarily inundating both lands—Attempt by one owner to erect bank for protection—Effect to increase inundation of opposite land—Injunction refused to restrain opposite owner from preventing erection:*

Plaintiff and defendants owned adjacent lands, near which was situated a tank which was common to both and the surplus from which had flowed from time immemorial down a channel which lay between the plaintiff's land and that of the defendants. The channel was insufficient to carry off all the water, and some of it flowed over plaintiff's lands and some over those of the defendants. The flow was not the result of extraordinary flood but was the normal state of things. Plaintiff desired to erect a bank to protect his land from the water but defendants had prevented him. It was found that if plaintiff did erect such a bank, it would throw back on the land of defendants more water than had customarily flowed over it and would increase the damage to which it had hitherto been subject. On a suit being brought by plaintiff for an injunction restraining defendants from interfering with the erection of the proposed bank:—*Held*, that plaintiff was not entitled to an injunction. *Menzies* v. *Breadalbane*, (3 Bligh N.S., 414), followed. *Gopal Reddi* v. *Channa Reddi*, (I.L.R., 18 Mad., 158), distinguished.

Venkatachelam Chettiar v. *Zamindar of Sivaganga* 409

JURISDICTION:—*See* "CIVIL PROCEDURE CODE."

2. ———— *See* "LETTERS PATENT."

3. ———— *Suit on mortgage—Land situated outside territorial jurisdiction of Court—Court otherwise competent to entertain suit—Decree passed without objection—Execution of decree:*

A suit on a mortgage was instituted in the Court of the District Munsif at Nellore, which was competent to try a suit of its nature and value; but the mortgage lands were situated within the jurisdiction of the Court of the District Munsif at Tirupati. A decree was passed for the amount due and for sale, no objection being raised as to want of jurisdiction of the Nellore Court to try the case. When the decree-holder applied for an

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order absolute and for execution of the decree, objection was taken that the Court had no jurisdiction to entertain the suit, and that the decree passed by it could neither be made absolute nor be executed:—*Held*, that the decree was not a mere nullity, and inasmuch as no objection had been taken to the entertainment of the suit before the decree had been passed the judgment-debtor should not be allowed to object to the validity of the decree in the course of its execution.

Gomatham Alamelu v. *Komandur Krishnamachar* 118

LAND ACQUISITION ACT—I OF 1894, ss. 12, 18, 49—*Award—Compulsory acquisition of buildings—Buildings adjacent and structurally connected—Onus on public body:*

When a public body seeks, under the Land Acquisition Act, to acquire any portion of a block of buildings which is structurally connected with the main block, the onus is on that body to show that the portion is not "reasonably required for the full and unimpaired use of the house."

Venkataratnam Naidu v. *The Collector of Godavari* 350

LANDLORD AND TENANT—*Buildings erected by tenant—Transfer of Property Act IV of* 1882, *s.* 108—*Removal of buildings during continuance of lease—Rule of common law in India:*

Certain land was leased in 1875 to a tenant for twenty years it being recited in the lease that the tenant took a lease of the land for constructing a building thereon for the purposes of trade. A building was erected, and it was not contended that it was of a kind different from or of a value out of proportion to what was in the contemplation of the parties when the lease was entered into. At the expiration of the term, the lessor sued to recover the land, but he did not claim that the tenant was no longer at liberty to remove the building (though this had not been removed during the continuance of the lease). On its being contended that the tenant was entitled to be paid the value of the building which he had erected on the land before he could be evicted:—*Held*, that it is established that the maxim '*quicquid inaedificatur solo solo cedit*' does not generally apply in India; and even in cases to which the English law as such was applicable, the Indian Legislature, by Act XI of 1855, departed from that maxim in the cases specified in section 2 of that Act (corresponding to section 51 of the Transfer of Property Act). Both under the Hindu and the Muhammadan law (as well as under the common law of India) a tenant who erects a building on land let to him can only remove the building and cannot claim compensation for it on eviction by the landlord. *Mahalatchmi Ammal* v. *Palani Chetti*, (6 M.H.C.R., 245), discussed.

Ismail Kani Rowthan Nazarali Sahib 211

2. ———— *Incumbrances by tenant and subsequent ejectment—Effect of ejectment on mesne incumbrances:*

The ejectment of a tenant, under section 10 or 41 of the Rent Recovery Act operates not only as a determination of the tenant's right of occupancy, but also as an extinguishment of all mesne incumbrances and subordinate interests created by the tenant. A tenant gave a usufructuary mortgage over his land and covenanted to repay the amount. About two years thereafter the shrotriemdar obtained a decree against the tenant directing him to accept patta as settled by the judgment. On his failure to do so the tenant was ejected. The mortgagee now sued the tenant and the shrotriemdar, claiming a personal decree as against the tenant and the sale of the mortgaged property as against the shrotriemdar, in whose possession it was:—*Held*, that the mortgagee was not entitled to an order for the sale of the mortgaged property.

Ekambara Ayyar v. *Meenatchi Ammal* 401

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3. ——————— *Notice to quit—Suit instituted without prior notice—Assertion of permanent occupancy rights not a denial of relationship of landlord and tenant:*

The assertion by a tenant of permanent occupancy rights and his denying the landlord's title to give a lease of the land to a third party is not a denial of the relationship of landlord and tenant which would render notice unnecessary.

Chinna Narayudu v. *Harischendana Deo* 23

4. ——————— *Permanency of tenure—Lease of temple lands by manager—Petition for fresh lease without mentioning former leases—Madras Regulation VII of* 1817—"*Ulavadai mirasidars*"—"*Paracudis*":

One of two persons, through whom the respondents claimed, acquired rights in certain lands under permanent leases granted by the manager of a temple in 1813 and 1820. In 1831 the lessee and the other person from whom the respondents derived title petitioned the Collector, under whose management the temple then was, for a lease of the land for one year. No reference was made in the petition to the former leases, and the petitioners described themselves as paracudis. In 1832 they executed a muchilika and security bond to the Collector, who sanctioned the lease to them in 1833. In those documents they described themselves as ulavadai mirasidars, but there was nothing else to indicate their claim to a permanent tenure. In a suit by the manager of the temple in 1892 to recover possession of the lands, the respondents set up the defence that they held in a permanent tenure, and were not liable to be ejected. The High Court (reversing the decrees of the Courts below) held that it was not sufficiently proved that the tenancy under the leases of 1813 and 1820 was over determined, that the transaction evidenced by the muchilika was a confirmation of the former leases and not a new lease, and that the respondents held the lands in a permanent tenure:—*Held*, by the Judicial Committee (reversing the decision of the High Court) that the question, whether the respondents had a permanent tenure or not, was, under the circumstances of the case, one to be decided on the contract sanctioned by the Collector in 1833, and under that they obtained nothing more than a yearly tenancy. The expression "ulavadai mirasidar" had not a sufficiently definite meaning to justify resting the decision of the case upon it. The term "paracudi," however, in which character the lease was asked for in 1831, was one well understood and definite, and documents in which it was used similar to that in the present case had been construed as giving no permanent right of occupancy. *Chockalinga Pillai* v. *Vythealinya Pandara Sannadhy*, (6 M.H.C.R., 164); *Thiagaraja* v. *Giyana Sambandha Pandara Sannadhy*, (I.L.R., 11 Mad., 77); and *Krishnasami Pillai* v. *Varadaraja Ayyangar*, (I.L.R., 5 Mad., 345), referred to.

Mayandi Chettiar v. *Chokkalingam Pillay* 291

5. ——————— *Suit for rent—Objections to patta—*"*Indefiniteness*"*—Estoppel by conduct of tenant:*

A clause in a patta providing that, in the event of the tenant raising wet cultivation on dry land with Sircar water, he should pay increased rent according to the rent of the neighbouring wet lands, is not bad for indefiniteness. There is a material distinction between the power of the Court in dealing, in suits under section 8 or section 9 of the Rent Recovery Act, with questions which have not been settled by contract or specifically provided for by law and its power when dealing with a litigation arising out of a contract constituted by an accepted patta. In determining objections founded on the alleged uncertainty of a term in a contract, the test is not whether the term is in itself certain but whether it is capable of being made certain. A provision in a patta that the customary fees payable by the tenant for the services of the village accountant and other public servants of the village would be summarily recovered and charged with interest if in arrear, is not an improper term. *Semble*, that a tenant may be estopped from objecting to the terms of a patta where he has

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accepted pattas containing similar terms for a series of years previously in respect of the same holding and has by his conduct led the landlord to suppose that the patta would not be objected to.

Sree Sankarachari Swamiar v. *Varada Pillai* 333

LEGAL PRACTITIONERS ACT—XVIII OF 1879, s. 28—*Agreement not filed in Court—Contract Act—IX of* 1872, *ss.* 217, 218—*Lien:*

The Legal Practitioners Act does not enact that no claim by a pleader for professional services rendered or for recovery of out-fees advanced shall be sustainable unless an agreement in writing for the same has been entered into with the client and filed in Court, but only that an agreement, if any, in respect thereto, shall be void unless the same has been reduced to writing and filed in Court. A pleader (as the Court found), at the request of his client disbursed moneys for out-fees in a suit in which he was retained, and took a promissory-note for the amount of the disbursements:—*Held*, that the promissory-note was, within the meaning of section 28 of the Legal Practitioners Act, an agreement respecting the amount of payment for charges incurred or disbursements made by the pleader in respect for the suit in which he had been retained, and as it had not been filed in Court as required by the section it was invalid. But that, independently of the promissory-note, the pleader was entitled to recover the out-fees advanced by him, and, under section 217 of the Contract Act, he was entitled to retain the same out of the sums received by him to the credit of his client. *Razi-ud-din* v. *Karim Bakhsh*, (I.L.R., 12 All., 169), and *Sarat Chunder Roy Chowdhry* v. *Chundra Kanta Roy*, (I.L.R., 25 Calc., 805), commented on.

Subba Pillai v. *Ramasami Ayyar* 512

LETTERS PATENT, Art. 12—"*Cause of action*"—*Promise made out of the jurisdiction of High Court to pay within the jurisdiction—Breach—Suit on Original Side—Jurisdiction:*

Defendant, at Hyderabad, undertook (as was assumed for the purposes of the case) to pay plaintiff within the jurisdiction of the Madras High Court a sum of money alleged to be due for services which had been rendered at Hyderabad or other places outside the jurisdiction. The alleged promise had not been performed and plaintiff brought this suit on the Original Side of the Madras High Court, no leave having been obtained:—*Held*, that the Court had no jurisdiction to try the suit. The words "cause of action" in article 12 of the Letters Patent, mean all those things which are necessary to give a right of action, and in a suit for a breach of contract the High Court has no jurisdiction, where leave has not been obtained, unless it is proved that the contract as well as the breach of it occurred within the local limits of its jurisdiction.

Seshagiri Row v. *Nawab Askur Jung* 494

2. ———————, **Art. 12**—"*Suit for land or other immoveable property*"—*Suit for sale of mortgaged land—Land situated outside jurisdiction of High Court—Jurisdiction:*

A "suit for land" (within the meaning of article 12 of the Letters Patent) includes any suit in which a decree is asked for operating directly upon the land, and therefore includes any suit brought to enforce a security upon land, such as a suit for the sale of land equitably mortgaged by deposit of title-deeds. *Semble*, that the phrase "suit for land or other immoveable property" (as used in article 12), includes all suits mentioned in clauses (*a*), (*b*), (*c*), (*d*), (*e*) and (*f*) of section 16 of the Code of Civil Procedure, 1882. Plaintiffs, in their plaint, prayed, *inter alia*, that certain lands, the title-deeds relating to which had been deposited with them by the defendants, might be sold, and the proceeds applied to the payment of the debt due to plaintiffs by defendants. All the lands were situated outside the original jurisdiction of the High Court:—*Held*, that the suit was out

for land or other immoveable property, within the meaning of article 12 of the Letters Patent, and the Court had no jurisdiction. *In the matter of the Petition of S. J. Leslie*, (9 B.L.R., 171), followed.

Nanm Lakshimikantham v. *Krishnasawmy Mudaliar* 157

3. ——————, **Art. 15**—"*Criminal Trial*"—*Appeal—Order to furnish security for keeping the peace*—"*Judgment*":

Petitioner had been ordered by a Head Assistant Magistrate to furnish security for keeping the peace, under section 107 of the Code of Criminal Procedure. The order was confirmed on appeal. An application to the High Court to revise the order came before a single Judge and was rejected. This appeal was filed against the last-mentioned order:—*Held*, that no appeal lay. *Per* THE OFFG. C.J.—The order requiring security was an order in a criminal trial, and, in consequence, the order passed in revision was also an order in a criminal trial. *Per* RUSSELL, J.—The order appealed against was not a "judgment" within the meaning of article 15.

In the matter of Ramasamy Chetty 510

4. ——————, **Art. 15**—"*Judgment*"—*Order not deciding question of right, but merely refusing to interfere on revision petition—Appeal:*

An order of the Court passed in a proceeding in which the Court is not necessarily bound to enter upon a consideration of the controversy between the parties, but may abstain from doing so and does so abstain is not a "judgment" within the meaning of article 15 of the Letters Patent, and no appeal lies therefrom. A case of revision under section 25 of the Provincial Small Cause Courts Act is of such a nature, and no appeal lies against an order passed on it unless the order is more than a mere refusal to entertain the case as one fit for revision. A plaintiff whose suit in a Small Cause Court had been dismissed applied under section 25 of the Provincial Small Cause Courts Act for revision. The petition was heard by a single Judge who refused to interfere and dismissed it with costs. On an appeal being preferred under article 15 of the Letters Patent:—*Held*, that no appeal lay as the order was a mere refusal to entertain the case as one fit for revision, and as such was not a "judgment" within the meaning of article 15 of the Letters Patent. But where the Court is bound to decide one way or other any question of right or liability, such an order is a "judgment," irrespective of the language in which it is expressed, for it has the effect of concluding the parties with reference to the right or liability.

Chinnasami Mudali v. *Arumuga Goundan* 432

5. ——————, **Art. 15**—"*Judgment*"—*Dismissal of application under s. 25 of the Small Cause Courts Act—Appeal:*

Where an application is made to the High Court to exercise its discretionary power under section 25 of Act IX of 1887, and a single Judge dismisses the application, no appeal lies from that order of dismissal, under article 15 of the Letters Patent. Such an order is not a "Judgment" within the meaning of that section. The word "dismissed" in such a case does not necessarily imply a decision as regards any right.

Puthukudi Abdu v. *Puvakka Kunhikutti* 340

LIMITATION ACT XV of 1877, s. 12—*Presentation of appeal—"Time requisite for obtaining copy of judgment:"*

Judgment was delivered in a case on the afternoon of the last Court day before the commencement of the Christmas vacation, when it was too late to apply for a copy of the judgment. Application for a copy was made on the day upon which the Court re-opened and an appeal was filed on a subsequent day which would have been in time if the period during which the Court was closed was allowed to be deducted. On its being contended that, inasmuch as no application for a copy had been made before the Court closed, the appellant was not entitled to have the period during which the Court was closed deducted:—*Held*, that the appellant was entitled to deduct the period during which the Court was closed. Such period, in the circumstances of the case, must be taken to be part of the "time requisite for obtaining a copy of the judgment."

Saminatha Ayyar v. *Venkatasubba Ayyar* 21

2. ——————, **s. 20**—*Application to execute decree:*

The provisions of section 20 of the Limitation Act are not applicable to applications in execution of a decree. *Rama Rau* v. *Venkatesu Bhandari*, (I.L.R., 5 Mad., 171), followed.

Kuppusami Chetty v. *Rengasami Pillai* 608

3. ——————, **s. 28, sched. II, art. III**—*Sale of land—Possession retained by vendor—Suit to recover possession seven years thereafter—Non-payment of purchase price pleaded—Vendors lien not extinguished:*

A sale-deed had been executed in plaintiff's favour more than seven years before the present suit, but the purchase money was not paid and the vendors continued in possession of the land. On the present suit being filed for a declaration of plaintiff's right and for the recovery of possession of the land:—*Held*, that the vendors had a charge, by operation of law, on the property sold, for the purchase money. As the purchaser had not paid the price and had taken no steps to recover possession the vendors were not bound to sue to enforce their lien. Though a suit by the vendors to enforce their lien would have been barred by limitation under article 111 when the present suit was filed, their lien was not extinguished by section 28 of the Limitation Act, and inasmuch as they were still in possession they had a right to retain possession until the purchase money should be paid and the lien be extinguished by such payment. *Umedmal Motiram* v. *Davu Bin Dhondiba*, (I.L.R., 2 Bom., 547), approved.

Subrahmania Ayyar v. *Poovan* 23

4. ——————, **s. 28, sched. II, arts. 124, 27, 14**—*Religious Endowment Act—Trustees of temple—Hereditary trustees—Management by rotation—Discontinuance of possession of trust properties of junior branch of trustees—Continuous possession by members of senior branch—Extinction of rights of junior branch in favour of senior branch:*

On the death of the last sole trustee of a public religious institutions, the trusteeship of which was hereditary in his family, without beneficial interest in the trust property or income, the office devolved by inheritance on his male descendants by his two wives. Until 1881, the management was conducted by the two branches respectively in rotation, each acting for a year. Since 1882, the members of the junior branch had discontinued possession of the immoveable properties belonging to the trust as also performance of the duties usually appertaining to the office of trustee, and the members of the senior branch had been, in turns, successively in possession of the properties and had performed the duties, to the exclusion of and adversely to the members of the junior branch, and the High Court found that there had been an ouster of the members of the junior branch for about 19 years prior to the present suit, and that the members of the senior branch had been in turns successively in possession of the properties and had performed the duties of the office of trustee, to the exclusion of and adversely to the members of the junior branch. Plaintiff, a son of the last sole trustee by his senior wife, now sued a grandson of the last sole trustee, whose father was also a son by the senior wife, to enforce his turn of management of the institution. Since 1882, plaintiff had been managing, not only during the years of his own turn, but also during the years of the turns of the members of the junior branch, who, plaintiff alleged, had transferred their turns to him. It was contended for the defendant that inasmuch as the plaintiff had not himself been in continuous possession for 12 years, and the possession of the defendant

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and of the other two members of the senior branch during the 19 years had not been adverse to the members of the junior branch, the rights of the latter could not be barred under article 124:—*Held*, that the right of the members of the junior branch, as co-trustees had been extinguished, whether the appropriate article be 127, 142 or 124. Each of the members of the senior branch must be deemed, in law, to have held and discharged the duties of the office on behalf of himself and the other members of the senior branch, to the exclusion of the junior branch. Consequently, the office and the properties had been for more than 12 years held and possessed by the members of the senior branch as a whole body, adversely to the members of the junior branch, as a body, and the rights of the latter had been, by the operation of section 28 of the Limitation Act, extinguished, not in favour of the plaintiff individually but in favour of the members of the senior branch as a body. The defendant could not therefore plead, in bar of the plaintiff's claim, that the junior branch, or one of its members, and not the plaintiff, was entitled to succeed him in the turn of management. A right to manage by rotation by each of several co-trustees in turn is not one that can, as between the trustees themselves, be acquired merely by the operation of the law of limitation. But *held*, that plantiff was entitled to the reliefs sought for upon the basis of the scheme of management, under which management by rotation was provided for. A scheme of management which has been framed and acted upon by the trustees cannot be revoked at the will and pleasure of any of them. It is competent for co-trustees to settle a scheme of management by each of the co-trustees in rotation, at any rate where no emoluments are attached and the office is an hereditary one. Where emoluments are attached and the office is hereditary, the emoluments will be subject to partition, in the strict sense of the term, like any other family property. But whatever may be the number of co-trustees the office is a joint one and the co-trustees all form, as it were, but one collective trustee, and therefore must execute the duties of the office in their joint capacity. Management by members of undivided and divided families discussed. It would be competent for a Court, in the exercise of its equitable jurisdiction, to settle a scheme for the management of a public religious or charitable trust by the various co-trustees in rotation. *Sri Raman Lalji Maharaj* v. *Sri Gopal Lalji Maharaj*, (I.L.R., 19 All., 428), discussed.

Ramanathan Chetty v. *Murugappa Chetty* 192

5. ——————————, s. 28, sched. II, art. 142—*Suit between third parties—Delivery of present defendant's land in execution—Present defendant not a party—Knowledge of delivery—Acquiescence—Failure to apply for reinstatement—Dispossession for more than twelve years—Extinction of title:*

The title to a piece of land was (apparently) vested in defendant prior to 1877, and defendant, till then (apparently) had possession of the land. In 1867, a suit was brought by the father of the present first plaintiff against a third party for the recovery of land. The present defendant was not a party to that suit. In 1874, in execution of the decree in that suit, passed in favour of the plaintiff therein, the Subordinate Court appointed a Commissioner to make a local investigation and submit a report showing the land to be delivered to the plaintiff therein. The Commissioner personally inspected the land, and, in his report, mentioned that the present defendant, though not a party to that suit, raised the objection that the boundaries fixed by the Commissioner of the land to be delivered to the plaintiff therein included land belonging to the present defendant. The report was considered by the Subordinate Judge, but the present defendant apparently did not appear before him, and the Subordinate Judge heard the parties to that suit and confirmed the plan prepared by the Commissioner and ordered delivery to be given to the plaintiff in that suit of the land shown in the plan. That order was modified by the District Court, and in 1877, a warrant of delivery was issued by the District Judge to the Nazir, directing him to deliver possession of the property to the plaintiff therein and to eject the person in enjoyment of the land if he should refuse to quit. This warrant was executed but, as the marks which had previously been placed on the land had been washed away, the Nazir fixed the boundaries again, and on this occasion also the present defendant's officials appeared before the Nazir and objected to his delivering over the land, and requested him to communicate their objection to the Court. The delivery was, however, made to the plaintiff in that suit, in the presence of the present defendant's officials, and in spite of their objections raised on his behalf. In 1899, the present suit was instituted by the son of the plaintiff in the former suit (and another) to recover possession of the same piece of land, when it was objected for the defendant that, though the delivery of the land in 1877 might be operative as a transfer of possession to the decree-holder as against the defendant in that suit, it did not amount to a dispossession of the present defendant, if possession was then in fact and in law with him:—*Held*, that the defendant had been dispossessed. The contention now raised on his behalf might have prevailed if the delivery of possession had been made without the present defendant's knowledge. But inasmuch as such delivery had been made in the presence of the present defendant's officials and in spite of their objections, it could not be said that the present defendant had not been dispossessed simply because possession was not delivered by enclosing the land with fences, though the boundaries were marked. Having regard to the nature of the land, nothing had to be done beyond what was done to effect delivery of possession. If, therefore, possession and title were really with the defendant at the time, he could have applied to the Court under section 230 of Act VIII of 1859, complaining of the delivery of possession and praying for his reinstatement. Defendant had, however, taken no action in the matter but had acquiesced in the proceedings, either because he really had no title to possession or because he was indifferent, and he had not cultivated the land since delivery of possession had been given. The defendant's title, if any, had therefore become extinguished in favour of the plaintiff in or about 1889, under the combined operation of article 142 and section 28 of the Limitation Act.

Kocherlakota Venkatakristna Row v. *Vadrevu Venkappa* 262

6. —————————— *Exercise by Government of its prerogative of imposing assessment on land liable to be assessed—No period of limitation—Regulation XXV of* 1802, *s.* 4—*Land exempted from payment of public revenue at permanent settlement—Resumption of inam:*

Certain land was exempted from the payment of public revenue at the time of the permanent settlement. Section 4 of Regulation XXV of 1802 declares that the Government, at the permanent settlement, has "reserved to itself the entire exercise of its discretion in continuing or abolishing" the exemption of such lands from liability to pay assessment to Government, and the permanent settlement of the land revenue was made excluding the said land:—*Held*, that it was competent to Government to impose a public assessment on the land. *Also*, that there is no period of limitation prescribed by any law within which alone the Government should exercise its prerogative of imposing assessment on land liable to be assessed with public revenue. *Collector of Chingleput* v. *Kosalram Naidu*, (Second Appeal No. 1352 of 1897 (unreported)), approved.

Boddupalli Jagannadham v. *The Secretary of State for India in Council* ... 16

7. ——————————, sched. II, art. 11—*Suit by person gainst whom order relating to possession is passed:*

The order contemplated by section 335 of the Code of Civil Procedure, (when a purchaser has been resisted by any person other than the judgment-debtor), is one which will become final and conclusive unless the party against whom it is passed institutes a suit (within a year, under article 11 of schedule II of the Limitation Act) and obtains an adjudication in his favour. If the Court declines to pass an order under section 335, deeming it best that the purchaser should be referred to a separate suit to enforce his purchase, article 11 has no application.

Meerudin Saib v. *Rahisa Bibi* 25

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8. ——————————, **sched. II, art. 11**—*Suit to establish right to or present possession of property—Attachment of debt not secured by negotiable instrument—Claim by third party—Application of art. 11 to order disallowing claim—Civil Procedure Code—Act XIV of* 1882, *ss.* 278–281—"*Possession*" *not restricted to mere tangible or physical possession:*

When a debt which is not secured by a negotiable instrument is attached under section 268 of the Code of Civil Procedure a claim may be preferred by a third party and may be investigated under section 278. An order passed on such a claim, disallowing it, is subject to the operation of section 283 of the Code of Civil Procedure and article 11 of the second schedule to the Limitation Act. The words "possessed" (in section 279) and "possession" (in sections 280 and 281 of the Code of Civil Procedure) are not used in a restricted sense as relating to a mere tangible or physical possession. They include constructive possession, or possession in law, of debts and other intangible property. *Basavayya* v. *Syed Abbas Saheb*, (I.L.R., 24 Mad., 20), dissented from.

Chidambara Patter v. *Ramasamy Patter*... 67

9. ——————————, **arts. 18, 120**—*Land taken under Land Acquisition Act—Refusal by Collector to give award—Possession taken by Government:*

Land had been taken under the Land Acquisition Act, possession having been taken by the Collector before an award was made. The Collector subsequently refused to give an award, on the ground that the land belonged to Government. More than one year after the Collector's refusal to give an award, the present suit was instituted for a declaration that the land belonged to the plaintiffs and for recovery of possession, or, in the alternative, for damages for the wrongful refusal of the Collector to give the award. The finding was that the land was the plaintiffs'; but the plea of limitation was raised:—*Held*, that the suit was not barred by limitation. The land had vested absolutely in Government, and so plaintiffs were not entitled to recover possession but could only claim damages for breach of a statutory duty on the Collector's part. The suit contemplated by article 18 of the Limitation Act is one for compensation for non-completion, and that article does not apply to a case in which the land has vested in Government. Article 120, therefore, governed the suit.

Mantharavadi Venkayya v. *The Secretary of State* 535

10. ——————————, **sched. II, art. 29**—*Civil Procedure Code—Act XIV of* 1882—*Attachment—Causing Court Seal to be affixed on door of warehouse—*"*Actual seizure*":

A judgment-creditor obtained a warrant of attachment which was executed by affixing it to the outer door of a warehouse in which goods belonging to his judgment-debtors were stored. The door was not broken open, nor was physical possession taken of the goods inside:—*Held*, that this, in effect, was actual seizure, within the meaning of section 269 of the Code of Civil Procedure, and that the suit was, in consequence, barred, under article 29 of schedule II to the Limitation Act.

Multan Chand Kanyalal v. *Bank of Madras* 340

11. ——————————, **sched. II, arts. 52, 120**—*Limitation for suit against son on original debt or on decree:*

Plaintiffs, in 1896, obtained a decree against the father of the present defendants, who died in 1897. Execution of that decree was refused as against the family property in the possession of the defendants. Plaintiffs, in 1899, instituted the present suit against defendants and obtained a decree. Questions having been referred to the Full Bench:—*Held*, (1) that independently of the debt arising from the original transaction, the decree against the father, by its own force created a debt as against him which his sons, according to the Hindu law, were under an obligation to discharge, unless they showed that the debt was illegal or immoral; (2)

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that if the suit had been brought on the original cause of action the article of limitation applicable would have been the same as against the father, namely, article 52; but as the suit had been brought on the cause of action arising from the decree against the father the article applicable was 120. Observations by Bhashyam Ayyangar, J., on the obligation of a son, under the Hindu law, to discharge debts incurred by his father.

Periasami Mudaliar v. *Seetharma Chettiar* 243

12. ——————————, **sched. II, arts. 57, 120—CONTRACT ACT—IX OF 1872, s. 176**—*Suit for sale of property pledged—Pledgee's right to sue for sale:*

Plaintiff lent money on the pledge of jewels, and sued more than three years and less than six years from the date of the pledge, to recover the amount lent, by sale of the jewels and from defendant personally:—*Held* (*per* SUBRAHMANIA AYYAR and BENSON, JJ.) that plaintiff was entitled to sue for the sale of the property pledged to him notwithstanding that he was also entitled, under section 176 of the Contract Act, to sell the property without reference to the Court. *Held also*, that the claim to proceed against the property pledged was governed by article 120, and the claim to proceed against the debtor personally was governed by article 57 of schedule II of the Limitation Act. *Per* DAVIES, J.—That the claim to proceed against the debtor personally was governed by article 57 and was barred, but that in so far as the suit was for a sale of the pledged property that was merely an incident in the nature of an accessory to the right to recover the debt, which became barred with the right of suit for that debt. The right of sale, however, remained. *Vitla Kamti* v. *Kalekara*, (I.L.R., 11 Mad., 153), commented on.

Mahalinga Nadar v. *Ganapathi Subbien* 528

13. ——————————, **art. 95**—"*Other relief*" *in consequence of fraud—Suit for damages caused by defendant's fraud:*

Plaintiff claimed compensation from the defendant for damages caused to plaintiff by the fraud practised by the defendant. The suit had been brought more than two years but less than three years after the fraud complained of. The fraud was this: defendant, a judgment-creditor of some debtors, had caused a Court seal to be fraudulently placed on the door of a warehouse in which perishable articles belonging to the debtors were stored. This deceived the plaintiff, also a judgment-creditor, who was thus prevented from obtaining the goods and selling them. The goods were ultimately obtained and sold at a loss. Damages were now claimed because the goods had deteriorated in quality, diminished in quantity and commanded a lower price in the market. On the question of limitation being raised:—*Held*, that the suit was not barred, it being governed by article 95 of schedule II to the Limitation Act. The "other relief" referred to in that article need not be of the same kind, as "setting aside a decree obtained by fraud," and the article is not thus limited to specific relief on the ground of fraud. The expression "other relief" is comprehensive enough to include compensation for damages caused to the plaintiff by the fraud practised by the defendant.

Bank of Madras v. *Multan Chand Kanyalal* 343

14. ——————————**sched. II, art. 110**—*Suit for arrears of rent—Madras Rent Recovery Act (Madras Act VIII of* 1865), *ss.* 7, 9, 10, 11, 14—*Proceedings by landlord to determine rent—Period from which limitation runs:*

The section of the Madras Rent Recovery Act (Madras Act VIII of 1865) relating to recovery of arrears of rent apply to ascertained rents, not to rents at rates which have yet to be ascertained. In article 110 of schedule II of the Limitation Act (XV of 1877), "arrears of rent" means arrears of ascertained rent which the tenant is under obligation to pay, and which the landlord can claim, and, if necessary, sue for:—*Held*, therefore, (reversing the decisions of the Courts in India) that where it is necessary for the landlord to take proceedings under the Madras Act VIII

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of 1865 to have the proper rate of rent ascertained, the period of limitation in a suit for arrears of rent runs from the date of the final decree determining the rent, and not from the close of the fasli year for which the rent is payable. *Sobhanadri Appa Rau* v. *Chalamanna*, (I.L.R., 17 Mad., 225), approved. *Sriramulu* v. *Sobhanadri Appa Rau*, (I.L.R., 19 Mad., 21), overruled. There is no distinction in this respect between cases in which, in the proceedings to ascertain the rent, the Courts have approved of the patta tendered by the landlord and those in which they have modified it.

Rangayya Appa Rao v. *Babba Sriramulu* 143

MADRAS REGULATION—VII OF 1817:—*See* "LANDLORD AND TENANT."

MAHOMEDAN LAW—*Partition of father's estate between brother and minor sister—Sister represented by husband—Debt owing by husband set off against amount due to his wife—Subsequent suit for entire share—Scope of guardianship—Validity of Guardian's Act:*

Plaintiff's husband had, on the occasion of her marriage, sent her father Rs. 938 for her benefit, which sum was entered in the father's accounts to plaintiff's credit. The father died, and plaintiff's brother, the defendant, entered the same amount to her credit. A partition then took place between plaintiff and her brother, in which plaintiff, being a minor, was represented by her husband. It was found that the husband owed the estate Rs. 1,700, whilst the estate owed him Rs. 400, and the net sum due by him was, with the minor plaintiff's consent, set off against the sum due by the estate to the plaintiff, and the balance still due by the husband was allotted to plaintiff as a portion of her share in the estate. On a suit being filed by the plaintiff (after attaining her majority) for the Rs. 938:—*Held*, that it was beyond the scope of her husband's duty, though he might have been plaintiff's guardian during her minority, to set off a debt due to her from the estate against the debt due by himself to it, and that the defendant could not rely on that transaction as binding on the plaintiff. Nor did it make any difference that the plaintiff, while a minor, assented thereto. The transaction was really in the nature of a contract and the fact that the minor was privy to it could not bind her.

Hayath Bibimasaheba v. *Syahsa Meya* 10

MALABAR LAW—*Adimayavana tenure—Land granted for services rendered prior to grant—Right of landlord to eject:*

An adimayavana tenure in South Malabar is a permanent one, and where land has been granted on it for services rendered prior to the grant, the landlord cannot eject the tenant so long as the land remains in the family of the grantee. Whether, in a case where such a grant has been made for services to be rendered subsequently to the grant, it may be resumed by dispensing with the services or only when the services are discontinued and the necessity arises for having them performed by others.—*Quære.*

Theyyan Nair v. *Zamorin of Calicut* 202

2.——————*Debt incurred by Karnavan and senior Anandravan for benefit of Tarwad—Decree for money—Liability of moveable property of Tarwad to attachment under that decree:*

A Tarwad consisted of plaintiffs and defendants Nos. 2 and 3. Defendants Nos. 2 and 3 were the Karnavan and senior Anandravan of the Tarwad. A money decree had been obtained as against the Karnavan and senior Anandravan on a debt which had been contracted by them for the benefit of the Tarwad, and, in execution of that decree, certain moveable property belonging to the Tarwad had been attached. In a suit for a declaration that the moveable property of the Tarwad was not liable to be attached and sold in execution of the decree:—*Held*, that the property was liable. *Ittiachan* v. *Velappan*, (I.L.R., 8 Mad., 484), and *Govinda* v. *Krishnan*, (I.L.R., 15 Mad., 333), discussed.

Manakat Velamma v. *Ibrahim Lebbe* 375

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3——————*Devolution of property—Application of Marumakkatayam or Makkatayam law—Presumption where deceased was Muhammadan:*

In North Malabar, where the devolution of property is in question, if the late owner was governed by the Muhammadan law, the presumption would be that the law governing the devolution of his estate would be the Muhammadan law, notwithstanding that the deceased was, through his mother, interested in tarwad property. In *Assan* v. *Pathumma*, (I.L.R., 22 Mad., 494), the property, the devolution of which was in question, had belonged to a person who was admittedly governed by Muhammadan law. That case should not be understood as lying down that in every case between Muhammadans in North Malabar, even when they are members of a Marumakkatayam tarwad, the devolution of property is governed by the Muhammadan law until the contrary is shown. Where the deceased has followed the Marumakkatayam law his self-acquired property passes, on his death, to his tarwad.

Kunhimbi Umma v. *Kandy Moithin* 77

4.——————*Kanom for fixed period—Kanamdar to enjoy portion of produce for interest—Anomalous mortgage—Forfeiture not entailed by disclaimer of mortgagor's title by kanomdar—Suit to recover the land prior to expiration of period—Maintainability:*

By the terms of a kanom deed, a term of 59 years was provided for its redemption, the amount was Rs. 500, and the kanomdar was to enjoy a portion of the produce for interest on the kanom and to pay the balance of the produce annually to the mortgagor—the jenmi. Prior to the expiration of the term, the kanomdar disclaimed the title of the jenmi, who thereupon brought the present suit, claiming the right to do so by reason of the disclaimer:—*Held*, that the transaction was an anomalous mortgage under the Transfer of Property Act, and not a lease, and the disclaimer of the jenmi's title by the kanomdar would not entail a forfeiture so as to enable the jenmi to sue for redemption of the mortgage before the expiration of the 59 years. The suit was therefore premature.

Raman Nair v. *Vasudevan Namboodripad* 26

5.——————**REVENUE RECOVERY ACT (MADRAS)—II OF 1864, s. 32**—*Purchaser of land at Revenue sale—Liability to pay tenant for improvements before obtaining possession:*

Where a kanom was granted for Rs. 5, the jenmi agreeing to pay the tenant the value of his improvements, and it was not alleged that the rent reserved was lower than the usual rent for such land, and the object of the lease was to bring waste land into cultivation:—*Held*, that, having regard to the small amount of the kanom, the transaction must be regarded as in substance a lease; and the engagement made by the jenmi to pay the tenant the value of his improvements was binding on the Collector under section 32 of (Madras) Act II of 1864. A purchaser of the land at a revenue sale was therefore bound to pay compensation to the tenant for improvements before he could obtain possession.

Meppatt Kunhamad v. *Chathu Nair* 373

MINOR:—*See* "CIVIL PROCEDURE CODE."

MORTGAGE—*Lease of even date—Construction*:—*See* "CONSTRUCTION OF DOCUMENT."

NEGOTIABLE INSTRUMENTS—*Payment—Contract of purchase—Hundi taken in part payment:*

Defendants agreed to sell paddy to plaintiff on the terms that the balance of the price, after giving credit for an advance of Rs. 1,000, should be paid by plaintiff on delivery at a place mentioned. It was agreed that an assignment of a debt for Rs. 100 and a hundi for Rs. 900 should be accepted as payment of the advance. Defendants sold the paddy to a

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third party at a higher price, and plaintiff now sued for damages for breach of contract:—*Held*, that plaintiff was entitled to damages. As the Rs. 100 assigned and the hundi for Rs. 900 were agreed to be the payment of the advance of Rs. 1,000, the acceptance of the hundi operated as payment, though it might be only conditional, and the right to receive the Rs. 900 as part of the price might revive if the hundi should be dishonoured, and notice of dishonour duly given. *Held also*, that the property in the paddy had passed to the buyer under section 78 of the Contract Act, and under section 95 of that Act, the defendants, as vendors, would have a lien on the goods and would not be bound to deliver until the price had been paid, including the Rs. 900 due under the hundi if the latter were dishonoured.

Kuttayan Chetty v. *Palaniappa Chetty* 540

PENAL CODE—ACT XLV OF 1860, s. 211—*Preferring a false charge—"Charge" made to Village Magistrate—Sustainability:*

An accusation of murder made to a Village Magistrate (who, under section 13 of Regulation XI of 1816, has authority to arrest any person whom he suspects of having committed the murder of a person whose body is found within his jurisdiction) is a "charge" within the meaning of section 211 of the Indian Penal Code, even though it does not amount to the institution of criminal proceedings and even though no criminal proceedings follow it owing to the police referring it as false on investigation.

Chenna Malli Gowda v. *Emperor* 129

2.——————————————*Preferring false charge—Statement not reduced to writing by Police officer:*

A person was convicted, under section 211 of the Indian Penal Code, of having preferred a false charge. It appeared that the accused had stated to a Police officer that certain of the prosecution witnesses had stolen his goats, and that he had made this statement intending to set the criminal law in motion against those persons. The statement had not been reduced to writing in accordance with the requirements of section 154 of the Code of Criminal Procedure. On its being contended that there was no evidence of a false charge, within the meaning of section 211:—*Held*, (1) that the test is—did the person who makes the charge intend to set the criminal law in motion against the person against whom the charge is made; (2) that (it being clear from the evidence that the accused did so intend) the fact that the statement made by the accused to the Police officer had not been reduced to writing in accordance with section 154 of the Code of Criminal Procedure did not prevent the statement made from being a false charge within the meaning of that section.

Mallappa Reddi v. *Emperor*... 127

3.——————————————, **s. 353**—*Using criminal force to deter a public servant—Entry by police on premises of suspected person at night—Assault on police:*

A police constable, at midnight, entered upon the premises of a person who was regarded by the police as a suspicious character, and knocked at his door to ascertain if he was there, whereupon he came out and abused and pushed the constable and lifted a stick as if he were about to hit the constable with it. On a complaint being preferred under section 353 of using criminal force to deter a public servant in the execution of his duty:—*Held*, that the offence had not been committed. The constable was not engaged in the execution of his duty as a public servant and was technically guilty of house trespass, and his action was calculated to cause annoyance to the inmates of the house, and was insulting to the accused, who was justified in causing the slight harm which he had inflicted on the constable. The latter could not be regarded, under section 99, as acting in good faith under colour of his office as his action was not authorized by any police circular or order.

Dorasamy Pillai v. *Emperor* 52

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4.——————————————, **s. 379**—*Theft—Dishonestly quarrying and removing stones from land in possession of another:*

Stones, when quarried and carried away are "things severed from the earth" (within the meaning of section 378, explanation 1 of the Indian Penal Code) and are "moveable property" (within the meaning of section 22) and as such are capable of being the subject of theft. A person who quarries and carries away stones from land in the possession of another commits theft. *Queen-Empress* v. *Kotayya*, (I.L.R., 10 Mad., 255), dissented from.

Venkatappayya Sastri v. *Madula Venkanna* 531

5.——————————————, **s. 378**—*Theft—Charge of stealing chanks—Shellfish taken from beds in sea—*Feræ naturæ*—"Possession" of complainant—Subject of theft:*

"Chanks" (popularly included among shell-fish, but really large molluscs) are found buried in beds of sand or in the sandy crevices of coral reefs in Palk's Bay, a large bay landlocked by British dominions for eight-ninths of its circumference and containing numerous islands which form part of the districts to which they are adjacent on the shores of India and Ceylon. It was shown by evidence that this bay (as well as parts of the adjacent Gulf of Mannar) had been effectively occupied for centuries by the inhabitants of India and Ceylon, respectively; that the "chanks" found therein had for centuries been the monopoly of the rulers of the country, both in India and Ceylon, and that licenses to gather them had been granted by the sovereign; and that "chank royalty" was one of the heads of revenue on which permanent assessment of an adjacent zamindari was fixed in 1802. Petitioner, who had leased from the Rajah of Ramnad the "chank beds" five miles off the coast of his zamindari, charged the counter-petitioners with having committed the offence of theft of "chanks" from these beds. On the defence being raised that "chanks" were fish, and were *feræ naturæ* and that those in question had been taken from beds in the open sea and had therefore not been taken from the possession of the complainant and could not be the subject of theft:—*Held*, that the "chanks" in question were capable of being the subject of theft.

Annakumaru Pillai v. *Muthupayal* 551

PRIVY COUNCIL—*Practice of—Decision of High Court in execution of order in Council—Appeal from such decision—Erroneous interpretation of order in Council—Expression of opinion by Judicial Committee on petition pending appeal:*

Where the High Court, in execution of an order in Council, had interpreted the order in a manner not intended, the Judicial Committee, pending an appeal from the High Court decision, expressed an opinion as to the intention of the order.

In the matter of the petition of Yarlagadda Durga Prasad Nayadu 153

PRACTICE:—*See* "ABATEMENT OF APPEAL."

PROVINCIAL SMALL CAUSE COURTS ACT—IX OF 1887, s. 16—*Small Cause suit wrongly tried on regular side—Regular appeal preferred against decree—No question of jurisdiction raised—Civil Revision Petition raising question of jurisdiction—Discretion of High Court to interfere or not, according to the merits:*

Petitioner presented this Civil Revision Petition to set aside a decree which had been passed against him by a District Munsif and upheld in the District Court, on the ground that the suit was one of a nature cognizable by a small Cause Court, whereas it had been tried as a regular suit. Petitioner (who was defendant in the suit), had raised no objection before the Munsif to the mode of trial; nor had he done so in his grounds of appeal to the District Court:—*Held*, with reference to section 16 of the

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Provincial Small Cause Courts Act, that, even assuming that the case was one of a nature cognizable by a Small Cause Court, the High Court was not bound to set aside the decrees of the lower Courts, but had a discretion to interfere or not, according to the merits of the case. *Suresh Chunder Maitra* v. *Kristo Rangini Dasi*, (I.L.R., 21 Calc., 249), approved and followed. *Ramasamy Chettiar* v. *Orr*, (I.L.R., 26 Mad., 176), not followed.

Parameshwaran Nambudiri v. *Vishn Embrandri* 478

REGISTRATION ACT—III OF 1877, s. 7—*Registration of mortgage—Interest in land—Right to redeem immoveable property mortgaged—Transfer of Property Act—IV of* 1882, *s.* 59*:*

Two documents were produced in evidence; one of which was in terms an absolute sale. This document had been registered. The other document (which was not dated) had apparently been written contemporaneously with the first, but it had not been registered. This document purported to show that the transaction between the parties was a mortgage:—*Held*, that the second document could not be received as evidence of a mortgage transaction not below Rs. 100, and that the registration of the first document, which was on the face of it an absolute and unconditional sale, could not be regarded or operate as the registration of a mortgage. Though there is nothing to prevent the whole of a mortgage transaction being reduced in any form to writing on different papers, whether attached together or detached, yet the requirements as to registration cannot be said to have been complied with if some of such papers are registered while others are left unregistered. A document which gives a person a right to redeem a mortgage on immoveable property on payment of money creates an interest in immoveable property and its registration is compulsory under section 7 of the Registration Act.

Mutha Venkatachelpati v. *Pyanda Venkatachelapati* 348

2. ——————————, **s. 17**—*Agreement to lease—Parkhast application—Endorsement sanctioning application—Communication to applicant—Document not expressed to be for over five years nor for rent exceeding Rs. 50 per annum—Necessity for registration:*

Application was made to a Devasthanam for some waste land on darkhast. The manager of the Devasthanam sanctioned the grant by endorsement on the darkhast application, and this was communicated to the applicant. The document did not in terms purport to be for a period exceeding five years, nor did the rent reserved by it exceed Rs. 50 per annum:—*Held*, that it must be taken to be an agreement to lease and, in consequence, subject to the provisions of the Registration Act as if it were a lease. But, treating it as a lease, it did not require registration under section 17 of the Registration Act. It did not in terms purport to be for a period exceeding five years nor did the rent reserved by it exceed Rs. 50 per annum. It was therefore exempted from registration by the notification of Government published under that section. The criterion for purposes of registration is what is expressed on the face of the document, not what incidents may be annexed by custom to a grant of the kind. Even though one such incident may be that the grantee is entitled to hold permanently, another would be that the tenant may relinquish the holding at the end of any fasli, and therfore before the expiration of five years.

Ramasamy Ayyar v. *Thirupathi Naik* 43

3. ——————————, **ss. 17, 49**—*Authority to adopt in writing and not contained in a will—Document not a testamentary disposition of property and not registered—Invalidity—Evidence Act I of* 1872, *s.* 91—*"Grant"—Admissibility of evidence of authority to adopt:*

In a suit for a declaration that first defendant was not the adopted son of plaintiff's deceased brother, the first defendant and his mother relied on an authority to adopt which was contained in a document which they

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contended was a will of the deceased. This document, which had never been registered, and which was the only evidence of the alleged adoption, authorised the wife to adopt, and further authorised her to put into the possession of the adopted son all the properties which the deceased got under a certain decree, and all his immoveable properties, etc.:—*Held*, that the document was not a testamentary disposition of property, within the meaning of section 3 of Act V of 1881. It was an authority to adopt and nothing else, and the direction therein to put the adopted son into possession of the property could not be construed as a divise of the property. It was simply a statement of the consequences that should legally follow on the adoption. *Mussumat Bhoobum Moyee Debia* v. *Ram Kishore Acharj Chowdhry*, (10 Moo., I.A., 279 at p. 312), referred to. The authority to adopt being in writing, and not being contained in a will, its registration was compulsory. Whether other evidence of such authority having been given could have been adduced, under section 91 of the Evidence Act—*Quære.*

Somasundara Mudali v. *Duraisami Mudaliar* 30

RELIGIOUS ENDOWMENT ACT—XX OF 1863:—*See* "LIMITATION."

RELIGIOUS ENDOWMENTS—*Hindu law—Character of appointment as head of mutt—Lunacy of office-holder—Effect on his position—Practice—Second counsel:*

Prior to 1896, first defendant in the present suit had presided over a mutt as its "Swami" or head, having been duly appointed to that office. In 1896, he became and was adjudged a lunatic. Prior to his lunacy he had nominated Vidyasamudra as his successor. In 1898, Vidyasamudra died without nominating a successor. In the same year, and after Vidyasamudra's death, a person who claimed the right to fill the office in such circumstances purported to appoint plaintiff to it. First defendant was then still alive and only died after the institution of the present suit, which was brought by plaintiff for a declaration that he had been validly appointed and for the recovery of the property belonging to the mutt:—*Held*, that plaintiff had not been validly appointed. Assuming that the person who purported to appoint plaintiff had the power to do so (which was not decided), there was no vacancy to be filled, at the date either of the appointment or of the institution of the suit. The first defendant as head of the mutt was not a mere trustee, and (in the absence of evidence of custom) had not forfeited his position by reason of his having become lunatic. The appointment relied on by plaintiff in consequence conferred no right on him. The custodian (or dharmakarta) of a temple is a mere trustee who is bound to apply the funds at his disposal in carrying out the object of the trust, such as the conduct of daily worship and the performance of ceremonies. The head of a mutt is not a mere trustee but a "corporation sole" having an estate for life in the permanent endowments of the mutt and an absolute property in the income derived from offerings, subject only to the burden of maintaining the institution. His power to alienate or charge the corpus of the endowment is limited to purposes necessary for the maintenance of the mutt, and alienations or charges will not be binding on the mutt or on his successors merely because they have been made for general religious and charitable purposes appropriate to the head of a mutt. *Sammantha Pandara* v. *Sellappa Chetti*, (I.L.R., 2 Mad., 175), commented on on this. Instances of "corporations sole" in India, both ecclesiastical and lay, considered. Appellants as well as respondents have a right to be heard by two counsel.

Vidyapurna Tirtha Swami v. *Vidyanidhi Tirtha Swami* 435

REGULATION XXV OF 1802, s. 4—*Land exempted from payment of public revenue at permanent settlement—Resumption of inam—Limitation—Exercise by Government of its prerogative of imposing assessment on land liable to be assessed—No period of limitation:*

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to itself the entire exercise of its discretion in continuing or abolishing" the exemption of such lands from liability to pay assessment to Government, and the permanent settlement of the land revenue was made excluding the said land:—*Held*, that it was competent to Government to impose a public assessment on the land. *Also*, that there is no period of limitation prescribed by any law within which alone the Government should exercise its prerogative of imposing assessment on land liable to be assessed with public revenue. *Collector of Chinglepat* v. *Kosatram Naidu*, (Second Appeal No. 1352 of 1897 (unreported)), approved.

Boddupalli Jagannadham v. *The Secretary of State for India in Council* ... 16

RENT RECOVERY ACT (MADRAS)—VIII OF 1865, s. 2—*Attachment by landholder of tenant's immoveable property more than one year after rent due—Validity:*

An attachment of a tenant's immoveable property, made more than one year after the date when the rent became due as specified in the patta tendered, is not within the time limited by section 2 of the Rent Recovery Act. *Appayasami* v. *Subba* (I.L.R., 13 Mad., 403), dissented from.

Chinnipakam Rajagopalachari v. *Lakshmidoss* 241

2. ——————————, **ss. 2, 76:**

The fact that the patta which has been tendered was a varam patta is no objection to a suit being sustained under the Rent Recovery Act by the landlord even if it be found that the proper rates were only money rates. Nor is an agreement to pay a money rent to be implied from the mere circumstance that rent has been paid in money for a series of years but at varying rates. *Kavipurapu Rama Rao* v. *Divisavalli Narasayya*, (I.L.R., 27 Mad., 417), approved. Having regard to section 76 of the Rent Recovery Act, no memorandum of objections lies against the finding of the Court of First Instance in cases under that Act. A clause in a patta requiring the tenant to be responsible for theft of crops by him or his servants is not a proper term of a tenancy under the Act, especially having regard to section 83 of the Rent Recovery Act, which provides for clandestine removal of crops.

Raja Parthasarathi Appa Row v. *Chevendra China Sundara Ramayya* ... 543

3. ——————————, **ss. 7, 9, 10, 11, 14**—*Proceedings by landlord to determine rent—Period from which limitation runs:*

The sections of the Madras Rent Recovery Act (Madras Act VIII of 1865) relating to recovery of arrears of rent apply to ascertained rents, not to rents at rates which have yet to be ascertained. In article 110 of the schedule II of the Limitation Act (XV of 1877), "arrears of rent" means arrears of ascertained rent which the tenant is under obligation to pay, and which the landlord can claim, and, if necessary, sue for:—*Held*, therefore, (reversing the decisions of the Courts in India) that where it is necessary for the landlord to take proceedings under the Madras Act VIII of 1865 to have the proper rate of rent ascertained, the period of limitation in a suit for arrears of rent runs from the date of the final decree determining the rent, and not from the close of the fasli year for which the rent is payable. *Sobhanadri Appa Rau* v. *Chalamanna*, (I.L.R., 17 Mad., 225), approved. *Sriramulu* v. *Sobhanadri Appa Rau*, (I.L.R., 19 Mad., 21), overruled. There is no distinction in this respect between cases in which, in the proceedings to ascertain the rent, the Courts have approved of the patta tendered by the landlord and those in which they have modified it.

Rangayya Appa Rao v. *Bobba Sriramulu* 14

4. ——————————, **ss. 7, 9, 72**—*Tender of patta—Landlord's right to sue:*

Where the patta which has been originally tendered prior to summary suit under section 9 of the Rent Recovery Act was one which the tenant was bound to accept, the landlord can sue on the strength of such tender alone, without any fresh tender of patta, or execution of a muchilika after

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judgment. If the patta which has been originally tendered was not such as the tenant was bound to accept and if it has been modified by a judgment in a summary suit, and if before the expiry of the fasli to which it relates the landlord has tendered the patta as amended, the landlord can also maintain a suit for rent under section 7, relying on such tender. But if no such tender has been made (and even in a case where it could not have been made by reason of the expiry of the fasli before the judgment was passed), the landlord can sue for rent only if the tenant has executed a muchilika which he was directed to execute by the judgment, or if he has refused to execute it. Though section 72 of the Rent Recovery Act provides that a certified copy of the judgment of the Collector shall have the same force and effect as a muchilika executed by the tenant himself, the tenant cannot be said to have refused to execute the muchilika unless, prior to suing for rent, the landlord has made a requisition or demand on the tenant calling upon him to execute a muchilika in accordance with the judgment then in force. *Court of Wards* v. *Darmalinga*, (I.L.R., 8 Mad., 2), dissented from. *Shunmuya Mudaly* v. *Palnati Kuppu Chetti*, (I.L.R., 25 Mad., 613), followed.

Bashyakarlu Naidu v. *Gundapaneni Subbanna* 4

5. ——————————, **ss. 7, 38, 39, 40, 78**—*Landlord's right to sell by summary process—Dependent on observance of special provisions of Act—Infringement of tenant's rights at common law where special provisions not observed—Tenant's right of action—Effect of the Statute on that right:*

Under the common law, a landholder has no right to sell his tenant's interest in the land for arrears of rent in a summary way. That right is given only by the Rent Recovery Act, and prior to exercising it the landholder must have complied with the special provisions of the Act as to tender of proper patta and exchange of patta and muchilika. Where a landholder who has not complied with these provisions summarily sells his tenant's interest in the land, he violates the tenant's right. Such violation is actionable in a Civil Court as an infringement of a common law right, and that right of action is not taken away by the Statute. The special remedy given to a tenant by section 40 of the Rent Recovery Act is cumulative, and it is open to a tenant to adopt it if he prefers it to the ordinary proceedings in a Civil Court. Though section 78 of the Rent Recovery Act only refers to the recovery of damages, the ancillary remedies of declaration and injunction would lie even if the only right to object to an attachment were that which is given by that Act. These remedies are clearly available where the right is one at common law. *Mahomed* v. *Lakshmipati*, (I.L.R., 10 Mad., 368), commented on. *Ramayyar* v. *Vedachella*, (I.L.R., 14 Mad., 441), approved. The question of limitation discussed. Where the purchaser of a tenant's interest in land takes, without demur, patta in the name of his vendor, it will not be open to him to object to that patta (in a suit for a declaration that an attachment was invalid) unless he has given timely notice to the landlord claiming that his own name should be entered in the patta. *Ekambara Ayyar* v. *Meenatchi Ammal*, (I.L.R., 27 Mad., 401), and *Sree Sankarachari Swamiar* v. *Varada Pillai*, (I.L.R., 27 Mad., 332), referred to.

Zamindar of Ettayapuram v. *Sankarappa Reddiar* 483

6. ——————————, **ss. 9, 10, 11**—*Suit to compel acceptance of patta—Provision in patta for payment of rent in kind—Power of Court to amend patta by providing for payment in money—"Rent":*

The term "rent," as used in section 11, paragraphs (1) and (2) of the Rent Recovery Act, includes rent of every description, whether payable in kind or in money. *Polu* v. *Ragavammal*, (I.L.R., 14 Mad., 52), explained. Where rent is payable in money but a patta has been tendered which provides for the payment in kind, the Court has power to amend the patta. *Mahasingavastha Ayya* v. *Gopaliyan*, (5 Mad. H.C.R., 425), approved. Whether a contract in terms to the effect that rent is payable in money but at a rate to be determined by the Court as reasonable would be a contract within the meaning of section 11 (1);—*Quære*. Rent had been paid in money from fasli 1288 to fasli 1308, at rates which had varied. On its

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being contended that the Court could find, from the mere fact of these past payments, that there was an implied contract between the parties that rent was to be payable in money at a rate to be determined by the Court:—*Held*, that such an implied contract could not be found. To warrant such a finding, the circumstances should be such as to suggest an agreement to pay at some definite rate.

Kavipurapu Rama Rao v. *Dirisavalli Narasayya* 417

7. ——————————, s. 12—*Right of tenants to relinquish their lands at end of year—"Tenants"—Rights of permanent lessees of melvaram rights of zamindar—Religious Institutions—Alienability of endowments:*

By the proviso to section 12 of the Rent Recovery Act, tenants have the right to relinquish their lands at the end of a revenue year. The defendants, by a registered deed, became permanent lessees of the melvaram rights of the plaintiff, who was a Zamindar. On the question whether the defendants were entitled to relinquish their interest under the deed, under section 12 of the Rent Recovery Act:—*Held*, that the proviso to that section was not intended to apply to persons in the position of the defendants. Though the defendants were the "tenants" of the plaintiff in the sense that they were bound to pay rent to the plaintiff yet they were not tenants in the sense in which that term is used in section 12. The defendants, being lessees of the melvaram, were farmers under an inamdar, and belonged to the class of landholders specified in section 3 of the Act. Sections 3 to 12 inclusive refer to the relations between these landholders and their tenants, and, for the purposes of section 12, the defendants were in the position, not of tenants but of landlords. *Lakshminarayana Pantulu* v. *Venkatarayanam*, (I.L.R., 21 Mad., 116), and *Ramasami* v. *Bhaskarasami*, (I.L.R., 2 Mad., 67), followed. *Subbaraya* v. *Srinivasa*, (I.L.R., 7 Mad., 580); *Appasami* v. *Ramasubba*, (I.L.R., 7 Mad., 262); *Ramachandra* v. *Narayanasami*, (I.L.R., 10 Mad., 229); *Baskarasami* v. *Sivasami*, (I.L.R., 8 Mad., 196) (so far as they proceed on the supposition that the word "tenant," as defined in section 1 of the Rent Recovery Act, is applicable to an intermediate landholder who has to pay rent to a superior landholder), dissented from. *Per* the Offg C.J. and RUSSELL, J. (after the decision of the Full Bench).—According to the Indian Common Law relating to Hindu religious institutions of the kind before the Court the landed endowments thereof are inalienable. Though proper derivative tenures conformable to custom may be created with reference to such endowments they cannot be transferred by way of permanent lease at a fixed rent, nor can they be sold or mortgaged. The revenues thereof may alone be pledged for the necessities of the institutions. *Prosanna Kumari Debya* v. *Golab Chand Baboo*, (L.R., 2 I.A., 145), referred to.

Nallayappa Pillian v. *Ambalavana Pandara Sannadhi* 465

8. ——————————, ss. 18, 24, 49—*Excessive distress—Remedy for person aggrieved:*

Though a person who is aggrieved by an excessive distress may have recourse to a suit for damages under section 49 of Act VIII of 1865, that is not his only remedy. An excessive distress which is forbidden by section 24 of that Act is a ground on which an appeal against a distraint may be filed under section 18, and if the distress is proved to be excessive the Collector may allow the appeal and set aside the distraint.

Rajah Chelikani Venkata Gopala Rayanim Garu v. *Narayanasami Reddi* ... 210

9. ——————————, ss. 18, 36, 40—*Insufficient notice of sale—Onus of showing that requirements of Act have been complied with—Irregularity—Civil Procedure Code—Act XIV of* 1882, *s.* 283—*Relief "in respect of the same matter"—Joinder of causes of action and parties—Suit against purchasers of different items at invalid sale:*

Where the validity of a sale of land for arrears of rent is in question it is for the landlord who seeks to avail himself of the special procedure by way of distress provided for by the Act to show that the requirements of the Act have been complied with. Insufficient notice of sale is not a mere irregularity curable under sections 36 and 40 of the Rent Recovery Act. The provisions of section 36 cannot be imported into section 40 so as to make the former applicable to a sale of land distrained for arrears of rent. Section 36 introduces an exception to the general rule that, *primâ facie*, non-compliance with the requirements of the Act will vitiate a sale; and this exception is expressly limited to the case of moveable property. The provision in section 18 as to the length of notice is that in fixing the day of sale, not less than seven days must be allowed. If a notice be published on the 16th announcing that a sale will take place on 22nd the sale will be bad, even though it may take place, in fact, on 23rd. A suit against a number of purchasers of different items of land distrained and subsequently sold under the Rent Recovery Act for a declaration that the sale was invalid for want of proper notice is not bad for misjoinder of parties and of causes of action. Though, in a sense, every item sold constitutes a separate sale, the "matter" is the same, the sale being of distrained property, under the same notification and in respect of the same arrears. The proceedings in which the various items are sold are one and the ground on which the validity of the sale is impugned is the same in each case. The same defect vitiates the whole proceeding and is the common ground of attack. The cause of action, namely, the wrongful sale, is the same as against all the defendants. When a suit is brought under section 283 of the Code of Civil Procedure, the attachment (and not the making of the order) constitutes the cause of action; and different purchasers of the attached property may be properly joined as defendants in the same suit.

Dorasamy Pillai v. *Muthusamy Mooppan* 94

10. ——————————, s. 49—*Summary suit for damages for wrongful distraint—No proper patta tendered—Jurisdiction of Summary Court:*

A tenant sued his landlords summarily under section 49 of the (Madras) Rent Recovery Act for cancellation of a distraint and for restoration of the property distrained or its value. It appeared that there were three landlords who owned the village and that the patta had been tendered by only two of them for their shares, and was consequently not a proper one:—*Held*, that the defendants were landlords who, had they tendered a proper patta, would have been entitled to distrain under the Act. The fact that the patta which had been tendered was not a proper one did not cause the proceeding taken by them under the provisions of the Act to be a proceeding not taken under colour of the Act. *Held*, also, that the suit was one for damages.

Velagaleti Ramakrishnayya v. *Suraneni Papayya Appa Row* 430

11. ——————————, s. 72—*Decision of Revenue Court on terms of patta—Confirmation on appeal to District Court—Subsequent suit for rent*—Res judicata:

The decision of a Revenue Court in a suit brought to settle the terms of the patta for a certain fasli, that decision being confirmed on appeal by a District Court, is final and binding in all Courts in respect of rent recoverable for that fasli. *Valliammalachie* v. *Sree Gulam Gouse Sahib*, (Appeal No. 118 of 1900 (unreported)), followed.

Vedachala Gramani v. *Boomiappa Mudaliar* 65

RES JUDICATA:

The decision of a Revenue Court in a suit brought to settle the terms of the patta for a certa n fasli, that decision being confirmed on appeal by a District Court, is final and binding in all Courts in respect of rent recoverable for that fasli. *Valliammalachie* v. *Sree Gulam Gouse Sahib*, (Appeal No. 118 of 1900 unreported), followed.

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REVENUE RECOVERY ACT—(MADRAS) ACT II OF 1864, ss. 1, 2, 3, 26 and 42—*Land Revenue—Tax levied on trespasser—"Prohibitory assessment"—Legality:*

Plaintiff had built a pial and shed to his house upon land which was part of a public road. Government thereupon imposed what is known as a "prohibitory assessment" and collected it from plaintiff, requiring him to remove his pial and shed and giving him notice that in future an enhanced rate would be charged. In a suit by plaintiff *inter alia* to recover the amount of the tax which he had paid:—*Held*, that the impost was not land revenue and the demand therefor as if it were such revenue was unauthorised and plaintiff was entitled to recover. Plaintiff possessed no interest in the land such as would constitute him a "landholder" within the meaning of the Revenue Recovery Act. He was improperly in possession of part of the surface of a public road, over which his right was merely one of passage; and the erection by him of the buildings was a wrongful act and a trespass. Government had no right to impose any assessment on him for such occupation. *Per* Sir SUBRAHMANIA AYYAR (*Offg. Chief Justice*).—The provisions of the Revenue Recovery Act and of Madras Regulation XXVI of 1802 show that land in respect of which land revenue is exigible is vested in some person or persons other than the Crown; and that the Crown possesses nothing more than a charge (though a first charge) in respect of the revenue due to it, upon the interest of such person or persons, realizable by sale thereof. They preclude the supposition that any Crown demand is recoverable as land revenue unless it be something due from one who is a landholder as defined by the Act. *Per* BHASHYAM AYYANGAR, J.—Civil Courts have jurisdiction to decide whether or not the land or person is at all under liability to be assessed for land revenue. If such liability does exist, the rate or amount of assessment fixed by Government cannot be questioned or revised by a Civil Court. In the case of all lands, any demand which may be made on behalf of the Crown on the occupant with the avowed object of compelling him to surrender or vacate the land, is not the imposition of land revenue, and the machinery provided by the Revenue Recovery Act for the realization of arrears of revenue cannot be resorted to for enforcing such a demand.

Madathapu Ramaya v. *The Secretary of State for India* 386

2. ——————————————————————, **s. 32**—*Purchaser of land at Revenue sale—Liability to pay tenant for improvements before obtaining possession:*

Where a kanom was granted for Rs. 5, the jenmi agreeing to pay the tenant the value of his improvements, and it was not alleged that the rent reserved was lower than the usual rent for such land, and the object of the lease was to bring waste land into cultivation:—*Held*, that, having regard to the small amount of the kanom, the transaction must be regarded as in substance a lease; and the engagement made by the jenmi to pay the tenant the value of his improvements was binding on the Collector under section 32 of (Madras) Act II of 1864. A purchaser of the land at a Revenue sale was therefore bound to pay compensation to the tenant for improvements before he could obtain possession.

Meppatt Kunhamad v. *Chathu Nair* 373

REVIEW:—*See* "CIVIL PROCEDURE CODE, ss. 540, 623."

RIPARIAN OWNERS:—*See* "INJUNCTION."

SALE IN EXECUTION OF DECREE—*Sale of "right, title and interest" of holder of impartible zamindari and member of joint family governed by Mitakshara law—Subsequent reversal of interpretation of law under which sale was held—Change in nature of interest owned by holder of impartible estate—Change of law whether retrospective—Effect of sale under new interpretation of law:*

In execution of a decree against the holder (by custom of primogeniture) of an impartible zamindari who was a member of a joint family governed by the Mitakshara law, his "right, title and interest" in the estate was

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sold in 1876. By the law as then interpreted such a holder had only a limited interest, and except for special justifiable causes (of which the debt on which the above decree was obtained was not one) no power of alienation beyond his life-time. Subsequently this interpretation of the law was reversed by the Judicial Committee in the cases of *Sartaj Kuari* v. *Deoraj Kuari* (L.R., 15 I.A., 51; I.L.R., 10 All., 272) and *Rao Venkata Surya Mahipati* v. *Court of Wards* (L.R., 26 I.A., 83; I.L.R., 22 Mad., 383) which decided that the holder of an impartible estate had an absolute interest in it, and made it alienable unless a custom against alienation were proved. In a suit by a purchaser at the sale against the successor by survivorship to the judgment-debtor for possession of the subject of sale, on the ground that the plaintiff had purchased an absolute interest in it:—*Held*, that the reversal of the previously accepted interpretation of the law did not displace its application to the contract contained in the certificate of sale of 1876, the parties to which were bound by the law as then understood, and that only the life-interest of the then holder passed by the sale.

Abdul Aziz Khan v. *Appayasami Naicker* 131

SALVAGE—*Compensation for rescuing vessel—Ingredients—Mode of assessing reward:*

Salvage is not always a mere compensation for work and labour. The interests of commerce, the benefit and security of navigation and the lives of the seamen, render it proper to estimate a salvage reward upon a more enlarged and liberal scale. The ingredients of a salvage service are enterprise in the salvors, the degree of danger and distress from which the property is rescued, the degree of labour and skill displayed and the value of the thing saved. In a claim for salvage it was shown that the salvors had not risked their lives, that the vessel saved had drifted with several men on board fourteen miles from harbour, where she had broken loose from her moorings, had no steering gear on board, and only one sail, which those on board (only two of whom were sailors) could not set, and the evidence showed that but for the assistance rendered by the salvors the vessel would have drifted out to sea and in all probability would have foundered. It was shown that a boat and some catamarans had been sent out by the owner of the vessel, but the finding of the Court was that it was most doubtful if the vessel could have been brought back to harbour by the party thus sent out, and that the danger from which she was rescued was very great, and that she was in imminent peril. The time occupied in the actual salving was about eight hours, but the salvors lost about a day in all; the skill displayed was considerable, and the value of the vessel salved was found to be Rs. 10,000:—*Held*, that plaintiffs were entitled to Rs. 2,000 for the salvage services they had rendered.

The Clan Line Steamers v. *'The Balces'* 127

SPECIFIC RELIEF ACT I OF 1877, s. 42—*Failure to claim consequent relief—Property in* custodia legis *plaintiff being the custodian:*

Plaintiff sought for a declaration of his right to property without asking that the property should be delivered to him. The property had belonged to S deceased. Prior to the death of S, who was a minor, proceedings had been taken for the appointment of a guardian for him under the Guardian and Wards Act. Pending those proceedings the District Court appointed plaintiff Receivor and placed him in possession of the property, removing the minor's mother, the present defendant, from the charge thereof. The High Court reversed that order and directed that possession of the property should be handed back to the defendant. This order had not been carried out to any extent at the date of suit. On the objection being raised that the suit was not maintainable by reason of section 42 of the Specific Relief Act:—*Held*, that the suit was maintainable. The possession of the property was, at the time, neither with the defendant nor with the plaintiff, it being in *custodia legis* and in the hands of an officer of the Court and it being a mere accident that that officer was the plaintiff.

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Inasmuch as the defendant was not in possession, plaintiff could not, as against her, have consequential relief, and nothing more was required to be done to secure to the plaintiff all his rights than to obtain an order of the Court enabling him to retain possession in his own right.

Vedanayaga Mudaliar v. *Vedammal* 591

STAMP ACT—I OF 1879, s. 34—*Instrument admissible in evidence on payment of duty and penalty—Promissory-note—Unconditional undertaking to pay money :*

A letter was written in the following terms:—"In addition to Rs. 115 already received, Rs. 385 is also required. Please send it by the bearer Streenevasan. The amount will be returned with interest at 12 per cent. without delay":—*Held*, that there was no unconditional undertaking on the face of the document to pay the money; that the undertaking was conditional on the amount being remitted as requested; and that it was not a promissory-note within the meaning of that term as used in section 34 of the Stamp Act, 1879. *Channamma* v. *Ayyanna*, (I.L.R., 16 Mad., 283), dissented from. *Narayanasami Mudaliar* v. *Lokambalammal*, (I.L.R., 23 Mad., 156 (footnote)), approved.

Bharata Pisharodi v. *Vasudevan Nambudri* 1

2. ——————**II OF 1889, s. 26, sched. I, Art. 57 (b)** - *Security for fulfilment of duties as cashier—Duty payable :*

In 1895, first defendant (for himself and on behalf of his sons) executed a mortgage in favour of Ragava Chetty, who, in 1896, assigned it to McDowell and Company. In 1899, first defendant (for himself and on behalf of his sons), McDowell and Company, and the present plaintiffs entered into another agreement whereby the former mortgage was transferred by McDowell and Company to the plaintiffs, a company with limited liability and the instrument also related to the accountability of the first defendant, who was their cashier, to the plaintiffs, and constituted a mortgage executed as security for the due fulfilment of his duties as cashier, and for the repayment of any sum that first defendant might be found liable for, as cashier, to an extent not exceeding Rs. 6,000. At the date of suit, first defendant was liable to plaintiffs in a sum of over Rs. 8,000, which plaintiffs now claimed:—*Held*, that section 26 of the Stamp Act of 1899 had no application to this case, the transfer of the mortgage being liable to a fixed duty under article 62 (*c*) of schedule I of the Act, and the duty payable in respect of the other portion of the instrument being also a fixed sum under article 57 (*b*). Though the latter instrument contained a promise by first defendant to pay plaintiffs the amount payable by him under the previous mortgage, this was not a fresh contract, entered into for consideration, but must be understood to operate only as an admission that what McDowell and Company had purported to transfer was a subsisting debt due by first defendant. As the sustenance of the present claim did not involve giving effect to the promise in the later document, the claim was unaffected by it even if it could have been treated as one requiring the payment of an *ad valorem* duty.

McDowell & Co. v. *Ragava Chetty* ... ...

TANJORE CUSTOM—*Free occupation of manaikats belonging to mirasidars by artizans—Conditional on rendering services :*

There is a practice in the Tanjore district by which purakudis or artizans are allowed to occupy manaikats belonging to mirasidars, free of rent, so long as they cultivate the lands of the mirasidars or render them services in other ways.

Lakshmana Padayachi v. *Ramanathan Chettiar* ... ...

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TRANSFER OF PROPERTY ACT—IV OF 1882, ss. 58 (b), 67, 68, 98—*Combination of simple and usufructuary mortgage—Personal covenant to pay—Right of mortgagee to decree for mortgage money and for sale :*

A mortgage deed, after acknowledging receipt of the consideration and mortgaging the land with possession (the usufruct, apparently, being taken in lieu of interest), contained the following proviso as to redemption:—"Thereafter, on [naming a date] on paying the [the amount advanced] we shall redeem our land. If on the date so fixed the amount be not paid and the land recovered back, in whatever year we may pay [the amount advanced] on [naming the date] of any year, then you shall deliver back our lands to us":—*Held*, that this contained a promise by the mortgagor to pay on the date named, and that the mortgagee was entitled to a decree for the mortgage money, under clause (*a*) of section 68 of the Transfer of Property Act, and to a decree for sale under section 67, the right to cause the mortgaged property to be sold in default of payment being implied within the meaning of section 68 (*b*).

Kangaya Gurukal v. *Kalimuthu Annavi* 526

2. ——————————————————, **s. 59**—*Registration of mortgage—Interest in land—Right to redeem immoveable property mortgaged :*

Two documents were produced in evidence; one of which was in terms an absolute sale. This document had been registered. The other document (which was not dated) had apparently been written contemporaneously with the first, but it had not been registered. This document purported to show that the transaction between the parties was a mortgage:—*Held*, that the second document could not be received as evidence of a mortgage transaction not below Rs. 100, and that the registration of the first document, which was on the face of it an absolute and unconditional sale, could not be regarded or operate as the registration of a mortgage. Though there is nothing to prevent the whole of a mortgage transaction being reduced in any form to writing on different papers, whether attached together or detached, yet the requirements as to registration cannot be said to have been complied with if some of such papers are registered while others are left unregistered. A document which gives a person a right to redeem a mortgage on immoveable property on payment of money creates an interest in immoveable property and its registration is compulsory under section 7 of the Registration Act.

Mutha Venkatachelapati v. *Pyanda Venkatachelapati* 348

3. ——————————————————, **ss. 86, 87**—*Order absolute for foreclosure without notice to defendant in foreclosure suit—Application to set order aside :*

A plaintiff in a foreclosure suit obtained a decree for foreclosure under section 86 of the Transfer of Property Act, and, the time limited for redemption by the defendant having expired without being extended, the plaintiff obtained, under section 87, but without notice to the defendant, an order absolute debarring the defendant from redeeming, and also for delivery of possession of the mortgaged property. On the contention being raised, on appeal, that the order was null and void for want of notice to the defendant:—*Held*, that the view of the majority of the Court in *Mallikarjunadu Setti* v. *Lingamurti Pantulu*, (I.L.R., 25 Mad., 244), which related to proceedings under section 89, was applicable to proceedings under section 87, and that such proceedings are proceedings in execution of the decree passed under section 86. In the present case, the application had been made within one year of the date of the decree, and, in consequence, under section 248 of the Code of Civil Procedure, no notice was necessary to the defendant. *Narayana Reddi* v. *Papayya*, (I.L.R., 22 Mad., 133), proceeds upon the view that the defendant could apply for an extension of the time for redemption only if and when the plaintiff applies for an order absolute under the second paragraph of section 87—a view which has been dissented from by the Full Bench in *Vedapuratti* v. *Vallabha Valiya Rajah* (I.L.R., 25 Mad., 300).

Pandu Prabhu v. *Juje Lobo* 4

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4. ——————————————————, s. 99—*Mortgage of land—Subsequent sale of equity of redemption in execution of decree in favour of third party—Purchase of equity of redemption by mortgagee—Subsequent suit by mortgagor to redeem—Maintainability:*

In 1882, plaintiff's father mortgaged certain immoveable property belonging to the tarwad now represented by plaintiff; and, subsequently, the mortgagee purchased the equity of redemption of the lands at a sale which was held in execution of a decree in favour of a third party. Both the mortgage and the sale were binding on the tarwad. Plaintiff now sued to redeem the lands contending that she was entitled to do so inasmuch as the sale of the equity of redemption had not been effected in a suit for sale by the mortgagee on his mortgage:—*Held*, that plaintiff was not entitled to redeem. *Erusappa Mudaliar* v. *Commercial and Land Mortgage Bank, Limited*, (I.L.R., 23 Mad., 377), not followed.

Ikkotha v. *Chakkiamma* 428

5. ——————————————————, s. 108—*Removal of buildings during continuance of lease—Rule of common law in India—Buildings erected by tenant:*

Certain land was leased in 1875 to a tenant for twenty years it being recited in the lease that the tenant took a lease of the land for constructing a building thereon for the purposes of trade. A building was erected, and it was not contended that it was of a kind different from or of a value out of proportion to what was in the contemplation of the parties when the lease was entered into. At the expiration of the term, the lessor sued to recover the land, but he did not claim that the tenant was no longer at liberty to remove the building (though this had not been removed during the continuance of the lease). On its being contended that the tenant was entitled to be paid the value of the building which he had erected on the land before he could be evicted:—*Held*, that it is established that the maxim '*quicquid inædificatur solo solo cedit*' does not generally apply in India; and even in cases to which the English law as such was applicable, the Indian Legislature, by Act XI of 1855, departed from that maxim in the cases specified in section 2 of that Act (corresponding to section 51 of the Transfer of Property Act). Both under the Hindu and the Muhammadan law (as well as under the common law of India) a tenant who erects a building on land let to him can only remove the building and cannot claim compensation for it on eviction by the landlord. *Mahalatchmi Ammal* v. *Palani Chetti*, (6 M.H.C.R., 245), discussed.

Ismai Kani Rowthan v. *Nizarali Sahib* 211

VIZAGAPATAM AGENCY RULES—RULE XXXI—*Right to petition Government—Rule of a substantive character—Revision in execution proceedings:*

Rule XXXI of the Agency Rules for the District of Vizagapatam is of a substantive character and provides for revision in execution and other petitions in regard to which no right of appeal has been given. Rule XXXI is not *ultra vires*.

Maharaja of Jeypore v. *Sri Niladevi Pattamahadevi* 109

THE INDIAN LAW REPORTS,

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APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Benson, Mr. Justice Bhashyam Ayyangar and Mr. Justice Russell.

1903. August 5. October 16.

BHARATA PISHARODI (PLAINTIFF), APPELLANT,

v.

VASUDEVAN NAMBUDRI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Stamp Act—I of 1879, s. 34—Instrument admissible in evidence on payment of duty and penalty—Promissory-note—Unconditional undertaking to pay money.

A letter was written in the following terms:—"In addition to Rs. 115 already received, Rs. 385 is also required. Please send it by the bearer Streenevasan. The amount will be returned with interest at 12 per cent. without delay":

Held, that there was no unconditional undertaking on the face of the document to pay the money; that the undertaking was conditional on the amount being remitted as requested; and that it was not a promissory-note within the meaning of that term as used in section 34 of the Stamp Act, 1879.

Channamma v. *Ayyanna*, (I.L.R., 16 Mad., 283), dissented from.

Narayanasami Mudaliar v. *Lokambalammal*, (I.L.R., 23 Mad., 156 (foot-note)), approved.

SUIT for money. Plaintiff claimed Rs. 680 on two documents, the first of which was set out as follows in the District Munsif's judgment:—

"Appu must have told you that Rs. 500 is required to buy some land. Rs. 115 is required immediately. Please send that sum by the bearer Appu *alias* Streenivasan taking his acknowledgment underneath. The money will be returned with 12 per cent.

* Second Appeal No. 1383 of 1901, presented against the decree of T. Venkataramaiya, Subordinate Judge of South Malabar at Palghat, in Appeal Suit No. 243 of 1901, presented against the decree of T. A. Ramakrishna Ayyar, District Munsif of Nedunganad, in Original Suit No. 360 of 1899.

BHARATA PISHARODI v. VASUDEVAN NAMBUDRI.

per annum interest or a proper document will be executed after receiving the remaining sum." The second was thus set out by the Munsif.--"In addition to Rs. 115 already received, Rs. 385 is required. Please send it by the bearer Streenivasan *alias* Appu taking his acknowledgment below. The amount will be returned with interest 12 per cent. per annum without delay." The District Munsif held that the first document was an agreement because it contained a promise to execute a proper document afterwards, and he admitted it in evidence after levying stamp duty and penalty (it being unstamped). He, however, on the authority of *Channamma* v. *Ayyanna*(1), held that the second document was inadmissible in evidence as it was a promissory-note, and it was, accordingly not marked or placed on the record. He refused to act on the first document as it had not been written in plaintiff's presence, and as the second document was inadmissible in evidence the remainder of the claim also failed. He dismissed the suit, and his order of dismissal was upheld by the acting Subordinate Judge on appeal, who also relied on *Channamma* v. *Ayyanna*(1).

Plaintiff preferred this second appeal.

J. L. Rosario for appellant.

K. P. Govinda Menon for first respondent.

The case first came before Subrahmania Ayyar and Moore, JJ.

The Court made the following

ORDER OF REFERENCE TO A FULL BENCH.—At the hearing of this second appeal before us a question has been raised as to whether the following letter, dated the 6th November 1896, is a promissory-note or not.--"In addition to Rs. 115 already received Rs. 385 is also required. Please send it by the bearer Streenivasan *alias* Appu taking his acknowledgment below. The amount will be returned with interest at 12 per cent. without delay." The District Munsif and the Subordinate Judge (on appeal) have, on the strength of the decision in *Channamma* v. *Ayyanna*(1), decided that this letter is a promissory-note. We dissent from this view and are in favour of the contrary opinion as expressed in the following cases where similar letters are dealt with,—*Narayanasami Mudaliar* v. *Lokambalammal*(2) and *Dhond Bhat Narhar Bhat* v. *Atmaram Moreshvar*(3).

(1) I.L.R., 16 Mad., 283. (2) I.L.R., 23 Mad., 156 (foot-note).
(3) I.L.R., 13 Bom., 669.

BHARATA PISHARODI v. VASUDEVAN NAMBUDRI.

As in our opinion the case of *Channamma* v. *Ayyanna*(1) was wrongly decided, we refer for the opinion of a Full Bench the question as to whether the letter set forth in this reference is a promissory-note within the meaning of that term as used in section 34 of Act I of 1879.

The case came on for hearing before the Full Bench, constituted as above, in due course.

J. L. Rosario for appellant.

K. P. Govinda Menon for first respondent

OPINION.—It is brought to our notice, that the words "taking his acknowledgment below" do not exist in the document which gave rise to the reference, and we deal with the question on the footing that these words are not in the document. There is no unconditional undertaking on the face of the document to pay the money. It is clear on the face of the document that the undertaking is conditional on the amount being remitted as requested. The document is, no doubt, similar to that in the case of *Channamma* v. *Ayyanna* (1), but we are unable to follow that decision. We think that the case of *Narayanasami Mudaliar* v. *Lokambalammal*(2) is correctly decided.

Following that decision and the decision of the Division Bench of three Judges in *Dhond Bhat Narhar Bhat* v. *Atmaram Moreshvar*(3), we are of opinion that the document under reference is not a promissory-note within the meaning of that term as used in section 34, Act I of 1879.

The second appeal coming on for final hearing after the expression of opinion of the Full Bench, the Court delivered the following

JUDGMENT.—We set aside the decrees of both Courts and send back the suit to the District Munsif for trial on the merits in all the issues.

(1) I.L.R., 16 Mad., 283. (2) I.L.R., 23 Mad., 156 (foot-note).
(3) I.L.R., 13 Bom., 669.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Benson, Mr. Justice Bhashyam Ayyangar and Mr. Justice Russell.

1903. October 13, 16.

BASHYAKARLU NAIDU (PLAINTIFF), PETITIONER IN ALL CASES,

v.

GUNDAPANENI SUBBANNA (DEFENDANT), RESPONDENT IN C.R.P. No. 492 of 1902.*

Rent Recovery Act (Madras)—VIII of 1865, ss. 7, 9 and 72—Tender of patta—Landlord's right to sue.

Where the patta which has been originally tendered prior to summary suit under section 9 of the Rent Recovery Act was one which the tenant was bound to accept, the landlord can sue on the strength of such tender alone, without any fresh tender of patta, or execution of a muchilka after judgment.

If the patta which has been originally tendered was not such as the tenant was bound to accept and if it has been modified by a judgment in a summary suit, and if before the expiry of the fasli to which it relates the landlord has tendered the patta as amended, the landlord can also maintain a suit for rent under section 7, relying on such tender.

But if no such tender has been made (and even in a case where it could not have been made by reason of the expiry of the fasli before the judgment was passed), the landlord can sue for rent only if the tenant has executed a muchilka which he was directed to execute by the judgment, or if he has refused to execute it.

Though section 72 of the Rent Recovery Act provides that a certified copy of the judgment of the Collector shall have the same force and effect as a muchilka executed by the tenant himself, the tenant cannot be said to have refused to execute the muchilka unless, prior to suing for rent, the landlord has made a requisition or demand on the tenant calling upon him to execute a muchilka in accordance with the judgment then in force.

Court of Wards v. *Darmalinga*, (I.L.R., 8 Mad., 2), dissented from.

Shunmuga Mudaly v. *Palnati Kuppu Chetti*, (I.L.R., 25 Mad., 613), followed.

SUITS to recover Rs. 48-3-1 being cist due for fasli 1308. The District Munsif's judgment was as follows:—

Defendant objects *inter alia* that the plaintiff's suit cannot be maintained as no proper patta as amended by the Collector has been tendered. The question is—Is the suit maintainable without

* Civil Revision Petitions Nos. 492 to 494 of 1902 presented under section 25 of Act IX of 1887, praying the High Court to revise the decrees of R. Hanumanta Row, District Munsif of Ellore, in Small Cause suits Nos. 195, 196 and 967 of 1902.

a proper patta as amended by the Collector being tendered? Admitting that he had recourse to a summary suit for the acceptance, by defendant, of a patta for the suit fasli, the plaintiff does not pretend to state in his plaint that he had tendered an amended patta which the defendant is bound to accept. He cannot therefore seek to enforce the terms of tenancy under section 7 of the Rent Recovery Act. The suit is therefore dismissed with costs.

Plaintiff filed these Civil Revision Petitions. The petitions first came before Mr. Justice Benson, who made the following

ORDER OF REFERENCE TO A FULL BENCH.—The decision of the District Munsif is opposed to the decision in the case of *Court of Wards* v. *Darmalinga*(1), and this decision has not been overruled generally by the Full Bench decision in *Shanmuga Mudaly* v. *Palnati Kuppu Chetti*(2) but only as regards cases in which it is sought to eject the tenant. The reasoning in the Full Bench Case, however, seems to me to apply to cases like the present, in which the suit is for rent, equally with cases in which ejectment is sued for.

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

S. Gopalaswami Ayyangar and *M. R. Ramakrishna Ayyar* for petitioner.

N. Rajagopala Chariar and *V. Ramesam* for counter-petitioners.

JUDGMENT.—If the patta which had been originally tendered before the summary suit under section 9 of the Rent Recovery Act was one that the tenant was bound to accept, the landlord might, by virtue of section 7, sue for the recovery of rent on the strength of such tender alone, without any fresh tender of a patta, or the execution of a muchilka after judgment.

But if the patta originally tendered was not such as the tenant was bound to accept, and if it had been modified by the judgment in the summary suit, and if before the expiry of the fasli to which the patta relates the landlord tendered the patta as amended, he could also maintain a suit for rent under section 7, relying on such tender. If, however, no such tender was made (and even in cases where it could not have been made by reason of the expiry of the fasli before the judgment was passed), the landlord could sue

(1) I.L.R., 8 Mad., 2. (2) I.L.R., 25 Mad., 613.

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for rent only if the tenant had executed a muchilka which he was directed to execute by the judgment, or if he had refused to execute the same.

In the latter case section 72 provides that the certified copy of the judgment of the Collector shall have the same force and effect as a muchilka executed by the tenant himself; but we are clearly of opinion that he cannot be said to have refused to execute the muchilka unless before suing for rent the landlord made a requisition or demand on the tenant calling upon him to execute a muchilka in accordance with the judgment then in force.

We dissent from the contrary view taken in *Court of Wards* v. *Darmalinga*(1).

The view we have taken is, we think, in accordance with that taken in the recent Full Bench decision of this Court in *Shanmuga Mudaly* v. *Palnati Kuppu Chetty*(2) although the proceedings in that case related to the ejectment of the tenant in execution of a decree under section 10.

In C.R.P. No. 494, there is no allegation of any such demand as is required by law, and there is therefore no ground for revision in that case. It is dismissed with costs.

In C.R.P. Nos. 492 and 493, however, the plaint distinctly alleges such demand and refusal. We therefore set aside the decrees of the District Munsif in these two cases and remand the suits for disposal according to law.

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(1) I.L.R., 8 Mad., 2. (2) I.L.R., 25 Mad., 613.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

KOTHANDARAM RAVUTH (THIRD DEFENDANT), APPELLANT,

1903. March 18, 19.

v.

MURUGESA MUDALIAR AND ANOTHER (PLAINTIFF AND FIRST DEFENDANT), RESPONDENTS.*

Indian Insolvency Act—11 & 12 *Vict., cap.* 21—*s.* 7—*Dismissal of petition after vesting order made—Composition deed made prior to dismissal—Validity.*

Two persons applied at Madras to be declared insolvents and an order was made whereby all their properties vested in the Official Assignee. They then entered into a deed of composition for the benefit of their creditors, four persons being appointed trustees under the deed. The insolvents' petition was subsequently dismissed on its being represented to the Court that the creditors had agreed to the deed of composition and one of the creditors then attached the insolvents' property. In support of this creditor's right to do this it was contended (in a suit brought by one of the trustees under the deed against the creditor) that inasmuch as the deed of composition had been executed after the vesting order and prior to the dismissal of the insolvents' petition, it was inoperative to transfer the property comprised in the deed to the trustees, and that it could not, in consequence, prevail against the attachment:

Held, that the provision in section 7 of the Insolvency Act that in case, after the making of any vesting order, the petition should be dismissed, the vesting order shall become null and void, has the effect of re-vesting the property in the insolvent retrospectively from the date of the vesting order. Independently, therefore, of section 43 of the Transfer of Property Act the composition deed operated to vest the property in the trustees, and the creditor had no right to attach it.

Ramasami Kottadiar v. *Murugesa Mudaliar*, (I.L.R., 20 Mad., 452), approved.

SUIT for a declaration that certain properties were trust properties under a composition deed and that first defendant was not entitled to attach them and bring them to sale in execution of his decree. Defendant had obtained a decree against Venkatesa Tawker and Tuljaram Tawker. The Tawkers failed, and on 11th January 1888 applied to the High Court at Madras to be declared insolvents. An order was thereupon passed (according to the

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* Second Appeal No. 1138 of 1900 presented against the decree of G. W. Elphinstone, District Judge of Trichinopoly, in Appeal Suit No. 3 of 1900, presented against the decree of T. A. Krishnaswami Ayyar, District Munsif of Trichinopoly, in Original Suit No. 251 of 1896.

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plaint) whereby all the properties of the insolvents were vested in the Official Assignee. On 17th December 1888, a deed of composition was entered into for the benefit of the creditors, under which all the properties of the insolvents were transferred to four trustees, of whom plaintiff was one. First defendant was a party to the deed of composition and his judgment-debt was included in it. Upon its being represented to the Insolvency Court that this deed had been completed the vesting order was cancelled. The trustees had been managing the estate for the benefit of the creditors, but the first defendant, disregarding the terms of the deed, attached the properties of the insolvents, under his decree. Plaintiff had presented a claim petition but it had been disallowed, so the present suit was brought. Defendants Nos. 2 and 3 were added as the latter had purchased the properties at a sale held in execution of first defendant's decree. The District Munsif made the declaration prayed for, and the District Judge confirmed it on appeal.

Third defendant preferred this second appeal.

V. Krishnasami Ayyar and *A. S. Balasubrahmania Ayyar* for appellant.

T. V. Seshagiri Ayyar for first respondent.

V. Ramesam for second respondent.

JUDGMENT.—The question which has been principally argued in support of this Second Appeal is that the composition deed, to which among others the appellant was a party and which was executed after the order of the Insolvency Commissioner in the High Court was passed and before the dismissal of the Insolvents' petition and the re-vesting order, is inoperative to transfer the property comprised in the composition deed to the plaintiff and other persons appointed as trustees and that it cannot therefore prevail against the attachment made by the appellant, though such attachment was made subsequent to the composition deed.

Having regard to section 7 of the Indian Insolvency Act, 1848, we think that this argument is untenable. That section provides that in case, after the making of any vesting order, the insolvents' petition should be dismissed, the vesting order shall from and after such dismissal become null and void, subject however to the condition that all acts done by the Official Assignee prior to the dismissal of the petition shall be good and valid, a saving which would be unnecessary if the re-vesting had not retrospective effect. We may observe that the section does not provide that the estate shall

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re-vest in the insolvent without any conveyance or assignment by the Official Assignee though a provision is made in the earlier part of the section for the vesting of the property in the Official Assignee without any conveyance or assignment by the insolvent. In our opinion the use of the phrase 'null and void' has the effect of re-vesting the property in the insolvent retrospectively from the date of the vesting order, and provision is therefore made for validating all acts done by the Official Assignee in the interval between the date of the vesting order and the dismissal of the insolvents' petition.

The view which we take of section 7 is in accordance with that taken by a division bench of this Court in *Ramasami Kottadiar* v. *Murugesa Mudali*(1).

Independently, therefore, of section 43 of the Transfer of Property Act the composition deed will be operative to vest the property in the trustees.

The attachment therefore was rightly raised on a claim made by the plaintiff as trustee under the composition deed. The plaintiff is the only trustee now alive except one who had renounced the trusteeship without the intervention of the Court in accordance with a power contained in the trust deed. It is clear that section 244 of the Civil Procedure Code is no bar to this suit.

The second appeal therefore fails and is dismissed with costs of the first respondent.

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(1) I.L.R., 20 Mad., 452.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1903. March 23.

HAYATH BIHIMASHAHEBA (PLAINTIFF), APPELLANT,

v.

SYAHSA MEYA (DEFENDANT), RESPONDENT.*

Mahomedan Law—Partition of father's estate between brother and minor sister—Sister represented by husband—Debt owing by husband set off against amount due to his wife—Subsequent suit for entire share—Scope of guardianship—Validity of guardian's act.

Plaintiff's husband had, on the occasion of her marriage, sent her father Rs. 938 for her benefit, which sum was entered in the father's accounts to plaintiff's credit. The father died, and plaintiff's brother, the defendant, entered the same amount to her credit. A partition then took place between plaintiff and her brother, in which plaintiff, being a minor, was represented by her husband. It was found that the husband owed the estate Rs. 1,700, whilst the estate owed him Rs. 400, and the net sum due by him was, with the minor plaintiff's consent, set off against the sum due by the estate to the plaintiff, and the balance still due by the husband was allotted to plaintiff as a portion of her share in the estate. On a suit being filed by the plaintiff (after attaining her majority) for the Rs. 938:

Held, that it was beyond the scope of her husband's duty, though he might have been plaintiff's guardian during her minority, to set off a debt due to her from the estate against a debt due by himself to it, and that the defendant could not rely on that transaction as binding on the plaintiff. Nor did it make any difference that the plaintiff, while a minor, assented thereto. The transaction was really in the nature of a contract and the fact that the minor was privy to it could not bind her.

SUIT for money. Plaintiff sued her brother for Rs. 938–1–3, due to her from the estate of her father, a Muhammadan. On the occasion of plaintiff's marriage (she being then a minor), her husband sent to her father money and other property to the value of Rs. 938–1–3. Her father entered this in his accounts to the credit of the plaintiff, and on his death the defendant, his son, entered it to the credit of the plaintiff. A partition then took place between plaintiff (who was still a minor) in 1891, when it was found that her husband owed the estate Rs. 1,724–4–8, the estate owing him Rs. 482–6–0. First defendant, with the

* Second Appeal No. 1599 of 1901, presented against the decree of W. M. Thorburn, District Judge of Kurnool, in Appeal Suit No. 130 of 1900, presented against the decree of Y. Krishnamurti, District Munsif of Kurnool, in Original Suit No. 480 of 1899.

plaintiff's consent, agreed to plaintiff's husband setting off against his net indebtedness to the estate the Rs. 938–1–3 due by the estate to the plaintiff, his net indebtedness being in that manner reduced to Rs. 303–13–5, which was treated as a portion of the assets of the estate and allotted to plaintiff as part of her share in the estate. Plaintiff now sued her brother for the original sum of Rs. 938–1–3. The District Munsif held that the defendant was not liable, and that the suit should have been brought by plaintiff against her husband, who had acted as his wife's guardian when the set off was effected. He dismissed the suit. The District Judge confirmed the Munsif's decree on appeal.

Plaintiff preferred this second appeal.

Mr. *D. Chamier* for appellant.

P. R. Sundara Ayyar and *V. Ramesam* for respondent.

JUDGMENT.—Upon the facts found by the Courts below the plaintiff is clearly entitled to a decree though it may be not for the whole amount claimed. The parties are Muhammadans. The facts found are that the plaintiff and defendant are sister and brother; that the plaintiff's husband on the occasion of their marriage, plaintiff being then a minor, sent to the plaintiff's father money and other property to the value of Rs. 938–1–3 for the benefit of the plaintiff; that the father entered the same in his accounts to the credit of the plaintiff; that, on the father's death, the defendant, his son, entered the same to the credit of the plaintiff; that there was a partition between the defendant and the plaintiff during the minority of the latter in 1891; that at that time, it was ascertained that the plaintiff's husband, Rosha Miah, was indebted to the estate in the sum of Rs. 1,724–4–8 and there was due to him a sum of Rs. 482–6–0, so the net debt due by him was Rs. 1,241–14–8. But the first defendant with the consent, as it is found, of the plaintiff agreed to Rosha Miah setting off against this Rs. 1,241–14–8 the sum of Rs. 938–1–3 which was due by the estate to the plaintiff herself and thus the balance of debt due by him was reduced to Rs. 303–13–5 which was treated as a portion of the assets of the estate and allotted to the plaintiff as part of her share in the estate.

The present suit of the plaintiff is to recover from her brother, the defendant, the sum of Rs. 938–1–3 due to her from the estate notwithstanding the arrangement made during her minority with her consent by which her husband was allowed to set off this

HAYATH BIHIMA-SHAHEBA v. SYAIISA MEYA.

amount against a debt due by him to the estate. Both the Courts below have dismissed the suit, holding that the plaintiff's remedy, if any, is against her husband not against the defendant.

In our opinion this view is erroneous. Though Rosha Miah may have been the guardian of the plaintiff during her minority yet it was clearly beyond the scope of his authority as guardian to set off a debt due to her from the estate against a debt due by himself to the estate; and the defendant, therefore, cannot rely on this transaction between him and Rosha Miah as binding on the plaintiff, and in our opinion it makes no difference that the plaintiff while a minor assented thereto. The transaction was really in the nature of a contract and the fact that the minor was privy to it cannot bind her.

The plaintiff is therefore entitled to recover the debt due to her from the estate of her father, but a portion of that estate has come to her hands in the partition and that portion must be charged with so much of the debt she now seeks to recover as bears to that debt the same proportion as the portion of the estate allotted to her in the partition bears to the portion of the estate taken by the defendant.

But as the defendant's action in allowing the set off in favour of Rosha Miah was not warranted, he ought to be chargeable with the amount allowed to be set off or so much of it as could have been recovered from Rosha Miah; and therefore the Rs. 938-1-3 or so much thereof as could have been recovered must be added to the property allotted to the defendant at the time of partition for the purpose of determining the proportion of the estate in the hands of the plaintiff and the defendant respectively.

Before, therefore, determining this appeal we remit the following issues to the District Judge: (1) Whether having regard to the financial condition of Rosha Miah, the whole or any part of the sum of Rs. 938-1-3 was irrecoverable; and (2) what was the value of the property allotted to the plaintiff and the defendant respectively at the time of partition. Fresh evidence on both sides may be taken.

[Findings were in due course returned and the case decided on them.]

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

LINGAPPA GOUNDAN AND ANOTHER (DEFENDANTS), APPELLANTS, 1903. March 20, 23, 24.

v.

ESUDASAN (PLAINTIFF), RESPONDENT.*

Hindu Law—Claim by illegitimate son of a Hindu, by a woman not a Hindu, to maintenance.

There is no text of Hindu law under which an illegitimate son of a Hindu, by a woman who is not a Hindu, can claim maintenance. Plaintiff, (who sued for maintenance out of the assets of his deceased father, a Sudra), was an illegitimate son, his mother being a Christian:

Held, that plaintiff could not be regarded as a Hindu by birth and he was, in consequence, not governed by Hindu law, and was not entitled to maintenance.

Under the rules laid down by Hindu law for determining the caste of the offspring of unions between parents belonging to different castes (amongst the four recognized main castes), the Dharma or religious rites applicable to the offspring are those prescribed for the mother's caste.

Though an illegitimate child is entitled to claim maintenance from his father under section 488 of the Criminal Procedure Code, such claim can only be enforced during the life-time of the father and the right terminates with his death. Such a statutory right is cumulative and does not deprive persons otherwise entitled to maintenance, by the common law, of their right to enforce payment of maintenance by action brought against the father during his life-time or against his estate after his death. But where persons are not entitled under the common law to claim maintenance from the father, the right conferred by statute can only be enforced by the particular remedy provided by the statute and to the extent provided therein. Plaintiff, therefore, who could only rely on the statutory right, could not seek to enforce it by suit; nor did the right exist after the father's death.

SUIT for maintenance alleged to have accrued due to plaintiff in respect of a period of about 14 months prior to the date of suit. Plaintiff was a minor native Christian, and sued by his next friend, the defendants being the representatives of one Ganisappan Goundan, a Sudra, who had died about 14 months prior to suit. It was claimed that plaintiff was the illegitimate child of the deceased, and that his mother (a native Christian) was the

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* Second Appeal No. 1473 of 1901, presented against the decree of A. Venkataramana Pai, Acting District Judge of South Malabar, in Appeal Suit No. 946 of 1900, confirming the decree of P. J. Itteyerah, District Munsif of Palghat, in Original Suit No. 86 of 1900.

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concubine of the deceased, who had maintained both plaintiff and his mother until his death. The District Munsif awarded maintenance at the rate of Rs. 3 a month. The Acting District Judge, on appeal, confirmed that order. He said :—"I think a Hindu is bound to maintain his illegitimate child. I am not referred to any authority in support of the contention that the concubine must be a Hindu. Be this as it may, the statutory law (section 488, Criminal Procedure Code) recognizes the right of an illegitimate child to recover maintenance from his father. The right of an illegitimate son to recover maintenance from his father's estate is not determined on the death of the father. His legal heirs take his estate subject to the charge which could have been enforced against him during his life-time."

Defendants preferred this appeal.

V Krishnaswami Ayyar and *A. Nilakanta Ayyar* for appellants.

J. L. Rosario for respondent.

JUDGMENT.—Upon the facts found by the Courts below, the question arising in this case is whether the plaintiff, a minor, who has brought this suit by his maternal grandmother as next friend, can claim maintenance out of the assets of his deceased putative father, a Sudra, the mother who was living in concubinage with him being a Christian by religion. The first question to be considered is whether the plaintiff's claim is governed by the Hindu law, and this, in our opinion, depends upon whether, by birth, he was a Hindu or not. He, like his mother, is admittedly now a Christian and has been brought up as such. But, if, by birth, he was a Hindu by religion, his change of religion would, of course, not deprive him of any right to maintenance which, under the Hindu law, he may have against his putative father or his estate (Act XXI of 1850). The Hindu law lays down certain rules for determining the caste of offspring of unions between parents belonging to different castes (amongst the four recognized main castes) and gives separate names to the mixed castes to which such offspring will belong. In all these cases the Dharma or religious rites applicable to the offspring are those prescribed for the mother's caste (*Brindavana* v. *Radhamani*(1)). The plaintiff, therefore, cannot be regarded as a Hindu by birth, and he is, therefore, beyond the pale of, and not governed by, the Hindu law. There

(1) I.L.R., 12 Mad., 72 at p. 80.

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is no text of Hindu law, under which an illegitimate son of a Hindu, by a woman who is not a Hindu, can claim maintenance, and in none of the reported cases has maintenance been ever awarded to an illegitimate son who was not a Hindu by birth; and in the only reported case on the point (*Addoyto Chunder Dass* v. *Woojan Beebee*(1)) in which maintenance was claimed for the illegitimate son of a Hindu by a Muhammadan woman, the claim was disallowed on the ground that such issue was not the offspring of a female servant, by the head male member of a family and also because the illegitimate son was of a "different race" from the putative father.

The lower Appellate Court has upheld the plaintiff's claim for maintenance, not only by applying the Hindu law, but also on the ground that the statutory provision made by section 488 of the Criminal Procedure Code recognizes the right of an illegitimate child to recover maintenance from his father, that such right is not determined by the death of the father and that, on his death, his estate is chargeable with the plaintiff's maintenance. No doubt, under section 488 of the Criminal Procedure Code, the plaintiff was entitled to claim maintenance from his putative father, but such claim could be enforced only during the life-time of the father and terminates with his death. In the case of illegitimate children entitled to claim maintenance under the common law, *i.e.*, the personal law applicable to them, the statutory remedy given by section 488 of the Criminal Procedure Code, will only be a cumulative remedy and will not take away the remedy under the common law to enforce such right by action brought against the father during his life-time, or after his death, against his estate (*Beckford* v. *Hood*(2), also *Ramayyar* v. *Vedachella*(3)) followed in *Sattappa Pillai* v. *Raman Chetti*(4). But in regard to illegitimate children who, like the plaintiff in this case, are not, under the common law, entitled to claim maintenance from the putative father, the right conferred on them by the statutory law can be enforced only by the particular remedy provided by the statute and to the extent therein provided (*Doe. d. Bishop of Rochester* v. *Bridges*(5) and *Branson* v. *Municipal Commissioner for*

(1) 4 Calc. L.R., 154.
(2) 7 T.R., 620.
(3) I.L.R., 14 Mad., 441.
(4) I.L.R., 17 Mad., 1.
(5) 1 B. & Ad., 859.

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Madras(1)). Hardcastle on the 'Interpretation of Statutes,' page 259, etc.; Maxwell, page 570, etc.

The plaintiff, who can rely only on the statutory right, cannot, therefore, seek to enforce it by suit, nor does such right survive the death of his putative father. The analogous statutory remedy provided in this case of bastards under the Bastardy laws in England (section 71 of 4 & 5 Will. IV, cap. 76; section 4 of 35 & 36 Vict., cap. 65), can be availed of against the mother or the putative father, as the case may be, only in the manner therein provided and not by an action at law, either during the life-time of the parents, or against their estate after their death.

The second appeal is therefore allowed and, reversing the decrees of both the lower Courts, the suit is dismissed. The question being a novel one and the plaintiff being a minor, we direct that each party bear his own costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1903. March 18.

BODDUPALLI JAGANNADHAM AND ANOTHER (PLAINTIFFS NOS. 2 AND 3), APPELLANTS,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER (DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

Regulation XXV of 1802, s. 4—Land exempted from payment of public revenue at permanent settlement—Resumption of inam—Limitation—Exercise by Government of its prerogative of imposing assessment on land liable to be assessed—No period of limitation.

Certain land was exempted from the payment of public revenue at the time of the permanent settlement. Section 4 of Regulation XXV of 1802 declares that the Government, at the permanent settlement, has "reserved to itself the entire exercise of its discretion in continuing or abolishing" the exemption of such lands from liability to pay assessment to Government, and the permanent settlement of the land revenue was made excluding the said land:

(1) I.L.R., 2 Mad., 389.

* Second Appeal No. 1366 of 1901 presented against the decree of I. L. Narayana Rao, Acting Subordinate Judge of Kistna at Masulipatam, in Appeal Suit No. 305 of 1900, presented against the decree of V. Subrahmanyam Pantulu, District Munsif of Guntur, in Original Suit No. 729 of 1898.

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Held, that it was competent to Government to impose a public assessment on the land.

Also, that there is no period of limitation prescribed by any law within which alone the Government should exercise its prerogative of imposing assessment on land liable to be assessed with public revenue. *Collector of Chingleput* v. *Kosalram Naidu*, (Second Appeal No. 1352 of 1897 (unreported)), approved.

SUIT for a declaration that the land of a certain tank bed was private inam belonging to plaintiffs. The following statement of the case is taken from the judgment of the Acting Subordinate Judge on appeal:—

"The plaintiff's case is that the first plaintiff's grandfather, Nageswara Somayazulu, acquired the land in question from the then Zamindar of Repalli as an inam for the construction of a tank thereon. It seems that another inam bearing curnam No. 8 was also granted as an endowment in fasli 1191 for the maintenance of the said tank. At the time of inam settlement, title-deed was granted for this latter inam to the plaintiff's and second defendant's father free of quit-rent upon condition that it should hold good so long as the charity-tank now in question was efficiently kept up. The suit tank inam was not, however, brought to the notice of the Inam Commissioner, and no title-deed was granted for it. Not being enfranchised, it was resumable at pleasure by the paramount power. The plaintiffs having abused the trust by utilizing the water of this charity-tank for the irrigation of their private lands, water-cess was levied for it by the Revenue Department, and the plaintiffs instituted Original Suit No. 401 of 1876 against the Secretary of State to recover the said water-cess on the ground that the tank was their private tank. It was therein finally decided that whether the tank was the private tank of the plaintiffs as contended for by them, or whether it was a charity tank as alleged by the Government, the water of the tank not constructed by the Government could not be regarded as Government water and that the Government could not levy water-cess therefor. The question as to whether it was a private tank or charitable tank was not finally decided in that litigation. As the inamdars did not put forth their claim either at the time of inam enquiry or within the period granted in the subsequent notification embodied in G.O., No. 1344, dated 10th September 1875, the Collector of the district issued orders on the authority of the Board's Proceedings, No. 1354, dated 23rd May 1877, that the extent covered by the suit tank should be fully assessed.

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He also recommended to the Government that as the plaintiffs have converted the charity tank into their private irrigation tank, and as the purpose for which the inam was granted failed in consequence, this endowment inam also might be resumed. The Government accordingly resumed the inam by G.O., No. 803, dated 11th September 1893. There is now no dispute about that. In granting the seri patta for the suit tank land, the Collector included the name of the second defendant also. The plaintiffs contend that the second defendant had no right to the land as his father had relinquished his right to the same at the time of the partition of the family property between him and his brothers. The second defendant on the other hand filed Original Suit No. 564 of 1896 to recover his one-third share of the suit tank. His defence in the first suit was that the tank was kept joint by the parties and the repairs to it were also executed jointly from time to time. On behalf of the Secretary of State, it was contended that the inam on which the suit tank was constructed, was originally granted on condition of the tank being utilized for charitable purposes and that as the plaintiff had violated the condition by using the water for irrigation purposes, the inam was rightly resumed. It was further urged that as the grant was made prior to the permanent settlement, and as the same was excluded from the items of revenue upon which peishcush was assessed the right to continue or abolish the revenue free tenure of the plaint land was entirely vested in the sovereign. The lower Court found that the suit tank was not a private tank of the plaintiffs' family and that the Government had a right to resume it at pleasure. The first suit was accordingly dismissed and the second suit decreed in second defendants' favour to the extent of one-fifth share, and the plaintiffs in the first suit have preferred these appeals. No doubt the Zamindar of Repalli granted the inam to Nageswara Somayazulu for the purpose of constructing a tank. It is not stated either in the original sanad or in the dumbalas that the water of the tank should be utilized for his own private purposes. [He discussed the question at length and concluded thus:—] For all the foregoing reasons I am inclined to agree with the District Munsif that the suit tank is a charitable tank and that utilization of the water thereof for irrigation purposes would be extremely detrimental to the charity. The plaintiffs have been admittedly using the water for irrigational purposes and having thus violated the conditions of the enfranchisement, the Government has every right to resume the inam and this resumption was made within the period allowed by the statute of limitation (article 149). The resumption must also stand good as the tank inam was not enfranchised. The prerogative right of resumption vested in the sovereign can be relinquished only by the enfranchisement. In the case of *Collector of Chingleput* v. *Kosalram Naidu*(1), their Lordships of the Madras High Court observed as follows:—'The plaintiff in his memorandum of objections contends that he is entitled to hold the land rent free on 'the ground that he has been cultivating it for 60 years without 'having paid any assessment to Government on account of it. 'This claim is based on the contention that the Government is 'now barred from levying such assessment under article 149 of the '2nd Schedule of the Limitation Act read with section 28 of the 'Act. But we do not think that the article or the section referred 'to has any application to the right of Government to levy assessment on land which is admittedly a right not conferred by 'legislative enactment; but one exercised in this country from time 'immemorial by the sovereign power. No limitation is placed on 'the exercise of that right by any statute or law. This being 'the recognised proposition of law, we have no other alternative 'than to hold that the Government has absolute power to resume 'the tank inam and to levy an assessment upon it.'

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"Again, under article 14 of the Limitation Act the plaintiffs not having instituted this suit within one year from the date of resumption, the suit must be thrown out as time barred.

"Coming next to the Appeal No. 305 of 1900, we see that the second defendant is admittedly the grandson of . . . . the original grantee of the inams, but it is urged on behalf of the plaintiffs that the second defendant's father relinquished his share in the inams at the time of the family partition. [He dealt with the evidence.] Assuming that the second defendant's father renounced his rights in favour of the plaintiffs, the seri patta granted by the Collector subsequently in the joint names of the plaintiffs and second defendant, must be respected. After resumption, the land was under the absolute disposal of the Government, and was alienable to whomsoever the Government pleased (*Venkata* v. *Rama*(2) and *Dharanipragada Durgamma* v.

(1) S.A. No. 1352 of 1897 (unreported). (2) I.L.R., 8 Mad., 249.

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Kadambarivirrazu(1)). I hold therefore that the second defendant is entitled to the one-fifth share in the suit inam as adjudged by the lower Court as the patta was granted by Government in the names of five persons. The decrees of the lower Court in the two suits must be upheld and the appeals dismissed with all costs."

Plaintiffs Nos. 2 and 3 in Appeal Suit No. 305 of 1900 preferred this second appeal.

P. S. Sivaswami Ayyar for appellant.

J. G. Smith for the Government Pleader for first respondent.

JUDGMENT.—The land in question is land which was lakhiraj or land exempt from the payment of public revenue at the time of the permanent settlement. Section 4 of Regulation 25 of 1802 declares that the Government at the permanent settlement has "reserved to itself the entire exercise of its discretion in continuing or abolishing" the exemption of such lands from liability to pay assessment to Government, and the permanent settlement of the land revenue was made excluding the said land. It was therefore fully competent to Government to impose a public assessment on the land, and this is all that is meant when it is said in this case that the inam land was resumed.

We concur with the decision of this Court in the case of *Collector of Chingleput* v. *Kosalram Naidu*(2) quoted by the Subordinate Judge, and hold that there is no period of limitation prescribed by any law within which alone the Government should exercise its prerogative of imposing assessment on land liable to be assessed to the public revenue.

The second appeal fails and is dismissed with costs.

(1) I.L.R., 21 Mad., 47 at page 48.
(2) S.A. No. 1852 of 1897 (unreported).

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

SAMINATHA AYYAR (DEFENDANT), APPELLANT,

v.

VENKATASUBBA AYYAR (PLAINTIFF), RESPONDENT.*

Limitation Act—XV of 1877, s. 12—Presentation of appeal—"Time requisite for obtaining copy of judgment."

Judgment was delivered in a case on the afternoon of the last Court day before the commencement of the Christmas vacation, when it was too late to apply for a copy of the judgment. Application for a copy was made on the day upon which the Court re-opened and an appeal was filed on a subsequent day which would have been in time if the period during which the Court was closed were allowed to be deducted. On its being contended that, inasmuch as no application for a copy had been made before the Court closed, the appellant was not entitled to have the period during which the Court was closed deducted:

Held, that the appellant was entitled to deduct the period during which the Court was closed. Such period, in the circumstances of the case, must be taken to be part of the "time requisite for obtaining a copy of the judgment."

APPLICATION to excuse delay in presenting appeal. The suit was for a declaration that an assignment which had been executed by plaintiff to defendant was void, and to recover a hypothecation bond assigned by it. The District Munsif made the declaration and ordered the bond to be delivered up to plaintiff. His judgment was dated 22nd December 1900. Defendant applied for copies of the judgment and decree on 7th January 1901. It appeared (as stated in the judgment of the High Court) that the 22nd December was the last Court day before the Christmas vacation; that the judgment had been delivered at 4 P.M., when, according to the practice of the Court, papers were not received. The Court re-opened on 7th January 1901, the day upon which the defendant applied for copies. He presented an appeal to the District Court on a day which would have been in time if he was entitled to deduct the period during which the Court had been closed.

* Second Appeal No. 1637 of 1901, presented against the orders of H. G. Joseph, District Judge of Trichinopoly, in S.R. Nos. 277 and 50 of 1901, presented against the decrees of S. Ramaswamy Ayyangar, District Munsif of Kulitalai, in Original Suit Nos. 284 of 1900 and 1212 of 1899 respectively.

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The District Judge held that the appeal was out of time by fourteen days and rejected it.

Defendant preferred this second appeal.

T. Subramania Ayyar for *P. S. Sivaswami Ayyar* for appellant.

K. Ramachandra Ayyar for respondent.

JUDGMENT IN SECOND APPEAL No. 1637 OF 1901.—This is an appeal from an order rejecting an appeal on the ground that it was out of time. A preliminary objection has been taken that no appeal lies as the order is not a decree as defined by section 2 of the Civil Procedure Code. If we had to consider the point apart from authority we might have felt disposed to adopt the view put forward on behalf of the respondent. The balance of authority, however, is against this view. The precise point was decided against the respondent in *Gulab Rai* v. *Mangli Lal*(1), *Raghunatha Gopal* v. *Nilu Nathaji*(2), and *Gunga Dass Dey* v. *Ramjoy Dey*(3). The principle of these decisions was applied by this Court in *Ayyanna* v. *Nayabhooshanam*(4) and *Zamindar of Tuni* v. *Bennayya*(5).

Having regard to these authorities we are not disposed to say that no appeal lies in the present case. The preliminary objection is overruled.

In this case judgment was delivered on 22nd December 1900, the last day before the Christmas vacation at 4 P.M., when, according to the practice of the Court, papers were not received. The appellant made his application for a copy of the judgment on 7th January 1901 the day on which the Court re-opened after the Christmas holidays and presented his appeal on a day which would be in time if he is entitled to deduct the period during which the Court was closed. His contention is that, in computing the period for appeal, the time during which the Court was closed should be deducted.

The contention on the other side is that, inasmuch as no application for a copy of the judgment was made before the Court closed, the appellant is not entitled to have the period during which the Court remained closed deducted in the computation of time. The argument was that the words "requisite for obtaining a copy of the judgment" presuppose an application for the copy.

(1) I.L.R., 7 All., 42.
(2) I.L.R., 9 Bom., 452.
(3) I.L.R., 12 Calc., 30.
(4) I.L.R., 16 Mad., 285.
(5) I.L.R., 22 Mad., 155.

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There is nothing in the section itself to suggest that these words ought to be so construed. It is not impossible to conceive of cases where time may properly be deducted, though the commencement of the period from which time is deducted precedes the actual application for a copy of the judgment. On the facts of the present case we think it may be said that this is one of those cases. For this reason we think the appellant is entitled to deduct the period from 23rd December to 6th January, both days inclusive as such period, in the circumstances of the case, must be taken to be part of the "time requisite for obtaining a copy of the judgment."

We must, therefore, set aside the order of the District Judge and direct him to receive the appeal and proceed with it according to law. The costs of this appeal will abide the event.

IN SECOND APPEAL No. 1215 OF 1901.—This case follows Second Appeal No. 1637 of 1901, and for the like reasons as are recorded in our judgment therein, we set aside the order of the District Judge and direct him to receive the appeal and proceed with it according to law. The costs of this appeal will abide the event.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

CHINNA NARAYUDU (FIRST DEFENDANT), APPELLANT,

1903. January 21.

v.

HARISCHENDANA DEO (PLAINTIFF), RESPONDENT.*

Landlord and tenant—Notice to quit—Suit instituted without prior notice—Assertion of permanent occupancy rights not a denial of relationship of landlord and tenant.

The assertion by a tenant of permanent occupancy rights and his denying the landlord's title to give a lease of the land to a third party is not a denial of the relationship of landlord and tenant which would render notice unnecessary.

SUIT in ejectment. A ground of defence was that plaintiff had not served proper notice on the defendant and that in consequence

* Second Appeal No. 980 of 1901, presented against the decree of F. Wolfe-Murray, District Judge of Ganjam at Berhampore, in Appeal Suit No. 77 of 1900, presented against the decree of D. Raghavendra Rao, District Munsif of Sompeta, in Original Suit No. 178 of 1899.

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the suit could not be maintained; also that the defendant held the land under permanent rights of occupancy. The District Munsif passed a decree in plaintiff's favour. The District Judge, on appeal, dealing with the question of notice, said:—"Then there is the question of no notice to quit being given him and I find with the Munsif that defendant has forfeited this right to notice to which he is entitled, because he has denied his landlord's title prior to suit as seen above. The want of such notice is therefore no obstacle to defendant's ejectment." He referred to *Unhamma Devi* v. *Vaikunta Hegde*(1). He dismissed the appeal.

Defendant preferred this second appeal.

V. C. Seshachariar for appellant.

P. R. Sundara Ayyar for respendent.

JUDGMENT.—A preliminary objection to the plaintiff's suit in ejectment was taken in the Courts below to the effect that no notice to terminate the defendant's tenancy was given by the plaintiff prior to bringing the suit. The Courts below overruled this plea on the ground that the defendant had denied the landlord's title, and that therefore no notice was necessary.

The documents referred to by the Courts below asserted the defendant's title as a permanent tenant and denied the plaintiff's title to give a lease of the land to a third party. This is not a denial of the relationship of landlord and tenant between the plaintiff and defendant which would render notice unnecessary.

On this ground we allow the second appeal and, reversing the decrees of the Courts below, dismiss the plaintiff's suit with costs throughout.

(1) I.L.R., 17 Mad., 219.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar, and
Mr. Justice Bhashyam Ayyangar.

MEERUDIN SAIB (PLAINTIFF), APPELLANT,

1903. April 8.

v.

RAHISA BIBI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *s.* 335—*Resistance to purchaser by person other than judgment-debtor—Order intended to become final unless suit instituted—Refusal by Court to make order—Limitation Act—XV of* 1877, *sched. II, art.* 11—*Suit by person against whom order relating to possession is passed.*

The order contemplated by section 335 of the Code of Civil Procedure, (when a purchaser has been resisted by any person other than the judgment-debtor), is one which will become final and conclusive unless the party against whom it is passed institutes a suit (within a year, under article 11 of schedule II of the Limitation Act) and obtains an adjudication in his favour. If the Court declines to pass an order under section 335, deeming it best that the purchaser should be referred to a separate suit to enforce his purchase, article 11 has no application.

SUIT to recover a house. Plaintiff purchased the house on 23rd March 1896, obtained a sale certificate and proceeded to take possession. He was resisted by the defendants, who were the relatives of the judgment-debtor, who had died. Plaintiff complained to the Court of the resistance, and notice was issued to the defendants, who set up title to the house. The Court declined to pass an order under section 335 of the Code of Civil Procedure, on the ground that the parties were Muhammadans, and that they had not been parties to the suit in which plaintiff had obtained his decree. Plaintiff was referred to a suit, and the present suit was accordingly brought, the defendants set up the same defence of title, and also contended that it was barred by limitation, as it had not been instituted within one year from the passing of the order. The District Munsif held that suit was governed by article 11, and dismissed it as time-barred.

The District Judge, on appeal, confirmed that order.

* Second Appeal No. 892 of 1901, presented against the decree of Manavedan Raja, District Judge of North Arcot, in Appeal Suit No. 312 of 1900, presented against the decree of S. Raghunathaiya, District Munsif of Vellore, in Original Suit No. 388 of 1899.

MEERUDIN SAIB v. TAHISA BIBI.

Plaintiff preferred this second appeal.

K. Srinivasa Ayyangar for second appellant.

JUDGMENT.—The order contemplated by section 335, Civil Procedure Code, is one which will become final and conclusive, unless the party against whom it is passed institutes a suit and obtains an adjudication in his favour. In the present case the District Munsif declined to pass an order under that section, as he thought it better that the purchaser should be referred to a separate suit to enforce his purchase. This case is similar to that of *Rash Behari Bysack* v. *Buddun Chunder Singh*(1) and we concur in the view therein taken that article 11 of the second schedule to the Limitation Act has no application to such a case as the present. We accordingly reverse the decrees of both the Lower Courts and remand the suit to the Court of First Instance for disposal according to law. The costs in this and in the Lower Appellate Court will be costs in the case.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Bhashyam Ayyangar.

1903. March 5.

RAMAN NAIR (DEFENDANT No. 2), APPELLANT,

v.

VASUDEVAN NAMBOODRIPAD AND ANOTHER (PLAINTIFF AND DEFENDANT No. 1), RESPONDENTS.*

Malabar Law—Kanom for fixed period—Kanomdar to enjoy portion of produce for interest—Anomalous mortgage—Forfeiture not entailed by disclaimer of mortgagor's title by kanomdar—Suit to recover the land prior to expiration of period—Maintainability.

By the terms of a kanom deed, a term of 59 years was provided for its redemption, the amount was Rs. 500, and the kanomdar was to enjoy a portion of the produce for interest on the kanom and to pay the balance of the produce annually to the mortgagor—the jenmi. Prior to the expiration of the term, the kanomdar disclaimed the title of the jenmi, who thereupon brought the present suit, claiming the right to do so by reason of the disclaimer:

(1) L.R., 12 Calc., 550.

* Second Appeal No. 1007 of 1901, presented against the decree of K. Krishna Rau, Subordinate Judge of South Malabar at Calicut, in Appeal Suit No. 653 of 1900, presented against the decree of T. A. Ramakrishna Ayyar, District Munsif of Nedunganad in Original Suit No. 132 of 1899.

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Held, that the transaction was an anomalous mortgage under the Transfer of Property Act, and not a lease, and the disclaimer of the jenmi's title by the kanomdar would not entail a forfeiture so as to enable the jenmi to sue for redemption of the mortgage before the expiration of the 59 years. The suit was therefore premature.

SUIT to recover four items of land demised on kanom by plaintiff's mana to defendants' tarwad in 1876. The material terms of the kanom are given in the judgment. The deed on which the suit was based had been executed by first defendant and his mother, and provided for a period of 59 years for redemption of the kanom. Plaintiff, however, complained that first defendant had recently denied plaintiff's jenm title, and set up title in himself. Plaintiff therefore brought the present suit before the expiration of the 59 years. Second defendant denied first defendant's right to bind him by the kanom deed. The District Munsif held that the suit was maintainable, the kanom tenant having, in his opinion, forfeited his right to hold for the stipulated period if he repudiated his landlord's title. He decreed as prayed. The Subordinate Judge modified the decree as to one item of land, but confirmed it in other respects.

Second defendant preferred this appeal.

Hon. Mr. *C. Sankaran Nayar* for appellant.

P. R. Sundara Ayyar for first respondent.

JUDGMENT.—This is a suit to redeem a kanom granted for a term of 59 years, the amount of the kanom being Rs. 500. The kanomdar is to enjoy a portion of the produce for interest on the kanom and annually pay the balance of produce which is fixed at 4 paras to the mortgagor the jenmi. In our opinion this is an anomalous mortgage under the Transfer of Property Act and not a lease and, even assuming that the mortgagor's title was disclaimed by the mortgagee, such disclaimer would not entail a forfeiture so as to entitle the mortgagor to sue for redemption of the mortgage before the expiration of the 59 years. The decisions cited for the respondent were all cases in which it was held that the customary period of 12 years, for which period a kanom runs in Malabar in the absence of any period being fixed in the deed, cannot be availed of by a mortgagee who has disclaimed the mortgagor's title or committed any waste, and no case has been cited in which it has been held that according to the local usage (section 98, Transfer of Property Act) in Malabar a mortgagee for a contractual term of

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years forfeits the term contracted for by denying the mortgagor's title. On this ground we hold that the suit is premature and it is unnecessary to consider or decide in this case when there was any real disclaimer of the landlord's title by the karnavan and, if so, whether such disclaimer would work a forfeiture against all the members of the tarwad.

We must allow the appeal and reverse the decrees of the Courts below so far as they award redemption but affirm them in so far as they award arrears of purapad due till date of suit, viz., Rupees 17-9-0.

Each party will bear and pay their own costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Bhashyam Ayyangar.

1902. February 23.

SUBRAHMANIA AYYAR (PLAINTIFF), APPELLANT,

v.

POOVAN AND FOUR OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act—XV of 1877, *s.* 28, *sched. II, art.* 111—*Sale of land—Possession retained by vendor—Suit to recover possession seven years thereafter—Non-payment of purchase price pleaded—Vendor's lien not extinguished.*

A sale-deed had been executed in plaintiff's favour more than seven years before the present suit, but the purchase money was not paid and the vendors continued in possession of the land. On the present suit being filed for a declaration of plaintiff's right and for the recovery of possession of the land:

Held, that the vendors had a charge, by operation of law, on the property sold, for the purchase money. As the purchaser had not paid the price and had taken no steps to recover possession the vendors were not bound to sue to enforce their lien. Though a suit by the vendors to enforce their lien would have been barred by limitation under article 111 when the present suit was filed, their lien was not extinguished by section 28 of the Limitation Act, and inasmuch as they were still in possession they had a right to retain possession until the purchase money should be paid and the lien be extinguished by such payment.

Umedmal Motiram v. *Davu Bin Dhondiba*, (I.L.R., 2 Bom., 547), approved.

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* Second Appeal No. 1316 of 1901, presented against the decree of R. D. Broadfoot, District Judge of South Arcot, in Appeal Suit No. 165 of 1900, presented against the decree of T. S. Thiagaraja Ayyar, District Munsif of Tirukkoyilur, in Original Suit No. 753 of 1899.

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SUIT for a declaration of plaintiff's right to land, and for possession of it. Plaintiff claimed under a sale-deed, dated 28th May 1892, by which he had purchased the land in question, which was the ancestral property of first defendant, of fourth defendant's father Munian and of one Kolanthai. The defendants admitted the genuineness of the sale-deed, but pleaded that no consideration had been paid thereon. They also contended that, if valid, it had been executed without family necessity and was in consequence not binding on the sons of the executants or on the brothers who had not executed it. Defendants Nos. 2 and 3 were sons of first defendant. The sale-deed had been executed by first defendant and his two brothers Munian and Kolanthai. The District Munsif found that consideration had been paid and that plaintiff was entitled to the land and decreed accordingly. The District Judge, on appeal, found that the sale-deed was genuine but that no money had been paid. He found that there was no family necessity and that the sale bound only the shares of the executants. He modified the Munsif's decree by declaring that plaintiff was entitled to the shares of the executants, namely, first defendant, Munian and Kolanthai, and that plaintiff should be given possession thereof on his paying the purchase price.

Plaintiff preferred this second appeal.

C. Venkatasubbarama Ayyar for appellant.

P. Nagabhushanam for first and third respondents.

JUDGMENT.—Upon the finding that there was no family necessity, the sale cannot affect the shares of the brothers who have not joined in the execution of the sale-deed.

The appellant also contends that he is entitled to an absolute decree in respect of the shares of the executants and not to a decree conditional upon his paying the purchase money to the vendors. The finding is that the price for the sale was not paid by the vendee to the vendors, and the plaintiff by the suit admits that the vendors continue in possession of the property sold, though the sale had taken place more than seven years before the suit.

We cannot accede to this argument inasmuch as the vendors have a charge by operation of law upon the property sold for the purchase money. And as the vendee not only did not pay the purchase money, but also did not take steps until this suit to recover possession from the vendors, the latter were not bound to sue to enforce their lien for the purchase money, the period of limitation

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for a suit for the same being under article 111 of the Limitation Act only three years from the date of sale.

Notwithstanding that a suit by the vendors for the enforcement of their lien would have been barred by limitation at the date of this suit, section 28 of the Limitation Act would not extinguish the lien. The lien not having been extinguished and the vendors being still in possession, they have a right to retain possession until the purchase money is paid and the lien extinguished by such payment. This we find is also the view taken in *Umedmal Motiram* v. *Davu Bin Dhondiba*(1), and we entirely concur in that decision.

The second appeal fails and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1903. February 13.

SOMASUNDARA MUDALY (FIRST DEFENDANT), APPELLANT,

v.

DURAISAMI MUDALIAR (PLAINTIFF), RESPONDENT. *

Registration Act—III of 1877, *ss.* 17, 49—*Authority to adopt in writing and not contained in a will—Document not a testamentary disposition of property and not registered—Invalidity—Evidence Act I of* 1872, *s.* 91—"*Grant*"—*Admissibility of evidence of authority to adopt.*

In a suit for a declaration that first defendant was not the adopted son of plaintiff's deceased brother, the first defendant and his mother relied on an authority to adopt which was contained in a document which they contended was a will of the deceased. This document, which had never been registered, and which was the only evidence of the alleged adoption, authorised the wife to adopt, and further authorised her to put into the possession of the adopted son all the properties which the deceased got under a certain decree, and all his immoveable properties, etc.:

Held, that the document was not a testamentary disposition of property, within the meaning of section 3 of Act V of 1881. It was an authority to adopt and nothing else, and the direction therein to put the adopted son into possession of the property could not be construed as a devise of the property. It was simply a statement of the consequences that should legally follow on the adoption.

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(1) I.L.R., 2 Bom., 547.

* Appeal No. 83 of 1901 presented against the decree of P. S. Gurumurti, Subordinate Judge of Kumbakónam, in Original Suit No. 50 of 1899.

SOMASUNDARA MUDALY v. DURAISAMI MUDALIAR.

Mussumat Bhoobum Moyee Debia v. *Ram Kishore Acharj Chowdhry*, (10 Moo. I.A., 279 at p. 312), referred to.

The authority to adopt being in writing, and not being contained in a will, its registration was compulsory.

Whether other evidence of such authority having been given could have been adduced, under section 91 of the Evidence Act—*Quære.*

SUIT for a declaration that first defendant was not the adopted son of one Somasundara Mudaliar, deceased, plaintiff's late brother. Defendants Nos. 2 and 3 were the widows of the deceased Somasundara Mudaliar. In support of the alleged adoption, the defence relied on an alleged will, which the deceased had executed in the following terms; and which was filed as exhibit I:—"The last will left by me Somasundara Mudaliar. As I am now in my last moments, I do hereby give you, Vanji Anni, my wife to understand as follows: I have given you authority to adopt Somasundaram, second son of Vaiyapuri Mudaliar Avargal, my brother-in-law and Village Munsif of Kumbakónam Town, and to have my obsequies and all other ceremonies performed by him. I have further hereby given you authority to put into his possession all the properties which I got under the decree in Suit No. 50 of 1899 on the file of the Subordinate Court of Kumbakónam. If you are not willing to adopt the said Somasundaram, you shall adopt anybody you please and put the properties into his possession. You shall put also all the immoveable properties, etc., I have in addition, into the possession of the adopted son. (Signed) SOMASUNDARAM."

The document was witnessed, but was not registered. No other evidence of any authority to adopt was adduced.

The Subordinate Judge gave plaintiff a decree as prayed for.

First defendant preferred this appeal.

V. Sankaranarayana Sastri for appellant.

Raja T. Rama Rau, Hon. Mr. *C. Sankaran Nayar* and *K. R. Subrahmania Sastri* for respondent.

JUDGMENT.—The appellant (first defendant) alleges that the adoption was made under an authority to adopt given in the so-called will, exhibit I. This document is in no sense a will, *i.e.*, a testamentary disposition of property (*vide* section 3, Act V of 1881). It is an authority to adopt and nothing else and the direction therein given to put the adopted son into possession of the property cannot be construed as a devise of the property. It is simply a statement of the consequences that should legally

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follow on the adoption (*Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*(1)).

The authority to adopt being in writing and not contained in a will, its registration is compulsory and unless registered it is inoperative to confer such authority (sections 17 and 49, Indian Registration Act III of 1877). We may add that there is no evidence except exhibit I to prove that authority was given, assuming that such evidence could be adduced, an assumption that is not free from doubt, the question depending on whether the word "grant" in section 91 of the Indian Evidence Act means a grant of property only or refers to other grants also. There being, therefore, no evidence that any authority to adopt was given, the adoption if it took place was invalid.

We therefore dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1903. February 19, 20. March 12, 13, 20.

GOPALASAMI CHETTI (PLAINTIFF), APPELLANT,

v.

ARUNACHELAM CHETTI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Hindu Law—Illegitimate son—Right to maintenance—Evidence Act—I of 1872, s. 112—Presumption as to paternity applicable only to offspring of married couple.

In a suit by an illegitimate son of a deceased Chetti against the adopted son and brother of his late father for a share in his father's estate, or in the alternative, for maintenance:

Held, that the claim for a share must fail as it was not shown that the deceased had left any separate or self-acquired property. The family of the deceased (consisting of his father and two sons, of whom one was the deceased) was not shown to have had any ancestral property, but it had acquired property by trade in which the father and the two sons were jointly engaged. There being no indication of an intention to the contrary, it must be presumed that the property thus acquired was held by the members of the family as joint property

(1) 10 Moo., I.A., 279 at p. 312.

* Appeal No. 136 of 1901 presented against the decree of T. Varada Rao, Subordinate Judge of Madura (East), in Original Suit No. 67 of 1899.

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with the incident of the right of survivorship. Inasmuch as the plaintiff's father had predeceased his father and brother, plaintiff could claim no share as against his grandfather and uncle; and, as he was illegitimate, he could not 'represent' his father in the undivided family.

Ramalinga Muppan v. *Pavadai Goundan*, (I.L.R., 25 Mad., 519), referred to.

The fact that in the present case there was a son in existence beside the illegitimate son made no difference, in principle, between this case and the cases already decided.

Held also, that plaintiff was entitled to maintenance. An illegitimate member of a family, who is not entitled to inherit, can be allowed only a compassionate rate of maintenance and cannot claim maintenance on the same principles and on the same scale as disqualified heirs and females who have become members of the family by marriage. But regard should be had to the interest which the deceased father of the illegitimate son had in the joint family property and the position of his mother's family.

Arrears of maintenance awarded for a period of nine years prior to the suit.

The presumption as to paternity in section 112 of the Indian Evidence Act only arises in connection with the offspring of a married couple. A person claiming as an illegitimate son must establish his alleged paternity in the same manner as any other disputed question of relationship is established.

SUIT for a share in the estate of plaintiff's father, or, in the alternative, for maintenance. Plaintiff claimed as the illegitimate son of one Chidambaram Chetti deceased, the first defendant being the adopted son and second defendant being the brother's son of the deceased. The facts are fully set out in the judgment. The Subordinate Judge dismissed the suit.

Plaintiff preferred this appeal.

V. C. Desikachariar for appellant.

V. Krishnaswamy Ayyar, *P. R. Sundara Ayyar* and *K. N. Ayya* for respondents.

JUDGMENT.—The plaintiff, claiming as the illegitimate son of one Chidambaram Chetti deceased, has brought the suit for his share in his father's estate or in the alternative for maintenance, against the first defendant, the adopted son, and the second defendant, the brother's son, of Chidambaram Chetti. The defendants denied *inter alia* that the plaintiff was the illegitimate son of Chidambaram Chetti and contended that, even if the plaintiff were his illegitimate son, he could not inherit to his father as his mother was a married woman; that Chidambaram Chetti left no separate or self-acquired property, and that, even if the said Chidambaram Chetti was entitled to a share in the property acquired in trade by his father and brother—on the footing that it was joint family property—such share on his death in 1868 passed by survivorship to his

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father and brother; and that the plaintiff cannot therefore claim any share in such property.

The Subordinate Judge found that the plaintiff's mother was not a married woman, that she was continuously kept by Chidambaram Chetti as a concubine, and that the plaintiff was his illegitimate son by such connection, but dismissed the plaintiff's suit on the ground that the plaintiff was estopped from maintaining it by reason of an arrangement made by Chidambaram Chetti in his lifetime, in accordance with which the plaintiff's mother, subsequent to Chidambaram Chetti's death, relinquished all her claims on receipt of a sum of Rs. 2,200 from the second defendant's father. It is impossible to uphold the decision of the Subordinate Judge on this point. A reference to paragraph 2 of the first defendant's written statement in which the said arrangement is alluded to and to exhibit II—the receipt given by the plaintiff's mother for the said amount—clearly shows that no arrangement or settlement was made as regards the plaintiff's right to a share as to maintenance, that the plaintiff's mother gave an acquittance only in respect of her own claims referred to in exhibit II, and that the transaction was not one in which she professed to act as the plaintiff's guardian during his minority or to affect any right or claim which he might have.

The respondents' pleader sought to support the decree appealed against by impugning the finding of the Subordinate Judge as to the plaintiff's status as the illegitimate son of Chidambaram Chetti and by contending that Chidambaram Chetti having died undivided from his father and brother, the plaintiff cannot claim any share in the joint property of such family notwithstanding the existence of the first defendant, the adopted son of Chidambaram Chetti.

We agree with the Subordinate Judge that the marriage of the plaintiff's mother with one Kuppusami has not been proved, and that the plaintiff is Chidambaram Chetti's illegitimate son entitled to rights of inheritance in respect of his father's estate, if any. The onus of establishing that he is the son of Chidambaram Chetti, is clearly on the plaintiff and he cannot by simply proving that his mother was the Chetti's concubine shift the onus on to the other side to disprove his paternity. The legal presumption as to paternity raised by section 112 of the Indian Evidence Act is applicable only to the offspring of a married couple. A person claiming as an illegitimate son must establish his alleged paternity

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like any other disputed question of relationship and can, of course, rely upon statements of deceased persons under section 32, clause 5, for opinion expressed by conduct under section 50 of the Evidence Act and also upon such presumptions of *fact* as may be warranted by the evidence.

[Their Lordships then dealt fully with the evidence on which they found that plaintiff was the illegitimate son of the late Chidambaram Chetti, and continued.]

The plaintiff would therefore certainly be entitled to a share in the estate of Chidambaram Chetti, had the latter left any separate or self-acquired property as alleged in the plaint. This, however, the plaintiff has entirely failed to establish. The family consisted of Arunachelam Chetti and his two sons Chidambaram Chetti and (his brother) Muthuraman Chetti (father of the second defendant). The family is not shown to have had any ancestral property, but it acquired property by trade in which the father and the two sons were jointly engaged. There being no indication of an intention to the contrary it must be presumed that the property thus acquired was held by the members of the family as joint property with the incident of the right of survivorship. Chidambaram Chetti having predeceased his father and brother, it has now been clearly established by decisions (*Krishnayyan* v. *Muttusami*(1), *Ranoji* v. *Kandoji*(2) and *Parvathi* v. *Thirumalai*(3)) that the plaintiff can claim no share as against his grandfather and uncle, and being illegitimate he cannot 'represent' his father in the undivided family. As stated in the judgment of this Court in *Ramalinga Muppan* v. *Pavadai Goundan*(4) "the effect of these decisions is that it is only when the father dies a separated householder that an illegitimate son is entitled to inherit to his separate estate," but that when the father dies an 'Avibhakta' (undivided from his lineal ancestors, brothers or other collaterals) he can claim no share in the joint family property. It is true that in none of the reported cases on the point did there exist, as in the present case, along with the illegitimate son, a legitimate son, by birth or adoption —of the deceased 'Avibhakta' or undivided father. But that circumstance cannot make any difference in principle inasmuch as the special rule of inheritance in favour of the illegitimate son of

(1) I.L.R., 7 Mad., 407.
(2) I.L.R., 8 Mad., 557.
(3) I.L.R., 10 Mad., 334.
(4) I.L.R., 25 Mad., 519 at p. 522.

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a Sudra, along with his legitimate brothers, provides that, in the absence of legitimate brothers, the illegitimate son may inherit the whole property in default of daughter's sons of the deceased. This clearly shows that the Sudra father therein contemplated is one that was divided from his ancestors and collaterals (see 'West and Buhler,' 3rd edition, volume I, page 72). But if he was not so divided the text cannot apply, though he may have left legitimate sons along with the illegitimate son. The only point decided in *Ramalinga Muppan* v. *Pavadai Goundan*(1) is that, if the illegitimate son of a separated Sudra predeceases his father, leaving him surviving his (the illegitimate son's) legitimate son and then the father dies, the illegitimate son's legitimate son will 'represent' his father and inherit the whole estate of his grandfather in preference to the divided brothers of the grandfather; and this does not in any way militate against the above principle.

It was also suggested and argued that though Chidambaram Chetti predeceased his father Arunachelam Chetti, the latter, being himself a separated householder and the *pater familias* of the joint family, could allot a share, by his choice to the plaintiff and that therefore on his death without making such allotment, the first and second defendants as the legitimate grandsons of Arunachelam Chetti should make the plaintiff 'partaker' of the moiety of a share. However plausible this argument may be, it is impossible to maintain this position both because the word 'father' in the text cannot grammatically include 'grandfather' and because the context relating to daughter's son shows that it cannot apply to the grandfather.

The plaintiff's claim, therefore, for a share in the joint family property entirely fails.

As regards his alternative claim for maintenance, the issues proceed on the footing that the plaintiff is entitled to maintenance unless such claim be barred by section 43, Civil Procedure Code, or the plaintiff be estopped from maintaining the suit (*vide* issues Nos. 6, 7, 8 and 16); and the only questions for decision are, what rate of maintenance should be decreed and whether past maintenance should also be awarded. In determining the rate of maintenance, an illegitimate member of a family who is not entitled to inherit can be allowed only a compassionate rate of maintenance and he

(1) I.L.R., 25 Mad., 519 at p. 522.

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cannot claim maintenance on the same principles and on the same scale as disqualified heirs and females who have become members of the family by marriage. In fixing, however, the compassionate rate of maintenance for the plaintiff, regard, no doubt, should be had to the interest of his deceased father in the joint family property and the position of his mother's family. We think that Rs. 25 per mensem during his life (from date of suit) will be a fair amount to be awarded under the circumstances and there is no reason to disallow to the plaintiff arrears of maintenance at the same rate for the period of nine years prior to the suit, as claimed by him (*Raja Yarlagadda Mallikarjuna Prasada Nayadu* v. *Raja Yarlagadda Durga Prasada Nayadu*(1)).

The plaintiff having succeeded only in part and the defendants having unsuccessfully impugned plaintiff's status as the illegitimate son of Chidambaram Chetti, each party will bear his own costs throughout.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice.

AMIRTHAM (PETITIONER), PETITIONER,

v.

ALWAR MANIKKAM AND OTHERS (COUNTER-PETITIONERS), RESPONDENTS.*

1903. January 20, 21.

Civil Procedure Code—Act XIV of 1882, *ss.* 407, 408, 409—*Suit in* formâ pauperis.

Sub-section (c) of section 407 of the Code of Civil Procedure does not refer solely to a question of jurisdiction. Under it, an applicant must make out that he has a good subsisting *primâ facie* cause of action capable of enforcement. *Kamrakh Nath* v. *Sundar Nath*, (I.L.R., 20 All., 299), followed.

Section 409, which provides that "the Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence the applicant is or is not subject to any of the prohibitions specified in section 407," enables the parties to argue the question if they so desire, but does not preclude the Court, if no argument is offered, from considering that question.

(1) I.L.R., 24 Mad., 147 at p. 154.

* Civil Revision Petition No. 259 of 1902, presented under section 622 of the Code of Civil Procedure, praying the High Court to revise the order of S. Raghava Ayyangar, District Munsif of Srivilliputtur, in Miscellaneous Petition No. 313 of 1902, dated 8th April 1902.

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APPLICATION for leave to sue *in formâ pauperis*. The District Munsif passed an order under section 408 of the Code of Civil Procedure appointing a day for the hearing of the application. The applicant appeared at the hearing of the application, but the defendants did not and the Court was not addressed on the question whether on the face of the application and of the evidence the applicant was or was not subject to any of the prohibitions specified in section 407. The Munsif made an order under section 409 dismissing the application on the ground that on the face of the plaint the petitioner appeared to have no right to sue.

The applicant preferred this civil revision petition.

A. S. Balasubrahmanya Ayyar for petitioner.

M. R. Ramakrishna Ayyar and *A. K. Sundaram Ayyar* for respondent.

JUDGMENT.—This is a revision petition against an order of a District Munsif dismissing an application for leave to sue *in formâ pauperis*. The Munsif made an order under section 408 of the Code of Civil Procedure appointing a day for the hearing of the application. The application duly came on for hearing under the provisions of section 409 of the Code and the District Munsif made an order under that section dismissing the application. He dismissed it upon the ground that the petitioner on the face of the plaint did not appear to have a right to sue. On the hearing of the application the petitioner appeared, but the defendants did not appear, and no argument was addressed to the Court with reference to the question whether, on the face of the application and of the evidence, the applicant was or was not subject to any of the prohibitions specified in section 407 of the Code. It has been argued before me that it was not competent for the District Munsif to dismiss the application upon the ground taken by him, and the argument was based upon the opening words of section 408 'if the Court sees no reason to refuse the application on any of the grounds stated in section 407' and on the second paragraph of section 409 'the Court shall also hear any argument which the parties may desire to offer,' etc. The argument was that the Court would not make an order under section 408 fixing a day for the hearing of the application, unless it was satisfied that there was no reason to refuse the application on any of the grounds stated in section 407, and, that being so the Court could not, where there had been no argument upon the point at the hearing, go into the

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question again when the hearing took place under section 409. To adopt the construction which I was invited on behalf of the petition to adopt with reference to section 409 would, it seems to me, be placing too narrow a construction upon the words of paragraph 2. Paragraph 2 says 'The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in section 407'. It enables the parties to argue the question, if they so desire, and requires the Court, if any argument is offered, to consider the argument, but, as it seems to me, it does not preclude the Court if no argument is offered when the matter comes on for hearing under section 409 from considering whether the applicant is subject to any of the prohibitions specified in section 407, and if the Court is of opinion that he is, from dismissing the application. It does not follow, because, at the time when the Court acting under section 408 fixes a day for the hearing of the application, it then sees no reason to refuse the application on any of the grounds stated, that at a later stage when exercising the powers conferred by section 409 it is not open to the Court to consider whether the applicant is subject to any of these prohibitions. All that section 408 means is that the Court at that stage of the proceedings must be of opinion that, on the materials then before the Court, there is no reason to refuse the application on any of the grounds stated in section 407. It is also the duty of the Court when the hearing takes place at a later stage, under section 409 to consider whether or not the applicant is subject to any of the prohibitions specified.

It has also been argued that paragraph C of section 407 refers to a matter of jurisdiction and not to the question whether or not a good cause of action is disclosed in the application. No doubt the concluding words of the paragraph "sue in such Court" lend some support to the argument that the paragraph refers to the jurisdiction of the Court and not to the cause of action disclosed in the application. I do not think the point is altogether free from doubt, but it has been carefully considered by the Allahabad High Court in two cases, and I am prepared to follow these decisions. In the later case of *Kamrakh Nath* v. *Sundar Nath*(1)

(1) I.L.R., 20 All., 299.

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the decision is to the effect that paragraph C of this section does not refer solely to a question of jurisdiction, but that the applicant must make out that he has a good subsisting *primâ facie* cause of action capable of enforcement.

The third point relied upon on behalf of the petitioner is that the plaint, on the face of it, discloses a right to sue. As to this I see no reason to differ from the conclusion at which the Munsif has arrived.

That being my view with regard to the three points raised on behalf of the petitioner, I hold that it has not been shown that the District Munsif failed to exercise a jurisdiction vested in him by law or that he acted illegally or with material irregularity.

I dismiss the petition with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1903. January 21.

PANDU PRABHU (DEFENDANT No. 1), APPELLANT,

v.

JUJE LOBO (PLAINTIFF), RESPONDENT.*

Transfer of Property Act—IV of 1882, ss. 86, 87—Order absolute for foreclosure without notice to defendant in foreclosure suit—Application to set order aside.

A plaintiff in a foreclosure suit obtained a decree for foreclosure under section 86 of the Transfer of Property Act, and, the time limited for redemption by the defendant having expired without being extended, the plaintiff obtained, under section 87, but without notice to the defendant, an order absolute debarring the defendant from redeeming, and also for delivery of possession of the mortgaged property. On the contention being raised, on appeal, that the order was null and void for want of notice to the defendant:

Held, that the view of the majority of the Court in *Mallikarjunadu Setti* v. *Lingamurti Pantulu*, (I.L.R., 25 Mad., 244), which related to proceedings under section 89 was applicable to proceedings under section 87, and that such proceedings are proceedings in execution of the decree passed under section 86. In the present case, the application had been made within one year of the date of

* Appeal against Appellate Order No. 37 of 1902, presented against the order of J. W. F. Dumergue, District Judge of South Canara, in Appeal Suit No. 301 of 1901, presented against the order of T. V. Anantan Nair, District Munsif of Mangalore, on Regular Miscellaneous Petition No. 1205 of 1901 (in Regular Suit No. 283 of 1901).

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the decree, and, in consequence, under section 248 of the Code of Civil Procedure, no notice was necessary to the defendant.

Narayana Reddi v. *Papayya*, (I.L.R., 22 Mad., 133), proceeds upon the view that the defendant could apply for an extension of the time for redemption only if and when the plaintiff applies for an order absolute under the second paragraph of section 87—a view which has been dissented from by the Full Bench in *Vedapuratti* v. *Vallabha Valiya Rajah* (I.L.R., 25 Mad., 300).

APPLICATION to cancel an order passed under section 87 of the Transfer of Property Act debarring the defendant in a foreclosure suit from redeeming the mortgaged property, and directing delivery of possession to the plaintiff in the suit. No notice of the application had been given to the defendant, the present petitioner. The District Munsif dismissed the petition. On appeal, the District Judge said: "The plaintiff obtained a foreclosure decree under section 86 of the Transfer of Property Act against the defendants on the 16th March 1901. The decree allowed the defendants three months' time to make payment and ordered that, in default of such payment, the defendants should be absolutely debarred of all right to redeem. On the 10th June 1901, the third defendant applied for further time. This application was rejected on the 6th July and, no payment having been made, the plaintiff applied for execution on the 9th idem. An order was passed on the 10th idem under the second clause of section 87 directing foreclosure and delivery of the property to the plaintiff. Delivery was made on the 31st July, obstruction offered by some of the defendants having been removed. The first defendant then applied on the 11th September for the cancellation of the delivery made to the plaintiff and for restoration of the property to himself. This application was dismissed and the first defendant appeals. The ground taken in appeal is that an order under the second clause of section 87 or an 'order absolute' as it is called in the last clause should not have been passed without notice to the defendants and *Narayana Reddi* v. *Papayya*(1) has been quoted as authority for this position." He dealt with that case and also with the decisions in *Elayadath* v. *Krishna*(2), *Ramasami* v. *Sami*(3) and *Vallabha Valiya Rajah* v. *Vedapuratti*(4) and concluded as follows:—"The result of these decisions, in my opinion, is that when a mortgagor has, by failing to make payment within the time limited by a decree

(1) I.L.R., 22 Mad., 133.
(2) I.L.R., 13 Mad., 267.
(3) I.L.R., 17 Mad., 96.
(4) I.L.R., 19 Mad., 40 at p. 48.

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under section 86 or under section 92, allowed the decree to become final, he cannot be allowed to take advantage of the proviso to section 87 or section 93 and that he is not entitled to notice for the purpose of enabling him to take such advantage. In the present case, the decree was less than a year old and notice was not required on any other ground. Hence I think that the order passed under the second clause of section 87 and subsequent delivery of the property to the plaintiff were not bad for want of notice." He confirmed the Munsif's order and dismissed the appeal.

The petitioner (defendant) preferred this appeal.

K. Narayana Rau for appellant.

K. P. Madhava Rau and *A. Srinivasa Rau* for respondent.

JUDGMENT.—The respondent obtained a decree for foreclosure under section 86, Transfer of Property Act, and the time limited for redemption by the defendant having expired without being extended, the respondent applied under section 87 for an order absolutely debarring the defendant from redeeming and for an order for delivery of possession of the property to him. The orders were accordingly made. It is contended by the appellant that the orders are null and void because no notice of the application was given to the defendant, appellant and the case of *Narayana Reddi* v. *Papayya*(1) is relied upon. That case, no doubt, supports the contention, but that decision proceeds upon the view that the defendant could apply for an extension of the time for redemption only if and when the plaintiff applies for an order absolute under the second paragraph of section 87, a view which has been dissented from by the Full Bench in *Vedapuratti* v. *Vallabha Valiya Rajah*(2). Following the decision of the majority of the Full Bench in the case of *Mallikarjunadu Setti* v. *Lingamurti Pantulu*(3) which related to proceedings under section 89 of the Transfer of Property Act, we hold that the same view is applicable to proceedings under section 87 and that such proceedings are proceedings in execution of the decree passed under section 86 of that Act. In the present case the application was made within one year of the date of decree and therefore under section 248, Civil Procedure Code, no notice was necessary to the judgment-debtor (defendant).

(1) I.L.R., 22 Mad., 133. (2) I.L.R., 25 Mad., 300.
(3) I.L.R., 25 Mad., 244.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1903. April 22.

RAMASWAMY AYYAR AND ANOTHER (DEFENDANTS NOS. 1 AND 5), APPELLANTS,

v.

THIRUPATHI NAIK (PLAINTIFF), RESPONDENT.*

Registration Act—III of 1877, *s.* 17—*Agreement to lease—Darkhast application—Endorsement sanctioning application—Communication to applicant—Document not expressed to be for over five years nor for rent exceeding Rs.* 50 *per annum—Necessity for registration.*

Application was made to a Devasthanam for some waste land on darkhast. The Manager of the Devasthanam sanctioned the grant by endorsement on the darkhast application, and this was communicated to the applicant. The document did not in terms purport to be for a period exceeding five years, nor did the rent reserved by it exceed Rs. 50 per annum:

Held, that it must be taken to be an agreement to lease and, in consequence, subject to the provisions of the Registration Act as if it were a lease. But, treating it as a lease, it did not require registration under section 17 of the Registration Act. It did not in terms purport to be for a period exceeding five years nor did the rent reserved by it exceed Rs. 50 per annum. It was therefore exempted from registration by the notification of Government published under that section.

The criterion for purposes of registration is what is expressed on the face of the document, not what incidents may be annexed by custom to a grant of the kind. Even though one such incident may be that the grantee is entitled to hold permanently, another would be that the tenant may relinquish the holding at the end of any fasli, and therefore before the expiration of five years.

SUIT to recover possession of land. Plaintiff claimed to have purchased the land from one Balakrishna Naidu, to whom it had been granted on darkhast. The District Munsif framed an issue as to whether the darkhast was invalid for want of registration. The nature of the application is more fully set out in the judgment of the Subordinate Judge. The application by Balakrishna Naidu and the order sanctioning it were produced, the latter stating that the grant of the lands on darkhast on the terms contained therein had been sanctioned. This was endorsed on the darkhast application. The District Munsif held that it came within the

* Civil Miscellaneous Appeal No. 136 of 1902, presented against the order of T. M. Rangachari, Subordinate Judge of Madura (West), in Appeal Suit No. 559 of 1901, presented against the decree of A. Narayanan Nambiar, District Munsif of Madura, in Original Suit No. 826 of 1900.

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definition of a lease as given in the Transfer of Property Act; that the darkhast corresponded to a lease in perpetuity; and that it was inadmissible in evidence for want of registration. The suit, in consequence, failed, and was dismissed.

The Subordinate Judge on appeal said :—

"Plaintiff claims his title from one Balakrishna Naidu. The land in question was waste, belonging to Minakshi Devasthanam. Balakrishna Naidu had applied for the land on darkhast. The District Munsif dismissed the suit on the sole ground that this application was unregistered. What appears on the application is that on the darkhast of Balakrishna, the village authorities submitted a report recommending the proposal. The Devasthanam Tahsildar forwarded the application with his recommendation to the Devasthanam Manager who sanctioned the grant on certain terms. I do not consider the darkhast application need have been registered. I never saw such a paper registered. The gist of the paper is that a direction was addressed to the Tahsildar of the Devasthanam Manager; it does not constitute a grant from the temple authority to Balakrishna. Most likely the grant was oral followed by delivery and there is internal evidence contained in the paper in question that the premium was only a sum of Rs. 50. Under section 54 of the Transfer of Property Act, a grant dealing with land, the value of which is under a hundred rupees, need not be registered if followed by delivery. Plaintiff does allege delivery in this case."

He reversed the decree and remanded the case for disposal.

Against that order, defendants Nos. 1 and 5 preferred this appeal.

P. S. Sivaswami Ayyar for appellant.

K. N. Ayya for respondent.

JUDGMENT.—We think that the endorsement of the Manager on the memorandum of darkhast, which endorsement was communicated to the applicant, must be taken to be an agreement to lease and therefore to be subject to the provisions of the Registration Act as if it were a lease. But treating it as a lease we do not think that it requires registration under section 17 of the Act. It does not in terms purport to be for a period exceeding five years, nor does the rent reserved by it exceed Rs. 50 per annum. It is therefore exempted from registration by the notification of Government published under that section.

It is argued that by custom a lease of this kind entitles the grantee to hold permanently. It may or may not be so, but the criterion for registration is what is expressed on the face of the document.

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If we had to go into the question of what incidents are annexed by custom to grants of the kind we would have to bear in mind that one of such incidents is that the tenant can relinquish the holding at the end of any fasli and, therefore, before the expiry of five years.

The appeal therefore fails and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

JAYANTI SUBBIAH (PLAINTIFF), APPELLANT,

v.

ALAMELU MANGAMMA (DEFENDANT), RESPONDENT.*

1902. April 14, 22.

Hindu Law—Husband's debts binding on widow in respect of assets come to her hands as legal representative—Widow's right to reside in husband's house.

Under the Hindu Law, the maintenance of a wife by her husband is a matter of personal obligation arising from the very existence of the relation and quite independent of the possession by the husband of any property, ancestral or acquired, and his debts take precedence of her claim for maintenance.

Where the family consists of only the husband and the wife, all debts which would bind the husband personally will necessarily be binding on the widow in respect of all the assets which have come to her hands as his legal representative.

Where a debt has been incurred by the husband only as a surety and not for the benefit of the family, it will be binding on the assets in the hands of the widow just as it will bind the whole of the family property if it devolves upon a son by right of survivorship.

Where an undivided Hindu family consists of two or more males, related as father and sons, or otherwise, and one of them dies leaving a widow, she has a right of maintenance against the surviving co-parcener or co-parceners *quoad* the share or interest of her deceased husband in the joint family property which has come by survivorship into the hands of the surviving co-parcener or

* Civil Miscellaneous Appeal No. 161 of 1901 presented against the order of S. Russell, District Judge of Bellary, dated 25th July 1901, in Civil Miscellaneous Petition No. 77 of 1901, connected with Execution Petition No. 29 of 1895 and Miscellaneous Petition No. 26 of 1901, Original Suit No. 16 of 1902, on the file of Subordinate Judge's Court of Bellary.

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co-parceners, and though such right does not in itself form a charge upon her husband's share or interest in the joint family property, yet, whenever it becomes necessary to enforce or preserve such right effectually, it may be made a specific charge on a reasonable portion of such joint family property, such portion not exceeding her husband's share or interest therein.

Such right may also, in certain cases, be enforced against the transferee of joint family property. *Manilal* v. *Baitara*, (I.L.R., 17 Bom., 398), discussed.

The deceased husband of defendant executed a promissory note as a surety, and after his death a decree was obtained against the defendant, his widow, on the promissory note. The decree-holder attached a house which had belonged to the deceased, and in which the widow was residing, brought it to sale and purchased it. On his endeavouring to obtain possession the widow resisted on the ground that she had a right of residence in the house during her lifetime and could not, therefore, be ejected:

Held, that the decree-holder was entitled to be given possession of the house and that the widow had no right of residence therein.

PETITION under section 328 of the Code of Civil Procedure. Petitioner was plaintiff in Original Suit No. 16 of 1892 in which the present counter-petitioner, who was the widow of one Naranappa, was defendant. That suit was based on a promissory note which had been made in plaintiff's favour by the defendant's late husband, Naranappa, the counter-petitioner being sued as his widow and legal representative. Petitioner obtained a decree, in execution of which he attached, brought to sale and purchased a house of the deceased, in which the counter-petitioner had been and was living. Petitioner attempted to obtain possession under section 318 of the Code of Civil Procedure, but was resisted, under section 334, by counter-petitioner, who claimed that she had a right to reside in the residential portion of the house during her life and could not be ejected. Further facts appear from the following order of the District Judge:—

"ORDER.—The house of the deceased Naranappa has been sold in execution to satisfy a debt incurred by him on a promissory note. The question at present to be settled is whether the widow of Naranappa can be ejected from the house. The promissory note was dated February 1892. Suit (Original Suit No. 16 of 1892) was filed against the widow Alamelu Mangamma. The first issue in that suit was:—(I) Whether the promissory note sued on is genuine and was executed for consideration or not? From the judgment in the case, it appears that two brothers Govindappa and Venkappa owed the plaintiff Rs. 1,500 and they further obtained a loan of Rs. 1,000 (at the request of

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the deceased Naranappa) from the plaintiff. For this Rs. 2,500 the deceased Naranappa executed the promissory note, subject of the suit. It is not apparent from the judgment what consideration Naranappa received for executing the promissory note. It has been mentioned now that Naranappa executed the promissory note to oblige his relations. In order to determine the question mentioned above it is necessary to settle the question whether the debt evidenced by the promissory note was binding on the family and therefore on the widow of the deceased Naranappa. The decree is against the property of the deceased Naranappa and binds the widow as the representative of her late husband. The family consisted of the husband and wife only. There is no finding in the case that the debt was a family debt binding on the family. In fact, we might consider the finding on the first issue mentioned as tending to the conclusion that the debt was a personal debt binding on the deceased Naranappa only and his property. This would scarcely be sufficient to enable the Court now to hold that the widow had lost her right of residence. She would lose her right only if the debt was a family debt and the house was being sold to satisfy that debt. I cannot now conclude on the evidence that the debt was a family debt. Under these circumstances, I find that the widow has not lost her right of residence. She cannot therefore be ejected from the residential portion of the house. The other part of the house, I understand from the Amin's report, has been delivered to the purchaser. *Ramanadan* v. *Rangammal*(1) and *Venkatammal* v. *Andyappa Chetti*(2) have been referred to in argument and the decision as regards law based entirely on these decisions."

Petitioner preferred this appeal.

A. T. Ambrose for appellant.

Dr. *S. Swaminadhan* for respondent.

BHASHYAM AYYANGAR, J.—The appellant is the decree-holder in Original Suit No. 16 of 1892, which he brought, on a promissory note made by the deceased Naranappa, against his widow and legal representative, the respondent. In execution of that decree he attached and became the purchaser of the house of the deceased Naranappa in which the widow, the respondent, had been and was living at the time of the purchase. When he

(1) I.L.R., 12 Mad., 260. (2) I.L.R., 6 Mad., 130.

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proceeded to obtain delivery of the house under section 318 of the Civil Procedure Code, he was resisted under section 334 by the respondent on the ground that she had a right of residence during her lifetime and that she could not therefore be ejected from the residential portion of the house. The District Judge upheld her contention holding that Naranappa's liability under the promissory note was incurred by him only as a surety for certain debts owing by certain relations of his to the appellant, and that it was therefore not incurred for the benefit of the family consisting only of Naranappa and his wife, the respondent. We are unable to follow the reasoning of the District Judge. The family consisted only of the husband and wife and all debts which would bind the husband personally are necessarily binding upon the widow in respect of all the assets which have come to her hands as his legal representative. Even if the family had been an undivided family consisting of father and son, a debt incurred by the father only as surety and not for the benefit of the family, would bind the whole of the joint family property which may have devolved upon the son by right of survivorship (*Sitaramayya* v. *Venkatramanna*(1) and *Tukaram Bhat* v. *Gangaram*(2)) and it is difficult to see on what principle the District Judge holds that the debt is not a family debt. Under the Hindu Law the maintenance of a wife by her husband is a matter of personal obligation arising from the very existence of the relation and quite independent of the possession by the husband of any property ancestral or self-acquired (Mayne's 'Hindu Law and Usage,' 6th edition, paragraphs 451 and 455) and *Savitribai* v. *Luximibai* and *Sadasiv Gayoba*(3) and his debts take precedence of her claim for maintenance (Mayne's 'Hindu Law,' paragraph 464). The District Judge relies in support of his decision upon the cases of *Venkatammal* v. *Andyappa Chetti*(4) and *Ramanadan* v. *Rangammal*(5). He appears to have misapprehended the principle of those decisions. When an undivided Hindu family consists of two or more males related as father and sons or otherwise and one of them dies leaving a widow, she has a right of maintenance against the surviving co-parcener or co-parceners, *quoad* the share or interest of her deceased husband

(1) I.L.R., 11 Mad., 378. (2) I.L.R., 23 Bom., 454.
(3) I.L.R., 2 Bom., 573 at pp. 597 and 598.
(4) I.L.R., 6 Mad., 130. (5) I.L.R., 12 Mad., 260.

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in the joint family property which has come by survivorship into the hands of the surviving co-parcener or co-parceners and though such right does not in itself form a charge upon her husband's share or interest in the joint family property, yet when it becomes necessary to enforce or preserve such right effectually, it could be made a specific charge on a reasonable portion of the joint family property such portion of course not exceeding her husband's share or interest therein (*Ramanadan* v. *Rangammal*(1)). Such right may also, in certain cases, be enforced against the transferee of joint family property (*vide* section 39 of the Transfer of Property Act). In *Venkatammal* v. *Andyappa Chetti*(2), the son, after the death of the father, incurred considerable debts and on mortgage bonds executed by him suits were brought and the properties brought to sale in execution of decrees passed in such suits. It was not shown that the debts were incurred for purposes which could bind his mother who, on the death of her husband, had a right of maintenance against her son *quoad* the share of her husband in the joint family property which the son mortgaged for a debt of his own and which was brought to sale for realisation of such debt. It was held that the house must be sold subject to her right to continue to reside in the house which she had been occupying till then. In *Ramanadan* v. *Rangammal*(1), the question was considered by a Full Bench. In that case the undivided family consisted of a father, sons and grandsons and on the death of the father the sons or some of them contracted a debt and in execution of a decree passed against the sons and grandsons for the recovery of such debt, the house in which the widow of the father was living was sold. An issue was sent as to the nature of the debt and it was found that the debt was incurred for the benefit of the whole family and no objection was taken to that finding. The Judges were unanimous in holding that the widow of the father had no right as against the purchaser to reside in the house of her late husband's family. Muttusami Ayyar, J., observed as follows:—"I am also of opinion that the purchase is valid as against the respondent. It is found that the judgment debt is a family debt and I take it that the debt though contracted only by the male co-parceners, was contracted by them, not for their exclusive benefit, but for the benefit

(1) I.L.R., 12 Mad., 260. (2) I.L.R., 6 Mad., 130.

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generally of the joint family consisting of themselves and their mother. A sale for the payment of her own debt would bind her interest in the house whatever it might be, and the decree in Original Suit No. 3 of 1882, was one which executed the hypothecation of 1875, and which was passed against the representatives of the joint family. In those circumstances the respondent is not entitled to set aside the sale unless she shows that the debt which has led to it is not binding upon her." He then distinguishes the case of *Venkatammal* v. *Andyappa Chetti*(1) on the ground that there was no finding in that case that the debt was a family debt, that is to say, "a debt contracted for the joint benefit of the mother and her sons." A debt contracted by the husband himself as in the present case is necessarily binding upon her and on his death without male issue his estate devolves upon her by right of inheritance, in the absence of any undivided kinsmen of his. It is a mistake, under such circumstances, to regard her as having a right of maintenance (which includes right of residence) against her husband's estate. She takes it as heir and must administer it as such. It is only the residue that is left after discharging her husband's debts that will belong to her. During her husband's lifetime she had, no doubt, a right of maintenance against him, but that was only a matter of personal obligation on the part of the husband, quite independent of the possession of any property and it did not form a charge upon his property. Kernan, J., in the Full Bench case states that "if the debt in respect of which the sale took place was *a debt due by her husband, no doubt could be entertained that she had no such right.* The only doubt there could be, as it appears to me is whether her right to reside in the house had not accrued as against the manager who succeeded her husband and whether such manager could have, by any act of his, voluntarily affected her right. However the finding is, that the debt incurred by the manager was for the benefit of the family." The italics in the above quotation are mine. In the case of *Dalsukhram Mahasukhram* v. *Lallubhai Motichand*(2), the father left not only a widow but a son who sold the house. It was held that the sale would be subject to the right of the widow to continue to reside therein, it being found that there were no proper reasons for the alienation by

(1) I.L.R., 6 Mad., 130. (2) I.L.R., 7 Bom., 282.

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the son and that the purchaser bought the house admittedly with full knowledge that the widow was residing therein. In *Bhikham Das* v. *Pura*(1) the owner of the dwelling house, who mortgaged the same, died leaving him surviving his wife and mother. In a suit brought against both of them after the death of the mortgagor to enforce the mortgage, it was held that it could be enforced by sale of the dwelling house. Apparently it was left an open question as to whether the widow (query mother) could be ousted by the auction purchaser. If the dwelling house devolved upon the mortgagor from his father, who left surviving him his widow, the mortgagor's mother, her right of residence could not be defeated by a sale made in satisfaction of a debt which was not incurred by the son for a purpose which would bind also his mother. In *Manilal* v. *Baitara*(2) the house was mortgaged by the husband in his lifetime and in execution of a decree enforcing such mortgage, it was sold and purchased by the defendant with knowledge that the mortgagor's widow was residing in the house at the time of the Court's sale. In a suit brought by the widow to establish her right to continue to reside during her lifetime in the house, her claim was negatived in the absence "of any allegation that the mortgage effected by the plaintiff's husband was not for the family advantage or was in any way in fraud of her rights." It does not appear from the report of the case whether there was any male member of the family other than the husband. If from the decision in that case it is to be implied that, in the view of the learned Judges who decided it, the widow would have a right to continue to reside in the house after it has been sold in satisfaction of a debt owing by her husband; unless the debt was incurred for a purpose which would be beneficial to and binding upon his wife, I am unable to concur in that view. The appeal is therefore allowed and the order of the District Judge is modified by directing that the respondent be ejected also from that portion of the house purchased by the appellant in which she has been residing. The order of the District Judge is affirmed in other respects. Each party will bear his or her own costs of this appeal.

BENSON, J.—I concur.

(1) I.L.R., 2 All., 141. (2) I.L.R., 17 Bom., 398.

APPELLATE CRIMINAL.

Before Mr. Justice Bhashyam Ayyangar.

1903. March 3.

DORASAMY PILLAI (ACCUSED), PETITIONER,

v.

EMPEROR (COMPLAINANT), RESPONDENT.*

Penal Code—Act XLV of 1860, s. 353—Using criminal force to deter a public servant—Entry by police on premises of suspected person at night—Assault on police.

A police constable, at midnight, entered upon the premises of a person who was regarded by the police as a suspicious character, and knocked at his door to ascertain if he was there, whereupon he came out and abused and pushed the constable and lifted a stick as if he were about to hit the constable with it. On a complaint being preferred under section 353 of using criminal force to deter a public servant in the execution of his duty:

Held, that the offence had not been committed. The constable was not engaged in the execution of his duty as a public servant and was technically guilty of house trespass, and his action was calculated to cause annoyance to the inmates of the house, and was insulting to the accused, who was justified in causing the slight harm which he had inflicted on the constable. The latter could not be regarded, under section 99, as acting in good faith under colour of his office as his action was not authorized by any police circular or order.

CHARGE of using criminal force to deter a public servant from discharging his duty, under section 353, Indian Penal Code. It appeared that the accused was registered in the books of the police as a person of suspicious character, and that the complainant, a police constable, was ordered to check the presence of the accused. In order to comply with this direction, the constable went at midnight, in uniform, with another constable, entered upon the premises of the accused and knocked at his door, to see if he was there. The accused thereupon came out, abused the constable and pushed him, and lifted a stick as if he were going to beat him.

* Criminal Revision Petition No. 589 of 1902, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of K. Rustum Sing, First-class Deputy Magistrate of Chidambaram, in Criminal Appeal No. 63 of 1902, *confirming* the finding and sentence of C. P. Doraswami Chettiar, Stationary Second-class Magistrate of Chidambaram, in Criminal Case No. 416 of 1902.

The constable's turban fell to the ground. The Stationary Second-class Magistrate convicted the accused and sentenced him to three months' rigorous imprisonment. The conviction and sentence were upheld, on appeal, by the Deputy First-class Magistrate.

The accused filed this criminal revision petition.

T. Rangachariar for petitioner.

The Public Prosecutor in support of the conviction.

JUDGMENT.—It is clear that the conviction of the accused in this case under section 353, Indian Penal Code, is illegal, and cannot be upheld. It is impossible to regard the constable as engaged in the execution of his duty as a public servant when he entered upon the premises of the accused about midnight with another constable and stood knocking at the door of the accused's house to see if he was present. The fact that the accused is a person who is regarded by the police as a suspicious character (K.D.) and as one whose movements ought to be watched does not authorize the complainant to enter upon his premises or knock at his door with a view to ascertaining whether he is present in his house or not. The Police Circular Orders referred to by the Magistrate have not the force of law, but in justice to them I may observe that there is nothing whatever in any of them which warrants the course adopted by the complainant. It is perfectly lawful for officers of the police to watch the movements of suspected characters, and they are properly required to do so by Police Circular Orders. But they can do so only by lawful means and not by trespassing upon their premises or by having recourse to other unlawful means. It is found that the accused came out, abused and pushed the complainant and afterwards brought a stick from inside and lifted it up as if he was going to beat him with it and that the complainant's turban fell on the ground when he was pushed. Under these circumstances, the accused would no doubt be guilty of assault or of using criminal force unless his act could be regarded as done in the exercise of the right of private defence of property. The constable in entering upon the accused's dwelling-house and knocking at his door at midnight with the intention of finding out whether the accused, who is regarded as a suspected character by the police, was in his house, was technically guilty of house trespass under section 442 of the Indian Penal Code. The course adopted by the constable was certainly one which would cause annoyance to the inmates of the house and is also insulting

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to the accused, and under section 104 the accused was justified in voluntarily causing to the complainant the slight harm which he inflicted on him, and the constable cannot be regarded under section 99, Indian Penal Code, as acting in good faith (*vide* section 52, Indian Penal Code) under colour of his office though his act may not be strictly justifiable by law. No Police Circular Order or any other order has been pointed out which, though not strictly justifiable in law, he can *bonâ fide* plead in support of the course pursued by him of entering upon the premises of the accused at midnight and knocking at the door. I may also remark that the sentence of three months' rigorous imprisonment which was passed upon the accused is unduly severe under the circumstances of the case even if he were guilty of any offence. I reverse the conviction and sentence and acquit the accused and direct that he be set at liberty, the bail bond being cancelled.

APPELLATE CRIMINAL.

Before Mr. Justice Bhashyam Ayyangar.

1903. March.

IN THE MATTER OF KALAGAVA BAPIAH (ACCUSED).*

Criminal Procedure Code—Act V of 1898, *ss.* 195, 196, 197, 215, 436—*Sanction—Notice to accused—Reference to High Court—Revisional powers.*

Section 215 of the Code of Criminal Procedure is not applicable to a case in which a commitment in question has not been made under any one of the four sections therein specified, but has been made under the directions of the High Court under section 526 (1) IV. An order of a Sessions Judge or District Magistrate passed under section 436, directing commitment, may be quashed by the High Court in the exercise of its revisional powers, though not under section 215. But an order passed by the High Court itself under section 526 cannot be so revised.

Sanction accorded by Government under section 197 is not null and void for the reason that no notice was given to the accused to show cause why it should not be given. It is a matter left to the discretion of Government whether such opportunity should be given to the person concerned before sanctioning his prosecution.

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* Criminal Miscellaneous Petition No. 11 of 1903 submitting to the High Court for orders the order of commitment of the accused in Sessions Case No. 41 of 1902 on the file of the Sessions Court of Godavari.

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There is a marked distinction between the classes of offences dealt with in section 195, clauses (*b*) and (*c*), and those dealt with in section 197. A Court granting sanction under section 195 (*b*) and (*c*) does so in connection with offences committed in or in relation to any proceeding in such Court, and the Court therefore Acts in its judicial capacity in granting the sanction on legal evidence. But the Government, in according or withholding sanction, under section 197 (for the prosecution of a public servant in respect of an offence alleged to have been committed by him as such public servant), acts purely in its executive capacity and the sanction need not be based on legal evidence.

The Criminal Procedure Code does not prescribe any particular form for the sanction required by section 197, as it does in the case of a sanction accorded under section 195.

REFERENCE to the High Court under section 215 of the Code of Criminal Procedure. The accused had been a member of the Municipal Council of Ellore and was charged with having committed an offence under section 168, Indian Penal Code. The accused had been committed to the Sessions Court for trial in pursuance of an order of the High Court. On the case being called on, objection was taken to the legality of the sanction, which had been accorded by Government in the following order:—Sanction is accorded to the prosecution of [naming the accused] a member of the Municipal Council of Ellore on a charge of having committed an offence under section 168, Indian Penal Code. The grounds of objection were (1) that no notice had been given to the accused before the sanction had been accorded; and (2) that the order did not specify with sufficient clearness the offence with which he was charged. The Acting District Judge referred to *Queen-Empress* v. *Sheik Beari*(1) and *Queen-Empress* v. *Samavier*(2) and, in submitting the case for orders, expressed the view that the employment of the word "sanction" by the legislature imported a judicial element into the act of the executive. On the second objection, he referred to the fact that in the order according sanction no intimation was given as to the nature of the offence under section 168, which the accused was charged with committing, nor as to the place where or the time when it had been committed; nor was there anything in the order to show whether the facts of the charge eventually preferred were before the Government when the sanction was accorded.

Mr. *John Adam* for the accused.

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(1) I.L.R., 10, Mad., 232. (2) I.L.R., 16 Mad., 468.

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ORDER.—The Acting Sessions Judge of Godavari makes this reference under section 215 of the Criminal Procedure Code for quashing a commitment made to his Court, by the Sub-Divisional Magistrate of Ellore, under an order made by the High Court under section 526, clause (1) IV, Criminal Procedure Code—the points of law urged by him for quashing the commitment being that the Local Government accorded the sanction, under section 197, Criminal Procedure Code, for the prosecution of the accused without giving him previous notice, and that the sanction accorded does not specify with sufficient clearness the offence for which he is to be prosecuted.

In my opinion section 215 of the Criminal Procedure Code under which this reference has been made, is inapplicable to the case inasmuch as the commitment in question is not one made under any one of the four sections therein specified, but is one made under the direction of the High Court under section 526 (1) IV. The case was pending before the Sub-Divisional Magistrate of Ellore, who was trying the case (under chapter XXI, Criminal Procedure Code) on a charge which had been framed against the accused when the case was pending before the Joint Magistrate of Rajahmundry, before it was transferred by the District Magistrate to Ellore; and on an application made by the accused to the High Court under section 526 of the Criminal Procedure Code for a transfer of the case, the High Court transferred its trial to the Sessions Court of Rajahmundry and directed the Sub-Divisional Magistrate to commit the accused for trial to that Court.

It will be observed that, under sections 436 and 526 of the Criminal Procedure Code, a commitment may be made without a charge against the accused (*vide* section 226 of the Criminal Procedure Code) and neither of these sections is specified in section 215. The order of a Sessions Judge or District Magistrate passed under section 436 directing commitment can be quashed by the High Court in the exercise of its revisional powers, though not under section 215; but an order passed by the Hight Court itself under section 526 cannot be so revised. The case, which has been thus committed to the Sessions Judge for trial, should be disposed of by him according to law and it will of course be competent to him to discharge the accused, if, in his opinion, the points of law urged by him be well founded.

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Even if it were competent to the High Court to quash the commitment under section 215 of the Criminal Procedure Code or under any other power I see no sufficient reason to do so, as in my opinion neither of the grounds urged by the Sessions Judge is well founded.

The sanction accorded by Government under section 197 cannot be held to be null and void for the reason that no notice was given to the accused to show cause why such sanction should not be given. It is a matter left entirely to the discretion of Government whether such opportunity should be given to the person concerned before sanctioning his prosecution, and the Criminal Court before which he is prosecuted is not an appellate authority over Government in the matter of the sanction. There is a marked distinction between the classes of offences dealt with in section 195, clauses 1 (*b*) and (*c*), and those dealt with in section 197. A Court granting sanction under section 195, clauses (*b*) and (*c*), does so in connection with offences committed in or in relation to any proceeding in such Court and the Court therefore acts in its judicial capacity in granting the sanction upon legal evidence. But the Government in according or withholding sanction under section 197—for the prosecution of a public servant in respect of an offence alleged to have been committed by him as such public servant—acts purely in its executive capacity and the sanction need not be based upon legal evidence. The Government is certainly not acting in a judicial capacity nor exercising a judicial function in authorising or sanctioning a prosecution under sections 196 and 197 of the Criminal Procedure Code, and there is nothing in the signification of the word 'sanction' to 'import' as the Sessions Judge supposes "a judicial element into the act of the executive," and the ruling of the Full Bench in *Queen-Empress* v. *Sheik Beari*(1) referred to by the Sessions Judge has no application whatever to the present case.

Nor can it be reasonably held that the sanction accorded by Government to the prosecution of the accused for an offence under section 168 of the Indian Penal Code is not a sanction for prosecuting the accused on the charge specified in the complaint. The offence with which he is charged in the complaint is "that during the term of his office as Municipal Councillor he was a

(1) I.L.R., 10 Mad., 232.

IN THE MATTER OF KALAGAVA BAPIAH.

partner in the year 1898 in all the contracts of Mr. Andrews, who had no capital of his own but was trading with the funds supplied to him by the defendant (and) that the said Mr. Andrews had taken up in July 1898 the contract for the supply of gravel and metal to the Ellore Municipality." The proceedings of the Government of Madras sanctioning the prosecution of the accused for having as a member of the Municipal Council of Ellore, committed an offence punishable under section 168 of the Indian Penal Code, recite that a letter from the Collector, Godavari district, dated 9th January 1902, "submitting report in the matter of the proposed removal, etc., of certain Councillors of the Ellore Municipality" was read and thereupon an order is passed declining to remove from office two of the Municipal Councillors named in the order, but sanctioning the prosecution of the present accused. It is therefore clear that the report of the Collector related to the proposed removal of two of the Councillors and to the prosecution of the accused for having, while a Municipal Commissioner, had an interest in contracts with the Municipal Council and that Government after consideration of the facts set forth in the Collector's report accorded its sanction for the prosecution of the accused and did not delegate its authority to the Collector, as was done by the Board of Revenue in the case of *Queen-Empress* v. *Samavier*(1) in which it was held that no sanction for prosecution had in law been given by the Board of Revenue, inasmuch as it simply authorised the Collector to prosecute the accused in that case "on such of the charges set forth in the Deputy Collector's report as he thinks likely to stand investigation by a Criminal Court." The Criminal Procedure Code does not prescribe any particular form for the sanction required by section 197, though in the case of a sanction accorded under section 195, sub-section (4) thereof prescribes that the sanction "shall, as far as practicable, specify the place in which and the occasion on which the offence was committed."

The complaint lodged against the accused in the present case is definite and specific and the complainant produced the above proceedings of the Government as according sanction for the prosecution instituted by him and it is simply a captious objection on the part of the accused—raised apparently for the first time before the Sessions Court—to say that the sanction accorded by

(1) I.L.R., 16 Mad., 468.

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Government does not disclose the particular contracts in respect of which his prosecution has been sanctioned. The sanction of Government to prosecute him, as a Municipal Councillor of Ellore under section 168 of the Indian Penal Code, can only be in respect of his alleged interest in some municipal contracts and it is not pretended or suggested that the sanction might relate to some contract or contracts other than that referred to in the complaint. If the letter of the Collector read in the proceedings of the Government and thus incorporated therewith had been produced before the Magistrate or were even now produced before the Sessions Court by the Public Prosecutor, there would be no room for such quibble and captious objection on the part of the accused.

For the above reasons the commitment made to the Sessions Court will stand and the Sessions Judge will proceed to try and dispose of the case according to law.

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

IN THE MATTER OF TAMMI REDDI (COMPLAINANT).*

1903. February 18.

Criminal Procedure Code—Act V of 1898, *s.* 250—*Order for compensation.*

The question whether the discretion given by section 250 of the Code of Criminal Procedure has been rightly exercised, must always depend upon the facts of the particular case. If the false charge is of such a nature that a prosecution is necessary on grounds of public policy, it may well be that a magistrate would exercise his discretion wrongly if, instead of sanctioning a prosecution, he awarded compensation. If the false charge is one which does not render it necessary on grounds of public policy that a prosecution should be sanctioned, a magistrate who makes an order for compensation cannot be said to exercise his discretion wrongly.

ORDER for compensation under section 250 of the Code of Criminal Procedure. The case was referred to the High Court for orders, under circumstances which are set out in the following

* Case referred No. 157 of 1902 (Criminal Revision Case No. 556 of 1902) for the orders of the High Court under section 438 of the Code of Criminal Procedure by Lewis Moore, Sessions Judge of Bellary Division, in his letter dated 11th November 1902, No. 2769.

IN THE MATTER OF TAMMI REDDI.

letter of reference:—"The Deputy Magistrate has followed the view of the law expressed by the Calcutta High Court in *Kina Karmakar* v. *Preo Nath Dutt*(1) (quoted by him) and also in *Parsi Hajra* v. *Bandhi Dhanuk*(2). With all due deference to the Calcutta High Court I prefer to accept the interpretation put on section 250 of the Criminal Procedure Code by the Madras High Court in the case of *Adikkan* v. *Alagan*(3). It appears to me that it is impossible in the present case to hold that the complaint was not vexatious. It is certainly vexatious to be accused of stealing one's own property. It follows that the order of the Sub-Magistrate was not illegal. The Calcutta High Court would, however, say that in passing such an order, the Magistrate did not exercise a proper discretion. On the other hand, the Madras High Court observed, in the case above quoted, as follows in connection with a false charge of theft:—'The sanction to prosecute for making a false charge is granted on grounds of public policy for an offence against public justice. The compensation is granted partly in order to deter complainants from making vexatious and frivolous complaints, and partly in order to compensate the accused for the trouble and expense to which he has been put by reason of the false complaint. We can see no ground in law or reason why compensation should not be granted in a case in which the Magistrate also directs a prosecution for making a false charge.'"

Dr. *S. Swaminadhan* for complainant.

JUDGMENT.—The question before us is not whether a sanction to prosecute under section 211 of the Indian Penal Code can be validly granted after an order for compensation under section 250 of the Code of Criminal Procedure has been made, but whether the second-class Magistrate exercised a wrong discretion in making an order for compensation. The question whether the discretion given by section 250 has been rightly exercised must always depend upon the facts of the particular case. If the false charge is of such a nature that a prosecution is necessary on grounds of public policy it may well be that a Magistrate would exercise his discretion wrongly if, instead of sanctioning a prosecution, he awarded compensation. If the false charge is one which does not render it necessary, on grounds of public policy that a prosecution should be sanctioned, a Magistrate who makes an order for compensation cannot be said to exercise his discretion wrongly.

These are the considerations to be borne in mind in making an order under section 250 of the Code of Criminal Procedure. We therefore set aside the order of the Deputy Magistrate and direct the appeal to be heard and disposed of in the light of the above observations.

(1) I.L.R., 29 Calc., 479. (2) I.L.R., 28 Calc., 251.
(3) I.L.R., 21 Mad., 237.

IN THE MATTER OF TAMMI REDDI.

APPELLATE CRIMINAL.

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

1903. July 27.

BANGARU ASARI, APPELLANT,

v.

EMPEROR, RESPONDENT.*

Criminal Procedure Code—Act V of 1898, ss. 199, 238—Charge of kidnapping and conviction for enticing married woman—No complaint by husband—Legality.

The provision in section 199 of the Code of Criminal Procedure that no court shall take cognizance of an offence under section 498 of the Indian Penal Code except upon a complaint made by the husband of the woman, means a complaint by the husband of an offence under section 498, not any complaint made by the husband.

An accused was charged with kidnapping or abducting a woman under section 366, Indian Penal Code, but the Sessions Judge, holding that the prosecution had failed to prove either kidnapping or abduction, convicted the accused, on the evidence, of an offence under section 498. In doing so he purported to act under section 238 of the Code of Criminal Procedure. The complaint before the court had been made by the husband, but was only general in terms:

Held, that the conviction was bad.

Empress v. *Kallu*, (I.L.R., 5 All., 233), followed and approved.

CHARGE of kidnapping a woman under section 366 of the Indian Penal Code. The Sessions Judge held that the prosecution had failed to prove either kidnapping or abduction, but, on the evidence, he convicted the accused of having enticed away a married woman, under section 498. A complaint had been preferred by the woman's husband, in general terms, in which he stated that his wife had been missed, that he searched for and found her in the backyard of the accused who subsequently brought the girl out

* Criminal Appeal No. 238 of 1903, presented against the sentence of K. C. Manavedan Raja, Sessions Judge of North Arcot Division, in Case No. 17 of the Calendar for 1903.

BANGARU ASARI v. EMPEROR.

and locked himself in his house. The complaint concluded by stating that the woman had informed the complainant that the accused had carried her into her house and gagged her mouth and confined her in a room and threatened to stab her if she cried out. The accused was charged under section 366, Indian Penal Code, with the result that has already been stated.

The accused preferred this appeal.

T. Venkatasubba Ayyar and *Narayana Sastri* for appellant.

The Public Prosecutor in support of the conviction.

JUDGMENT.—In this case the accused was charged with an offence under section 366 of the Indian Penal Code. The Sessions Judge held that the prosecution had failed to prove either kidnapping or abduction but on the evidence he convicted the accused of an offence under section 498. In so doing he purported to act under section 238 of the Code of Criminal Procedure. Sub-section (3) of this section provides that nothing in the section shall be deemed to authorise a conviction of any offence referred to in section 199 when no complaint has been made as required by that section. Section 199 says no court shall take cognizance of an offence under section 498 of the Indian Penal Code except upon a complaint made by the husband of the woman. We think this means a complaint made by the husband of an offence under section 498, not *any* complaint made by the husband.

This is the view adopted by the Allahabad High Court in *Empress* v. *Kallu*(1). The Calcutta High Court has taken a different view—see *Jatra Shekh* v. *Reazat Shekh*(2). We agree with the reasoning, and with the conclusion of the Allahabad High Court. The conviction is bad and must be set aside on the ground that, there being no complaint by the husband of an offence under section 498, the Court had no jurisdiction to convict.

The prisoner must be set at liberty.

(1) I.L.R., 5 All., 233.

(2) I.L.R., 20 Calc., 483.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Bhashyam Ayyangar.

1902. August 15.

RAJA SIMHADRI APPA ROW (DEFENDANT), PETITIONER IN ALL CASES,

v.

RAMACHANDRUDU (PLAINTIFF), RESPONDENT IN CIVIL REVISION PETITION No. 403 OF 1901.*

Civil Procedure Code—Act XIV of 1882, *s.* 13—Res judicata—*Previous suit in Munsif's Court in ordinary jurisdiction—Subsequent suit on Small Cause Court Side.*

A decision in a previous suit in a District Munsif's Court in the exercise of its ordinary jurisdiction may operate as *res judicata* in a subsequent suit between the same parties on the small cause side of the Court.

SUIT, in a Court of Small Causes for Rs. 12-6-0, being the amount paid by plaintiff under a distraint levied by defendant. The suit (with a number of others of a similar nature) had been filed by a ryot of Ventrapragada village against the minor Zamindar for the refund of money which had been collected from him by distraint by defendant for fasli 1308. Defendant pleaded that a proper pattah had been duly tendered to plaintiff and that the rate of Rs. 6 per acre had been in force for many years, and that that rate had been already recognized by the Appellate Court in a previous suit on the summary side of the Court of the District Munsif of Gudivada and that plaintiff's claim was barred by *res judicata*. Judgments of the High Court were filed in which the rate at which rent could be claimed had been decided, and in which it had been held that a previous adjudication as to the rate of rent was operative as *res judicata* between the parties. These judgments were in suits which had been filed in the District Munsif's Court at Gudivada in the exercise of its ordinary jurisdiction in respect of rent due for fasli 1305. The Munsif pointed out that the High Court's judgment itself laid down that

* Civil Revision Petition No. 403 and other connected petitions of 1901 presented under section 25 of Act of IX of 1887 praying the High Court to revise the judgments and decrees of V. L. Narasimham, District Munsif of Tenali, in Small Cause Suits Nos. 241 to 243, 245 to 247, 249, 248, 251 to 262 and 266 to 270 of 1901 respectively.

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the previous adjudication was binding on the parties in any subsequent litigation in the same Court. That, he said, was not the case here. The present suit could not be tried by the Munsif's Court in the exercise of its ordinary jurisdiction. He found that the pattahs which had been tendered were improper, and gave plaintiff a decree for the amount claimed.

Defendant preferred this civil revision petition.

S. R. Ramasubba Ayyar and *K. N. Ayya Ayyar* for petitioner.

P. S. Sivaswami Ayyar and *C. Venkatasubbaramiah* for respondents.

JUDGMENT.—The decision of the Court of Appeal in Original Suit No. 1 of 1897 on the file of the District Munsif of Gudivada that the rate of rent for the class of lands now in question is Rs. 6 per acre is clearly *res judicata* in favour of the landlord, the defendant in this suit, and the fact that by virtue of section 586, Civil Procedure Code, no second appeal lay to the High Court in that case, does not make such decision inoperative as *res judicata* in the present suit (*Ahmed* v. *Moidin*(1)). The contention that, as the former suit was a regular suit and the present only a small cause suit, the decision in such former suit cannot operate as *res judicata* in the present suit, because the District Munsif of Gudivada cannot take cognizance on his regular side of this suit which is a small cause suit, is manifestly untenable. Under the Small Cause Courts Act a suit cognizable by a Small Cause Court is not to be instituted and tried by an ordinary Civil Court if, and so long as, within the local limits of its jurisdiction a Small Cause Court is established competent to take cognizance of such small cause suit. But that circumstance does not, within the meaning of section 13 of the Code of Civil Procedure, make the ordinary Civil Court, viz., in this case the Court of the District Munsif of Gudivada on his regular side a Court which is not a Court of jurisdiction competent to try the present suit. The decrees of the lower Court are therefore reversed and the suits dismissed with costs throughout.

There is no ground for revision and the revision petitions are dismissed with costs.

(1) I.L.R., 24 Mad., 444.

APPELLATE CIVIL.

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

1903. March 19.

VEDACHALA GRAMANI AND OTHERS (DEFENDANTS), APPELLANTS,

v.

BOOMIAPPA MUDALIAR (PLAINTIFF), RESPONDENT.*

Rent Recovery Act (Madras)—VIII of 1865, *s.* 72—*Decision of Revenue Court on terms of pattah—Confirmation on appeal to District Court—Subsequent suit for rent*—Res judicata.

The decision of a Revenue Court in a suit brought to settle the terms of the pattah for a certain fasli, that decision being confirmed on appeal by a District Court, is final and binding in all Courts in respect of rent recoverable for that fasli.

Valliammalachie v. *Sree Gulam Gouse Sahib*, (Appeal No. 118 of 1900 (unreported)), followed.

SUIT for Rs. 1,171-11-0, being the value of melwaram due to plaintiff, a Zemindar, under whom defendants 1 and 4 were mirasi tenants for the lands in their holding. It was alleged that a pattah was tendered by plaintiff for the fasli 1309 to defendants 1 and 4, on whose failure to accept it a suit was filed before the Sub-Collector; that after the decision in that suit the defendants executed a muchilika, that they had not paid the melwaram of the wet lands due to plaintiff, but had taken the produce. The other defendants were impleaded as brothers or sons of first and fourth defendants. The District Munsif raised the following issues (with others):—

"Is the judgment of the Revenue Court enforcing acceptance of pattah binding on the defendants?—6th "Is the pattah tendered a proper one?" On the former he said that no authority had been cited for the contention that the Revenue Court's decision debarred the defendants from pleading in this Court that the pattah was not one which they were bound to accept, and he regarded the cases as deciding the opposite.

* Appeal against order No. 155 of 1902 presented against the order of A. C. Tate, District Judge of Chingleput in Appeal Suit No. 330 of 1902, presented against the decree of E. J. S. White, District Munsif of Chingleput, in Original Suit No. 593 of 1900.

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He held that the pattah tendered to defendants was not a proper one, and dismissed the suit. The District Judge, on appeal, reversed that order. He said: "The question of the liability of the defendants 1 and 4 to accept the pattah for fasli 1309, the terms of which are now sought to be enforced has been admittedly settled by the Sub-Collector in a suit under Act VIII of 1865, and that decision has been also confirmed by this Court on appeal. That rendered the matter *res judicata*, subject of course to the result of any second appeal to the High Court; and it was not open to the District Munsif to again consider the propriety of the terms of the pattah for fasli 1309."

He allowed the appeal and remanded the case for disposal.

Defendants preferred this appeal.

S. Gopalswamy Ayyangar for appellants.

T. V. Seshagiri Ayyar for respondent.

JUDGMENT.—The decision of the Revenue Court was in a suit brought to settle the terms of the pattah for fasli 1309 and that decision being confirmed on appeal, by the District Court, became final and binding on all Courts for the rent recoverable for that particular year as decided in that suit. Section 72 of the Rent Recovery Act necessarily involves this conclusion and prevents the re-opening of any question as to the rent thus settled to be due. This view has been maintained in several unreported cases—*vide Valliammalachie* v. *Sree Gulam Gouse Sahib*(1) recently decided. The decision in the case of *Rangayya Appa Rau* v. *Ratnam*(2) is not in conflict with it, inasmuch as the question of the propriety of the terms of the pattah was not there the subject matter of a suit in a Revenue Court brought to settle its terms, but arose incidentally in a suit brought to set aside a distraint. The order of remand was therefore right and the appeal is dismissed with costs.

(1) Appeal No. 118 of 1900 (unreported). (2) I.L.R., 20 Mad., 392.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Benson, Mr. Justice Bhashyam Ayyangar and Mr. Justice Russell.

CHIDAMBARA PATTER (THIRD DEFENDANT), APPELLANT,

v.

RAMASAMY PATTER AND OTHERS (PLAINTIFF, FIRST AND SECOND DEFENDANTS, L. R. OF SECOND DEFENDANT), RESPONDENTS.*

1903. April 28. October 16.

Limitation Act—XV of 1877, *sched. II, art.* 11—*Suit to establish right to or present possession of property—Attachment of debt not secured by negotiable instrument—Claim by third party—Application of art.* 11 *to order disallowing claim—Civil Procedure Code—Act XIV of* 1882, *ss.* 278-281—"*Possession*" *not restricted to mere tangible or physical possession.*

When a debt which is not secured by a negotiable instrument is attached under section 268 of the Code of Civil Procedure a claim may be preferred by a third party and may be investigated under section 278.

An order passed on such a claim, disallowing it, is subject to the operation of section 283 of the Code of Civil Procedure and article 11 of the second schedule to the Limitation Act.

The words "possessed" (in section 279) and "possession" (in sections 280 and 281 of the Code of Civil Procedure) are not used in a restricted sense as relating to a mere tangible or physical possession. They include constructive possession, or possession in law, of debts and other intangible property.

Basavayya v. *Syed Abbas Saheb*, (I.L.R., 24 Mad., 20), dissented from.

SUIT for a declaration that a sum of Rs. 1,600 deposited by second defendant in the kuri of Kannampra Nair had been assigned by second defendant to plaintiff, for proper consideration, that the assignment was valid, and that the money could not be attached and sold in execution of the decree in Original Suit No. 377 of 1899, and that the attachment and sale were null and void. Second defendant had assigned his right to the money to plaintiff in July 1900. First defendant obtained a decree against second defendant in Original Suit No. 377 of 1899, and attached the money. Plaintiff put in a claim petition, which was rejected in November 1900. In January 1901, the right to the money was sold and purchased by third defendant at a court sale for Rs. 260. Plaintiff

* Appeal against order No. 170 of 1902, presented against the order of T. Venkataramaiya, Subordinate Judge of Palghat, dated 16th October 1902, in Appeal Suit No. 482 of 1902, preferred against the decree of M. G. Krishna Rao, District Munsif of Alatur, in Original Suit No. 556 of 1901.

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now sued for the reliefs already referred to. First defendant pleaded that the suit was barred by limitation as it had not been brought within a year from the date of the rejection of plaintiff's claim petition. He impugned the assignment to plaintiff by second defendant, and contended that the attachment and sale in execution of the decree in Original Suit No. 377 of 1899 were legal and valid, and that plaintiff was not entitled to any relief. Second defendant was *ex parte*. Third defendant supported first defendant. The first issue raised the question of limitation. The District Munsif held that the suit was barred. He said: "The claim was rejected on 29th of November 1900; the sale took place on 30th January 1901; the present suit was filed on 12th December 1901. The question is whether article 11 of the second schedule of the Limitation Act is applicable. The claim was put in under section 278 of the Code of Civil Procedure, and the order was passed under section 280. Hence the article is applicable." He dismissed the suit.

The Acting Subordinate Judge reversed that order on appeal, holding that section 278 must relate to specific immoveable or moveable property, and that it would not apply to a debt attached under section 268. He held, in consequence, that the suit was not governed by article 11 and remanded it for trial on the merits.

The third defendant preferred this appeal.

The case first came before Benson and Bhashyam Ayyangar, JJ.

P. R. Sundara Ayyar for appellant.

K. R. Subrahmania Sastri for respondent.

The Court made the following

ORDER OF REFERENCE TO A FULL BENCH.—Before disposing of this appeal we wish to refer the following question for the opinion of the Full Bench, viz :—

Whether when a debt not secured by a negotiable instrument is attached under section 268, Civil Procedure Code, a claim can be preferred by a third party, and investigated under section 278, Civil Procedure Code, and, if so, whether an order disallowing the claim is subject to the operation of section 283, Civil Procedure Code, and article 11 of Schedule 2, Limitation Act.

The question must be taken to have been decided in the negative in the case of *Basavayya* v. *Syed Abbas Saheb*(1), but we are doubtful as to the correctness of that decision and the question

(1) I.L.R., 24 Mad., 20.

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is of such wide importance that we think it desirable that it should be settled by a Full Bench.

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

C. V. Anantakrishna Ayyar (for *P. R. Sundara Ayyar*) for appellant.—The suit is barred by limitation. Section 278 speaks of "any property" attached in execution. Section 266 makes it clear that a debt is "property." A reference to sections 268 and 301 shows how a debt is to be attached and how possession thereof is to be given to the purchaser. Sections 278 to 283 are wide enough to cover debts. The Privy Council has decided that the Code is exhaustive (*Gopal Chunder Bose* v. *Kartick Chunder Dey*(1)). If sections 280 to 283 do not cover cases of debts, anomalies would follow. The word "possession" is used in these sections in its legal, technical sense. A creditor is in law seized of, or is in possession of, his debt. A mortgagor is in possession of his equity of redemption, though physical possession of the property may be with the usufructuary mortgagee. Reference may be made to other sections of the Code where the word "possession" is used, but it is submitted that section 355 is conclusive of the matter. It says that a receiver "shall possess himself of all such property" including "debts." Section 246 of Act VIII of 1859 was differently worded.

T. R. Ramachandra Ayyar and *K. R. Subrahmania Sastri* for the respondent.—The suit is not barred by limitation. Article 11 of the Limitation Act does not apply, for sections 280 to 283 do not apply to cases where debts are attached. It is only if sections 280 to 283, Civil Procedure Code, apply to the attachment of debts not secured by any negotiable instrument, that article 11 of the Limitation Act would apply. Sections 280 to 283 speak of possession, and so they apply only to cases of property of which there could be possession; that is, those sections apply only to cases of specific moveable or immoveable property. The word "possession" is used in these sections in its popular sense of "physical possession." [BHASHYAM AYYANGAR, J.—Should it not be taken that the word is used in its legal sense? Whenever the Legislature means "physical" possession, it expressly says so—see for example article 10 of the Second Schedule of the Limitation Act.] We rely on *Mussamut*

(1) I.L.R., 29 Calc., 716.

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Rambutty Kooer v. *Kamessur Pershad*(1), *Basavayya* v. *Syed Abbas Saheb*(2), *Harilal Amthabhai* v. *Abhesang Meru*(3), *Monmohiney Dassee* v. *Radha Kristo Dass*(4), and *Ibrahim Mullick* v. *Ramjadu Rakshit*(5). The definition of the word possession in the 'Century Dictionary' also supports our contention. [Bhashyam Ayyangar, J., referred to the definition of the word possession, given in Anderson's 'Law Dictionary,' Webster's 'Dictionary' and Stroud's 'Judicial Dictionary,' and suggested that "possession" meant such possession as the nature of the thing permitted.] We submit that section 301, Civil Procedure Code, shows that the Legislature was aware that a "debt not secured by a negotiable instrument" was not capable of "possession" as ordinarily understood, and so a specific mode of delivery of such a debt is pointed out for the purpose of execution. If sections 278 to 283, Civil Procedure Code, are made applicable to all debts and other intangible things, it is submitted that the consequences would be serious. We submit that *Basavayya* v. *Syed Abbas Saheb*(2) is rightly decided.

The appellant was not called upon to reply.

The Court expressed the following

OPINION.—Our answer to the questions put to us is in the affirmative. In our opinion sections 278 to 281 of the Civil Procedure Code are not restricted to properties under attachment which are capable of tangible or physical possession.

The term "possession" is, no doubt, one which is used in widely different senses in dealing with different subjects, and refers sometimes to tangible or physical possession and sometimes to constructive possession, or possession in law. In Webster's 'Dictionary' the legal meaning of "possession" includes "the having or holding of property in one's power or command." See also Anderson's 'Dictionary of Law,' page 790.

In our opinion it would be unreasonable to restrict the meaning of the word "possessed" in section 279, and of the word "possession" in sections 280 and 281 to merely tangible or physical possession. Such restricted meaning would, we think, unduly narrow the operation of section 278 which relates to

(1) 22 W.R., 36.
(2) I.L.R., 24 Mad., 20.
(3) I.L.R., 4 Bom., 323.
(4) I.L.R., 29 Calc., 543.
(5) I.L.R., 30 Calc., 710.

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claims preferred to and objections made to the attachment of, "any property attached." Section 266 specifies a debt as one species of property which is liable to attachment, and section 268 prescribes the mode in which a debt is to be attached. Section 301, which vests a debt sold in execution in the purchaser, refers to such transfer of the debt as "delivery" of the debt. No reason can be suggested for excluding from the beneficent operation of the claim sections of the Code debts and other species of intangible property. We may also refer to section 355 of the Code in which the word "possess" is clearly used as applicable not only to tangible property but also to debts and other intangible property.

We are therefore of opinion that the words "possess" and "possession" in the claim sections of the Code include constructive possession, or possession in law, of debts and other intangible property, and that the decision to the contrary effect in *Basavayya* v. *Syed Abbas Saheb*(1) is erroneous.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

1903. February 20. March 6, 12.

McDOWELL AND COMPANY LIMITED (PLAINTIFFS), APPELLANTS,

v.

RAGAVA CHETTY AND OTHERS (DEFENDANTS), RESPONDENTS.*

Stamp Act—II of 1899, s. 26, sched. I, art. 57 (b)—Security for fulfilment of duties as cashier—Duty payable—Hindu Law—Father's liability in respect of acts constituting criminal offence—Liability of sons.

In 1895, first defendant (for himself and on behalf of his sons) executed a mortgage in favour of Ragava Chetty, who, in 1896, assigned it to McDowell and Company. In 1899, first defendant (for himself and on behalf of his sons), McDowell and Company, and the present plaintiffs entered into another agreement whereby the former mortgage was transferred by McDowell and Company

(1) I.L.R., 24 Mad., 20.

* Original Suit Appeal No. 27 of 1902, presented against the judgment of Mr. Justice Boddam, dated the 21st day of April 1902, in Original Suit No. 181 of 1901.

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to the plaintiffs, a company with limited liability and the instrument also related to the accountability of the first defendant, who was their cashier, to the plaintiffs, and constituted a mortgage executed as security for the due fulfilment of his duties as cashier, and for the repayment of any sum that first defendant might be found liable for, as cashier, to an extent not exceeding Rs. 6,000. At the date of suit, first defendant was liable to plaintiffs in a sum of over Rs. 8,000, which plaintiffs now claimed.

Held, that section 26 of the Stamp Act of 1899 had no application to this case, the transfer of the mortgage being liable to a fixed duty under article 62 (*c*) of schedule I of the Act, and the duty payable in respect of the other portion of the instrument being also a fixed sum under article 57 (*b*). Though the later instrument contained a promise by first defendant to pay plaintiffs the amount payable by him under the previous mortgage, this was not a fresh contract, entered into for consideration, but must be understood to operate only as an admission that what McDowell and Company had purported to transfer was a subsisting debt due by first defendant. As the sustenance of the present claim did not involve giving effect to the promise in the later document, the claim was unaffected by it even if it could have been treated as one requiring the payment of an *ad valorem* duty.

Where a Hindu father becomes liable for money taken by him and misappropriated under circumstances which constitute the taking itself a criminal offence his minor sons cannot be held liable under the rule of Hindu law as to the pious duty of a son to pay his father's debts.

Pareman Dass v. *Bhattu Mahton* (I.L.R., 24 Calc., 672), and *Mahabir Prasad* v. *Basdeo Singh*, (I.L.R., 6 All., 234), followed.

Natasayya v. *Ponnusami*, (I.L.R., 16 Mad., 99), distinguished and explained.

SUIT on two mortgages. The material portions of the documents are set out in the judgment. The suit was for Rs. 8,558-7-4, alleged to be due under the mortgages, which had been executed by first defendant for himself and on behalf of his minor sons. The first defendant had occupied the position of cashier to the plaintiffs, and the later in date of the two mortgages had been executed as security for the due fulfilment by first defendant of his duties as cashier and for the repayment of any sum he might be found liable for, to an extent not exceeding Rs. 6,000. The first defendant was *ex parte*: and the defence set up on behalf of his minor sons, the other defendants, was that, as the property mortgaged was ancestral property, the first defendant had no right to encumber it for purposes not binding on his sons. It was also pleaded that first defendant had (according to the plaint) committed what was substantially a criminal breach of trust as cash-keeper in the plaintiffs' employment and inasmuch as the plaintiffs had taken the later mortgage in respect of the money so due, plaintiffs had compounded the offence, and so much of the

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claim as related to defalcations could not be supported, the mortgage being to that extent void and opposed to law. The learned Judge sitting on the Original Side granted a decree in plaintiffs' favour for the amount sued for as against first defendant personally, but as against the mortgaged property he allowed the claim only to the extent of Rs. 2,000, on the ground that under the later mortgage the plaintiff Company was, by section 26 of the Stamp Act, precluded from recovering a larger sum.

Plaintiffs preferred this appeal.

Mr. *J. G. Smith* for appellants.

Mr. *T. Richmond* for second to fourth respondents.

JUDGMENT.—This is a suit by McDowell and Company, Limited, against Raghava Chetty, the defendant, lately the Cashier of the Company, and his sons, who are minors, for the recovery of Rs. 8,558-7-4 being the amount stated to be due under two mortgages executed by Raghava Chetty for himself and on behalf of his minor sons, on the 4th November 1895 and the 19th October 1899, respectively. Mr. Justice Boddam granted a decree in favour of the plaintiff for the amount sued for, against the first defendant personally; but as against the mortgaged property the learned Judge allowed the claim only to the extent of Rs. 2,000, on the ground that under the later of the mortgages mentioned above, the Company was, by the provisions of section 26 of the Indian Stamp Act II of 1899, precluded from recovering a larger sum.

In this appeal, preferred by the Company, the contesting respondents are the minor defendants and three questions were raised in the argument:—

FIRST.—Whether the said mortgage is an instrument falling within the provisions of section 26 of the Indian Stamp Act.

SECONDLY.—Whether the mortgage was illegal on the ground that it was executed in consideration of the Company forbearing to prosecute the first defendant for embezzlement of funds held by him as their Cashier.

THIRDLY.—Whether the sum of Rs. 5,372-1-10, being the amount of the plaintiffs' claim less the sum of Rs. 3,186-5-6 admittedly due under the mortgage of the 4th November 1895, was a debt not binding on the minor defendants under the Hindu Law, and, therefore, not chargeable upon their shares of the mortgaged property.

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As to the first question, the instrument of the 19th October 1899 was executed between the members of the firm of McDowell and Company of the first part, the first defendant for himself and on behalf of his sons of the second part and Messrs. McDowell and Company Limited of the third part. Its provisions fall under two heads. Those under the first relate to the transfer to McDowell and Company, Limited, by the firm of Messrs. McDowell and Company of the mortgage of the 4th November 1895, executed by the first defendant to one Emil Carl Ruppell, Assistant to the said firm, and by him formally assigned on the 5th December 1896 to the firm. This part of the instrument was, of course, only the transfer of a mortgage and as such liable to a fixed stamp duty (see article 62, clause (c) of schedule I of the Indian Stamp Act). The provisions of the instrument, under the other head, relate to the accountability to the Company of the first defendant in respect of the Company's funds coming to his hands as the Company's cashier, and constitutes a mortgage deed executed as security for the due fulfilment of his duties as cashier, and as security for the repayment of any sum he may be found liable for as cashier, to an extent not exceeding Rs. 6,000. The stamp duty payable as to this part was also a fixed duty (article 57, clause (*b*), of schedule I to the Indian Stamp Act). In these circumstances, section 26 of the Act, which extends only to cases of instruments liable to *ad valorem* duty, can have no application to the present case.

No doubt, there is in the instrument a promise on the part of the first defendant to pay to McDowell and Company, Limited, the amount payable by him under the mortgage of 1895. This, however, was, obviously no fresh contract, entered into for consideration, but must be understood to operate only as an admission that what the firm purported to transfer was a subsisting debt due by him. Even, if, in any way, it could possibly be viewed otherwise, it cannot touch either the right of the Company to recover the amount of the mortgage of 1895, by virtue of the assignment by the firm to the Company, unaffected as it is by anything contained in the instrument as a contract between the Company and the first defendant, or the right to recover from the defendant what he may be liable for by virtue of the provisions falling under the second head, the said promise having no reference whatever to the matter dealt with by those provisions.

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In other words, as the sustenance of no part of the claim of the Company here involves giving effect to the promise above referred to, the claim must be held to be unaffected thereby, even if the promise be treated as one requiring the payment of an *ad valorem* duty as urged on behalf of the respondents.

As to the second question, we are clearly of opinion that the contention on behalf of the respondents, viz., that the mortgage of the 19th October 1899 is tainted with illegality, has no foundation. No doubt in exhibit II a letter of the 1st September 1899 addressed by the Assistant Manager of the Company to the first defendant with reference to the opening of the cash chest when suspicions came to be entertained about his defalcations, it was stated that the Police would be called in if necessary. But the first defendant having, as desired in the letter, sent in the key of the cash chest, it was opened, and the deficit found according to the accounts as they stood unverified was debited to him. There is absolutely no evidence to show that any intention to prosecute the first defendant was subsequently entertained, or any steps in the matter taken on behalf of the Company with or without the knowledge of the first defendant. It is scarcely necessary to say that the mere fact that on the accounts being gone into defalcations to a large amount were discovered, and the execution of the instrument in question for the amount due followed some time after, would in no way warrant the inference that such execution was the result of an arrangement to compound any offence.

Turning to the third and last question, the onus in respect of it is of course upon the contesting respondents and though they have called no evidence on the point yet upon the evidence adduced on behalf of the Company itself, the only conclusion that can be arrived at is that every one of the items making up the total of the claim under consideration relates to company's moneys taken by the first defendant and misappropriated under circumstances which constituted the taking itself a criminal offence. Such being the case, it must be held, following the decisions in *Pareman Dass* v. *Bhattu Mahton*(1) and *Mahabir Prasad* v. *Basdeo Singh*(2), that the defendants Nos. 2 to 4 cannot be held liable in respect of these sums under the Hindu Law rule as to the pious duty of a son to pay his father's debts

(1) I.L.R., 24 Calc., 672. (2) I.L.R., 6 All., 234.

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As to the case of *Natasayya* v. *Ponnusami*(1) it is clearly distinguishable. There the father of the defendants entered into a contract with one member of the plaintiffs' family and collected certain moneys due to the family. On the plaintiff repudiating the contract, he was not paid his share of the collections by the father of the defendants. Though, in entering into the contract purporting to bind the plaintiffs' family when it could not bind the family and in collecting the moneys due to it and withholding the plaintiffs' share, the father of the defendants had acted in circumstances which warranted the learned Judges in characterizing his conduct as dishonest, yet the withholding of the money accounted to nothing more than a breach of civil duty having no sort of resemblance to the present case. Our conclusion is therefore in no way inconsistent with the actual decision of the learned Judges in that case, which we think was right, though we do not wish to be understood as expressing entire concurrence with all the observations made by them with reference to the general question of the sons' liability under the Hindu Law.

We must therefore modify the decree of the learned Judge and direct that the whole amount decreed against the first defendant inclusive of costs throughout, be realizable on his share of the mortgaged property and that the shares of defendants Nos. 2, 3 and 4 be liable for the sum of Rs. 3,186-5-6 out of the amount decreed against the first defendant and interest on such sum of Rs. 3,186-5-6. As regards the costs between the plaintiff and defendants Nos. 2, 3 and 4 the plaintiff Company must pay its own costs. The amount of the taxed costs of the appeal and the money advanced by the plaintiff to defendants Nos. 2, 3 and 4 for the purposes of the suit in the Court below will be recoverable by the plaintiff with the amount charged hereby on the shares of the defendants Nos. 2, 3 and 4. The time allowed for payment is four months.

Messrs. *King & Josselyn*.—Attorneys for appellants.

Mr. *James Short*.—Attorney for second to fourth respondents.

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

APPELLATE CIVIL

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

KUNHIMBI UMMA AND ANOTHER (DEFENDANTS NOS. 1 AND 2), APPELLANTS,

v.

KANDY MOITHIN AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 3 AND 4), RESPONDENTS.*

1903. March 4.

Malabar law—Devolution of property—Application of Marumakkatayam or Makkatayam law—Presumption where deceased was Muhammadan.

In North Malabar, where the devolution of property is in question, if the late owner was governed by the Muhammadan law, the presumption would be that the law governing the devolution of his estate would be the Muhammadan law, notwithstanding that the deceased was, through his mother, interested in tarwad property.

In *Assan* v. *Pathumma*, (I.L.R., 22 Mad., 494), the property, the devolution of which was in question, had belonged to a person who was admittedly governed by Muhammadan law. That case should not be understood as laying down that in every case between Muhammadans in North Malabar, even when they are members of a Marumakkatayam tarwad, the devolution of property is governed by the Muhammadan law until the contrary is shown.

Where the deceased has followed the Marumakkatayam law his self-acquired property passes, on his death, to his tarwad.

SUIT for a declaration that the otti rights of one Kunhayan Kutti, deceased, were liable to be sold in execution of a decree of which plaintiff was the transferree. Defendants Nos. 1 and 2 claimed the properties as the legal representatives of the deceased, who, they said, had followed Makkatayam law. The District Munsif framed an issue as to whether the deceased was governed by Makkatayam law, as alleged by defendants Nos. 1 and 2 or by Marumakkatayam law, as alleged by plaintiff. He decided the issue in favour of plaintiff, and gave the declaration sued for. He said:—"In addition to the slight evidence adduced by plaintiff in favour of Marumakkatayam succession for the late Kunhayan Kutti, the fact that the High Court has held that in North Malabar the presumption is that the Muhammadans are governed by Marumakkatayam (*Aryappalli Kuttiassan* v. *Chalil Biyatumma*(1)) is also

* Second Appeal No. 1527 of 1901, presented against the decree of M. J. Murphy, District Judge of North Malabar, in Appeal Suit No. 63 of 1901, presented against the decree of M. Subbayyar, District Munsif of Quilandy, in Original Suit No. 157 of 1900.

(1) S. App. No. 380 of 1895 (unreported).

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in plaintiff's favour, for first and second defendants have not proved the contrary by satisfactory evidence. I find the issue, therefore, for the plaintiff."

Defendants Nos. 1 and 2 appealed to the Acting District Judge, who concurred with the finding of the Munsif that the circumstances led to the conclusion that the deceased was a member of a tarwad following Marumakkatayam law. He continued:—"In connection with the law on the point, I am, however, referred to *Assan* v. *Pathumma*(1) and in particular to the dictum which appears at page 505. The case under consideration in that suit was different to that here. One of the persons there was admittedly a person governed by Muhammadan law and the remark in question was not, it is urged, an essential point in the determination of that suit. It has always, I think, hitherto been held in North Malabar that when a person is found to belong to a Marumakkatayam family, his self-acquisitions are presumed to be amenable to the same Marumakkatayam system of devolution, unless it is set up and proved that his self-acquisitions are, by custom or otherwise subject to the Muhammadan law of inheritance (*vide Illikka Pakramar* v. *Kutti Kunhamed*(2) and *Aryappalli Kuttiassan* v. *Chalil Biyatumma*(3)). But in the ruling first quoted, the following remark occurs: "the Muhammadan law must be taken to govern the devolution of the separate and exclusive property of a Moplah, notwithstanding that he is a member of a tarwad owning property subject to Marumakkatayam law except when it is shown that the Muhammadan law has, even in regard to the separate and exclusive property of such a person, been superseded by rules established by usage or otherwise." If this were to be held to throw the burden of proof henceforth on those who assert Marumakkatayam law for self-acquisitions of a person whose family follows that law, I should have referred the suit back to the District Munsif, for a special finding on an issue whether Marumakkatayam law did not prevail, also in regard to the deceased Kunnayan's private property. But in view of many cases decided specifically by the High Court to the contrary, I am doubtful as to the necessity of doing this. Besides, it was no part of the appellants' case in the lower

(1) I.L.R., 22 Mad., 494. (2) I.L.R., 17 Mad., 69.
(3) S.A. No. 380 of 1895 (unreported).

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Court that the devolution of the deceased's private property might be according to Muhammadan law, he himself as a member of his tarwad being Marumakkatayam. Their contention simply was that the deceased and his family also were followers of Mukkatayam and it was tacitly agreed that whatever law governed him and his family governed also his self-acquisitions. The nature of the exhibits and the arguments in the case show this. It must be conceded, however, that as the rulings on the points now stand, there is a certain amount of doubt regarding the presumption about the devolution of the self-acquired property of a member of a Marumakkatayam Moplah family." He dismissed the appeal.

Defendants Nos. 1 and 2 preferred this second appeal.

V. Ryru Nambiar for appellants.

K. R. Subrahmania Sastri for first respondent.

JUDGMENT.—With reference to the case *Assan* v. *Pathumma*(1), the fact that the property, the devolution of which was in question belonged to a person who was admittedly governed by Muhammadan law should not be overlooked. In such a case the presumption would be that the law applicable was the Muhammadan law, notwithstanding that the deceased owner of the inheritance was through his mother interested in tarwad property.

That case should not be understood as laying down that in every case between Muhammadans, in North Malabar, even when they are members of a Marumakkatayam tarwad, the devolution of property is governed by the Muhammadan law until the contrary is shown. The question will, to a great extent, depend upon the circumstances of each case and the presumption would often be in favour of the Marumakkatayam rule of devolution, since we know that, in fact, that rule is followed in very many instances by such families.

In the present case District Judge has considered the question with reference to the enjoyment of the property and the surrounding circumstances and has arrived at the conclusion that the deceased owner of the property was governed by the Marumakkatayam rule. Consequently the conclusion that the self-acquired property of the deceased passed to the tarwad is right.

The second appeal fails and is dismissed with costs.

(1) I.L.R., 22 Mad., 494.

APPELLATE CIVIL.

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

1903. March 26, 27. April 7.

MUTHAPPA CHETTY AND FOUR OTHERS (PLAINTIFFS NOS. 1, 2, 4, 5 AND 3), APPELLANTS,

v.

MUTHU PALANI CHETTY AND FOUR OTHERS (DEFENDANTS NOS. 3, 4, 5, 1 AND 2), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *ss.* 28, 46, 53, 578—*Misjoinder of causes of action—Relief "in respect of the same matter"—Partners—Suit by one of two partners against the other partner and third party—No allegation of collusion—Maintainability.*

A suit was brought in which the following reliefs (as the High Court found) were claimed:—As against first defendant, damages for his breach of contract as an agent of the firm in which first plaintiff and third defendant were partners: and as against third defendant for dissolution of partnership and for damages. First defendant had been sent to conduct the firm's business, as its agent, at S. and on his failure to carry out instructions and to render accounts, it was agreed that third defendant should proceed to S., receive the accounts and collect the firm's assets and that the firm should be wound up in six months. Third defendant, it was alleged, went to S., but acted in collusion with first defendant, wound up the business and collected the firm's assets at S., but failed to render an account thereof or to give first plaintiff his share in them. The other parties to the suit were all impleaded as undivided sons. On its being contended that the case fell within section 28 of the Code of Civil Procedure and that inasmuch as first plaintiff was not in a position to know whether first defendant had or had not handed over the firm's assets to third defendant, he was entitled to sue them jointly or in the alternative:

Held, that the suit was not maintainable, the plaint alleging two distinct causes of action as against defendants Nos. 1 and 3, respectively. Even if the words "in respect of the same matter" in section 28, warranted a different construction being placed upon that section than that which the English Courts have placed on the corresponding Rule 4 of Order XVI, it could not be said that the right to relief alleged to exist against first defendant was "in respect of the same matter" as the right to relief alleged to exist as against third defendant:

Held also, that there was a further objection to the plaint in that the plaintiff was not entitled to sue in his own name in respect of first defendant's breach of contract with the firm, the cause of action not being based on any allegation of collusion by first defendant with third defendant.

* Second Appeal No. 849 of 1901, presented against the decree of H. Moberly, District Judge of Madura, in Appeal Suit No. 87 of 1900, presented against the decree of T. Varada Row, Subordinate Judge of Madura (East), in Original Suit No. 5 of 1899.

Such a misjoinder was not a mere irregularity as would be condoned under section 578.

A case like the present, in which separate causes of action were alleged against the two defendants, did not come within section 46, which empowers a Court to order that the suit be confined to such of the causes of action as may be conveniently disposed of in one suit.

The power given to the Court by section 53 to return a plaint for amendment is only discretionary, and where the Court does not return a plaint which is bad for misjoinder of parties or of causes of action, the defendant is not precluded from raising the objection at the hearing of the suit or on appeal.

SUIT as against first defendant for damages for his breach of contract as agent of the plaintiffs' firm; and as against third defendant for dissolution of partnership and for damages. The facts of the case and the allegations in the plaint, so far as they are material to the question of misjoinder of causes of action are fully set out in the judgment. Plaintiffs Nos. 2 to 5 were the undivided sons of first plaintiff; second defendant was the undivided son of first defendant, and defendants Nos. 4 and 5 were the undivided sons of third defendant.

The Subordinate Judge decreed that defendants should pay plaintiffs Rs. 2,565. The District Judge, on appeal, dismissed the suit, holding that the cause of action against the third defendant was distinct from that against first defendant. He held that the suit was not maintainable in its present form.

Plaintiffs Nos. 1, 2, 4 and 5 preferred this second appeal.

P. R. Sundara Ayyar and *S. Srinivasa Ayyangar* for appellants.

R. N. Ayya for first and third respondents.

SIR ARNOLD WHITE, C. J.—In this case, the plaint alleges that an agreement of partnership was entered into between the first plaintiff and the third defendant, for the purpose of carrying on business at a place called Silangoor, that a further agreement was entered into that the first defendant should be sent as agent to Silangoor, and that he should conduct the business there. The plaint also alleges that the first defendant failed to carry out his instructions and failed to furnish accounts, and that an agreement was then entered into between the first plaintiff and the third defendant that the third defendant should proceed to Silangoor, should receive the accounts and the cash and assets of the firm and that the business of the firm should be wound up in six months. The plaint also alleges that the third defendant, acting in collusion with the first defendant, wound up the business, returned to

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India with the assets of the firm and failed to render accounts to the first plaintiff or to hand over to him his share in the partnership assets. The plaint alleges that the course of action is the defendants not rendering proper accounts and not paying the amounts due to the plaintiffs after the arrival of the defendants in India, and the plaintiffs ask for a decree, (1) ordering the first to third defendants to deliver over all the accounts relating to R.M.M.A., a firm belonging to the plaintiffs and third to fifth defendants and to furnish proper vouchers, (2) ordering the defendants to pay to the plaintiffs the capital, profit, etc., appertaining to the proportionate share of the plaintiffs after examining the accounts upon their being produced by the first to third defendants and after striking accounts, and (3) ordering the defendants to stand responsible for the damages, which might have been caused to the firm through any negligent or wrongful act of the first to third defendants.

It will thus be seen that the plaintiffs sue the first defendant for damages for his breach of contract as an agent of the firm. They sue the third defendant for dissolution of the partnership. The fact that they also make a claim for damages against the third defendant does not prevent the cause of action against the first defendant from being distinct from that against the third. Mr. Sundara Ayyar argued that the case fell within section 28 of the Code, and that inasmuch as the plaintiff was not in a position to know whether the first defendant had or had not handed over the accounts and assets of the firm to the third defendant, he was entitled to sue them jointly or in the alternative. He laid stress upon the fact that whereas section 26, which deals with the joinder of plaintiffs, allows all persons to be joined as plaintiffs in whom the right to the relief claimed is alleged to exist, whether jointly, severally, or in the alternative in respect of the same *cause of action*, section 28 which deals with the joinder of defendants allows all persons to be joined as defendants against whom the right to relief is alleged to exist whether jointly, severally, or in the alternative *in respect of the same matter*. He also relied upon the fact that the limitation to the application of section 31 is, in terms, restricted to the joinder of *plaintiffs* in respect of distinct causes of action.

Section 28 corresponds to rule 4 of Order XVI of the Rules of the Supreme Court except that the words "in the same matter" occur in the section of the code, whilst they do not occur in the

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English rule. The terms of the English rule would thus seem to be wider and more general than the terms of the section, and it is in England settled law that two separate causes of action cannot be charged against two defendants in one section. See the judgment of the House of Lords in *Sadler* v. *Great Western Railway Company*(1) and of the Court of Appeal in *Burstall* v. *Beyfus*(2). The case of *Walters* v. *Green*(3) is clearly distinguishable. There the plaintiff sued several defendants in respect of a joint tort. To my mind, the plaint in the present case can only be construed as alleging two distinct causes of action against the defendants Nos. 1 and 3. Even if the plaintiff is entitled to rely on the words "in respect of the same matter" in section 28 as warranting a different construction being placed upon the section from that which the English Courts have adopted with reference to the corresponding rule, it cannot be said that the right to relief alleged to exist against the first defendant is in respect of the same matter as the right to relief alleged to exist against the third defendant. Mr. Sundara Aiyar was bold enough to argue that the claim for damages was a claim for damages in the winding up, and that, reading the third prayer of the plaint by the light of the allegations in paragraphs 8 and 12, the winding up was the 'same matter' in respect of which the right to relief was alleged to exist against the two defendants. It seems to me the matters are essentially different. The matter in the one case is an alleged breach of contract by an agent of the firm. In the other case, it is the right of one partner in the firm as against the other partner, to have accounts taken, and the partnership wound up.

There is further objection to the plaint in the present suit. As against the first defendant the cause of action is breach of contract by the agent of the firm. This being so, the plaintiff cannot sue in his own name. If the cause of action had been collusion by the agent with the other partner, it may be that the plaintiff could have brought the suit in his own name against the agent and joined the other partner as a defendant. See *Longman* v. *Pole*(4); Lindley 'on Partnership,' Sixth Edition, p. 289.

There is no doubt an allegation in paragraph 7 of the plaint, but it is clear from the allegations in paragraph 5 that the

(1) [1898], I.A.C., 450.
(2) L.R., 26 Ch.D., 35.
(3) [1899], 2 Ch.D. 696.
(4) Moo. and Mal., 223.

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plaintiff's alleged cause of action against the first defendant accrued prior to, and was quite independent of, the alleged collusion.

As regards section 578 of the Code, and the merits of the case not being affected by the error or irregularity it seems to me that the observations made by the judges of this Court in the case of *Namasivaya Gurakkal* v. *Kadirammal*(1) are applicable in the present case.—"As the case of each defendant must be decided on its own merits without any reference to the case of another, and as the cases of each will be different (as even the plaint itself shows) we are of opinion that the misjoinder has affected and must affect the merits of each man's case and cannot therefore be passed over as a mere irregularity and condoned as such under section 578 of the Code of Civil Procedure." The case of *Mohuna Chandra Roy Choudry* v. *Atil Chandra Chakravarti Choudry*(2) to which Mr. Sundara Ayyar referred is certainly not an authority for his proposition that misjoinder of causes of action can be cured by section 578. Without deciding the point the judges suggest that it cannot (see page 544).

Mr. Sundara Ayyar further contended that the objection as to misjoinder of causes of action could not be properly taken in the issues or raised at the hearing of the suit and he relied on the provisions of sections 46 and 53. Section 46 applies when there are several causes of action against the same defendant or the same defendants jointly (see *Khadar Saheb* v. *Chotibibi*(3)). Section 45 gives the right to construe several causes of action against the same defendant or the same defendants jointly, whilst section 46 empowers the court to order that the suit be confined to such of the causes of action as may be conveniently disposed of in one suit. For the reasons which I have stated it seems to me that the present case, where separate causes of action are alleged against the two defendants, does not come within the section.

Section 53 gives to the court a discretionary power at, or at any time before, the settlement of issues to return a plaint for amendment if it joins causes of action which ought not to be joined in the same suit. The code apparently does not contemplate an application by a party that a plaint be amended and proceedings stayed till the amendment is made. No doubt, in the present case, the proper course for the Court of First Instance to have

(1) I.L.R., 17 Mad., 168 at p. 175. (2) I.L.R., 24 Calc., 540.
(3) I.L.R., 8 Bom., 616.

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adopted would have been to have returned the plaint for amendment under section 53. But the power given to the court by section 53 is only a discretionary power, and if it is shown that the form of a suit is bad by reason that there has been a misjoinder of parties or of causes of action which is not warranted by the provisions of the code which deal with this branch of the law of procedure, I do not think it can be said that a party is precluded from raising the objection and taking it at the hearing of the suit or on appeal. The authorities are the other way. See for instance *Mohuna Chandra Roy Choudry* v. *Atil Chandra Chakravarti Choudry*(1). I can find nothing in the provisions of the Code to warrant Mr. Sundara Ayyar's proposition that, when a Court of First Instance decides a question of misjoinder in favour of the plaintiffs, there is an end of the matter and the defendant is precluded from raising the question in appeal. The present law of procedure may be defective, but this can only be cured by amending the law.

Mr. Sundara Ayyar contended that, in any view, the District Judge was wrong in dismissing the suit and that he ought to have returned the plaint for amendment. I think the Judge was right in dismissing the suit. See *Kachar Bhojvaija* v. *Bai Rathore*(2); *Ram Narain Dut* v. *Annoda Prosad Joshi*(3). In *Ramanuja* v. *Devanayaka*(4) and *Salima Bibi* v. *Sheikh Muhammad*(5) the suit was held to be bad on the ground of misjoinder of plaintiffs, not, as in the present case, on the ground that distinct causes of action have been joined against different defendants in the same suit. I think this appeal should be dismissed with costs.

BODDAM, J.—I agree.

(1) I.L.R., 24 Calc., 540. (2) I.L.R., 7 Bom., 289.
(3) I.L.R., 14 Calc., 681. (4) I.L.R., 8 Mad., 361.
(5) I.L.R., 18 All., 131.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

1903. April 7, 29.

CHENNAPATNAM GOPAL ROW AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

TADAKAMALLA NARASIMHA ROW AND OTHERS (DEFENDANTS NOS. 1 TO 8 AND WIDOW OF DEFENDANT NO. 9), RESPONDENTS.*

Construction of document—Hypothecation bond—Lease of even date to husband of mortgagee—Provision in both instruments that interest under bond should be paid by lessee out of rent—Liability of mortgagor.

First defendant and his brother (since deceased) executed an instrument of hypothecation to A, the wife of seventh defendant, on consideration that A should pay a creditor of the executants a sum which was due by them to him. The document provided that interest should be paid to A in the following manner:—She was to be paid by her husband the rent payable by her husband to the executants under a lease recited as having been granted to the husband that day. The principal sum was to be repayable within 17 years. The lease was for a term of 28 years, and it, in its turn, referred to the instrument of hypothecation, and provided that the rent payable under it should be paid by the seventh defendant to A (his wife), and that after the debt to A under the hypothecation bond had been cleared, the rent should be paid to the lessors (the executants of the hypothecation bond, namely, first defendant and his deceased brother). On a suit being brought by the transferees of A's interest in the hypothecation bond:

Held, that the first defendant and the sons of the deceased brother were not liable to the claim. The simultaneous execution of the hypothecation and the lease, the facts that the term of the latter covered the whole period fixed in the hypothecation bond for repayment of the principal, the relationship between the hypothecation creditor and the lessee, (which pointed to their interests being practically identical), and the specific reference in each instrument to the appropriation of the rent to the interest, showed that the transaction between the parties was of a tripartite character, intended to relieve the obligors from any responsibility in respect of interest, and to entitle the obligee to look for liquidation of interest solely to the source pointed out.

SUIT for interest due on Rs. 2,000 secured by a hypothecation bond. On 3rd April 1886, first defendant and his brother

* Second Appeal No. 843 of 1901, presented against the decree of W. Gopala Chariar, Subordinate Judge of North Arcot, in Appeal Suit No. 37 of 1900, presented against the decree of M. Deva Row, District Munsif of Tirupati, in Original Suit No. 462 of 1898.

Jagannatha Row (since deceased) executed the bond. This was in favour of Ammayammall, the wife of the seventh defendant, and was filed as exhibit A. It contained the following terms:—

"Debt bond executed on 3rd April 1886 in favour of Muttukuru Sitaram Pantulu's wife Ammayammall . . . . . About 900 cawnies [describing their boundaries] nanja and punja, of Daminedu village situated within the above boundaries we have mortgaged to you without possession, and have become indebted to you in the sum of Rs. 5,000, ... being the amount relating to the assignment that you should pay to Mumbi Krishnama Charyulu the debts due by us to him. Hence, interest hereon for each year at 10 annas per cent. per mensem being Rs. 375, you have agreed to our assignment to you that your husband [the present seventh defendant] should pay till the payment of the debt under this document, towards the interest for the debt due to you, Rs. 375 being the balance after deducting from Rs. 500 being the Bilmakta for the Izara amount of 132 puttis payable to us yearly by Mottukuru Sitaram Pantulu in accordance with the Izara Patta granted this day by us to your husband, Muttukuru Sitaram Pantulu in the aforesaid Daminedu village and in accordance with that mentioned in the muchilika hitherto executed in his favour by us on 20th April 1885,—after deducting from . . . not only Rs. 20 which we have heartily remitted to him out of the Izara amount, but also Rs. 105 on account of the Sircar quit-rent, &c., for the balance of Rs. 480. Therefore you should at the end of Ani of each year recover from him the amount of interest payable to you. We shall pay to you within seventeen years the amount of principal due to you. Or we shall pay within eight months from the date of your demand after the expiry of the seventeen years. We shall not till the debt is fully discharged put these mortgage lands in possession of others in any kind of way."

On the same day, the executants of the bond exhibit A, executed a lease to the seventh defendant (husband of Ammayammall), which was filed as exhibit 15, and contained the following terms:—

"Izara patta executed and granted on 3rd April 1886 by Tadakamalla Srinivasa Row Garu's sons, 1. Narasimha Rao, and 2. Jagannatha Row, in favour of Muttukuru Vallabha Row's son, Sitaram Pantuluvaru. [Here followed a description of the land.]"

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The present plaintiffs became transferees of Ammayammall's rights under exhibit A, and (the principal sum secured thereby being apparently not yet due) brought the present suit for six years' interest, due under it in respect of Rs. 2,000, it being admitted that only that amount had been paid by Ammayammall as consideration for exhibit A. Defendants Nos. 2 and 3 were the sons of Jagannatha Row (deceased): and defendants Nos. 4 to 6 were the sons of first defendant. The District Munsif gave a decree for the amount claimed as against defendants Nos. 1 to 7. The Subordinate Judge, on appeal, modified this decree, holding that defendants Nos. 1 to 6 were not liable for the interest claimed. He said:—

"The suit was brought for recovering Rs. 900, the amount of interest due for the period between 13th July 1892 and 13th July 1897 on a hypothecation bond executed by first defendant and his deceased brother to one Ammayammall on 3rd April 1886 [exhibit A]. The said Ammayammal and her husband (seventh defendant) hypothecated their rights under the aforesaid bond to one Appala Charlu under a deed, dated 4th January 1888 [exhibit B]. He brought a suit on this latter bond for the amount of first instalment, obtained a decree, and in execution proceedings of the decree brought the right of Ammayi and her husband to Court sale, and purchased the same himself. He assigned his right as such purchaser to plaintiffs and they now claim the amount of interest due under the bond, exhibit A. The defendants Nos. 1 to 6 denied their liability on the grounds that the plaint bond was discharged and that they were not personally liable. In the lower Court and in this Court, the story of discharge was found not true. The lower Court allowed a decree against defendants Nos. 1 to 6 and 7 personally for the amount sued for, but held that the hypothecation was not liable. Against this decree plaintiffs did not appeal. Nor did the seventh defendant appeal. The defendants Nos. 1 to 6 appealed, and in this Court it was held that they were not personally liable, but on the mistaken assumption that the suit was for the amount due under the bond (exhibit B), the plaintiffs were declared entitled to bring to sale the rights of the mortgagee under exhibit A. The plaintiffs having applied for a review of this last portion of the decree, the review was allowed and the appeal re-heard as to the question of the personal liability of defendants Nos. 1 to 6 which is the only chief point for decision now. The document (exhibit A) stipulates payment of interest,

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but recites that another arrangement was entered into for making good the interest. It states that the right of collecting rent of Rs. 350 from seventh defendant to whom some of the hypothecated lands were leased, was assigned to the mortgagee with his consent and that the mortgagee should, therefore, recover the said amount annually from seventh defendant for a period of 17years; and it further distinctly provides that the mortgagor bound himself to repay to the mortgagee, within 17 years, only the principal amount of Rs. 5,000. The agreement to make good interest does not constitute a personal covenant. The arrangement that the mortgagee should recover Rs. 375, the interest from another person, coupled with the express provision that the debtor was to repay only the principal amount, unmistakeably denotes an intention that the creditor should not hold the debtor personally responsible for interest. The question appears also to be *res judicata*: for, in the previous suit, Original Suit No. 220 of 1892 (Tirupati Munsif's file) which was brought by the same plaintiffs against the defendants Nos. 1 to 6 and others for the amount of interest due under the same bond for the 3 years previous to 1892, it was held that there was no personal covenant and that therefore there was no cause of action against defendants Nos. 1 to 6 (exhibit XI). Although that suit was for the interest of a different period, still as a question of title, it was directly raised and decided. Even if not *res judicata*, the observation of the High Court is clearly in support of the view above expressed. As a fact, only Rs. 2,000 were lent under bond (exhibit A) and the interest for that amount is now claimed. There is reason to believe that the lease to seventh defendant terminated. There is no clause that if the lease terminated, the debtor should make good the interest as such. There is no evidence as to the reason for termination though the seventh defendant's silence, when the entire village was leased to Pokkal Reddi in 1889, exhibit F, suggests the presumption that the termination was brought about by consent of first and seventh defendants. It may be that such termination, which was prejudicial to the mortgagee's interest, was fraudulently brought about. On that ground, the mortgagee's rights to recover the amount from seventh defendant may not be lost; and as a fact, even in this suit, the seventh defendant is sought to be made liable and plaintiffs obtained a decree against him. It is not clear how plaintiffs can claim from the defendants Nos. 1 to 6 this amount, when

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the seventh defendant is held liable for it. . . . . I find that the defendants Nos. 1 to 6 are not personally liable for the amount claimed."

Plaintiffs preferred this second appeal.

P. R. Sundara Ayyar for appellants.

V. Krishnaswami Ayyar for first to sixth respondents.

R. Sadagopachariar and *T. T. Tiruvenkatachariar* for eighth respondent.

JUDGMENT.—The first defendant and his deceased brother Jagannatha Row executed on the 3rd April 1886 an instrument of hypothecation for Rs. 5,000 in favour of Ammayamma, wife of the seventh defendant, Ammayamma undertaking to pay to a creditor of the first defendant and his brother the sum of Rs. 5,000 due to him from them. Admittedly only Rs. 2,000 of this amount was paid by Ammayamma and the plaintiffs, who claim as transferees of Ammayamma's interest in the hypothecation, have brought the present suit for the recovery of interest said to be due on this sum of Rs. 2,000 for six years from the 13th July 1892. The District Munsif gave a decree for the sum sued for against defendants Nos. 1 to 7. On appeal, the Subordinate Judge in modification of this decree held that defendants Nos. 1 to 6, of whom defendants Nos. 2 and 3 are sons of the deceased Jagannatha Row and defendants Nos. 4 to 6 the sons of the first defendant were not liable in respect of the claim and dismissed the suit as against them.

On behalf of the plaintiffs—appellants—the contention that defendants Nos. 1 to 6 should have been held responsible was sought to be supported, so far as we were able to follow the argument, in two ways—firstly, that their liability was deducible from the language of the instrument of hypothecation itself, and secondly, that, even if such construction was not well founded, the failure of the arrangement made in the instrument for the liquidation of interest cast upon those defendants the duty of making good the interest in question.

The provisions of the instrument so far as they bear on the question under consideration are as follows:—"Hence interest hereon for each year at 10 annas per cent. per mensem being Rs. 375, you have agreed that your husband should pay till the payment of the debt under this document towards the interest for the debt due to you, Rs. 375 being the balance after deducting from Rs. 500 payable to us yearly by your husband Muttukuru Sitaram Pantulu in accordance with the izara patta granted this

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day by us to him . . . . not only Rs. 20 which we have heartily remitted to him out of the izara amount, but also Rs. 105 on account of sircar quit-rent, etc. Therefore you should, at the end of Ani each year, recover from him the amount of interest payable to you. We shall pay to you within seventeen years the amount of principal due to you or we shall pay it within eight months from the date of demand after the expiry of seventeen years . . . . " Now, the lease referred to here as executed on the same date was for a term of twenty-eight years, and it, in its turn, refers to the instrument of hypothecation and provides that the net rent of Rs. 375 payable thereunder to the lessors should be paid by the lessee to his wife Ammayamma and that, after the debt to Ammayamma was cleared, the gross rent of Rs. 500 should be paid directly to the lessors.

Now the simultaneous execution of the hypothecation and the lease, the facts that the term of the latter covered the whole period fixed in the hypothecation for repayment of the principal, the relationship between the hypothecation creditor and the lessee, which, of course, points to their interests in the matter being practically identical and, lastly, the specific reference in each instrument to the appropriation of the rent to the interest, indubitably show that the transaction between the parties was of a tripartite character intended to relieve the obligors from any responsibility in respect of interest and to entitle the obligee to look for liquidation of interest solely to the source pointed out. Were it otherwise, the language of the instrument would have been certainly different and a promise on the part of the obligors to pay interest either generally or on the happening of specific contingencies would have found a place in the document. The absence of any such promise coupled with the direct and unambiguous covenant relating to the repayment of principal in the concluding part of the instrument makes it quite clear that the arrangement relied on by the defendants was not a mere subsidiary provision implying an ultimate liability on the part of the mortgagors for any interest not realized by receipt of rent, but the entire contract on the point between the parties operating as a complete adjustment of the obligee's right to interest by an unqualified assignment to her of the right of the obligors to the rent for the whole period fixed for the re-payment of the principal. The suggestion made on behalf of the appellants that the mere fact that the parties contemplated a right in the

obligee to interest on the principal would imply an undertaking on the part of the mortgagors to pay the same, notwithstanding the special provisions in the document relating to the liquidation thereof, is clearly untenable. We may here refer to *Mathew* v. *Blackmore*(1) where a somewhat similar contention was urged, but unsuccessfully, in respect of principal and interest lent under an arrangement that it was to be repaid out of certain specific sources. That loan had been contracted by the defendant from the plaintiff for the purpose of paying off the debts of one Leman under whose will the defendant was executor and trustee, and the instrument evidencing the loan provided for its repayment "out of the moneys which should come to his hands as such trustee." The instrument, however, more than once spoke of the sum borrowed as money "lent and advanced." For the plaintiff it was contended that a general liability to repay the money ought to be implied from the description "money lent and advanced." Pollock, C.B., who delivered the judgment of the Court, rejected the contention, dealing with the matter thus: "In the present case the question is whether a contract by parol can be implied for repayment when there is an express covenant under seal relative to it. The rule of law as well as of reason and good sense is *expressum facit cessare tacitum* and where there is an express covenant that the defendant shall out of trust funds . . . . pay the sum advanced, we think it impossible that, at the same time, he made himself absolutely liable for the payment of it *simpliciter*; and, at all events, to do so would be to create a contract by implication different from and much more onerous than that entered into by the express words used . . . . " This reasoning is applicable in the present instance and the contention under notice must accordingly fail.

As to the case of *Venkateshwara* v. *Kesava Shetti*(2) cited for the appellants, the facts and circumstances there were different, since the observations of the learned judges clearly show that the arrangement in question there was merely of a subsidiary character not intended to affect the primary liability of the mortgagor for the mortgage amount.

Passing to the other argument of the appellants, based on the failure of the arrangement, no clear account of the circumstances

(1) 1 H. & N., 762.

(2) I.L.R., 2 Mad., 187.

resulting in such failure appears to have been given by either party. The lease itself was, as said before, for a period much longer than that fixed for repayment of the principal. The instrument of lease reserved to the lessors no power whatever to terminate the lease during its term. It is not alleged that there was a forfeiture of the lessee's right in consequence of any act or default on his part warranting such forfeiture. It is difficult, therefore, to see how the lease was in point of law at an end. And the fact that the plaintiffs hold a decree for the amount sued for against the seventh defendant is not consistent with the supposition that the lease has terminated. Be this as it may, all that appears is that on the 1st July 1889 the first defendant and his deceased brother, ignoring the lease to the seventh defendant, demised the whole village to one Pokkal Reddi and in execution of a decree against him brought to sale his leasehold rights and purchased the same themselves. Assuming that the seventh defendant has been actually ousted in consequence of the transactions with or proceedings against Pokkal Reddi, a matter which is not explicitly dealt with by the Courts below, it is difficult to see how that would render the mortgagors liable for what is claimed here as interest. None of the covenants under section 65 of the Transfer of Property Act applies to a case like the present. But granting that, with reference to the terms of the arrangement entered into between Ammayamma, the seventh defendant and the first defendant and his brother, the two last acted wrongfully in regard to the plaintiffs also in interfering with the possession and enjoyment of the seventh defendant, such interference may expose them to an action for damages, but it would not entitle the plaintiffs to ask the Court to read the instrument of hypothecation as if it contained a promise on the part of the mortgagors to pay interest in the events which have happened and thus in effect to readjust, in the language of Muthusami Aiyar, J., in the case already cited, the original contract on an equitable basis supposed to be better suited to the altered state of things.

The decree appealed from should therefore be sustained and we accordingly dismiss this second appeal with costs of the defendants Nos. 1 to 6.

APPELLATE CIVIL.

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

1903. July 17, 20. August 6.

DORASAMY PILLAI AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

MUTHUSAMY MOOPPAN AND OTHERS (DEFENDANTS NOS. 1 TO 11), RESPONDENTS.*

Rent Recovery Act (Madras)—VIII of 1865, ss. 18, 36, 40—Insufficient notice of sale—Onus of showing that requirements of Act have been complied with—Irregularity—Civil Procedure Code—Act XIV of 1882, s. 283—Relief "in respect of the same matter"—Joinder of causes of action and parties—Suit against purchasers of different items at invalid sale.

Where the validity of a sale of land for arrears of rent is in question it is for the landlord who seeks to avail himself of the special procedure by way of distress provided for by the Act to show that the requirements of the Act have been complied with.

Insufficient notice of sale is not a mere irregularity curable under sections 36 and 40 of the Rent Recovery Act. The provisions of section 36 cannot be imported into section 40 so as to make the former applicable to a sale of land distrained for arrears of rent. Section 36 introduces an exception to the general rule that, *primâ facie*, non-compliance with the requirements of the Act will vitiate a sale; and this exception is expressly limited to the case of moveable property.

The provision in section 18 as to the length of notice is that in fixing the day of sale, not less than seven days must be allowed. If a notice be published on the 16th announcing that a sale will take place on 22nd the sale will be bad, even though it may take place, in fact, on 23rd.

A suit against a number of purchasers of different items of land distrained and subsequently sold under the Rent Recovery Act for a declaration that the sale was invalid for want of proper notice is not bad for misjoinder of parties and of causes of action. Though, in a sense, every item sold constitutes a separate sale, the "matter" is the same, the sale being of distrained property, under the same notification and in respect of the same arrears. The proceedings in which the various items are sold are one and the ground on which the validity of the sale is impugned is the same in each case. The same defect vitiates the whole proceeding and is the common ground of attack. The cause of action, namely, the wrongful sale, is the same as against all the defendants.

When a suit is brought under section 283 of the Code of Civil Procedure, the attachment (and not the making of the order) constitutes the cause of action; and different purchasers of the attached property may be properly joined as defendants in the same suit.

* Second Appeal No. 1352 of 1901, presented against the decree of G. F. T. Power, District Judge of Tanjore, in Appeal Suit No. 989 of 1900, presented against the decree of S. Runganada Mudaliar, District Munsif of Tanjore, in Original Suit No. 568 of 1898.

SUIT for a declaration that a sale of certain land for arrears of rent under Act 8 of 1865, was invalid. The suit was brought against a number of defendants, each of whom had purchased items of land at the sale. The defence of misjoinder of parties and of causes of action was raised. The District Munsif set out the objection as raised by the defendants on this ground thus:—"The objection as to misjoinder of parties is connected with the plea of misjoinder of causes of action, and they both stand together. Plaintiffs' argument is that their suit is in the main that the revenue sale under which defendants claim is bad, and that plaintiffs still continue owners. On the other hand, defendants contend that the sales were held on different dates, the properties sold were different, the purchasers were different, and therefore, the cause of action was different as against each purchaser." Further facts material to the questions raised are set out in the judgment. The District Munsif dismissed the suit on the ground that it was bad for multifariousness. An appeal to the District Judge was dismissed, with a modification as to costs.

Plaintiffs preferred this second appeal.

P. S. Sivaswami Ayyar for appellants.

V. Krishnaswami Ayyar for first, second, sixth, ninth and tenth respondents.

JUDGMENT.—Two questions arise for determination in this appeal. First, was the sale of the lands in question bad for the reason that the requirements of section 18 of the Act (VIII of 1865) with reference to public notice were not complied with? Secondly, was the suit bad for misjoinder of parties and causes of action?

As regards the first question, section 18 requires a notice to be fixed up specifying the property to be sold and the time and place fixed for its sale and provides that in fixing the day of sale not less than seven days must be allowed from the date of the notice. The time fixed for the sale was the 22nd, 23rd, 25th and 26th of April.

The notice was dated the 14th of April, but the District Munsif found, and there was evidence to support the finding, that it was not published till the 16th, *i.e.*, less than seven days before the first day fixed for sale. The District Judge was of opinion that the evidence did not establish that the notice was published less than seven days before the earliest of the four days fixed for the sale.

In thus placing the onus on the plaintiffs we are clearly of opinion that the learned Judge was wrong. It is for the landlord,

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who seeks to avail himself of the special procedure by way of distress provided for by the Act, to show that the requirements of the Act have been complied with (see the judgment of the Privy Council in *Maharajah of Burdwan* v. *Tarasundari Debi*(1) and *Nattu Achalai Ayyangar* v. *Parthasaradi Pillai*(2), *Mahomed Zamir* v. *Abdul Hakim*(3), *Hurro Doyal Roy Chowdhry* v. *Mahomed Gazi Chowdhry*(4). The learned Judge further held that even if the sale notice was published only six days before the sale, this amounted merely to an irregularity which would not vitiate the sale. Here, again, we think he was wrong. Section 40 provides that the sale of a defaulter's interest in land should be conducted under the rules laid down for the sale of moveable property distrained for arrears of rent, and section 36 provides that no irregularity in publishing or conducting a sale of *moveable* property under the Act shall vitiate the sale, but that any person who has sustained damage by reason of the irregularity may bring a summary suit before the Collector to recover compensation for the damage. It was argued that section 36 and section 40 must be read together and that the effect of section 36 is imported into section 40 so as to make the provisions of section 36 with reference to sales of moveable property applicable to a sale of land distrained for arrears of rent. Such a construction cannot be adopted without doing violence to the express words of the section.

Section 36 introduces an exception to the general rule that *primâ facie* non-compliance with the requirements of the Act, will vitiate a sale. The exception is expressly limited to the case of moveable property; and it may be said there is good reason for this. Damage sustained by irregularity in the sale of moveable property could in all cases be met by pecuniary compensation. It is quite conceivable that damage sustained by irregularity in the sale of land could not. It seems to us impossible to treat the enactment contained in section 36 as one of "the rules laid down for the sale of the landed property" referred to in section 40. The *ratio decidendi* of the case *Nattu Achalai Ayyangar* v. *Parthasaradi Pillai*(2), appears to us to be applicable to the facts of the present case.

It was also contended that inasmuch as the sale did not in fact commence until the 23rd, a notice published on the 16th would

(1) I.L.R., 9 Calc., 619 at p. 624.
(2) I.L.R., 3 Mad., 114.
(3) I.L.R., 12 Calc., 67.
(4) I.L.R., 19 Calc., 699.

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be published seven days before the sale and the requirements of the section would be met. The short answer to this contention is that the section does not require that the notice should be published seven days before the sale takes place, *but that in fixing the* day of sale not less than seven days must be allowed. August 22nd was none the less the fixed day of sale because, as events turned out, no sale in fact took place on that day. In our judgment the sale was bad and must be set aside.

As regards the second question, the District Munsif was of opinion that the suit was bad for misjoinder. In the view taken by the Judge it was not necessary for the lower Appellate Court to decide the point. In our judgment the suit is not bad for misjoinder.

The right to relief alleged to exist against the several defendants is in respect of the same matter (see section 28 of the Code of Civil Procedure), viz., the alleged wrongful sale of the plaintiffs' lands. In a sense, of course, the sale of every item of the property sold constituted a separate sale, but the "matter" was the same. The sale was a sale of distrained property under the same notification and in respect of the same arrears. The proceeding in which the various items were sold was one and the ground upon which the validity of the sale was impugned is the same in each case. The same defect vitiates the whole proceeding and is the common ground of attack. The cause of action is the same as against all the defendants. In the cases to which Mr. Krishnaswami Ayyar referred (*e.g.*, *Burstall* v. *Beyfus*(1)), the cause of action alleged against defendant A was distinct from the cause of action alleged against defendant B. Even if the words "in respect of the same matter" occurring in section 28 of the Code of Civil Procedure warrant a narrower construction being placed upon the section than that which the English Courts have adopted with reference to the corresponding English rule (R.S.C.O. XVI, r. 4), we feel no doubt that the "matter" in the present case is the same. As regards the Indian authorities, reference need only be made to the cases of *Byathamma* v. *Avulla*(2), *Dampana-boyina Gangi* v. *Addala Ramaswami*(3), *Raghunath Mukund* v. *Sarosh Rama*(4), and *Hira Lal Mozundar* v. *Prosunno Chunder*

(1) L.R., 26 Ch. D., 35.
(2) I.L.R., 15 Mad., 19.
(3) I.L.R., 25 Mad., 786.
(4) I.L.R., 23 Bom., 266.

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Biswas(1)). Mr. Krishnaswami Iyer sought to distinguish the last-mentioned case on the ground that when, as in that case, a suit was brought under the provisions of section 283 of the Code, the making of the order constituted the cause of action. But this is not so. When a suit is brought under that section, the attachment is the cause of action, and different purchasers of the attached property may be properly joined as defendants in the same suit. So here, the wrongful sale is the cause of action and the different purchasers at the sale were rightly joined as defendants.

We think the plaintiffs are entitled to the declaration for which they ask. We accordingly set aside the decrees of the lower Courts and make the declaration as prayed. The plaintiffs are entitled to their costs throughout.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

1903. July 22, 29.

SYED NATHADU SAHIB (PLAINTIFF), APPELLANT,

v.

NALLU MUDALY (DEFENDANT), RESPONDENT.*

Execution—Purchase by decree-holder at sale in execution of his decree—Suit for land and mesne profits—Decree modified in second appeal—Attachment and sale of lands for mesne profits pending appeal—Sale under attachment—Purchase by judgment-creditor and suit to recover lands purchased—Maintainability.

K obtained a decree against R, on a hypothecation bond, purchased the hypothecated property in execution and assigned his rights under the purchase to the present plaintiff. Plaintiff sued the present defendant and others for the recovery of the lands and obtained a decree for possession and mesne profits. The High Court, in second appeal, held that plaintiff was entitled to recover possession of only three-fourths of the lands and mesne profits of such three-fourths, and that defendant's share in the lands, namely, one-fourth, was affected neither by the decree obtained by K, nor by the execution proceedings under it. While

(1) 12 C.L.R., 556.

* Second Appeal No. 1666 of 1901, presented against the decree of T. Varada Row, Subordinate Judge of Madura (East), in Appeal Suit No. 498 of 1900 presented against the decree of V. Swaminatha Ayyar, District Munsif of Tirumangalam, in Original Suit No. 141 of 1900.

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that second appeal was pending, plaintiff had attached other lands belonging to the defendant on account of the mesne profits awarded to him by the decree then under appeal, caused them to be sold and became the purchaser thereof, for Rs. 70, the amount of the total mesne profits being Rs. 100. The present suit was to recover the lands so purchased, and it was contended for the plaintiff that though the decree under which the sale in question had taken place had been modified subsequently, yet, inasmuch as the purchase was for an amount less than the three-fourths of the mesne profits the defendant was bound by the sale:

Held, that the plaintiff was not entitled to succeed. The rule is that where a decree-holder purchases at a sale in execution of his decree the purchase is subject to the final result of the litigation between him and his judgment-debtor (though where a third party purchases, the subsequent modification of the decree does not affect his rights). The rule still applies where the property is sold for a sum equal to, or less than, that eventually found to be due. The object of the rule is to prevent the interests of judgment-debtors from suffering by sales of their property before their liability is finally determined, and to prevent judgment-creditors from profiting at the expense of their debtors by becoming purchasers in sales pending litigation by way of appeal.

Whether a decree-holder-purchaser might, in a suit properly framed, be treated as if he held a charge on what he purchased for what was ultimately found due to him, where the decree was not altogether reversed but only modified—*Quære.*

Baboo Gowree Boyyonath Pershad v. *Jodha Singh*, (19 Suth., W.R., 416), referred to.

SUIT for land. The manner in which plaintiff's claim arose is fully set out in the judgment and in the head-note. The District Munsif dismissed the suit and the Subordinate Judge upheld that order.

Plaintiff preferred this second appeal.

R. Subrahmania Ayyar for appellant.

T. V. Seshagiri Ayyar for respondent.

JUDGMENT.—One Kylasam Chetti obtained a decree against Chinna Ibrahim Rowthan on a hypothecation bond, purchased the hypothecated property in execution and assigned his rights under the purchase to the appellant. The appellant instituted Original Suit No.6 of 1886 in the Court of the District Munsif of Tirumangalam against the present respondent (Chinna Ibrahim's brother) and others for the recovery of the said lands and obtained a decree for possession and mesne profits. The matter ultimately came before the High Court in second appeal, in which it was, among other things, held that the appellant was entitled to recover possession of only three-fourths of the lands and mesne profits in respect of such three-fourths and that the respondent's share of the lands, viz., one-fourth, was affected neither by the decree

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obtained by Kylasam Chetti, nor the execution proceedings thereunder. During the pendency of such second appeal, the appellant attached other lands of the respondent on account of the mesne profits awarded to him by the decree then under appeal, caused the same to be sold and became the purchaser thereof for the sum of Rs. 70, the amount of the total mesne profits having been settled to be Rs. 100 and odd.

In the present case the appellant sues for the recovery of the lands so purchased.

The District Munsif and the Subordinate Judge dismissed the suit on the ground that the decree in execution of which the appellant became the purchaser having been modified in the second appeal, the sale during the pendency of such appeal was not binding on the respondent.

On behalf of the appellant it was urged that though the decree under which the sale in question took place was modified subsequently, yet inasmuch as the purchase was for an amount less than three-fourths of the mesne profits settled as aforesaid, the respondent is absolutely bound by the sale. No doubt the decree in the second appeal for delivery of the three-fourths of the lands awarded to the appellant was, as against all the defendants therein, inclusive of the present respondent; but so far as the mesne profits were concerned, the respondent was not in express terms stated to be a party liable and it does not appear that any proceedings were taken subsequent to the decree in the second appeal, with reference to the ascertainment, so far as the respondent was concerned, of his liability, if any, in respect of mesne profits, or of the extent thereof. Even assuming that the respondent was one of the parties responsible for the whole of the mesne profits payable in respect of the three-fourths of the lands decreed to the appellant and that the amount thereof was equal to, or exceeded, the price for which the appellant made the purchase relied on, it is difficult to see how on principle that would take the appellant's case out of the scope of the rule laid down by the Judicial Committee in *Zain-ul-abdin Khan* v. *Muhammad Asghar Ali Khan*(1) and the cases following it, which is to the effect that, though in the case of third parties purchasing at execution sales, the subsequent reversal or modification of the decree or order under which the sale took

(1) I.L.R., 10 All., 186.

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place does not affect their rights, it is otherwise in the case of decree-holders themselves purchasing, and that in their case the purchase is subject to the final result of the litigation between them and their judgment-debtors.

There is no authority for the contention on behalf of the appellant that when the property is knocked down for a sum equal to, or less than, that eventually found due, the rule has no application. Nor can any sound reason be found to support it. The object of the rule in so far as it relates to judgment-creditors is apparently to prevent the interests of judgment-debtors suffering by sales of their property before their liability is finally determined, and to avoid judgment-creditors profiting at the expense of their debtors by becoming purchasers in sales pending litigation by way of appeal. To uphold the contention in question would, on the one hand, result in judgment-debtors who are appealing against decrees passed against them having to pay more than they are in truth bound to pay in order to prevent a sale of their properties before their liability is finally ascertained, and, on the other, to encourage speculative purchases by decree-holders to the injury of judgment-debtors. In cases where the decree is not altogether reversed but only modified, the view most favourable to a decree-holder-purchaser in the position of the appellant would be that deducible from the case of *Baboo Gowree Boyyonath Pershad* v. *Jodha Singh*(1) where it was held that a judgment-debtor seeking as plaintiff to get rid of the sale should have relief only on condition that he paid up what was due under the ultimate decree, in other words, that the decree-holder-purchaser should be treated as if he held a charge upon what he purchased for what was ultimately found due to him—though no such course appears to have been suggested in the case of *Set Umedmal* v. *Srinath Ray*(2), where reliance was placed on the case cited from 19, Weekly Reporter, apparently for another purpose.

Be this as it may, the party seeking relief here is not the judgment-debtor, but the decree-holder-purchaser, who has not prayed for possession on condition that the defendant fails to pay within a time to be fixed by the Court what he had to pay under the decree in the second appeal, as he should have done if the view of the law applicable to the case be as stated above. On the contrary,

(1) 19 Suth. W.R., 416. (2) I.L.R., 25 Calc., 810.

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he has throughout proceeded on the untenable footing that his purchase was absolutely binding on the respondent.

The lower Courts were therefore right in dismissing the suit; this second appeal fails and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Subrahmanya Ayyar and Mr. Justice Boddam.

1903. July 30. August 14.

VEERANA PILLAI AND ANOTHER (DEFENDANTS NOS. 1 AND 2), APPELLANTS,

v.

MUTHUKUMARA ASARY AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, ss. 13, 43—Suit for land in wrongful possession of defendants—Former suit to recover money alleged to be due on mortgage by sale—Maintainability.

Plaintiffs sued to recover possession of land which, they alleged, was in the wrongful possession of the defendants. In a former suit plaintiffs had sued certain defendants (two of whom were defendants in the present suit) to recover money alleged to be due under a mortgage by sale of the land. That suit was dismissed on the ground that the alleged mortgage was an usufructuary mortgage which contained no covenant to pay and that, in consequence, no suit for the money or for the sale of the land could be maintained. In the present suit, plaintiffs claimed as mortgagees and complained that the two defendants, though let into possession as tenants, refused to surrender the land and were setting up title.

Held, that the suit was not barred by section 43 or by section 13, Explanation II of the Code. The rights which were the subject of litigation in the former suit were totally different from those now claimed.

Arunachalam Chetti v. *Meyyappa Chetti*, (I.L.R., 21 Mad., 91), commented on.

Ramaswami Ayyar v. *Vythinatha Ayyar*, (I.L.R., 26 Mad., 760), approved and followed.

SUIT to recover possession of land from persons alleged to be in wrongful possession. The main question raised was whether the present suit was barred by reason of a previous suit. The nature of the previous is set out in the judgments. The District Munsif held that the suit was barred and dismissed it. The

* Civil Miscellaneous Appeal No. 132 of 1902, presented against the order of T. M. Rangachari, Subordinate Judge of Madura (West), in Appeal Suit No. 613 of 1901, presented against the order of V. Swaminatha Ayyar, District Munsif of Tirumangalam, in Original Suit No. 632 of 1900.

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Subordinate Judge reversed that order and directed the Munsif to try the suit on its merits.

Defendants Nos. 1 and 2 preferred this appeal.

V. Krishnaswami Ayyar for appellants.

P. S. Sivaswami Ayyar for respondents.

SUBRAHMANYA AYYAR, J.—The plaintiffs in the present suit had brought a previous suit, Original Suit No. 510 of 1898 on the file of the District Munsif's Court of Madura, against nine persons, inclusive of the first two defendants in the present suit, who were the eighth and ninth defendants therein. The plaint in that suit, in effect, stated that on the 9th August 1864, Suppan Asari, father of the plaintiffs, had for the sum of Rs. 245, stipulated to be repaid in three years, obtained from Palani Kumaru Pillai, grandfather of the then first and third defendants and father of the second defendant's husband, and Muthukaruppa Pillai, father of the then fourth and fifth defendants, a mortgage of the lands now in dispute, which had vested in the mortgagors to the exclusion of their brother, the then sixth defendant, father of the seventh defendant; and after certain other averments, to which reference will be made later on, prayed for a decree for repayment of the mortgage amount as well as of certain other sums subsequently advanced on the condition that they were to be repaid along with the mortgage amount, and for an order for sale of the mortgaged property.

That suit was eventually, so far as appears, dismissed on the ground that the alleged mortgage was a purely usufructuary mortgage which contained no covenant to pay and that that being so, no suit for the money or for the sale of the land could be maintained.

In the present suit the plaintiffs refer to their alleged title to the lands in question as mortgagees, much in the same terms as in the previous plaint and proceed to state that the present first defendant (eighth formerly) though let into possession as a tenant by the plaintiffs is setting up a title in himself and that he and the second defendant (ninth formerly), who got into possession through him, refuse to surrender the land; and pray for a decree for possession of the lands and mesne profits. The plaint states as an alternative ground for the reliefs claimed that, even should the plaintiffs fail to make out the letting alleged, they are entitled to recover on their title as usufructuary mortgagees under the said instrument of the 9th August 1864.

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The lower Appellate Court has held that the present suit was not barred by the previous suit.

On behalf of the appellants (first and second defendants) this conclusion was impeached, it being urged that the suit was barred under the provisions of section 43, Code of Civil Procedure, or section 13, Explanation II, or both.

The law as to questions of bar under these provisions was discussed at great length in *Ramaswami Ayyar* v. *Vythinatha Ayyar*(1), and all the previous important authorities bearing on the subject were fully reviewed and examined, and I need only say that I entirely concur in the conclusions arrived at there. Though I did share in the view that some of the observations of the Judicial Committee in *Kameswar Pershad* v. *Rajkumari Ruttan Koer*(2) warranted the notion that Explanation II to section 13 of the Code of Civil Procedure had introduced a change in the law of *res judicata* in so far as plaintiffs were concerned, so as to make it incumbent on them to make every cause of action relating to the property in litigation and existing at the time of the suit, a ground of attack, unless such a course was likely to lead to confusion, and whatever may be the correct interpretation to be put upon the language of the Judicial Committee in the above case had it stood by itself, yet, having regard to other pronouncements by the same tribunal re-affirmed subsequently to the said decision, such notion can no longer be taken to be well-founded. Consequently, speaking for myself, anything in the language used in the judgment in *Arunachalam Chetti* v. *Meyyappa Chetti*(3) inconsistent with the view of the law as expounded in the recent decision of this Court above referred to can no longer be treated as of any authority.

Turning now to the appellants' contentions here, there can be no doubt that they are unsustainable. The rights which were the subject of litigation in the suit of 1898 were an alleged right to recover a sum of money on a covenant which, it was found, did not exist and an alleged right accessorial to such covenant, viz., a right to an order for sale. These rights are, of course, absolutely different from what are now sought to be made the subject of adjudication, viz., the right to eject a tenant and another claiming through him, on the ground of the tenant's denial of the landlord's

(1) I.L.R., 26 Mad., 760. (2) I.L.R., 20 Calc., 79. (3) I.L.R., 21 Mad., 91.

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title and the right of a mortgagee to possession under a purely usufructuary mortgage, which latter necessarily negatives a right to recover money on a covenant to pay, or to obtain an order for sale. The rights in respect of which the plaintiffs now demand judgment, in other words, the causes of action now sued upon, being thus entirely different from the rights or causes of action to which the previous suit related, section 43 of the Civil Procedure Code, which simply enjoins that the whole claim arising out of the same cause of action should be included in the suit, can have no application. Next, as to the objection raised with reference to Explanation II to section 13. No doubt, in the plaint in the suit of 1898 reference was made, among other things, to the possession of the mortgaged lands by the plaintiffs, to a letting by them of the lands to the then eighth (present first) defendant, and to the latter denying his alleged landlord's title and setting up a claim to the property himself. But, though these averments may have been relevant as a reason for the inclusion of the eighth and ninth defendants in the suit in order to get an order for sale binding on them, yet it is manifest that in that suit, the plaintiffs could not, on the basis of those averments, have prayed for a decree for possession from the present defendants, since that would have been a clear case of misjoinder of causes of action and consequently the causes of action now relied on were not, with reference to the previous suit, "matters which might and ought to have been made grounds of attack" within the meaning of Explanation II to section 13 of the Civil Procedure Code, even if the interpretation to be put on Kameswara Pershad's case were different from that adopted in the recent second appeal above referred to.

The present objection on behalf of the appellants fails all the more, since, according to the decision of this Court already referred to, that explanation does not render it incumbent on a plaintiff to combine as grounds of attack every cause of action he may have at the date of the suit in respect of the property sued for, even if it were possible for the plaintiffs to have, consistently with established rules of pleading, claimed the present reliefs also in the former suit.

The appeal, therefore, in my opinion, fails and I would dismiss it with costs.

BODDAM, J.—I agree that the plaintiffs' suit is not barred under section 13 or section 43, Civil Procedure Code. It is not

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necessary for me to state the facts of the case or to do more than state my conclusions as shortly as possible after the very full judgment of Sir Subrahmanya Ayyar, J.

The cause of action in the former suit was to recover the mortgage amount by sale of the mortgaged premises. The present suit is a suit to recover possession of the land from persons who are in wrongful possession.

Although the first and second defendants in the present suit were joined as defendants in the first suit, as persons claiming an interest in the land, the present claim formed no part of the cause of action in that suit nor was it a cause of action upon which the plaintiffs could rely in the alternative or otherwise in support of the relief they sought in that suit. The cause of action in the present suit is totally distinct and different and therefore the suit is not barred. The appeal should be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1903. April 16, 17.

VEERAPPA CHETTIAR (FIFTH DEFENDANT, COUNTER-PETITIONER), APPELLANT,

v.

RAMASWAMI AIYAR (PLAINTIFF, PETITIONER), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *s.* 234—*Personal decree by one partner against another for dissolution and for a definite sum of money—Death of judgment-debtor—Right of decree-holder to execute—Joinder of undivided brother of deceased—Legality—Hindu Law.*

Petitioner had obtained a decree against his three partners dissolving the partnership and ordering the first defendant to pay him a definite sum of money. Before the decree was executed, first defendant died, and petitioner now sought to execute it, under section 234 of the Code of Civil Procedure, against the widow and undivided brother of first defendant who had been joined as defendants as the legal representatives of the deceased. The first defendant had not been sued in a representative capacity, as managing member of his family, nor was it shown that the business was a family business:

Held, that inasmuch as the decree was purely *in personam* against the first defendant, and not a decree against any property represented by him, or one

* Civil Miscellaneous Appeal No. 142 of 1902, presented against the order of E. B. Elwin, District Judge of South Arcot, dated the 27th September 1902, in E.P. No. 36 of 1902 (M.P., No. 413 of 1902), in Original Suit No. 8 of 1900.

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winding up the affairs of the partnership and providing for payment of its debts and for distributing the surplus according to the shares of the partners, petitioner was not entitled to execute it as against the brother by attaching and bringing to sale joint family property which had come to him by survivorship, whether it was ordinary family property or property acquired for the family by the partnership trade.

Held, further, that execution should proceed only against the widow, who alone was the legal representative of the first defendant, and the brother's name should be removed from the record. Execution should be granted, under section 234, against the widow, as the legal representative of the deceased first defendant. If the deceased had left any separate property it could be attached even in the hands of the fifth defendant, just as it might be attached if it were found in the hands of any stranger.

EXECUTION petition. Petitioner had brought a suit against three defendants, his partners, for dissolution of partnership and for winding it up. A decree was passed (after a reference to arbitration and receipt of award) dissolving the partnership and ordering first defendant to pay a definite sum of money to plaintiff. Before that decree was executed first defendant died, and petitioner brought his widow on the record as fourth defendant and his undivided brother as fifth defendant, these being joined as the legal representatives of the deceased first defendant. There was nothing on the record to show that first defendant had been sued in his representative capacity as managing member of the family; nor was it shown that the trade was a family business. The District Judge ordered execution to issue against these defendants and such property as had come into their possession, holding that first defendant had managed both partnership and joint family property, and fifth defendant was liable though he was not a party to the decree.

Fifth defendant preferred this appeal.

V. Krishnaswami Ayyar and *S. Srinivasa Ayyar* for appellants.

P. R. Sundara Ayyar, T. Rangaramanuja Chariar and *T. V. Gopalaswami Mudaliar* for respondent.

JUDGMENT.—The plaintiff brought this suit against the first defendant and two other partners for dissolution of partnership and for winding it up. After making a reference to arbitration and receipt of an award, a decree was passed dissolving the partnership, and ordering the first defendant to pay a definite sum of money to the plaintiff. Before the decree was executed by the plaintiff the first defendant died and the plaintiff now seeks to execute the decree under section 234, Civil Procedure Code, against

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the widow and undivided brother of the first defendant. The District Judge has joined the widow and brother as defendants Nos. 4 and 5 and has allowed execution to proceed against them in respect of such property as has come into their possession, evidently meaning to include not only the separate property, if any, of the deceased, but also the partnership property which had been in the hands of the first defendant and which, after the first defendant's death, had come into the hands of the fifth defendant. We are unable to uphold the order of the District Judge as it stands.

The principal question which has been argued before us in support of the order is that the decree against the first defendant was a decree against him as managing member of the family in respect of the trade which he carried on in partnership with the plaintiff and the second and third defendants, and that the decree can be executed after his death against the surviving member of the family, viz., the fifth defendant, just as if he had been a party to the suit.

The decree against the first defendant which is sought to be executed is not a decree against any property represented by the first defendant, nor is it a decree winding up the affairs of the partnership providing for payment of its debts and distributing the surplus according to the shares of the partners (*vide* section 265, Indian Contract Act); but it is purely a decree *in personam* against him.

We may also add that there is nothing on the record to show that the first defendant was sued in his representative capacity as managing member of the family nor is the trade in respect of which the suit was brought one that is necessarily a family business and not the first defendant's individual trade. That being so, we are clearly of opinion, following the Full Bench decisions of this court in *Karnataka Hanumantha* v. *Andukuri Hanumayya*(1), *Karpakambal Ammal* v. *Ganapathi Subbayyan*(2), and *Muttia* v. *Virammal*(3) that the decree cannot be executed against the fifth defendant by attaching and bringing to sale joint family property which has come to him by survivorship whether it is ordinary family property, or property acquired for the family by the partnership trade.

(1) I.L.R., 5 Mad., 232. (2) I.L.R., 5 Mad., 234.
(3) I.L.R., 10 Mad., 283.

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The other question argued before us on behalf of the appellant is that execution should proceed only against the widow who alone is the legal representative of the first defendant, and that execution cannot proceed against the fifth defendant even if he be in possession of any portion of the first defendant's assets that was his separate property.

We think that this contention is well founded. The name of the fifth defendant should be struck off the record and execution should be granted under section 234 against the widow as the legal representative of the deceased first defendant. If the latter has left any separate property the same may be attached, even in the hands of the fifth defendant, just as it might be attached if it were found in the hands of any stranger.

In the result we allow the appeal with costs and setting aside the order of the District Judge we direct him to restore the petition to his file and to dispose of it afresh according to law.

APPELLATE CIVIL.

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

MAHARAJA OF JEYPORE (APPELLANT), PETITIONER,

v.

SRI NILADEVI PATTAMAHADEVI AND ANOTHER (RESPONDENTS), RESPONDENTS.*

1902. November 28. December 9, 10, 17.

Vizagapatam Agency Rules—Rule XXXI—Right to petition Government—Rule of a substantive character—Revision in execution proceedings.

Rule XXXI of the Agency Rules for the District of Vizagapatam is of a substantive character and provides for revision in execution and other petitions in regard to which no right of appeal has been given.

Rule XXXI is not *ultra vires*.

EXECUTION Petition, filed in the Court of the Agent to the Governor, Vizagapatam. An order was passed on the petition by the Acting Senior Assistant Agent, against which the petitioner

* Civil Miscellaneous Petition No. 792 of 1900 under rule 31 of the Agency Rules for Vizagapatam District praying in the circumstances stated therein for review of the judgment of W. O. Horne, Agent to the Governor at Vizagapatam, dated 5th April 1900, in Miscellaneous Appeal No. 1 of 1900, preserted against the proceedings of W. Lys, the Senior Assistant Agent at Vizagapatam, dated 22nd December 1899, in the matter of Civil Miscellaneous Petition No. 10 of 1899

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appealed to the Agent, who confirmed the order. The petitioner now presented this Civil Miscellaneous Petition, under Rule 20 of the Agency Rules for the District of Vizagapatam.

V. Krishnaswami Ayyar and *C. R. Tiruvenkata Chariar* for petitioner.

P. R. Sundara Ayyar for respondents.

JUDGMENT.—Objection was taken on behalf of the respondents that Rule XXXI of the Vizagapatam Agency Rules gave no general right of petitioning the Government, but only prescribed the channel through which petitions that were otherwise provided for should pass. If this view were correct, the rule would have been quite unnecessary, as at the time it was enacted there were no cases in which petitions were otherwise provided for. The cases to which our attention has been drawn were provided for subsequently to the passing of Rule XXXI. Rule XXXI must therefore have been intended to provide for cases for which no previous provision has been made, such as petitions relating, like this, to matters in execution of decrees, for which no appeal was allowed. It is unlikely that the Government should have overlooked the necessity for providing for revision by them of the orders of the Agent and his assistants in the very important subject of execution of decrees when several rules have been made regarding the subject, and the control of Government in the matter is expressly reserved in one instance (see rule XXII). The provision in the rule XXXI that the petition thereunder received may be referred to certain authorities, shows that the rule was one of a substantive character and not merely to provide for the formality to be observed in the submission of the petition. Our view is the same as that taken in *Chakrapani* v. *Varahalamma*(1).

It was next contended that if the rule was what we consider it to be, it was *ultra vires* inasmuch as it was in excess of the powers conferred upon the Government by section 4 of Act 24 of 1839 under which the rules were made. We are unable to agree with the contention that it was not competent for the Governor in Council, acting under that section, to reserve any control in himself over the Agents and their subordinates in the exercise of their judicial powers. The words "to determine in what suits an appeal shall lie to the Sadar Adawlat" should not be understood

(1) I.L.R., 18 Mad., 227.

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as restricting the Government from making rules for the control of the Agents and their subordinates otherwise than by appeal to the Sadar Adawlat, and the words "to determine to what extent the decisions of the Agents in Civil Suits shall be final" have been held, in *Maharajah of Jeypore* v. *Jammanadhora*(1) not to disable the Government from making the decisions of the Agents subject to review under the orders of the Sadar Adawlat, as provided in Rule XX, although no appeal is provided for. We consider that the words "to prescribe such rules as he may deem proper for the guidance of such agents, etc.," are wide enough to warrant the Governor in Council to reserve to himself a power of control such as he gives himself under Rule XXXI. Under the Act, the operation of the ordinary laws within the Agency Tracts was excluded, and the control of the administration of Justice was virtually vested in the Governor in Council, as is implied from the provision empowering him to make such rules in that respect as he deems proper, without any limitation to his powers. The designation of the officer in whom the actual administration of Justice was vested in the Act, namely "the Agent to the Governor" shows that the Legislature itself recognized his subordination to the Governor, leaving it to the Governor to define and explain the extent of such subordination by Rules. As in our opinion the Rule XXXI was *intra vires* the question whether it was validated under the Indian Councils Act 24 and 25 Vict., Chap. 67, Section 25, does not arise.

It was further urged that the order was not that of the Agent but of his Assistant, and so Rule XXXI was inapplicable, but we find that the order was passed under the authority of the Agent as is expressly stated therein.

Coming to the merits, we must take it that the Agent's order refusing to attach and sell the property in execution of the decree was not passed in the exercise of his discretionary power under the concluding part of clause 2 of Rule XXXI but because the Agent considered the property was not liable to be proceeded against in execution of the decree. The Agent relied on a provision of the Civil Procedure Code which does not apply to the Agency Tracts. The property sought to be attached, viz., the interest of the defendant in the land, even assuming it was a grant for her maintenance

(1) I.L.R., 24 Mad., 345.

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is not exempted from attachment under the provision to clause 2 of Rule XXXI, by which alone the Agent was bound. He should therefore have granted execution unless the application for execution was barred by limitation. This, the Agent held, was not the case with reference to the only contention before him, that it had become barred subsequent to August 1896. Though the correctness of this view could not be impeached, the respondent's vakil wanted to show that the execution of the decree had become barred previous to 1896. As this point was not raised before the Agent, and no satisfactory explanation was forthcoming why it had not then been raised, we must decline to allow the question of limitation to be re-opened in the manner suggested. We must therefore reverse the order in question and direct that the application for execution be restored to the file and proceeded with in due course. The petitioner's costs in this Court should be paid by the respondent.

APPELLATE CIVIL.

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

1903. March 27. April 2.

PERUMALLA SATYANARAYANA (PETITIONER), APPELLANT,

v.

PERUMALLA VENKATA RANGAYYA (COUNTER-PETITIONER), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *ss.* 523, 365—*Agreement for arbitration filed in Court—Death of one of the parties—Application by legal representative to be brought on record.*

Where matters in difference have been submitted to arbitration, the submission is, under the law in force in British India, not revocable without just and sufficient cause, even where the submission has not been made a rule of Court. And where the submission has been made a rule of Court and has become the subject of a suit, it can only be revoked by leave of the Court upon good cause being shown. The policy of the Indian Legislature has been not to follow the English common law with regard to references to arbitration. Such contracts are not revocable, in India, at the will of either party, nor will the authority of an arbitrator necessarily be revoked by the death of one of the parties to

* Civil Miscellaneous Appeal No. 139 of 1902, presented against the order of F. H. Hamnett, District Judge of Gódávari, dated 11th July 1902, and passed on Civil Miscellaneous Petition No. 144 of 1902 in Original Suit No. 16 of 1901.

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the arbitration. The question whether a legal representative of a deceased party is or is not entitled to enforce the contract to refer depends upon whether the right dealt with in the reference is merely of a personal nature or is one which survives to the legal representative. Where it is one that survives, the proceedings before the arbitrators do not, under section 361, abate by reason of the death of a party. As the right to have partition of joint family property is one which survives to an adopted son, an agreement to refer the partition of such property to arbitrators is not put an end to by the death of a party to it, and if there is any dispute as to who is the legal representative, the Court should (at any rate where the agreement has been filed in Court) proceed under section 367 of the Code of Civil Procedure.

PETITION. The petitioner applied to have his name entered on the record in Original Suit No. 16 of 1901 on the file of the District Court in place of the deceased plaintiff therein, P. Tiruvengadam. The said Tiruvengadam and his nephew, P. Venkata Rangayya, the defendant in the suit, were the members of an undivided Hindu family, and, on 15th December 1900, entered into an agreement in writing to submit the partition of their joint family property to the arbitration of certain persons. On 25th March 1901, Tiruvengadam, the plaintiff, applied, under section 523 of the Code of Civil Procedure, to the District Court, to have the agreement filed, the defendant Venkata Rangayya consenting. The application was accordingly numbered as Original Suit No. 16 of 1901, and its decision was referred to the arbitrators. On 18th August 1901, while the arbitration proceedings were pending and before the award was given, Tiruvengadam died, and the present petitioner subsequently applied under section 365 of the Code to have his name entered on the record in the place of the deceased plaintiff. He claimed to have been adopted by Tiruvengadam, which the defendant denied. The question as to whether petitioner was in fact the legal representative of Tiruvengadam was not decided under section 367, but the Judge passed the following order on the application: "The right to enforce this agreement to have the lands divided does not, I think, survive to the petitioner. The agreement was a purely personal one entered into by the late plaintiff and the first defendant. The agreement did not in any way affect the rights of the parties to the land to be divided. It was only if there was an award, and then a decree, that the rights of the parties to the property would have been changed in virtue of the agreement. Under these circumstances, I hold that even if petitioner is the late plaintiff's legal representative, the

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right to sue does not survive to him and the suit abates." He dismissed the petition.

Petitioner preferred this appeal.

K. Jagannadha Ayyar, for *V. Ramesam*, for appellant, contended that the agreement to refer to arbitration was one that the manager of a joint family had power to make and that it was binding on all the members and was not terminated by the death of the manager, even though no award had been made. The right to have partition of the joint family property survived to the legal representative, and so the reference to arbitration also subsisted.

K. Subrahmania Sastri, for respondent, contended that the contract to refer was a personal one and was revoked by the death of either party to it, prior to the award being made, and he submitted that it made no difference that the agreement to refer had been filed in Court under section 523 of the Code. Even though the legal representative's right to claim partition survived, he could not come in as a party to the reference under section 365, and continue it. He cited the following cases as authorities for the contention that the authority of an arbitrator is revoked by the death of either party to it;—*Potts* v. *Ward*(1); *Toussaint* v. *Hartop*(2), *Cooper* v. *Johnson*(3) and *Rhodes* v. *Haigh*(4). He submitted that the principle laid down in those cases should be applied in India.

JUDGMENT.—One Thiruvengadam deceased and his nephew Venkata Rangayya, who were the members of an undivided Hindu family, entered, on the 25th December 1900, into an agreement in writing to submit to the decision of certain persons the disputes which had arisen between them with reference to the partition of their joint property and to abide by the partition to be made by them. On the 25th March 1901, Tiruvengadam applied, under section 523 of the Code of Civil Procedure, to the District Court of Gódávari to have the agreement filed. Venkata Rangayya, on notice to him, having consented to the agreement being filed, the application was numbered as a suit and the matter was referred to the decision of the arbitrators named. Pending the proceedings before the arbitrators, Tiruvengadam died, on the 18th August 1901. Tiruvengadam's daughter's son Satyanarayana, a minor,

(1) 1 Marshall, 366; 15 R.R., 680.
(2) 7 Taunt., 571.
(3) 2 B. and Ald., 394.
(4) 2 B. and C., 345.

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who is the appellant before us, alleging himself to be the adopted son of Tiruvengadam, applied through his natural father as his next friend under section 365 of the Code of Civil Procedure to have his name entered on the record in the place of the deceased plaintiff Tiruvengadam. The adoption thus set up was denied by the defendant (respondent).

Without pursuing either procedure prescribed by section 367 of the Code of Civil Procedure in reference to the determination of the question whether Satyanarayana was the legal representative of the deceased Tiruvengadam, the District Judge passed an order abating the suit. In support of the Judge's order our attention was drawn to *Potts* v. *Ward*(1), *Toussaint* v. *Hartop*(2), *Cooper* v. *Johnson*(3) and *Rhodes* v. *Haigh*(4), which lay down that the authority of an arbitrator is revoked by the death of any one of the parties to the submission before an award is made. This was apparently a corollary of the rule of common law that the authority of an arbitrator might, at any time before the award was made, have been revoked at the pleasure of any party to the submission, whether the submission was by agreement in writing, by bond, deed, Judge's order or order at *nisi prius*,—a rule apparently founded on the view that with reference to agreements to refer to arbitration any contracting party may, without the consent of the other, put an end to the contract on the mere ground that he has changed his mind, and which was due to the disfavour with which contracts to refer to arbitration were formerly looked upon in England as contracts tending to oust the jurisdiction of the ordinary Courts. But in this country, as pointed out in the case of *Nagasawmy Naik* v. *Rungasamy Naik*(5) the policy of the Legislature has always been different and the English Common Law rule has not been followed. According to the law here the submission of an existing dispute once made is not, without just and sufficient cause, revocable even in the case of a submission which has not been made a rule of Court, while, with reference to a submission which has been made a rule of Court and consequently where the matter has become the subject of a suit, the submission can be revoked only with the leave of the Court for good cause shown (*Pestonjee* v. *Manockjee* (6)).

(1) 1 Marshall, 366; 15 R.R., 680.
(2) 7 Taunt, 571.
(3) 2 B. and Ald., 394.
(4) 2 B. and C., 345.
(5) 8 Mad. H. C.R., 46.
(6) 12 Moo.I.A., 112.

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It follows, therefore, that contracts to refer to arbitration should not, in this country, be treated as standing upon the peculiar footing that such contracts are revocable at the mere will of a party so as to warrant the view that every such contract is essentially of a personal nature, as the District Judge seems to have thought, and the question whether a legal representative of a deceased party is or is not entitled to enforce the contract to refer is a question which would depend upon whether the right dealt with in the reference is of a merely personal nature or is one which survives to the legal representative. Accordingly, where the submission has been made a rule of Court and the right is one which falls under the latter description, the proceedings must, under section 361 of the Code of Civil Procedure, be held not to abate by reason of the death of a party. And as the right to partition which is the subject-matter of the submission in the present case would survive to the deceased plaintiff's adopted son, if there is one, the District Judge should have proceeded under section 367 of the Code of Civil Procedure.

We accordingly set aside his order and direct that the application be restored to his file and dealt with according to law. The costs of this appeal will be costs in the case.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1903. April 15.

SHANMUGAM PILLAI (PETITIONER), APPELLANT,

v.

SYED GULAM GHOSE (RESPONDENT), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *s.* 43—*Suit on muchilika for rent for fasli* 1305—*Previous suit on different muchilika for rent for fasli* 1306—*Maintainability.*

Plaintiff, the inamdar of a village, sued to recover from defendant, one of his mirasidars, arrears of melvaram due for fasli 1305, under a registered muchilika. On its being pleaded, in defence, that plaintiff had already filed a suit in respect of fasli 1306:

* Appeals Nos. 4, 5, 6 and 7 of 1903 under section 15 of the Letters Patent presented against the judgment of Mr. Justice Subrahmania Ayyar, dated 17th December 1902, in Civil Revision Petitions Nos. 18, 19, 20 and 21 of 1902, presented against the decrees of P. S. Gurumurti, Subordinate Judge of Kumbakonam, in Small Cause Suits Nos. 501, 502, 503 and 510 of 1901.

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Held, that the present suit was barred by section 43 of the Code of Civil Procedure. Though there were separate muchilikas for the faslis 1306 and 1305, yet there was but one cause of action, namely, the non-payment of rent by a tenant to his landlord.

SUIT for rent. The Subordinate Judge gave the following judgment:—

"Plaintiff, Inamdar of the Sarvamaniam villages of Valuthur, &c., sued to recover from the defendant, one of his mirasidars, Rs. 477-12-8 being arrears of melvaram due for fasli 1305 under a registered muchilika for five years executed by the defendant on 20th May 1891. The defendant disputed the value of paddy as also the claim for faslijasti and interest. He also pleaded set-off and added that the suit was barred by section 43 of the Code of Civil Procedure as a suit for fasli 1306 had been filed already. I think the objection under section 43, Code of Civil Procedure, is untenable. This suit is on a registered muchilika which gives six years' time to sue for the rents as they fall due, whereas the other suit (Original Suit No. 64 of 1900 on the file of this Court) for rent of fasli 1306, as admitted between the parties, was on a patta and a revenue judgment based thereon which allow plaintiff only three years' time to sue for the rent they refer to. Causes of action and limitation periods are different in each case and so I think the plea of bar under section 43 is untenable." He gave judgment for plaintiff:

Defendant filed a civil revision petition which came on for hearing before Subrahmania Ayyar, J., who held that the Subordinate Judge was right in deciding that this suit was not based on the same cause of action as that on which the suit for the rent for the fasli 1306 had been based. He dismissed the petition.

Petitioner preferred this appeal under article 15 of the Letters Patent.

Mr. Joseph Satya Nadar for appellant.

C. Ramachandra Rau Sahib for respondent.

JUDGMENT.—We do not think that the orders of the Subordinate Judge and of this Court which are appealed against can be supported. Though there were separate muchilikas for faslis 1306 and 1305, yet there was but one cause of action, viz., non-payment of rent by a tenant to his landlord. Though the rents became payable under different documents and at different times, they are only different claims under the same cause of action or tenancy. The case is very similar to the case where several articles are sold

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in succession by A to B. If the vendor sues for the price he must sue for the price of all the goods sold up to the date of his suit and cannot sue separately first for one and then for another. *Chockalinga Pillai* v. *Kumara Viruthalam*(1) and *Grimbly* v. *Aykroyd*(2) there quoted. Section 43 of the Civil Procedure Code is a bar to the second suit.

We set aside the order of this Court appealed against and the decree of the Subordinate Judge and dismiss the suits with costs throughout.

APPELLATE CIVIL.

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

1903. March 27. April 2.

GOMATHAM ALAMELU (PETITIONER—PLAINTIFF), APPELLANT,

v.

KOMANDUR KRISHNAMACHARLU (SECOND COUNTER-PETITIONER—SECOND-DEFENDANT), RESPONDENT.*

Jurisdiction—Suit on mortgage—Land situated outside territorial jurisdiction of Court—Court otherwise competent to entertain suit—Decree passed without objection—Execution of decree.

A suit on a mortgage was instituted in the Court of the District Munsif at Nellore, which was competent to try a suit of its nature and value; but the mortgaged lands were situated within the jurisdiction of the Court of the District Munsif at Tirupati. A decree was passed for the amount due and for sale, no objection being raised as to want of jurisdiction of the Nellore Court to try the case. When the decree-holder applied for an order absolute and for execution of the decree, objection was taken that the Court had no jurisdiction to entertain the suit, and that the decree passed by it could neither be made absolute nor be executed:

Held, that the decree was not a mere nullity, and inasmuch as no objection had been taken to the entertainment of the suit before the decree had been passed, the judgment-debtor should not be allowed to object to the validity of the decree in the course of its execution.

(1) 4 Mad. H.C.R., 334. (2) 1 Exch., 479.

* Civil Miscellaneous Second Appeal No. 43 of 1902, presented against the order of T. M. Swaminadha Ayyar, District Judge of Nellore, dated 25th November 1901, in Appeal Suit No. 85 of 1901, presented against the order of T. M. Rungachari, District Munsif of Nellore, in Miscellaneous Petition No. 122 of 1901 in Original Suit No. 40 of 1898.

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PETITION under section 89 of the Transfer of Property Act. Petitioner had obtained a mortgage decree against the counter-petitioners in the District Munsif's Court at Nellore and presented this petition to that Court to have that decree made absolute. The second defendant (counter-petitioner) objected that the decree could not be executed, as the mortgaged property was not situated within the jurisdiction of the Court, and as first defendant had never resided within its jurisdiction. The District Munsif passed the following order:—"I have heard the vakils on both sides; this application is opposed by second defendant. The property shown in the decree as mortgaged lies entirely within the jurisdiction of Tirupati Court, and this Court has no jurisdiction to pass any decree affecting the said immoveable property; nor have I any jurisdiction to pass the order absolute as prayed for for the same reason (see *Premchand Dey* v. *Mokhoda Debi*(1))." He dismissed the application. The Acting District Judge, on appeal, said:—"I am of opinion that the lower Court's view is correct. It is idle to allege that the failure of the defendants to contend want of jurisdiction conferred on the Court below the right to entertain a suit affecting immoveable property outside its territorial jurisdiction. It is not also right to contend that the proviso to section 16 of the Civil Procedure Code covers this case; for the relief sought for cannot be obtained by the personal obedience of the defendants. Further, it is only the second defendant that was residing within the Nellore District Munsif's Court's jurisdiction. The rulings in *Vithalrao* v. *Voghoji*(2) and *Isak* v. *Khatija*(3) are authorities for holding that the right to sue for foreclosure of the mortgage, lies in the Tirupati District Munsif's Court."

He dismissed the appeal.

Petitioner preferred this appeal against that order.

P. R. Sundara Ayyar for appellant.

DAVIES, J.—Assuming that the District Munsif who gave the decree should not have entertained the suit so far as it related to an order for the sale of the land, we are clearly of opinion that the decree was not void inasmuch as the Munsif was competent, as regards the nature and value of the suit, to exercise jurisdiction and his decree was passed without objection. No objection could

(1) I.L.R., 17 Calc., 699. (2) I.L.R., 17 Bom., 570.
(3) I.L.R., 23 Bom., 756.

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therefore have been taken to the validity of that decree in execution. Accordingly the orders of both the Courts below must be set aside and the application restored to the file and proceeded with according to law. In the circumstances no order will be made as to costs.

SUBRAHMANIA AYYAR, J.—The proper Court for the institution of the suit in so far as the order for the sale of the mortgaged land was concerned was, in my opinion, the Tirupati District Munsif's Court (*Vithalrao* v. *Vaghoji*(1)). Nevertheless the decree of the District Munsif's Court at Nellore, as that of a Court perfectly competent to try a suit of the nature in question, were the lands within the local limits assigned to that Court, could not be held to be a nullity, no objection having been taken to the entertainment of the suit by that Court before the decree was passed. Compare *Revell* v. *Blake*(2) and see also *Naro Hari* v. *Anpurnabai*(3). The judgment-debtor should not therefore have been allowed to object to the validity of the decree in the course of its execution.

I therefore agree in the order proposed.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice.

1902. February 2.

SANKARARAMA AYYAR AND ANOTHER, PETITIONERS,

v.

SUBRAMANIA AYYAR AND OTHERS, RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *s.* 407—*Application for leave to sue* in formâ pauperis—*Grounds for dismissing.*

Where application is made for leave to sue *in formâ pauperis*, the Court is not bound to give the leave if the allegations made by the petitioner are such that, if true, they would show a good cause of action.

(1) I.L.R., 17 Bom. 570. (2) L.R., 8 C.P., 533.
(3) I.L.R., 11 Bom., 160, note at p. 170.

* Civil Revision Petition No. 203 of 1902, presented under section 622 of the Code of Civil Procedure, praying the High Court to revise the order of Vernor A. Brodie, District Judge of Coimbatore, in Civil Miscellaneous Petition No. 91 of 1901, dated the 27th day of January 1902.

SANKARARAMA AYYAR v. SUBRAMANIA AYYAR.

APPLICATION for leave to sue *in formâ pauperis*. The District Judge dismissed the application, whereupon the applicant filed this civil revision petition, on the ground that the Judge was bound to give leave if the allegations made by the petitioners were such that, if true, they would show a good cause of action.

V. Krishnaswami Ayyar for petitioner.

P. S. Sivaswami Ayyar for respondent.

JUDGMENT.—I am asked to revise an order of the District Judge dismissing an application for leave to sue *in formâ pauperis*. The argument has been that the Judge was bound to give leave if the allegations made by the petitioners were such that, if true, they would show a good cause of action. Such a construction of section 407, Civil Procedure Code, seems to me to be quite inconsistent with the express words of section 406, Civil Procedure Code, and is unsupported by authority. The authorities are the other way—see *Kamrakh Nath* v. *Sundar Nath*(1) and *Amirtham* v. *Alwar Manikkam*(2).

This petition is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar.

1903. July 15.

SESHA AYYAR AND ANOTHER (RESPONDENTS NOS. 2 AND 3), PETITIONERS,

v.

NAGARATHNA LALA (APPELLANT), COUNTER-PETITIONER.*

Civil Procedure Code—Act XIV of 1882, *s.* 549—*Security for costs—Appeal under Letters Patent in case from mufussil—Power of High Court to order appellant to give security.*

A respondent in an appeal preferred under article 15 of the Letters Patent against the decision of a single Judge of the High Court in a case from the mufussil cannot apply for an order on the appellant to give security for the costs

(1) I.L.R., 20 All., 299. (2) I.L.R., 27 Mad., 37.

* Civil Miscellaneous Petition No. 370 of 1903, praying the High Court to order the appellant in Letters Patent appeal No. 1 of 1903, on the file of the High Court, to furnish security for the costs of the respondents Nos. 2 and 3 therein.

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of an appeal. Section 549 of the Civil Procedure Code applies only to appeals preferred to the High Court from subordinate Courts subject to its appellate jurisdiction and not to appeals preferred to the High Court, under article 15 of the Letters Patent, from the judgment of one of its own Judges. Nor does section 647 apply to appeals under the Letters Patent so as to extend the provisions of section 549 to such appeals.

APPLICATION for security for costs. The application was made by the respondent in an appeal which had been preferred under article 15 of the Letters Patent against the decision of a single Judge of the High Court in a case from the mufussil.

K. Balamukunda Ayyar, for the appellant, raised a preliminary objection that the petition could not be entertained. He contended that the Court has no jurisdiction to order security to be given for the costs of a respondent in a Letters Patent appeal. The Civil Procedure Code does not apply to such appeals, so section 549 cannot apply. (Vide *Sabhapathy Chetti* v. *Narayanasami Chetti*(1).) Nor had any rules been framed by the High Court for demanding security in such a case. This being a mufussil case the jurisdiction of the late supreme Court, as a Court of equity, could not be invoked.

M. R. Sankara Ayyar, for respondents Nos. 2 and 3.—It appears that no appeal lay to the late Sudder Court from the judgment of one of its Judges. The Letters Patent provide for an appeal in the case of the High Court. Though the jurisdiction of the High Court is invoked under article 15 of the Letters Patent, the procedure to be followed should, in the absence of any express provision to the contrary, be that prescribed by the Civil Procedure Code for appeals. Section 549 is general in its terms. Section 632 makes its provisions applicable to the High Court. The effect of the Letters Patent appeal being only to re-open the second appeal, it is only a continuation of the second appeal and the procedure prescribed for second appeals is applicable. Under section 587, section 549 would apply. Even if not, under section 647, it would apply. The word "appeals" in the section would not cover Letters Patent appeals. At any rate the High Court has an inherent jurisdiction to demand security from an appellant before it. The High Court that hears the second appeal and the Letters Patent appeal is the same. Its powers

(1) I.L.R., 25 Mad., 555.

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are not more limited in the latter case than in the former. It would be an anomaly to hold that the High Court has no power to demand security in the Letters Patent appeal while it has power in the case of a second appeal. Moreover the respondents were not called upon to appear in the second appeal and now they are. There would be hardship in holding that no security for costs can be demanded now. Where no specific rules exist, the Court will act according to justice, equity and good conscience.

JUDGMENT.—In my opinion the respondent in a Letters Patent appeal preferred against the decision of a single Judge of this Court in a mufussil case cannot apply for security being demanded from the appellant for costs. Section 549 of the Civil Procedure Code applies only to appeals preferred to the High Court from subordinate Courts subject to its appellate jurisdiction (*Sabhapathy Chetti* v. *Narayanasami Chetti*(1)) and not to appeals preferred to the High Court under article 15 of the Letters Patent from the judgment of one of its own Judges. Assuming that it would be competent to the High Court to pass such a rule, no rule has been made under section 652 of the Civil Procedure Code authorising the making of such an application. It is also conceded that no such rule was in force in the old Sudder Court and that being so, section 9 of the Charter Act cannot be relied upon in support of this application. I am unable to accede to the argument that section 647 of the Civil Procedure Code applies to Letters Patent appeals and that therefore the provisions of section 549 are extended to Letters Patent appeals. The petition is therefore rejected but without costs.

(1) I.L.R., 25 Mad., 555.

APPELLATE CRIMINAL.

Before Mr. Justice Bhashyam Ayyangar.

1903. July 16.

IN THE MATTER OF SUBBAMMA, ACCUSED.*

Criminal Procedure Code—Act V of 1898, s. 195 (b)—Power of superior Court to revoke sanction after complaint lodged.

P obtained sanction from a Stationary Sub-Magistrate to prosecute S for offences under sections 211 and 193, Indian Penal Code, alleged to have been committed before that Magistrate. P did not prefer any complaint in pursuance of the sanction, but the police, relying on it, preferred a charge sheet to the Joint Magistrate against the accused in respect of the alleged offence under section 211. The Joint Magistrate struck the case off his file, giving as his reason for so doing that he *suo motu* quashed the Sub-Magistrate's sanction under section 195 (*b*) of the Code of Criminal Procedure:

Held, that the Joint Magistrate's action in striking the case off his file was legal and proper, though the reason given by him for so doing was erroneous and his act in quashing the sanction *ultra vires*. A Joint Magistrate, though authorized under section 407 (2) to entertain appeals preferred by persons convicted on a trial by the Stationary Magistrate is not the Court to which appeals from the Court of the Stationary Magistrate ordinarily lie, within the meaning of section 195 (7). The Court to which the Court of the Stationary Magistrate is, within the meaning of section 195 (6) and (7), subordinate is that of the District Magistrate. *Eroma Variar* v. *Emperor*, (I.L.R., 26 Mad., 656), and *Sadhu Lall* v. *Ram Churn Pasi*, (I.L.R., 30 Calc., 394), followed. The Joint Magistrate could not, therefore, revoke the sanction given by the Stationary Sub-Magistrate, the District Magistrate alone having the power to revoke or grant a sanction given or refused by the Stationary Sub-Magistrate. Nor was it competent to a District Magistrate, under section 407, to direct that applications for revoking or granting a sanction given or refused by a Sub-Magistrate may be presented to the Joint Magistrate.

Whether the Court authorized to exercise such a power under sub-section (6) can exercise it *suo motu*, as if it were a Court of revision, where no application has been made to it either to give a sanction which has been refused or to revoke a sanction which has been given.—*Quære.*

The course pursued by the police in sending a police report in respect of the offence was contrary to law; but whether, on the strength of the sanction accorded to P, a police officer or other stranger might have preferred a complaint against S.—*Quære.*

The mere fact that a complaint has been made, in pursuance of sanction, will be no bar to a Court competent under sub-section (6) to deal with an application for revoking such sanction, entertaining such application and disposing of it according to law, even if the complaint in pursuance of the sanction has been preferred to itself.

* Case referred No. 52 of 1903 (Criminal Revision Case No. 189 of 1903) for the orders of the High Court under section 438 of the Code of Criminal Procedure by A. Butterworth, District Magistrate of Nellore, in his letter, dated 16th May 1903, Reference No. 481-Mag.

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CASE submitted to the High Court for orders under section 438 of the Code of Criminal Procedure. One Subbamma charged one Perumma with theft, but the Stationary Sub-Magistrate discharged the accused on the ground that no case had been made out. Perumma then applied to the Stationary Sub-Magistrate for sanction to prosecute Subbamma for offences under sections 193 and 211, Indian Penal Code. The Magistrate accorded sanction as requested. Thereupon the police, acting on this sanction, laid a complaint against Subbamma in the Joint Magistrate's Court. The Joint Magistrate held this to be irregular, with reference to section 155 (2) of the Code of Criminal Procedure, as the complaint should have been laid by Perumma. He read the charge-sheet and struck the case off his file, the grounds given being (*a*) that the words constituting the offence of perjury were not quoted in the application for sanction, or in the order according it, and (*b*) that there did not appear to be a strong *primâ facie* case on the false charge and that the Sub-Magistrate did not seem to have been satisfied as to its falsity. Questioned as to the provision of law under which he had struck the case from off his file, the Joint Magistrate replied that he had not acted under any section of the Code of Criminal Procedure unless it was section 195. He said the case should never have come on his file, for he refused to take cognizance of it. But before he had examined the sanction the case had been numbered on his file. There was, in consequence, nothing left for him but to pass a proceeding striking it off the file. He considered that such an order was valid under section 195. The letter of reference stated that section 195 gives a superior Court power to revoke a sanction granted by a subordinate Court, and added that the Joint Magistrate claimed that by virtue of this provision he had power, *suo motu*, and, upon a mere perusal of the sanction accorded by a subordinate Court, to cancel it. The District Magistrate, while upholding this view, considered it doubtful whether that power continued after a complaint had been lodged or after the police had put in a charge-sheet. He raised that question in the reference.

JUDGMENT.—In this case one Perumma was accorded sanction by the Stationary Sub-Magistrate, Ongole, Nellore district, under section 195, Criminal Procedure Code, to prosecute the accused for offences under sections 211 and 193, Indian Penal Code, alleged to have been committed before the said Magistrate. Perumma did

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not prefer any complaint in pursuance of the sanction obtained by her. But the police, relying upon the sanction accorded by the Sub-Magistrate, preferred a charge-sheet to the Joint Magistrate, Ongole, against the accused in respect of the alleged offence under section 211, Indian Penal Code, notwithstanding that an offence under that section is not cognizable by the police. It is clear that the course pursued by the police in sending a police report in respect of this offence is contrary to law. It does not appear that any police officer preferred any complaint on oath in the ordinary way to the Joint Magistrate. It is therefore unnecessary to consider whether, on the strength of the sanction accorded to Perumma, a police officer or other stranger may prefer a complaint against the accused. Under these circumstances the Joint Magistrate's action in striking the case off his file is legal and proper, though the reasons given by him for so doing, viz., that *suo motu* he quashed the Sub-Magistrate's sanction under sub-section (6) of section 195 is unsound in law. The question referred to this Court by the District Magistrate is whether a superior Court which has power, under section 195 (*b*), to revoke the sanction, loses that power in respect of a sanction under which a prosecution has been already instituted before itself. The District Magistrate has evidently assumed that the Joint Magistrate, who presumably has been authorized under section 407(2) to entertain appeals preferred by persons convicted on a trial by the Stationary Magistrate, is the Court to which appeals from the Court of the Stationary Magistrate ordinarily lie within the meaning of section 195 (7). This view is erroneous and within the meaning of sub-sections 6 and 7 of section 195 the Court to which the Court of the Stationary Magistrate is subordinate is that of the District Magistrate (*vide* Full Bench decision in *Eroma Puriar* v. *Emperor*(1) and *Sadhu Lall* v. *Ram Churn Pasi*(2)). The Joint Magistrate of Ongole is therefore not the authority which can revoke under sub-section 6, the sanction given by the Stationary Sub-Magistrate, and it is the District Magistrate alone that can revoke or grant a sanction given or refused by the Stationary Sub-Magistrate of Ongole, nor is it even competent to a District Magistrate, under section 407, to direct that applications for revoking or granting a sanction given or refused by the Sub-Magistrate may be presented to the Joint

(1) I.L.R., 26 Mad., 656. (2) I.L.R., 30 Calc., 394.

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Magistrate. The action of the Joint Magistrate in quashing the sanction being therefore *ultra vires* it is unnecessary to consider whether the Court authorized to exercise such a power under sub-section (*b*) can exercise the same *suo motu* as if it were a Court of revision when no application has been made to it either to give a sanction which has been refused or to revoke a sanction which has been given.

As regards the question put by the District Magistrate I may observe that the mere fact that a complaint has been made in pursuance of the sanction would be no bar to a Court, competent under sub-section (6) to deal with an application for revoking such sanction, entertaining such application and disposing of it according to law, even if the complaint in pursuance of the sanction has been preferred to itself. The order striking the case off the file being legal for the reasons already stated, it does not require to be revised, but the order of the Joint Magistrate, if any, revoking or quashing the sanction given by the Stationary Magistrate is set aside.

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice.

1903. March 20.

MALLAPPA REDDI AND ANOTHER (FIRST AND FOURTH ACCUSED), PETITIONERS,

v.

EMPEROR, COUNTER-PETITIONER.*

Penal Code—Act XLV of 1860, s. 211—Preferring false charge—Statement not reduced to writing by Police officer.

A person was convicted, under section 211 of the Indian Penal Code, of having preferred a false charge. It appeared that the accused had stated to a Police officer that certain of the prosecution witnesses had stolen his goats, and that he had made this statement intending to set the criminal law in motion against those persons. The statement had not been reduced to writing in accordance with the requirements of section 154 of the Code of Criminal Procedure. On its

* Criminal Revision Petition No. 570 of 1902, presented under sections 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the judgment of J. Hewetson, Sessions Judge of Tinnevelly, in Criminal Appeal No. 43 of 1902, confirming the finding and sentence of E. H. Wallace, Joint Magistrate of Tuticorin, in Calender Case No. 18 of 1902.

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being contended that there was no evidence of a false charge, within the meaning of section 211:

Held, (1) that the test is—did the person who makes the charge intend to set the criminal law in motion against the person against whom the charge is made; (2) that (it being clear from the evidence that the accused did so intend) the fact that the statement made by the accused to the Police officer had not been reduced to writing in accordance with section 154 of the Code of Criminal Procedure did not prevent the statement made from being a false charge within the meaning of that section.

CHARGE, against four accused, of preferring a false complaint, under section 211, Indian Penal Code. Accused Nos. 1 and 4 were convicted and sentenced by the Acting Joint Magistrate to eighteen months' rigorous imprisonment. Accused Nos. 2 and 3 were discharged. The Sessions Judge, on appeal, upheld the conviction and sentence. First accused made his complaint to the police on the night of 29th March, whilst fourth accused made his on the morning of 30th March. It was in consequence of this that it was contended that the accused should not have been jointly charged. It appeared also that the statements made by the first accused to the Police officer were not reduced to writing in accordance with the requirements of section 154 of the Code of Criminal Procedure.

The accused filed this criminal revision petition.

Mr. *J. G. Smith* for petitioner.

JUDGMENT.—Two points have been raised on behalf of the petitioners, first that there was no evidence of a false charge made by the first and fourth accused within the meaning of section 211 of the Penal Code, secondly that the fourth accused ought not to have been tried together with accused Nos. 1 and 3. As regards the first point it has been laid down by this court in a recent case that the test to apply is,—did the person who makes the charge intend to set the criminal law in motion against the person against whom the charge is made. It seems perfectly clear, on the evidence in this case, that the first accused, when he stated to a Police officer that certain of the prosecution witnesses had stolen his goats, intended to set the criminal law in motion against these persons. The fact that the statement made by the accused to the Police officer was not reduced to writing in accordance with the requirements of section 154 of the Criminal Procedure Code, does not, to my mind, prevent the statement made from being a false charge within the meaning of the section. I

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can find no authority for placing this narrow construction on the words "falsely charged" and on principle I can find no good reason for adopting such a construction.

As regards the fourth accused, the case is much stronger inasmuch as the charge made by him was reduced into writing and signed by him.

I think there was evidence that accused, Nos. 1 and 4 "falsely charged" the prosecution witnesses within the meaning of section 211 of the Code.

As regards the question of misjoinder it is true the false charge of stealing goats was made by the first accused on one day and by the fourth accused on the following day. I think the offence was the same, viz., a false charge that certain persons stole certain goats and that the first and fourth accused were properly tried together.

As regards the sentence I think a distinction can be drawn between the case of the first and fourth accused. The fourth accused persisted in the charge. The first withdrew it, or at any rate made up his mind not to proceed with it at a very early stage.

In the case of the first accused I reduce the sentence of eighteen months' rigorous imprisonment to nine months' rigorous imprisonment.

As regards the fourth accused the petition is dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1903. February 27.

CHENNA MALLI GOWDA (ACCUSED), APPELLANT,

v.

EMPEROR, RESPONDENT.*

Penal Code—Act XLV of 1860, s. 211—Preferring a false charge—"Charge" made to Village Magistrate—Sustainability.

An accusation of murder made to a Village Magistrate (who, under section 13 of Regulation XI of 1816, has authority to arrest any person whom he suspects of

* Criminal Appeal No. 782 of 1902, presented against the sentence of Vernor A. Brodie, Sessions Judge of Coimbatore Division, in Case No. 122 of the Calendar for 1902.

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having committed the murder of a person whose body is found within his jurisdiction) is a "charge" within the meaning of section 211 of the Indian Penal Code, even though it does not amount to the institution of criminal proceedings and even though no criminal proceedings follow it owing to the police referring it as false on investigation.

CHARGE of preferring a false charge of murder, under section 211, Indian Penal Code. The charge was made by the accused in the first instance to the Village Magistrate. The Sessions Judge convicted and sentenced the accused.

The accused preferred this appeal.

Mr. *D. Chamier* for accused.

Mr. *J. G. Smith* for the Public Prosecutor.

JUDGMENT.—There can be no reasonable doubt that the appellant falsely accused three men of having murdered his brother and that he knew the accusation to be false. The accusation was made, in the first instance, to the Village Magistrate who, under section 13, Regulation XI of 1816, has authority to arrest any person whom he suspects of having committed the murder of a person, whose body is found, as it was in this case, within his jurisdiction.

Such an accusation made to a Village Magistrate is, we think, a "charge" within the meaning of section 211, Indian Penal Code, even though it does not amount to the institution of criminal proceedings and even though no criminal proceedings follow it owing to the police on investigation referring the charge as false.

On this ground, we think the conviction is right, and it is not necessary to consider the subsequent complaint made to the Subordinate Magistrate, which complaint was substantially, though, perhaps not technically, dismissed.

We dismiss the appeal.

PRIVY COUNCIL.

ABDUL AZIZ KHAN (PLAINTIFF),

v.

APPAYASAMI NAICKER AND OTHERS (DEFENDANTS),

AND THREE OTHER APPEALS CONSOLIDATED.

P.C.*
1903.
April 29, 30.
November 13.

[On appeal from the High Court of Judicature at Madras.]

Sale in execution of decree—Sale of "right, title and interest" of holder of impartible zemindari and member of joint family governed by Mitakshara law—Subsequent reversal of interpretation of law under which sale was held—Change in nature of interest owned by holder of impartible estate—Change of law whether retrospective—Effect of sale under new interpretation of law.

In execution of a decree against the holder (by custom of primogeniture) of an impartible zemindari who was a member of a joint family governed by the Mitakshara law, his "right, title and interest" in the estate was sold in 1876. By the law as then interpreted such a holder had only a limited interest, and except for special justifiable causes (of which the debt on which the above decree was obtained was not one) no power of alienation beyond his life-time. Subsequently this interpretation of the law was reversed by the Judicial Committee in the cases of *Sartaj Kuari* v. *Deoraj Kuari* (L.R., 15 I.A., 51; I.L.R., 10 All., 272) and *Rao Venkata Surya Mahipati* v. *Court of Wards* (L.R., 26 I.A., 83; I.L.R., 22 Mad., 383) which decided that the holder of an impartible estate had an absolute interest in it, and made it alienable unless a custom against alienation were proved. In a suit by a purchaser at the sale against the successor by survivorship to the judgment-debtor for possession of the subject of sale, on the ground that the plaintiff had purchased an absolute interest in it. *Held*, that the reversal of the previously accepted interpretation of the law did not displace its application to the contract contained in the certificate of sale of 1876, the parties to which were bound by the law as then understood, and that only the life-interest of the then holder passed by the sale.

FOUR consolidated appeals from two decrees (18th July 1898) of the High Court at Madras, affirming two decrees (29th September 1894, and 24th September 1895) of the Subordinate Judge of Madura (West).

The first suit (26 of 1893) was brought on 23rd February 1893 by the present appellant Abdul Aziz Khan and six other plaintiffs (now appellants or represented by appellants), against Appayasami Naicker and his two sons Kulandai and Elaya. The Commercial

* *Present:*—Lord MACNAGHTEN, Lord LINDLEY, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.

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and Land Mortgage Bank of India was, on 5th October 1893, added as a defendant on its own application. In this suit Abdul Aziz Khan was solely entitled to relief against the defendants, the other plaintiffs being joined in consequence of an arrangement between them and Abdul Aziz Khan by which they were to supply him with funds for the prosecution of the suit. The object of the suit was to recover possession (to be given to Abdul Aziz Khan) of 12 specified villages in an impartible zemindari called Kannivadi (the succession to which was governed by the law of primogeniture) of which Appayasami Naicker (since deceased) was then in possession as zemindar.

The plaintiff Abdul Aziz Khan sought in the suit to enforce his title as a purchaser in execution during the life-time of Bangaru Appaya Naicker who died on 9th February 1881 leaving no issue, and who was the immediate predecessor of his brother Appayasami as zemindar of Kannivadi. The Commercial Bank of India claimed the villages as mortgagees.

The zemindari of Kannivadi came by succession to Bangaru Appaya Naicker in 1852 as the eldest son of Narasimha Appaya Naicker, his immediate predecessor, and was at that time burdened with a heavy revenue charge and also with large debts contracted by his predecessors which there was no prospect of his being able to discharge. Bangaru tried to manage the estate through agents; and from December 1853 one Adimulam Pillai was so employed, at first jointly with others, and, in 1858, as sole agent. On 20th July 1861 Bangaru executed a lease for thirty years to Adimulam Pillai of the whole estate (except three villages) to secure its better management by him. Bangaru had, however, incurred fresh liabilities, and was sued by various creditors who obtained decrees against him; and some of such decrees to the amount of Rs. 2,37,980 besides interest and costs were assigned to Abdul Aziz Khan. In execution of these decrees the right, title and interest of Bangaru in the twelve villages in suit were sold, and purchased by Abdul Aziz Khan who claimed possession of the property from the expiry of the lease to Adimulam Pillai in July 1891. The plaint prayed for a declaration of his title against the defendants, for possession, mesne profits, costs and other relief.

The defendants in their written statement set up that Bangaru was only entitled to the net usufruct of the estate for his life, with

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power to charge the estate only for purposes beneficial to the property or necessary for the family, and without power to alienate any portion of the estate for a term expiring beyond his life-time, basing their contention both upon the tenure upon which the estate was held, and upon the custom of the family. They also set up that they were not bound by the debts alleged to have been incurred by Bangaru Appaya Naicker, nor by the Court sales made in execution of the decrees passed against him in respect of such debts. They challenged the reality of the assignments of the decrees and contended that the right, title and interest sold ceased with Bangaru's death, and that the estate then passed unencumbered to the first defendant Appayasami by survivorship. They also contended that only a life interest was intended to be sold by the Court and bargained for and purchased by the plaintiff Abdul Aziz Khan for the sum of Rs. 7,010 which he paid, and that he was at the time of sale and subsequently, fully aware that what he bargained for and purchased was only the right, title and interest of Bangaru, and was consequently estopped by his conduct from bringing the suit.

The defendants also set out the transaction of the transfer for thirty years to Adimulam Pillai, and the result of a suit by Appayasami Naicker to set it aside; in which suit the lease had been held inoperative as against the estate in the hands of Appayasami, but was held valid as a mortgage to the extent of Rs. 1,20,000 which sum was found to have been old debts incurred by the predecessors of Bangaru Appaya Naicker for purposes binding on the estate. This amount the defendants stated that the first defendant Appayasami Naicker had paid into Court and had obtained delivery of the property leased including the villages in suit, and on this they contended that the suit was not maintainable but that the plaintiffs' only remedy, if any, was a suit for redemption on the footing of the instrument of lease.

The written statement then asserted the existence of claims by the Commercial and Land Mortgage Bank of India as mortgagees from the first defendant for money lent to enable him to pay the sum of Rs. 1,20,000 into Court, and insisted that the Bank was a necessary party to the suit.

The written statement of the Commercial Bank of India claimed title as mortgagee under mortgages by Appayasami Naicker, and decrees thereon going back to the time when he

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borrowed money to pay the sum of Rs. 1,20,000 into Court. It supported the contentions of the other defendants and contended also that the plaintiff's purchases were subject to the Bank's own claim.

Of the issues raised the only one now material is the sixth, "Whether what was attached, bargained for, sold and purchased by the first plaintiff is only the life interest of the deceased Bangaru Appaya Naicker?"

This issue was decided by the Subordinate Judge in favour of the defendants. The material portion of his judgment was as follows:—

"After hearing the arguments advanced on both sides by learned pleaders, I arrive at the conclusion that the uniform course of decisions in this Presidency before the ruling in *Sartaj Kuari* v. *Deoraj Kuari*(1) was that acts and alienations by the holder of an impartible zemindari made to enure beyond his life-time, will, if otherwise than *bonâ fide*, and if prejudicial to the family, be set aside; his acts and alienations are good for his life, but not beyond it and that series of decisions in this Presidency established the practice above referred to. Until very lately, it was the settled usage of those Provinces of India which administer Mitakshara law that the holder of an ancestral impartible estate could not alien or encumber it beyond his own life so as to bind his co-parceners, except for purposes beneficial to the family and not merely to himself. In 1888, however, the ruling in *Sartaj Kuari* v. *Deoraj Kuari*(1) was passed, holding that the property was absolutely at the alienor's disposal which struck at the root of all the previous rulings. The sales in this case took place in 1872, 1874 and 1875, more than thirteen years before the date of the ruling in *Sartaj Kuari* v. *Deoraj Kuari*(1) when the established doctrine in this Presidency was that the zemindar had only a life interest. In deciding this issue as to what was attached, bargained for, sold and purchased by first plaintiff, we must be guided only by the prevailing law at that time. Nobody could have expected then what the Privy Council decided thirteen years hence. The Courts and parties must have proclaimed for sale and sold only what right, title and interest the judgment-debtor had in the property according to the law then in force. In deciding upon the intention of the parties, I must agree in the arguments set forth by the defendants' learned Counsel and find that the life interest of the judgment-debtor was alone sold and purchased by plaintiff. Nobody could have dreamt or thought of what was to

(1) L.R., 15 I.A., 51; I.L.R., 10 All., 272.

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happen thirteen years afterwards. The plaintiffs' attempt to apply the ruling in *Sartaj Kuari* v. *Deoraj Kuari*(1) to the intention of the parties at the sale in 1875 and before that is futile. It is unnecessary for me to repeat all the facts and points of law set out in the arguments of defendants' Counsel in support of this view. The conduct of the plaintiffs and the low price paid for this large estate of immense value referred to in the arguments fully support my finding on the intentions of the parties. I therefore decide this issue in the affirmative."

Consequent on his finding on this issue the Subordinate Judge passed a decree dismissing the suit with costs.

An appeal to the High Court from this decision was dismissed with costs. (See *Abdul Aziz Khan Sahib* v. *Appayasami Naicker*(2).)

The second suit (35 of 1894) was brought on 7th July 1894 by the Commercial and Land Mortgage Bank of India against Abdul Aziz Khan and his co-plaintiffs in the previous suit (26 of 1893), against Appayasami Naicker and his two sons, the defendants in the last-named suit, and against a number of persons who claimed portions of the property in suit under alleged purchases or mortgages. The plaintiff Bank sought in the suit to enforce their alleged mortgage right to the property, which right occurred after Abdul Aziz Khan's purchases.

The previous suit (26 of 1893) was pending at the time of the filing of this suit (35 of 1894) and was on 29th September 1894 decreed against Abdul Aziz Khan by the Subordinate Judge.

Abdul Aziz Khan by his written statement in the latter suit (35 of 1894) filed on 24th November 1894 objected to being joined as a party in the suit claiming that the matters in dispute between him and the Bank, being the same in both suits, ought to be decided in the other suit (26 of 1893) in which the Bank had intervened, and could not be litigated again in the latter suit (35 of 1894); and he stated that he was about to appeal to the High Court against the decision of the Subordinate Judge.

The matters in issue between the Bank and Abdul Aziz Khan were the same as those raised in suit 26 of 1893, with the addition of an issue as to whether the decision of the previous suit was not *res judicata* in this suit, and of another issue as to whether the suit could be maintained against Abdul Aziz Khan.

(1) L.R., 15 I.A., 51; I.L.R., 10 All., 272.
(2) I.L.R., 22 Mad., 110 at p. 112.

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The Subordinate Judge held that the suit might be unsustainable, if the High Court should remand the prior suit for trial of the question whether the mortgages under which the plaintiff Bank claimed to intervene, had any effect in charging the zemindari to which Abdul Aziz Khan claimed to be absolutely entitled by virtue of his purchases. In case, however, the High Court did not so remand the prior suit, the Subordinate Judge held the latter suit was maintainable. The question whether Abdul Aziz khan had purchased an absolute interest in the zemindari or only an interest for the life of Bangaru (in which latter case only could the Bank claim any interest in the property in suit), had been decided against Abdul Aziz Khan when his written statement in the latter suit was filed and the Subordinate Judge held that he was bound by that decree in the previous suit as being a *res judicata*. The Subordinate Judge made a mortgage decree as between the other parties to the suit, but ordered Abdul Aziz Khan to bear his own costs.

Abdul Aziz Khan and the other unsuccessful parties appealed to the High Court and the appeal came before the same Judges who had decided the appeal in suit 26 of 1893, and on 18th July 1898, they gave judgment dismissing the appeal on the ground that as they had already decided in the other appeal "that the appellants' interest in the property ceased with the death of the late zemindar Bangaru Appaya Naicker in 1881, they have no *locus standi*."

To His Majesty in Council there were two appeals brought in each of the two suits, Abdul Aziz Khan having severed from the persons who were his co-plaintiffs in suit 26 of 1893 and his co-defendants in suit 35 of 1894 on account of his dissatisfaction with their performance of their arrangement with him as to funds, and they having filed a separate appeal in each suit. They however did not appear and the only respondent who appeared was the Commercial and Land Mortgage Bank of India.

On these appeals.

Mr. *A. Phillips* for Abdul Aziz Khan in suit 26 of 1893, contended that Bangaru had an absolute interest in Kannivadi and was entitled to dispose of it absolutely; and that what passed at the sale was therefore his absolute interest and not a life interest only as had been held by the Courts below. Section 249 of the Civil Procedure Code (Act VIII of 1859), which was the Act under

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which the sale was held enacted that the "right, title and interest" of the judgment-debtor was to be sold, and the certificate of sale under section 259 stated that that was what was sold. The question what was his right, title and interest, was, it was submitted, a question of law, and in that view it made no difference that the Court and the parties interested might have supposed that only a limited interest would pass by the sale. That there was any such supposition is not proved. Evidence as to the belief of the interested parties or of the intention of the Court that only a limited interest would pass would be irrelevant and inadmissible and no such intention or belief could be shown except so far as they appeared from the proceedings. But in the proceedings there was nothing to indicate such intention or belief: no inadequacy of price had been proved. The question was what actually did pass. Many cases had occurred in which the question had been whether *more* than the right, title and interest of the judgment-debtor had passed by a sale, but there was no case in which the question had arisen as to *less* than such interest passing. It could not be supposed that there was any intention of the Court that the sale should pass anything *less* than the actual right, title and interest of the judgment-debtor, much less that any such intention was known to the bidders or purchasers at the sale, or any contemplation by such bidders and purchasers that anything *less* than such right, title and interest would pass by the sale. At the time of the sale, it is true, the proprietor of an impartible zemindari was thought to have only a life-interest in the estate; but since 1888 and the case of *Sartaj Kuari* v. *Deoraj Kuari*(1) that view of the law had been held to have been wrong; and it is now settled that the holder of an impartible estate had an absolute interest in it and could alienate it unless any special custom against such alienation was proved. *Rao Venkata Surya Mahipati* v. *Court of Wards*(2). By these decisions the law was not changed but set right, the former cases being declared to have been wrongly decided. They declared what the law actually was at the time of sale although it was not applied, and since by the correct law applicable to the case Bangaru had an absolute interest in the zemindari, that interest must by the Code of

(1) L.R., 15 I.A., 51; I.L.R., 10 All., 272.
(2) L.R., 26 I.A., 83; I.L.R., 22 Mad., 383.

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Civil Procedure have passed by the sale to the purchaser the present appellant, Abdul Aziz Khan.

Mr. *J. D. Mayne* and Mr. *L. Dettruyther* for the Commercial Bank of India contended that at the time of the sale Bangaru had only an interest for his life in the zemindari, and that only such life-interest passed by the execution sale. The question in this case was, what was intended and expected to be, and actually was, sold according to the then prevailing law, not what might have been sold under an alteration in the law as subsequently declared. At the time of the sale it was the opinion of the Courts, and was therefore the law, that a zemindar holding an impartible estate was in the same position as any other holder of an estate under the Mitakshara law, except as to partition, that is, that he could only alienate what he had, and that was an interest for life in the estate. Reference was made to *Pettachi Chettiar* v. *Sangili Vira Pandia Chinnatambiar*(1) and *Beresford* v. *Ramasubba*(2) per *Muthusami Ayyar, J.*, at pages 203, 204 and 208 of the report. What the Court intends to sell and what is actually sold and purchased is, as has been held by the judicial committee, a question not of law but of fact, to be decided by the circumstances of each case as it occurs. The cases of *Gridharee Lall* v. *Kantoo Lall*(3), *Doendyal Lal* v. *Jugdeep Narain Singh*(4), *Hardi Narain Sahu* v. *Ruder Perkash Misser*(5), *Nanomi Babuasin* v. *Modhun Mohun*(6), *Simbhunath Pande* v. *Golap Singh*(7), *Minakshi Nayudu* v. *Immudi Kanaka Ramaya Goundan*(8), *Daulat Ram* v. *Mehr Chand*(9), and *Mahabir Pershad* v. *Moheswar Nath Sahai*(10) were referred to, and also the case of *Lekkamani* v. *Ranga Kristna Muttu Vira Puchaya Naikar*(11). At the time of the sale it was quite certain that as the law then stood only the life-interest of Bangaru could be sold. That was all the right, title and interest he had in the property to be sold, and that was what was intended to be sold by

(1) L.R., 14 I.A., 84; I.L.R., 10 Mad., 241.
(2) I.L.R., 13 Mad., 197 at pp. 203, 204, 208.
(3) L.R., 1 I.A., 321; 14 B.L.R., 187.
(4) L.R., 4 I.A., 247; I.L.R., 3 Calc., 198.
(5) L.R., 11 I.A., 26; I.L.R., 10 Calc., 626.
(6) L.R., 13 I.A., 1 at pp. 18, 19; I.L.R., 13 Calc., 21 at p. 36.
(7) L.R., 14 I.A., 77; I.L.R., 14 Calc., 572.
(8) L.R., 16 I.A., 1 at p. 5; I.L.R., 12 Mad., 142 at p. 147.
(9) L.R., 14 I.A., 187; I.L.R., 15 Calc., 70.
(10) L.R., 17 I.A., 11 at pp. 14, 16; I.L.R., 17 Calc., 584 at p. 589.
(11) 6 Mad. H.C.R., 208 at p. 226.

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the Court and what was expected to be sold by the bidders and purchasers at the sale. All the proceedings preliminary to, and at, the sale showed that the property was dealt with on the principle that only a life-interest in it could be sold. The fact that it was sold for a low price indicated that that was known to all interested in the sale. From the delay in instituting his suit it may be presumed that Abdul Aziz knew he had only purchased a life-interest in the property. The fact that since the sale the law had been altered could, it was submitted, make no difference as to the law which was to be applied at the date of the sale. The law now was that laid down in the cases of *Sartaj Kuari* v. *Deoraj Kuari*(1) which was followed in *Beresford* v. *Ramasubba* (2) by the Madras High Court, and *Rao Venkata Surya Mahipati* v. *Court of Wards*(3); but those cases were not to have a retrospective effect given to them. The law to be applied was that which prevailed at the time of the sale; no judicial decision could enlarge the interest which passed by the law as it then stood, and which had been held under the then circumstances of the case to be the only interest that could have passed.

It was also contended that the purchase by Abdul Aziz Khan was subject to the rights of Adimulam Pillai in the zemindari, and therefore subject to the rights of all persons up to and including the Commercial Bank by whose money Adimulam Pillai's charge on it had been paid off.

Mr. *Phillips* in reply cited *Sonaram Dass* v. *Mohiram Dass*(4), to show that the purchaser took his chance, and ran all risks, the Court not being responsible to him for any loss he may sustain. It was only in cases where there was any ambiguity that the question as to what passed at a sale was considered a question of fact. Reference was made to *Pettachi Chettiar* v. *Sangili Vira Pandia Chinnatambiar*(5), *Hardi Narain Sahu* v. *Ruder Perkash Misser*(6), *Nanomi Babuasin* v. *Modhun Mohun*(7), and *Minakshi Nayudu* v. *Immudi Kanaka Ramaya Goundan*(8). In the

(1) L.R., 15 I.A., 51; I.L.R., 10 All., 272.
(2) I.L.R., 13 Mad., 197, at pp. 203, 204, 208.
(3) L.R., 26 I.A., 83; I.L.R., 22 Mad., 383.
(4) I.L.R., 28 Calc., 235.
(5) L.R., 14 I.A., 84; I.L.R., 10 Mad., 241.
(6) L.R., 11 I.A., 26; I.L.R., 10 Calc., 626.
(7) L.R., 13 I.A., 1; I.L.R., 13 Calc., 21.
(8) L.R., 16 I.A., 1; I.L.R., 12 Mad., 142.

present case there was no ambiguity, and therefore no question of fact to be decided. According to the law Bangaru had an absolute interest in the zemindari, and when his "right, title and interest" were sold, an absolute interest must have passed by the sale.

On 13th November 1903 the judgment of their Lordships was delivered by Sir ANDREW SCOBLE.

JUDGMENT.—These appeals were heard together, as the decision in all depends upon the same point. The material facts may be very shortly stated.

Bangaru, who succeeded to the zamindari of Kannivadi, in the Madras Presidency, in the year 1852 was a member of a joint Hindu family governed by the Mitakshara law. The zemindari is an impartible estate, the succession to which is regulated by the custom of primogeniture, and upon the death of Bangaru on the 9th February 1881, without male issue, his brother Appayasami succeeded to the zemindari.

Bangaru had found the estate heavily encumbered; and after endeavouring for some years, without much success, to manage it through agents, he executed, on the 20th July 1861, an instrument by which he transferred to one Adimulam for 30 years the possession and management of the whole zemindari, with the exception of three hill villages, in order to secure the regular payment of the Government demand, the gradual reduction of existing debts, and a modest income for himself. Having made this arrangement, Bangaru proceeded to incur fresh liabilities, and in 1870 and 1871 numerous suits were brought against him, and money decrees obtained by creditors. Two of these were transferred to the appellant Abdul Aziz Khan. The first, dated 18th March 1870, was for Rs. 5,264–15–9, with interest and costs; and the second, dated 7th March 1871, for Rs. 20,904–9–0, with interest and costs. In execution of these decrees, 12 villages of the zemindari were attached and sold by order of the District Court of Madura, and were purchased by the appellant above-named for a total sum of Rs. 7,010. The certificate of sale of seven villages is dated on the 7th March 1873, and that of the remaining five villages on the 22nd March 1876. In both cases, what was purchased was expressed on the face of the certificate to be "the right, title, and interest" possessed by the defendant Bangaru in the properties mentioned.

As has been already stated, Bangaru died without issue in 1881, and on the 23rd April in that year the respondent Appayasami (since deceased) filed a suit against Adimulam and others to set aside the instrument of 20th July 1861, as not binding upon him for reasons given in the plaint. The District Judge found that it was not binding as a lease, but was binding as a mortgage, and after taking an account of what was due to Adimulam as mortgagee, passed a decree in his favour for Rs. 1,87,835 with interest. Upon appeal to the High Court at Madras, this decree was affirmed, with the exception that the sum payable to the mortgagee was reduced to Rs. 1,20,000. To satisfy this decree and redeem the property, Appayasami borrowed money from various persons, whose claims are now represented by the respondent the Commercial Bank of India.

On the 20th July 1891 the term of 30 years reserved in the conveyance to Adimulam expired, and the appellant Abdul Aziz Khan brought a suit to recover possession of the 12 villages which he had purchased at the Court sales before-mentioned from Appayasami, whom he alleged to be in wrongful possession of them. Appayasami, in his written statement, asserted that all that was attached and sold in execution of the money decrees held by the appellant "was the right, title, and interest of the deceased Bangaru, and that such right, title, and interest ceased with his death." Of the numerous issues raised, the most important was the sixth, viz., "Whether what was attached, bargained for, sold, and purchased by the (appellant) was only the life interest of the deceased Bangaru?"

The Civil Procedure Code of 1859, which was in force at the time of the execution sales, "required that property sold in execution should be described as the right, title, and interest of the judgment-debtor, and it has been held in many cases that the presence of these words in the sale certificate is consistent with the sale of every interest which the judgment-debtor might have sold" (*Mahabir Pershad* v. *Moheswar Nath Sahai*(1)). Each case, however, must depend upon its own circumstances, and "in all the cases, at least the recent cases, the inquiry has been what the parties contracted about if there was a conveyance, or what the purchaser had reason to think he was buying if there was no

(1) L.R., 17 I.A., 11 at p. 16; I.L.R., 17 Calc., 584 at p. 589.

conveyance, but only a sale in execution of a money decree" (*Simbhunath Pande* v. *Golap Singh*(1)). As Lord Watson put it in the course of the argument in the case of *Pettachi Chettiar* v. *Sangili Vira Pandia Chinnatambiar*(2), in the case of a sale in execution of a money decree, "the questions are, what did the Court intend to sell, and what did the purchaser understand that he bought?" These are questions of fact, or rather of mixed law and fact, and must be determined according to the evidence in the particular case.

In the present case, it is not disputed that Bangaru and his brother constituted an undivided Hindu family, and that the debts in respect of which the decrees were made were not debts for which the joint estate was liable, if it passed by survivorship to the younger brother. What then was the extent of the interest held in the estate by Bangaru in his brother's lifetime, and which he was entitled to charge in favour of a personal creditor? As regards the law of the matter in 1873 and 1876, when the sales took place, it was the accepted law in Madras that the holder of an impartible zemindari who was himself a member of an undivided family, could not alienate or encumber the corpus of the estate so as to bind his co-parceners, except for justifiable especial causes. Prior to 1889, there had been a series of decisions to this effect in the Madras Courts, but in that year, following the judgment of this Committee in the case of *Sartaj Kuari* v. *Deoraj Kuari*(3), the High Court of Madras overruled those decisions (*Beresford* v. *Ramasubba*(4)); and it has recently been held by this Committee in the case of *Rao Venkata Surya Mahipati* v. *Court of Wards*(5) that impartible zemindaris in the Presidency of Madras are not inalienable in the absence of proof of some special family custom or tenure attaching to the zemindari, and having that effect. This reversal of the previously accepted interpretation of the law does not, in their Lordships' opinion, displace its application to the construction of the contracts contained in the certificates of sale now under consideration. "The rights of the parties to a contract," as Mr. Justice Willes observes in delivering the judgment of the

(1) L.R., 14 I.A., 77 at p. 83; I.L.R., 14 Calc., 572.
(2) L.R., 14 I.A., 84 at p. 85.
(3) L.R., 15 I.A., 51; I.L.R., 10 All., 272.
(4) I.L.R., 13 Mad., 197.
(5) L.R., 26 I.A., 83; I.L.R., 22 Mad., 383.

Court of Exchequer Chamber in *Lloyd* v. *Guibert*(1), "are to be judged of by that law which they intended, or rather by which they may justly be presumed to have bound themselves." Their Lordships agree with the Courts below in holding that in 1873 and 1876, when the sales took place, the parties must be taken to be bound by the law as it was at that time understood, and that the estate purchased by the appellant was only the life interest of the then zemindar. Their Lordships will humbly advise His Majesty that these appeals should be dismissed, and the decrees of the High Court at Madras confirmed.

Munhar Das and his co-appellants have not appeared before their Lordships in support of their appeals. Their Lordships will accordingly order them to pay the costs of those appeals incurred by the Commercial Bank of India, the only respondent who has appeared. The Bank's costs of the other two appeals must be paid by Abdul Aziz Khan, the appellant therein.

Appeals dismissed.

Solicitors for the appellant (Abdul Aziz Khan)—Messrs. *T. L. Wilson & Co.*

Solicitors for the respondents (the Commercial Bank of India)—Messrs. *Burton, Yeates & Hart.*

PRIVY COUNCIL.

RANGAYYA APPA RAO (PLAINTIFF),

v.

BOBBA SRIRAMULU AND OTHERS (DEFENDANTS).

P.C.* 1903. November 5. December 2.

[On appeal from the High Court of Judicature at Madras.]

Limitation Act (XV of 1877), sch. II, art. 110—Suit for arrears of rent—Madras Rent Recovery Act (Madras Act VIII of 1865), ss. 7, 9, 10, 11, 14—Proceedings by landlord to determine rent—Period from which limitation runs.

The sections of the Madras Rent Recovery Act (Madras Act VIII of 1865) relating to recovery of arrears of rent apply to ascertained rents, not to rents at rates which have yet to be ascertained.

(1) [1865], 6 B. & S., 100 at p. 133.

* *Present:* Lord MACNAGHTEN, Lord LINDLEY, Sir ANDREW SCOBLE and Sir ARTHUR WILSON.

In article 110 of schedule II of the Limitation Act (XV of 1877), "arrears of rent" means arrears of ascertained rent which the tenant is under obligation to pay, and which the landlord can claim, and, if necessary, sue for:

Held, therefore, (reversing the decisions of the Courts in India) that where it is necessary for the landlord to take proceedings under the Madras Act VIII of 1865 to have the proper rate of rent ascertained, the period of limitation in a suit for arrears of rent runs from the date of the final decree determining the rent, and not from the close of the fasli year for which the rent is payable.

Sobhanadri Appa Rau v. *Chalamanna*, (I.L.R., 17 Mad., 225), approved. *Sriramulu* v. *Sobhanadri Appa Rau*, (I.L.R., 19 Mad., 21), overruled.

There is no distinction in this respect between cases in which, in the proceedings to ascertain the rent, the Courts have approved of the patta tendered by the landlord and those in which they have modified it.

CONSOLIDATED appeals from decrees (8th December 1896) of the High Court at Madras affirming decrees (22nd October 1894) of the District Judge of Kistna, which had affirmed decrees (11th September 1893) of the District Munsif of Bezwada dismissing suits brought by the plaintiff, now appellant.

The suits were brought for arrears of rent for the years 1295, 1296, 1297 and 1298 fasli. All the Courts in India held that the suits were barred by limitation, and whether they were so or not was the only question for decision on this appeal.

The plaintiff Raja Rangayya Appa Row Bahadur is the Zamindar of Nuzvid. The defendants (now respondents) are cultivating tenants of the village of Mustabada in the plaintiff's zamindari. Prior to 1885 the tenants relinquished 2,000 acres in the village, refusing to pay the rents demanded. This land was known as "vidudalu" land, while the land which the defendants had all along cultivated was known as "mamool" land. For the years 1292 to 1294 fasli a lease of the vidudalu land was put up to auction, and was purchased jointly by all the defendants who took possession of it and divided it amongst themselves for the purpose of cultivation. Subsequently an arrangement was made with the plaintiff by which, instead of a joint liability of all the defendants for the rent of the whole of the land, each of the defendants became separately liable for the rent only of his own holding. This lease expired at the end of June 1885. The defendants however remained in possession and continued to cultivate the land with the consent of the plaintiff; but disputes arose as to the rents payable by them since the expiration of the lease. The tribunal for determination of these disputes was the Revenue Court acting in accordance with Madras Rent Recovery Act (Madras Act VIII

of 1865). That Act by section 3 provides that landholders shall enter into written agreements with their tenants, those made by the landholders being called pattas, and those made by the tenants being called muchilkas. Section 4 contains provisions as to the contents of patta and muchilka, and requiring the rent to be specified.

Section 7 enacts that—

"No suit brought and no legal proceedings taken to enforce the terms of a tenancy shall be sustainable unless pattas and muchilkas have been exchanged as aforesaid, or unless it be proved that the party attempting to enforce the contract had tendered such a patta or muchilka as the other party was bound to accept, or unless both parties shall have agreed to dispense with pattas and muchilkas."

Section 9 is as follows:—

"When a tenant shall, for one month after demand, have refused to accept such a patta as the landholders specified in section 3 are entitled to impose and to grant his muchilka in exchange it shall be lawful for such landholders to proceed by a summary suit before the Collector to enforce acceptance of the patta."

Sections 10 and 11 enact rules for procedure and to determine what is a proper patta, and empower the Collector to fix the rent payable in case of dispute. By the final decree the tenant is bound to accept the patta as amended and approved, and to execute a muchilka in accordance with it.

The year 1295 fasli was the first year in which the defendants cultivated the vidudalu land after the termination of their lease. For that year the plaintiff tendered pattas claiming certain rates of rent and specifying the terms on which the defendants were to hold. They refused to accept these pattas, and the plaintiff consequently instituted a suit to compel them to accept them. The Assistant Collector on 31st January 1887 fixed what he thought to be proper terms of the tenancy. Both the plaintiff and the defendants appealed from his decision to the District Judge of Kistna who amended the pattas, but they were not finally settled till 29th October 1889 by the judgment of the High Court at Madras on second appeal to that Court (see *Rangayya Appa Rau* v. *Kadiyala Ratnam*(1)).

Whilst that suit was pending it became necessary for the plaintiff to tender pattas for the year 1296 fasli. The defendants refused to accept them and another suit to compel acceptance was

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

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filed. This suit was decided on 20th December 1887 by the Assistant Collector, and by the District Judge of Kistna (after a remand) on 11th August 1890 in accordance with the judgment of the High Court on 29th October 1889.

Similar proceedings were taken for the years 1297 and 1298 fasli, and those proceedings were finally decided by judgment dated 11th August 1890.

The rents being in arrear the suits out of which the present appeals arose were instituted on 28th October 1892, a separate suit being filed against each defendant. The plaint in each case stated the previous litigation between the parties and the determination by the Courts of the terms of the tenancy including the rate of rent payable.

The written statements denied the allegations made in the plaint, and pleaded that the suits were barred by limitation.

The Munsif held that the rent of the years 1295, 1296, 1297 and 1298 fasli fell due, according to the current of the Madras decisions on 1st July in each of the years 1886, 1887, 1888, and 1889, respectively, and that the suits of those fasli years were barred by the limitation period of three years, having been filed on 29th October 1892; and that there was nothing in the Limitation Act to extend the time in cases where suits have been brought to enforce acceptance of pattas, by making the period of limitation run from the final determination of such suits. He therefore dismissed the suits.

On appeal, the District Judge in his judgment, dated 22nd October 1894, said:—

"The date of institution was admittedly more than three years from the end of the fasli years for which the items of kist were respectively due, but the plaintiff who had in most cases got the rates of kist settled by the Courts by bringing suits under section 9 of the Rent Recovery Act pleaded that the period of limitation should be held to run from the dates respectively of the orders passed finally settling the rates, whether in the case of an appeal by the District Court or High Court, or, in the case of no appeal, by the Revenue Courts.

"I am referred for the plaintiff to the decision of Justice Sir T. Muttusami Ayyar holding that the period of limitation commences from the date when the plaintiff was in a position to sue for rent, that is, the date of the decree; *Sobhanadri Appa Rau* v. *Chalamanna*(1).

(1) I.L.R., 17 Mad., 225.

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If I am to be guided by that reported decision I should remand the suits to the lower Court for a finding as to the sums actually due to the plaintiff for each of the four faslis by the defendants in each case. The defendants in their written statements disputed the correctness of the amounts claimed by the plaintiff, and the contention which is strongly urged before me was not gone into by the Munsif.

"For the defendants on the other hand I am referred to an unreported decision, dated 28th August last, in which a decision of Justice Sir T. Muttusami Ayyar in a case precisely similar to that of *Sobhanadri Appa Rau* v. *Chalamanna*(1) was overruled in appeal by Justices Parker and Best. If I am to be guided by this more recent decision, for the report of which sufficient time has not yet elapsed, I must confirm the Munsif's decision that the claim is barred by time. It is pointed out to me that, under section 3 of Act XVIII of 1875, I should not consider the unreported decision at all; but I think that I should not be exercising a proper discretion under the circumstances if I were to ignore it. I decide to follow the more recent though at present unreported decision of the High Court, and uphold the Munsif's finding that the claim for the kist due for faslis 1295, 1296, 1297 and 1298 was time barred."

The plaintiff then appealed to the High Court and a Division Bench of that Court (Collins, C.J., and Benson, J.) on 8th December 1896 confirmed the decisions of the Courts below. Their judgment was as follows:—

"The point urged before us is that the period of limitation should be computed from the date of the final decree in the suit with regard to the propriety of the patta tendered, and not from the date when the arrears of rent fell due; and in support of this contention reference is made to the terms of section 72 of the Rent Recovery Act, and especially to its concluding sentence. The effect of that section with reference to limitation was fully discussed in *Rangayya Appa Rau* v. *Venkata Reddi*(2), and the contention now urged by the appellant was held to be invalid. That decision was to the same effect as the decision of this Court referred to in the District Judge's judgment as unreported, but which has since been reported (see *Sriramulu* v. *Sobhanadri Appa Rau*(3)) where the older decisions are discussed. The appellant's contention is, thus, concluded by the authority of repeated decisions of this Court. We must, therefore, dismiss this second appeal with costs."

(1) I.L.R., 17 Mad., 225.
(2) I.L.R., 22 Mad., 249, note (2). Referred cases Nos. 11 and 13 to 136 of 1893.
(3) I.L.R., 19 Mad., 21.

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On this appeal, which was heard *ex parte*, Mr. *L. De Gruyther* for the appellant contended that on the construction of the Madras Rent Recovery Act (Madras Act VIII of 1865) arrears of rent could not be considered to be due until the final decree in a suit brought to determine the rate of rent for which the tenant was liable. Section 7 of the Act enacted that no suit for rent can be brought until pattas and muchilkas have been exchanged; and that result could not be attained, in cases where the tenant declines to accept the patta tendered by the landlord, until the latter has taken steps under the Act to enforce the patta as tendered, or in such an amended form as the Revenue Court may approve of; see sections 9, 10 and 11 of the Act. In such cases (and of such nature were the present suits) if the arrears of rent were held to be due at the end of each fasli year, limitation would be running against the landlord during his proceedings for determination of the rate of rent, so that a suit for the rent might be barred notwithstanding that under the Rent Act he had never been entitled to bring it. Such a result, it was submitted would be quite inconsistent with the intention of the Act. Reference was made to *Gopalasawmy Mudelly* v. *Mukkee Gopalier*(1), *Sayud Chanda Miah Sahib* v. *Lakshmana Ayyangar*(2), *Easwara Doss* v. *Pungavanachari*(3), and *Ali Khan* v. *Appadu*(4). On the question when limitation began to run in such cases the later decisions of the Madras High Court were in conflict, the case of *Sobhanadri Appa Rau* v. *Chalamanna* (5) deciding that the three years' limitation under article 110 of schedule II of the Limitation Act (XV of 1877) runs from the date of the final decree fixing the rate of rent, that being the earliest date at which the landlord is in a position to sue for the rent; and *Sriramulu* v. *Sobhanadri Appa Rau*(6), holding that limitation runs from the end of the fasli year for which the rent is payable. The former decision, it was submitted, was correct. The rent must first be ascertained, and it was only from the final decree by which the rent was determined that limitation under article 110 of the Limitation Act should be held to run. In that case the present suits would not be barred. The case of *Mussumat Ranee Surno Moyee* v. *Shooshee Mokhee Burmonia*(7) decided on section 32 of

(1) 7 Mad. H.C., 312 at p. 331.
(2) I.L.R., 1 Mad., 45.
(3) I.L.R., 13 Mad., 361.
(4) I.L.R., 7 Mad., 304.
(5) I.L.R., 17 Mad., 225.
(6) I.L.R., 19 Mad., 21.
(7) 12 Moo. I.A., 244; 2 B.L.R.P.C., 10.

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the Bengal Rent Act (X of 1859) was referred to as showing that limitation in a suit for arrears of rent had been held to run from a period later than the end of the year for which the rent was payable.

On 2nd December 1903 the judgment of their Lordships was delivered by Sir ARTHUR WILSON.

JUDGMENT.—This appeal raises a question of considerable importance in Madras, and as to which there has been some difference of opinion amongst the learned Judges of the High Court.

The plaintiff (appellant) is the Zamindar of Nuzvid, and is a "landholder" within the meaning of the Rent Recovery Act (Madras Act VIII of 1865). The several defendants hold lands under him in the village of Mustabada, which is included in his zamindari, and they are "tenants" within the meaning of the Act.

The defendants occupied the lands to which the present controversy relates for a long period, but the time which has to be considered in this appeal commences with the fasli year 1295. In that year the plaintiff tendered pattas which the defendants refused to accept (similar proceedings took place in the subsequent years). The plaintiff thereupon instituted summary suits before the Collector to enforce the acceptance of the pattas and the execution of corresponding muchilkas. The Head Assistant Collector, who heard the cases, made his order modifying the terms of the proposed pattas and directing the tender of pattas embodying his modifications. The District Judge on appeal made additional changes in the pattas. On further appeal the High Court again varied the terms of the pattas to be tendered; and thus by the decree of the High Court dated the 29th October 1889 the conditions of the tenancies, including the rates of rent, were finally determined.

The present suits were brought on the 28th October 1892 in the Court of the Munsif of Bezwada. In them the plaintiff claimed to recover from the defendants balances of rent for their respective holdings, at the determined rates, in respect of the fasli years 1295, 1296, 1297, 1298, and subsequent years.

With the subsequent years this appeal has nothing to do, it is limited to the four years mentioned. The Courts in India have held that the claim for rent in respect of those four years is barred by limitation, and the correctness of that ruling is the one question raised in the present appeal.

The rule of limitation applicable to the case is article 110 of schedule II of the Indian Limitation Act (Act XV) of 1877, which prescribes for a suit for arrears of rent a period of limitation of three years reckoned from the time when the arrears become due. The Courts in India have held that the period of limitation in this case for the rent of each fasli year runs from the close of that year, and if that view be correct the cases have been rightly decided. The contention before their Lordships was that the period should be counted from the 29th October 1889, when the decree of the High Court determined the rent payable. And if this contention be correct, these claims were in time.

The point of time from which, under the Limitation Act, the period of limitation is to run is that at which the arrear became due. In most cases no doubt the point of time at which rent becomes due is the close of the period in respect of which it is to be paid. But this is not necessarily always the case in India, and the Limitation Act is an Act for all India. Legislation, or custom, or express contract, or the special circumstances of any case may make rent become due at a point of time different from the close of the period in respect of which it is to be paid. The case of *Mussumat Ranee Surno Moyee* v. *Shooshee Mokhee Burmonia*(1), heard before this Board, is an example of a suit for rent, governed by a law of limitation substantially the same as that now before their Lordships, in which the date at which the rent became due was held to be an entirely different date from the close of the period in respect of which that rent was payable. The object of a Limitation Act is presumably to compel people who have actionable claims to sue upon them with due promptitude or to forfeit the right to do so at all. In such an Act the falling due of rent naturally means the falling due of an ascertained rent, which the tenant is under an obligation to pay, and which the landlord can claim and, if necessary, sue for.

In order to see when rent becomes due in a case like the present it is necessary to turn to the Rent Recovery Act (Madras Act VIII of 1865). That Act enacts (section 3) that certain landholders and others shall enter into written engagements with their tenants, to be embodied in pattas and muchilkas, which (section 4) must contain, amongst other things, the amount and nature of the rent.

(1) 12 Moo. I.A., 244; 2 B.L.R.P.C., 10.

By section 7 no suit or legal proceedings for rent can be sustained unless patta and muchilka have been exchanged, or a patta has been tendered such as the tenant was bound to accept, or both parties have agreed to dispense with such documents. If a patta is tendered and the tenant refuses to accept it, the landholder (section 9) may proceed by summary suit before the Collector to enforce acceptance of the patta. And in such a suit it is for the Collector to settle the terms of the tenancy, including the rent, in accordance with the principles laid down in the Act. From the Collector's decision an appeal lies to the Civil Courts (section 69).

Under this procedure it seems clear that as long as proceedings are pending before the Collector and, on appeal from him, before the Civil Courts, the rate of rent is in suspense, for no one can say what it will prove to be, and that therefore no arrear of rent can be said to have become due within the meaning of the Limitation Act. That this is the meaning and effect of the Rent Recovery Act becomes much plainer on a further examination of the Act The Act (section 87) keeps alive the right to proceed in the Civ Courts in respect of rent, and the present appeal arises out of a civil suit so brought. But the Act deals very briefly with such suits. Its meaning and effect can be better learned from the provisions relating to those special and summary remedies which are dealt with in some detail and fill a large part of the Act. They are available for arrears of rent and must be put in force within one year from the time when the rent became due (section 2). Those special remedies are distress, sale of the holding, ejectment, and arrest. And in each of these cases the proceedings must commence with a document stating the amount of rent due (sections 15, 16, 39, 41, 46).

Their Lordships are of opinion that in the present cases no rent was in arrear or due till the rates of rent were ascertained by the decree of the High Court of the 29th October 1889, and that limitation runs from that date.

It may be well to notice two arguments against the view taken by their Lordships, which seem to have had weight with some of the learned Judges in Madras.

Section 14 of the Rent Recovery Act says that when rent shall remain unpaid at the time when, according to any written agreement or the custom of the country, it ought to have been paid, it is to be "deemed an arrear of rent." It has been said, and no doubt rightly, that by the custom of the country agricultural rents are

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payable at or before the close of the fasli year. And it has been thought that this section defines the point of time at which agricultural rent becomes in arrear at the close of the fasli year. And so it seems to do in the cases to which it applies. But in their Lordships' opinion this whole series of sections applies to ascertained rents, not to rents at rates which have yet to be determined.

Another argument has been based upon section 7 of the Act, already cited. It has been thought that under that section where a landholder has tendered a patta which the tenant refuses, but which, as the result of the litigation rendered necessary by that refusal, has been found to have been a proper one, and then proceeds to sue for the rent so ascertained, he may be met by a plea of limitation, on the ground that he might have sued, and ought to have sued, for the rent without waiting to have the rate determined. If that view were correct, it would not affect the present case, for in this case the patta tendered by the landholder was not approved by the Courts, but was altered by them. The High Court, however, in the judgment under appeal, has drawn no distinction between the case in which the patta tendered has been ultimately approved by the Courts and the case in which it has been modified. And their Lordships think the Court was right in so doing. Section 7 is not an enabling section, but a restraining section. In order to see when there is an arrear which can be sued for it is necessary to examine the Act as a whole; and the reasons have already been stated which lead their Lordships to think that its provisions as to rent due, rent in arrear, and the recovery of rent refer to ascertained rents

For the foregoing reasons their Lordships are of opinion that the claims for rents in respect of the years 1295, 1296, 1297, and 1298 are not barred by limitation. They will humbly advise His Majesty that the decrees of the High Court and the District Court ought to be discharged with costs, and those of the Munsif's Court discharged, and that the cases ought to be remitted to the High Court with a declaration to the above effect, in order that they may be disposed of in the Munsif's Court in accordance with that declaration.

The appellant will recover his costs of this appeal from the respondents.

Appeal allowed.

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

PRIVY COUNCIL.

IN THE MATTER OF THE PETITION OF YARLAGADDA DURGA PRASADA NAYADU AND ANOTHER.

P.C.* 1903. December 2.

[On petition relating to an appeal from the High Court of Judicature at Madras.]

Privy Council, practice of—Decision of High Court in execution of order in Council —Appeal from such decision—Erroneous interpretation of order in Council —Expression of opinion by Judicial Committee on petition pending appeal.

Where the High Court, in execution of an order in Council, had interpreted the order in a manner not intended, the Judicial Committee, pending an appeal from the High Court decision, expressed an opinion as to the intention of the order.

PETITION in the matter of the consolidated appeals and cross appeals of *Mallikarjuna Prasada Nayadu* v. *Durga Prasada Nayadu* (Privy Council Appeals Nos. 87 and 88 of 1898) and of *Mallikarjuna Prasada Nayadu* v. *Venkata Ramalinganna* (Privy Council Appeals Nos. 89 and 90 of 1898) from decrees (9th March 1894) of the High Court at Madras.

The parties to the above appeals were three brothers Mallikarjuna, Durga Prasada, and Ramalinganna, the eldest of whom, Mallikarjuna, was Zamindar of the estate of Challapalli or Devarakota, and the petition, which was filed by the two younger brothers, stated the following facts;—

In 1880 Durga Prasada brought a suit for partition against his brothers which, in 1882, was dismissed by the District Judge of Kistna, decreed by the High Court in 1885, and again dismissed by the Privy Council on 1st May 1890, on the ground that the estate was impartible and that the eldest son was entitled to hold it alone (see *Srimantu Raja Yarlagadda Mallikarjuna* v. *Srimantu Raja Yarlagadda Durga*(1)). In that suit the High Court, having decreed partition, had on 10th November 1887 made an order allowing each of the present petitioners maintenance at Rs. 500 a month from 25th April 1887 which sum was to be debited

* *Present:* Lord MACNAGHTEN, Lord LINDLEY, Sir ARTHUR WILSON and Sir JOHN BONSER.

(1) L.R., 17 I.A., 134; I.L.R., 13 Mad., 406.

against their shares of the mesne profits in the partition suit; and under that order the petitioners received that maintenance for 39 months (May 1887 to July 1890) amounting to Rs. 19,500 each.

In April 1891 the petitioners brought two separate suits against Mallikarjuna for maintenance at Rs. 2,000 a month, and for arrears of past maintenance at the same rate, and in his judgment in these suits the District Judge of Kistna, on 4th December 1891, said, "the decree will be for twelve years' maintenance at Rs. 500 a month, deducting 39 months which they" (the petitioners) "have already received: there will also be maintenance at Rs. 500 a month for seven months, the duration of these suits: there will be maintenance from this date at the rate of Rs. 750 per mensem." The decree in each suit was "that defendant do pay to plaintiff maintenance at Rs. 750 per mensem on 4th of each month beginning with January 4th, 1892, as also Rs. 56,000, with interest at 6 per cent. per annum from this date to date of payment, towards past maintenance the whole to be a charge in the Challapalli Zamindari."

From these decrees Mallikarjuna appealed to the High Court. On 22nd April 1892 he made an application to the District Judge in the partition suit for a refund of the Rs. 19,500 which had (under the order of the High Court) been paid in that suit to each of the petitioners, but his application was refused.

On 9th March 1894 the High Court, in the appeals in the maintenance suits, reversed the decrees of the District Judge as to Rs. 52,500 arrears of maintenance, but confirmed those decrees in allowing to the petitioners the sums of Rs. 19,500 received by them, as well as the sum of Rs. 3,500 for maintenance pending the suit in the District Court, and also confirmed the decrees as to future maintenance. The High Court, however, held that the petitioners must refund the sums of Rs. 19,500 received in the partition suit. On the same day (9th March 1894) the High Court reversed the order of the District Judge of 22nd April 1892 and allowed the application for a refund of the sums of Rs. 19,500 but without interest, making an order to that effect. Both the petitioners and Mallikarjuna appealed to His Majesty in Council from these orders of the High Court.

Pending the appeals Mallikarjuna, on the 28th October 1896, applied in the maintenance suits to set off the sums of Rs. 19,500, the refund of which had been ordered in the partition suit, against

the same sums decreed to the petitioners in the maintenance suits, and that application was granted, the petitioners not objecting.

On 7th August 1900 the Judicial Committee of the Privy Council reversed, in appeal, the decrees of the High Court in the maintenance suits (see *Raja Yarlagadda Mallikarjuna Prasada Nayudu* v. *Raja Yarlagadda Durga Prasada Nayudu*(1)) and restored the decrees of the District Judge as to the arrears of maintenance. The decree (so far as material) was as follows:—"It is hereby ordered that the said decree of the High Court of Judicature at Madras, dated 9th March 1894, be and the same is hereby discharged in so far as it orders and decrees that in amendment of the decree of the District Court of Kistna, dated 4th December 1891, as to arrears of maintenance and property charged, the amount of Rs. 23,000 be substituted for Rs. 56,000 awarded in the said decree of the said District Court, ... and in lieu thereof it is hereby ordered that the orders contained in the said decree of the said District Court as to the payment of Rs. 56,000, as to the interest thereon, and as to the property on which the same are to be charged be and the same are hereby restored."

On 16th August 1900 Mallikarjuna applied to the District Court stating that he had in accordance with the order of the Privy Council paid into the treasury two sums of Rs. 52,500 (being the sum of Rs. 56,000 after deducting Rs. 3,500 which had been paid in 1892 after the decree of the District Judge), and on 22nd August 1900 the petitioners applied for payment to them of the sums of Rs. 52,500.

On 11th March 1901 the petitioners applied for execution of His Majesty's order in Council so far as it remained unexecuted, giving credit for the sums of Rs. 52,500 received out of Court. On the 13th March 1901 Mallikarjuna put in a petition claiming that the sums of Rs. 19,500 with interest ought to be deducted from the amount remaining to be recovered under the Privy Council order. The District Judge disallowed this claim, but on appeal by Mallikarjuna the High Court on 27th January 1903 decided that the petitioners must give credit for the said sums of Rs. 19,500.

The petitioners submitted that the proper construction of His Majesty's order in Council was that the petitioners should be

(1) I.L.R., 27 I.A., 151; I.L.R., 24 Mad., 147.

IN THE MATTER OF THE PETITION OF YARLAGADDA DURGA PRASADA NAYADU.

placed in the same position as they were placed in by the decree of the District Judge, and pointed out that the sums of Rs. 19,500 which had already been allowed for and deducted in His Majesty's order would, under the decision of the High Court, be deducted a second time.

The petitioners prayed His Majesty in Council to give such directions, make such declarations, and (if necessary) so amend the order in Council as to give it the effect intended.

Mr. *L. De Gruyther* for the defendant contended that as an appeal had been filed from the decision of the High Court in the execution of the order of His Majesty in Council, that order could not be dealt with until the appeal came on for hearing: the petition was an informal appeal from the form of the order.

[Lord MACNAGHTEN referred to *Rajunder Narain Rae* v. *Bijai Govind Sing*(1) as to the power of the Judicial Committee in dealing with orders in Council.]

Sir *W. Rattigan*, K.C., and Mr. *Cowell* contended that, it being certain that there was no intention that the sums of Rs. 19,500 should be twice deducted, words should be added to the order in Council which would make that clear to the Court that had to execute the order, and so render the expense of an appeal unnecessary.

Mr. *De Gruyther* replied.

On 2nd December 1903 their Lordships expressed the following opinion which was delivered by Lord MACNAGHTEN.

JUDGMENT.—Their Lordships are of opinion that the orders of His Majesty in Council of the 7th August 1900 were intended to uphold the decrees of the First Court, and to decide that the sum due to the petitioners at the date of His Majesty's orders was the balance of Rs. 56,000, after deducting the sum of Rs. 19,500 in question between the parties.

Their Lordships will make no order as to the costs of this petition, and direct the petition to stand over generally.

Solicitors for the petitioners—Messrs. *Frank Richardson* and *Sadler*.

Solicitor for Raja Yarlagadda Mallikarjuna—Mr. *R. T. Tasker*.

(1) 2 Moo. I.A., 181 at pp. 207 and 216.

ORIGINAL CIVIL.

Before Mr. Justice Moore.

NALUM LAKSHIMIKANTHAM AND ANOTHER, PLAINTIFFS,

v.

KRISHNASAWMY MUDALIAR AND OTHERS, DEFENDANTS.*

1903. October 15.

Letters Patent—Art. 12—"Suit for land or other immoveable property"—Suit for sale of mortgaged land—Land situated outside jurisdiction of High Court—Jurisdiction.

A "suit for land" (within the meaning of article 12 of the Letters Patent) includes any suit in which a decree is asked for operating directly upon the land, and therefore includes any suit brought to enforce a security upon land, such as a suit for the sale of land equitably mortgaged by deposit of title-deeds.

Semble, that the phrase "suit for land or other immoveable property" (as used in article 12), includes all suits mentioned in clauses (*a*), (*b*), (*c*), (*d*), (*e*) and (*f*) of section 16 of the Code of Civil Procedure, 1882.

Plaintiffs, in their plaint, prayed, *inter alia*, that certain lands, the title-deeds relating to which had been deposited with them by the defendants, might be sold, and the proceeds applied to the payment of the debt due to plaintiffs by defendants. All the lands were situated outside the original jurisdiction of the High Court:

Held, that the suit was one for land or other immoveable property, within the meaning of article 12 of the Letters Patent, and the Court had no jurisdiction.

In the matter of the petition of S. J. Leslie, (9 B.L.R., 171), followed.

SUIT for the sale of mortgaged land. The question raised and decided was whether the High Court, in the exercise of its original civil jurisdiction, has jurisdiction to entertain a suit in which plaintiffs prayed that lands, the title-deeds relating to which had been deposited with the plaintiffs, might be sold, and the proceeds applied to the payment of the debt due by the defendants to the plaintiffs.

The pleadings are summarised in the judgment.

Kumarasami for plaintiffs.

T. V. Seshagiri Ayyar, for first defendant, contended that the Court had no jurisdiction, a suit to enforce a charge on land being a "suit for land or other immoveable property," within the meaning of article 12 of the Letters Patent. The language of article 12 of the Letters Patent is identical with the language of

* Civil Suit No. 163 of 1902.

section 5 of the Code of Civil Procedure, 1859. Section 5 of the Act of 1859 has now been expanded into the various clauses of section 16 of the present Code of Civil Procedure. Article 12 of the Letters Patent may therefore be taken to be identical with the provisions of the Code of Civil Procedure. The present case is covered by clause (*c*) of section 16. Consequently the Original Side is not the proper forum. He cited the following cases:—*Nagamoney Mudalliar* v. *Janakiram Mudalliar*(1), *Suruan Hassein* v. *Shahazadah Gulam Mahomed*(2), *Delhi Bank* v. *Wordie*(3), *In the matter of the petition of S. J. Leslie*(4), *Hara Lall Banerjee* v. *Nitambini Debi*(5), *Seshagiri Rau* v. *Rama Rau*(6), *Chetti Gaundan* v. *Sundaram Pillai*(7), *Krishna Row* v. *Hachapa Sugapa*(8), *Shrimant Maharaj Yashvantrav Holkar* v. *Dadabhai Cursetji*(9), *Sorabji* v. *Rattonji*(10), and *Balaram* v. *Ramchandra*(11).

P. Dorasami Ayyangar, for fifth defendant.

Mr. *Chamier*, for sixth defendant, also contended that the Court had no jurisdiction. He cited: *Deen Doyal Poramanick* v. *Kylas Chunder Pal*(12), *Delhi Bank* v. *Wordie*(3), *Jairam Narayan Raje* v. *Atmaram Narayan Raje*(13), *Sreenath Roy* v. *Cally Doss Ghose*(14), and *Land Mortgage Bank* v. *Sudurudeen Ahmed*(15), and contended that the decisions in the Calcutta High Court should be followed. *Sorabji* v. *Rattonji*(10), really followed *Shrimant Maharaj Yashvantrav Holkar* v. *Dadabhai Cursetji*(9), and both depended on the English case *Paget* v. *Ede*(16) as showing that a foreclosure suit seeks relief *in personam*. But this view was opposed to the later decisions in *Heath* v. *Pugh*(17), *Harlock* v. *Ashberry*(18), and *London and Midland Bank* v. *Mitchell*(19).

Kumarasami, in reply, referred to *Govinda* v. *Mana Vikraman*(20), *Vithalrao* v. *Vaghoji*(21), and *Nistarini Dassi* v. *Nundo Lall Bose*(22).

(1) I.L.R., 18 Mad., 142.
(2) 9 W.R., 170 at p. 173.
(3) I.L.R., 1 Calc., 249.
(4) 9 B.L.R., 171.
(5) I.L.R., 29 Calc., 315.
(6) I.L.R., 19 Mad., 448.
(7) 2 Mad., H.C.R., 51.
(8) 2 Mad. H.C.R., 307.
(9) I.L.R., 14 Bom., 353.
(10) I.L.R., 22 Bom., 701.
(11) I.L.R., 22 Bom., 922.
(12) I.L.R., 1 Calc., 92 at p. 94.
(13) I.L.R., 4 Bom., 482.
(14) I.L.R., 5 Calc., 82.
(15) I.L.R., 19 Calc., 358.
(16) L.R., 18 Eq., 118.
(17) L.R., 6 Q.B.D., 345; L.R., 7A.C., 235.
(18) L.R., 19 Ch.D., 539.
(19) [1899], 2 Ch., 161 at p. 164.
(20) I.L.R., 14 Mad., 284 at p. 286.
(21) I.L.R., 17 Bom., 570.
(22) I.L.R., 26 Calc., 891 at p. 921.

JUDGMENT.—The following preliminary issue has been framed in this case:—Has the Court jurisdiction to try this suit? This is a suit in which the plaintiff prays *inter alia* that certain lands, the title-deeds relating to which were deposited with him by the defendants, may be sold and the proceeds applied to the payment of the debt due to him by them. It is admitted that all the lands are situated outside the original jurisdiction of this Court, and the question that is raised in the preliminary issue is as to whether a suit framed for a decree for sale of certain lands mortgaged to the plaintiff by the defendants is a suit for land or other immoveable property within the meaning attached to those words in clause 12 of the Letters Patent. In clause 12 the phrase used is "suits for land or other immoveable property" and identically the same words are used in the first Civil Procedure Code (*Vide* section 5 of Act VIII of 1859). In the present Civil Procedure Code this expression has been greatly elaborated and it runs now (section 16, Act XIV of 1882) as follows: "Suits—

(*a*) for the recovery of immoveable property,
(*b*) for the partition of immoveable property,
(*c*) for the foreclosure or redemption of a mortgage of immoveable property,
(*d*) for the determination of any other right to or interest in immoveable property,
(*e*) for compensation for wrong to immoveable property,
(*f*) for the recovery of moveable property actually under distraint or attachment."

The question it appears to me that really arises in this case is whether the phrase "suit for land or other immoveable property" can be held to include all or, if not all, any and if so which of the abovementioned suits. This question has never, as far as I can ascertain, been decided by the Madras High Court. A question similar to, but not identical with, that now under consideration arose in the case of *Nagamoney Mudalliar* v. *Janakiram Mudalliar*(1) but it was not decided. That was a suit for the redemption of a mortgage. The point that came before the High Court was whether, where permission to institute such a suit had been granted by the Registrar, it was open to the Judge before whom the suit came for trial to entertain the objection that the order granting

(1) I.L.R., 18 Mad., 142.

permission was illegal. The Judges on appeal held that it was open to the Judge to consider the legality or otherwise of the order, and the case was accordingly sent back to him with a view to this being done. I have ascertained, however, that eventually the suit was withdrawn and that the question at issue as to jurisdiction was not decided. In *Seshagiri Rau* v. *Rama Rau*(1) the question that arose was whether a suit for partition of family property was a suit for land within the meaning of clause 12 of the Letters Patent. The High Court held that such a suit was a suit for land or other immoveable property and that the High Court had, therefore, no jurisdiction to try the suit as the land was situated wholly outside the limits of their local jurisdiction. These appear to be the only Madras cases bearing on the question now at issue. There are, however, two decisions of the other High Courts which are directly on the point now under consideration. They are those of *Venkoba Balshet Kasar* v. *Rambhaji Valad Arjun*(2) and *In the matter of the petition of S. J. Leslie*(3). In *Venkoba Balshet Kasar* v. *Rambhaji Valad Arjun*(2) the question was whether a suit for the recovery of a mortgage debt by the sale of the mortgaged property was a suit for land within the meaning of section 5 of the Code of Civil Procedure then in force, *i.e.*, Act VIII of 1859. The High Court held as follows : "We think that this is not a suit for land within the meaning of section 5 of Act VIII of 1859. Comparing that section with sections 223 and 224 of the Code, we think that a suit for land is a suit which asks for delivery of the land to the plaintiff." A diametrically different decision was arrived at by the Bengal High Court in the decision in *In the matter of the petition of S. J. Leslie*(3). That also was a suit brought upon a mortgage praying for a decree for the amount due thereunder, and that in default of payment the land mortgaged might be sold. It came before a Bench in appeal, and the Judges, Markby and Ainslie, JJ., held that the suit was a suit for land. In his judgment Markby, J., observes as follows: "I think that the plaint, so far as it asks for a sale of the mortgaged property in satisfaction of the mortgaged debt, is a "suit for land" within the meaning of section 5 of the Code of Civil Procedure (Act VIII of 1859) which regulates the jurisdiction in this case. Mr. Branson contended that these words should be read as signifying those suits

(1) I.L.R., 19 Mad., 448. (2) 9 B.H.C.R., 12.
(3) 9 B.L.R., 171.

alone in which the land itself is sought directly to be recovered. It was admitted that a much wider construction had been put by Macpherson, J., upon the similar words of the charter of the High Court; that learned Judge holding that a suit for foreclosure by the mortgagee was, as such a suit for land, in *Bibee Janu* v. *Murza Mahommed Hadee*(1) and that a suit for redemption was so also, in *Sreemuthy Lalmoney Dassee* v. *Juddornath Shaw*(2), but it was contended that these decisions were not correct. We see no reason to suppose this. They have never been questioned as far as we are aware. On the contrary, the uniform practice of this court on its original side has been in accordance with them. They are also supported by the decision in *Suruan Hassein* v. *Shahazadah Gulam Mahomed*(3) where it was held that a suit brought to enforce a security against land was a suit for the recovery of an interest in immoveable property within the meaning of clause 12 of section 1 of Act XIV of 1859. Upon the authority of these decisions, I hold that a suit for land includes any suit in which a decree is asked for operating directly upon the land, and therefore includes any suit brought to enforce a security upon land." I am of opinion that this last decision *In the matter of the petition of Leslie*(4) is correct and should be followed. I would indeed be prepared to go further and to hold that the phrase "suit for land or other immoveable property" as used in clause 12 of the Letters Patent includes all suits mentioned in clauses (*a*), (*b*), (*c*), (*d*), (*e*) and (*f*) in section 16 of the present Code of Civil Procedure That section appears to me in fact to be simply an amplification with details of the old section of the Act of 1859, on which the clause in the Letters Patent was, it appears, based. I consequently hold that this is a suit for land lying wholly outside the ordinary original jurisdiction of the High Court and consequently decide the preliminary issue in the negative. It follows that this suit must be dismissed with costs (2 sets).

Attorney for sixth defendant—Mr. *A. E. Rencontre.*

(1) 1 I.J.N.S., 40. (2) 1 I.J.N.S., 319.
(3) 9 W.R., 170. (4) 9 B.L.R., 171.

APPELLATE CIVIL.

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

1903. July 22.

ROTTALA RUNGANATHAM CHETTY AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

PULICAT RAMASAMI CHETTI (PLAINTIFF), RESPONDENT.*

Hindu Law—Conveyance by father of immoveable property allotted to him in partition subsequently to the date of the conveyance—Validity—Consideration for conveyance inadequate—Property conveyed the undivided family property of the assignor and his own sons—Purchaser's right limited to a charge on the property to the extent of the consideration paid—Transaction in effect a gift as to part and a sale as to remainder.

In 1898, R and his brother filed a suit against their father and their two younger brothers for partition. On 18th December 1898, before the decree was passed, R conveyed a house to the present first defendant. The decree was then passed, and by it, the house in question was allotted to R's share. In 1900, a suit was instituted on behalf of R's minor sons against R praying for partition of the properties which had been allotted to R by the decree in the suit of 1898. On October 8th, 1900, R applied to be and was adjudged an insolvent. The present plaintiff was appointed Receiver in the minors' partition suit against R, but as the present first defendant (the alienee of the house in question) had not been made a party to it, the Receiver was authorized to institute the present suit against the present first defendant in order to determine the validity of the conveyance. Though the conveyance had been executed prior to the decree by which the house was actually allotted to R, it was not clear whether the house had not become the separate property of R under an agreement prior to the institution of the suit of 1898:

Held, that in any event, every member of an undivided family has a vested interest in joint family property, which interest will be affected by transactions entered into by him in favour of purchasers for value (*Ayyagiri Venkata Ramayya* v. *Ayyagiri Ramayya* (I.L.R., 25 Mad., 690)). The conveyance, therefore, could not be held to be inoperative and void by reason that the property conveyed was not vested in the vendor at the date of the conveyance.

The validity and operation of the conveyance must be decided on the footing that it was a conveyance of ancestral property made by a Hindu father, the managing member of a joint Hindu family consisting of himself and his minor sons.

* Original Side Appeal No. 42 of 1902, presented against the decree of Mr. Justice Boddam, dated 16th day of October 1902, in Original Suit No. 87 of 1902.

Held, also, that inasmuch as the conveyance purported to have been made only in part for valuable consideration, the estimated value of the house being Rs. 11,000, and the valuable consideration recited in the conveyance being only Rs. 1,000, the conveyance was, in effect, one for value to the extent of Rs. 1,000, and a conveyance by way of gift to the extent of Rs. 10,000. In these circumstances, if the property conveyed had been the sole and separate property of R, the conveyance would have been valid and operative in its entirety. But as the property conveyed was the joint property of R and his sons, effect could not be given to the conveyance as if R had been the sole owner of the whole property, or even of a third part thereof.

It is not competent to an individual member of a Hindu family to alienate by way of gift his undivided share or any portion thereof; and such an alienation, if made, is void *in toto*. This principle cannot be evaded by the undivided member professing to make an alienation for value when such value is manifestly inadequate and inequitable.

In such a case the transaction can be upheld against the family, in respect of the alienor's interest in the joint family property only to the extent of the value received, and *semble*, that if the conveyance be in respect of a reasonable portion of the joint family property, for the discharge of an antecedent debt (not incurred for an illegal or immoral purpose), the conveyance, as such, will bind the sons also.

Under the circumstances of the present case, *held*, that first defendant was not entitled to claim the benefit of the conveyance as such, in respect either of the whole house or of R's one-third share therein, which, subsequently to the conveyance, had become vested in the Official Assignee. But as first defendant had paid value to the extent of Rs. 1,000, and that was an antecedent debt of R, binding also on his minor sons, first defendant was entitled to an equitable charge on the whole of the property to the extent of that Rs. 1,000 with interest thereon from the date of the conveyance, and was liable for rent.

SUIT for a declaration that a deed of conveyance in favour of first defendant, dated 18th December 1899, was invalid and void, and praying that the first defendant be ordered to deliver it up for cancellation.

The facts are summarised in the judgment of the High Court, on appeal, as follows:—

"The question arising for decision in this case is as to the validity and operation of a conveyance (dated the 18th December 1899) of the house and ground mentioned in the plaint, executed by one T. Ramasami Chetti in favour of the first defendant. Since the date of the conveyance Ramasami Chetti applied to be adjudged an insolvent and an order has been made vesting all his effects and estate in the Official Assignee who has been joined as third defendant in the suit. In a suit for partition (Original Suit No. 213 of 1898) brought by Ramasami Chetti and his brother against their father (Subbu Chetti) and their two younger brothers,

the house and ground in question were (along with other properties) allotted by the decree therein, passed subsequent to the conveyance, to the share of Ramasami Chetti. Shortly afterwards Civil Suit No. 64 of 1900 was instituted on behalf of the two minor sons of Ramasami Chetti for partition of the properties allotted to the share of their father Ramasami Chetti, by the decree in Original Suit No. 213 of 1898, against Ramasami Chetti (who in the meanwhile has been adjudged an insolvent) as first defendant and the Official Assignee as second defendant. The plaintiff in the present suit was appointed Receiver therein.

"Though the house and ground in question were included in the partition suit, yet as the alienee thereof, viz., the first defendant in the present suit had not been made a party to the suit, the Receiver was specially authorized by the learned Judge to institute the present suit in order to determine the validity of the conveyance made by Ramasami Chetti. Though the alienation in question was made before the decree in the first partition suit, yet it is not clear that Subbu Chetti and his sons did not become divided in interest by reason of an agreement to divide which was alleged to have been entered into prior to that suit and that by such agreement the house and ground in question did not become the separate property of Ramasami Chetti and his minor sons. Whether that be so or not, the property comprised in the conveyance subsequently became such separate property by the decree passed in the suit."

The conveyance in question (exhibit 6) was in the following terms:—"*Sale deed.*—The sale deed without any incumbrances executed by T. Ramasami Chetti, in favour of R. Ranganatham Chetti, on the 18th December 1899, is as follows:—On the 8th September 1893 you have sold premises No. 50, Guruvappen Street, to my father T. V. R. Soobbee Chetti. I now sell this house to you with all the right, title and interest for the sum of Rs. 1,000. You must credit this in my account with you. You, your heirs, executors, administrators and assigns can enjoy the use of this house without any dispute. I was meeting all expenses in connection with taxes and repairs. The grounds on which I sold this house for a low price to you are as follows:—Because you have given me and my brother T. Varadarajulu Chetti ample help in the conduct of Original Suit No. 213 of 1898 between myself and my father to enable us to win it. Because

on the 8th September 1893 you have sold at a loss your landed property to my father on my assurance, as a recompense I sold you the house. I have handed over entire possession of it. As the said house was allotted to my share, as referred to in schedule A of the Razi in Original Suit No. 213 of 1898, there is no sort of dispute. If there should be any such through me or by my heirs or by any one else, I without any objection shall, out of my own money, pay any loss you may sustain. The rental agreement executed by you in favour of my father on the 4th October 1897 and the arrears of rent due by you are now considered to be cancelled. Moreover you can without objection get a fresh Collector's certificate produced either in your name or in your son's name. As soon as the titledeeds, rental agreement and other documents come into my possession from my father I shall entrust them to you. (Sd.) T. RAMASAMI CHETTI (the signature was witnessed)."

The learned Judge, sitting on the Original Side, made the declaration as prayed. He held that the property in the house and ground was not vested in Ramasami Chetti at the date when the conveyance was executed; also that it had not been executed for good consideration or in good faith. He held that plaintiff was entitled to dispute the sale in its entirety.

Defendants Nos. 1 and 2 preferred this appeal.

Mr. *J. G. Smith* for appellants.

Mr. *Chamier* for respondent.

JUDGMENT [after stating the facts as above].—In any event, every member of an undivided family has a vested interest in joint family property, which interest will be affected by transactions entered into by him in favour of purchasers for value (vide *Ayyagiri Venkata Ramayya* v. *Ayyagiri Ramayya*(1)). The conveyance therefore cannot be held to be inoperative and void by reason that the property conveyed was not vested in the vendor at the date of the conveyance. The validity and operation of the conveyance should be decided on the footing that it is a conveyance of ancestral property made by a Hindu father, the managing member of a joint Hindu family consisting of himself and his two minor sons. The conveyance (exhibit 6) on the very face of it, purports to be made partly for valuable consideration and in the main, in return for favours shown to the vendor and his father

(1) I.L.R., 25 Mad., 690.

and help rendered to the vendor and his brother in connection with the partition suit, by the vendee (first defendant herein) who was also the maternal uncle of the vendor. The estimated value of the property (conveyed) is about Rs. 11,000 and the valuable consideration for the conveyance is recited to be only Rs. 1,000, being a portion of the debt then due from the vendor to the vendee, on accounts between them. It was sought to be established (in the present suit) on behalf of the first defendant that there was an agreement between him on the one hand and Ramasami Chetti and his brother (plaintiffs in Original Suit No. 213 of 1898) on the other, that he was to render them services in regard to the partition suit, in consideration of their promise to convey the house and ground to him (the same having originally belonged to the vendee's family), and that the conveyance was made in pursuance of such agreement, after the successful termination of the partition suit. We are clearly of opinion that the first defendant, the maternal uncle of Ramasami Chetti, never entered into any such oral agreement with his nephews, but helped them in the conduct of that suit only as a close relative interested in them. If there was any such agreement, it is incredible that it would not have been recited in the conveyance (exhibit 6). Exhibit 6 is in effect a conveyance for value to the extent of Rs. 1,000, and a conveyance by way of gift to the extent of Rs. 10,000, and if the property conveyed had been the sole and separate property of Ramasami Chetti, the conveyance would be perfectly valid and operative in its entirety. But as the property conveyed was the joint property of himself and his two sons, effect cannot be given to the conveyance as if Ramasami Chetti was the sole owner of the whole property or of even a third part thereof. It has now been definitely settled by judicial decisions that it is incompetent to an undivided member of a Hindu family, to alienate by way of gift his undivided share or any portion thereof and that such alienation is void *in toto*, and this principle cannot be evaded by the undivided member professing to make an alienation for value, when such value is manifestly inadequate and inequitable. In such a case, the transaction can be upheld against the family, in respect of the alienor's interest in the joint family property, only to the extent of the value received. There is, in the present case, no doubt that Ramasami Chetti, the father, was indebted to the first defendant to the extent of about Rs. 1,000 at the time of the conveyance and it is not alleged nor

has any attempt been made to show that this debt was incurred for any illegal or immoral purpose; and the conveyance was made partly in discharge of Rs. 1,000 of such antecedent debt and if the conveyance had been of a reasonable portion of joint family property (for the discharge of such debt), the conveyance, as such, would bind the sons also. Under the circumstances of the case, the first defendant is not entitled to claim the benefit of the conveyance as such, either in respect of the whole house and ground or of the father's one-third share therein which, subsequent to the conveyance, has become vested in the Official Assignee. But as he has paid value to the extent of Rs. 1,000, and that amount as an antecedent debt of the father is binding also upon his minor sons, he has an equitable charge on the whole of the property to the extent of Rs. 1,000, with interest thereon, at 9 per cent. per annum, from the 18th December 1899 (the date of the conveyance). He will be liable to pay rent at the rate of Rs. 45 per mensem from the 18th December 1899, till the end of January 1903 (when it is represented he was ejected from the house, in execution of the decree appealed against), setting off the amount of rent thus due against the sum of Rs. 1,000 and the interest thereon. The result is that the plaintiff is entitled to a decree for the house and ground in question and the sum of Rs. 403–12–0 besides costs. The decree appealed against is accordingly varied and as the appeal substantially fails, the appellants must pay the costs of the respondent.

Mr. *S. Subbayya Chetty*, attorney, for appellants.

Messrs. *Branson & Branson*, attorneys, for respondent.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, Mr. Justice Subrahmania Ayyar and Mr. Justice Boddam.

1903. August 5, 20.

RAJAH PARTHASARADHI APPA ROW (FIRST COUNTER-PETITIONER—PLAINTIFF), APPELLANT,

v.

RAJAH RENGIAH APPA ROW AND ANOTHER (PETITIONER AND SECOND COUNTER-PETITIONER (DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 502—Application for money to be delivered to party to suit—Money deposited in another Court of co-ordinate jurisdiction in another suit—Jurisdiction of Court to make order.

A suit was instituted in the Subordinate Court of Masulipatam by the Medur Ranee to recover the Medur estate. The Ranee was the natural mother of N who died. The defendant claimed to have adopted N. Money was, in pursuance of an order of the High Court, paid into the Subordinate Court of Masulipatam to the credit of the suit. The plaintiff died, and A and B were brought on the record as plaintiffs. The suit was subsequently heard and dismissed and an appeal was lodged. The defendant then died, and C was made respondent in the appeal (which was still pending when the present judgment was delivered). The contention of C, as respondent in that appeal, was that he was entitled to the Medur estate jointly with A and B (the appellants). C then instituted a suit in the District Court of Godavari against A and B for partition of the Medur estate (and also of the Nidadavole estate). The contention of C in this suit was also that he was entitled jointly with A and B. At a subsequent date, the District Court of Godavari made an order, on the application of A, in the suit pending in that Court, for payment to A (on security being furnished) of one-third of the money which had been paid into the Subordinate Court of Masulipatam as aforesaid to the credit of the suit in that Court:

Held (SUBRAHMANIA AYYAR, J., *dissenting*) that the District Judge had no jurisdiction to make the order. Though C was at the most, according to his own case, only entitled to one-third of the properties in question and though it was part of his case that A was entitled to one-third and the parties to the suit were the same, such a state of things did not give jurisdiction to the District Court of Godavari to deal with money which had been paid into another Court of co-ordinate jurisdiction, in another suit, under the orders of the High Court. Section 502 of the Code of Civil Procedure would seem to apply only when the party making the admission holds the property or other thing which the party in whose favour the order is made seeks to have delivered to him. But even if that section was

* Civil Miscellaneous Appeal No. 140 of 1902 presented against the order of F. H. Hamnett, District Judge of Godavari, dated 15th September 1902, passed on Civil Miscellaneous Petition No. 510 of 1902, in Original Suit No. 44 of 1899.

intended to apply to a case where the property is not so held by the party making the admission, it would not cover a case where the money was held by another Court to the credit of another suit.

Per SUBRAHMANIA AYYAR, J.—(1) The District Court had power to direct the payment, notwithstanding that the money was not held by any of the parties to the suit, provided the order was otherwise sustainable. (2) Inasmuch as the District Court had the power, it was not precluded from directing the payment by the mere fact that the fund out of which the payment was to be made was in the custody of another Court of co-ordinate jurisdiction (namely the Subordinate Court of Masulipatam), without reference to the circumstances of the litigation in connection with which the money had come into the custody of that Court and to the rights possessed by the parties in that fund. An order by the District Judge under section 502 would be binding on the other parties to the litigation; and the Subordinate Court at Masulipatam would give effect to it as no real conflict could arise, in consequence, between the process of the two Courts in the matter.

APPLICATION for payment of money out of Court. The circumstances under which the application was made are fully set out in the judgment of the Chief Justice. The District Judge made an order, the nature of which is also set out in the judgment. Against that order the counter-petitioner preferred this appeal.

Hon. Mr. *C. Sankaran Nayar*, *S. Gopalaswami Ayyangar* and *C. R. Tiruvenkata Chariar* for appellant.

Raja T. Rama Rau, *V. Krishnaswami Ayyar* and *P. R. Sundara Ayyar* for respondents.

Sir ARNOLD WHITE, C.J.—This is an appeal against an order of the District Court of Godavari directing the payment out of Court of one-third of certain moneys standing to the credit of Original Suit No. 35 of 1895 in the Subordinate Judge's Court of Masulipatam on security being furnished. The material facts and dates with reference to the circumstances in which the application was made are as follows:—

In 1895 the Medur Ranee instituted Original Suit No. 35 of 1895 in the Masulipatam Court to recover possession of the Medur estate. One Papamma Row and the Court of Wards were made defendants to that suit. For the purposes of to-day it will be sufficient to say generally that Papamma Row alleged that she had validly adopted Narayya Appa Row, the son of the Medur Ranee. The boy died during the life-time of the Medur Ranee and of Papamma Row. The Medur Rance claimed the Medur property on the ground of her rights as natural mother, whilst Papamma Row claimed it on the ground of her rights as adoptive

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mother of the deceased boy. At the time of the institution of the suit the Court of Wards were in possession of the estate on behalf of the boy. In that suit an application was made by the Court of Wards for the appointment of a Receiver. The matter came before the High Court on appeal and on 29th July 1898, an order for payment into Court was made by the High Court. By that order Papamma Row (the first defendant) was appointed Receiver in place of the then Receiver and the latter was ordered to deposit in the Bank of Madras at Cocanada all the jewels and securities in his possession and to pay into the Bank any balance of cash that might remain after payment of all legal charges, the money to be invested and to stand to the credit of Original Suit No. 35 of 1895. In pursuance of this order the money, in round figures some ten lakhs of rupees, was paid into Court to the credit of Original Suit No. 35 of 1895 in the Masulipatam Court. As a matter of fact, for purposes of convenience, the money was deposited in the local branch of the Madras Bank. In March 1899 the Medur Ranee died and the two respondents to the appeal now before this Court were brought on the record as the second and third plaintiffs in Original Suit No. 35 of 1895. This suit was heard and on 2nd December 1899 it was dismissed. The plaintiffs appealed to this Court and their appeal is now pending. Two days after the dismissal of the suit Papamma Row died, and the present appellant, as the representative of Papamma Row, was made a respondent to the appeal by the plaintiffs in Original Suit No. 35 of 1895. His case is that he stands in the same degree of relationship with the common ancestor as the second and third plaintiffs in Original Suit No. 35 of 1895 and that he is entitled to the estate jointly with them. On 14th December 1899, the present appellant instituted Original Suit No. 44 of 1899 in the District Court of Godavari against the two plaintiffs in Original Suit No. 35 of 1895. In this suit he claimed partition of the Medur estate and also of another estate known as the Nidadavole estate. Papamma Row had derived her right to this estate through her husband. The present appellant's case with regard to the Nidadavole estate also is that he stands in the same degree of relationship with the common ancestor as the two defendants to the suit (second and third plaintiffs in Original Suit No. 35 of 1895 and the present respondents) and that he is entitled to this estate jointly with them. The case of the first of the present respondents as regards

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the Nidadavole estate is that he is entitled to the whole of that estate by right of primogeniture.

On 26th January 1900, a Receiver was appointed in Original Suit No. 44 of 1899 for the Nidadavole and Medur estates and for the moveables appertaining to the Nidadavole estate pending the disposal of that suit. The order appointing the Receiver did not purport in any way to deal with the money deposited in the Bank of Madras to the credit of Original Suit No. 35 of 1895 in the Sub-Court of Masulipatam.

On 9th January 1901, an application by the present first respondent of a similar character to that on which the order was made which is now before this Court was dismissed and the order dismissing this application was affirmed by the High Court. The progress of the litigation has been delayed by reason of the passing of the Impartible Estates Act, but as things stand at present the appeal in Original Suit No. 35 of 1895 will shortly be heard by this Court, while there seems no reason to doubt that Original Suit No. 44 of 1899 will be disposed of by the District Court of Godavari in the course of the next few weeks.

On 8th August 1902, the first defendant in Original Suit No. 44 of 1899 (the first respondent now before this Court) made the application with which we are now concerned. The application was made to the District Court of Godavari in Original Suit No. 44 of 1899 and it asked that Court to order payment to the petitioner of one-third of the cash balance to the credit of the Medur estate and also to direct the Receiver to pay to the petitioner one-third of the cash balance to the credit of the Medur and Nidadavole estates. The District Judge declined to make any order on the second prayer of the petition on the ground that there were practically no funds in the Receiver's hands out of which payments could be made. But he ordered the payment out of one-third of the money in Court subject to security being furnished. The first defendant in the suit in which the application was made (Original Suit No. 44 of 1899) did not appeal against so much of the order of the District Judge as declined to order the payment out of moneys in the hands of the Receiver appointed in that suit. The moneys which the District Judge ordered to be paid out of Court were moneys which had been paid into the Masulipatam Court to the credit of the Masulipatam suit under the order of the High Court, dated 29th July 1898. I am of opinion that the District

Judge had no jurisdiction to make this order. It is no doubt true that the plaintiff in Original Suit No. 44 of 1899 (the present appellant) is at the most, according to his own case, only entitled to one-third of the properties in question, that it is part of his case that the present first respondent is entitled to one-third of the properties, and that the parties to the two suits are the same. But this state of things does not give jurisdiction to the Godavari Court to deal with moneys which had been paid into another Court of co-ordinate jurisdiction, in another suit, under the orders of the High Court. The District Judge was of opinion that section 502 of the Civil Procedure Code applied, since the money was held on behalf of the parties to the two suits.

The section runs as follows:—

"When the subject-matter of a suit is money or some other thing capable of delivery, and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last named party, with or without security, subject to the further direction of the Court."

On the true construction of the section it seems to me that it only applies when the party making the admission holds the property or other thing which the party in whose favour the order is made seeks to have delivered to him. But even adopting the construction for which Mr. Krishnaswami Aiyar contended, and assuming that the section was intended to apply to a case where the property is not held by the party making the admission, the section, in my opinion, would not cover a case where the money was held by another Court to the credit of another suit. The District Judge in paragraph 18 of his order directed that this one-third share should be attached, and Mr. Krishnaswami Aiyar, so far as I could follow his argument upon the point, sought to support the order on the ground that the one-third share could be regarded as "attached" within the provisions of section 272, Civil Procedure Code. In the first place the order is not, and does not purport to be, an order of attachment. There could be no attachment in Original Suit No. 44 of 1899 for the reason that there is, as yet, no decree in the suit. In the second place the section merely provides a special method of attachment in a case in which the Court ordering the attachment has jurisdiction to make the order. The

words "subject to the further orders of the Court from which the notice issues" presuppose that it is competent for the Court to make the further orders referred to in the section. In my opinion it was not competent for the Godavari Court to make any order with reference to the moneys in the Sub-Court of Masulipatam standing to the credit of the Masulipatam suit. Where property is the subject of legal proceedings there is no doubt jurisdiction in certain circumstances to allow the payment of the income of the property to parties interested. In England this jurisdiction is recognized in R.S.C. Order 50, Rule 9, which reproduces the provisions of the old Chancery Procedure Act. I feel no doubt that at any rate a High Court in this country has jurisdiction to make an order *pendente lite* for the payment of moneys in the hands of a Receiver to one of the parties to a suit. For a case in which this jurisdiction was exercised see *Motivahu* v. *Premvahu*(1). In the present case if a proper application were made in the proper Court an effective order as to the disposition of the fund in Court could be made. I am of opinion that there was no jurisdiction in the Godavari Court to make the order complained of, and I think it should be set aside.

BODDAM, J.—I agree.

SUBRAHMANIA AYYAR, J.—The facts of the case, which are all undisputed, having been fully set out in the judgment of the learned Chief Justice, I shall, without repeating them, proceed at once to consider the questions which in my opinion arise for determination. They are:—

1. Whether the District Court had power to direct payment to the first respondent of the amount referred to in its order, notwithstanding that the money was not in the hands of either of the other parties to the litigation, the appellant or the second respondent.

2. Whether, assuming the District Court had such power, it was precluded from directing the payment by the mere fact that the fund out of which the payment was to be made, was in the custody of another Court of co-ordinate jurisdiction (viz., of the Sub-Court of Masulipatam), without any reference whatever to the circumstances of the litigation in connection with which the money came into the custody of that Court and to the rights possessed by the parties in that fund.

(1) I.L.R., 16 Bom., 511.

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3. And lastly whether, if the order of the District Judge is not open to question on either of the above grounds, it was rightly passed on the merits.

Now the first question depends on the construction of section 502 of the Civil Procedure Code, which runs thus:—"When the subject-matter of a suit is money or some other thing capable of delivery, and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last named party, with or without security, subject to the further direction of the Court."

I can see no warrant at all, either in the language or the reason of this provision, to confine its operation only to cases where the money or the thing capable of delivery is actually held by a party to the suit. If the intention of the legislature was so to confine it, it was of course the easiest thing to have made that intention clear. For instance that could have been done by inserting after the words "capable of delivery" the short clause "and is held by a party to the suit" and substituting for the words "any party thereto" immediately following, the words "such party." To adopt the construction suggested on behalf of the appellant is to import into the section the material words suggested above or something to that effect. It cannot be said that the introduction of such material words is necessary to avoid any absurdity or incongruity or the like, which would result from the adoption of the strictly grammatical construction of the section. No liberty being taken with the language of the section, it follows that the order contemplated by the section can be passed whether the money or other thing is in the hands of a party to the litigation or not, so long of course as such order is enforceable without infringing the rights of a person not a party to the suit.

There is nothing in the reason of the provision which should make us hesitate to accept this conclusion as the right one. In fact, all considerations on that score will, I think, be found to point in its favour. As might have been expected, the learned pleaders for the appellant did not shrink from urging that under the law of this country a Court has no power, prior to decree, to make any such order as is contemplated by section 502, Civil Procedure Code, in respect of property in its own hands, even though the conditions as to the property being the subject-matter of the suit and the

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admissions as to the title thereto were present. As to whether such an order could be passed in virtue of any inherent authority in the Court, it may be observed that no power of the kind is claimed in respect of property in the hands of a party. It has to be borne in mind that there is an essential distinction between a Court's inherent power and its jurisdiction. I am not aware of any authority which supports the view that the inherent power of a Court could be invoked except for the limited purpose of preserving and enforcing order, securing efficiency and preventing abuse of process in the exercise of a jurisdiction which the Court otherwise possesses. This being so, unless section 502, Civil Procedure Code, is held applicable to such a case, it would follow that the legislature, while taking the trouble to enable a Court to pass orders as to property in the hands of a party, in the circumstances contemplated by the section, has left unprovided the case of property otherwise similarly circumstanced, because of the more advantageous fact that it is in its own hands. I therefore unhesitatingly come to the conclusion that the restricted construction sought to be put upon the section is untenable and that the District Court had power to direct the payment, notwithstanding that the money was not held by any of the parties to the suit, provided that the order was otherwise sustainable.

Passing to the next question it is to be observed that the contention as to this on behalf of the appellant rests on the extraordinary assumption that once property in litigation passes into the custody of a Court, such custody becomes, somehow, completely disconnected with the matters in litigation and the rights of the parties concerned—that it has a magic about it which would preclude any other tribunal having jurisdiction over other litigation in respect of the same property and entitled by its adjudication to bind the parties litigating in the Court having custody, from passing any order affecting the property even though the execution of, or the giving effect to, such order in no way conflicts with any decrees or orders passed or to be passed by the Court having the custody. The very statement of this assumption is to my mind sufficient to expose its fallacious character. No cases were cited in the argument throwing light on the point and apparently the question is new to this country. So far as I am aware there is little English authority bearing on the point and this is possibly because the conditions of judicature in England have scarcely admitted of

any such question of conflict arising. If however we turn to the United States, such questions, owing to the existence side by side of Federal and State Courts, have arisen not infrequently and a number of cases are to be found in the reports of the tribunals of that country, dealing, with sufficient fulness and clearness, with the main principles applicable to the matter and the working thereof in actual practice. It is however enough for the present purpose to refer to a few of them.

Buck v. *Colbath*(1) decided by the Supreme Court of the United States in 1865, seems to be a leading authority. There the facts were these: Buck, a Marshal of the United States, having in his hands a writ of attachment against certain parties, levied the same upon certain goods. Colbath, who was not among these parties, brought an action of trespass in a State Court against Buck for taking the goods. At the trial, Colbath proved his ownership and Buck relied solely on the fact that he was Marshal and held the goods under the writ. The defence of the Marshal was held unsustainable.

Though so far as the facts go, the present case is different, yet as the law relating to the matter under consideration is elaborately expounded in the judgment, and as some dicta in an earlier decision of the same tribunal connected with the matter and likely to give rise to misapprehension are explained, it may be well, notwithstanding their length, to extract the following passages:—

"It must be confessed that this decision (*Freeman* v. *Howe*(2)) took the profession generally by surprise, overruling as it did the unanimous opinion of the Supreme Court of Massachussets as well as the opinion of Chancellor Kent in his Commentaries (Volume I, 410). We are however entirely satisfied with it and with the principle upon which it is founded, a principle which is essential to the dignity and just authority of every Court and to the comity which should regulate the relations between all Courts of concurrent jurisdiction. That principle is that whenever property has been seized by an officer of the Court by virtue of its process, the property is to be considered as in the custody of the Court and under its control for the time being, and that no other Court has a right to interfere with that possession unless it be some Court which may have a direct supervisory control over the Court whose

(1) 3 Wallace, 334. (2) 24 Howard, 450

process has first taken possession, or some superior jurisdiction in the premises . . . . A departure from this rule would lead to the utmost confusion and to endless strife between Courts of concurrent jurisdiction . . . .

"This principle however has its limitations; or rather its just definition is to be attended to. It is only while the property is in the possession of the Court either actually or constructively that the Court is bound or professes to protect that possession from the process of other Courts. Whenever the litigation is ended or the possession of the officer or Court is discharged, other Courts are at liberty to deal with it according to the rights of the parties before them whether these rights require them to take possession of the property or not. The effect to be given in such cases to adjudications of the Court first possessed of the property depends upon principles familiar to the law; but no contest arises about the mere possession and no conflict but such as may be decided without unseemly and discreditable collisions . . . . It is obvious that the action of trespass against the Marshal in the case before us does not interfere with the principle thus laid down and limited. The Federal Court could proceed to render its judgment in the attachment suit, could sell and deliver the property attached and have its execution satisfied without any disturbance of its proceedings or any contempt of its process. While at the same time, the State Court could proceed to determine the questions before it involved in the suit against the Marshal without interfering with the possession of the property in dispute . . . .

"Seizing upon some remarks in the opinion of the Court in the case of *Freeman* v. *Howe*(1) not necessary to the decision of that case, to the effect that the Court first obtaining jurisdiction of a cause has a right to decide every issue arising in the progress of the cause and that the Federal Court could not permit the State Court to withdraw from the former the decision of such issues, the counsel for the plaintiff in error insists that the present case comes within the principle of those remarks.

"It is scarcely necessary to observe that the rule thus announced is one which has often been held by this and other Courts, and which is essential to the correct administration of justice in all countries where there is more than one Court having

(1) 24 Howard, 450.

jurisdiction of the same matter. At the same time it is to be remarked that it is confined in its operation to the parties before the Court or who may, if they wish to do so, come before the Court and have a hearing on the issue so to be decided .... But it is not true that a Court having obtained jurisdiction of a subject-matter of a suit and of parties before it thereby excludes all other Courts from the right to adjudicate upon other matters having a very close connection with those before the first Court, and in some instances requiring the decision of the same questions exactly.

"In examining into the exclusive character of the jurisdiction of such Courts, we must have regard to the nature of the remedies, the character of the relief sought and the identity of the parties in the different suits. For example a party having notes secured by a mortgage on real estate, may, unless restrained by statute, sue in a Court of Chancery to foreclose his mortgage, and in a Court of law to recover a judgment on the notes and in another Court of law in an action of ejectment to get possession of the land. Here in all the suits the only question at issue may be the existence of the debt mentioned in the notes and mortgage; but as the relief sought is different and the mode of proceeding is different, the jurisdiction of neither Court is affected by the proceeding in the other. And this is true notwithstanding the common object of all the suits may be the collection of the debt. The true effect of the rule in these cases is, that the Court of Chancery cannot render a judgment for the debt, nor judgment of ejectment but can only proceed in its own mode, to foreclose the equity of redemption by sale or otherwise. The first Court of law cannot foreclose or give judgment of ejectment, but can render a judgment for the payment of the debt; and the third Court can give the relief by ejectment but neither of the others. And the judgment of each Court in the matter properly before it is binding and conclusive on all other Courts. This is the illustration of the rule when the parties are the same in all three of the Courts.

"The limitation of the rule must be much stronger and must be applicable under many more varying circumstances when persons not parties to the first proceeding are prosecuting their own separate interests in other Courts.

"The case before us is an apt illustration of these remarks. The proceeding in the attachment suit did not involve the title of Colbath to the property attached. The whole proceeding in that

Court, ending as it might in a judgment for the plaintiff, an execution and sale of the property attached and satisfaction thereby of the plaintiff's debt, may be and in such cases usually is carried through without once requiring the Court to consider the question of title to the property. That is all the time a question between the officer or the purchaser at his sale, on the one side, and the adverse claimant on the other. There is no pretence, nor does any one understand that anything more is involved or concluded by such proceedings, than such title to the property as the defendant in attachment had, when the levy was made.

"Hence it is obvious that plaintiff in error is mistaken when he asserts that the suit in the Federal Court drew to it the question of title to the property and that the suit in the State Court against the Marshal could not withdraw that issue from the former Court."

Reference may next be made to the decision of the Supreme Court of Illinois in *Plume and Atwood Manufacturing Co.* v. *Caldwell*(1) which strikingly brings out the necessarily intimate connection which exists between the custody of property by a Court and the rights of the parties concerned and further shows that their acts pending such custody may enable another Court to pass decisions touching the property, in short, transfer jurisdiction over the property to that Court. The facts briefly were:—

A corporation in Chicago had become insolvent. Writs of attachment had been issued at the instance of certain creditors of the corporation by a Circuit Court of the United States and property seized by the Sheriff thereunder. A voluntary assignment in favour of the creditors was then made and an assignee appointed. When the assignee sought to reduce the assigned property to possession he found it in the hands of the Sheriff who claimed the right to hold the same subject only to the order of the Court which issued the writs. However, the creditors at whose instance the writs had been issued and the seizure made gave their consent to an order by the County Court upon the Sheriff to pass possession to the assignee subject to the lien, if any, in their favour arising by reason of the seizure. It was held that the property passed from the jurisdiction of the Circuit Court which made the seizure and had the custody to the County Court which had jurisdiction over the assignment for the benefit of

(1) 29 American State Repts., 305; 136 Illinois, 163.

creditors, on the simple principle that the jurisdiction of the former Court was one that could be waived by the party. The contention raised and the reasons for its being overruled were thus stated:—

"Appellants deny the jurisdiction of the County Court to pass judgment upon the validity of the liens created by the levy of their attachments. They insist that the Circuit Court alone had jurisdiction over the attached property and could alone ascertain and declare their rights in respect of the same. This point may be conceded if the parties in interest had not by consent invested the assignee with the possession of the attached property and thus clothed the County Court with exclusive jurisdiction in respect thereof and in respect of all claims thereon. The only defect in the jurisdiction of the County Court was the want of possession by the assignee and when that defect was supplied by the voluntary consent of appellants that the property should pass to the assignee, subject to their claims, the County Court was clothed with full authority to settle all conflicting claims, including questions of priority that might arise in respect of such property. It was entirely competent for the parties to consent, as they did, to the order of the County Court directing the Sheriff to turn over possession of the property to the assignee. The rule giving exclusive jurisdiction to the Court first acquiring it is one that the parties may waive; and by consent the jurisdiction of the Circuit Court was here waived and the property passed into the hands of the assignee to be disposed of under the direction of the County Court, to all intents and purposes as if the assignee had acquired possession prior to the levy, but subject to the lien created by such writs. It is true that the consent of the appellants for the transfer of possession from the Sheriff to the assignee who is trustee for all the creditors as well as for the debtor corporation, was upon the condition that such transfer should be subject to all priorities, liens and rights that might have been acquired by the levy of such attachment. The right of all parties to the attached property was to remain *in statu quo*. If appellants by their attachments had acquired valid liens, such liens were to remain unaffected by the order on the Sheriff to surrender possession to the assignee. This determined no right in the creditors, but left such rights for future adjudication by the Court having jurisdiction of the insolvent's property. If the bank

appellee had a prior lien by the levy of its execution, it was to continue a lien until the debt was paid. If, on the other hand, execution was obtained by fraud, or was preferential, then it would be set aside. And the same is true in respect of the attachments. These and all other questions, by the voluntary surrender of the property to the assignee, were submitted to the judgment of the County Court."

The case of *Spiller* v. *Wells*(1) decided in 1899 by the Supreme Court of Virginia may be next noticed. The following passage at page. 880 of the American State Reports in the judgment is all that is material here:—

"The rule established is necessary to the orderly and decent administration of justice. Nothing can be more unseemly than a struggle for jurisdiction between Courts; but a rule which rests for its support upon considerations of convenience however great, and of decency, order and priority however exacting must yield to the higher principle which accords to every citizen his right to have a hearing before some Court."

This extract shows that the jurisdiction arising from custody of property by a Court cannot bar the trial of a question relating to the property in another Court if such trial cannot be had in the Court having the custody.

The case of *Gay Hardie and Company* v. *Brierfield Coal and Iron Company*(2) decided by the Supreme Court of Alabama in 1891, though not a case of property in the custody of a Court, furnishes a clear illustration of the statement just made, for there it was held that though the trustee of a mortgage bond of an insolvent corporation had procured in a Circuit Court of the United States a decree for foreclosure and sale of property, the simple contract creditors of the corporation were at liberty to maintain a bill in a State Court to have the issue of the mortgage bonds and the decree for foreclosure in the Circuit Court declared fraudulent and void as to them. It was laid down that the right to maintain the bill rested not merely on the ground that the subject-matter of the second suit was not the same as that of the first, but also on the ground that the simple contract creditors suing in the State Court were without adequate means of asserting their

(1) 70, American State Repts., 878; 96 Virginia, 598.
(2) 33, American State Repts., 122; 94 Alabama, 303.

claims in the foreclosure suit in the Circuit Court, since they were unable to make themselves parties thereto without the consent of the complainant therein and did not occupy that relation to the matter or the parties in the suit which would enable them to file a bill of review of the decree and show error apparent on the record. The ground for the decision was thus put by the Court (see p. 136 of the American State Reports):—

"All authorities recognize the importance of carefully preserving the boundary line between Courts of concurrent jurisdiction in order to prevent conflicts and to preserve in harmony their relations to each other . . . . To prevent abuse of the principle, and the successful perpetration of injustice or fraud through the forms of law, Courts accord to suitors and litigants all necessary latitude; and they are not restricted to any one forum for the adjudication of any question or right, provided only that such adjudications are not upon questions pending in another Court which had prior jurisdiction and provided that its writs or process shall not hinder the performance of any lawful mandate of such concurrent Court or interfere with or disturb the possession of any subject-matter then *in gremio legis*."

From the above authorities and others which I refrain from quoting lest this judgment might be unduly encumbered, for instance cases of seizure by a State Court of property subsequently litigated in Federal Courts on the ground of Maritime liens thereon, over which class of litigation Federal Courts alone have jurisdiction, as to which *Moran* v. *Sturges*(1) and the cases cited therein may be consulted, the following propositions would be seen to be clearly deducible:—

(i) That the custody by a Court of property belonging to litigants does not give the Court any arbitrary power over it,

(ii) That though such custody could not be interfered with directly by the orders of another Court, yet this is but a rule of comity intended solely to avoid unseemly collisions in the execution of process of different authorities,

(iii) That the rule in question is not a rigid and inflexible one but is capable of adaptation to circumstances and could never be worked so as to defeat or obstruct the doing of justice in due course and consequently in no way interferes with the power of a

(1) 154, United State Repts., 256.

Court other than that having custody, to pass orders touching the property where it has jurisdiction to pass the orders and bind the parties in connection with whose litigation the custody of the other Court began and

(iv) That it is therefore incumbent on the Court having the custody, on due application being made to it, to give effect to such an order in so far as it is not inconsistent with the performance of its own duties respecting the property, in the litigation before itself.

It is obvious that there is nothing in the rule thus deduced, that is peculiar to any particular country and that they rest on a policy necessarily applicable to every system of judicature presenting similar conditions. Indeed section 272 of the Code of Civil Procedure on which Mr. Krishnaswami Aiyar relied, not—as I understood him—as directly governing the present case, but only as supporting his argument by analogy, contains a distinct recognition of the principles referred to in so far as execution of decrees passed by one Court, by attachment of property in the custody of another Court, is concerned.

I ought perhaps to add that no argument against the soundness of the conclusions come to by me can be derived from the absence of an express provision in the Code pointing out how effect is to be given to an order passed under section 502, Civil Procedure Code, in respect of property in the custody of another Court. But likewise the Code contains no direction as to how a *decree* by one Court in respect of property in the custody of another Court, is to be carried out. Of course on the transmission of the decree to the Court having the property, that Court under section 228 of the Civil Procedure Code should direct the property to be dealt with according to the decree. And this would be so, not because of any express direction in the Code in respect of the specific case, but because that would necessarily be the course to be adopted had the property been in the custody of the very Court which passed the decree. It follows, therefore, that in a case like the present it would be the duty of the Court having the property to direct payment in accordance with the order so far as such payment would in no way derogate from anything to be done by itself, on due application being made to it. Whether the application is to take the shape of a requisition by the Court itself or that of a petition by the party interested, is a mere matter of

form which in no way affects the competency of the Court to pass the order or the validity thereof otherwise. The general principles applicable to the subject being apprehended to be as stated above, I shall proceed to consider the case with reference to the circumstances of the respective litigations in the two Courts.

First, as to the litigation in Masulipatam, the original plaintiff, the Medur Ranee, claimed that she was entitled to the money among other properties as her deceased son's heir. This was denied by the defendant Papamma Row who herself claimed the property as adoptive mother and heir of the deceased. The suit was dismissed. Appeals have been preferred to this Court in which the present appellant is contesting the respondents' claim in the right relied on by Papamma Row. The appeals have not been decided by this Court and there is no decree touching the property in question to be executed. In this state of matters Papamma Row's successors, no doubt, may, subject to any order of the Appellate Court in the matter, ask the Masulipatam Court to direct payment of the money in its custody to themselves. But such an application is, in the circumstances, impossible for the two others entitled on the appellant's showing as Papamma Row's successors are the respondents themselves, who deny his right to participate in the fund and base their case on a footing inconsistent with Papamma Row's alleged right itself, viz., that of the Medur Ranee's alleged right. Now looking from the point of view of those claiming under the Medur Ranee, it is clear they could not obtain any relief, interlocutory or otherwise, unless they succeeded in the appeals; and supposing they do, no order to be passed in pursuance of the appellate decree in such event, can really conflict with the present order directing payment of a third of the money in the custody of the Court to the first respondent, since the party entitled to the benefit of both the orders is one and the same person, viz., the first respondent himself, who would then be entitled to even more than a third, viz., a half.

Obviously therefore in no view of the possible termination of the Masulipatam litigation can it be said that the order of the Godavari Court would in any way trench upon any orders to be passed by the Masulipatam Court in respect of the money.

Turning to the Godavari litigation it should be remarked that the appellant's claim to a share in the moneys is only as one

of the successors of the Papamma Row. That no question between him and the respondents on the footing on which this suit of the appellant rests, could have been or could be litigated in the Masulipatam Court is patent; for there the Court was called upon simply to decide whether the Medur Ranee's claim or Papamma Row's claim was well founded. If the former be upheld by the ultimate decree in that case, that would exclude the appellant from any participation in the money, on the very hypothesis on which his case in both the Courts rests. If, on the other hand, Papamma Row's claim be upheld that would result in the confirmation of the decree dismissing the suit and the Court could not go into any dispute arising between those entitled to take as Papamma Row's successors *inter se*. Hence the inclusion by the appellant himself of the fund in the custody of the Masulipatam Court, among the properties in litigation in the Godavari Court and the claim for the division thereof. The appellant having thus made the fund a subject of the suit and having had all along to admit the first respondent's right therein to the extent of a third at least, it is impossible to see how it can lie in his mouth to question by any reference to the Masulipatam litigation the power of the Godavari Court to pass orders respecting it.

This being so, the order of the District Judge, taking section 502, Civil Procedure Code, to be applicable to the case, cannot but bind the appellant and the other parties to the litigation and preclude any of them from contending to the contrary before the Masulipatam Court in any proceeding coming before it between these parties; and the Masulipatam Court must give effect to it since, as already shown, no real conflict can in consequence arise between the process of the two Courts in the matter.

Lastly, as to the merits, they are all in favour of the first respondent. It was said on behalf of the appellant that the appeals to this Court in the Masulipatam suit, as well as the original suit in the Godavari Court, are likely to be disposed of ere long. But the disposal of those matters cannot bring the object proposed to be effectuated by this order within measurable distance of its being otherwise accomplished. It is impossible to say what the result will be in the appeals to this Court or in the suit in the Godavari Court and when, if at all, a final decree in favour of the first respondent will be passed, seeing that the

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class of litigants before us, disputing about valuable zamindaris, almost think that it is beneath their dignity to be content with any but a decision of His Majesty in Council. Moreover, the passing of the Impartible Estates Act which tied the hands of the parties for more than a year is an incident sufficient to show the peculiar vicissitudes to which litigation in this country is subject. Though it is some years since the litigation between the parties began, the first respondent, admitted on all hands to be entitled to a third, has been unable to get a single rupee yet, out of the large accumulated fund in the Masulipatam Court or out of that in the Godavari Court; and he is similarly kept out of the enjoyment of even his admitted share of the income accruing from time to time out of the zamindaris, the annual net rent of which alone is over two lakhs of rupees. It is not surprising therefore that he has been unable to meet the demands of his creditors and is threatened with litigation and loss. The appellant, on the other hand, has failed to show by anything tangible that his interests would suffer by the first respondent's application being granted. It seems, therefore, to me that the District Court exercised a very proper discretion in making the present order, which it safeguarded by the reservation of funds required to meet all contigencies and by requiring security.

It remains only to add that the mention of attachment in the Judge's order should be taken to have reference to what is to be done on the receipt of the money. I understand the District Court to say that in order to give effect to its intentions it would treat the money when received as in its hands for the satisfaction of the first respondent's creditors and would make payment accordingly from time to time.

I would therefore dismiss the appeal with costs.

Sir ARNOLD WHITE, C.J.—In accordance with the decision of the majority of the Court, the order of the District Judge will be set aside.

The first respondent must pay the costs of the appellant and of the second respondent here and in the Court below.

ORIGINAL CIVIL.

Before Mr. Justice Moore.

THE CLAN LINE STEAMERS (LIMITED), PLAINTIFFS,

v.

'THE BALCES,' DEFENDANT.*

1903. September 8.

Salvage—Compensation for rescuing vessel—Ingredients—Mode of assessing reward.

Salvage is not always a mere compensation for work and labour. The interests of commerce, the benefit and security of navigation and the lives of the seamen, render it proper to estimate a salvage reward upon a more enlarged and liberal scale. The ingredients of a salvage service are enterprise in the salvors, the degree of danger and distress from which the property is rescued, the degree of labour and skill displayed and the value of the thing saved.

In a claim for salvage it was shown that the salvors had not risked their lives, that the vessel saved had drifted with several men on board fourteen miles from harbour, where she had broken loose from her moorings, had no steering gear on board, and only one sail, which those on board (only two of whom were sailors) could not set, and the evidence showed that but for the assistance rendered by the salvors the vessel would have drifted out to sea and in all probability would have foundered. It was shown that a boat and some catamarans had been sent out by the owner of the vessel, but the finding of the Court was that it was most doubtful if the vessel could have been brought back to harbour by the party thus sent out, and that the danger from which she was rescued was very great, and that she was in imminent peril. The time occupied in the actual salving was about eight hours, but the salvors lost about a day in all; the skill displayed was considerable, and the value of the vessel salved was found to be Rs. 10,000:

Held, that plaintiffs were entitled to Rs. 2,000 for the salvage services they had rendered.

THE facts are fully set out in the judgment.

Mr. *Chamier*, for the plaintiffs, cited the following cases on the question of the amount that should be awarded as salvage:—*Aitchison* v. *Lohre*(1), *Wells* v. *Gas Float Whittorn*(2), *The Werra*(3), 'Maude and Pollock,' Vol. I, pp. 659, 660 and 661. He contended that the barque was practically derelict and that the rate of salvage applicable to derelicts should be awarded.

Mr. *Napier*, for the defendants, cited the following cases:—*Raffin* v. *The Chilka*(4) and *The Janet Court*(5).

* Original Civil and Maritime Suit No. 1 of 1903.

(1) L.R., 4 A.C., 755 at p. 760. (2) L.R., [1897], A.C., 337 at p. 343.
(3) L.R., 12 P.D., 52. (4) I.L.R., 7 Bom., 196.
(5) L.R., [1897], P.D., 59.

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JUDGMENT.—On the night of 5th July 1902 the barque 'Balces' which was anchored in the Port of Porto Novo broke loose from anchorage and drifted out to sea. The boat was, it appears, under repair at the time and there were sleeping in her on the night on which she drifted out seven men, five of whom admittedly were caulkers who were employed in repairing the boat, while the other two are stated to have been watchmen, who also, it is alleged on behalf of the defendant, were lascars or sailors. The steamer 'Clan Lamont' belonging to the plaintiffs steamed out of the Port of Cuddalore at 9 o'clock on the morning of the 6th of July. From the log, it appears that this steamer sighted the barque 'Balces' at 10 A.M. "without any sails set, drifting and with distress flags flying." The steamer bore down to her, sent out a boat and found that she had parted her cable at Porto Novo and had been drifting all night. At 11-30, the steamship 'Clan Lamont' took the 'Balces' in tow and proceeded at half speed towards Cuddalore. Her steering gear was out of order and useless and there were no sails on board the ship. The boat was therefore, it is stated in the log, "practically dereliet" and was drifting towards the south-west monsoon in the Bay of Bengal and must have foundered. At 2 P.M. the tow rope parted owing to the 'Balces' "not steering and the rope being across her bow." The steamship 'Clan Lamont' stopped and at 2-50 another rope was got fast to the 'Balces' and the 'Clan Lamont' then proceeded towards Cuddalore where she arrived at about 4-30. The steamer 'Clan Lamont' handed over the barque 'Balces' to the Port Officer, left Cuddalore harbour at about 7-30 and steamed towards Vizagapatam. The plaintiffs allege that the 'Balces' was, to the best of their information and belief, worth about Rs. 15,000 at the time that these occurrences took place, and claim a sum of Rs. 5,000 as salvage on account of the services rendered by them to the 'Balces.' The defendant traverses the allegations made in the plaint in various particulars and submits that Rs. 500 is a fair and reasonable sum for him to pay on account of any services that were rendered by the 'Clan Lamont' to the 'Balces.' He has not been examined himself here and no witnesses have been called on his behalf. The Captain, Chief Engineer and others on board the 'Clan Lamont' were examined by commission in Glasgow on the 18th and 19th June last, but no one appeared on that occasion on behalf of the

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defendant and they were consequently not cross-examined. The only question that really has to be considered in this case is as to the amount that should be paid to the plaintiffs as salvage on account of the services which they undoubtedly rendered to the 'Balces' on the 6th of July 1902. There has been some discussion at the hearing of this case as to whether it can be held that the 'Balces,' was what is called a 'derelict,' that is to say, as defined in Wharton's 'Law Lexicon,' 'a vessel forsaken at sea.' It is urged on behalf of the defendant that, as there were seven men on board, two of whom were sailors, it cannot be held that the boat was a 'derelict.' The point does not appear to be one of much importance, for as pointed out in the judgment in *The Janet Court*(1) by Sir Francis Jenne, the fact that the subject of a salvage is a derelict does not now, and it is doubtful if it ever really did, carry with it a right to remuneration consisting of a half, a third, or any specific proportion of the value of the property salved. "There is no magic in the word 'derelict,' but the term imports a certain state of things containing elements which tend, on the general principles of salvage, to raise the amount of the salvage award and, in fact, the amount of award depends not on the question as to whether the barque can have been held to be a 'derelict' or not but on the value of the services which were performed by the salvor to the property salved." The principles in which salvage compensation should be leased have thus been laid down by Lord Stowell in *The Clifton*(2) and these rules, which are as follows, have been followed in all subsequent cases: "Now salvage is not always a mere compensation for work and labour. The interests of commerce, the benefit and security of navigation, the lives of the seamen, render it proper to estimate a salvage reward upon a more enlarged and liberal scale. The ingredients of a salvage service are, first, enterprise in the salvors risking their own lives to save their fellow-creatures and to rescue the property of their fellow-creatures; secondly, the degree of danger and distress from which the property is rescued—whether it were in imminent peril or almost certainly lost; thirdly, the degree of labour and skill which the salvors incurred and displayed and the time occupied. Lastly, the value." I now proceed to apply these principles to the present case. I do not think

(1) L.R., [1897], P.D., 59.

(2) 3 Hagg., 120.

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that it can be said that the salvors risked their lives in saving the barque 'Balces.' Secondly, as regards the degree of danger and distress from which the barque was rescued, it is not easy to pronounce with absolute certainty. It is shown that when the 'Clan Lamont' came up to the 'Balces' she had drifted to a point at a distance of 14 miles from Cuddalore. The south-west monsoon had burst at the time, but so far as the evidence goes there was no storm prevailing on the 6th July, nor was there anything that can be called a heavy monsoon prevalent at the time. The absence of any mention of a storm in the Log book is sufficient proof that no storm prevailed, and the other entries in the Log book satisfy me that although the monsoon had burst, yet that there was no heavy monsoon weather during that day. The 'Balces' had no proper steering gear on board. The rudder was on board, but the wheel, it is admitted, without which the rudder could not be worked, was on shore for repair when the boat drifted from anchor. There was one sail in the barque, but it was not set and, according to the evidence that is given, the only two men on the boat who could be said to be sailors could not have been able without assistance to set the sail. It must, therefore, be assumed that if the 'Clan Lamont' had not rescued the 'Balces' the barque would have drifted to the north-east and in all probability would have foundered and been lost. It is however shown that a boat and some catamarans were sent out by the owner of the barque from Cuddalore on the morning of the 6th, and if there had been no heavy monsoon weather or strong wind, it is possible that they might have been able to get out to the 'Balces' and rescue the crew, and also, although that, it must be admitted is most doubtful, bring the barque to shore. The case is, therefore, not very dissimilar from that of the 'Chilka' dealt with in *Raffin* v. *The Chilka*(1), where, owing to her machinery having broken down, the 'Chilka', when she was 96 miles off the Arabian coast, was drifting towards a dangerous part of the coast and in all probability would have been wrecked and all lives lost if she had not been rescued by the steamship 'Henry Bolekow.' In that case it was held that the services rendered by the rescuing ship were not merely towing services but salvage and that the salvors were entitled to compensation on

(1) I.L.R., 7 Bom., 196.

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ıe principles which I have already quoted from the judgment in ıe 'Clifton' case. I therefore hold that the danger from which ıe 'Balces' was rescued was very great and that it was in ınminent peril and would almost certainly have been lost, if it ad not been for the opportune arrival of the 'Clan Lamont.' 'he third point is the labour and skill which the salvors displayed nd the time occupied. The time occupied was, as has already een shown, from 10 A.M. till 6 P.M. The skill displayed must ave been considerable. From the evidence of the captain of the Clan Lamont' it is clear that, owing to the fact that the Balces' had no steering gear which could be worked, it was ound very difficult to tow the boat into harbour, and in doing so he captain and the men on the 'Clan Lamont' had to expend onsiderable labour and show considerable skill.

The last point for consideration is the value of the boat saved nd as to this there cannot be much dispute in the present case. 'he plaintiff values it at Rs. 15,000. The defendant says in his vritten statement that it (the boat) was not worth more than Rs. 10,000, and it is shown that, when the boat was sold under he orders of this Court by Messrs. Simson & Co. of Cocanada in une 1903, it realised a sum of Rs. 6,500. In these circumstances, think, and I cannot be very far wrong if I find that the value of he 'Balces' at the time of these occurrences was about Rs. 10,000. t appears that the 'Clan Lamont' was, in consequence of the lelay at Cuddalore, about a day late in arriving at Vizagapatam, nd we must, therefore, take it that the loss of time was a day. 'he captain states that the value of the coal consumed in salving he barque was about £50 and estimates the value of the ıawsers and ropes used in towing and the "damage done to boat nd gear" at another £50; and the general expenses of the ship nd crew, apart from coal, at about £60 or thereabouts. The aptain also states that this does not take into account the damage lone to the steamship 'Clan Lamont' and her engines. I think hat it must be admitted that this is a very exaggerated estimate. I cannot credit the statement that the coal consumed in conse-quence of the delay at Cuddalore was worth anything like £50, nor that the cost of the ropes, etc., and the damage caused in towing the boat could have amounted to another £50, or that the general expenses of the crew, apart from coal, were £60, or more, and further I cannot hold that there is evidence which satisfies me

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that damage was caused either to the steamship 'Clan Lamont' or to her engines by the undue strain put upon her in towing the boat. Considering the relative dimensions of the boats, it is scarcely possible that there could have been any such strain. I think it must be admitted that these valuations are excessive. As already stated the defendant offered Rs. 500. At the close of the argument Mr. Napier on his behalf stated that the defendant was willing to give Rs. 1,000. I find the first and second issues in the affirmative and on a careful consideration of all the evidence that has been given and the arguments of Counsel on both sides, I decide on the third issue that an award of Rs. 2,000 will be reasonable compensation for the salvage services rendered.

I accordingly pass a decree for that amount with costs including the costs of the commission. The balance in Court to the credit of the suit to be paid to the owner of the defendant barque 'Balces,' Muhamad Saib Maracoir.

Messrs. *King & Josselyn*, attorneys, for plaintiffs.

Mr. *James Short*, attorney, for defendant.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1903. August 3, 4, 12.

RAMANATHAN CHETTY (DEFENDANT), APPELLANT,

v.

MURUGAPPA CHETTY (PLAINTIFF), RESPONDENT.*

Limitation Act—XV of 1877, s. 28, sched. II, arts. 124, 127, 142—Religious Endowment Act—Trustees of temple—Hereditary trustees—Management by rotation—Discontinuance of possession of trust properties of junior branch of trustees—Continuous possession by members of senior branch—Extinction of rights of junior branch in favour of senior branch.

On the death of the last sole trustee of a public religious institution, the trusteeship of which was hereditary in his family, without beneficial interest in the trust property or income, the office devolved by inheritance on his male descendants by his two wives. Until 1881, the management was conducted by

* Appeal No. 121 of 1901 presented against the decree of T. Varada Rao, Subordinate Judge of Madura (East), in Original Suit No. 52 of 1900.

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the two branches respectively in rotation, each acting for a year. Since 1882, the members of the junior branch had discontinued possession of the immoveable properties belonging to the trust as also performance of the duties usually appertaining to the office of trustee, and the members of the senior branch had been, in turns, successively in possession of the properties and had performed the duties, to the exclusion of and adversely to the members of the junior branch, and the High Court found that there had been an ouster of the members of the junior branch for about 19 years prior to the present suit, and that the members of the senior branch had been in turns successively in possession of the properties and had performed the duties of the office of trustee, to the exclusion of and adversely to the members of the junior branch. Plaintiff, a son of the last sole trustee by his senior wife, now sued a grandson of the last sole trustee, whose father was also a son by the senior wife, to enforce his turn of management of the institution. Since 1882, plaintiff had been managing, not only during the years of his own turn, but also during the years of the turns of the members of the junior branch, who, plaintiff alleged, had transferred their turns to him. It was contended for the defendant that inasmuch as the plaintiff had not himself been in continuous possession for 12 years, and the possession of the defendant and of the other two members of the senior branch during the 19 years had not been adverse to the members of the junior branch, the rights of the latter could not be barred under article 124:

Held, that the right of the members of the junior branch, as co-trustees, had been extinguished, whether the appropriate article be 127, 142 or 124. Each of the members of the senior branch must be deemed, in law to have held and discharged the duties of the office on behalf of himself and the other members of the senior branch, to the exclusion of the junior branch. Consequently, the office and the properties had been for more than 12 years held and possessed by the members of the senior branch as a whole body, adversely to the members of the junior branch, as a body, and the rights of the latter had been, by the operation of section 28 of the Limitation Act, extinguished, not in favour of the plaintiff individually but in favour of the members of the senior branch as a body. The defendant could not therefore plead, in bar of the plaintiff's claim, that the junior branch, or one of its members, and not the plaintiff, was entitled to succeed him in the turn of management.

A right to manage by rotation by each of several co-trustees in turn is not one that can, as between the trustees themselves, be acquired merely by the operation of the law of limitation. But *held*, that plaintiff was entitled to the relief sought for upon the basis of the scheme of management, under which management by rotation was provided for.

A scheme of management which has been framed and acted upon by the trustees cannot be revoked at the will and pleasure of any of them.

It is competent for co-trustees to settle a scheme of management by each of the co-trustees in rotation, at any rate where no emoluments are attached and the office is an hereditary one. Where emoluments are attached and the office is hereditary, the emoluments will be subject to partition, in the strict sense of the term, like any other family property. But whatever may be the number of co-trustees the office is a joint one and the co-trustees all form, as it were, but one collective trustee, and therefore must execute the duties of the office in their joint capacity.

RAMANATHAN CHETTY v. MURUGAPPA CHETTY.

Management by members of undivided and divided families discussed.

It would be competent for a court in the exercise of its equitable jurisdiction, to settle a scheme for the management of a public religious or charitable trust by the various co-trustees in rotation.

Sri Raman Lalji Maharaj v. *Sri Gopal Lalji Maharaj*, (I.L.R., 19 All., 428), discussed.

SUIT by a co-trustee to enforce his turn of management of a temple and its endowments for three years.

The devasthanam in question was that of Agastheeswaraswami and Sundra Nayaki Amman, in Kottur village, in the Sivaganga zamindari. The last sole trustee had been Mayandi Chetti, grandfather of the plaintiff and great grandfather of the defendant. At his death, the office devolved by inheritance on his male descendants by his two wives, there being four descendants in each branch. Both plaintiff and defendant belonged to the senior branch. The facts out of which the present claim arose are fully set out in the judgment. The Subordinate Judge decreed in plaintiff's favour. Defendant preferred this appeal.

V. Krishnaswami Ayyar, *P. R. Sundara Ayyar* and *C. V. Anantakrishna Ayyar* for appellant.

The Advocate-General (Hon. Mr. *J. P. Wallis*), Mr. *M. A. Tirunarayana Chariar* and *P. S. Sivasvami Ayyar* for respondent.

JUDGMENT.—This is an appeal against the decree of the Subordinate Judge of Madura (East) in a suit which was brought by the respondent to enforce his turn of management of the plaint temple and its endowments for a period of three years commencing from the 15th July 1899.

It is admitted that the plaint temple (with its endowments) is a public religious institution, that the trusteeship thereof is hereditary in the family of the parties to the suit, but that the family has no beneficial interest in the property or income of the temple. Mayandi Chetti, the grand father of the respondent and the great grandfather of the appellant, was the last sole trustee, and on his death, the office devolved by inheritance on his male descendants by his two wives. Four of them were his grandsons or great grandsons through his first wife and the other four grandsons or great grandsons through the second (see paragraph 7 of the judgment of the Subordinate Judge). Under the notion, apparently, that Mayandi's property devolved in equal undivided moieties (1, Strange's 'Hindu Law,' page 205) upon the respective descendants by his two wives, the management of the temple was

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until about 1881–82 conducted by these in rotation, each for one year.

We agree with the Subordinate Judge that the management was taken alternately by one member of each branch and not, as falsely asserted by the appellant, by the members of the senior branch consecutively for four years and then by the members of the junior branch likewise for four years. We also agree with the Subordinate Judge that since 1881–82 (in which year the management was in the hands of a member of the junior branch) the respondent has been managing the temple not only during the years of his own turn, but also during the years of the turns of the members of the junior branch. We are, however, unable to agree with the Subordinate Judge that the appellant, at the end (in July 1899) of the year of his turn, transferred possession of the villages to the respondent, that the respondent was thereafter dispossessed and that he is on that ground entitled to the decree sought for.

The respondent's claim is clearly stated in paragraphs 3 and 4 of the plaint. In paragraph 3 it is stated that it has been arranged that during every term of eight years of management the management was to be by the four members of the senior branch, the respondent having his turns in the second, fourth, fifth, sixth and eighth years, the appellant in the third year and the other two members in the first and seventh years, respectively. The appellant has thus had full opportunity to disprove this arrangement or establish why the same is not binding upon him or should be discontinued. In paragraph 4 of the plaint it is further stated that the four members of the junior branch (whose turns of management would come in the second, fourth, sixth and eighth years) transferred their turns to the respondent and that he has been enjoying the same for about nineteen years without any objection and with full right.

The appellant's pleader, in support of the appeal, chiefly urges (i) that the evidence adduced in proof of the transfer is legally inadmissible inasmuch as the alleged transfer was by an unstamped instrument (which is said to have been lost), (ii) that such transfer, even if proved, is invalid in law, (iii) that the right of the members of the junior branch as co-trustees has not been extinguished by the law of limitation, and (iv) that even if their right had been extinguished the respondent could not as against the

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appellant acquire a right under the law of limitation to the additional number of turns of management claimed by him.

If the respondent's title in the suit rested merely on the transfer made to him by the four members of the junior branch (who were co-trustees with him and the other members of the senior branch), it must be admitted that in the absence of the alleged instrument of transfer which was admittedly unstamped and unregistered other evidence in proof of such transfer is inadmissible. It therefore becomes unnecessary to consider and decide whether such relinquishment, if proved, can be relied upon by the respondent as the basis of his title, having regard to the ruling of the Privy Council in *Rajah Vurmah* v. *Ravi Varma*(1) and the decisions of this Court in *Kuppa* v. *Dorasami*(2), *Narayana* v. *Ranga*(3), *Alagappa Mudaliar* v. *Sivaramasundra Mudaliar*(4) and *Annasami Pillai* v. *Ramakrishna Mudaliar*(5).

On the question of limitation, we are clearly of opinion that the right of the members of the junior branch as co-trustees has been extinguished, whether the appropriate article applicable to the case be article 127 or 142 or, as contended by the appellant's pleader, article 124. The evidence establishes beyond all doubt that the members of the junior branch had since May 1882 discontinued possession of the immoveable properties belonging to the temple, as also performance of the duties usually appertaining to the office of trustee of the temple and that the members of the senior branch have been in turns successively in possession of the properties of the temple and performed the duties of the office of trustee, to the exclusion of and adversely to the members of the junior branch. Two of the members of the junior branch who, as witnesses, now support the appellant admit that an abortive attempt was made about eight years ago (about 1892) to regain possession of the office, and in fact falsely depose that they did regain possession for a short period of three months. Bearing in mind that the discontinuance of possession on the part of the members of the junior branch was in consequence of their having relinquished their rights in favour of the respondent (as is now clearly admitted by one of the members of the junior branch as the plaintiff's first witness and by the appellant himself in two former depositions

(1) I.L.R., 1 Mad., 235.
(2) I.L.R., 6 Mad., 76.
(3) I.L.R., 15 Mad., 183.
(4) I.L.R., 19 Mad., 211.
(5) I.L.R., 24 Mad., 219 at p. 230.

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—see his exhibits QQ and RR), it is clear beyond all doubt that there has been an ouster of the members of the junior branch for about nineteen years prior to the suit.

The learned pleader for the appellant argues that inasmuch as the respondent has not himself been in continuous possession for twelve years, and the possession of the appellant and of the other two members of the senior branch during the above period of nineteen years was not adverse to the members of the junior branch, the rights of the latter could not be barred under article 124. This argument proceeds on a misapprehension that when trust property is managed in rotation by co-trustees the possession of the office by each during his turn is exclusive of or adverse to the other co-trustees. Though each of the co-trustees may during his turn in the rotation be regarded in a sense as the acting or executive trustee for the year (or period) (cf. *Attorney-General* v. *Holland*(1)), yet he holds the office and discharges the duties thereof on behalf of all the co-trustees and not on behalf of himself alone. In fact, as a general rule, even during the turn of each co-trustee, all the co-trustees are entitled, and, in fact, are bound to act jointly in matters other than the ordinary routine duties. The supposed relinquishment by the junior branch, in favour of the respondent whether the same be valid or not in law, was one that was made to the knowledge of the appellant (see exhibits QQ and RR) and the other members of the senior branch and was so acted upon since 1882, the respondent taking the turns of management of the junior branch also. Each of the members of the senior branch must under these circumstances be taken in law to have held and discharged the duties of the office, on behalf of himself and the other members of the senior branch to the exclusion of the junior branch. In this view, the office of trustee and the properties of the temple have been for more than twelve years held and possessed by the members of the senior branch, as a whole body, adversely to the members of the junior branch, as a body, and the rights of the latter have been, by the operation of section 28 of the Limitation Act, extinguished (*Alagirisami Naicker* v. *Sundareswara Ayyar*(2)) not in favour of the respondent individually but in favour of the members of the senior branch as a body. The appellant, therefore, cannot plead, in bar of the respondent's claim, that the junior

(1) 47 E.R., 476.
(2) I.L.R., 21 Mad., 278.

branch or rather one of its members and not the respondent is entitled to succeed him in the turn of management.

The only question that remains to be considered is whether the respondent can enforce as against the appellant his turns of management according to the rotation which has been in force since 1882. Having regard to the nature of the right of management by rotation by each of several co-trustees (as explained above) such right cannot, as between themselves, be acquired merely by the operation of the Law of Limitation (see *dictum* of the High Court of Bombay quoted on appeal with approval by the Privy Council in *Vinayak* v. *Gopal*(1)).

But, in our opinion, the respondent is clearly entitled to the relief sought for upon the basis of his title as disclosed in paragraph 3 of his plaint, and we cannot accede to the contention of the appellant that according to the true construction of the plaint, the respondent's cause of action is based only on the relinquishment made in his favour by the members of the junior branch and the validity thereof and that no relief should be given to him in this suit on the footing of the scheme of management set forth in paragraph 3 of the plaint. We are clearly of opinion that the decree appealed against should be upheld as the appellant has failed to show any valid ground for discontinuance or supersession of that scheme. No Court in the exercise of its equitable jurisdiction under section 539, Civil Procedure Code, or otherwise, will be disposed to revise and alter such scheme unless it is satisfied that in the interests of the institution and the more effective management of its affairs such revision is needed.

In paragraph 6 of his written statement the appellant admits that it was originally arranged that each one of the co-trustees should manage the affairs of the temple for one year (in rotation) on his own behalf and as agent of the others but pleads in paragraph 7 that such arrangement is revocable at the instance of any of the trustees. This plea is clearly unsustainable and no authority has been cited in support of such proposition. A scheme of management which has been framed and acted upon by the trustees cannot be revoked at the will and pleasure of any of them. It is next urged that the practice which has been in force since 1882 cannot be regarded as a scheme consented to by the four

(1) I.L.R., 27 Bom., 353 at p. 357.

co-trustees of the senior branch. Such practice was certainly a deviation from the original arrangement (admitted by both parties) according to which the management has to be held in turns by all the eight members (in both the branches) and though there is no proof of any express agreement entered into between the four members of the senior branch to alter the original scheme of management yet according to the principle clearly enunciated by section 252 of the Indian Contract Act, such agreement and a consent thereto (between the members of the senior branch) must be implied from the uniform course of dealings and practice extending over a period of 19 years.

It may be that this revised scheme of management was the result of a *bonâ fide* belief on the part of all the members of both the branches, that the members of the junior branch had validly relinquished their rights in favour of the respondent and that he should therefore take their turns. Even if such relinquishment be not valid in law to vest by its own force in the respondent their turns of management that can be no ground for holding that a scheme of management which has been in force since such relinquishment can be revoked at the will and pleasure of any of the trustees. It may be added, that in no case has it ever been held that, where the office of trustee is hereditary in a family and one of the members, for no valuable consideration, renounces his right in favour of one or some of his co-trustees, with the knowledge and consent of the others, such relinquishment is illegal or invalid.

The contention that it is not competent for co-trustees to settle a scheme of management by each of the co-trustees in rotation, in cases at any rate in which no emoluments are attached to the hereditary offices of trustee, cannot be upheld. In the case of hereditary offices in this country the number of co-trustees is in the very nature of things liable to increase and the co-trustees may belong to various branches of the family. The office may or may not have emoluments attached thereto. In the former case the emoluments will be subject to partition in the strict sense of the term like any other family property. But whatever may be the number of co-trustees the office is a joint one and the co-trustees all form, as it were, but one collective trustee and therefore must execute the duties of the office in their joint capacity (Lewin on 'Trusts,' eighth edition, 258; Perry on 'Trusts,' paragraph 411), and so

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long as the duties of the office are thus discharged and one of them is not the managing member of the undivided family in which the office is hereditary each of them is entitled and bound to participate equally with the others in the management of the trust, though it may be that if the subject-matter of the trust had been ordinary partible property (and not trust property) the shares of the co-trustees who form the members of the family would be unequal. When by reason of the family becoming divided the eldest member ceases to be the managing member of the family it becomes highly inconvenient and also detrimental to the interests of the religious institution if one and all the members (as co-trustees) are to participate in the joint discharge of the duties of the office. Further, though the office is in its nature indivisible, yet, it being hereditary in the family, the family when it becomes divided regards each member of it as having the same share or degree of interest in the office as in other joint family property which is legally partible. Except in the few cases in which the hereditary office may be descendible only to a single heir, the usage and custom generally is that along with other properties the office also is divided in the sense that the office is agreed to be held and the duties thereof discharged in rotation by each member or branch of the family, the duration of their turns being in proportion to their shares in the family property. Such a scheme of management may proceed either on the footing that the co-trustees are to continue as undivided members *quoad* the trust property or on the footing of being divided members, as in the case of the rest of the family property. In either case as between themselves their position will be that of co-trustees though on the death of any of them the devolution of his interest in the office will vary according as the scheme of management has been settled on the one footing or the other. Even in cases in which recourse is had to a suit for the partition of the family property, the Courts give effect to the usage and custom above referred to, by providing in the decree for management of religious and charitable institutions by different members or branches of the family in rotation on the above principle (see Mayne's 'Hindu Law,' sixth edition, paragraphs 439 and 468, 2; Morley's 'Digest,' 146; see also *Anund Moyee Chowdhrani* v. *Boykantnath Roy*(1), *Ram Soondur Thakoor* v. *Taruck*

(1) 8 Suth. W.R., 193.

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Chunder Turkoruttun(1)). Such usage and custom is not restricted— as apparently held in *Sri Raman Lalji Maharaj* v. *Sri Gopal Lalji Maharaj*(2) to cases in which there are emoluments attached to the office, but extends as well to cases like the present in which the trustees have no beneficial interest. The usage is as wholesome in the one case as in the other, for the efficient and smooth discharge of the duties of the office which, being hereditary in the family, devolves on all the members thereof as co-trustees however numerous they may be.

The view taken by the learned Judges of the Allahabad High Court in *Sri Raman Lalji Maharaj* v. *Sri Gopal Lalji Maharaj*(2) that one of several co-trustees is not entitled to ask a Court to partition the duties of the trust between himself and his co-trustees so as to give him the exclusive possession and management of the trust property for (say) six months in the year, putting the other trustees entirely aside during his period of management and that trusteeship is not "personal property" liable to partition is one to which no exception can be taken. But as already pointed out an arrangement by which the several co-trustees are to discharge their duties in rotation, each for a certain period, is not even during the period of management by each in rotation, a management and possession of the trust property (by such co-trustee) to the exclusion of and adversely to the other co-trustees. It could hardly be denied that the author of a trust who appoints several co-trustees might (as in *Attorney-General* v. *Holland*(3) already referred to) provide that each trustee in rotation should be the acting trustee for a year and that it would be competent for a Court in the exercise of its equitable jurisdiction to settle a scheme for the management of a public religious or charitable trust by the various co-trustees in rotation, if such management would be more beneficial to the interests of the trust than the joint and concurrent management thereof by a large number of co-trustees. If so it is difficult to see on what principle it could be held that it is not competent to the co-trustees themselves to settle a scheme of management by turns (*cf.* Perry on 'Trusts,' paragraph 417), having regard to the considerations above adverted to, as to the duration of the turn of each co-trustee and that such arrangement can be terminated

(1) 19 Suth. W.R., 28. (2) I.L.R., 19 All., 428.
(3) 47 R.R., 476.

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at the will and pleasure of any of the co-trustees. Probably the juristic basis for the usage and custom above referred to is not strictly the legal right of partition of ordinary joint family property, but the equitable right to settle a suitable scheme for the efficient and satisfactory management of trusts—the duration of the turns of the several members in rotation being however fixed with reference to the law of partition. It has, however, to be borne in mind that that the interests of the trust are paramount, and the scheme of management only subsidiary and if it be shown to the satisfaction of the Court that the existing scheme, however equitable it may be as to the relative distribution and apportionment of the management as between the co-trustees themselves, is injurious to the interests of the trust, the Court has full power to alter the scheme both as to the duration of the turns and otherwise as to it may seem appropriate.

The appeal fails and must be dismissed with costs save that the portion of the decree relating to the delivery of the accounts will be modified by omitting the words "Schedule C" and substituting therefor the words "of the temple in the possession or under the control of the defendant."

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1903. April 21, 22.

THEYYAN NAIR AND THREE OTHERS (DEFENDANTS NOS. 1, 3, 4 AND 5), APPELLANTS,

v.

ZAMORIN OF CALICUT AND OTHERS (THIRD PLAINTIFF AND DEFENDANTS NOS. 11 TO 19, 25 TO 28 AND 20TH REPRESENTATIVE), RESPONDENTS.*

Malabar law—Adimayavana tenure—Land granted for services rendered prior to grant—Right of landlord to eject.

An Adimayavana tenure in South Malabar is a permanent one, and where land has been granted on it for services rendered prior to the grant, the landlord cannot eject the tenant so long as the land remains in the family of the grantee.

* Second Appeal No. 1265 of 1901 presented against the decree of T. Venkatarama Ayya, Subordinate Judge of South Malabar at Palghat, in Appeal Suit No. 230 of 1901 presented against the decree of M. G. Krishna Rao, District Munsif of Temelprom, in Original Suit No. 360 of 1899.

Whether, in a case where such a grant has been made for services to be rendered subsequently to the grant, it may be resumed by dispensing with the services or only when the services are discontinued and the necessity arises for having them performed by others.—*Quære.*

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SUIT for land. Plaintiff claimed the lands as his jenm, and stated in his plaint that his predecessor had leased them to second defendant and to the karnavan of defendants Nos. 1 to 10 at an annual rent. When, however, plaintiff demanded that the lands be surrendered or that the lease be renewed, defendants set up Adimayavana rights. Defendants Nos. 1 to 10 admitted plaintiff's jenm title to the lands, but contended that the lease was not a simple one, but that the lands had been held by the defendants' tarwad for more than a century on Adimayavana right of perpetual tenure for services rendered, that such right had been admitted by plaintiff's predecessors, and that no provision for surrender was made in the lease. They also claimed to be entitled to the value of improvements. Exhibit A, the renewed lease, was in the following terms:—

"Tit by Poonthuraken for the information of Moochikal Tekkedath Neelu's daughter Kalu and Kalu's son Samu of Kunisseri Amsom and Desom, Palghat taluk. The rent of 29 items including lands sowing 80 paras of paddy and other properties which belong to my (Zamorin of Calicut) Manhalur Cherikkal and which are described in the subjoined schedule, along with the upper and lower usufructs thereon, is 160 paras of paddy valued at Rs. 45-11-5, being the rent due exclusive of the allowance for Adimayavana as heretofore. Out of this amount of 160 paras of paddy, the balance left after deducting the amount for revenue is 48 paras. The amount for paravasi (allowance for measurement) is 9 paras and 6 danglis. The total rent to be paid per year is 57 paras and 6 danglis. You shall pay to the Cherikkal per year the aforesaid rent of 57 paras and 6 danglis of paddy and also 3 fanams for Panapattam, 1 fanam for Krishnanattam (a kind of play) and 80 leaves of palmyra tree, and you shall also pay the additional revenue, if any, levied in future."

The first issue was "whether the plaint demise (exhibit A) is a Verumpatom or an Adimayavana." The District Munsif decided that the parties to exhibit A believed that the Adimayavana rights had been enjoyed in perpetuity in the past and that their intention was that the same rights were to continue in the future.

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He dismissed the suit. The District Court reversed that decision and decreed that plaintiff should recover possession of the lands upon paying the value of the improvements.

The defendants Nos. 1, 3, 4 and 5 preferred this second appeal.

J. L. Rosario for appellants.

K. P. Govinda Menon for first respondent.

JUDGMENT.—The question for decision is whether, under the document (exhibit A) and the previous documents of which it is a renewal, the plaintiff (who is the jenmi or landlord) can eject the defendants on the footing that they are only tenants at will or tenants from year to year. The words of the document on which its character depends are "the rent of 29 items . . . . is 160 paras of the paddy, being the rent due, exclusive of allowance for Adimayavana as heretofore." The rent reserved therefore is the difference between the full rental value and the deduction which the tenant is entitled to enjoy for his Adimayavana right. The whole question is what is the Adimayavana tenure which entitles him to a portion of the produce. If that is a permanent tenure it is not contended that he can be ejected. "Adimayavana" in its etymological sense, may be translated "beneficial enjoyment on account of services," but there is ample judicial authority for holding that the phrase *primâ facie* imports a permanent tenure which was granted as a reward for past services or both for past and future services. In this respect, it is very similar to "Anubhavam" which was held by this Court to be a permanent lease (*Chera Narayanan Nambudripad* v. *Unni Rarichan*(1)). In that case, this Court adopted the finding of Mr. Wigram, the District Judge of Malabar, who held that "etymologically the word means no more than 'enjoyment,' but to a Malayali the word when found in a conveyance invariably means 'perpetual enjoyment' and the tenure is irredeemable so long as it remains in the grantee's family. It is as nearly as possible equivalent to an inam holding on the Eastern Coast." A similar view was adopted by this Court in *Manishere* v. *Kannan Nair*(2).

The Sadar Court, in their Proceedings of the 5th August 1856, refer to the Adina right in these words. "In this case the land is made over in perpetuity to the grantee either unconditionally

(1) S.A. No. 595 of 1878 (unreported).
(2) S.A. No. 569 of 1879 (unreported).

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as a mark of favour or on condition of certain services being performed. The terms *Adina* and *Kudima* mean a slave or one subject to the landlord, the grant being generally made to such persons . . . . Land bestowed as a mark of favour can never be resumed, but where it is granted as remuneration for certain services to be formed, the non-performance of such services, involving the necessity for having them discharged by others, will give the landlord power to recover the land." In the present case it is not alleged or proved that the grant was for future services to be rendered or that any services have been in fact rendered since the grant was made. It is therefore unnecessary to consider whether in such cases the grant can be resumed by dispensing with the services or only when the services are discontinued and the necessity of having them performed by others exists.

We may add that, in the present case, the land has been in possession of the defendants' family and the rent payable has remained unaltered from time immemorial (exhibits B, C, D and A).

The decision of this Court (*Zamorin of Calicut* v. *Puliakote* (1)) on which the lower Appellate Court relies, proceeded upon the construction placed upon the instrument then sued upon, and the import of the Adimayavana tenure was not considered. We are therefore not prepared to follow that decision as one that governs the present case. We therefore allow the second appeal and reversing the decree of the Subordinate Judge restore that of the District Munsif, with costs in this and in the lower Appellate Court.

(1) S.A. No. 602 of 1898 (unreported).

APPELLATE CIVIL.

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

1903. July 28. August 14, 18.

GOVINDARAZULU NARASIMHAM (PLAINTIFF), APPELLANT,

v.

DEVARABHOTLA VENKATANARASAYYA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Law—Sale by father of family lands for expenses of one son's marriage—No assent by other sons—Effect of sale on interest of the other sons.

A Hindu father sold certain ancestral lands to defray the marriage expenses of one of his four sons. That son and another assented to the sale. On its being contended that the sale was invalid in so far as the shares of the other two sons were concerned, there being no family necessity, and there being no moral or religious obligation on a Hindu father to get his son married, so as to make the sale valid as against the other sons:

Held, that there is no authority for the proposition that the omission to perform the ceremony of marriage in the case of a male Brahman entails a forfeiture of his caste or status, and, in consequence, there is no moral or religious obligation on a father to bring about the marriage of his son. The sale of land was therefore invalid in so far as the shares of the other brothers were concerned.

SUIT for a declaration of right to and for the recovery of land. In 1884, Ramabrahman, the father of defendants Nos. 1 to 3 and of one Nagendrudu (since deceased) sold by a deed filed as exhibit I certain ancestral lands to Rajayya for Rs. 268, which sum was required by the vendor in connection with the marriage of his son Nagendrudu. In 1898, defendants Nos. 2 and 3 sold the land to the present plaintiff for Rs. 500 alleging that it had fallen to their share in a division. They executed a registered sale-deed in plaintiff's favour (exhibit A). The deed of sale (exhibit I) was signed by first defendant and by Nagendrudu, as witnesses, and the High Court found that they assented to the sale made thereby. The question raised was whether exhibit I was valid in so far as the shares of defendants Nos. 2 and 3 were concerned. The District Munsif held that the land had been sold under exhibit I for the expenses of Nagendrudu, and that the sale was binding on

* Second Appeal No. 1076 of 1901 presented against the decree of C. G. Kuppuswami Ayyar, Subordinate Judge of Cocanada, in Appeal Suit No. 201 of 1900, presented against the decree of V. G. Narayana Ayyar, District Munsif of Amalapur, in Original Suit No. 1059 of 1898.

defendants Nos. 1 to 3. He dismissed the suit as he held that the plaintiff had acquired no right by his purchase to the land in dispute. The Subordinate Judge upheld this finding and confirmed the Munsif's decree.

Plaintiff preferred this second appeal.

C. R. Tiruvenkata Chariar for appellant.

T. V. Seshagiri Ayyar for third to fifth respondents.

JUDGMENT.—Ramabrahman had four sons, the first, second, and third defendants and Nagendrudu. On the 29th March 1884, he sold certain ancestral lands to one Rajayya for Rs. 268 which was required by him in connection with the marriage of his son Nagendrudu (exhibit I). The first defendant and Nagendrudu signed this document as witnesses and there can be no doubt that they assented to the sale made thereby. The main question that has been argued in this second appeal is whether the sale evidenced by exhibit I can be held to be valid in so far as the shares of the second and third defendants are concerned. It does not appear to be seriously disputed that the law bearing on this question is correctly set out by Mr. Mayne as follows (Hindu Law, 6th edition, para. 336). "It is an established rule that a father can make no disposition of the joint property which will prejudice his issue, unless he obtains their assent, if they are able to give it, or unless there is some established necessity, or moral, or religious obligation to justify the transaction." The first defendant and Nagendrudu, as already stated, assented to the sale. It is clear that there was nothing that can be termed necessity for the sale and the question therefore to be decided is whether there was such a moral or religious obligation on the father to get his son Nagendrudu married as to make the sale valid in so far as the shares of the second and third defendants are concerned. It, of course, cannot be contended that there is a legal obligation on a father to get his son married, but it is strongly urged on behalf of the contending respondents that there is a religious obligation on him to get this ceremony performed. In support of this proposition we have been referred to certain sacred texts and to passages in the works of ancient law-givers. To these a brief reference must be made. Attention is drawn to the following verses in Chapter II of the Laws of Manu:—Nos. 36-47, 169, 170 and 172 (Sacred Books of the East, Volume 25, pages 36, 37, 38 and 61). In these verses directions are given as to the initiatory ceremonies to be performed

in the case of Brahmans and it is laid down that he who has not been initiated is on a level with a Sudra (verse 172). Nowhere, however, is marriage in the case of a male included among the initiatory ceremonies. Then as to the obligation on a father or, if he is dead, on an elder brother to perform the initiatory ceremonies, reference is made to Narada, Chapter 13, verse 33, which is to the effect that for those brothers for whom the initiatory ceremonies have not been duly performed by their father, they must be performed by the brothers from the paternal property (Sacred Books of the East, Volume 33, page 197). Commenting on this Dr. Jolly, the learned Translator and Editor of Narada, writes: "There appears to be some doubt as to what is meant by the term Samskara 'initiatory or sacramental ceremonies,' some commentators including the ceremony of marriage in that term and others declaring the initiatory ceremonies to terminate with the investiture with the sacred thread" (Narada, page 197 note). Turning to the Mitakshara, we find (Chapter I, section I, para. 29) as follows: "Even one person, who is capable, may conclude a gift, hypothecation, or sale, of immoveable property, if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable (Stoke's 'Hindu Law Books,' page 376). The question that has to be decided with reference to this text is, do the words "or the like" include the marriage of a son? As to this we are referred to the annotation by Mr. Colebrooke appended to Chapter I, section VII, para. 3 of the Mitakshara relating to initiation which is as follows: "Initiation (Samskara); a succession of religious rites commencing on the pregnancy of the mother and terminating with the investiture of the sacerdotal thread, or with the return of the student to his family and finally his marriage (Stoke's 'Hindu Law Books,' page 398). Mr. Colebrooke in his Digest expresses himself even more positively as to marriage being one of the initiatory ceremonies. Commenting on the text "let the father himself perform the eight ceremonies which perfect *the second birth of a twice-born man*," he names the eight ceremonies to which he believes that the text refers concluding with the investiture of sacred thread (7th) and the ceremony on the return of the student from his preceptor's house (8th) and then adds: "The whole number of ceremonies called Samskara as expiating the sinful taint contracted in the

mother's womb, and as effecting regeneration, in other words, as perfecting the class of a twice-born man, are ten," *i.e.*, to the eight ceremonies which he has already mentioned, he adds the ceremony which precedes conception and marriage which he says is the last of these sacraments (Colebrooke's 'Digest of Hindu Law,' Volume II, page 301). We cannot find that Mr. Colebrooke had any sufficient authority for including marriage among the ceremonies necessary to perfect the class of a twice-born man. In the Smriti Chandrika, the text from Narada relating to the initiatory ceremonies which "must be invariably performed" (Chapter XIII, verse 34) is quoted and commented on as follows: "The ceremonies contemplated by this text commence with Jatakarma and end in Upanayana. The word 'ceremonies' takes here the above limited sense as the text says 'must *without fail* be defrayed' as marriage, &c., are not ceremonies that must *without fail* be performed, the law permitting the life of a perpetual student" (Smriti Chandrika translated by T. Krishnaswami Ayyar, page 60). As to this question we have no hesitation in accepting the opinion of Mr. Justice Muttuswami Ayyar which is as follows: "The phrase 'the like' in para. 29 (Mitakshara, Chapter I, section 1, para. 29 to which allusion has already been made) both according to Hindu Law and the rule of construction, refers to the annual sradhas the ceremony of Upanayanam in the case of minors in the three higher classes, and of marriage in the case of girls belonging to those classes before they attain their puberty, and in short to such ceremonies as, if unperformed, would entail a forfeiture of caste or status" (*Ponnappa Pillai* v. *Pappuvayyangar*(1)). We must hold that there is a complete absence of authority for the proposition that omission to perform the ceremony of marriage in the case of a male Brahman entails a forfeiture of his caste or status and, such being the case, there is no moral or religious obligation on a father to bring about the marriage of his son.

For the foregoing reasons we must hold that the sale of the plaint land included in exhibit I is invalid in so far as the shares of the second and third defendants are concerned. The plaintiff in his appeal to the Subordinate Judge's Court and in second appeal here makes no claim except in regard to the shares of these sons and we accordingly allow this second appeal with costs; set aside

(1) I.L.R., 4 Mad., 1 at p. 17.

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the decrees of both the lower Courts and give the plaintiff a decree for the recovery of two-fifths of the plaint land. The defendants Nos. 4, 5 and 6 are ordered to pay their own costs and those of the plaintiff throughout and the defendants Nos. 1, 2, 3 and 7 will pay their own costs in all Courts.

APPELLATE CIVIL.

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

1903. March 2.

RAJAH CHELIKANI VENKATA GOPALA RAYANIM GARU (DEFENDANT), APPELLANT,

v.

NARAYANASAMI REDDI (PLAINTIFF), RESPONDENT.*

Rent Recovery Act (Madras)—Act VIII of 1865, *ss.* 18, 24, 49—*Excessive distress—Remedy for person aggrieved.*

Though a person who is aggrieved by an excessive distress may have recourse to a suit for damages under section 49 of Act VIII of 1865, that is not his only remedy. An excessive distress which is forbidden by section 24 of that Act is a ground on which an appeal against a distraint may be filed under section 18, and if the distress is proved to be excessive the Collector may allow the appeal and set aside the distraint.

SUMMARY suit by a tenant against his landlord complaining that excessive distraint had been levied on plaintiff's cattle. This was denied by the landlord. The Deputy Collector found that the distress was not excessive and dismissed the suit. The District Judge reversed this decision, holding that the value of the distrained property was out of proportion to the amount of arrears and that the distraints were, in consequence, illegal, under section 24 of Act VIII of 1865.

Defendant preferred this second appeal.

E. Venkatarama Sarma for appellant.

T. Rangachariar for respondent.

JUDGMENT.—It is argued for the appellant that the proper remedy is by a suit for damages under section 49 of Act VIII of

* Second Appeals Nos. 70 to 73 of 1902 presented against the decree of A. C. Tate, District Judge of Chingleput, in Original Suits, Nos. 143 to 146 of 1901, presented against the decision of P. Sivarama Ayyar, Deputy Collector of Trivellore in Summary Suits Nos. 41 to 44 of 1901, respectively.

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1865. That course is, no doubt, open to a person aggrieved by an excessive distress. But we do not think that it is his only remedy.

We think that an excessive distress which is forbidden by section 24 is a ground on which an appeal against a distraint may be filed under section 18 of the Act, and if the distress is proved to be excessive the Collector may allow the appeal and set aside the distraint as the District Judge has done in this case.

We have no doubt that the District Judge was right in finding that the distress was, in fact, excessive.

We dismiss the second appeals, with costs in Second Appeal No. 71 of 1902.

APPELLATE CIVIL.

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

1903. August 21. September 23.

ISMAI KANI ROWTHAN (FIRST DEFENDANT), APPELLANT,

v.

NAZARALI SAHIB AND ANOTHER (PLAINTIFF AND SECOND DEFENDANT), RESPONDENTS.*

Landlord and tenant—Buildings erected by tenant—Transfer of Property Act—IV of 1882, *s.* 108—*Removal of buildings during continuance of lease—Rule of common law in India.*

Certain land was leased in 1875 to a tenant for twenty years it being recited in the lease that the tenant took a lease of the land for constructing a building thereon for the purposes of trade. A building was erected, and it was not contended that it was of a kind different from or of a value out of proportion to what was in the contemplation of the parties when the lease was entered into. At the expiration of the term, the lessor sued to recover the land, but he did not claim that the tenant was no longer at liberty to remove the building (though this had not been removed during the continuance of the lease). On its being contended that the tenant was entitled to be paid the value of the building which he had erected on the land before he could be evicted:

Held, that it is established that the maxim '*quicquid inaedificatur solo solo cedit*' does not generally apply in India; and even in cases to which the

* Second Appeal No. 66 of 1902 presented against the decree of P. S. Gurumurti, Subordinate Judge of Kumbakónam, in Appeal Suit No. 1075 of 1900, presented against the decree of T. Swami Ayyar, District Munsif of Tiruvalur, in Original Suit No. 205 of 1899.

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English law as such was applicable, the Indian Legislature, by Act XI of 1855, departed from that maxim in the cases specified in section 2 of that Act (corresponding to section 51 of the Transfer of Property Act). Both under the Hindu and the Muhammadan law (as well as under the common law of India) a tenant who erects a building on land let to him can only remove the building and cannot claim compensation for it on eviction by the landlord.

Mahalatchmi Ammal v. *Palani Chetti*, (6 M.H.C.R., 245), discussed.

SUIT by a lessor to recover land leased to tenants. The defendants or those through whom they claimed had leased three plots of land from plaintiff's father, namely plots A, B and C. The leases relating to plots A and B, recited that the tenants leased the lands for constructing a building thereon for the purposes of trade, and the lease relating to C provided that the tenants, who were then erecting a thatched house on the plot, would remove it and vacate the site in case the lessor wanted it to construct a building thereon for the mosque to which it belonged. The lease relating to plots A and B had been taken in 1875 for a term of 20 years, and that relating to plot C, in 1887, for 3 years. Plaintiff, as the trustee and manager of the mosque, now sued to recover possession of the three plots "after removal of the buildings erected thereon by the defendants," and for mesne profits. Plaintiff did not claim that the defendants were no longer at liberty to remove the buildings which they had erected on the lands because of their failure to do so during the continuance of the lease. As regards the buildings themselves which defendants had erected on the plots, it was not contended that they were of a kind different from or of a value out of proportion to what was in contemplation of the parties when the leases were entered into. The parties to the suit were Muhammadans. The District Munsif held that plaintiff was entitled to recover the plots and allowed the defendants one month to remove their buildings and vacate. The defendants appealed to the Subordinate Judge, who dismissed the appeal.

First defendant preferred this second appeal.

P. R. Sundara Ayyar for appellant.

P. S. Sivaswami Ayyar for first respondent.

JUDGMENT.—The only ground urged and argued in this appeal is that the decree appealed against should have provided for payment to the appellant of compensation, before he is evicted from plots A, B and C, the measure of compensation being the

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present market value of the buildings erected thereon by him, after he had taken a lease of plots A and B in 1875 for a term of 20 years, and of plot C in 1887 for a term of 3 years. In exhibits B and C—counterparts of the leases relating to plots A and B—it is expressly stated that the appellant took a lease of the lands for constructing a building thereon for carrying on trade, and in exhibit D, which relates to plot C, it is provided that the appellant, who was then erecting a thatched house on the plot, would remove the same and vacate the site in case the lessor (first respondent's father) wanted it to construct a building thereon, for the Thaikkal to which the plots belonged.

In regard to plot C, no question of compensation therefore arises and the appeal so far as it relates to that plot is clearly unsustainable, firstly, because the first respondent prior to the institution of this suit did give notice to quit (exhibit E), expressly stating therein that the land was required for erecting a building thereon for the Thaikkal and, secondly, because, according to the proper construction of exhibit D, the condition relating to the site being required for the erection of a building thereon for the Thaikkal, was to apply only if the lessee was to be required to give up the site during the 3 years' term of the lease.

As regards the buildings erected on plots A and B, it is not contended that they are of a kind different from or of a value out of proportion to what was in the contemplation of the parties when the transaction of lease was entered into. Nor has any claim been made on behalf of the first respondent that the appellant is no longer at liberty to remove the buildings as he has not done so before the expiration of the term of the lease in 1895, or that, at any rate, at the option of the first respondent, the appellant must leave the building as it is, on payment to him of compensation for his right to remove the building, the measure of such compensation being the value, not of the building as it is, but of the materials (after the building should be demolished).

The only question, therefore, for determination in this appeal, is whether the appellant can insist upon being paid the value of the house before he is ejected; and as the two leases—exhibits B and C—were taken before the passing of the Transfer of Property Act, the question has to be determined with reference to the law as it obtained here before the Transfer of Property Act. It has long been judicially settled in this country (see *In the matter of*

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the petition of Thakoor Chunder Paramanick(1)) that the maxim of the English law '*Quicquid inaedificatur solo solo cedit*' does not generally apply here; and even in cases to which the English law as such was applicable, the Indian Legislature by Act XI of 1855 has departed from the above maxim in the cases specified in section 2 of the Act (corresponding to section 51 of the Transfer of Property Act). So far as cases arising in the mofussil are concerned, the Hindu or the Muhammadan law as such is not strictly applicable to cases arising from contracts (*vide* section 16 of the Madras Civil Courts Act) and such cases must be governed by the rule of 'justice, equity and good conscience' based upon the customary law of the land which, in the absence of proof of any special usage or custom, will be presumed to be in accordance with the texts of the Hindu or Muhammadan law as the case may be.

The Hindu and the Muhammadan law bearing upon the subject in question (in this appeal) was examined by a Full Bench of the Calcutta High Court (*In the matter of the petition of Thakoor Chunder Paramanick*(1)), and Sir Barnes Peacock, in delivering the judgment of the Full Bench, laid down the common law of the land as follows:—

"We think it clear that, according to the usages and customs of the country, buildings and other such improvements made on land do not, by the mere accident of their attachment to the soil, become the property of the owner of the soil; and we think it should be laid down as a general rule that, if he who makes the improvement is not a mere trespasser, but is in possession under any *bonâ fide* title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil, the option of taking the building or allowing the removal of the material remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess—" (at page 598).

The leading authority on the subject in the Hindu law is the following text of Narada (Chapter VI, verses 20, 21, Sacred Books of the East, Volume 33, pages 143, 144):—"(20) If a man has built a house on the ground of a stranger and lives in it, paying

(1) B.L.R., Supp. Vol., F.B.R., 595 at p. 597.

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rent for it, he may take with him, when he leaves the house, the thatch, the timber, the bricks and other building materials. (21) But if he has been residing on the ground of a stranger, without paying rent and against that man's wish, he shall by no means take with him on leaving it, the thatch and the timber."

It may be noted in passing that the first of the above two texts is directly applicable to the present case, and by providing that the tenant may remove the materials of the house negatives by implication the right of the tenant to demand compensation. The latter text—which is applicable to the case of a trespasser building on the land of another against that man's wish—is in accordance with the maxim of the English law.

The Muhammadan law on the subject had recently to be considered and applied by the Judicial Committee of the Privy Council in a case on appeal from His Majesty's Court at Zanzibar in *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.*(1). In that case the respondents, an English Company, were owners of certain lands which they had purchased from the natives. The land was required by the British Government for the construction of a railway and was taken possession of and buildings erected thereon in anticipation of the Indian Land Acquisition Act being extended to Zanzibar by an order in council and the land being duly acquired thereunder. Accordingly when the notification under section 6 of the Act was duly published, the buildings had been erected on the land. Under section 23 of the Act the Company were entitled to compensation according to the market value of the land as it was at the time of the publication of the declaration under section 6. The respondents, contending that according to the maxim of the English law (already noticed) they had become the owners of the buildings erected on their land (as they stood at the date of the publication of the declaration up to which date their ownership in the land continued), claimed compensation for the land with the buildings thereon. Their Lordships of the Privy Council held that the English law 'recognises the principle that the incidents of land are governed by the law of its site' and that this being the Muhammadan law in Zanzibar, the case was governed by the Muhammadan law. Following the text of the Hedaya:—"If a person usurp land and

(1) I.L.R., 26 Bom., 1.

plant trees in it or erect a building upon it, he must in that case be directed to remove the trees and clear the land and to restore it to the proprietor. If removal . . . . be injurious to the land, the proprietor of the land has the option of paying to the proprietor of the trees or the building a compensation equal to their value and thus possessing himself of them, because in this case, there is an advantage to both and the injury to both is obviated" (Hamilton's 'Translation,' Vol. III, Book 37, page 539)—they held that the respondent Company had not become the owners of the buildings on their land at the date of the publication of the notice (under section 6 of the Land Acquisition Act). Their Lordships then point out that according to the Hedaya the compensation to which the person who erected the building would be entitled is only the value of the materials of the building (after it is demolished), because he is not at liberty to have the building on the ground but only to remove and carry away the materials.

Thus both under the Hindu and the Muhammadan law—and it may here be observed that the parties to the present suit are Muhammadans—and the common law of the land (as laid down by the Full Bench of the Calcutta High Court in *In the matter of the petition of Thakoor Chunder Paramanick*(1), a tenant who erects a building on land let to him can only remove the same and not claim compensation for it on eviction by the landlord.

When the Transfer of Property Act was enacted, this rule was adopted by the Legislature in section 108 (*h*). The section provides, *inter alia*, that in the absence of a contract or local usage to the contrary, the lessee must not without the lessor's consent erect on the property (leased) any permanent structure (except for agricultural purposes) [clause (*p*)], that the lessee may remove at any time during the continuance of the lease all things which he has attached to the earth [clause (*h*) and *vide* definition of 'attached to the earth' in section 3] and that on the determination of the lease the lessee is bound to put the lessor into possession of the property in as good a condition as it was in at the time when he was put in possession [clauses (*q*) and (*m*)]. It will thus be seen that the prohibition in clause (*p*) against the construction of permanent structures on the land (except for agricultural purposes) does not apply when, according to the contract of the parties, the land

(1) B.L.R., Supp. Vol., F.B.R., 595 at p. 597.

is let for the erection of a dwelling house or shop thereon (as in the present case) and that under clause (*p*) buildings erected on the land by the lessee may be removed during the term of the lease and that under clauses (*q*) and (*m*) the lessee should, on the determination of the lease, restore the land to the lessor in the state in which it was at the time of the letting. Even if the building erected on the land demised be one contemplated and sanctioned by the lease, the above provisions will be applicable thereto unless there is a contract or local usage to the contrary—(such as) that the lessee shall, on eviction, be entitled to compensation for the building or that he shall, with or without compensation, restore the land let to him with the building that he may have erected thereon during the continuance of the lease.

The rules laid down by the Transfer of Property Act thus substantially reproduce the law as it stood before the Act. It is, however, noteworthy that clause (*h*) of section 108 only provides for the tenant removing, 'during the continuance of the lease,' all things which he may have attached to the land, and nothing is said as to the rights of the parties in respect of such things after the determination of the lease, if they have not been already removed by the tenant. The question may arise whether the tenant forfeits all his rights in such things if he has not so removed them; and in the absence of any contract on that point, the question will have to be solved with reference to 'local usage,' whatever may be the precise sense in which that expression is used in section 108. According to the customary or common law of the land, as laid down in *In the matter of the petition of Thakoor Chunder Paramanick*(1), the option in such cases will be with the lessor either to take the building on paying compensation, or, if he is unwilling to pay compensation, to allow the tenant to remove the building—the measure of compensation (in the former case), according to the Muhammadan law as laid down in the Hedaya, being the value of the materials (after the building is demolished)—a juristic principle as logical and refined as, in the great majority of cases, it is advantageous to both parties by obviating injury to either and at the same time preserving the building. As already observed, the first respondent in the present case, however, allows the appellants to remove the building.

(1) B.L.R., Supp. Vol., F.B.R., 595 at p. 597.

The preponderance of case law on the subject is also decidedly against the appellant's contention. In a case arising in Calcutta between landlord and tenant (*Parbutty Bewah* v. *Woomatara Dabee*(1)), it was held that the custom was for tenants to remove the structures erected by them and that such custom had its origin in the Hindu and the Muhammadan laws as explained in *In the matter of the petition of Thakoor Chunder Paramanick*(2). In *Russickloll Mudduck* v. *Lokenath Kurmokar*(3) Wilson, J., held that the relation between landlord and tenant (in the Presidency Town of Calcutta) being one of 'contract and dealing between party and party' within the meaning of section 17 of 21 Geo. III, c. 70, was governed by the Hindu or the Muhammadan law, as the case may be—the Indian Contract Act not being inconsistent with it in this respect—and that the ruling of the Full Bench in *In the matter of the petition of Thakoor Chunder Paramanick*(2) as to the removal of the buildings erected by the tenant was applicable to Calcutta. In *Juggut Mohinee Dossee* v. *Dwarka Nath Bysack*(4), however, Garth, C.J., and Pontifex, J., while holding that the ruling in *Paramanick's Case* would be applicable to Calcutta in cases arising between landlord and tenant, held that in cases arising in Calcutta between an owner of land and a trespasser erecting buildings upon it, the High Court was bound by the express language of the charter to administer the law of 'equity and good conscience' as administered by the Supreme Court, which generally speaking was 'the self-same law of equity administered in the English Courts of Equity' and that therefore, the building became the property of the owner of the land. The ruling in *Paramanick's Case* has been approved by the Calcutta High Court in a recent decision in *Ismail Khan Mahomed* v. *Jaigun Bibi*(5).

In *Shaik Husain* v. *Govardhandas Parmanandas*(6) it was held in the case of a yearly tenancy (in the town of Bombay) that there was "no authority for holding that a tenant who erects buildings on a demised land is entitled to compensation on being evicted on the termination of his tenancy' and that such claim for compensation is impliedly negatived by his right to remove such buildings—a right not only established by judicial decisions but also now enacted by the Legislature in section 108 (*h*) of the Transfer of

(1) 14 B.L.R., 201.
(2) B.L.R., Supp. Vol., F.B.R., 595 at p. 597.
(3) I.L.R., 5 Calc., 688.
(4) I.L.R., 8 Calc., 590.
(5) I.L.R., 27 Calc., 570 at p. 586.
(6) I.L.R., 20 Bom., 1.

Property Act. It would seem that in this case also, as in the present case, the land was demised for building purposes. In *Beni Ram* v. *Kundan Lal*(1) there was a lease, given in 1858, of six bighas of land for a term of years (ending with the then current revenue settlement of the mouzah in which the land leased was situate), for the construction thereon of a saltpetre factory. During the term of the lease, the tenant, after the completion of the factory, and, in fact, after it had ceased to exist, erected houses on the land, at a considerable cost, with the knowledge of and without any interference or objection on the part of the landlord. A suit in ejectment, brought after the termination of the lease, was dismissed by the Indian Courts (including the High Court on second appeal) on the ground that the landlord stood by and acquiesced in the erection of the permanent structures. On appeal (by special leave) their Lordships of the Privy Council, in reversing the decrees of the Courts below and passing a decree in ejectment, with liberty to the tenant to remove the houses built on the land, observed that "in order to raise the equitable estoppel which was enforced against the appellants by both the Appellate Courts below, it was incumbent upon the respondents to show that the conduct of the owner, whether consisting in abstinence from interfering, or in active intervention, was sufficient to justify the legal inference that they had, by plain implication, contracted that the right of tenancy under which the lessees originally obtained possession of the land should be changed into a perpetual right of occupation" (at page 502). They further drew attention, to the fact that the maxim of the English law '*Quicquid inaedificatur solo solo cedit*' has no application in India and that the established rule is that the lessee may remove at any time during the continuance of the lease all things which he has attached to the earth, provided he leaves the property in the state in which he received it; implying thereby that there is thus in India even less reason than in England, for raising a plea of equitable estoppel against the landlord in the case of a lease for a term of years. In *Venkatavaragappa* v. *Thirumalai*(2) it was held that where a tenant from year to year with the permission of the landlord sank wells in the land demised, he was not entitled, under the Hindu law, to any compensation therefor from the landlord, after the determination of the tenancy.

(1) I.L.R., 21 All., 496.
(2) I.L.R., 10 Mad., 112.

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In *Jugmohan Das* v. *Pallonjee*(1) it was held by Strachey, J., that a tenant who had erected buildings and effected improvements on land demised to him was not entitled to be paid their value on the determination of the tenancy merely because he had acted under a mistaken belief, shared by his landlord, that he had a larger interest (a lease for 999 years) than he really had (one from year to year).

The case principally relied on by the appellant's pleader is that of *Mahalatchmi Ammal* v. *Palani Chetti*(2). In that case, a piece of land had been demised as a house site with permission to erect a permanent building thereon. The lease was in writing and it was construed by the Courts as creating only a tenancy from year to year. The suit was brought by the lessor to recover the house site and compel the defendants to remove the building they had erected on the land. The lower Appellate Court passed a decree to the effect that the plaintiff should either pay to the tenant the value of the building and recover the site with the building on it, or sell the site to the defendants. On appeal preferred by the plaintiff to the High Court this decree was confirmed. The material portion of the judgment bearing on the question is as follows:—[HOLLOWAY, J.—"A piece of land of small value is granted as a house site. The resumption of such land at all is most uncommon; the general understanding is that the holding shall be in perpetuity at the fixed rent. The contract being in writing we are not at liberty to say that the tenancy is to endure beyond the term expressly fixed, but, following many cases, we are at liberty to say that the resumption shall be only upon the terms of the lessor compensating for the permanent improvements upon the land, and we are certainly not at liberty to say that in so deciding the Principal Sadr Amin is wrong."] [INNES, J.—"Plaintiff lets the land to defendant by an instrument in which it is expressly permitted him to erect permanent buildings. This instrument has been construed as a lease from year to year, and that construction has not been disputed in special appeal. It must, therefore, be taken to be what it has been found to be. But it is clear that it could not have been the intention of the parties that, after the defendant had gone to the outlay contemplated by the agreement of the parties, plaintiff should be at liberty to treat this as a lease

(1) I.L.R., 22 Bom., 1.

(2) 6 M.H.C.R., 245.

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from year to year and nothing more, and to eject defendant at any yearly term, with the almost total loss of the advantage to be derived from the money he has been induced, under the agreement, to lay out. For if this were so, all that defendant could do would be to pull his house to pieces and remove the materials which would not, of course, realize anything like the value of the building. I think, therefore, that the decision of the Principal Sadr Amin is in accordance with principle in decreeing that plaintiff, before ejecting defendant, must pay the value of the buildings."]

It is by no means clear what the "many cases" referred to as precedents by Holloway, J., are. They are probably cases the principle of which is enunciated in section 51 of the Transfer of Property Act relating to improvements made by the transferree of land, believing in good faith that he is absolutely entitled thereto—and the form of the decree (affirmed by the High Court) giving the option, to the owner of the property, (as in the class of cases referred to in section 51) either to buy the building or to sell the site to the tenant makes it all the more probable that the precedents which Holloway, J., had in view were such cases. The defendant in that case contended that the lease was a permanent one and not one from year to year, though the instrument was otherwise construed by the Courts. The terms of the lease are not set forth either in the report of the case or in the judgments. But if the lessee believed in 'in good gaith' [*vide* section 3, clause (20) of the General Clauses Act X of 1897]—as is probable from the circumstances adverted to in the judgment of Holloway, J.—that he had, in the property, the absolute interest of a permanent lessee and in such faith erected a permanent building on the site, the case would probably fall within the class of cases referred to in section 51 of the Transfer of Property Act (*Shaik Husain* v. *Govardhandas Parmanandas*(1); *cf. Jugmohan Das* v. *Pallonjee*(2)).

The decision of Innes, J., however, seems to proceed on a different principle. From the fact that the lease expressly permits the tenant to erect permanent buildings, the learned Judge apparently implies, as one of the terms of the contract of letting, that the lessor would not exercise his right of ejectment without paying

(1) I.L.R., 20 Bom., 1 at p. 7.

(2) I.L.R., 22 Bom., 1 at pp. 15 and 16.

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compensation for the buildings erected by the tenant. Whether the learned Judge would have implied such a term, if the lease had been not one from year to year, but one for a term of 20 years (as in the present case) or for a longer period, it is not possible to say. If such a term is to be annexed to the contract by implication, it will be difficult to make a distinction (in this respect) between leases for a short term and leases for a long term. With all deference it is not possible to hold that such a term can be annexed by implication. If there be a well-established usage to that effect, it will of course be an incident of the contract. But, as already shown, the customary law of the land is otherwise and Narada's text (verse 20 already quoted) refers specifically to the taking of land on lease for building purposes. If in the above case, the lessee had, as he might have, terminated the yearly lease shortly after he erected the building, could he have required the landlord to pay him the cost of the building or sell to him the land? The only difference between letting land without permission—either express or implied—to erect buildings thereon and letting the same with such permission, is that in the former case the lessee cannot under clause (*p*) of section 108, Transfer of Property Act, erect any permanent buildings on the land (except for agricultural purposes) and if he does so, a suit for a mandatory injunction for the removal of the building even during the term of the lease will lie (*Ramanadhan* v. *Zamindar of Ramnad*(1)).

It is unnecessary to refer to cases in which it has been held either that the leasehold tenure was a permanent one and therefore an ejectment would not lie, or that the conduct of the lessor was such as to raise an equitable estoppel in favour of the lessee for compensation on eviction (*vide Yeshwadabai and Gopikabai* v. *Ramchandra Tukaram*(2); *Dattatraya Rayaji Pai* v. *Shridhar Narayan Pai*(3)). In the present case the lease was for a definite term of 20 years with permission to build on the land and there can be no pretence that the lessee did or could believe in good faith that he had a permanent right in the property or that any conduct of the lessor, subsequent to the lease, has created an equitable estoppel against his evicting his tenant without compensation.

(1) I.L.R., 16 Mad., 407.
(2) I.L.R., 18 Bom., 66.
(3) I.L.R., 17 Bom., 786.

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The second appeal therefore fails and I would dismiss it with costs.

MOORE, J.—I concur in the conclusions arrived at by my learned colleague and in holding that this second appeal should be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Bhashyam Ayyangar.

1903. September 11.

PALANIAPPA CHETTI (COUNTER-PETITIONER), PETITIONER,

v.

ANNAMALAI CHETTI AND ANOTHER (PETITIONERS), RESPONDENTS.*

Criminal Procedure Code—Act V of 1898, s. 195—*Charter Act—Revocation of sanction—Power of High Court.*

Under sub-section (6) of section 195 of the Code of Criminal Procedure, a petition by way of appeal lies to the High Court in every case in which a Civil or Criminal Court subordinate to it, within the meaning of sub-section (7) (*a*) gives or refuses a sanction, whether in respect of an offence committed before it or of one committed before a Court subordinate to it, and, in the latter case, whether it gives a sanction refused by the Subordinate Court or revokes a sanction accorded by such Court.

Under clauses (*b*) and (*c*) of sub-section (1), the sanction may be accorded in the first instance by the Court to which the Court in which the offence was committed is subordinate, even though no application for sanction has been made to the latter Court. For the purposes of clauses (*b*) and (*c*) of sub-section (1), a sanction accorded by the High Court would operate as a sanction accorded by a Court subordinate to it, such as the District Court. An order passed by an Appellate Court is, in law, the order which ought to have been passed by the Subordinate Court, and will, in consequence, have the same efficacy and operation as the order which ought to have been passed by the latter.

Section 439 of the Code of Criminal Procedure provides that the High Court, as a Court of revision, may exercise the powers conferred on a Court of Appeal by section 195. In a case in which both the Original Criminal Court and the Appellate Criminal Court refuse sanction, the High Court, as a Court of revision, may call for the record and, if the refusal proceeds on an error of law, it may

* Civil Miscellaneous Petition No. 1319 of 1902, Civil Revision Petition No. 25 of 1903, praying the High Court to set aside the order dated 5th November 1902, passed by H. Moberly, District Judge of Madura, in Civil Miscellaneous Petition No. 173 of 1902.

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accord the sanction which ought to have been granted by the Appellate Criminal Court and such sanction will be operative for the purposes of clauses (*b*) and (*c*) of sub-section (1).

A plaintiff in a suit applied for attachment before judgment and filed an affidavit in support of that application in which he stated that the defendants intended to alienate their properties with *mala fide* intentions. He did not state in the affidavit that this statement was based on what he had been told. He was, however, orally examined, and then deposed that he had heard that the defendants were intending to alienate property. The petition was dismissed. Thereupon sanction was asked for, the Subordinate Judge according sanction only for an offence under section 199 of the Indian Penal Code, and refusing sanction for offences under sections 193, 196 and 200. The sanction accorded was not based on the oral evidence but on the statement in the affidavit. The defendants appealed (under section 195 of the Code of Criminal Procedure), against the refusal to grant sanction for offences under sections 193, 196 and 200, to the District Judge, who accorded sanction for the prosecution of the petitioner under those sections also:

Held, on revision, that the District Judge had not exercised a sound discretion in according the sanction, for although the petitioner had not stated in his affidavit that the statements therein were made on hearsay, he had stated so in his oral evidence and the affidavit was not inconsistent with that evidence.

Whether a Village Magistrate is a magistrate within the meaning of section 197, clause (*a*) of the Code of Civil Procedure, as that expression is defined in the Imperial General Clauses Act.—*Quære.*

PETITION praying for the revocation of sanction accorded by the District Court for the prosecution of petitioner. The facts are fully set out in the judgment.

V. Krishnaswami Ayyar, *P. R. Sundara Ayyar* and *K. Jagannada Ayyar* for petitioner.

T. Rangachariar for respondents.

JUDGMENT—*In Civil Miscellaneous Petition No.* 1319 *of* 1902.—This purports to be a petition presented under section 195, Criminal Procedure Code, praying for the revocation of a sanction given by the District Judge of Madura for the prosecution of the petitioner for alleged offences under sections 193, 196 and 200 of the Indian Penal Code, which sanction had been refused by the Subordinate Judge's Court of Madura (East) in which it is alleged that the offences were committed. The respondents' pleader takes the preliminary objection that no petition lies to this Court under section 195, Criminal Procedure Code, inasmuch as the application for sanction has been considered and dealt with both by the Subordinate Judge's Court and the District Court, to which alone the Subordinate Judge's Court is 'subordinate' within the meaning of sub-section 7 (*a*) of section 195, Criminal Procedure Code. Taking

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the converse of the present case, viz., a case of sanction having been given by the Subordinate Judge's Court and the same being revoked by the District Court under sub-section (6), he argues that the sanction prescribed by clauses (*b*) and (*c*) of sub-section (1) is a sanction to be accorded either by the Court in which the offence was committed or by the Court to which such Court is 'subordinate' within the meaning of sub-section 7 (*a*), that therefore a sanction accorded by the High Court in cases in which the offence was committed in a Court not 'subordinate' to it within the meaning of sub-section 7 (*a*), will be inoperative, that sub-section (6) is controlled by clauses (*b*) and (*c*) of sub-section (1), and that it should therefore be held that sub-section (6) does not contemplate a petition by way of appeal to the High Court in such cases. If this contention were well founded, it would no doubt follow that a petition to the High Court would not lie under sub-section (6) in the present case simply because the relief sought is the revocation of a sanction accorded by the District Court and not the granting of a sanction refused by the District Court. We are clearly of opinion that the argument advanced on behalf of the respondents is untenable and that under sub-section (6) a petition by way of appeal lies to the High Court in every case in which a Civil or Criminal Court subordinate to it within the meaning of sub-section 7 (*a*) gives or refuses a sanction whether in respect of an offence committed before it or of one committed before a Court subordinate to it, and in the latter case, whether it gives a sanction refused by the Subordinate Court or revokes a sanction accorded by such Court. Under clauses (*b*) and (*c*) of sub-section (1), the sanction may be accorded in the first instance by the Court to which the Court in which the offence was committed is subordinate even though no application for sanction has been made to the latter Court. The contention that for purposes of clauses (*b*) and (*c*) of sub-section (1) a sanction accorded by the High Court would not operate as a sanction accorded by a Court subordinate to it, viz., the District Court is manifestly untenable and proceeds on a misapprehension of the jurisdiction exercised by an appellate tribunal. An order passed by the Court of Appeal is in law the order which ought to have been passed by the Subordinate Court and will therefore have the same efficacy and operation as the order which ought to have been passed by the latter. A reference to section 439 of the Code of Criminal

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Procedure places the matter beyond all doubt. That section expressly provides among other things that the High Court, as a Court of revision, may exercise the powers conferred on a Court of Appeal by section 195. In a case in which both the Original Criminal Court and the Appellate Criminal Court refuse a sanction, the High Court, as a Court of revision, may call for the record and if the refusal proceeds on an error of law, it may accord the sanction which ought to have been granted by the Appellate Criminal Court and such sanction will of course be operative for purposes of clauses (*b*) and (*c*) of sub-section 1. We therefore overrule the preliminary objection and proceed to dispose of the petition on the merits.

The petitioner in a suit brought by him for about two lakhs of rupees against the respondents and others applied under section 483, Civil Procedure Code, for an attachment before judgment and in an affidavit which was filed in support of the petition he declared "that the defendants 1 to 11, without having good intention but with bad intention, were attempting to dispose of the immoveable properties belonging to them by alienation or otherwise." The petitioner was examined *viva voce* in support of his petition and deposed in his examination-in-chief that the defendants were, he heard, going to alienate their immoveable properties and in cross-examination stated that he knew this only from hearsay but could not remember the names of the persons who said so. The petition was dismissed. This application for sanction to prosecute was then brought and the Subordinate Judge granted sanction only for an offence under section 199, Indian Penal Code, and refused sanction for offences under sections 193, 196 and 200 of the Indian Penal Code, for reasons which it is unnecessary to go into. The sanction was not based upon any statement made by the petitioner in his oral evidence but upon the above-mentioned declaration made by him in his affidavit. The respondents preferred an appeal to the District Judge under section 195, Criminal Procedure Code, against the refusal of the Subordinate Judge to accord sanction under sections 193, 196 and 200, Indian Penal Code. The District Judge, holding that a Village Magistrate is a Magistrate within the meaning of clause (*a*) of section 197, Civil Procedure Code, accorded sanction for the prosecution of the petitioner, also under the above sections of the Indian Penal Code.

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We are clearly of opinion that the District Judge did not exercise a sound discretion in according sanction for the prosecution of the petitioner. Although in his affidavit he did not state that he based his statement made therein upon hearsay, yet the declaration in his affidavit is not inconsistent with his having based it upon hearsay, and in his examination as a witness he clearly stated in his examination-in-chief itself that his statement was based upon hearsay and the sanction sought for and accorded is not for having falsely deposed as a witness. The interests at stake in the suit were considerable and there is nothing whatever on the record to show that he acted dishonestly in applying for attachment before judgment and we do not think that the ends of justice demand that he should be prosecuted for the statement he made in his affidavit which statement it is clear he made only on hearsay. We therefore set aside the sanction granted by the District Judge for offences under sections 193, 196 and 200 of the Indian Penal Code.

Civil Revision Petition No. 25 *of* 1903.—This is a petition to set aside the sanction granted by the Subordinate Judge of Madura (East) for the prosecution of the petitioner under section 199 of the Indian Penal Code, which sanction was affirmed by the District Judge.

It is needless to repeat the facts which led up to this sanction as they have already been stated in our judgment in Civil Miscellaneous Petition No. 1319 of 1902.

It is unnecessary to consider and decide whether, as held by the District Judge, a Village Magistrate in this Presidency is or is not a Magistrate within the meaning of section of 197, clause (*a*), Civil Procedure Code, as that expression is defined in the Imperial General Clauses Act (Act I of 1868 and Act X of 1897) for we find that the affidavit in question was sworn to before a Village Munsif who perhaps is also a Village Magistrate and the expression "Village Munsif" is defined in the Madras Village Courts Act, 1888, as the Judge of the Court of a Village Munsif established under that Act and under clause (*a*) of section 197 of the Civil Procedure Code "any Court may administer the oath of the declarant" to an affidavit. Under sections 195 and 483, Civil Procedure Code, evidence may be given by affidavit in support of an application for attachment before judgment and if such affidavit is intended to be used in a judicial proceeding before a Court of Justice and the

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declarant has made a statement therein that is false to his knowledge touching any point material to the object for which the affidavit is to be used, the declarant will be guilty of an offence under section 199, Indian Penal Code. We cannot therefore hold that the Courts below acted illegally or with material irregularity in the exercise of their jurisdiction within the meaning of section 622, Civil Procedure Code, in granting and upholding the sanction for an offence under section 199, Indian Penal Code, and if the matter to which the sanction relates had not come before us on its merits in Civil Miscellaneous Petition No. 1319 of 1902 in which we have just held that the case was one in sanction for a criminal prosecution ought not to have been granted, we should have simply rejected this petition and should not have thought it necessary to exercise the extraordinary power of superintendence conferred on this Court by section 15 of the Charter Act.

As however we have already had to quash the sanction accorded in the same matter, though under different sections of the Indian Penal Code, we think it right and proper that in this case also, in exercise of our powers under section 15 of the Charter Act, we should set aside the sanction granted and we accordingly do so.

APPELLATE CIVIL.

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

1903. August 11, 12, 13, 28.

TOTTEMPUDI VENKATARATNAM (PLAINTIFF), APPELLANT,

v.

TOTTEMPUDI SESHAMMA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu law—Will by member of joint family—Nature of property bequeathed—Self-acquired or family property.

The question raised in a suit was whether certain property which a Hindu testator had purported to deal with by his will was his self-acquired property or was the family property of the testator and his son and grandson:

* Second Appeal Nos. 798 and 799 of 1901, presented against the decrees of W. C. Holmes, District Judge of Kistna, in Appeal Suit Nos. 342 and 314 of 1900, presented against the decree of S. Gopala Chariar, Subordinate Judge of Kistna, in Original Suit No. 7 of 1899.

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Held, that the separate property of the testator would be (1) property acquired by his own exertions, (2) without the aid of family funds, (3) which he did not mix with family property with the intention of adding it to the family funds. *Also*, that a statement contained in the will was not evidence on the question whether the property dealt with by the will was or was not self-acquired; nor was the conduct of the testator's son in not objecting to the will; nor was a so-called reference to arbitration by the son and grandson.

The fact that the property in the hands of the testator had increased during a long period to a considerable value from a small nucleus of family property was not sufficient to rebut the presumption that it was all family property. *Ramanna v. Venkata*, (I.L.R., 11 Mad., 246), distinguished and explained.

SUIT for a declaration of the invalidity of a will, and for the recovery of property dealt with by the will. T. Subbayya died in 1897 having married two wives by whom he had issue as follows:—By his first wife (since deceased), two sons, the elder of whom predeceased him, and the younger of whom was now impleaded as sixth defendant. Plaintiff, who was the natural son of sixth defendant, claimed that he had been adopted to the elder son, by his widow. By the second wife (who survived the testator and was impleaded as first defendant), Subbayya left four daughters, who were impleaded as defendants Nos. 2 to 5. Subbayya left a will (exhibit VI) in the following terms:—

"I married two wives. Of them, the first wife had two sons; and of these, the elder named Punnayya, lived 25 years, was married and died without issue about 20 years ago; his wife named Pichamma is living in her parent's house. My second wife, the said Seshamma, has four daughters, named (1) Chukkamma, (2) Mahalakshmi, (3) Sowbhagyam and (4) Manikyam. Besides this, there is no other male issue. Out of the said daughters, I performed only the marriages of the first and second daughters. I possess all the properties mentioned in the schedules hereto annexed, viz., immoveable properties—the dry seri lands remaining under my rightful enjoyment in . . . villages, house-sites, houses, etc., in the said Yerlagadda village, and the house-sites, thatched houses, etc., in villages; moveable properties—cattle, utensils, carts, debts due to me from others and cash on hand. One (fourth) part of this immoveable property is my ancestral property, and the other three parts of immoveable and the entire moveable property is my self-acquisition. There are no debts due by me to others. The particulars of division I intend making of my property in the villages aforesaid are:—Since, out of the said property, three parts of immoveable property and the entire moveable property are my

self-acquisitions, since my second wife has no male issue and since her daughters are very young and their ceremonies (marriages, etc.), have yet to be performed, the property mentioned in the schedule annexed hereto out of the said property is given to my second wife Seshamma with powers of gift, sale, etc., for the marriages and other auspicious ceremonies of girls whose marriages have yet to be performed, for the maintenance of the said girls and for your maintenance throughout your life-time, so that you shall give the same in equal shares to your four daughters after your death. The property mentioned in the schedule annexed hereto is given away to my son Veerayya with powers of gift, sale, etc. The costs to be incurred for my funeral rites after my death shall be defrayed out of the whole estate. It is arranged that Venkataratnam, the three years old son of my younger son Veerayya, should be given in adoption to Pichamma, the widow of Punnayya, the elder son of my first wife, and that a fourth of the schedule mentioned property assigned to Veerayya should be given to that boy, and that the said property should remain in Veerayya's charge during the minority of the said boy."

It appeared that defendants Nos. 1 and 6 had, by exhibit VII, empowered the defendants' eighth witness to settle the disputes between them with reference to the will and the division of the properties. He made an award which followed the directions in the will and assigned certain properties to first defendant and others to sixth defendant. The first defendant was awarded about one-fourth of the immoveables and a little over one-third of the moveables and outstandings. The remaining properties were allotted to sixth defendant. Plaintiff sought to establish his own and sixth defendant's right to the whole of the properties left by Subbayya and he asked for a declaration that neither the will nor the submission to arbitration nor the award affected their rights. The third issue raised the question whether the properties in question (except some 16 acres) were the self-acquired properties of Subbayya or the common family property; and the fourth had reference to the validity of the will. The Subordinate Judge found that the entire property held by Subbayya at the time of his death was the joint property of himself, his son (sixth defendant) and his grandson (plaintiff). He said it was "true that from small beginnings Subbayya expanded the dealings to so large a sum as Rs. 20,000, but this was really the work of over

half a century, for he was 75 years old when he died." He said there had been a considerable nucleus of property to start with, and there was no evidence of the existence and application of separate funds of Subbayya for the purchase of new properties, or for the carrying on dealings, and that what had been so acquired had never been kept apart. He found that the product was joint family property and was ancestral in Subbayya's hands. On the fourth issue he held that the defendants could not claim under the will of an undivided coparcener. He gave plaintiff a decree for partition and possession of a half share in all the immoveable property, and he gave plaintiff and sixth defendant the whole of the jewels and cash.

Defendants Nos. 1 to 5 appealed to the District Judge, who said :—"The main question of fact is whether Subbayya possessed any and how much self-acquired property. The lower Court did not discuss fully the evidence on the point and although this appeal was argued at vast length, the facts were not brought out clearly, perhaps this was unavoidable. So there is no little difficulty in dealing with the question. The law on the point I take to be thus: Subbayya's separate property would be property (1) acquired by his own exertions, (2) without the aid of family funds, and (3) which he did not mix with family property intending to add it to the family funds. The lower Court considered that Subbayya left no self-acquired property. In coming to this conclusion the lower Court did not take into consideration what Subbayya stated in his will. It is contended for the appellant in Appeal Suit No. 314 of 1900 that what Subbayya stated is evidence under section 32, clauses 2 and 7 of the Evidence Act, and for the respondent it is contended that the statement is a statement of a fact in issue and not merely of a relevant fact and so cannot be taken into consideration (*Patel Vandravan Jekisan* v. *Patel Manilal Chunilal* (1)) and the wording of the section is relied on. What Subbayya stated in his will was this. He stated in paragraph 2 and in schedules referred to in the paragraph what property he had possession of and stated 'one-fourth of this immoveable property is 'my patrimony and the remaining three-fourths of the immoveable 'property and all the moveable property is my self-acquisition.' Section 32 of the Evidence Act allows statements of 'relevant facts'

(1) I.L.R., 15 Bom., 565.

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to be considered, but does not say that statements of 'facts in issue' can. It is contended that 'relevant facts' as used in section 32 includes 'facts in issue,' but that was not the view taken in *Patel Vandrawan Jekisan* v. *Patel Manilal Chunilal*(1). The third issue as framed was 'whether the properties in question except some 'eight acres form the self-acquisition of Subbayya or the common 'family property.' Some eight acres of the plaint property admittedly formed part of the family property. As to the rest of the plaint property the issue, I think, should have been, was it the common family property? The plaintiff's right to recover depends on his proving that it is. If it is not, the plaintiff cannot recover. In Subbayya's hands the property was either his private property or his family property. All the defendants admit is that Subbayya had some family property. No presumption can be made under the Evidence Act, I think, that all Subbayya's property was family property. On the issue that, as I think, arises on the pleadings, the statement in Subbayya's will to which I have referred is admissible. I would attach great weight to what Subbayya said in his will because he was really the only person who probably knew personally how the property was acquired. The statement of Subbayya in his will does not stand alone. The statement was not made in secret. The will was written by the family gumastah and was attested by the village munsif and curnam and several others. Subbayya's son, the sixth defendant, was with him when he made his will and his conduct in not objecting, is an admission by conduct of the correctness of the statements made in the will. Besides, the karar exhibit VII is to my mind the clearest admission by the sixth defendant of the right of defendants Nos. 1 to 5 to the share bequeathed to them. All that was referred to the arbitrator, was what property should be given to defendants Nos. 1 to 5 to satisfy their claims. This reference is an admission of the rights of defendants Nos. 1 to 5 under the will and that is equivalent to an admission of Subbayya's right to bequeath property to those defendants and the only right to bequeath would be because Subbayya had self-acquired property. The evidence of the statement in Subbayya's will that all but certain portions of his property was his self-acquired property taken with the conduct of the sixth defendant in not objecting to the assertion in

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the will and his conduct in executing the karar VII, seems to me to be evidence of the strongest possible kind that Subbayya had self-acquired property."

In the result he found that, with the exception of the immoveable property which was admitted to be ancestral, none of the property was Subbayya's family property. He found the award was binding on all the members of the family, and dismissed plaintiff's suit.

Plaintiff preferred this second appeal.

The Advocate-General (Hon. Mr. *J. P. Wallis*), *T. V. Seshagiri Ayyar*, *P. R. Sundara Ayyar* and *S. Rajagopala Ayyangar* for appellant.

V. Krishnaswami Ayyar and *K. Subrahmania Sastri* for first to third respondents.

JUDGMENT.—The first question for determination in these second appeals is whether the property which T. Subbayya purported to deal with by his will (exhibit VI) was the family property of the plaintiff and the sixth defendant or the self-acquired property of T. Subbayya. The Subordinate Judge held that the property in question was family property. The District Judge was of opinion that it was self-acquired. The will recites that one-fourth of the immoveable property dealt with by the will was ancestral property and that the whole of the moveable property was self-acquired. It is common ground that one-fourth of the immoveable property was ancestral. The District Judge, in paragraph 4 of his judgment, states correctly the law applicable to the question which he had to decide. He says: "The law on the point I take to be thus: Subbayya's separate property would be property (1) acquired by his own exertions, (2) without the aid of family funds, and (3) which he did not mix with family property intending to add it to the family funds." The District Judge was of opinion that these three conditions were satisfied. In coming to this conclusion he relied mainly (1) on the statement in Subbayya's will, (2) the conduct of Subbayya's son (the sixth defendant) in not objecting to the will, and (3) the so-called reference to arbitration by the first and sixth defendants embodied in exhibit VII.

In our opinion none of these matters is evidence upon the question whether the property dealt with by the will was ancestral or self-acquired. At the time the will was executed, the testator

would seem to have been under the honest belief that he had full disposing powers over the property on the ground that it was self-acquired; but the statement in the will that the property was self-acquired is clearly not evidence of the fact that it was self-acquired. As regards the conduct of the sixth defendant in not opposing the will, he no doubt, so far as he was capable of forming an opinion at all, shared Subbayya's belief that the property dealt with by the will was self-acquired; and his acquiescence was based on the supposition that Subbayya had full disposing power over the property.

As regards exhibit VII it is clear that at the time the so-called submission to arbitration was made, no question had arisen between the parties to the submission as to whether or not the testator had disposing power over the property. The so-called 'arbitrator' was appointed to divide the property in accordance with the provisions of the will. The submission to arbitration therefore carries the case no further than the statement in the will. The District Judge apparently attached little weight to the oral evidence and observed that the witnesses probably had but little personal knowledge of Subbayya's affairs. Here we agree with him. Eliminating, then, the matters upon which the District Judge based his conclusion, what is left to rebut the presumption that the property was family property except the fact that from small beginnings the property became something considerable, worth about Rs. 20,000? This is not enough. As the Subordinate Judge points out the growth of the property was the work of over half a century and was partly at least the product of the skill and labour of Subbayya's father; and, admittedly, there was a considerable nucleus of joint property to start with. We agree with the finding of the Subordinate Judge on the third issue and we think there was no evidence to support the finding of the District Judge.

It was contended on behalf of the respondents that even assuming the property to be family property, the disposition effected by the will could not be impeached by the plaintiff. It was argued that if such a disposition of family property had been effected *inter vivos* by Subbayya as the manager of the family, with the consent of the sixth defendant, the only adult member of the family, it would have been binding on the plaintiff, that the handing over of a proportion of the property for the maintenance and marriage expenses of Subbayya's second wife and the daughters

of his second wife, was an arrangement which it would have been reasonable and proper for him to have made, that it would have been competent to him to have made such a disposition of the property *inter vivos* in his capacity as managing member, and that being so, it was equally competent to make the disposition by the will. In the present case we feel no doubt that Subbayya made his will under the belief that he had full disposing power over the property. We hold that in law, he had no such power and for the purposes of this branch of the appellant's argument it was conceded he had no such power. But we are asked to presume that a man who, acting on the assumption that he could make any testamentary disposition he pleased with reference to his property, deals with that property by will, would have made the same disposition of his property *inter vivos* if he had been aware that his rights over the property were only those of the manager of an undivided family property. We do not think we are entitled to make any such presumption or to speculate what Subbayya would or would not have done if he had been aware that the property in question was, in law, not self-acquired but ancestral. This being so, it is not necessary for us to consider how far Mr. Krishnaswami Ayyar's proposition that, with reference to an ancestral estate, testamentary disposition stands on the same footing as a gift *inter vivos* is supported by the authorities. We may observe, however, that the general proposition in the judgment of the Privy Council in the case of *Baboo Beer Pertab Sahee* v. *Maharajah Rajendar Pertab Sahee*(1), "Decided cases, too numerous to be now questioned, have determined that the testamentary power exists, and may be exercised, at least within the limits which the law prescribes to alienation, by gift *inter vivos*" was made, as the context shows, with reference to self-acquired property, and that the authorities which go to show that as regards an undivided share of coparcenary property the powers of giving and bequeathing are co-extensive (see, for instance, *Court of Wards* v. *Venkata Surya Mahipati Ramakrishna Rao*(2) do not help the respondent, since the disposition which Subbayya purported to make by his will, cannot, in any view, be regarded as a disposition of an undivided share of family property. The will does not purport to deal with an undivided share but with the whole property.

(1) 12 Moo. I.A., 38. (2) I.L.R., 20 Mad., 167 at p. 183.

TOTTEMPUDI VENKATA-RATNAM v. TOTTEMPUDI SESHAMMA.

Mr. Krishnaswami Ayyar also contended that the award was binding on the plaintiff. The award is not binding on the plaintiff so far as the question before us is concerned for the reason, amongst others, that the question whether the lands were ancestral or self-acquired was no part of the subject-matter of the submission to arbitration or of the award. As has been pointed out, the arbitrator was appointed to divide the property in accordance with the provisions of the will.

The plaintiff's claim in this case was in the alternative. He asked that either he or his father (the sixth defendant) should be put in possession of the whole of the properties in question or alternatively, that he (the plaintiff) should be put in possession of a moiety of the properties after partition. The Subordinate Judge held that the plaintiff was only entitled to a moiety. The plaintiff appealed against the decree of the Subordinate Judge in so far as it only gave him a moiety. In his appeal to this Court the point that he is entitled to the whole is not taken in the grounds of appeal, but the question was argued before us. We think the Subordinate Judge was right. The sixth defendant also appealed against the decree of the Subordinate Judge in so far as it only gave a moiety of the lands to the plaintiff, and this appeal was dismissed. He appealed to this Court against the decree of the lower Appellate Court and then abandoned his appeal. As regards one undivided moiety the plaintiff is suing on behalf of his father. In these circumstances we think the plaintiff's case, in so far as he claims to be entitled to the whole, fails. In *Ramanna* v. *Venkata*(1) the son succeeded in setting aside an alienation, though an earlier suit brought by the father to set aside the same alienation failed, the result being that the father succeeded in recovering through his son what he could not recover himself and what he was estopped from recovering by a suit instituted in his own right. But this case is distinguishable. It appears from the papers in the case, though it is not made clear in the report, that the father's suit was to set aside the alienation, not on the ground that he had no power to alienate, but on the ground that he had been coerced into making the alienation. Second Appeal No. 798 of 1901 is, therefore, dismissed. We allow Second Appeal No. 799 of 1901, set aside the decree of the lower Appellate Court and restore the decree of

(1) I.L.R., 11 Mad., 246.

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the Subordinate Judge. The order as to costs in the Court of First Instance made by the Subordinate Judge will stand. Both in the lower Appellate Court and in this Court the plaintiff's case has been that he was entitled to the whole of the property in question. This being so, the parties will bear their own costs in this Court and in the lower Appellate Court.

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

BANDANU ATCHAYYA AND OTHERS (ACCUSED), APPELLANTS,

v.

EMPEROR, RESPONDENT.*

1903. September 15.

Criminal Procedure Code—Act V of 1898, ss. 366, 367—Mode of delivering judgment and its contents—Judgment written and delivered after conviction of prisoners—Defect vitiating conviction.

Where a judgment, in a criminal trial, was written and delivered some days after the prisoners were convicted and sentenced:

Held, that this was a violation of sections 366 and 367 of the Code of Criminal Procedure and was more than an irregularity. It was a defect which vitiated the convictions and sentences.

Queen-Empress v. *Hargobind Singh*, (I.L.R., 14 All., 242), approved.

CHARGE of murder. Three persons were charged with murder before a Sessions Judge and assessors. The assessors expressed the opinion that the accused were not guilty. The Sessions Judge found the first accused guilty of murder and passed the extreme sentence on him. He found the other two accused guilty of abetment of murder and sentenced them to transportation for life. The judgment was (as is found in the judgment of the High Court), written and delivered some days after the prisoners were convicted and sentenced.

The accused appealed.

V. Krishnaswami Ayyar and *V. Ramesam* for accused.

The Public Prosecutor in support of the conviction.

* Referred Trial No. 36 of 1903 referred by J. J. Cotton, Sessions Judge of Vizagapatam Division, for confirmation of the sentence of death passed upon the first prisoner in case No. 11 of the calendar for 1903. The second and the third accused preferred Criminal Appeal Nos. 436 and 437 of 1903.

BANDARU ATCHAYYA v. EMPEROR.

JUDGMENT.—In this case the judgment was written and delivered some days after the prisoners were convicted and sentenced. This is a violation of the provisions of sections 366 and 367 of the Code of Criminal Procedure. In our opinion it is more than an irregularity. It is a defect which vitiates the convictions and sentences. As to this we take the same view as that adopted by the Allahabad High Court in the case of *Queen-Empress* v. *Hargobind Singh*(1). In all the circumstances we think the proper course is to set aside the convictions and sentences and to direct that the accused be retried. The retrial will be held at the November Sessions of the Vizagapatam Court.

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice.

1903. August 25.

MOHIDEEN ABDUL KADIR AND OTHERS (ACCUSED), PETITIONERS,

v.

EMPEROR, RESPONDENTS.*

Criminal Procedure Code—Act V of 1898, s. 342—Examination of accused—Filling gap in prosecution evidence by questioning accused—Charge of defamation—Failure to prove making and publication—Irregularity.

Eight persons were charged with defamation by making and publishing a certain petition regarding the conduct of the complainant. Though other evidence was adduced by the prosecution, it was not proved that the accused made and published the matter which was alleged to be defamatory. The Magistrate, however, asked the accused if thay had signed the petition, and accepted their answers as proving that they had and as relieving the prosecution from proving the making and publication of the alleged defamatory matter by the accused. He convicted the accused:

Held, that the convictions must be set aside. A gap in the evidence for the prosecution cannot be filled up by any statement made by the accused in his examination under section 342 of the Code of Criminal Procedure. The omission to prove the making and publication of defamatory matter is more than an irregularity; it is a defect which vitiates the conviction.

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(1) I.L.R., 14 All., 242.

* Criminal Revision Case No. 141 of 1903 presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of H. Moberly, Sessions Judge of Madura, in Criminal Appeal No. 80 of 1902 confirming the conviction and sentence passed by J. R. Higgins, First-class Sub-Divisional Magistrate of Ramnad, in Calendar Case No. 29 of 1902.

MOHIDEEN ABDUL KADIR v. EMPEROR.

CHARGE of defamation. Eight persons were convicted of defamation because in a petition to the Collector of the District of Madura alleged to have been made and published by them, the complainant, a Hospital Assistant, was charged with having (inter alia) refused to give medicine to cholera patients except when the hospital was open. The convictions were upheld, on appeal, by the Sessions Judge, who, however, commented thus on the Magistrate's procedure:—

"I must invite the Magistrate's attention to one grave irregularity that he committed. It is a strict rule of law, that an accused person may not be examined except for the purpose of enabling him to explain any circumstances appearing in the evidence against him. On the 15th July the first four prosecution witnesses were examined. Not one of them proved that the petition that the Collector received had been signed or sent by the accused. So far as I can see there was absolutely no evidence on 15th July that the accused had by words intended to be read made or published any imputation concerning the Hospital Assistant and yet on that very day notwithstanding the provisions of section 342 of the Code of Criminal Procedure, the Magistrate examined all the accused and the first question he put to them was 'did you sign the petition?' A defamation case is a warrant case; it was necessary, therefore, that the prosecution should prove that the accused made or published an imputation regarding the Hospital Assistant and the Magistrate should not have remedied the flaw in the prosecution case by illegally examining the accused about a fact regarding which no evidence had been given. Appellants have not taken exception in their appeal memo. to the Magistrate's procedure. Had they done so, I should have been obliged to order a retrial."

The accused preferred this criminal revision petition.

Mr. *Chamier*, for petitioners, contended that the accused ought to have been acquitted as the prosecution had failed to prove the making and publishing of the libel by the accused. The Magistrate was not entitled to fill a gap in the prosecution evidence by questioning them and recording their statements under section 342 of the Code of Criminal Procedure. This was not a mere irregularity. He cited *Basanta Kumar Ghattak* v. *Queen-Empress*(1).

The Public Prosecutor in support of the conviction.

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(1) I.L.R., 26 Calc., 49.

MOHIDEEN ABDUL KADIR v. EMPEROR.

ORDER.—I interfere in this case with considerable reluctance having regard to the delay which has taken place, the judgment of the Sessions Judge having been given on 11th December 1902 and the revision petition not having been presented till 20th April 1903.

But notwithstanding the delay in the presentation of the revision petition, I do not think the conviction ought to be allowed to stand.

The Sessions Judge points out that there is no evidence of the making and publishing of the alleged defamatory statements by the accused. I am bound to accept this as true unless it could be shown that the Judge was wrong and that there was evidence of making and publishing. The Public Prosecutor is not in a position to show the Judge was wrong and as a matter of fact the record does not show any evidence of making and publishing by the accused. The Head Assistant Magistrate appears to have assumed that certain statements made by the accused in answer to questions put to them under section 342, Criminal Procedure Code, relieved the prosecution from the necessity of proving that the accused made and published the alleged libel. In this he was clearly wrong. If authority be needed, it is to be found in *Basanta Kumar Ghattak* v. *Queen-Empress*(1) where it was held that a gap in the evidence for the prosecution cannot be filled up by any statement made by the accused in his examination under section 342, Criminal Procedure Code. The Sessions Judge got over the difficulty by saying that no exception was taken to the "irregularity" in the memorandum of appeal to him. The omission to prove the making and publishing by the accused seems to me more than an irregularity. In my opinion it is a defect which vitiates the conviction.

The conviction and sentences must be set aside and the case must go back to the Head Assistant Magistrate for retrial.

(1) I.L.R., 26 Calc., 49.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Benson, Mr. Justice Bhashyam Ayyangar and Mr. Justice Russell.

CHINNIPAKAM RAJAGOPALACHARI AND ANOTHER (PLAINTIFF AND LEGAL REPRESENTATIVE), APPELLANTS,

v.

LAKSHMIDOSS (DEFENDANT), RESPONDENT.*

1903. October 20. November 16.

Rent Recovery Act (Madras)—VIII of 1865, s. 2—Attachment by landholder of tenant's immoveable property more than one year after rent due—Validity.

An attachment of a tenant's immoveable property, made more than one year after the date when the rent became due as specified in the patta tendered, is not within the time limited by section 2 of the Rent Recovery Act.

Appayasami v. *Subba*, (I.L.R., 13 Mad., 463), dissented from.

SUIT to set aside an attachment. The facts and the question raised are set out (by Sir Subrahmania Ayyar, Officiating C.J., and Boddam, J.) in the following

ORDER OF REFERENCE TO A FULL BENCH.—The question raised in this case is whether an attachment of the plaintiff's immoveable property more than one year from the time when the rent became due as specified in the tendered patta was in time. In the lower Court it was held to be in time on the authority of *Appayasami* v. *Subba*(1). This decision appears to have been followed in *Raja Papamma Row* v. *Duggirala Sembheswara Row*(2).

It is urged before us that the reasoning upon which the decision in *Appayasami* v. *Subba*(1) rests has been greatly weakened by subsequent decisions, viz., *Sriramulu* v. *Sobhanadri Appa Row*(3), *Venkatagiri Rajah* v. *Ramasami*(4), *Kumarasami Pillai* v. *President, District Board of Tanjore*(5), and see also *Sir Ramasami Mudaliar* v. *Annadorai Ayyar*(6).

* Second Appeal No. 673 of 1901, presented against the decree of A. C. Tate District Judge of Chingleput, in Appeal Suit No. 181 of 1900, presented against the decree of P. Krishna Rao Pantulu, District Munsif of Chingleput, in Original Suit No. 170 of 1900.

(1) I.L.R., 13 Mad., 463.
(2) Second Appeal No. 728 of 1899 (unreported).
(3) I.L.R., 19 Mad., 21.
(4) I.L.R., 21 Mad., 413.
(5) I.L.R., 22 Mad., 248.
(6) I.L.R., 25 Mad., 454.

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Moreover the decision in *Appayasami* v. *Subba*(1) seems hardly consistent with the language of sections 2 and 14 of the Rent Recovery Act.

If the view in *Appayasami* v. *Subba*(1) be strictly followed, it would not be easy to hold that a landlord is entitled to distrain moveable property within the fasli even though the rent had become due. There seems to be hardly any ground for holding that a landlord is not entitled in such circumstances to proceed for arrears due to him against moveable property and section 38 of the Rent Recovery Act would seem to imply that he has such a right.

We therefore refer to a Full Bench the question whether the proceedings against the immoveable property in this case were taken in time within the meaning of section 2 of the Rent Recovery Act.

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

P. S. Sivaswami Ayyar for second appellant.

Mr. *M. A. Tirunarayanachariar* and *V. C. Seshachariar* for respondent.

The Court expressed the following

OPINION.—Our answer to the question referred for our opinion is that the attachment of the plaintiff's immoveable property which was made more than one year after the date when the rent became due as specified in the patta tendered, was not within the time limited by section 2 of the Rent Recovery Act VIII of 1865. The decision in *Appayasami* v. *Subba*(1) is in direct conflict with the decision in *Thayamma* v. *Kulandavelu*(2) and we think that the view taken in the latter is correct.

Section 14 makes it perfectly clear that the rent, or any instalment of rent, is deemed an arrear of rent if it is not paid on the date on which it is payable according to the terms of the patta or custom; and it is not the less an arrear which accrued due on that date because the patta had not been tendered prior thereto, the tender being postponed to the end of the fasli or revenue year. Such tender is only a condition precedent to the institution of legal proceedings for the recovery of the arrear of rent. Though coercive process against the land is postponed by section 38 of the

(1) I.L.R., 13 Mad., 463. (2) I.L.R., 12 Mad., 465.

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Act until the expiration of the fasli, yet, under section 2, limitation runs from the date when the rent (or instalment of rent) sought to be recovered became an arrear under section 14.

We may add that no real hardship results from these provisions of the law as instalments do not in practice fall due during the first few months of the fasli, and the landlord has therefore a reasonably sufficient time after the end of the fasli to take proceedings even in regard to the earliest instalment in arrear.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Benson, Mr. Justice Bhashyam Ayyangar and Mr. Justice Russell.

PERIASAMI MUDALIAR AND ANOTHER (DEFENDANTS NOS. 3 AND 4), APPELLANTS,

v.

SEETHARAMA CHETTIAR AND TWO OTHERS (PLAINTIFFS), RESPONDENTS.*

1903. August 12, 13. December 7.

Hindu Law—Money due by and decree against father—Execution proceedings after death of judgment-debtor against family property in possession of sons refused—Suit by creditor against sons—Decree obtained—Effect of decree against father as creating debt binding on sons—Limitation Act XV of 1877, sched. II, arts. 52, 120—Limitation for suit against son on original debt or on decree.

Plaintiffs, in 1896, obtained a decree against the father of the present defendants, who died in 1897. Execution of that decree was refused as against the family property in the possession of the defendants. Plaintiffs, in 1899, instituted the present suit against defendants and obtained a decree. Questions having been referred to the Full Bench:

Held, (1) that independently of the debt arising from the original transaction, the decree against the father, by its own force created a debt as against him which his sons, according to the Hindu law, were under an obligation to discharge, unless they showed that the debt was illegal or immoral;

(2) that if the suit had been brought on the original cause of action the article of limitation applicable would have been the same as against the father, namely, article 52; but as the suit had been brought on the cause of action arising from the decree against the father the article applicable was 120.

Observations by Bhashyam Ayyangar, J., on the obligation of a son, under the Hindu law, to discharge debts incurred by his father.

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* Second Appeal No. 40 of 1902, presented against the decree of W. Gopalachariar, Subordinate Judge of Bellary and Salem at Salem, in Appeal Suit No. 186 of 1901, presented against the decree of K. Ramanathayyar, District Munsif of Salem, in Original Suit No. 700 of 1899.

PERIASAMI MUDALIAR v. SEETHARAMA CHETTIAR.

SUIT for money. The facts are sufficiently set out (by Subrahmania Ayyar and Boddam, JJ.) in the following

ORDER OF REFERENCE TO A FULL BENCH.—The present suit is for the recovery of money which in the first instance became due in respect of the purchase of certain goods. The purchases were made (speaking generally for the purposes of this case) in September 1894.

On the 12th November 1896 the plaintiffs obtained a decree against the father of the appellants alone. He died in 1897.

On proceeding to execute the decree against the family property in the possession of the appellants and other members of the family execution was refused.

The plaintiffs thereupon instituted the present suit on the 25th September 1899 against the undivided brothers of the deceased and his sons the appellants. As against the former the suit was dismissed, but the claim was decreed against the appellants in the lower Appellate Court.

The main question is whether the suit is in time.

The plaint, after referring to the original purchase and the subsequent proceedings, including the obtaining of the decree, treats the cause of action as having arisen on the date of the decree.

If in a case like the present the cause of action is to be taken as having arisen on the date of the original purchase, the question of limitation will depend upon which article of the Limitation Act applies to the case. In a suit as against the father, undoubtedly article 52 would have applied. It is contended that that article would not apply here and that article 120 is the only article applicable. *Natasayyan* v. *Ponnusami*(1), *Ramayya* v. *Venkataratnam*(2), and *Narsingh Misra* v. *Lalji Misra*(3), lay down that the latter article applies.

The case of *Abboyi Naidu* v. *Punrengammal*(4) decides the contrary and lays down in effect that the article applicable is that which would have applied to the suit against the father himself.

A further question which arises with reference to the question of limitation is whether exhibit R, which was a petition put in on behalf of the defendants by their vakil (one of the major defendants being described therein as the appellant's guardian, he,

(1) I.L.R., 16 Mad., 99. (2) I.L.R., 17 Mad., 122.
(3) I.L.R., 23 All., 206.
(4) C.M.A., No. 14 of 1900 (unreported).

PERIASAMI MUDALIAR v. SEETHARAMA CHETTIAR.

however, not having been appointed under the Guardians and Wards Act) in the course of the execution proceedings on the decree against the father after his death operates as an acknowledgment within section 19 of the Limitation Act as against the appellants who are minors.

In *Sobhanadri Appa Rau* v. *Sriramulu*(1), it was held that it was competent to a mother not appointed under any Act as guardian of her minor child to bind her child by acknowledging a debt on the part of the minor, provided that it is not barred by limitation at the date of such acknowledgment.

In *Annapagauda* v. *Sangadiyyapa*(2), it was held that a guardian appointed under the Guardians and Wards Act can sign an acknowledgment of liability in respect of, or pay part of the principal of, a debt, so as to extend the period of limitation against his ward in accordance with sections 19 and 20 of the Limitation Act, provided it be shown in each case that the Guardian's Act was for the protection or benefit of the ward's property. Whether in the case of a person not appointed as a guardian under the Guardians and Wards Act the *proviso* in the Bombay case would be held necessary does not appear to have been decided.

On the other hand it has been held in *Wajibun* v. *Kadir Buksh*(3), that a mother as natural guardian of her child has no authority to make an acknowledgment on behalf of the minor so as to give a fresh start for limitation.

As to the contention that the cause of action is to be taken as arising on the date of the decree—that is to say, if the right sued upon is not the original sale but a right created by the decree—it was urged that in circumstances like the present it is not open to the plaintiffs to found a cause of action on the decree. This has not been definitely considered and decided so far as we are aware although the case of *Ramayya* v. *Venkataratnam*(4) would seem to support this view.

Having regard to the importance of the questions involved and the conflict of authorities we refer for the consideration of the Full Bench the following questions:—

Whether independently of the alleged debt arising from the original transaction, the decree against the father by its own force

(1) I.L.R., 17 Mad., 221. (2) I.L.R., 26 Bom., 221.
(3) I.L.R., 13 Calc., 292. (4) I.L.R., 17 Mad., 122.

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creates a debt as against him, which his sons, according to the Hindu law, are under an obligation to discharge, unless they show that such debt was illegal or immoral?

What is the article of the Indian Limitation Act applicable to the suit against the son either upon the original debt or on the debt, if any, arising from the decree?

Whether a petition presented and signed by a vakil appointed on behalf of a minor representative of a deceased judgment-debtor by his natural guardian, in which there is an acknowledgment of the debt, is, within the meaning of section 19 of the Indian Limitation Act, an acknowledgment which would give a starting point against the minor?

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

Mr. *Joseph Satya Nadar* for appellants.

R. Subrahmania Ayyar for respondents.

The Court expressed the following opinion:—

BENSON, J.—With regard to the first question referred for our decision, it is difficult to see on what principle a judgment-debt due by a father should be less the subject of a pious obligation on the part of his son than any other debt due by the father. That the debt is not the same as the original debt seems clear. It may, in fact, be more, or it may be less. Even though it be more than the original debt, the father, by virtue of the judgment is bound to discharge it. A judgment of a competent Court creates a duty on the part of the father to discharge the sum decreed, and there is no reason why such a debt should be excepted from the rule of Hindu law which imposes a pious obligation on the son to discharge his father's debts, provided they were not incurred for what are technically described as immoral or illegal purposes.

I would, therefore, answer the first question in the affirmative.

As regards the second question, if the suit had been brought on the original cause of action the article of limitation applicable would have been the same as against the father, *i.e.*, article 52; but as the suit has been brought on the cause of action arising from the decree against the father the article applicable is 120. Article 122 has, in my opinion, no application, for the suit is not, in any view, "a suit upon a judgment." It is a suit to enforce a son's pious obligation under the Hindu law to discharge his father's

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debt. There is therefore no bar by limitation and there is no necessity to answer the third question in the reference.

BHASHYAM AYYANGAR, J.—Before answering the first and second questions referred to the Full Bench for its opinion it is desirable to state succinctly the substance of the course of judicial decisions defining the obligation of a son, under the Hindu law, to discharge debts incurred by his father. It has now been clearly established that though the son is not personally liable for such debts—either during or after the life-time of the father—yet his interest and share in the joint family property belonging to himself and his father is, equally with the father's share and interest in such property, liable for the father's debts during his life-time; and after his death the entire joint family property in the hands of the son is liable for the same. Such liability, however, does not attach to the son's share in the joint family property during the father's life-time or to any portion of the joint family property in the hands of the son, after the father's death, if the father's debt be one of the specified classes excepted by the Hindu law, such exceptions being generally referred to in judicial decisions—though not very accurately—as illegal or immoral debts. If the father alienates joint family property for the discharge of a debt—not illegal or immoral—due by him, or if such property is sold in discharge of such debt in execution of a decree passed against the father, the voluntary alienation or execution sale will bind the son's interest also in the property alienated or sold though he was not a party to the alienation or decree. If, however, the son has not joined in an alienation by the father or if a sale takes place in execution of a decree passed against the father only, it will be open to the son to contend that the alienation or sale does not affect his interest in the joint family property by showing that the debt in question of his father was one contracted or incurred by him for an illegal or immoral purpose and as such is not binding upon him.

Though during the father's life-time the suit could not be brought against the son only, for recovery of a debt due by the father, yet the son may be joined as a party defendant in a suit brought against the father and if the plaintiff succeeds in the suit against both the father and the son, a sale of joint family property which takes place in execution of such decree will bind the son also—though such decree cannot be executed against him personally—and he will be precluded from bringing a suit to contest the

sale on the ground that the debt was incurred for an illegal or immoral purpose—a plea which, if well founded, he *ought* to have advanced and established in the original suit, in which case the decree would have been passed against the father only and the suit would have been dismissed as against the son.

If the decree was obtained against the father only and the father dies before the decree is executed or fully executed, the decree can of course be executed against the son (under section 234 of the Civil Procedure Code) in his character as "legal representative" of the deceased judgment-debtor; and in that case only the separate or self-acquired property of the deceased father can be attached and sold as the property of the deceased which has come to the hands of the legal representative, but according to the course of decisions in this Presidency, the joint family property in the hands of the son could not be attached and sold either in whole or in part, the *ratio decidendi* of these decisions being that in executing the decree against the son on the death of the father, the question whether the debt is an illegal or immoral one cannot be raised in execution proceedings and that the decree can be executed against the son under section 234, Civil Procedure Code, only as the legal representative of his deceased father, who, equally with the father, will be bound by the decree, whatever may have been the character of the debt but who will be liable to satisfy the decree only to the extent of the "assets" of the deceased father, *i.e.*, his separate or self-acquired property, which have come to his hands.

In my opinion the result will be the same if, pending a suit brought against the father only, the father dies before decree and the plaintiff, instead of bringing a fresh suit against the son, as such, prosecutes the suit against him as the legal representative of his deceased father and obtains a decree against him in that character.

It has also been established by judicial decisions that notwithstanding that a decree has been obtained against the father, the creditor may after the father's death sue the son, subject of course to the law of limitation, upon the original cause of action—which, so far as the father was concerned has merged in the decree against him—and obtain a decree against the son for the debt due by the father or for so much thereof as has not been paid or recovered in execution of the former decree against the father himself, or (after his death) against the son in his character as legal representative, and that the period of limitation in respect of such a suit against

the son begins to run, not from the date of the death of the father but from the date from which limitation commenced to run against the father himself (*Mallesam Naidu* v. *Jugala Panda* (1)). In such a suit against the son, he can of course plead the illegal or immoral character of the fathers's debt, but if he fails to establish that defence and a decree is obtained against him it cannot be executed against him personally but only by attachment and sale of the whole or any portion of the joint family property in his hands.

The difficulty arises in cases in which such an action against the son, upon the original cause of action, is barred at the time of the death of the father, though the execution of the decree obtained against the father is not barred. This difficulty was sought to be overcome in the case of *Mallesam Naidu* v. *Jugala Panda*(1) by attempting to treat the suit against the son as a suit upon the judgment which had been obtained against the father—in which case the period of limitation would, under article 122, be twelve years from the date of the judgment. In that case the Division Bench which referred it for the opinion of a Full Bench on another point, overruled this contention on the ground that the sons not being parties to the judgment it was not binding upon them and they could not therefore be sued upon a judgment obtained against the father. As against the *judgment-debtor* himself or against his *legal representative* (who, as such, is equally bound by the judgment) it has long been held that under the Indian processual law the remedy is only by way of execution of the decree and that no suit could be brought upon the judgment (*Merwanji Nowroji* v. *Ashabai*(2)), and section 94 of the Presidency Small Cause Courts Act XV of 1882 expressly provides that no suit shall lie on any decree of the Small Cause Court, and this provision is directly applicable to the present case in which the judgment against the father was passed by the Presidency Court of Small Causes at Madras.

The principal question which has been referred to the Full Bench in this case is whether a decree for money against the father by its own force creates a debt, binding on the father, which his sons are under an obligation to discharge, unless they show that such debt was illegal or immoral. This question does not appear to have been ever before directly raised or considered, though the numerous cases in which a sale of joint family property in

(1) I.L.R., 23 Mad., 292. (2) I.L.R., 8 Bom., 1.

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execution of a decree for money against the father has been held to bind the son's share and interest therein really proceed on the footing that the decree-debt, as a debt of record, is binding upon the son and that therefore the sale is binding upon him and the onus has not been cast on the purchaser at such sale to prove and establish as against the son, independently of the judgment, the original antecedent debt or obligation in justification of the sale, as he would have had to do if there had been no judgment against the father but the father had made a voluntary sale of joint family property for the discharge of an alleged antecedent debt. In my opinion the first question referred to the Full Bench must be answered in the affirmative for the following reasons. As the decree-debt cannot be recovered from the son (after the death of the father) by executing the decree against him personally or in respect of joint family property in his hands and as it is always open to him to contend that the decree-debt is illegal or immoral and therefore it does not bind him, the reason why no suit could be brought against the father himself for recovery of the judgment-debt is inapplicable to a suit being brought against the son for recovery of the decree-debt. No doubt, as held in the order of reference in the case of *Mallesam Naidu* v. *Jugala Panda*(1) already referred to, a suit would not lie against the son on a judgment obtained against the father to which the son was no party and which, therefore, as a judgment could not bind him. But I can see no reason why a suit could not be brought against the son to recover a debt of record due by the father, which debt the father was under an obligation to discharge, quite independently of the cause of action or the alleged original debt on which the suit had been brought against him. Under the English law a judgment that the plaintiff shall recover, against the defendant, a sum of money as debt or damage or costs of suit, creates a debt which is therefore a debt or contract of record and a judgment for the defendant that he shall recover a sum of money for his costs of defence also creates a debt of record. Judgments of Courts not of record and judgments of Foreign and Colonial Courts create simple contract debts. (Leake on 'Contracts,' page 133.) Payment of these debts can be enforced not only by 'execution of the ordinary process of the Court' but also by an action of debt upon the judgment except in

(1) I.L.R., 23 Mad., 292.

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respect of judgments of the Statutory County Courts, in regard to which it has been held—as it has been held in India with reference to the judgments of all Courts governed by the Code of Civil Procedure—that an action upon the judgment would be inconsistent with the remedies on the judgment provided by the County Courts Acts. There is no reason whatever for holding that under the Hindu law judgments given by the Sovereign or by judicial tribunals established by him are less solemn or less obligatory by their own force than they are under the English Jurisprudence. A Hindu father, therefore, against whom a decree has been passed for a sum of money is under no less obligation—legal and religious—to obey the decree and discharge the debt thereby imposed upon him than to discharge debts 'contracted' by him; and the pious obligation of the son to discharge his father's debts extends as much to the one as to the other. The whole of the joint family property in the hands of the son must be held liable to satisfy the debt imposed upon the father by the judgment, as a solemn debt of record, quite independently of the original cause of action or alleged debt on which the suit against the father had been brought. In cases in which a cause of action against the father for a tort, may not survive him or, though surviving him, the tort committed by the father may be one in respect of which the son as such may not under the Hindu law be under a pious obligation to make good the damages out of joint family property, no suit could, on the death of the father, be brought against the son; but if a decree for damages had been obtained against the father in respect of such tort the amount awarded as damages would, subject to the exceptions under the Hindu law, be binding upon the son as a debt of record due by the father and on his death a suit could be brought against the son to enforce payment of the same out of joint family property in his hands though no suit could be brought against him on the original cause of action against the father. The decree against the father can of course, like any other decree against him, be executed against the son, in his character as legal representative to the extent of the separate or self-acquired property of the father which has come to his hands.

In cases, therefore, where a decree for money has been obtained against the father, but he dies before execution of the same, the creditor has, besides executing the same against the son as legal representative, the option of suing the son either on the original

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cause of action—if it be one in respect of which the son as such would be liable—or to enforce payment of the decree-amount as a debt of record due by the father. In the former case the judgment against the father cannot be relied upon by the creditor as binding the son and he must prove and establish the cause of action or the alleged debt just as if no such suit had been brought against the father and judgment obtained. In the latter case, the judgment as such would not bind the son and it will be admissible only to prove the existence of a judgment-debt due by the father at the date of the judgment; and the only defences open to the son will be either that the decree-debt is not one which is binding upon him—as being illegal or immoral under the Hindu law—or that the same has been discharged, whether such discharge (by payment or adjustment) has been recorded as certified (*vide* section 258, Civil Procedure Code) or not.

I need hardly add that it will not be open to the creditor, after the death of the father against whom he had obtained a judgment which has not been satisfied, to recover the amount twice over from the son both by suing him on the original cause of action and also on the judgment-debt, any more than he could at present recover the amount twice over by suing the son on the original cause of action and also by enforcing payment of the judgment-debt by executing the decree (obtained against the father) against the son in his character as legal representative. The same is the case under general law in respect of all joint and several liabilities in regard to which though judgment against one—which remains unsatisfied—is no bar to the recovery of judgment against any other or others of the debtors—there being a cause of action against each severally—yet the amount can be realized only once and the satisfaction in whole or in part of the decree against any one will in law operate as a satisfaction in whole or in part of the cause of action against each of the other debtors and, if any decree had been obtained against any of them, as a satisfaction, in whole or in part, of such judgment-debt also. (*Dhunput Sing* v. *Sham Soonder Mitter*(1). Leake on 'Contracts,' third edition, pages 377 and 780.)

Where the creditor sues the son on the original cause of action the law of limitation—including the article in the second schedule

(1) I.L.R., 5 Calc., 291.

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to the Limitation Act—applicable to such suit will be just the same as that which would be applicable to it if it had been brought against the father himself. This is conclusively established by the principle of the decision of the Court of Appeal in *Beck* v. *Pierce*(1). It was there held that the cause of action in respect of which a husband is liable for his wife's ante-nuptial debts is his wife's contract, not his own, and the statute of limitations had always been regarded as beginning to run in his favour as well as in his wife's from the time when the cause of action accrued against her and any acknowledgment or part payment by her before marriage kept her debt alive both against her and her after-taken husband. In the case of a contract, no doubt, the only person who can under the general law be ordinarily sued on it is the contracting party or his legal representative or in some cases his assign. But if a son is under the Hindu law under an obligation to fulfil the father's contract of debt, as a husband is under the English law to fulfil his wife's ante-nuptial contract of debt, the suit against the son or the husband is a suit on the contract just as much as a suit against the legal representative of a contracting party. It may be that the liability of the contracting party himself is unlimited but that of the son or the husband or the legal representative on the same contract is limited, in the case of the son to the extent of the joint family property in his hands, in the case of the husband to the extent of his wife's property which he may have acquired, and in the case of the legal representative to the extent of the assets of the deceased which may have come to his hands. But in all these cases the cause of action on which the son, husband or legal representative is liable to be sued is that against the father, wife or person represented respectively, and the law of limitation applicable is therefore the same.

In *Narasinga* v. *Subba*(2), however, it was held by this Court that a suit on a bond against the executant thereof and his sons was not, with reference to the provisions of Act XI of 1865, a suit of a nature cognizable by a Court of Small Causes, so far as it sought relief against the son. No reasons are stated in the judgment, but if, as contended by the respondents' pleader, the inference to be drawn from the judgment is that the suit, as against the sons, cannot be regarded as founded upon a 'contract' within the

(1) L.R., 23 Q.B.D., 316. (2) I.L.R., 12 Mad., 139.

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meaning of section 6 of Act XI of 1865, I am, with all respect, unable to concur in that decision.

The decision in *Beck* v. *Pierce*(1) (already referred to) is also decisive on the question that the recovery of a judgment against the father—which has however not been satisfied—is no bar to a subsequent suit against the son on the same cause of action.

Where the creditor however sues the son, not upon the original cause of action, but to recover the debt created by the decree (against the father) as a debt of record, the article of the Limitation Act applicable to the suit would be the residuary article No. 120, which prescribes a period of six years commencing from the time when the cause of action accrued. The cause of action for such a suit being the contract of record which imposed the decree debt upon the father, time will begin to run from the date of the judgment against the father unless the decree itself provided for payment of the decree-debt at a future date, in which case time will run from such date. It should, however, be borne in mind that the son is not legally bound to discharge the father's debt if it was not a subsisting debt at the date of the father's death. If therefore the execution of the decree against the father was barred at the date of his death the creditor cannot bring a suit against the son to enforce payment of the debt of record though the period of six years from the date of the judgment has not expired.

The answer to the second question therefore is that if the suit against the son is upon the original cause of action, the law of limitation applicable thereto is the same as that which would have applied to the suit if it had been brought against the father himself; but if the suit is for the recovery of the debt of record arising from the decree against the father, the article of the law of limitation applicable to it is No. 120 of the second schedule to Act XV of 1877.

As regards the third question referred to the Full Bench, it is admitted by both sides that in the view which we have expressed on the first and the second questions this question becomes unnecessary and as the point is one of considerable difficulty involving a consideration of several English and Indian decisions cited before us, I prefer to express no opinion on it in a case in which the question does not really arise, beyond observing that, for purposes of giving

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

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a fresh starting point for computing the period of limitation, payment of interest or part payment of principal by a receiver or guardian may stand on a different footing than an acknowledgment of liability made by him.

RUSSELL, J.—I concur.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Benson, Mr. Justice Bhashyam Ayyangar and Mr. Justice Russell.

PONNUSAMI MUDALI (DEFENDANT), APPELLANT,

v.

MANDI SUNDARA MUDALI (PLAINTIFF), RESPONDENT.*

1903. August 4.* October 15.

Civil Procedure Code—Act XIV of 1882, *ss.* 525, 540, 620—*Application to file an award—Registration as a suit—Award set aside—Application for revision—Maintainability—Right of appeal from order setting aside award.*

An application was made to file an award in a District Munsif's Court and was registered as a suit. The defendant appeared, and the District Munsif took evidence, whereupon, he refused to file the award and set it aside, being of opinion that the arbitrators had been guilty of misconduct in making the award. The applicant filed a civil revision petition in the High Court:

Held, (1) that the order refusing to file the award and setting it aside was a decree, and (2) that an appeal lay against that decree.

APPLICATION to file an award. Plaintiff had applied to the District Munsif of Vellore, under section 525 of the Code of Civil Procedure, to file an award made by two arbitrators, to whom plaintiff and defendant had referred certain differences. The application was registered as a suit, whereupon defendant appeared, upon notice, and opposed the filing of the award. The District Munsif took evidence and, being of opinion that the arbitrators had been guilty of misconduct in making the award, refused to file it and set it aside. The plaintiff then applied to the High Court for revision of the District Munsif's order.

* Appeal No. 20 of 1903 under section 15 of the Letters Patent against the judgment of Sir Arnold White, Chief Justice, dated 2nd February 1903, in Civil Revision Petition No. 267 of 1902, presented under section 622 of the Code of Civil Procedure to revise the decree of S. Raghunathaiya, District Munsif of Vellore, in Original Suit No. 359 of 1900, dated 31st March 1902.

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The case first came before the Chief Justice, who held that the circumstances referred to by the District Munsif as involving misconduct were mere informalities in the procedure of the arbitrators, that no misconduct on their part had been made out, and that, under section 526 of the Code of Civil Procedure, the District Munsif had no power to set aside the award. He reversed the order and directed the award to be filed.

Against that order, appellant filed this appeal, under article 15 of the Letters Patent.

Hon. Mr. *C. Sankaran Nayar* and *R. Sivarama Ayyar* for appellant.

V. Krishnaswami Ayyar for respondent.

The case came on for hearing before Subrahmania Ayyar and Boddam, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.—The respondent in this appeal applied to the District Munsif of Vellore, under section 525 of the Code of Civil Procedure, to file an award made by two arbitrators to whose decision the respondent and the appellant had submitted certain differences in connection with a partnership trade they had been carrying on.

The application having been registered as a suit, the appellant appeared upon notice and opposed the filing of the award. The District Munsif having taken evidence, and being of opinion that the arbitrators had been guilty of misconduct in making the award refused to file it and "set it aside."

The respondent then applied to this Court under section 622 of the Civil Procedure Code to have the order revised, and the learned Chief Justice came to the conclusion that the circumstances referred to by the District Munsif as involving misconduct were mere informalities in the procedure of the arbitrators, that no misconduct on their part was made out and that under section 526, Civil Procedure Code, the District Munsif had no power to set aside the award, and consequently reversed the order of the Munsif and directed the award to be filed.

In this appeal one point which arises for determination has reference to the nature and effect of the order of the District Munsif. If the said order was a decree within the meaning of the expression as used in the Civil Procedure Code and one appealable under the provisions thereof this Court would have no jurisdiction to interfere in revision.

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In *Mana Vikrama* v. *Kristnan Nambudri*(1) it was, no doubt, held that a decision whereby a Court refuses to file an award under section 526 is not a decree, but only an order against which the Code allows no appeal. The learned Judges based this view solely on the ground that the proceeding under section 525 is not in fact a suit—a ground, which, with all deference to the learned Judges, is obviously untenable, inasmuch as the section itself speaks of the proceeding, once the application is registered, as a suit and it is now established beyond controversy that such a proceeding is a suit though it be one commenced by an application and not by a plaint in the usual form. Our attention was also called to the following observation in *Gowdu Magata* v. *Gowdu Bhagavan*(2) tending to the same view :—"In the former case (*i.e.*, where the Court refuses to file the award) no right is conclusively negatived, for the award can be enforced by an ordinary suit" (see at page 300). But the suggestion thus made is in effect in conflict with the observations of the Judicial Committee in *Muhammad Nawaz Khan* v. *Alam Khan*(3) which clearly imply that any matter which is directly and substantially in issue and is determined in a proceeding under section 525 would be *res judicata* in any subsequent litigation between the same parties involving the same points.

Moreover, according to the *ratio decidendi* of the decision of the majority in the Full Bench case of *Mahomed Wahiduddin* v. *Hakiman*(4), an order such as that in question here is a decree; and the recent case of *Ghulam Jilani* v. *Muhammed Hassan*(5) relied on by the appellant shows that the Judicial Committee apparently take the same view. At page 58 of the report, their Lordships, dealing with the case of applications to file awards made out of Court, observe :—"Proceedings described as a suit and registered as such should be taken in order to bring the matter . . . . under the cognizance of the Court. That is or may be a litigious proceeding—cause may be shown against the application—and it would seem that the order made thereon is a decree within the meaning of that expression as defined in the Civil Procedure Code." And as at page 56 they say "the decisions of the Indian Courts on those provisions (viz., those of the Civil Procedure Code relating to arbitrations) are so conflicting that it may be useful to state the

(1) I.L.R., 3 Mad., 68.
(2) I.L.R., 22 Mad., 299.
(3) L.R., 18 I.A., 73.
(4) I.L.R., 25 Calc., 757.
(5) L.R., 29 I.A., 51.

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conclusions at which their Lordships have arrived on some of the disputed points brought to their attention in the course of the argument" the view stated in the passage quoted above has to be accepted as an actual decision by the Committee on the point dealt with. It, therefore, seems to us that the ruling in *Mana Vikrama* v. *Kristnan Nambudri*(1) on the point under consideration is erroneous.

Next, taking the Munsif's order in question to be a decree it seems to us to be clear that an appeal lay against it, for the prohibition against an appeal contained in the concluding part of section 522 has reference only to a decree passed on an award accepted as valid and cannot apply to an order amounting to a decree which neither rests on nor is made in accordance with an award but proceeds on the footing that there is no valid award. The cases of *Kombi Achen* v. *Pangi Achen*(2) and *Krishnan Chetti* v. *Muthu Palandi Vacha Makali Tevar*(3) are decisions relating to decrees passed in accordance with awards.

We, therefore, refer for the decision of the Full Bench the questions—

(1) Whether the order of the District Munsif, dated the 31st March 1902, refusing to file the award and setting it aside is a decree? and

(2) Whether an appeal lay against it?

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

Hon. Mr. *C. Sankaran Nayar* and *R. Sivarama Ayyar* for appellant.

V. Krishnaswami Ayyar for respondent.

The Court delivered the following

OPINION.—We think that the matter is practically concluded by the *dictum* of the Privy Council in the recent case of *Ghulam Jilani* v. *Muhammed Hassan*(4) that an order made on an application to file an award under section 525 of the Civil Procedure Code "would seem to be a decree within the meaning of that expression as defined in the Civil Procedure Code." This is a considered *dictum*, and is, we think, fully in accordance with the scheme and policy of the Code.

(1) I.L.R., 3 Mad., 68. (2) I.L.R., 21 Mad., 405.
(3) I.L.R., 22 Mad., 172. (4) L.R., 29 I.A., 51.

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The decision of the Privy Council in *Muhammad Nawaz Khan* v. *Alam Khan*(1) is not at variance with the above view. We think that the contrary view taken in *Mana Vikrama* v. *Kristnan Nambudri*(2) is erroneous.

Our answer to the reference made to us is (1) that the order of the District Munsif refusing to file the award and setting it aside is a decree, and (2) that an appeal lay against that decree.

The appeal came on for final hearing in due course before Sir Subrahmania Ayyar, Offg. C.J., and Boddam, J., when the Court delivered the following

JUDGMENT.—Following the ruling of the Full Bench, we reverse the order of the learned Chief Justice on the ground that an appeal lay and no revision petition could be heard.

Each party will bear his own costs in the revision petition as well as in this appeal.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Benson, Mr. Justice Bhashyam Ayyangar and Mr. Justice Russell.

SIVAGAMI ACHI (DEFENDANT No. 7—SEVENTH COUNTER-PETITIONER), APPELLANT,

v.

SUBRAHMANIA AYYAR (PLAINTIFF), PETITIONER, RESPONDENT.*

1903. October 30. November 16.

Civil Procedure Code—Act XIV of 1882, *s.* 287—*Proceedings relating to proclamation of sale—"Order"—Appeal.*

None of the proceedings of a Court under section 287 of the Code of Civil Procedure and the rules framed thereunder in relation to the proclamation of sale is an "order" within section 244 and as such appealable as a "decree."

Sivasami Naickar v. *Ratnasami Naickar*, (I.L.R., 23 Mad., 568), and *Ganga Prosad* v. *Raj Coomar Singh*, (I.L.R., 30 Calc., 617), dissented from.

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(1) I.L.R., 18 Calc., 414. (2) I.L.R., 3 Mad., 68.

* Civil Miscellaneous Appeal No. 117 of 1903, presented against the order of P. J. Itteyerah, Subordinate Judge of Kumbakonam, in Execution Petition Register No. 215 of 1902 (Original Suit No. 40 of 1900).

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Proceedings under section 287 are in themselves administrative and not judicial, but if and when a sale does take place, and it has to be judicially confirmed, objections may be taken to the confirmation of the sale on any of the grounds mentioned in section 311 of the Code, some of which may relate to the contents of the proclamation.

QUESTION referred to a Full Bench. The case came first before Boddam and Bhashyam Ayyangar, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.—This appeal relates to the settlement of the proclamation of sale made by the Court to carry out an order absolute for sale of property ordered to be sold under a mortgage decree. The grounds of appeal taken are as to the estimated market value of the property set out, the place where the sale is to take place, the lots in which it is to be sold and the amount for the recovery of which the property is to be sold. A preliminary objection is taken that no appeal lies against the proceedings of the Court under section 287, Civil Procedure Code, and the rules of the High Court framed thereunder, and that such proceedings are not orders within the meaning of section 244, Civil Procedure Code, as the expression "order" is defined in the Code.

We are disposed to think that the preliminary objection is well founded and that under section 287, Civil Procedure Code, the proceedings are in themselves administrative and not judicial, but that if and when a sale does take place, if ever, and it has to be judicially confirmed, objections may be taken to the confirmation of the sale on any of the grounds mentioned in section 311, Civil Procedure Code, some of which may relate to the contents of the proclamation. This view receives strong corroboration from the provision enacted by section 288, Civil Procedure Code, that no Judge or other public officer shall be answerable for any error, mis-statement or omission in any proclamation under section 287, Civil Procedure Code, unless the same has been committed or made dishonestly, a provision which, in view of Act XVIII of 1850, would have been quite superfluous if proceedings under section 287, Civil Procedure Code, were "judicial" and not "administrative."

Against an order confirming or refusing to confirm a sale there is a right of first appeal under section 588, Civil Procedure Code, and no second appeal can lie, but if proceedings under section 287, Civil Procedure Code, are regarded as orders passed under section 244, Civil Procedure Code, relating to proceedings in execution between parties to the suit, there will be not only a first appeal but

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also a second appeal. In support of the right of appeal *Sivasami Naickar* v. *Ratnasami Naickar*(1) and *Ganga Prosad* v. *Raj Coomar Singh*(2) are relied on by the vakil for the appellant, but we doubt whether in those cases the above considerations were urged before the Courts and whether in deciding them it was intended to decide that the proceedings of the Court under section 287, Civil Procedure Code, and the rules framed thereunder were orders within the meaning of section 244, Civil Procedure Code.

In these circumstances we refer for the opinion of a Full Bench the following question:—

"Whether all or any of the proceedings of a Court passed under section 287, Civil Procedure Code, and the rules made thereunder in relation to the proclamation of sale are an 'order' within section 244, Civil Procedure Code, and as such appealable as a decree."

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

K. Balamukunda Ayyar for appellant.

C. R. Tiruvenkatachariar for respondent.

The Court expressed the following

OPINION.—Our answer to the reference is that in our opinion none of the proceedings of a Court under section 287, Civil Procedure Code, and the rules framed thereunder in relation to the proclamation of sale is an "order" within section 244 and as such appealable as a "decree."

We concur in the reasons given in the Order of Reference, and we may add that the view that the proceedings in themselves, under section 287, are of an administrative and not a judicial character is further supported by the fact that special provision is made in section 287, to summon witnesses and make enquiry into the matters referred to in the section, a provision which would be superfluous if the proceedings were judicial. We are therefore constrained to dissent from the decisions in the cases of *Sivasami Naickar* v. *Ratnasami Naickar*(1) and *Ganga Prosad* v. *Raj Coomar Singh*(2).

To allow an appeal, and, as a consequence, a second appeal, in regard to proceedings under section 287 as if they were orders made under section 244, and therefore decrees, would enormously increase the difficulties and delays which even now occur in obtaining

(1) I.L.R., 23 Mad., 568. (2) I.L.R., 30 Calc., 617.

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the execution of decrees, and that without any counterbalancing advantages. For if the sale is eventually held, and a material irregularity in publishing or conducting it is proved and loss has thereby been caused to the objector he can get the sale set aside; whereas even if there has been an irregularity but no loss has resulted it is contrary to the policy of the Code (section 311) to interfere with the sale.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Bhashyam Ayyangar.

1903. November 3, 4, 5, 13.

KOCHERLAKOTA VENKATAKRISTNA ROW (DEFENDANT), APPELLANT,

v.

VADREVU VENKAPPA AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Limitation Act—XV of 1877, *s.* 28, *sched. II, art.* 142—*Suit between third parties—Delivery of present defendant's land in execution—Present defendant not a party—Knowledge of delivery—Acquiescence—Failure to apply for reinstatement—Dispossession for more than twelve years—Extinction of title.*

The title to a piece of land was (apparently) vested in defendant prior to 1877, and defendant, till then (apparently) had possession of the land. In 1867, a suit was brought by the father of the present first plaintiff against a third party for the recovery of land. The present defendant was not a party to that suit. In 1874, in execution of the decree in that suit, passed in favour of the plaintiff therein, the Subordinate Court appointed a Commissioner to make a local investigation and submit a report showing the land to be delivered to the plaintiff therein. The Commissioner personally inspected the land, and, in his report, mentioned that the present defendant, though not a party to that suit, raised the objection that the boundaries fixed by the Commissioner of the land to be delivered to the plaintiff therein included land belonging to the present defendant. The report was considered by the Subordinate Judge, but the present defendant apparently did not appear before him, and the Subordinate Judge heard the parties to that suit and confirmed the plan prepared by the Commissioner and ordered delivery to be given to the plaintiff in that suit of the land shown in the plan. That order was modified by the District Court, and in 1877, a warrant of delivery was issued by the District Judge to the Nazir, directing him to deliver possession of the property to the plaintiff therein and to eject the person in enjoyment of the land if he should refuse to quit. This

* Appeal No. 148 of 1901, presented against such portion of the decree of J. H. Munro, District Judge of Godavari, in Original Suit No. 38 of 1899.

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warrant was executed but, as the marks which had previously been placed on the land had been washed away, the Nazir fixed the boundaries again, and on this occasion also the present defendant's officials appeared before the Nazir and objected to his delivering over the land, and requested him to communicate their objection to the Court. The delivery was, however, made to the plaintiff in that suit, in the presence of the present defendant's officials, and in spite of their objections raised on his behalf. In 1899, the present suit was instituted by the son of the plaintiff in the former suit (and another) to recover possession of the same piece of land, when it was objected for the defendant that, though the delivery of the land in 1877, might be operative as a transfer of possession to the decree-holder as against the defendant in that suit, it did not amount to a dispossession of the present defendant, if possession was then in fact and in law with him:

Held, that the defendant had been dispossessed. The contention now raised on his behalf might have prevailed if the delivery of possession had been made without the present defendant's knowledge. But inasmuch as such delivery had been made in the presence of the present defendant's officials and in spite of their objections, it could not be said that the present defendant had not been dispossessed simply because possession was not delivered by enclosing the land with fences, though the boundaries were marked. Having regard to the nature of the land, nothing had to be done beyond what was done to effect delivery of possession. If, therefore, possession and title were really with the defendant at the time, he could have applied to the Court under section 230 of Act VIII of 1859, complaining of the delivery of possession and praying for his reinstatement. Defendant had, however, taken no action in the matter but had acquiesced in the proceedings, either because he really had no title to possession or because he was indifferent, and he had not cultivated the land since delivery of possession had been given. The defendant's title, if any, had therefore become extinguished in favour of the plaintiff in or about 1889, under the combined operation of article 142 and section 28 of the Limitation Act.

SUIT for land. The facts and arguments are fully set out in the judgment. The District Court allowed the plaintiffs' claim in part and disallowed the rest.

Defendant preferred this appeal. Plaintiffs preferred a memorandum of objections.

V. Krishnaswami Ayyar, N. Subba Rau and *S. Gopalaswami Ayyangar* for appellant.

C. Ramachandra Rao Saheb and *K. Venkatalingam* for respondents.

JUDGMENT.—The respondents sue to eject the appellant from an island in the Godavari; the Court of First Instance allowed the claim in part and disallowed the rest. The appellant has preferred this appeal in respect of the portion decreed to the respondents, viz., the tract referred to by the District Judge as the triangle ABC; the respondents have lodged a memorandum of objections,

under section 561, in respect of the portion disallowed. The appeal was argued at great length, but, in our opinion, it fails on the ground that even if, as contended on behalf of the appellant, the title to the island, including the triangular portion, was in him prior to 1877, and he then had such possession of the triangle as it was capable of, he was in law dispossessed of the same in May 1877 and delivery of possession thereof was, under process of Court (exhibit A) made to the respondents adversely to the appellant, in execution of the decree in Original Suit No. 46 of 1867, though the appellant was no party to that suit, and that his title has been extinguished in favour of the respondents prior to 1891-92, when he entered upon possession of the land.

Original Suit No. 46 of 1867 was brought by the first respondent's father against the proprietor of the Gutala Estate for the recovery of an island in the same part of the Godavari, which, admittedly, was at the time a sandy waste not fit for any kind of cultivation. The suit was dismissed by both the Court of First Instance and the lower Appellate Court, apparently on the ground that the land sued for was mere sandy waste, but on the 24th November 1871, the High Court in second appeal reversed the decrees of the Courts below and ordered and decreed "That the plaintiff is entitled to recover the whole or so much of the island in dispute as lies on his side of the middle line of the river and that, in execution of this decree, an enquiry be accordingly directed and that the whole, or if a portion only of the island appertains to plaintiff that portion marked out by proper boundaries, be delivered to him." For the purpose of carrying out this decree the Court of First Instance (the Subordinate Court of Godavari) by order, dated the 18th March 1874 (not filed), appointed the Nazir of the Court a Commissioner under section 180 of the then Code of Civil Procedure to make a local investigation (*vide* exhibit XXXI) and submit a report (*vide* exhibit H_2) with a plan showing the portion of the island to be delivered to the plaintiff, according to the directions of the High Court. Exhibit H_2, dated the 10th August 1874, is the report submitted by the Nazir and exhibit H_1, the plan prepared by him. The Nazir who personally inspected the island made the necessary measurements and enquiries concerning the boundaries of the lanka. After referring to the disputes raised on behalf of the parties to the suit as to the marking of the boundaries, he adverts to the objection raised in the matter on

behalf of the present appellant, who was no party to that suit, by his Peishkar and other officials in order that the Court may consider such objection. The objection (exhibit VIII, dated the 12th April 1874) was to the effect that the boundaries as fixed by the Nazir included lands belonging to this appellant, the triangular plot ABC already referred to having been included within such boundaries. It appears from the report that the Nazir indicated the boundaries by fixing marks and flagstaffs. The Subordinate Judge, after hearing the objections raised on behalf of both the parties to the suit, confirmed the plan prepared by the Nazir as Commissioner and ordered delivery of the land to the plaintiff in the suit, according to the plan (*vide* exhibit XXXI, dated 6th March 1876). It does not appear from this order that the present appellant was represented before the Subordinate Judge in support of the objection taken on his behalf, and presumably the Subordinate Judge took no notice of the objection. Appeals were preferred to the District Judge against this order and he, by his order (exhibit H_3, dated the 28th August 1876) modified the order of the Subordinate Court in favour of the plaintiff in that suit and directed delivery accordingly. In execution of the order as thus modified a warrant of delivery was issued by the District Judge to the Nazir of his Court (*vide* exhibit J, dated the 14th March 1877) directing him to deliver possession of the property to the plaintiff and to eject the person in enjoyment of the same if he should refuse to quit. The Nazir of the District Court proceeded to the lanka, executed the warrant by delivering possession of the land to the plaintiff in the suit and obtained his receipt (exhibit A, dated the 21st May 1877), acknowledging delivery of possession of the land according to the boundaries and particulars set forth in the receipt. The Nazir, in making his return to the warrant (on the 18th July 1877—*vide* exhibit J) and forwarding the receipt, stated, among other things, as follows:—"By the time of my visit there were none of the marks, etc., formerly fixed by the late Subordinate Court Nazir for showing the boundaries, etc., according to the plan then filed by him in this matter. On enquiry I learnt from the officials of both parties and from the ryots that they were washed away by subsequent floods in the Godavari. Therefore it became necessary to again fix the boundaries in accordance with the orders of your Court, and make measurements and deliver the suit lanka lands to the plaintiff" . . . .

"Besides this, the Polavaram Zamindar's officials inform me, as they informed the late Subordinate Court's Nazir that, in the land measured (illegible) in the northern portion is included a portion of the said Polavaram Zamindar's land known as 'Suryudi lanka,' and that that also is being delivered possession of to the plaintiff; and they requested me to communicate this matter to the Court. The nature of the lanka reported by them is shown in the Subordinate Court plan. 'Suryudi lanka' is shown in plaintiffs' plan also. But the whole of the site mentioned is inundated by the Godavari floods and is now fully covered by sand, and there is no mark of a lanka. So I have reported the matter."

It will thus be seen that the boundary marks fixed in 1874 by the Nazir of the Subordinate Court in accordance with the plan prepared by him had been washed away by floods in 1877 and that the District Court Nazir had again to fix the boundaries and make the necessary measurements in accordance with the order of the District Court, for delivering possession of the lands thus marked and measured, to the plaintiff and that the appellant's officials appeared before him also and objected to such delivery, and requested him to communicate their objection to the Court. It is therefore established beyond all doubt not only that the appellant was aware that along with other lands, the triangular plot ABC was included within the boundaries, but that possession of the same was delivered in the presence of the appellant's officials to the agent of the plaintiff in Original Suit No. 46 of 1867, in spite of the objection raised on behalf of the appellant, which objection, as desired by them, was communicated to the Court, and that prior to making such delivery the boundaries were fixed and marked. The learned pleader for the appellant argues that though such delivery may be operative as a transfer of possession to the decree-holder as against the defendant in that suit, yet it does not amount to a dispossession of the appellant, if possession was then in fact and law with him. This argument would no doubt carry weight, if the delivery of possession had been made without the appellant's knowledge or objection. But, as already stated, this was not the case. The decree-holder claimed to be put into possession of the land as owner in spite of the appellant's claiming the same as part of his lands and the Nazir put the decree-holder into possession, in the presence of the appellant's officials and in

spite of their objections, and reported the matter to the Court. It cannot be contended that the appellant was not dispossessed, simply because possession was not delivered by enclosing the land with fences, though the boundaries were marked. The land was at the time mere sandy waste, on which there was neither cultivation, nor any persons living. Nothing, therefore, beyond what the Nazir did had to be done for effecting delivery of possession. If possession and title were then really with the appellant, he certainly was in a position to have applied to the Court under section 230 of Act VIII of 1859, the Civil Procedure Code then in force, complaining of the delivery of possession and praying for his reinstatement. He, however, took no action in the matter but acquiesced in the proceedings, either because he really had no title to possession or because he was indifferent, as the land was mere sandy waste. A person dispossessed in execution of a decree against another may not be bound to institute proceedings in Court under section 230 of Act VIII of 1859 or even bring a regular suit for recovery of possession but may, if he is able to do so, re-enter and take possession of the land (cf. *Ranjit Singh* v. *Bunwari Lal Sahu*(1)). We agree with the District Judge that the oral evidence adduced on behalf of the appellant to show that he cultivated the land in question or let the same for cultivation subsequent to 1877, and before 1891-92, is vague and untrustworthy. As regards the documentary evidence relied upon (exhibit VII) there is nothing therein to show that it refers to or includes the land in question.

We are also of opinion that the respondents have failed to show that they or their predecessor in title ever cultivated the land in question or let the same for cultivation prior to 1891-92. The truth is that the land was not fit for cultivation or for any other beneficial use till 1891-92, about which time, owing to the deposit of silt, it became valuable and fit for cultivation. After some disputes between the parties, it has since then been in the possession of the appellant.

If, as we hold, there was an ouster of the appellant in 1877—assuming he was then in possession—to his knowledge under process of Court in execution of a decree to which he was no party, and possession was delivered to the respondents' predecessor in

(1) I.L.R., 10 Calc., 993.

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title, it is certain that possession in law continued with them (the respondents) till about 1891-92, though no beneficial use of it was made by or on behalf of the respondents till then. The result would be that the appellant's title, if any, would have been extinguished in favour of the respondents in or about 1889 under the combined operation of article 142 and section 28 of the Limitation Act.

The learned pleader, for the appellant, cites the cases of *Juggobundhu Mukerjee* v. *Ramchunder Bysack*(1), *Ranjit Singh* v. *Bunwari Lal Sahu*(2), *Joggobundhu Mitter* v. *Purnanund Gossami*(3), and *Ramchandra Subrao* v. *Ravji*(4), in support of his contention. In the first of these (*Juggobundhu Mukerjee* v. *Ramchunder Bysack*(1)), it was held by a Full Bench that, when in execution of a decree awarding possession to the plaintiff, possession is delivered to him either under section 223 or 224 of Act VIII of 1859 (corresponding to sections 263 and 264 of the present Code), such delivery must be deemed equivalent to actual possession as against the defendant, as in contemplation of law both parties must be considered as being present at the time when the delivery is made, but that as against third parties such "symbolical" possessson (as it is called) would be of no avail because they are no parties to the proceeding. This ruling was followed in the two later cases in *Ranjit Singh* v. *Bunwari Lal Sahu*(2), and *Joggobundhu Mitter* v. *Purnanund Gossami*(3), in both of which the delivery of possession had been made to the purchaser at a sale held in execution of the decree. In *Ramchandra Subrao* v. *Ravji*(4), it was held by a Full Bench that the delivery of possession which is directed to be given by section 263, Civil Procedure Code, contemplates the decree-holder being placed in actual possession and that the language of section 332 assumes the possibility of a third person being dispossessed in effecting such delivery, but that the mere formal delivery of possession to the decree-holder and taking a receipt from him cannot of itself effect such dispossession of a third party. It was, however, observed "whether what occurs on the occasion of giving such formal delivery has that effect (viz., of dispossessing a third party) is a question of law and fact; but it is clear, we think, on the authorities, that there is no dispossession

(1) I.L.R., 5 Calc., 584.
(2) I.L.R., 10 Calc., 993.
(3) I.L.R., 16 Calc., 580.
(4) I.L.R., 20 Bom., 351.

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in the eye of the law, unless the deprivation of possession is complete as a fact, a conclusion which the Court has to form on the whole of the evidence (see Lindley's 'Introduction to the Study of Jurisprudence,' appendix, page cxxiii), although what may occur may amount to a disturbance or obstruction of possession. Again, he who occupies land in the absence of the possessor does not, according to Savigny, 'at the moment acquire juridical possession'; (Savigny, on 'Possession,' translated by Perry, page 261). In other words, it must be followed up by other acts of possession of which the third party has notice . . . . for as regards a third person—assuming, as we do, that he was not affected by the decree it cannot matter that the decree was in a partition suit. In *Ramaji Govind* v. *Yaswada*(1) it is quite possible that the Court considered that the third person was present and did not obstruct."

In none of the above cases was possession delivered by the officer of the Court to the decree-holder or the purchaser, as the case may be, in the presence of, or to the knowledge of the third party or, as in this case, adversely to him in spite of his protest. In the Full Bench decision of the Bombay High Court, it is however distinctly stated that delivery of property under section 263, Civil Procedure Code, might amount to a dispossession, in the eye of the law, of a third party; if such delivery takes place in the presence of the third party and he does not obstruct or if the delivery takes place hostilely to him, and that the question of such dispossession is a mixed question of law and fact to be determined with reference to the state of things attending the delivery.

In the Calcutta case above referred to, as well as in some other reported cases, a delivery of possession under section 263 or 264, Civil Procedure Code, or section 318 or 319 is referred to as "symbolical" or "formal" possession and sometimes even as "proper" possession. In all cases of delivery of possession of immoveable property, whether to the decree-holder or to an execution purchaser, the officer entrusted with the warrant of delivery proceeds to the spot and delivery of possession is effected on the land or at a spot near enough to command a view of the land with its boundaries (see Savigny on 'Possession,' page 150), in the presence of the decree-holder or purchaser or their agent and generally in the presence also of several others, including village officers; and, after the

(1) Bom. P.J., 1878, p. 56.

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delivery is thus effected, a receipt acknowledging delivery of possession and attested by witnessess is obtained and forwarded to the Court along with the return to the warrant. If the judgment-debtor be the party in possession, it is difficult to see what else has to be done to put the decree-holder or purchaser in actual possession. The officer of the Court, by effecting delivery as above indicated, puts the decree-holder or purchaser in actual possession of the land. If, however, the judgment-debtor be not the party in possession, but a third party is in possession, a delivery thus made in the absence of the third party and not hostilely to him cannot by *itself* affect his possession, nor amount to an ouster or dispossession of him, and his possession will continue uninterrupted. The delivery of possession, therefore, under any of the above sections cannot legally be characterised as "symbolical" or "formal" either as against the judgment-debtor in possession or against a third party in possession. If the judgment-debtor is in possession, such delivery operates as a delivery of actual possession. If a third party is in possession, it is no delivery of possession at all, as against him, if made in his absence and without his knowledge but it is operative as an ouster or dispossession of him and placing of the decree-holder or purchaser in actual possession, if such delivery takes place in the presence of and adversely to the claim of such third party.

If, as we hold, the appellant was dispossessed in 1877 in favour of the respondents' predecessor in title and the respondents were dispossessed by the appellant in 1892–93, they will be entitled to eject the appellant as a wrong doer, even if the title to the island in question be in the Crown and the respondents had not, in 1892–93, acquired title against the Crown by sixty years' possession (vide *Narayana Row* v. *Dharmachar*(1)). It is therefore unnecessary to consider and decide the other questions arising in the case which have been argued before us.

The appeal therefore fails and is dismissed with costs.

We also fully agree with the District Judge, for the reasons given by him, that the respondents have entirely failed to establish their title to the portion of the island disallowed by him. The memorandum of objections is also dismissed with costs.

(1) I.L.R., 26 Mad., 514.

APPELLATE CRIMINAL.

Before Mr. Justice Bhashyam Ayyangar.

ON REFERENCE FROM

Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Boddam.

RAMASWAMI GOUNDEN (PRISONER), APPELLANT,

v.

EMPEROR, RESPONDENT.*

1903. November 9, 17, 26, 30.

Evidence Act—I of 1872, s. 114 (b)—Evidence of accomplice—Necessity for corroboration.

The case against an accused, who was tried on a charge of murder, depended entirely upon the evidence of the first witness, who deposed that he had worked for accused prior to and at the date of the murder; that the woman whom accused was charged with murdering had also worked for accused, and had become *enceinte* by him; that she had frequently demanded money of accused and at last threatened to disgrace him if he did not pay her; that on the evening of the murder accused obtained a crow-bar from the witness, and, later on, went to where the deceased was sleeping, when the witness heard a cry, and, on secretly approaching the spot, saw accused strike the deceased on the head with a crow-bar; that witness then ran away; that accused called him; that he went to the spot, and accused asked him to put the body in an empty pit some distance off; that witness refused to help, whereupon accused dragged the body to the pit and threw it in; that next morning accused threatened to murder the witness if he mentioned what had happened; that some fifteen days later, after a quarrel with accused, witness ran away and gave information to the brother of the deceased woman and then to the police, who, with some villagers, were taken by witness to the pit, where the body was found and, subsequently, identified. The witness stated that he had not given information earlier because he was afraid. The only evidence adduced in corroboration of any part of this witness' evidence was that the brother and sister of the deceased had heard of the relations between accused and the deceased, that the body was found in the pit, and that death was shown to have been caused, at about the time and place stated by the first witness, by fracture of the skull, which might have been caused by a blow from a crow-bar.

On its being contended, on behalf of the accused, that the first witness was an accomplice, or, if not an accomplice in the strict sense of the term, that he was no better than an accomplice and that his evidence should therefore be corroborated in material particulars, and that in the absence of such corroboration the accused should not be convicted:

* Referred Trial No. 55 of 1903 (Criminal Appeal No. 549 of 1903) referred by V. A. Brodie, Sessions Judge of Coimbatore Division, in case No. 63 of the Calendar for 1903.

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Held (*per* Sir SUBRAHMANIA AYYAR, Offg. C.J., and *per* BHASHYAM AYYANGAR, J., on reference), that the witness was not an accomplice in the crime for which the accused was charged, inasmuch as he had not been concerned in the perpetration of the murder itself. Even assuming that, after the murder had been committed, the witness had assisted in removing the body to the pit, and that he could have been charged with concealment of the body under section 201 of the Penal Code, that was an offence perfectly independent of the murder, and the witness could not rightly be held to be either a guilty associate with the accused in the crime of murder, or liable to be indicted with him jointly. The witness was therefore not an accomplice and the rule of practice as to corroboration had no application to the case.

Per BODDAM, J.—Even if the witness was not an accomplice, having regard to the fact that he was cognizant of the crime for fifteen days without disclosing it and that he had a cause of quarrel with the accused at the time when he did disclose it, it would be most unsafe to act upon his evidence unless it was corroborated in some material particular connecting the accused with the crime.

The rule of practice as to the necessity for corroboration of the evidence of an accomplice discussed.

Queen v. *Chando Chandalinee*, (24 W.R. (Cr.), 55), *Ishan Chandra Chandra* v. *Queen-Empress*, (I.L.R., 21 Calc., 328), and *Alimuddin* v. *Queen-Empress*, (I.L.R., 23 Calc., 361 at p. 365), discussed.

CHARGE of murder. The Sessions Judge, sitting with assessors, convicted the accused. The facts of the case, so far as they relate to the question decided, appear in the head-note, and are fully set out in the judgment.

The accused preferred this appeal.

The case first came on for hearing before Sir Subrahmania Ayyar, Offg. C.J., and Boddam, J.

Mr. *Nugent Grant* and *P. Narasimhachariar* for appellant.

The Public Prosecutor in support of the conviction.

Sir SUBRAHMANIA AYYAR, Offg. C.J.—The accused Ramaswami Gounden has been convicted by the Sessions Judge of Coimbatore of the murder of one Angayi and sentenced to death. The case for the prosecution briefly is, that after the deceased Angayi had been deserted by her husband some years ago she used to work as a servant under the accused; that during that time the accused, who was a widower, kept her; that he having since married again broke off the connection with the deceased; that the latter had been in the habit of dunning the accused for money for expenses, which she sometimes got; that on or about the 8th June last she again applied for pecuniary help to the accused, who was then in his field; that on his refusing to comply with her request she would not leave the place but lay down there threatening to disgrace

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him publicly before his relatives who had come for the festival then about to take place in the adjacent village of Malayampundi; that later on that night the accused struck the deceased, who still persisted in staying in the field, with a crow-bar on the head, killed her and threw her body into a grain-pit 10 or 12 feet deep, some distance off in a field of one of his cousins and covered up the place.

The case thus set up practically rests on the evidence of Velappa Gounden, a boy of about 16 or 18 who was, at the time of the murder, living with, and, under the protection of, the accused and working for him, the accused holding in his hands what little money belonged to the witness. Velappa speaks to the intimacy which had previously existed between the deceased and the accused, to her demanding money from the accused on the occasion in question, to the accused's refusal, to the threat by the woman as aforesaid, to the infliction of the fatal blow by the accused and to the concealment of the body in the pit where it was found upon his giving information some days later. Though the witness did not admit that he assisted the accused in removing the body from the place of murder to the pit and covering it up, yet the Sessions Judge was of opinion that the witness was most likely to have done so. Having regard to the circumstances in which the witness was working under the accused, it is not probable that he would have ventured to disobey if, as is likely, the accused, assuming him to be the murderer, had required him to help in concealing the body. In dealing with this case it is perhaps better to proceed as if Velappa had assisted the accused in the way supposed, though I cannot say I believe he did so assist.

Proceeding on some such assumption, the learned counsel for the appellant contended that Velappa being an accomplice and his evidence being uncorroborated in respect of anything tending to connect the accused with the murder, the Court would, if the case had been tried before a jury, have been bound to direct the jury to acquit the accused, and consequently this Court ought to acquit him; and he more than once invited us to lay down the law on the point, as if the question had not long since passed the stage of controversy and as if the rules on the point required fresh enunciation. But the whole subject of accomplice testimony has been over and over again considered and expatiated upon. As shown

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in the Indian leading case of *Elahee* v. *Buksh*(1) in which Sir Barnes Peacock went into the whole matter exhaustively, the Indian law on the subject has been borrowed from the English law and it is not necessary now to do more than to refer to *Rex.* v. *Boyes*(2) as containing, so far as I am aware, the practically final statement of the law in England in no uncertain terms.

The third count in the charge, of which alone Boyes was convicted, was that he gave a bribe to Pougher, a voter at an election. He was tried by a jury before Martin, B. Pougher was called as to this count and his evidence was to the effect that, on the morning of the election, he went to a place where the defendant was, saw the defendant and was desired to go into a room and on doing so heard a voice say "two" which was followed by two sovereigns being put into his hands. In the course of the summing up, the learned Judge said (page 34 in Cox's report) "Assume for the purpose of the present discussion that this man was speaking the truth. Is there any law which prohibits a jury from believing a man who (it must be assumed for the sake of the argument) spoke the truth, simply because he is not corroborated? I know of none. I know of no rule of law myself, but there is a rule of practice which has become so hallowed as to be deserving of respect." After some more observations to the effect that it was doubtful whether the evidence of other witnesses examined in the case, viz., the remaining voters who said they had received in similar circumstances the other sums mentioned in the several counts of the indictment, furnished such corroboration as was contemplated by the rule, the case was left with the jury who returned a verdict of guilty. On a motion for a new trial one of grounds taken was the absence of corroboration of Pougher's testimony, and counsel for the defendant contended that as the witness was uncorroborated, the Judge ought to have directed the jury not to act upon it. But Cockburn, C.J., observed (page 35, Cox's report): "If he (Martin, B.) told them the practice was generally not to act on the evidence of an accomplice without being confirmed, but if the evidence made out to their minds that he was speaking the truth, they ought to believe him, I think his direction was right. I protest against its being the duty of the Judge to direct the jury to acquit because the evidence of an

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

(2) 9 Cox C.C., 32; S.C., 1 B. & S., 311.

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accomplice is uncorroborated." Wightman, J., added "The law does not of necessity require any corroboration."

In the course of the same argument the Chief Justice after referring to certain passages in Taylor on 'Evidence' bearing on the point as a fair exposition of the practice, added "We think he ought not to have told the jury to acquit if the witness was uncorroborated." However a rule *nisi* was granted on this ground also but it was subsequently discharged, the Court (Wightman, Crompton, Hill and Blackburn, JJ., according to the report in Best and Smith, and Cockburn, C.J., Crompton, Hill and Blackburn, JJ., according to that in Cox), in substance holding that the rule that the evidence of an accomplice requires corroboration, is not a rule of *law* but a rule of general and usual practice, the application of which is for the discretion of the Judge by whom the case is tried.

The substance of the law as laid down by the decided cases has been embodied in the Indian Evidence Act, though, as Mr. Mayne observes, "singularly enough it is necessary to collect it from different parts of the Act." They are section 133, illustration (*b*) and section 114, and the explanation to that illustration. Neither the language of the said illustration (*b*) nor its position in the Act is perhaps best calculated to put the matter in an altogether unmistakeable light; for the term "presumption" is used in English law so as to include a great variety of incongruous matters, as will be seen from the following quotation which, despite its length, I venture to make from the instructive chapter on 'Presumptions' in Thayer's 'Preliminary Treatise on Evidence' at the common law. The author concludes the chapter by observing "It may be remarked that the numberless propositions figuring in our cases under the name of presumptions are quite too heterogeneous and non-comparable in kind, and quite too loosely conceived of and expressed to be used or reasoned about without much circumspection. Many of them are grossly ambiguous, true in one sense and false in any other; some are not really presumptions at all, but only wearing the name, some express merely a natural probability and others, for the sake of having a definite line, establish a mere policy. Very many of them, like the rule about children born in wedlock, lay down a *primâ facie* rule of the substantive law and others a rule of general reasoning and of procedure founded on convenience or probability or good sense; like the wide-reaching principle which 'presumes a usual and

ordinary state of things rather than a peculiar and exceptional condition . . . . legality than crime, and virtue and morality rather than the opposite qualities; which demands a construction of evidence as well as of written language *ut res magis valeat quam pereat.*' Some are maxims, others mere inferences of reason, others rules of pleading, others are variously applied; as the presumption of innocence figures now as a great doctrine of criminal procedure and now as an ordinary principle in legal reasoning or a mere inference from common experience or a rule of the law of evidence. Among things so incongruous as these and so beset with ambiguity there is abundant opportunity for him to stumble and fall who does not pick out his way and walk with caution."

It may be noted that the explanation to illustration (*b*) of section 114 refers to the *presumption* that an accomplice is unworthy of credit unless he is corroborated in material particulars, as a *maxim* and affords, so far as it goes, a striking illustration of the justice of Professor Thayer's remarks and it is evident that some of the misconceptions which attend the question of accomplice-testimony are due to the phraseology adopted in treating of it. If, however, it be remembered, that what is laid down as to the untrustworthiness of uncorroborated accomplice-testimony is not a presumption, in the strictly legitimate sense of the term, in the law of evidence—in other words, is not a rule of law which throws upon the party against whom it works the duty of going forward with the evidence (Thayer's 'Preliminary Treatise on Evidence,' page 339), but is a precept of caution, hallowed indeed by constant practice in charging juries and never to be lost sight of in estimating the weight due to such tainted evidence, there is little chance of one going astray in the application of what Judges have always significantly distinguished from a rule of law characterising it as a mere matter of practice. To claim for it greater potency, in the face of section 133 of the Indian Evidence Act, would be to introduce an artificial scale of credit; and "nothing can be more absurd" to borrow from the language of Lord Denman in *King* v. *Harborne*(1) "than that there should be any rigid presumptions as to matters of fact where the only questions ought to be what evidence is admissible and what inferences may *fairly* be drawn from it."

(1) 2 A. & E., 540.

With these remarks on the general question raised by the learned counsel, I proceed to consider whether the suggestion that Velappan was an accomplice is well founded. The term "accomplice" signifies a guilty associate in crime (*United States* v. *Neverson*(1)) or, as it is put in another case, "where the witness sustains such a relation to the criminal act that he could be jointly indicted with the defendant, he is an accomplice" (*White* v. *Commonwealth*(2)). Now there can be no hesitation in concluding that Velappa had no manner of concern in the perpetration of the murder itself. His own evidence does not lend the least colour in favour of the view that he had anything to do with the killing of the deceased. Nor is there otherwise any evidence tending to such a supposition, though, as already observed, it is not improbable that, after the murder was committed, the witness assisted in the removal of the dead body from the place of murder to the pit in which it was buried. But this being all the complicity that can be attributed to him it seems to me that that could not make his evidence against the accused that of an accomplice; for though the witness might be indictable under section 201 of the Penal Code for the concealment of the body (while the accused himself could not be, see *Noor Bux Kazi* v. *Empress*(3) and *Queen-Empress* v. *Lalli*(4)), yet such offence on the witness's part being one perfectly independent of the murder, the witness could not rightly be held to be either a guilty associate with the accused in the crime of murder or liable to be indicted with him jointly.

Thus in a prosecution for adultery it appeared that the defendant and O procured two rooms opening into each other, and were visited by two women; and that the defendant and one of the women occupied one of the rooms most of the night and O and the other woman occupied the other room. It was held that O was not an accomplice of the defendant in that though he might have been guilty of a crime himself, he did not assist defendant in the crime of adultery (*State* v. *Evan*(5)).

Reference may also be made to Baron Martin's observations in *Rex* v. *Boyes*(6) already cited which go to show that the different voters who were bribed in one and the same place and on one and

(1) 'Century Digest,' Vol. 14, Col. 1779.
(2) 'Century Digest,' Vol. 14, Col. 1780.
(3) I.L.R., 6 Calc., 279.
(4) I.L.R., 7 All., 749.
(5) Century Digest,' Vol. 14, Col. 1780.
(6) 9 Cox C.C., 32; S.C., 1 B. & S., 311.

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the same occasion, were not accomplices of each other. The learned Judge said (page 34, Cox C. C.). "This case is distinguishable from that cited by the counsel for the defendant for they were there accessories properly so called and all the persons were concerned in the same offence in which they came to give evidence against the man. In this particular case it is not so, because all of these are separately gone into and it is not one and the same offence."

The Judges, however, who discharged the rule, without directly deciding the point, were all of opinion that even if, in a sense, the voters were accomplices of Pougher, their evidence must be held to furnish sufficient corroboration.

Be this as it may, there is no doubt that the authorities draw a clear distinction which is referred to and illustrated in the explanation to illustration (1) of section 114 of the Indian Evidence Act and which is well pointed out in the following observations of Hill, J.: "In the application of the rule much depends on the nature of the crime and the extent of the complicity of the witness in it. If the crime is a very deep one and the witness so far involved in it as to render him apparently unworthy of credit he ought to be corroborated. On the other hand if the offence be a light one as in *Rex* v. *Hargrave*(1) where the nature of the offence and the extent of the complicity could not much shake his credit, it is otherwise" (1 B. & S., 322). In *Rex* v. *Hargrave*(1) referred to here, Patteson, J., ruled that notwithstanding that persons present at, and sanctioning, a prize-fight where one of the combatants is killed are guilty of manslaughter as principals in the second degree, yet they are not such accomplices as to require their evidence to be confirmed if they are called as witnesses against other parties charged with the manslaughter.

Take for instance cases of bribery on the part of public officials not infrequently occurring in this country. Suppose one, where the witness himself has tempted the public servant with the bribe for some unrighteous end of his own and another, where the facts are as in the cases of *Narayanaswami Naidu*, *Aswartha Reddi* and *Krishnaswami* v. *Emperor*(2) where a Police Inspector was held to have extorted money by a threat of falsely implicating the witnesses in a charge of murder and handcuffing and imprisoning them unless

(1) 5 C. & P., 170.

(2) Crl. Appeals Nos. 26, 28 and 33 of 1903 (unreported)

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they paid money. It is scarcely necessary to say that it would not be good sense to treat the two cases alike. The proper application of the rule would be to require corroboration in the one and to dispense with it in the other. This was clearly implied in the judgment of this Court in the said criminal appeals when it was observed "they are more involuntary than voluntary accomplices and in that light their evidence is not tainted as much as it would otherwise be."

In this connection it only remains to observe that Velappan's delay in reporting the perpetration of the murder which he says he saw committed, to which some reference was made in the argument, is quite immaterial and would be so even had he altogether failed to give information and thus brought himself under section 202 of the Penal Code. It would be clear from reasons already stated that that would not make him an accomplice.

It follows, therefore, that the rule of practice as to corroboration has no application to the case first, because Velappa was not an accomplice within the meaning of the rule and secondly, because even if he were, his complicity as a youthful tool in the hands of one who stood to him in *loco parentis* is not such as to make it necessary to require corroboration.

The question then resolves itself into one of the credibility of Velappa's evidence, to be decided, no doubt, as in the case of any other witness with reference to the circumstances of the case. Viewing the testimony in this light I agree with the Sessions Judge for much the same reasons as those given by him, in holding that his evidence is substantially true and may be acted upon. The strongest point that can be made against the witness is that the disclosure of the crime was not made purely in the interests of public justice, and but for the quarrel between the accused and the witness shortly before the witness gave information to the police, he would not have moved in the matter at all. Considering that the witness is but a lad, that he had long been under the protection of the accused, that the whole of the money which was all his property was held by the accused, it was not unnatural, however culpable it may have been, that the witness did not report the crime of his master and guardian until, as he says, he was goaded on to it by the prisoner's subsequent ill-treatment of the witness.

The delay in such circumstances does not to my mind argue that the evidence is false.

I would, therefore, confirm the conviction. As to the sentence, however, having regard to the fact that the murder was committed in consequence of the deceased attempting to blackmail the accused, and of her having threatened to disgrace him in the presence of people who were about to assemble on the occasion of the festival at the place, I would commute the sentence to one of transportation for life.

BODDAM, J.—The accused was convicted of murder and sentenced to death subject to the confirmation of that sentence by the High Court. He has appealed against the conviction and the appeal and the referred trial have been heard at the same time. The case against the accused depends entirely upon the evidence of the first witness, a young man of 18, who says he was present when the accused murdered the deceased (a cooly woman named Angayi) on Monday, the 8th June, and saw him dispose of the body by throwing it into a cholam-pit, where it was found some 16 days later upon information given by him 15 days after the murder.

The story told by this witness is that he had been working for the accused for 2½ years before the murder, that the deceased also worked for the accused as sweeper, and that the accused married in Peratasi and as the deceased had become *enceinte* by him, he, in October preceding the murder, had sent her away to Kariyampatti, a village in the Dindigul taluk, whence she was brought back in four or five days by her brother after presumably having procured abortion, as he says she came back much thinner. That the accused again sent her away giving her money to Appayanpatti, but when she had spent that money she returned and used to come frequently to the accused's garden asking for money and would remain and not leave unless money was given to her. That on Monday in Vyasi at noon she came to the accused's garden and asked the accused for money and threatened to complain to the Pattagar and his relations and disgrace him if he did not pay her. She then went to lie down between two ricks. In the evening the accused asked the witness for the crow-bar and he gave it to him. He and the accused then went to meals. At night the accused and others made a collection for a festival next day. After the people went to bed the accused came to witness who was at the pen feeding the dogs. He then went to where the woman was lying down leaving the witness feeding the dogs. The witness heard a cry of Ayyo!

and thinking the accused was beating the woman he went and hid in the cholam and saw the accused strike the deceased on the head with a crow-bar and being afraid he ran back to the pen. The accused called him and he went to him and the accused then asked the witness to help him to put the dead body into the cholam-pit about 70 yards from where the corpse was, which was then empty and open. The witness says he refused and the accused dragged her alone by the legs to the cholam-pit and threw her in. After that the witness went and slept at the pen and the accused, after closing the cholam-pit went to his house. About cock-crow next morning the accused came to where the witness was lying and threatened that if he disclosed the matter to any one he would not pay him Rs. 40 due to him and would deal with him as with Angayi. Ten days later the witness sold a goat for Rs. 4-12-0 and asked the accused for Rs 5 to buy a cow, when the accused refused and threatened to take the Rs. 4-12-0 from him saying he was not in need of any cow-calf. Afterwards the accused, finding the witness had not gone to the pen, beat him and threatened to throw him into the cholam-pit. After this, next morning the witness ran away, met the brother of the deceased woman, told him what had happened to Angayi and on his way home the witness met the Station-House officer in a bandy and told him and took him and some villagers to the cholam-pit. When the stone over the cholam-pit was lifted, there was a bad smell and the Station-House officer left a guard. This was on the 23rd June. Next day, in the evening the Sub-Magistrate, Hospital Assistant and others arrived, and the body was taken out of the pit and identified. The witness says he did not tell before because he was afraid.

The only evidence given in addition to that of this witness is that of the deceased's brother and sister, a goldsmith whose evidence the Sessions Judge entirely disbelieves, the man in whose house she lived at Kariyampatti, the police and the Village Munsif and the *post-mortem* certificate.

The only evidence given by the brother is that he heard the deceased was in the accused's keeping and that he brought her back from Kariyampatti to the accused's house. When he brought her back, she appeared to be pregnant and that she must have had a miscarriage after she came back to the accused—in this respect contradicting the first witness.

The sister says 'I was told by people generally and by deceased that she was living with accused for two or three years.'

The fifth witness merely proves that the deceased came to Kariyampatti and stayed three or four days.

The Station-House officer proves that he received information from the first witness at noon on the 23rd when he met him accidently as he was driving in a bandy about 1½ miles from the accused's house—and the Village Munsif proves that on the 23rd June the Station-House officer sent a Toti to him.

The *post-mortem* certificate shows that death was due to fracture of the skull, there being a fracture 2 inches long through which it was easy to pass a probe into the brain. Death must have occurred at least 2 weeks before.

From the above, it will be seen that the only corroboration of any part of the story of the first witness is that the brother and sister *had heard* that the deceased had been in the accused's keeping; that the body was found in the cholam-pit and that death was caused by fracture of the skull which might have been caused by a blow from a crowbar.

The cholam-pit in which the body was found was common to the accused and his brothers and was not actually on the accused's land though adjacent to it.

On behalf of the accused it is urged that to all intents and purposes, though possibly not in strict law, the first witness is an accomplice—and the Sessions Judge has held that he was an accomplice—and that therefore unless his evidence be corroborated by independent testimony proving not only that the deceased came by her death in the manner described, but also directly connecting the accused with the murder—the accused ought not to be convicted; and secondly, that even if the accused is not an accomplice and the necessity for such corroboration is not in practice obligatory on evidence such as has been given in this case, no jury would be justified in finding the accused guilty. So far as the connection of the accused with the crime is concerned there is no evidence at all except that of the first witness who has admittedly a cause of quarrel with the accused and who has never said anything about the crime or the accused's connection with it until he had reason to wish to injure the accused and therefore his evidence is so tainted with suspicion that it should not be relied upon to convict any one of so serious a crime.

The law in England with regard to the necessity for corroborating the evidence of an accomplice is that corroboration of accomplices is not necessary in strict law (*R.* v. *Atwood*(1)), but it is the general practice to require corroboration, and for the prosecution (in order to induce the jury to credit his testimony) to give other evidence confirmatory of at least some of the leading circumstances of his story from which the jury may be able to presume that he has told the truth as to the rest, and for the Judge to tell the jury not to act upon the uncorroborated testimony of an accomplice (*Rex* v. *Rudd*(2), *In re Meunier*(3)). It has been said that if an accomplice be confirmed as to the particulars of the story, he does not require confirmation as to the persons charged, but this doctrine has been rejected in later cases inasmuch as the confirmation as to the circumstances proves only that the accomplice was participient in the felony, not that the particular party charged was his confederate (*Rex* v. *Webb*(4), *Rex* v. *Wilkins*(5), *R.* v. *Birkett*(6), *R.* v. *Stubbs*(7)), and where upon an indictment against principals and accessories, the case against the principal was proved by an accomplice who was confirmed as to the accessories but not as to the principal the jury were directed to acquit the prisoners (*R.* v. *Wells*(8), *Rex* v. *Moores*(9)).

The law is practically the same in this country. In *Queen-Empress* v. *Maganlal & Motilal*(10), a Full Bench case, the law is stated as follows:—"By the law both of India and England the "evidence of an accomplice is admissible and a conviction is not "illegal because it proceeds upon the uncorroborated testimony of an "accomplice (section 133, Indian Evidence Act)." But the presumption allowed by illustration (*b*) of section 144 of the Evidence Act that an accomplice is unworthy of credit unless he is corroborated in material particulars has become a rule of practice of almost universal application. Judges now in their charges usually tell a jury that under ordinary circumstances it is unsafe to convict on such evidence without the substantial corroboration of independent evidence. A Judge who combines the functions of Judge and jury is equally bound to scrutinise accomplice evidence with great care

(1) 1 Leach, 464.
(2) 1 Cowp., 331 at p. 336.
(3) L.R., [1894], 2 Q.B., 415.
(4) 6 C. & P., 595.
(5) 7 C. & P., 272.
(6) R. & R., 73.
(7) D. & P.C.C., 555.
(8) 1 M. & M., 326.
(9) 7 C. & P., 270.
(10) I.L.R., 14 Bom., 115.

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and to consider whether there is any corroborating evidence when the main evidence is of an accomplice character.

Assuming for the moment in this case that the first witness is, as the Sessions Judge considers, an accomplice, there is, as I have said before, absolutely no evidence to corroborate his story except that the body was found in the cholam-pit and that the brother and sister were informed that the accused had kept the deceased. How does that corroborate the accused's story? The woman is murdered, there is no question as to that; the question is how, when and by whom. It is assumed that she was murdered by a blow with a crowbar as her skull was fractured, but what corroboration is there of the first witness's story that a crowbar was in fact the instrument used or that it was used by the accused? It is quite as possible that the first witness was the murderer as the accused, and he has a very good reason for attributing the murder to the accused against whom he has a grievance. Would it in these circumstances be right, in the absence of any independent evidence, to connect the accused with the crime, to find him guilty and hang him merely because the first witness says so. There is clearly no independent evidence to connect the accused with the crime. The fact that he had at one time kept the deceased does not suggest a motive—and even if it did, a motive alone is not sufficient to constitute corroborative evidence of the facts. If therefore the first witness is in law an accomplice I am clearly of opinion that it would be the duty of the Judge to direct the jury that there was not sufficient evidence before them upon which they would be justified in finding the accused guilty.

Now is the first witness an accomplice or should his evidence be treated as the evidence of an accomplice?

According to his own account he was cognizant of the crime and concealed it for 15 days and did not divulge it until he had a cause of quarrel with the accused, and then he accuses him of it not by going straight to the police but first when he accidentally met the brother of the deceased and then to the police when he accidentally met the Station-House officer. He was in any case an accomplice in concealing the body, and his evidence is to that extent at all events the evidence of an accomplice. In *Ishan Chandra Chandra* v. *Queen-Empress*(1), the case against the accused rested mainly

(1) I.L.R., 21 Calc., 328.

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upon the testimony of an informer who admitted that, after becoming cognizant of the crime, he kept quiet about it for six days and it was urged on behalf of the accused that even if not an accomplice his evidence ought not to be acted upon except to the extent to which it was corroborated by independent testimony. In dealing with this question in their judgment at page 336 the Judges say "we agree with the learned Sessions Judge that it would be "unsafe in this case to act upon the unsupported evidence of "Gooroo Pershad. We are not prepared to say he is an accomplice. He may have been one but it is impossible to say in this "case that he helped in the commission of the offence. He was "undoubtedly cognizant of it and omitted to disclose it for six days. "From any point of view we do not think that his testimony is "such as to justify a conviction except where he is corroborated."

These observations exactly apply to the evidence of the first witness in this case—and in *Alimuddin* v. *Queen-Empress*(1), the Judges say "we cannot but regard the evidence of these two witnesses as no better than that of accomplices. At any rate they "took such a part in this transaction as to make it most unsafe for "the Court to rely upon their evidence unless corroborated in some "material respect in convicting the accused."

In my opinion even if the first witness was not an accomplice, having regard to the fact that he was cognizant of the crime for 15 days without disclosing it and that he had a cause of quarrel with the accused at the time when he did disclose it, it would be most unsafe to act upon his evidence unless it was corroborated in some material particular connecting the accused with the crime, and as there is no such evidence, I think the accused ought to be acquitted.

Even apart from the necessity for corroboration I do not think that in this case the accused ought to be convicted upon the evidence given. I do not think any one could say with confidence that the guilt of the accused is brought home to him or that there is not a reasonable doubt as to his guilt.

I think no one could rely upon the evidence of the first witness even though it did not require corroboration.

I would allow the appeal, and set aside the conviction and sentence and acquit the accused.

(1) I.L.R., 23 Calc., 361.

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The case was referred to Bhashyam Ayyangar, J., under sections 378 and 429 of the Code of Criminal Procedure.

Mr. *Eardley Norton* and *P. Narasimhachari* for appellant.

The Public Prosecutor in support of the conviction.

JUDGMENT.—This case, in which the accused has been sentenced to death on a charge of murder, has been referred to me under sections 378 and 429, Criminal Procedure Code, in consequence of a difference of opinion between the Officiating Chief Justice and Boddam, J. The Sessions Judge treated the principal witness in the case, viz., the first prosecution witness as an 'accomplice' who is unworthy of credit unless he is corroborated in material particulars and in summing up the case to the assessors stated that it would be unsafe to convict the accused upon the evidence of such a person unless in respect of material particulars he was corroborated by independent reliable evidence. Differing from the assessors, he convicted the accused of murder as, in his opinion, the accomplice was corroborated in material particulars by independent reliable evidence notwithstanding that he did not rely upon the evidence of the fourth witness for the prosecution, whose evidence alone, if believed, would corroborate the accomplice in a material particular which would go towards implicating the accused in the murder of the deceased.

I agree with Boddam, J., that the particulars referred to by the Sessions Judge in respect of which the evidence of prosecution witness No. 1 is corroborated by other reliable evidence only go to show that the deceased was murdered at or about the time and place mentioned by the first witness and that she had been for some time in the service of the accused and probably in his keeping but that none of these particulars implicates the accused in the murder. In *Rex* v. *Webb*(1), an accomplice was called to prove the case against the prisoners and he stated that when the robbery was committed, the thieves took a ladder from the premises of Mr. Player. To confirm the accomplice Mr. Player's servant was called to prove that Mr. Player's ladder was taken away on the night on which the felony was committed and counsel for the prosecution also proposed to call other witnesses to confirm the accomplice as to the mode in which the felony was committed. Williams, J., addressing the counsel for the prosecution stated as follows:—

(1) 6 C. & P., 595.

"You must show something that goes to bring the matter home to the prisoners. Proving by other witnesses that the robbery was committed in the way described by the accomplice is not such confirmation of him as will entitle his evidence to credit so as to affect other persons. Indeed I think it is really no confirmation at all as every one will give credit to a man who avows himself a principal felon for at least knowing how the felony was committed. It has always been my opinion that confirmation of this kind is of no use whatsoever."

In *Rex* v. *Moores*(1), before Alderson, B., and Williams, J., it was held that if A is charged as a principal and B as a receiver, an accomplice when called to give evidence against B ought to be confirmed as to some matter affecting B and a confirmation as to the guilt of A does not advance the case against B; and in *Rex* v. *Wilkins*(2), Alderson, B., in summing up, stated that there was a great difference between confirmations as to the circumstances of the felony and those which applied to the individuals charged, the former only proving that the accomplice was present at the commission of the offence, the latter showing that the prisoner was connected with it and that this distinction ought always to be attended to. In *R.* v. *Wells*(3), on an indictment against principal and accessories, the case against the principal was proved by the testimony of an accomplice who was confirmed as to the accessories but not as to the principal. Littledale, J., held that there being no confirmation against the principal felon the case failed altogether. In a learned note by the reporter this ruling is criticised but the criticism is really a criticism of the longstanding and 'hallowed' rule of practice of advising the jury not to convict on the testimony of an accomplice unless he is corroborated in material particulars.

If the first witness for the prosecution was really an accomplice and the trial was before a jury I should, in drawing the attention of the jury to this practice, explain that there was no corroboration of the accomplice in a material particular implicating the accused in the murder unless they believed the evidence of the fourth witness for the prosecution, but I should add that even if they did not believe prosecution witness No. 4, the conviction of the accused on the uncorroborated testimony of the accomplice is perfectly legal

(1) 7 C. & P., 270. (2) 7 C. & P., 272

(3) 1 M. & M., 326.

and that it would be their duty so to convict him if they believed the accomplice and gave credit to his evidence. I am however unable to agree with Boddam, J., that if the first witness was in law an accomplice "it would be the duty of the Judge to direct the jury that there was not sufficient evidence before them upon which they would be justified in finding the accused guilty," and with all respect I should say that this would be a misdirection. In *Rex* v. *Boyes*(1), Cockburn, C.J., adverting to counsel's argument that Martin, B., ought to have directed the jury not to act upon the uncorroborated testimony of an accomplice, protested against it being the duty of the Judge to direct the jury to acquit because the evidence of an accomplice is uncorroborated and added that the Judge ought not to have told the jury to acquit if the witness was uncorroborated. It may be that except under very special circumstances the settled course of practice is not to convict a prisoner upon the sole and uncorroborated testimony of an accomplice and if, in the opinion of the Judge, there are no special circumstances which would induce him to give credit to the evidence of the accomplice and convict the prisoner on his sole uncorroborated testimony he may no doubt, under sub-section 2 of section 298 of the Code of Criminal Procedure, express such opinion to the jury and in that sense advise them to acquit the prisoner. Under sub-sections (2) and (3) of section 289 of the Code of Criminal Procedure it is clear that it is only in cases in which the Court considers that there is no evidence, on behalf of the prosecution, that the accused committed the offence, that the jury can be directed to return a verdict of 'not guilty.'

The Sessions Judge's view that the first prosecution witness is an accomplice is however clearly untenable and the learned counsel for the appellant while conceding that the witness is not an 'accomplice' in the strict sense of the term contends on the authority of the cases of *Queen* v. *Chando Chandalinee*(2), *Ishan Chandra Chandra* v. *Queen-Empress*(3), *Alimuddin* v. *Queen-Empress*(4), that the first witness is a quasi-accomplice and no better than an accomplice and that it would be unsafe to convict the accused upon his uncorroborated testimony. The first witness, who is a servant of the accused, was in no way privy to the murder of the deceased. His evidence

(1) 9 Cox C.C., 32 at p. 35.
(2) 24 W.R. (Cr.), 55.
(3) I.L.R., 21 Calc., 328.
(4) I.L.R., 28 Calc., 361 at p. 363.

is that after the accused had murdered the deceased he came to the pen to which the witness had returned after seeing the accused strike the deceased a blow with the crow-bar, and called upon him to come and help him to put the deceased's body into the cholam-pit, that he refused to do so though he accompanied the accused to the spot, that the accused alone dragged the body by the legs the one hundred yards to the cholam-pit and that after putting it in replaced the stone over the opening and covered it over with earth, after which the accused went home and the witness to the pen. The Sessions Judge considers it unlikely that the witness ventured to disobey the accused and says that he has 'little doubt that the witness helped to put the body in the cholam-pit, though he now very naturally disclaims having done so as he is afraid to admit having had any hand in the disposal of the corpse himself.' This is by no means improbable; and assuming that the witness did assist the accused to hide the body with the intention of screening him, his master, from punishment, he would be guilty of an offence under section 201 of the Indian Penal Code. But whether this be so or not, he is guilty of an offence under section 202, Indian Penal Code, as he was legally bound, under section 44 of the Criminal Procedure Code, *forthwith* to give information to the nearest Magistrate or Police Officer, of the commission of the murder of which he was aware and the fact that he gave such information about a fortnight afterwards—when he had quarrelled with the accused will not altogether exculpate him. It is unnecessary to repeat the reasons given by the Officiating Chief Justice, in which I fully concur, for holding that the witness cannot be regarded as an 'accomplice' in the crime for which the accused is now under trial, and with all deference I am constrained to dissent from the view taken by the learned Judges of the Calcutta High Court in the cases above noted, that the evidence of a witness who, like the first prosecution witness in the present case, has helped the accused to conceal the corpse of the person murdered or has omitted to give information of the murder of which he was aware, should be regarded and tested as that of an accomplice and not acted upon unless corroborated in material particulars. In regard to the testimony of accomplices or *participes criminis*, there is no doubt the maxim that an accomplice is unworthy of credit unless he is corroborated in material particulars and this rests not on any rule of law but only 'on a rule of practice which has become so

hallowed as to be deserving of respect.' But there is no authority whatever in English law which warrants the extension of this maxim to persons who are not accomplices, as in the Calcutta cases (referred to); and I do not think it will be in furtherance of justice to regard another class of witnesses as *quasi* accomplices and to extend the maxim to them. It is very doubtful whether even the practice which has become 'hallowed' by time "is not one of the instances in which the law of the country has been subtilised for the protection of individuals (including notably corrupt officials) and not for the furtherance of justice." The rule of law that a conviction upon the uncorroborated testimony of an accomplice is not illegal (*vide* section 133 of the Evidence Act) is practically rendered nugatory by this rule of practice with the further result that there is strong temptation to suborn evidence to corroborate the accomplice on a material particular and when such corroborative evidence is forthcoming it acquires undue importance, and this as well as the evidence of the accomplice are both easily credited.

The learned counsel for the appellant is unable to suggest any reasonable hypothesis as to the murder of the deceased, and believing fully, as I do, that the evidence given by the first witness is trustworthy and substantially true, I must hold that the accused has been rightly convicted of murder. He committed the murder deliberately and with a deadly weapon and I regret that I am unable to see any provocation or other extenuating circumstance which would justify the substitution of the sentence of transportation for life for the sentence of death. I therefore confirm the sentence passed by the Sessions Judge and dismiss the appeal.

PRIVY COUNCIL.

MAYANDI CHETTIYAR, PLAINTIFF,

v.

CHOKKALINGAM PILLAY AND OTHERS, DEFENDANTS.

P.C.*
1903.
November 5.
1904.
February 26.

[On appeal from the High Court of Judicature at Madras.]

Landlord and tenant—Permanency of tenure—Lease of temple lands by manager—Petition for fresh lease without mentioning former leases—Madras Regulation VII of 1817—"Ulavadai mirasidars"—"Paracudis."

One of two persons, through whom the respondents claimed, acquired rights in certain lands under permanent leases granted by the manager of a temple in 1813 and 1820. In 1831 the lessee and the other person from whom the respondents derived title petitioned the Collector, under whose management the temple then was, for a lease of the land for one year. No reference was made in the petition to the former leases, and the petitioners described themselves as paracudis. In 1832 they executed a muchilika and security bond to the Collector, who sanctioned the lease to them in 1833. In those documents they described themselves as ulavadai mirasidars, but there was nothing else to indicate their claim to a permanent tenure. In a suit by the manager of the temple in 1892 to recover possession of the lands the respondents set up the defence that they held in a permanent tenure, and were not liable to be ejected. The High Court (reversing the decrees of the Courts below) held that it was not sufficiently proved that the tenancy under the leases of 1813 and 1820 was ever determined, that the transaction evidenced by the muchilika was a confirmation of the former leases and not a new lease, and that the respondents held the lands in a permanent tenure:

Held, by the Judicial Committee (reversing the decision of the High Court) that the question, whether the respondents had a permanent tenure or not, was, under the circumstances of the case, one to be decided on the contract sanctioned by the Collector in 1833, and under that they obtained nothing more than a yearly tenancy.

The expression "ulavadai mirasidar" had not a sufficiently definite meaning to justify resting the decision of the case upon it. The term "paracudi," however, in which character the lease was asked for in 1831, was one well understood and definite, and documents in which it was used similar to that in the present case had been construed as giving no permanent right of occupancy.

Chockalinga Pillai v. *Vythealinga Pandara Sannadhi*, (6 M.H.C.R., 164), *Thingaraja* v. *Giyana Sambandha Pandara Sannadhi*, (I.L.R., 11 Mad., 77), and *Krishnasami Pillai* v. *Varadaraja Ayyangar*, (I.L.R., 5 Mad., 345), referred to.

APPEAL from a decree (13th August 1896) of the High Court at Madras, on second appeal, by which the decrees (13th November

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* *Present:* Lord MACNAGHTEN, Lord LINDLEY, Sir ANDREW SCOBLE, Sir ARTHUR WILSON, and Sir JOHN BONSER.

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1893 and 29th August 1894) of the Subordinate Judge of Negapatam and of the District Judge of Tanjore, respectively, were reversed and the appellant's suit dismissed with costs.

The appellant was trustee or manager of the temple of Kayarohanaswami, at Negapatam, in the district of Tanjore, and the suit was brought by him in the capacity of landlord to eject the respondents from certain lands in the village of Vadagudi, of which they were admittedly tenants, but which they claimed to hold permanently as cultivators subject only to the payment of certain dues to Government and to the Temple.

The only question on this appeal was whether, on the construction of certain documents produced by the respondents, they were only tenants from year to year, or held the lands on a permanent tenure.

Both the lower Courts held that the respondents had not shown any higher title than that of cultivating tenants from year to year; and that the plaintiff could eject them and recover the lands sued for. They therefore decreed the suit.

On appeal, the High Court (*Collins*, *C.J.*, and *Benson*, *J.*) held that the respondents were in possession on a permanent tenure and were not liable to be evicted. They therefore reversed the decrees of the Courts below. The report of the case before the High Court will be found in *Chockalingam Pillai* v. *Mayandi Chettiar*(1) where the facts are fully set out.

On this appeal, which was heard *ex parte*,

Mr. *DeGruyther*, for the appellant, contended that the High Court were wrong in holding that the respondents had proved a permanent tenure. They derived title through two persons, Virdhachala and Subbaien, of whom the former alone had received previous grants from the managers of the Temple. Those persons had not referred to the rights of Virdhachala under the earlier grants in their petition to the Collector in 1831 which led to the muchilika of 10th January 1832, nor had they then asked for a permanent lease, which it was not certain the Collector could have granted, had it been demanded. The Subordinate Judge and District Judge, it was submitted, were right in holding that the petition showed that Virdhachala had given up or lost any rights he might have had under the previous grants, and had intentionally

(1) I.L.R., 19 Mad., 485.

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asked for no higher rights than those possessed by Subbaien. Those previous grants, moreover, were not pleaded as a defence in the present suit, and the High Court had acted erroneously in basing their judgment on considerations founded upon those documents. No permanent tenure was created under the muchilika of 10th January 1832. Similar documents had been construed as giving no permanent right of occupancy. *Chockalinga Pillai* v. *Vythealinga Pandara Sannadhy*(1), *Thiagaraja* v. *Giyana Sambandi Pandara Sannadhi*(2), and *Krishnasami Pillai* v. *Varadaraja Ayyangar*(3) were referred to. The fact that the muchilika in the present case described the tenants as "ulavadai mirasidars" had not the effect, given to it by the High Court, of distinguishing this case from those cited: that expression was merely the tenants' description of themselves, and it had besides no very definite meaning. Reference was also made to pages 396, 606 of the Manual of the District of Tanjore compiled under the orders of Government by T. Venkasami Row, and published in 1888, and to the Madras Regulation VII of 1817. The respondents were, it was submitted, only yearly tenants and liable to ejectment on proper notice, which the Subordinate Judge found had been given.

On 26th February 1904, the judgment of their Lordships was delivered by Sir ANDREW SCOBLE;—

JUDGMENT.—The suit out of which this appeal arises was brought by the appellant as trustee or manager of the Temple of Kayarohanaswami, of Negapatam, in the district of Tanjore in the Madras Presidency, to recover possession of certain lands in the village of Vadagudi, of which the Temple is mirasidar, from a number of defendants, who are admittedly tenants under the Temple, but who claim a permanent tenure as cultivators, dependent only on the payment of ayan and swamibhogam, that is to say, of the revenue due to Government and a money-rent to the proprietor. So long as these payments are made, they deny the right of the Temple to eject them; and their title is said to be derived, either directly or indirectly, from two persons named Virdhachala and Subbaien, with whom a settlement of the lands was made by the Collector of Tanjore in the year 1833. The Subordinate Judge of Negapatam and the District Judge of

(1) 6 M.H.C.R., 164. (2) I.L.R., 11 Mad., 77.
(3) I.L.R., 5 Mad., 345 at p. 353.

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Tanjore decided the suit in favour of the appellant, but the High Court of Madras, upon appeal, reversed their decision. The question which their Lordships have to determine is the nature of the interest which Virdhachala and Subbaien had in the lands in question; for it is not disputed that whatever interest they had has passed to the respondents. It is much to be regretted that the respondents did not appear upon this appeal, and that the case has to be decided *ex parte*.

In the written statement of the principal respondent it is alleged that "the whole of the lands mentioned in the plaint belonged to our ancestors. Two hundred years ago they gave away the *miras* right which they had in them to the Temple of Kayarohanaswami and retained the permanent *ulavadaikani* (or right of cultivation). In accordance with the said *ulavadaikani* right, our ancestors and ourselves have, for the last 200 years, been enjoying the lands, cultivating them and paying the *ayan* and *swamibhogam* amounts to the Temple." There was no reliable evidence as to the origin of the relation between the tenants and the Temple, but in support of their allegation of the character of their tenancy three documents were produced by the respondents, to which great weight is attached in the judgment of the High Court. These documents were more than thirty years old, came from proper custody, and may be presumed to be authentic. By the first, which is dated 11th March 1813, the then manager of the Temple gave a permanent lease of one-half of the lands in dispute to Chokkanada Pillay, the father of Virdhachala, and the other half appears to have been granted on a similar tenure to one Nalla Pillai. Nalla Pillai appears to have transferred his interest, after Chokkanada's death, to Virdhachala, and by the second document, which is dated 26th January 1820, Virdhachala obtained the entire land on permanent lease from the manager of the Temple. The third document, which is dated 6th July 1822, is a sub-lease of a half-share of the property by Virdhachala to two persons named Visvanatha Mudaliar and Namasivaya Mudaliar. The first and second documents are described as *vara adai olai chits*, which is translated as "deeds letting land for cultivation and providing for share of produce," and the character of the tenure granted is described as *ulavadaikani* or "cultivation-right land," that is to say, land which the grantee and his heirs were to have a hereditary right to cultivate. In the third, the tenure is described

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as *ulavadai miras*, a phrase which is not employed in the transactions between the Temple and the grantees. There is some uncertainty as to the precise meaning of this last phrase; but the Courts below concur in holding that the two grants by the Temple manager, if still valid and subsisting, confer a permanent and heritable title.

It must be observed, however, that the second and more important of these grants bears a date subsequent to the passing of Madras Regulation VII of 1817, which vested the general superintendence of all charitable endowments "in land or money" in the Board of Revenue, and made it the duty of the local agents of the Board (of whom the Collector was one *ex officio*) to report to the Board "any instance in which they may have reason to believe that lands or buildings, or the rent or revenues derived from lands, are unduly appropriated," care being taken not to infringe private rights. These grants were thus liable to objection not only on the ground that "to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time would be a breach of duty" in the trustee, unless there were special circumstances of necessity to justify it (*Shibessouree Debia* v. *Mothooranath Acharjo*(1)), but also because the effect of the Regulation was to supersede the powers of managers to alienate charitable property, and to sanction the revision of existing appropriations, if unduly made.

There is nothing on the record to show at what date the Collector took in hand the direction of the affairs of this particular Temple, but on the 4th December 1831 a petition in the following terms was presented to him:—

"To

"N. W. KINDERSLEY, ESQ.

"*Principal Collector of the Tanjore Province.*

"*Durkhast* (tender or application for land presented to the Revenue Department) written and given by the two persons Vadagudi Virdhachalla Pillai and Subbaien, who are *parakudi* (*parakudis*) of the assessed lands owned in the village of Vadagudi by Kayarohanaswami of Negapatam, Andanapettai Maganam, Kivalur Taluq.

(1) 13 Moo. I.A., 270 at p. 275.

"As we shall not only continue to pay for one year the current Fasli 41, swamibhogam paddy 51 kalams 4 marcals to the temple, paying also the Circar assessment taking on *durkhast* for the current Fasli 41, the wet land 20 velis, 5 mahs, 40¾ gulis and dry land, &c., 6 mahs, 81 gulis of the said village and cultivating and enjoying the land, but shall also furnish adequate cash security therefor (or cash security adequate thereto), we request that orders may be passed to settle (or make certain) and give for *ekasal* (a Revenue expression meaning one year) *durkhast ijara* (contract or lease granted upon application to the Revenue Department) in our names accordingly.

"(Signed) VIRDHACHALLAM.
"(,,) SUBBAIEN.

"(Signed) VENKATA ROW,
Tahsildar."

"*4th December* 1831.

In this petition which, it will be observed, is in the names of two persons, Virdhachala and Subbaien, no reference is made to the antecedent grants held by Virdhachala. The petitioners are described as *purakudis*, that is to say, "tenants who provide themselves with seeds and ploughing cattle, and cultivate the land by personal or hired labour, receiving a share of the produce in return." The application is for a lease for one year, and no distinction in status is made between the two applicants. There is also some difference between the quantity of the land mentioned in Virdhachala's grants and that applied for in the petition. When it is borne in mind that one of those grants was made only four years before, and the other three years after the passing of the Regulation of 1817, it does not seem improbable that the existence of these grants was not brought to the notice of the Collector, by whom their validity might have been questioned, and that the petitioners preferred to base their application on grounds less open to controversy. Be this as it may, neither in the *muchilika* of 10th January 1832 nor in the security bond of 11th January 1832 which followed the petition and completed the tender of the applicants for a lease of the lands, is there anything to indicate a claim to occupancy tenure, except that the applicants are described as *ulavadai miras* instead of as *purakudis*. On the other hand, the *muchilika* clearly contemplates a tenancy for more than one year, for it provides that "if, in any year," garden crops are raised by means of irrigation, a higher money-rent is to

be paid. In like manner it is stipulated that "if in any *fasli*, damage is caused by flood or drought," allowance is to be "made for the damage, according to custom and discretion." And the applicants further agree that "as *kayam taram thirwa* (permanent classification money-assessment) has been fixed from the current *fasli* 1241 . . . . . we shall pay the Circar the *thirwa* (money-assessment) of each *numberwari* land." In explanation of the phraseology used, it is stated that classification-settlement is a settlement of assessment made with reference to the quality of each field (or number) as opposed to the settlement of a village in gross; and that such a settlement was at that time in progress in the Tanjore district.

No *pattah* appears to have been granted in exchange for the *muchilika*, but the order passed by the Collector is shown in the following extract from an official diary containing copies of orders sent to the tahsildar of Kivalur, the district in which the property is situated:—

"Received your arzi, dated 18th January last, stating that, as the two persons Virdhachala Pillay and Subbaien who had *given durkhast* (presented a petition or tender) for the previous *one sal* (one year, termed also *ekasal*) as per order for the assessed wet, dry, &c., land owned by Kayarohana Swami of Negapatam, said taluq, in the village of Vadagudi, had agreed to *taram faisal* (classification settlement) permanently at the rate of 51 kalams of paddy per annum (on account of) swamibhogam to the temple paying the Circar kist due for the said land, you had obtained *muchilika*, &c., from him (them) and forwarded the same and soliciting orders for putting him (them) in possession of the land.

"Referring to that matter, you shall put the *ijaradar* (tenderer) in possession of the said land and collect duly as per instalments what is *due to the Circar* as well as the swamibhogam.

"(Initld.) M. K.

"CAMP VALLAM,
"*14th February* 1833."

This being the state of the title of the defendants, as shown by the documentary evidence in the case, the following issue was raised in the Court of the Subordinate Judge:—

"Whether under the terms of the *muchilika* of the 10th January 1832, Virdhachella Pillai and Subbaien were tenants from year to year or acquired a right of occupancy?" And the

Subordinate Judge found that "looking at the *muchilika* by itself it does not evidence more than a contract of letting from *fasli* to *fasli* at the yearly rent specified;" and he further held that from the petition it was plain that Virdhachala, "owing to his inability to cultivate the land, or from some other reason, must have given up his right of perpetual lease granted to him under" the grant of 26th January 1820. The District Judge of Tanjore came to the same conclusion. He says "In some way or other it is perfectly clear, as the Subordinate Judge points out, that on the 4th December 1831" (the date of the petition to the Collector) Virdhachala "had either given up or had lost all his right to the perpetual lease granted to him" by the Temple authorities; and he held that "all he and his successors in title have to depend upon is the fresh contract that was made" (with the Collector) "in 1832," under which no permanent right of occupancy was conferred.

The learned Judges of the High Court took a different view. They held that the tenancy began, not under the *muchilika*, but under the grant from the Temple authorities in 1813; that there was no sufficient evidence to prove that the tenancy under the grant of 1813 and 1820 was ever determined, and that the transaction evidenced by the *muchilika* was not a new lease, but a confirmation of the previous grant, with a modification as to the mode of paying the rent. In support of these conclusions, they attach much importance to the description of the applicants, in the *muchilika* and security bond, as *ulavadai mirasidars;* and they hold that this description differentiates the present case from cases in which the High Court had, under similar circumstances, decided otherwise. They accordingly reversed the decrees of the Courts below, and dismissed the plaintiff's suit with costs throughout.

Upon a careful consideration of the whole of the evidence in the case, their Lordships are unable to adopt the conclusions arrived at by the learned Judges of the High Court. It seems to them incredible that if the previous grants had been brought to the knowledge of the Collector in 1831–33, there should not have been some reference to those grants in the proceedings taken before him. Not only is there no such reference, but the applicants come before him in the same character as *parakudis*, and their description as *ulavadai mirasidars* does not occur in any document emanating from the Collector's office, but only in documents put forward by the applicants themselves. The words, moreover, do

not appear to have a well-established meaning. The Judges of the High Court translate them as "persons with an hereditary right to cultivate"; but the Subordinate Judge says that, although the meaning of the words taken separately is clear enough, "the meaning of both the words put together is not explained," nor does the combination find a place in Wilson's Glossary. It would be extremely unsatisfactory to rest the decision in a case of this importance on a vernacular expression of doubtful signification.

On the other hand, their Lordships find that the term *parakudis*, which is employed by the applicants in their petition to the Collector, has a well-understood and definite meaning, and the character of the tenure created by the proceedings before the Collector in analogous cases has been determined by judicial decisions. In the case of *Chockalinga Pillai* v. *Vythealinga Pandara Sannadhy*(1), in which the circumstances were very similar to those of the present appeal, and there was a *muchilika* in similar terms, it was held that no permanent tenancy was created. "The language of the agreement," said Scotland, C.J. (p. 168), "had, I think, no greater effect than the ordinary form of *muchilika* given by a ryot in exchange for a pattah, except so far as it indicated the intention that its terms should apply to every successive fasli for which the holding might be continued by neither party exercising the right to terminate it at the end of a fasli." This decision was followed by the Madras High Court in the case of *Thiagaraja* v. *Giyana Sambandha Pandara Sannadhi*(2), in which the circumstances were almost indentical; and their Lordships see no reason to differ from the conclusions at which those learned Judges arrived, upon a state of facts which cannot be distinguished, in any material degree, from those in the present suit. In a third case, *Krishnasami Pillai* v. *Varadaraja Ayyangar*(3), in which there was no *muchilika* and the decision turned on length of occupation, it was held that the term *purakudi ulavadai*, by which the tenant's predecessor in title was described in his petition to the Collector, did not necessarily imply a right of occupancy; but, in other respects, the decision does not affect the question now before their Lordships which, in their opinion, must be decided upon the contract sanctioned by the Collector in 1833.

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(1) 6 M.H.C.R., 164. (2) I.L.R., 11 Mad., 77.
(3) I.L.R., 5 Mad., 345.

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Their Lordships will humbly advise His Majesty that this appeal ought to be allowed, and the decree of the High Court reversed with costs, and the decree of the District Court of Tanjore restored. The respondents will pay the costs of the appeal.

Appeal allowed.

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

APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Subrahmania Ayyar, Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1903. March 19, 20.

KARUPPAI NACHIAR (THIRD DEFENDANT), APPELLANT IN APPEAL SUIT No. 152 OF 1900,

v.

SANKARANARAYANAN CHETTY AND OTHERS (PLAINTIFFS NOS. 1 TO 6 AND DEFENDANTS NOS. 1, 2, 5 TO 10), RESPONDENTS.

SANGILIVEERA NACHIAR (DECEASED) AND OTHERS (FOURTH DEFENDANT AND HER LEGAL REPRESENTATIVES), APPELLANTS IN APPEAL SUIT No. 186 OF 1900,

v.

SANKARANARAYANA CHETTY AND OTHERS (PLAINTIFFS NOS. 1 TO 6 AND DEFENDANTS NOS. 1 AND 2), RESPONDENTS.

NALLAPUREDDI NARASIMHA REDDI (FIRST DEFENDANT), APPELLANT IN SECOND APPEAL No. 1338 OF 1901,

v.

NALLAPUREDDI MAHALAKSHMAMMA AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 3 TO 8), RESPONDENTS.*

Hindu Law—Devolution of stridhanam property of a woman on her sons who are members of undivided family with their father at the time—Estate taken as co-owners or tenants in common.

When the stridhanam property of a woman devolves on her sons, who, with their father, form an undivided Hindu family at the time of the mother's death,

* Appeals Nos. 152 and 186 of 1900, presented against the decree of T. Varada Rao, Subordinate Judge of Madura (East), in Original Suit No. 14 of 1899.

Second Appeal No. 1338 of 1901, presented against the decree of F. M. Swaminadha Ayyar, Acting District Judge of Nellore, in Appeal Suit No. 359 of 1899, presented against the decree of Y. Krishna Row, District Munsif of Kavali, in Original Suit No. 776 of 1897.

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the sons take it as co-owners or tenants in common without benefit of survivorship.

The stridhanam property of a woman (with a single exception) primarily descends upon her daughters, and, in default of daughter on the daughters' offspring, females having precedence over male offspring. It is only in default of the daughters' line that sons succeed to their mother's stridhanam.

Venkayyamma Garu v. *Venkataramanayyamma Bahadur Garu*, (I.L.R., 25 Mad., 678), explained.

In the Mitakshara, no distinction is made between "*obstructed*" and "*unobstructed*" heritage in respect of the devolution of stridhanam property. The definitions of "obstructed" and "unobstructed" heritage given therein refer in terms only to the property of a male.

In the Hindu Law, the word "ancestor" is not used in the wide sense in which it is used in English Law as merely equivalent to the "propositus" and as co-relative of "heir." In the Hindu Law it is used only as signifying a direct ascendant in the paternal or maternal line, and, more technically, as signifying the paternal grandfather and his ascendants in the male line.

Where, on the death of a maternal uncle, his estate devolves by inheritance on his sister's sons, who at the time are undivided members of a Hindu family governed by the Mitakshara law, they take it as co-owners or tenants in common without benefit of survivorship.

QUESTIONS referred to a Full Bench. In Appeals Nos. 152 and 186 of 1900 the Court (Subrahmania Ayyar and Davies, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.—One of the questions which arise for determination in this case is whether sons of a woman who succeed to her stridhanam and who are at the time the succession opens members of a joint family with their father, take as joint tenants or as tenants in common.

This question is one of difficulty having regard to the recent decision of the Judicial Committee in *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu*(1). We, therefore, submit the question for the decision of the Full Bench.

In Second Appeal No. 1338 of 1901, the Court (Benson and Bhashyam Ayyangar, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.—This appeal has been argued on the footing that the deceased husband of the plaintiff, the first defendant's grandfather and the third defendant were undivided brothers when they inherited their maternal uncle's property and that no partition of the property was made between the three brothers. The question of law which has to be decided

(1) I.L.R., 25 Mad., 678.

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in the case is whether the plaintiff as the heir of her husband who died issueless is entitled to claim a third share in the property to which share her husband would have been entitled in his lifetime if a partition had been effected. It is argued on the strength of the recent decision of the Privy Council in *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu*(1) that the maternal uncle's estate devolved upon his sister's sons who were undivided when the inheritance opened as joint family property with the incident of the right of survivorship as it is understood under the Mitakshara law and that as the plaintiff's husband died without being divided from the first and third defendants, his interest in the maternal uncle's estate passed by survivorship to the first and third defendants and that therefore the plaintiff cannot maintain this suit. The question as to whether the recent ruling of the Privy Council can be extended to inheritance which devolves upon co-heirs other than grandsons by a daughter and as to how far that ruling is a binding authority in cases other than the succession of grandsons by a daughter to the maternal grandfather's property, which was the only question actually decided by the Privy Council in that case, is one of great importance and not free from difficulty. We refer the following question for the opinion of a Full Bench :—

Whether the estate of a male which devolves by inheritance on his sister's sons who at the time that the succession opens happen to be undivided members of one and the same joint Hindu family governed by the Mitakshara law but possessing no joint family property is taken by the brothers as joint family property with the incident of survivorship as generally understood under the Mitakshara law or as co-heirs each entitled to an undivided one-third share which, on the death of one of them without male issue, devolves as his separate property on his widow.

C. R. Tiruvenkatachariar and *S. Srinivasa Ayyangar* for appellants in Appeals Nos. 152 and 186 of 1900.

V. Krishnasami Ayyar and *P. R. Sundara Ayyar* for respondents.

T. V. Seshagiri Ayyar for appellant in Second Appeal No. 1338 of 1901.

T. Ethiraja Mudaliar for respondents.

The Court delivered the following

(1) I.L.R., 25 Mad., 678.

KARUPPAI NACHIAR v. SANKARA-NARAYANAN CHETTY, ETC.

OPINION.—These two references are so closely connected that it will be convenient to deal with them in one judgment.

The question referred for opinion in Appeal Suits Nos. 152 and 186 is whether when the stridhanam property of a woman devolves on her sons, who, with their father, form an undivided Hindu family at the time of the mother's death, the sons take as joint tenants with benefit of survivorship, or jointly or in common without benefit of survivorship.

The appellant's pleader contends that the recent ruling of the Privy Council in the case of *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu*(1), on which the respondent mainly relies, does not apply to this case in which the co-heirs inherited the stridhanam of their mother, and that there is no warrant under the Hindu Law of Mitakshara for holding that the stridhanam of a woman devolves upon her heirs, even if they be her male issue, as joint property with benefit of survivorship. We think that this contention is well founded. It is impossible to read the judgment of the Privy Council without coming to the conclusion that they guarded themselves against using language which would apply to the devolution of stridhanam property. After setting forth the facts of the case fully at the beginning of the judgment, they advert to the obscurity of the 'Mitakshara Law of Inheritance' in the case of women, and refer to their former decisions as conclusively establishing that property inherited by a widow from her husband or by a daughter from her father, is a limited and restricted estate only, and not stridhanam, and that upon her death the next heirs of the husband or father succeed thereto, and that, therefore, the co-heirs in the case before them on the death of their mother succeeded as heirs to their maternal grandfather. Their Lordships then propose the question "What then was the character of the property which they took?" and begin to answer it as follows :—"In the grandfather's hands it was separately acquired property. In the hands of the grandsons it was ancestral property which had devolved on them under the ordinary law of inheritance." If their Lordships were of opinion that it would have made no difference whatever whether it was the mother's stridhanam which had devolved upon her sons, or the maternal grandfather's property which had devolved upon them, there was no object

(1) I.L.R., 25 Mad., 678.

KARUPPAI NACHIAR v. SANKARA-NARAYANAN CHETTY, ETC.

in making a pointed statement that the estate which a daughter inherits from her father is not her stridhanam, and that on her death her sons take it directly as heirs of their maternal grandfather, and that the estate, devolved on the grandsons under the ordinary law of inheritance. The ordinary law of inheritance referred to is, there can be no doubt, the cardinal text of the 'Hindu Law of Inheritance' to the separate property of a male, as opposed to the inheritance to the property of a hermit, dealt with separately by the author of the Mitakshara in chapter 2, section 8, and devolution of the stridhanam property of a woman, also separately dealt with in chapter 2, section 11. We cannot accede to the suggestion of the respondent's pleader that "ordinary law of inheritance" is here used as distinguished from any mode of descent sanctioned by a special custom or usage opposed to the general law of inheritance, as laid down in the Mitakshara. Nor can we accede to the appellant's contention, founded upon the passage quoted and followed by their Lordships from the judgment in the case of *Katama Natchiar* v. *Rajah of Sivagunga*(1), that the ruling of the Privy Council under consideration cannot apply to the present case by reason that the undivided family in the present case consisted not only of the two undivided brothers, on whom the stridhanam devolved, but also of their father, for in the case before their Lordships there was in fact, as appears from the judgment of this Court as well as of the Privy Council, the very same joint family as in the present case, and the property devolved on the sons to the exclusion of their father.

As, then, the question before us is not concluded by the authority of the Privy Council ruling relied on by the respondent, we have to consider "what is the rule of Hindu Law under the Mitakshara which is applicable?" At the outset we may observe that the stridhanam property of a woman, with a solitary exception which need not be referred to here, primarily descends upon her daughters, who either are or will necessarily on marriage become members of a different family, and in default of daughters, on the daughter's offspring, females having precedence over male offspring. It is only in default of the daughter's line that sons succeed to their mother's stridhanam. The rule of devolution is substantially the same under the Dayabhaga system of Hindu law which, unlike

(1) 9 Moo. I.A., 543 at p. 611.

KARUPPAI NACHIAR v. SANKARA-NARAYANAN CHETTY, ETC.

the Mitakshara, does not recognize the benefit of survivorship even in the case of unobstructed succession to the property of a male. In the case of the devolution of a male's property under the Mitakshara, the cardinal principle is that it should remain in the same family, and that is the reason why agnates, however remote, are preferred to cognates, however near, with one exception, viz., the daughter's son. So far as a widow, daughter, mother and paternal grandmother, who are specially provided for in the line of inheritance, are concerned, they, as has now been conclusively established, are simply interposed during their life-time, without diverting the line of inheritance among agnates, until they are exhausted. There is not a single instance indicated in the Mitakshara of the benefit of survivorship between co-heirs inheriting stridhanam property, and, in our opinion, there is no divergence between the Mitakshara and the Dayabhaga as to the character of the estate which, in the case of stridhanam property, devolves upon co-heirs. It would be revolutionary to hold that all property which comes to two or more persons who happen to be members of an undivided family is taken by them with benefit of survivorship, and there is no warrant whatever in the Mitakshara for such a general proposition. It has been held in more cases than one that property which comes to members of an undivided family by devise or gift is not taken by them with benefit of survivorship (*Remun Persad* v. *Mussumat Radha Beeby*(1), *Bai Diwali* v. *Patel Bechardas*(2)). The Privy Council, no doubt, has ruled in *Venkayamma Garu* v. *Vekataramanayyamma Bahadur Garu*(3) that the position taken by the High Court of Calcutta (*Jasoda Koer* v. *Sheo Pershad Singh*(4)) and by this Court (*Sri Raja Chelikani Venkataramanayamma Garu* v. *Appa Rau Bahadur Garu*(5)) that obstructed heritage universally devolves on co-heirs as tenants in common, and not as joint tenants with benefit of survivorship, is one that is erroneous; but their Lordships have abstained from laying down that, as a universal rule, a heritage which devolves upon co-heirs, who happen to be all or some of the members of an undivided family under the Mitakshara, is taken by them with benefit of survivorship. They refer only to two instances as

(1) 4 Moo. I.A., 137 at p. 174.
(2) I.L.R., 26 Bom., 445.
(3) I.L.R., 25 Mad., 678.
(4) I.L.R., 17 Calc., 33.
(5) I.L.R., 20 Mad., 207.

He was only pointing out that the real meaning of Yagnavalkya was not that, on the death of the mother, the sons ought to divide her property among themselves as might at first sight be supposed, but only that they are to inherit such portion of the mother's property as may be necessary to discharge her debts, and that it is upon the daughters that the inheritance devolves, subject merely to a deduction in favour of the sons if there are any debts of the mother to be discharged.

The learned pleader for the respondent next refers to chapter 1, section 4, commenting upon Yagnavalkya's text, chapter 2, verse 118, in which it is declared that whatever is acquired by one coparcener alone, without detriment to the father's estate, does not appertain to the co-heirs. The author of the Mitakshara explains that the father's estate referred to in the text will also apply to mother's estate, in other words, whatever is acquired by one of the sons, without the aid of the mother's stridhanam, will belong to himself, and not to him along with the co-heirs. Though the author of the Mitakshara here refers only to the mother, the reference is only by way of illustration, and the import simply is that whatever is acquired by one of the co-heirs without the aid of the heritage which has devolved on the co-heirs, no matter from whom, will belong to him solely, and it is only if the acquisition is made with the aid of the heritage that it will really form an accretion to the heritage and belong to all the co-heirs (Burnell's 'Dayavibhaga,' page 48; 'Smritichandrika,' chapter 6, paragraph 2; Krishnasvami Iyer's 'Translation,' page 78; 'Dayabhaga,' chapter 6, section 1, paragraph 17; Stokes' 'Hindu Law Books,' page 269). The author of the Mitakshara, therefore, was not thinking of the character of the heritage devolving on a plurality of co-heirs from different relations, but his object was only to declare that if one of the co-heirs makes an acquisition without the aid of such an heritage, it belongs to him solely, and the co-heirs of the heritage cannot claim a share in such acquisition. Though the author of the Mitakshara deals specially with the partition of the father's property by sons, yet it is clear from chapter 1, section 1, paragraphs 4 and 5, that the rules prescribed for the partition of the father's estate apply *mutatis mutandis* to the partition of property inherited from any relation, and by co-heirs, whether sons or other relations of the deceased.

Another argument used by the respondent's pleader is that, as in the case of the grandsons inheriting to the paternal grandfather, so in the case of grandchildren inheriting to the Stridhanam of the maternal or paternal grandmother, they take *per stirpes* and not *per capita*. No doubt there may be this similarity, but, as pointed out by the learned pleader for the appellant, there is a dissimilarity in another respect, viz., that where the deceased dies leaving children and grandchildren the grandchildren do not by representing their deceased mother or father, as the case may be, step into their shoes and inherit along with the children of the deceased.

The respondent's argument does not, therefore, carry any weight, and is especially ineffective in view of the fact that, notwithstanding that daughter's sons do not take *per stirpes*, but *per capita*, it has been held by the Privy Council that maternal grandfather's property devolves upon them with benefit of survivorship. We must, therefore, hold that none of the arguments addressed to us show that stridhanam property, when it devolves upon a plurality of heirs, is held by them with benefit of survivorship, or that, at any rate, it is so in the case of stridhanam property of a mother devolving upon her sons. We must also hold that in the case of the devolution of stridhanam property there is nothing peculiar in the Mitakshara law as distinguished from the Dayabhaga law, so as to import the doctrine of survivorship as between the co-heirs, and thus restrict the operation of the rules of inheritance laid down for the devolution of stridhanam property.

Our answer to the question referred to us in Appeal Suits Nos. 152 and 186 is that the sons take the stridhanam of their mother as co-owners or tenants in common.

The second question referred for our opinion is whether the maternal uncle's estate devolves upon his nephews who, at the time of their uncle's death, are members of an undivided family, as joint tenants with benefit of survivorship, or as tenants in common, or co-owners without benefit of survivorship.

The real question which we have to decide is whether this matter is concluded by the ruling of the Privy Council in *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu*(1).

(1) I.L.R., 25 Mad., 678.

We should have no hesitation in holding that it is not so concluded, but for the observation contained in the judgment of the Privy Council that the decision of this Court (*Sri Raja Chelikani Venkataramanayamma Garu* v. *Appa Rau Bahadur Garu*(1)) which was before their Lordships in appeal and which was reversed and also the decision of this Court in *Saminadha Pillai* v. *Thangathanni*(2) were open to the same objections as their Lordships pointed out to the decision of the Calcutta High Court in *Jasoda Koer* v. *Sheo Pershad Singh*(3), which was followed by this Court in the two cases referred to. After full consideration, and not without some diffidence, we have come to the conclusion that the ruling in *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu*(4) does not conclude the question referred to us. At the outset we may observe that the ruling of their Lordships with which we are dealing in terms applies only to the case of daughter's sons. These form a class of co-heirs, not liable to be increased after the inheritance has devolved on the class. But the same cannot be said of all other classes of co-heirs, such as sister's sons who succeed in priority to a sister (*Lakshmanammal* v. *Tiruvengada Mudali*(5)). In the case of the latter class, therefore, an anomaly occurs in applying the principal of survivorship which does not arise in applying it to the former class. In the case of daughter's sons the inheritance will not devolve on them until after the death of all the daughters, and no one, therefore, can come into existence in the undivided family, as a daughter's son, after the inheritance has devolved upon the class; but in the case of the heritage of a maternal uncle there may be only one or two nephews in the undivided family at the time of the uncle's death, and other nephews may be born subsequent thereto. Though such after-born nephews are part of the same class as the nephews who were in existence at the time of the uncle's death, yet they can acquire no right in the property of their maternal uncle, which has already vested in the nephews who were in existence when the uncle died.

Such right as they may acquire by birth in the joint family property of their father or grandfather will be limited to paternal property or to property of the paternal line. In an undivided

(1) I.L.R., 20 Mad., 207.
(2) I.L.R., 19 Mad., 70.
(3) I.L.R., 17 Calc., 33.
(4) I.L.R., 25 Mad., 678.
(5) I.L.R., 5 Mad., 241.

family every member on birth acquires a right in such property, and the right accruing to him is equal to that of his father in the paternal grandfather's property. By the principal of representation, which obtains in an undivided family, the male issue of a deceased member steps into the shoes of the deceased.

In the case, then, that we are considering, the after-born nephew cannot, on his birth into the undivided family, acquire any right in the property of his maternal uncle since it had already vested in his brothers before he was born.

If sister's sons take the heritage simply as co-heirs, without benefit of survivorship though they are members of an undivided family, the property will belong to them as their separate property, and on the death of each, his undivided share will devolve upon his separate heirs, including of course his after-born brothers.

In *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu*(1) their Lordships of the Privy Council while stating that in the grandfather's hands the estate was separately acquired property, added that it became ancestral property in the hands of the grandsons when it devolved on them by inheritance, and their Lordships applied the law of survivorship in tracing succession to such property on the death of one of the grandsons. We cannot therefore regard the use of the expression "ancestral property" as suggested by the learned pleader for the appellant as a mere casual statement, carrying no special significance. In the Hindu law the word "ancestor" is not used in the wide sense in which it is used in English law as merely equivalent to the *propositus* and as the co-relative of heir. In Hindu law it is used only as signifying a direct ascendant in the paternal or maternal line, and more technically as signifying the paternal grandfather and his ascendants in the male line, and in Colebrook's 'Translation of the Mitakshara' it is the expression "father's father's property" that is translated into "ancestral property." While it may or may not be that the expression "ancestral property" in their Lordship's judgment is used in the latter sense in which technical sense it is used in several judgments of their Lordship of the Privy Council and also by the Indian Legislature (*Suraj Bunsi Koer* v. *Sheo Persad Singh*(2), *Parbati Kumari Debi* v. *Jagadis*

(1) I.L.R., 25 Mad., 678. (2) I.L.R., 5 Calc., 148 at p. 164.

Chunder Dhabal(1), *Rajah Suraneni Venkata Gopalla Narasimha Row* v. *Rajah Suraneni Lakshma Venkama Row*(2), *Umrithnath Chowdhry* v. *Gourcenath Chowdry*(3) and article 126 of the second schedule to the Indian Limitation Act, 1877) it appears to us clear that it is not used as denoting property other than that which has devolved from a direct ancestor either in the paternal or maternal line. In the case before their Lordships the property had devolved from the maternal grandfather. In the present case the maternal uncle from whom the inheritance devolved cannot be regarded as an ancestor in the maternal line, in the sense in which the term is used by writers on Hindu law. So far as a daughter's sons are concerned, they have a peculiar position in the Hindu law which is denied to all other cognates. Under the older Hindu law, the son of an appointed daughter (*putrika putra*) was equal to an *aurasa* or legitimate son and he took his rank, according to many authorities, as the highest among the secondary sons. Although this branch of the law is now obsolete, its effect survives in the 'Hindu law of Inheritance' and in the consciousness of the people, for even now he takes a place practically next after male issue, the widow and daughters being simply interposed during their respective lives and the maternal grandfather is regarded "as becoming the possessor of a son's son."

The position of a daughter and daughter's son in the line of inheritance is considered in the Mitakshara, chapter 2, section 2, paragraphs 5 and 6, from which we quote the following "Then *Vishnu* says 'If a man have neither son, nor son's son, nor (wife nor female) issue, the daughter's son shall take his wealth. For in regard to the obsequies of ancestors, daughter's sons are considered as son's sons.'" *Manu* likewise declares "by that male child whom a daughter, whether formally appointed or not, shall produce from a husband of an equal class, the maternal grandfather becomes the grandsire of a son's son: let that son give the funeral oblation and possess the inheritance." See also 'Dayabhaga,' chapter XL, section II, paragraphs 18, 19 and 20 (Stokes' 'Hindu Law Books,' page 327).

The difference in his position under the old law and the present law is that under the former if he is the son of an appointed

(1) I.L.R., 29 Calc., 433 at pp. 452 & 453. (2) 12 Moo. I.A., 113 at p. 140.
(3) 13 Moo. I.A., 542 at p. 546.

daughter (and only one such daughter can be appointed), he becomes by a fiction of law the son or son's son of the maternal grandfather, and as such a member of the grandfather's family, and is not a member of his own father's family ('Mitakshara,' chapter 1, section 11, paragraph 3).

Under the present law he is a member of his own father's family, but he is regarded as being also as good as a son's son to his maternal grandfather.

If by reason of a daughter's son being considered for spiritual purposes, as equal to a son's son, when the maternal grandfather dies without male issue, the estate devolving upon him (though as "obstructed heritage") from the maternal grandfather can, by a fiction of law, be regarded as "ancestral" property in his hands in the technical sense in which that term is used in the Hindu law, viz., as denoting property descending from a paternal male ancestor, the daughter's sons, when there are more than one, will not only hold such estate as joint family property with mutual rights of survivorship to the exclusion of their father and his other co-parceners, if any, but their male issue will also on birth acquire, in such property, a right jointly with and equal to their father's. But if the estate devolving on daughter's sons is to be regarded only—as in truth it is—as coming to them from the maternal line, their male issue cannot acquire in such estate a right by birth equal to their father's—for such right is expressly limited to property devolving upon the father from the paternal line ('Mitakshara,' chapter I, section 5, paragraph 5). The anomaly in this latter view will be that though the daughter's sons who are undivided as between themselves hold the maternal grandfather's estate (according to the ruling of the Privy Council in *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu*(1) as joint family property with the benefit of survivorship as understood under the Mitakshara law, yet their male issue will not become joint owners in such property possessing equal rights with their father. There can hardly be any doubt that the right of survivorship on which the ruling of the Privy Council is based, is the right of survivorship obtaining under the Mitakshara system (*Jogeswar Narain Deo* v. *Ramchandra Dutt*(2)) according to which the right will not prevail in favour of the survivor, as against the male issue

(1) I.L.R., 25 Mad., 678. (2) I.L.R., 23 Calc., 670 at p. 679.

of the deceased. Under the Mitakshara joint family system there can be no joint family property in respect of which the male issue of the joint owners will not by birth become joint owners with their father (see *Sudarsanam Maistri* v. *Narasimhulu Maistri*(1)).

If, therefore, we are to understand the expression "ancestral property" in their Lordships' judgment otherwise than in its technical sense, according to which it is property in which a son on his birth becomes an equal owner with his father, the result of the ruling will be that a species of joint family property unknown to the Mitakshara will be brought into existence.

But for the absence of any allusion in the judgment of the Privy Council to the texts already quoted, declaring a daughter's son to be as good as a son's son and that "there is no difference in law" between them, we should not hesitate to say that the expression "ancestral property" is used in the judgment in the technical sense already referred to. The nature of the estate devolving upon a daughter's son was considered by this Court in two cases (*Muttayan Chetti* v. *Sivagiri Zamindar*(2), *Sivaganga Zamindar* v. *Lakshmana*(3)), both of which were considered by this Court in *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu*(4). In both, the question raised was whether the son of the daughter's son had a right of interdiction against an alienation made by his father of his maternal grandfather's property. In both these cases it was held that though in respect of such property, the son may not on birth become an equal owner with his father, entitled to demand partition from his father, yet such property is not the self-acquisition of the father which he can alienate at his will and pleasure. The former case in *Muttayan Chetti* v. *Sivagiri Zamindar*(2) was carried in appeal to the Privy Council (*Muttayan Chetti* v. *Zamindar of Sivagiri*(5)) and their Lordships, while concurring in the view that the property was not the self-acquisition of the father, refrained from deciding whether or not the father had absolute power of disposition over such property as he has over his self-acquisition—the decision of that question having become unnecessary in the view which they took of the case on another point. If, in the recent decision of the

(1) I.L.R., 25 Mad., 149 at pp. 155 & 156. (2) I.L.R., 3 Mad., 370.
(3) I.L.R., 9 Mad., 188. (4) I.L.R., 25 Mad., 678.
(5) I.L.R., 6 Mad., 1.

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Privy Council in *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu*(1) the expression "ancestral property" be regarded as having been used by their Lordships in the restricted technical sense above referred to, the result will be that the son will have an equal right with his father in the property which has devolved on the latter from his maternal grandfather, and the *ratio decidendi* of the ruling itself may be inferred to be that when the maternal grandfather's property devolves upon the sons of a daughter, they and they alone succeed to the maternal grandfather as if he was their father's father, but in respect of their own paternal property they will be joint owners thereof with their father and his other co-parceners, if any.

Whether such be the *ratio decidendi* or not, and whether the expression "ancestral property" be used as denoting property coming from the paternal line only or from both paternal and maternal lines, we are unable, notwithstanding the adverse comment of the Privy Council on the decision of this Court in *Saminadha Pillai* v. *Thangathanni*(2) to extend the ruling in *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu*(1) to cases other than those in which the inheritance devolves from a paternal or maternal male ancestor on his lineal descendants, whether as "unobstructed" or as "obstructed" heritage. The decision in *Saminadha Pillai* v. *Thangathanni*(2) was referred to as follows in the judgment of this Court in the Jaggampet case (*Sri Raja Chelikani Venkataramanayamma Garu* v. *Appa Rau Bahadur Garu*(3)):—"The *ratio decidendi* of this decision and of the Calcutta ruling (*Jasoda Koer* v. *Sheo Pershad Singh*(4)) which in effect it followed, is identical, viz., that survivorship does not exist in any case in which property passes as obstructed heritage." The observation of the Privy Council that *Saminadha Pillai* v. *Thangathanni*(2) case is open to the same objection as the decision of this Court in *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu*(1) can be construed only as a disapproval of the general position therein maintained that survivorship cannot exist in any case in which property passes as obstructed heritage, and not as a disapproval of the actual decision in the case, even apart from the question of fact on which also it was based. The

(1) I.L.R., 25 Mad., 678.
(2) I.L.R., 19 Mad., 70.
(3) I.L.R., 20 Mad., 207 at p. 218.
(4) I.L.R., 17 Calc., 33.

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ruling of the Calcutta High Court in *Jasoda Koer* v. *Sheo Pershad Singh*(1) also proceeded on the same general principle—which was disapproved of by the Privy Council. But as the Calcutta decision, like *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu*(2), related to the property of a maternal grandfather devolving upon his daughter's sons, it became necessary for their Lordships of the Privy Council to examine whether, apart from the reasons given,—which their Lordships disapproved of—the decision itself was sound or not; and adverting to the principles regulating the devolution of joint family property under the Mitakshara law, they came to the conclusion that the decision itself was erroneous. But as regards the decision of this Court in *Saminadha Pillai* v. *Thangathanni*(3),—which related to a case of collateral succession—it was unnecessary for their Lordships to examine the soundness or otherwise of the actual decision in the case, apart from the general position therein taken, and the actual decision itself cannot, therefore, be considered as overruled.

Our answer to the question referred to us in Second Appeal No. 1388 of 1901 is that on the death of the maternal uncle each of the nephews then in existence took an undivided one-third share of the estate which on his death devolved as his separate property.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

TUTIKA BASAVARAJU (PLAINTIFF), APPELLANT,

v.

PARRY & Co. (DEFENDANTS), RESPONDENTS.*

1903. July 31. August 3. September 28.

Contract Act—IX of 1872, s. 230—Contract by agent—Principal resident abroad—Presumption of personal liability of agent—Rebutted where contract made in name of principal.

Plaintiff telegraphed to P. & Co. (who were the managing agents of a company having its registered office in England but carrying on business in

(1) I.L.R., 17 Calc., 33. (2) I.L.R., 25 Mad., 678.
(3) I.L.R., 19 Mad., 70.

* Appeal No. 104 of 1901, presented against the decree of F. Murray, District Judge of Ganjam at Berhampore, in Original Suit No. 8 of 1900.

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India) for a quotation as to the price of sugar. P. & Co. replied in their own name, merely quoting the rate, and plaintiff accepted the offer and forwarded a deposit. On the following day, P. & Co. addressed a letter to plaintiff with which was enclosed a memorandum of sale, which contained all the terms of the contract. The letter and the memorandum bore the name of the company printed at the top and P. & Co. signed both as "managing agents." Delay having occurred in the delivery of the sugar, plaintiff instituted the present suit against P. & Co. for the return of the deposit and for damages. P. & Co., in their written statement, pleaded that the suit was not maintainable against them inasmuch as they were merely agents:

Held, (1) that the contract, for the alleged breach of which the suit was brought, was that which had been formally reduced to writing in the memorandum of sale;

(2) that the company was resident abroad, and that a presumption, in consequence, arose under section 230 of the Contract Act that the defendants, though the agents of that company, were personally liable under the contract;

(3) that this presumption of law is one which can be rebutted, and is rebutted when the foreign principal is, in writing, made the contracting party, and the contract is made directly in his name.

SUIT to recover money deposited on a sugar contract and damages for breach of that contract. Plaintiff was a trader at Berhampore, and the defendants were the managing agents of the East India Distillery Company, Limited. On 4th September 1899, plaintiff sent the following telegram (exhibit 32) addressed to Messrs. Parry & Co.:—"What rate N sugar thousand bags c. f. i. Gopalpore." To this Messrs. Parry & Co. replied (exhibit 33) on the following day:—"Offer thousand N October, November, seventeen six c. f. i." On the same day plaintiff telegraphed (exhibit 34) "received telegram, confirmed. Sent deposit thousand rupees." Messrs. Parry & Co. also on the same day, addressed the following letter (exhibit 35) to the plaintiff:—

"DEAR SIR,—We enclose copies of telegrams exchanged and confirm ours of yesterday's date making you an offer of 1,000 bags N October, November shipment at Rs. 17-6 per bag c. f. i. Gopalpore, usual deposit of one rupee per bag. We trust you will be able to place an order with us at this rate. We are dear Sir, Yours faithfully, (Signed) pp. PARRY & Co., Managing Agents."

On 6th September Messrs. Parry & Co. addressed the following letter (exhibit 36) to plaintiff:—

"DEAR SIR,—We are in receipt of your telegram of 5th instant and note that you accept the offer of 1,000 bags N at Rs. 17-6 per bag c. f. i. Gopalpore October, November shipment. We

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enclose herewith sale-note for sale and await the deposit of one rupee per bag. We are dear Sir, Yours faithfully, (Signed) pp. PARRY & Co., C. W. Prest, Managing Agents."

The sale-note (exhibit 37) enclosed was as follows:—

"Memorandum of sale made by the East India Distilleries and Sugar Factories, Ld., Madras. 6th September 1899, Madras. To M.R.Ry. Tutika Basavaraju, Berhampore (Ganjam). DEAR SIR,—We have pleasure in confirming sales as under:—No. of contract—562. Code cipher of do.—Butterfly. Article—Sugar. Quality—N. Quantity—1,000 bags. Price—Rs. 17-6 per bag c. f. i. Gopalpore. Terms—Deposit of rupee one per bag. Shipment—October, November shipment. Reimbursement—By demand draft. Closed by—Your telegram of 5th instant as per copy enclosed. Yours faithfully, (Signed) pp. PARRY & Co., C. W. Prest, Managing Agents. *N.B.*—Shipment to be considered duly effected if made by British India steamer due to call by time-table within the date above specified and in the event of such steamer not calling, the shipment to be considered duly effected if made by the following steamer. Strike clause.—If on account of riots, strikes, break down of machinery or other damage or accident to the factories belonging to the East India Distilleries and Sugar Factories, Limited, or pestilence amongst the workmen thereof, any part of the goods under this contract be not shipped within the time hereinbefore appointed for shipment, the said quantity shall be deducted from the contract quantity or shipped as soon as possible thereafter, the buyers having the option (which is to be declared by telegram as soon as notice of short shipment is given by sellers) of refusing acceptance of the quantity short shipped if after time. In either case the buyers shall have no claim on the sellers for loss in respect of the non-shipment or late shipment of such quantity short shipped."

It appeared that the steamers had sailed irregularly, and for this and other reasons Messrs. Parry & Co., as agents for the East India Distillery Company, did not ship the sugar during the months of October and November. On 27th November, however, they wrote (exhibit L) to the plaintiff that they proposed to ship the thousand bags by the steamer which was due at Cuddalore on 1st December. To this, plaintiff telegraphed (exhibit LI):—"Contract time expired. I don't want sugar." Plaintiff now sued to recover the deposit of Rs. 1,000 and damages

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for the non-delivery of the sugar. The defendants pleaded (*inter alia*) that they were not interested in the subject-matter of the suit except as managing agents for the East India Distilleries and Sugar Factories, Limited, but they intimated their consent to the written statement being taken as the written statement of the company if the plaint should be amended by substituting the name of the Distilleries Company for that of Messrs. Parry & Co. Plaintiff did not, however, amend his plaint. The defendants further contended that the delivery which they had offered to make was a compliance with the terms of the contract, that they had been ready and willing to supply the sugar but that plaintiff had wrongfully refused to accept it. They claimed Rs. 1,600 damages for plaintiff's wrongful refusal, and retained the deposit of Rs. 1,000 towards those damages. The District Judge ordered the defendants to pay plaintiff Rs. 500, and ordered each party to pay his own costs.

Plaintiff preferred this appeal; and the defendants filed a memorandum of objections.

P. R. Sundara Ayyar and *C. V. Anantakrishna Ayyar*, for appellant, contended that the telegrams formed a complete contract with the defendants: also that the East India Distilleries Company was a "merchant residing abroad" within the meaning of section 230 (1) of the Contract Act. They also contended that the defendants had not complied with the terms of the contract as to delivery.

Mr. *D. Chamier*, for the respondents, contended that the complete contract was contained in the memorandum of sale, exhibit 37. The telegrams merely fixed the material terms of the contract with reference to the rates prevalent in the market. In mercantile contracts, the parties do not set out matters well-known to both (*Humfrey* v. *Dale*(1)). Plaintiff was well aware from prior dealings which he had had with the defendants that the latter were only the managing agents for the company, moreover, the sale-note made that clear, and was a contract with the company, to which plaintiff had raised no objection. Even though the company was registered in England and had a registered office in England, its business was carried on in India, and it must be regarded as residing here within the meaning of section 230 (1). The pre-

(1) 26 L.J., Q.B., 137 at p. 139.

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sumption arising under that section is rebuttable (*Mackinnon* v. *Lang*(1)) and here the sale-note had been signed on behalf of the company.

The case was also argued at length on the question whether there had been any breach of contract.

C. V. Anantakrishna Ayyar replied.

JUDGMENT.—The appellant sues the respondents for recovery of Rs. 1,000 deposited with them on a sugar contract, with interest on the same and for damages to the extent of Rs. 2,375 alleged to have been sustained by him by reason of the respondents' breach of contract. The respondents plead that they are only the managing agents for the East India Distilleries and Sugar Factories, Limited, that they are not liable to be sued on the contract and that the suit should have been brought against the latter company. They also plead that the appellant (plaintiff) refused to take delivery of the goods and that in consequence they have sustained damages to the extent of Rs. 1,600 and that they are entitled to retain the deposit amount of Rs. 1,000 and to a judgment against the appellant (plaintiff) for the balance of Rs. 600.

The District Judge gave judgment in favour of the plaintiff for Rs. 500 and disallowed his claim in other respects. The plaintiff prefers this appeal for recovery of the balance of Rs. 3,215 disallowed by the District Judge and the defendants take objection, under section 561, Civil Procedure Code, to the decree appealed against on the grounds that they are not liable to be sued on the contract and that, if they were liable, they are entitled to judgment against the plaintiff on their counter-claim.

In our opinion the objection taken by the defendants (Messrs. Parry & Co.) that they are not liable to be sued on the contract and that the suit ought to have been brought against their principal, the East India Distilleries Company (Limited) is well founded in law and that being so, it follows that it is not competent to the defendants to prefer a counter-claim.

It is clear that the contract for the alleged breach of which the action has been brought, is the contract which has been formally reduced to writing in exhibit XXXVII, dated the 6th September 1899—which purports to be a memorandum of sale made by the East India Distilleries and Sugar Factories, Limited, to the plaintiff

(1) I.L.R., 5 Bom., 584.

and which is signed by the defendants as *managing agents*. This memorandum contains all the terms of the contract,—the principal terms, viz., the quality and the quantity of sugar to be supplied, the price and the time for shipment, having been settled on the 5th September, by telegraphic communication between the plaintiff and the defendants under the name and style of Messrs. Parry & Co. (exhibits XXXII, XXXIII and XXXIV). The defendants in their letter (exhibit XXXV), dated the 5th September 1899, enclosing copies of the telegrams exchanged and confirming their telegram, describe themselves both at the top of the letter and below their signature as *managing agents*, the name of the East India Distilleries and Sugar Factories, Limited, also appearing at the top of the letter, above the date. This letter was followed by another letter (exhibit XXXVI), dated the 6th September (with similar heading and signature) enclosing the memorandum of sale (exhibit XXXVII) already referred to. No objection was taken to it by the plaintiff. Two previous contracts for sale of sugar to the plaintiff, which, as in this case, had been also settled by telegraphic communication between the plaintiff and the defendants, had been formally reduced to writing in similar memoranda of sale and sent to the plaintiff (exhibits XXIX and XXX (*f*), dated the 29th June and the 31st August 1899, respectively). In paragraph 3 of the plaint, the plaintiff refers to the sale-note (exhibit XXXVII) as embodying the terms of the contract and the only exception he takes to it is as to the addition " at foot, of two new clauses, one as to shipments and the other as to strikes, to which clauses, however, they (the defendants) did not draw plaintiff's attention." He does not there take any exception to the name the East India Distilleries Company appearing as that of the party contracting to sell the sugar or to the defendants signing the sale-note merely as *managing agents*. Under these circumstances it is manifest that the defendants cannot be held to be personally bound by the contract—*vide* section 230 of the Indian Contract Act—unless the plaintiff can rely on any of the presumptions referred to in clauses 1, 2 and 3 of the section. The learned pleader for the appellant relies on clause 1 of section 230 on the ground that the principal company is a " merchant resident abroad " within the meaning of that clause. The learned counsel for the respondents, while admitting that the East India Distilleries Company (Limited) is a

company registered in England under the English Companies Acts (1862 to 1890) having its registered office in England, contends that the company must be regarded as residing here, where its manufacturing business (of sugar making) is carried on, and in support of this contention cites the case of *Taylor* v. *Crowland Gas & Coke Company*(1). We are decidedly of opinion that this contention is untenable. According to the opinion of most recent writers on Private International Law and the decisions of English Courts (*Adams* v. *G.W. Railway Co.*(2), *Shields* v. *G.N. Ry. Com.*(3), *Minor* v. *L. & N.W. Ry.*(4), *Corbett* v. *The General Steam Navigation Company*(5), *Le Tailleur* v. *S.E. Ry. Com.*(6), and *Keynsham Blue* v. *Barker*(7)), the residence and domicile of an incorporated trading company is its principal place of business, *i.e.*, the place where the administrative business of the company is conducted, which may not be the place where its manufacturing or other business operations are carried on (Lindley on Companies, 6th edition, page 1223). In illustration of this doctrine, Dicey in his 'Conflict of Laws' observes as follows (at page 155) :—" Thus if a company incorporated under the Companies Acts, 1862 to 1890, for the carrying on of manufactures in India, has a registered office in England and its affairs are conducted in England, the company is domiciled in England not in India." The case of *Taylor* v. *Crowland Gas & Coke Company*(1) cited by respondents' counsel—in which it was held that a corporation must be considered as dwelling at the place where it carries on its business – is really against his contention, for the place of business therein referred to is the place where the administrative business of the corporation is carried on.

This question was fully considered (in *Calcutta Jute Mills Company* v. *Nicholson*(8)), in connection with the liability of the Calcutta Jute Mills Company (Limited)—a company registered and incorporated in England but earning profits abroad—to pay income-tax under the English Income Tax Act. The following extract from the judgment of Kelly, C.B., presents the matter in a very clear light and is conclusive on the question :—" The question is whether this company can be held liable to the income-tax

(1) 11 Ex. Rep. 1 at p. 6.
(2) 6 H. & N., 404.
(3) 7 Jur. N.S., 631.
(4) 1 C.B.N.S., 325.
(5) 4 H. & N., 482.
(6) L.R., 3 C.P.D., 18.
(7) 2 H. & C., 729.
(8) L.R., 1 Ex. D., 428.

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upon the entirety of its profits. It is a company incorporated in England, under the laws of England, by virtue of the Joint Stock Companies Acts and therefore its first origin and existence are in England alone . . . . . Now, it signifies little whether the office in which the very important business of holding meetings at which everything, that is, or may be done by the company is determined is an office rented from any other person in the city or whether it is a place lent for that purpose by one of the directors for the use of the company and at the disposition of the company. Here, then, is their location—their residence, if I am to apply the terms of the statute—here the directors meet when they have occasion, and the company meets, that is, the general body of the shareholders or such as choose to attend, hold their general and their special meetings. Here the company transacts its business, and exercises the extensive powers with which it is invested by Act of Parliament. . . . . It is true that . . . . in fact there is one Calcutta director. It is not that there exists by virtue of the constitution of the company, a director having power himself to act and conduct the affairs of the company in India; but it is that the governing body, the directors in England, have power to appoint one or more persons and have appointed one to be the resident director and manager, the governor, as it were, of the company in India. It is he who directs and controls the whole conduct of the business in India, but he is merely the appointee and agent of the directors in England. We find that all the buying, selling and manufacturing and the whole of the property in which the capital of the company is invested, are in India alone. . . . . Then arises the question, What is the meaning of the word 'residing' as applied to a Joint Stock Company and to this case? The answer is—whether there may or may not be more than one place at which the same Joint Stock Company can reside, I express no opinion at present—a Joint Stock Company resides where its place of incorporation is, where the meetings of the whole company or those who represent it are held, and where its governing body meets in bodily presence for the purposes of the company and exercises the powers conferred upon it by statute and by the articles of association. That acts of the highest importance affecting the well-being of the company, the operation of its business, the realizing and disposing of its funds, are done in India is perfectly true; but they are all done

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by mere agents—whether they be directors or not—appointed under the sole authority of the governing body in this country. . . . . There is no shadow of authority to show that a place in which the governing body, the directors, meet and where the shareholders at large hold their general and their special meetings and exercise their power of transacting the business is not the principal seat of business and the place at which, in the language of the statute, the company may be said to reside . . . . But the appellants say that the whole business of the company is transacted in India alone . . . . All that is true, but every act done, the working of the mills, the realizing of the profits, the transmission of the proportion of the profits in question to England, and the distribution of the rest of the profits in the form of dividends to the different shareholders—all that, if not done by the company directly in India, is done by them indirectly, because it is done by the person appointed by them, whom they may recall at their pleasure and who has no authority to interfere in any way in the affairs of the company except the authority conferred on him by the governing body at home . . . . In contemplation of law, the money [profits, etc.] is theirs and, if they choose, they clearly have the power to order the acting director in India to remit the two-thirds in question to England, for them to remit it back to India to him to distribute to the Indian shareholders, and it is only because that proceeding would be expensive, useless and hazardous that it is not done" (pages 444 to 447).

We, therefore, hold that the East India Distilleries Company (Limited) is a corporate company resident abroad and that therefore it must be *presumed* that the defendants, though agents of that company, are personally liable upon the contract. But this presumption of law is one that can be rebutted and we are constrained to hold that this presumption is rebutted, when the foreign principal himself is, in writing, made the contracting party and the contract is made directly in his name—as in the present case. In the foot-notes to paragraph 268 of Story on Agency (9th edition, page 327) it is laid down (quoting from a judgment of Bigelow, C.J.) that "the more reasonable and correct doctrine is that when goods are sold to a domestic agent or a contract is made by him, the fact that he acts for a foreign principal is evidence only that the agent and not the principal is

liable. It is in reality in all cases a question to whom the credit was in fact given. Where goods are sold it is certainly reasonable to suppose that the vendor trusted to the credit of a person residing in the same country with himself, subject to laws with which he is familiar and to process for the immediate enforcement of a debt, rather than to a principal residing abroad, under a different system of laws and beyond the jurisdiction of the domestic forum. But even in such a case the fact that the principal is resident in a foreign country is only one circumstance entering into the question of credit and is liable to be controlled by other facts" (see also per Coleridge, J., in *Lennard* v. *Robinson*(1)).

In *Mahony* v. *Kekule*(2), in which it was held that where a contract in writing is made by an agent, which is in form with the foreign principal and not with the agent, the latter is not liable, although the contract was signed by *him* "for and on account of" the foreign principal—Jervis, C.J., observed as follows (at page 398):—"Ordinarily where an English agent contracts on behalf of a principal residing abroad, the agent is *primâ facie* considered to pledge his own credit because it is highly improbable that the person he is contracting with would give credit to the foreigner. But that is not like this case. Here is a written contract, the meaning of which is to be collected from the face of it. It is expressed to be a contract between Vacher and Tilly and Mahony. But it is said that because it is signed at the end by Kekule 'as agent for Vacher and Tilly,' therefore he is to be held liable. That, however, by no means follows. That is nothing more than an assertion that he had authority to make the contract for them. Could it have been contended that Kekule would have been liable, if he had signed the contract (having authority so to do) with the names of Vacher and Tilly? . . . . Here Kekule makes no contract at all. The contract professes to be between Vacher and Tilly and the plaintiff, Kekule, merely representing Vacher and Tilly."

In *Gadd* v. *Houghton*(3), the agents (brokers) of a certain company resident abroad gave a sold-note running thus:—"Sold to you on account of James Morand & Co., &c., &c."—and signed by them with their own name "J. C. Houghton & Co."

(1) 5 E. & B., 125. (2) 14 C.B., 390.
(3) L.R., 1 Ex. D., 357.

without any addition. In an action by the purchaser against the agents for non-delivery, the Court of Appeal held (reversing the decision of the Exch. Div.) that the words "on account of James Morand & Co." showed an intention to make the foreign principal (and not the brokers) liable and that the brokers were not liable on the contract. The case of *Paice* v. *Walker*(1), was commented upon and distinguished. In that case, though the agent purported to contract on behalf of a foreign principal, yet they signed the contract in their own name without any addition. But the defendants in the present case having signed as "managing agents" they cannot be held personally liable even according to that decision—which has, however, been practically over-ruled by the decision in *Gadd* v. *Houghton*(2).

Notwithstanding that the defendants raised the objection, in their written statement itself, that they were not personally liable and offered to defend the suit on behalf of their principal company if the plaint was amended and the latter substituted as defendants in their place, the plaintiff, without adopting this course, raised the first and second issues in the case as to the maintainability of the suit against the defendants themselves and prosecuted the suit against them. We cannot, therefore, now allow the suit to be converted into one against the East India Distilleries Company, Limited, and deal with the case on such footing. We may add that section 27, Civil Procedure Code, applies only to cases in which a suit has been instituted in the name of a wrong person as *plaintiff* and not to cases in which a suit has been instituted against a wrong person as *defendant*.

It now becomes unnecessary to consider and decide the various other questions that were raised and argued at considerable length in the appeal.

The result is that the appeal fails and is dismissed with costs; the memorandum of objections (to the decree) on behalf of the respondents is allowed, except in respect of their counter-claim, with proportionate costs, and, reversing the decree of the District Judge, the suit is dismissed with costs.

Attorneys for respondents—Messrs. *Barclay, Orr & David*

(1) L.R., 5 Ex., 173. (2) L.R., 1 Ex. D., 357.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Bhashyam Ayyangar.

CHIDAMBARA MUDALIAR (PLAINTIFF), APPELLANT,

1903. August 28.

v.

KOOTHAPERUMAL (SECOND DEFENDANT), RESPONDENT.*

Hindu Law—Father's debt binding on sons even during father's life-time—Alienations for its discharge binding on sons—Nature of mortgage debt—No distinction between mortgage given for antecedent debt and mortgage given for debt then incurred.

It is established by a uniform course of decisions under the Hindu Law that a debt incurred by the father which is not shown to be illegal or immoral is, even during the life-time of the father, binding on the son's interest in the family property; and that any alienation, voluntary or involuntary, made to discharge the debt is binding on the son.

In the case of a mortgage-debt incurred by the father, the debt is the primary obligation and the mortgage is only a collateral security for its discharge.

If the debt is binding on the son, its discharge by making an usufructuary mortgage or by enforcing the security by sale is equally binding on the son inasmuch as he is thereby exonerated from liability to discharge the debt of the father by means of other family property.

There is no distinction, in principle, between a mortgage given for an antecedent debt and a mortgage given for a debt then incurred, for in either case the debt is binding on the son and the enforcement of the security exonerates the son from the burden of his father's debts.

SUIT for money due on two simple mortgage bonds. Defendants Nos. 1, 3 and 4 had executed the bonds in plaintiff's favour, first defendant also signing as guardian of second defendant, his minor son. The defence filed on behalf of second defendant was that the debts were not incurred for purposes which were binding on him and that neither he nor his interest in the mortgaged property was liable for plaintiff's claim. The first issue was whether second defendant was liable to pay the debt. The District Munsif passed a decree in plaintiff's favour as against defendants Nos. 1, 3 and 4 personally, and against the property of the family of defendants Nos. 1 and 2. The facts were complicated, but the money appeared

* Second Appeal No. 108 of 1902 presented against the decree of O. Sivarama Krishnamma, Subordinate Judge of Trichinopoly, in Appeal Suit No. 20 of 1901 presented against the decree of S. Doraiswami Ayyar, District Munsif of Trichinopoly, in Original Suit No. 280 of 1899.

to have been advanced at the time when the mortgage bonds were executed. The defendants Nos. 1, 2 and 3 appealed to the Subordinate Judge, who exonerated the second defendant's share in the family property, but in other respects confirmed the decree. Dealing with second defendant's liability he remarked that though second defendant had not pleaded that the debt had been contracted for immoral or illegal purposes, plaintiff had adduced no evidence as to the purposes for which the loans had been taken.

Plaintiff preferred this second appeal.

P. R. Sundara Ayyar for appellant.

P. S. Sivaswami Ayyar for respondent.

JUDGMENT.—It is now established by a uniform course of decisions that a debt incurred by the father which is not shown to be illegal or immoral is, even during the life-time of the father, binding upon the son's interest in the family property and that any alienation, voluntary or involuntary, made to discharge the debt is binding upon the son. In the case of a mortgage debt incurred by the father the debt is the primary obligation and is binding upon the son if it is not for an illegal or immoral purpose and the mortgage is only a collateral security for the discharge of the debt either by the receipt of the rents and profits by the mortgagee or by causing it to be sold after the debt has become payable. If the debt is binding upon the son the discharge of the debt either by making a usufructuary mortgage or by enforcing the security by sale, is equally binding upon the son inasmuch as he is thereby exonerated from liability to discharge the debt of the father by means of other joint family property. If a sale of joint family property made by the father for the purpose of discharging his debt which is not illegal or immoral is binding, it is difficult to see on what principle it can be held that a mortgage executed by the father as security for the discharge of the debt will not bind the son simply because the debt was not anterior to the mortgage but was incurred at the same time as the mortgage and the mortgage was executed as security therefor. In the case of *Sami Ayyangar* v. *Ponnammal*(1) it was, no doubt, held that the mortgage as such will not bind the son's share unless it was executed as security for an antecedent debt, that is, for a debt that existed independently of the mortgage transaction. The authority

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

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of this decision has been considerably shaken by the two later decisions of this Court in *Ramasamayyan* v. *Virasami Ayyar*(1) and *Palani Goundan* v. *Rangayya Goundan*(2) which decide that unless the son shows that the mortgage executed by the father on which decree was passed against the father alone was for an illegal or immoral debt the mortgage decree, as such, will bind also the son's share in the mortgage-property. The same view has been taken by the Calcutta High Court in *Lala Suraj Prasad* v. *Golal Chand*(3) and by the Allahabad High Court in *Debi Dat* v. *Jadu Rai*(4) and by the Bombay High Court in *Ramchandra* v. *Fakirappa*(5).

On principle it is difficult to make any distinction between a mortgage given for an antecedent debt and a mortgage given for a debt then incurred, for in either case the debt is binding upon the son and the enforcement of the security exonerates the son from the burden of the father's debt. Such a distinction does not really afford any protection to the son, for his share in the mortgage property can, as a general rule, be seized and brought to sale, even in the latter case, for the recovery of the debt as a personal debt due by the father (though also secured by a mortgage) unless such share has been validly alienated in favour of a third party, since the date of the mortgage but prior to its attachment.

We therefore allow this appeal, and, reversing the decree of the Lower Appellate Court in so far as it modifies the decree of the District Munsif, we restore the decree of the District Munsif with costs in this and in the Lower Appellate Court.

(1) I.L.R., 21 Mad., 222.
(2) I.L.R., 22 Mad., 207.
(3) I.L.R., 28 Calc., 517.
(4) I.L.R., 24 All., 459.
(5) 2 Bom. L.R., 450.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Moore.

PATHAMMAL (PLAINTIFF), APPELLANT,

v.

SYED KALAI RAVUTHAR (DEFENDANT), RESPONDENT.*

1903. April 29. October 30.

Evidence Act—I of 1872, *s.* 92—"*Contradicting, varying, adding to or subtracting from*"—*Admissibility of oral evidence when question not as between parties to the instrument or their privies.*

Plaintiff sued defendant for a piece of land, alleging that it had been given to her by a relation. The defence was that the property had been purchased by the defendant from M. A document was filed which purported to be a sale of the land to plaintiff, but defendant contended that the document had been executed in plaintiff's name *benami* for him :

Held, that oral evidence was admissible in support of the contention that there had been a gift of the land to plaintiff, the question not arising as between the parties to an instrument or their privies, so as to bring it within the purview of section 92 of the Evidence Act. Though plaintiff and defendant claimed through one and the same person, yet they could not be treated as parties contracting with each other, nor would oral evidence be evidence to vary the terms of any written agreement between them.

Rahiman v. *Elahi Baksh*, (I.L.R., 28 Calc., 70), commented upon.

SUIT for land. Plaintiff was the minor daughter of defendant, whom she sued by her mother as next friend. A deed (filed as exhibit A) had been executed by one Usiyammal, the maternal aunt of plaintiff's mother, in favour of plaintiff, by which Usiyammal purported to sell certain land to plaintiff. Plaintiff's case was that the transaction evidenced by exhibit A was really a gift in her favour, and she claimed the land on that ground. Defendant contended that the transaction was really a sale, as exhibit A purported to be, and that the document had been executed in plaintiff's favour *benami* for himself. The Subordinate Judge found that the land was the property of the plaintiff, and gave judgment in her favour. Defendant appealed to the District Judge, who said :—

"Plaintiff's case (as set out in paragraph 3 of the plaint) is that exhibit A is not a sale deed but a deed of gift. The learned

* Second Appeal No. 1643 of 1901 presented against the decree of H. Moberly, District Judge of Madura, in Appeal Suit No. 194 of 1901 presented against the decree of T. M. Ranga Chariar, Subordinate Judge of Madura (West), in Original Suit No. 44 of 1899.

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Subordinate Judge has allowed plaintiff to adduce evidence on this point and he has practically found that exhibit A was intended to be a deed of gift. The learned Subordinate Judge has evidently overlooked the provisions of section 92 of the Indian Evidence Act. Exhibit A is on its face a deed of sale, and no oral evidence is admissible to show that a deed of sale was really meant to be a deed of gift (*Rahiman* v. *Elahi Baksh*(1)). Plaintiff, contends that section 92 of the Indian Evidence Act does not prohibit the disproof of a recital in a contract as to the consideration that has passed, by showing that the actual consideration was something different to that alleged and she relies on *Vasudeva Bhatlu* v. *Narasamma*(2). That was a case between vendee and vendor and it is clearly distinguishable from the present one. In that case it was decided that a vendee may prove that a sale deed is supported by consideration other than that set out in the deed of sale; it is certainly no authority for the proposition that oral evidence may be adduced to show that a document, which on its face is a deed of sale, is not a deed of sale, but a deed of gift."

He reversed the decree and dismissed the suit.

Plaintiff preferred this second appeal.

V. Krishnaswami Ayyar and *A. Nilakanta Ayyar* for appellant.

P. R. Sundara Ayyar and *K. N. Ayyar* for respondent.

JUDGMENT.—The ptaintiff, who is the defendant's daughter and a minor, sues through her mother as next friend to recover possession of the plaint-mentioned lands alleging that the properties were given in gift to her on the 16th September 1888 by Usiyammal, the next friend's paternal aunt. The defence was that the property was purchased by the defendant from the said Usiyammal, the sale deed, however, being executed in the name of the plaintiff *benami* for him. The Subordinate Judge who tried the case in the first instance gave a decree in favour of the plaintiff; but on appeal it was reversed, the District Judge being of opinion that the oral evidence adduced by the plaintiff in support of the gift set up was inadmissible and that the purchase must be taken to have been by the defendant.

We are unable to agree in the view taken by the District Judge as to the admissibility of the evidence. It is scarcely

(1) I.L.R., 28 Calc., 70. (2) I.L.R., 5 Mad., 6.

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necessary to point out that this question does not arise as between parties to an instrument or their privies—so as to bring it within the purview of section 92 of the Indian Evidence Act; for though the plaintiff and defendant claim through one and the same person yet so far as the present matter is concerned they cannot be treated as parties contracting with each other, or the oral evidence adduced treated as having been let in to vary the terms of any written agreement *between them*.

The District Judge was therefore in error in treating the case as one falling within the said section 92. He has, however, in support of his view cited the case of *Rahiman* v. *Elahi Baksh*(1). The report of the case is by no means clear and if the learned Judges intended to decide that section 92 would govern cases like the present or that even otherwise evidence such as that in question would be inadmissible between parties in the position of the present plaintiff and defendant, we must with all deference say we cannot accept their conclusion, as both principle and the weight of authority are, in our opinion, clearly against such a view.

The learned Vakil for the respondent drew our attention to section 99 of the Evidence Act as supporting the above decision. We are unable to see any force in this argument. No doubt in section 99 the word "varying" only is used while in section 92 the words are "contradicting, varying, adding to or subtracting from." But it is difficult to see that in using the expression "varying" only anything less could have been meant than what is conveyed by the several expressions in section 92 and as every "contradicting," "adding to" or "subtracting from" would necessarily be a "varying" of the instrument, the legislature apparently use that expression as sufficient to convey all that is denoted by the other different expressions occurring in the earlier section. Even otherwise, section 99, being merely an enabling provision, could not be held to prohibit the reception of evidence as to a fact in issue or a relevant fact admissible independently thereof.

Clearly therefore the evidence adduced in support of the alleged gift should not have been ignored by the lower Appellate Court.

(1) I.L.R., 28 Calc., 70.

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We must therefore call upon the District Judge to consider the whole evidence and submit revised findings on the questions raised.

The District Judge in due course returned a finding that plaintiff was not the owner of the land sued for.

The case came on for final hearing, when the Court accepted the finding and dismissed the appeal.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Boddam.

1903. August 7, 10 and 14.

SREE SANKARACHARI SWAMIAR (PLAINTIFF), PETITIONER,

v.

VARADA PILLAI (DEFENDANT), RESPONDENT.*

Landlord and tenant—Suit for rent—Objections to patta—"Indefiniteness"—Estoppel by conduct of tenant.

A clause in a patta providing that, in the event of the tenant raising wet cultivation on dry land with Sircar water, he should pay increased rent according to the rent of the neighbouring wet lands, is not bad for indefiniteness.

There is a material distinction between the power of the Court in dealing, in suits under section 8 or section 9 of the Rent Recovery Act, with questions which have not been settled by contract or specifically provided for by law and its power when dealing with a litigation arising out of a contract constituted by an accepted patta. In determining objections founded on the alleged uncertainty of a term in a contract, the test is not whether the term is in itself certain but whether it is capable of being made certain.

A provision in a patta that the customary fees payable by the tenant for the services of the village accountant and other public servants of the village would be summarily recovered and charged with interest if in arrear, is not an improper term.

Semble, that a tenant may be estopped from objecting to the terms of a patta where he has accepted pattas containing similar terms for a series of years previously in respect of the same holding and has by his conduct led the landlord to suppose that the patta would not be objected to.

SUIT for rent. Prior to suit, patta had been tendered, but was not accepted. At the trial, defendant contended that he was

* Civil Revision Petition No. 459 of 1902 presented under section 25 of Act IX of 1887 praying the High Court to revise the decree of V. Swaminatha Ayyar, District Munsif of Poonamallee, in Small Cause Suit No. 328 of 1902.

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entitled to refuse to accept the patta, owing to some of its terms. Details of the terms objected to will be found in the judgments. The District Munsif dismissed the suit.

Plaintiff filed this civil revision petition.

P. S. Sivaswami Ayyar and *T. R. Venkatarama Sastri* for petitioner.

V. Krishnaswami Ayyar for respondent.

SUBRAHMANIA AYYAR, J.—In this case the suit was brought by the petitioner, a landlord, against the defendant, his tenant, for the recovery of rent of the fasli year 1310. Before suit a patta had been tendered, but was not accepted. At the trial, the defendant urged that certain terms in the patta (to be referred to and considered later on), were such as to entitle him to refuse to accept the patta. The District Munsif agreed with the contention and dismissed the suit.

The petitioner, whilst denying that the terms of the patta referred to were open to such objection, contended that, even if they were, the defendant was estopped from raising any such question in the present suit inasmuch as pattas containing precisely similar terms had been accepted for a series of years in respect of the same holding.

Without taking any evidence as to the truth of the allegations on which this contention was based, the District Munsif held that, even assuming the allegations to be true, they could not support a plea of estoppel. Is this conclusion sustainable? Now there can be no doubt that if previous to the year to the rent of which the suit relates, the tenant had in express terms told the landlord that pattas containing terms objected to were to be taken as proper pattas and that the landlord might act on that footing the tenant would be precluded from impugning similar pattas tendered subsequently unless and until he had withdrawn his previous representation by communicating to the landlord that he objected to the terms in question, in circumstances permitting the latter suing the former in time to obtain an adjudication under section 9 of the Rent Recovery Act as to the terms of a proper patta and to compel the acceptance of such a patta for the year in respect of which the tender was duly made.

It follows that, if the allegations on behalf of the petitioner about the acceptance for a series of years of precisely similar pattas be true, that constituted a representation by conduct that the

landlord might proceed on the footing that the pattas were proper ones which, of course, would have the same effect as a representation in so many words.

It is in the interests of the tenant that the law imposes on the landlord the duty of tendering a patta setting forth the various matters referred to in section 4 of the Rent Recovery Act. It being open to the tenant to refuse to take any patta containing terms not considered by him proper, no other conclusion is possible when the patta is accepted than that the tenant asserts by implication that the patta is or may be taken to be, a proper one, especially when this conduct is repeated from year to year.

The District Munsif thought that the representation, if any, in cases like this relates only to a matter of belief in the tenant's mind. Now take the case of a tenant, who, though fully aware that a particular term in a patta is open to objection, nevertheless, for reasons of his own, takes the patta without demur. In such a case is not the representation in respect of what by itself is no other than a fact, viz., the propriety of the patta, irrespective of the belief one way or the other of the tenant as to that matter? In other words, the case may virtually be taken to stand thus;—The landlord asks the tenant "may I take this patta to be correct." The tenant replies in the affirmative. What question of belief or opinion arises here? In my view none.

It has now to be observed that there is nothing in the nature of any of the terms in question to preclude the application of the doctrine of estoppel to the case, if the plaintiff substantiates his allegations, for, as will be shown at once, none of them is necessarily illegal, but they are one and all such as the tenant may have assented to so as by such assent to have made a patta containing them a valid contract between himself and his landlord.

Turning now to the items objected to, the first runs as follows: "If you raise nunjah cultivation on punjah land with Sircar water you shall pay therefore *tirvajasti* according to the tirva of neighbouring nunjah land." This was held by the District Munsif to be bad for indefiniteness; but I cannot agree. In *Sattappa Pillai* v. *Raman Chetti*(1) it is pointed out (at page 7) that it is proper to define in a patta the terms of the tenancy with reference to a possible contingency which may arise in the course of the fasli for

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

which the patta is tendered. The case contemplated by the term under consideration is such a contingency. The landlord could not know beforehand whether the tenant would in the particular year raise wet crops on dry land with the aid of water supplied by the landlord or what specific lands would be used for the purpose. In such circumstances how can the landlord be expected to say more than that on the contingency happening nunjah rates would have to be paid? That, had the landlord contented himself with simply saying so, such provision in the patta would be held valid, is clear from the case just referred to, and a provision in those terms would, I think, be understood as referring to rates payable on neighbouring lands which would ordinarily be of similar quality. How then can the express mention of what otherwise would be implied make any real difference? If it does, one would think that the clause was thereby rendered more definite rather than the contrary. It may not here be out of place to say that the phraseology of the clause in question is substantially what the Legislature itself adopts as a proper criterion for the determination of the rate of rent in certain circumstances (see Rule III in Section 11 of the Rent Recovery Act). My conclusion on this point is confirmed by the decisions in the numerous cases which came up to this Court from the Sivaganga Zamindari in regard to a provision in pattas tendered by the landlord but refused by the tenants, to the effect that on failure of the tenant to raise paddy crop on wet land, he should pay half *varam* calculated on the average yield of such nanjah lands in the village or on the average yield of *adjoining* lands. This was held to be a proper provision (see *Nagalinga Thavan* v. *R. G. Orr*(1)). The decision in *Ramasami* v. *Rajagopala*(2) on which the learned pleader for the respondent laid stress was in suits under section 9 of the Rent Recovery Act; and *Ramanjulu* v. *Ramachandra*(3) stands on the same footing. There can be little doubt that there is a material distinction between the power of the Court in dealing with questions raised in a suit under section 8 or 9 of the Act not settled by contract or specifically provided for by law and its power when dealing with a litigation arising out of a contract constituted by an accepted patta. In the former case the law gives to the Court

(1) C.R.P. No. 327 of 1894 (unreported). (2) I.L.R., 11 Mad., 200.
(3) I.L.R., 7 Mad., 150.

greater latitude than in the latter. In the one the Court has to decide the question with reference to its view of what is fair and proper in all the circumstances, while in the other the Court has only to decide whether the terms are obnoxious to the general law of contract and consequently altogether unenforceable. And it is scarcely necessary to say that in determining objections founded on the alleged uncertainty of a term in a contract, the test to be applied would be not whether the term is in itself certain but whether it is capable of being made certain. *Id certum est quod reddi certum potest.*

Judged by that test it is impossible to hold that such a term as that under consideration occurring in a completed contract would be void for uncertainty.

The next objection relates to the provision in the patta that the customary fees or marais payable by the tenant along with the rent, in connection with the services of the village accountant and certain other public servants of the village, would also be summarily proceeded for and charged with interest if in arrear. The District Munsif held that these fees were not recoverable by summary process and that interest could not be charged thereon and that therefore this clause in the patta was improper.

I disagree with him here also. According to the immemorial custom of the country, these fees are generally payable out of the produce of the land, and in the majority of cases, it is the landlord that has to collect and pay them over to the servants concerned. Though not rent in the sense in which he could appropriate them himself yet in so far as their recovery is concerned, that they are to be treated as part of the rent is clear from section 4 of the Act which provides for the mention in the patta of the amount and nature of the rent "including any fees or charges payable with it according to established usage." Were the fees to be taken as absolutely distinct from the rent the expression "including" would not have been used, and it is impossible to believe that the Legislature, while compelling the landlords to make the patta comprehend such fees, intended to disable him from recovering them by the process admittedly applicable to rent proper or to preclude him from charging interest at the same rate on both. It is hardly necessary to add that the inconvenience which would arise from such a construction of the Act, would be grave and manifest. Section 52 of the Revenue Recovery Act, which provides for the

recovery by summary process of emoluments due to village servants, indicates that the policy of the Legislature is in the direction of facilitating the collection of fees like those under consideration otherwise than by suits (see *Collector of North Arcot* v. *Nagi Reddi*(1)) where it was held that an accountant even in a permanently-settled zamindari village came within the provision).

The last clause objected to refers to the tenant removing the produce after paying the rent and obtaining a receipt. It must be admitted that if the question were whether in a suit under section 9 this provision would be upheld in the absence of a contract the answer would be in the negative. But there is nothing to prevent a tenant contracting to be bound by such a provision. Section 82 of the Rent Recovery Act, referred to on behalf of the petitioner, is enough to show that such a contract would not be opposed to law.

The two cases cited, *Bhupathi* v. *Rajah Rangayya Appa Rau*(2) and *Siriparapu Ramanna* v. *Mallikarjuna Prasada Nayudu*(3) may now be referred to. The former seems to have no bearing on the present question. The latter, in so far as it was relied on as being relevant here, decided only that a payment for a series of years of certain fees which in their nature were voluntary (certain temple fees), could not warrant the conclusion that there was an implied contract to pay them. In neither of the cases was any plea of estoppel such as that advanced here raised and it is difficult to see how such a plea could have been allowed to be raised in the suits, governed, as they were, by section 10 of the Rent Recovery Act, according to which the Court has to decide what the terms of the patta should be. On the other hand, *Govinda Setti* v. *Sreenevasa Row Sahib*(4), to which our attention was drawn on behalf of the petitioner, is a clear and direct authority in favour of his contention on the point.

The conclusion of the District Munsif on the question of estoppel, therefore, is, in my opinion, unsustainable.

I would set aside the decree of the District Munsif and remand the case for disposal with reference to the plea of estoppel in the light of the observations made above and with reference to the other questions arising in the case.

The costs of this petition will abide the result.

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(1) I.L.R., 15 Mad., 35.
(2) I.L.R., 17 Mad., 54.
(3) I.L.R., 17 Mad., 43.
(4) S.A. No. 1331 of 1901 (unreported).

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BODDAM, J.—I am not prepared to hold that the allegations made on behalf of the plaintiff are incapable of supporting a case of estoppel by conduct on the part of the defendant; but I am not by any means clear that they are sufficient to constitute such an estoppel, unless upon evidence being taken it is proved that the plaintiff's position has been altered in consequence of the alleged conduct of the defendant upon which the estoppel is based. I think therefore that evidence should be taken and the exact facts established before the case is disposed of and I agree that the District Munsif was wrong, in the circumstances, to dismiss the suit without taking any evidence that might be tendered on either side.

As regards the objections to the patta I agree in the observations of Sir Subrahmania Ayyar.

I would set aside the decree of the District Munsif and remand the case for disposal according to law. The costs of this petition will abide and follow the event.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar.

1903. November 9.

CHINNASAMY AYYAR (PLAINTIFF), PETITIONER,

v.

RATHNASABAPATHY PILLAY AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Contract Act—IX of 1872, *s.* 69 *—Payment by one interested—Decree for land in plaintiff's favour—Land withheld pending appeals—Payment of kist by plaintiff—Suit for amount paid.*

Plaintiff had obtained decrees for possession of certain lands, but, pending an appeal and second appeal, the lands were withheld from him. He, however, paid the kist, and now sued to recover the amount so paid:

Held, that he was entitled to recover. It was a payment by one interested in it, which the defendants, as the persons in actual possession, were bound by law to pay.

* Civil Revision Petition No. 123 of 1903 presented under section 25 of Act IX of 1887, praying the High Court to revise the decree of K. Ramachandra Ayyar, Subordinate Judge of Negapatam, in Small Cause Suit No. 402 of 1902.

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SUIT for Rs. 413-5-9, being the amount of cist paid by plaintiff in respect of certain lands. Plaintiff had sued for the lands in Original Suit No. 69 and Original Suit No. 71 of 1895, in the Court of the District Munsif at Negapatam, and obtained decrees for possession in June 1896, and the lands were delivered to him in March 1899 and May 1901, respectively, having been withheld from him in the interval, pending an appeal and a second appeal. The District Munsif dismissed the suit, holding that plaintiff had paid the cist as a voluntary payment to protect his own property.

Plaintiff preferred this civil revision petition.

K. Kuppuswami Ayyar for petitioner.

P. K. Singaracharlar for respondent.

JUDGMENT.—The payment of cist made by the petitioner to Government in respect of lands decreed to him but withheld from him by the respondents pending an appeal and second appeal preferred by the latter is certainly not an officious payment made by the petitioner but a payment made by one interested in such payment which the respondents, as the persons in actual possession were bound by law to pay. The petitioner, while recovering possession of the land with mesne profits, gave credit to the respondents for the proportionate cist chargeable on the land, in assessing mesne profits for the fasli in question, viz., 1308. He is therefore clearly entitled to the amount sued for which he paid to Government as the cist due for fasli 1308 for the land decreed to him as well as the land belonging to the respondents, both of which were subject to a consolidated assessment. The revision petition is allowed with costs throughout and the plaintiff will have a decree for Rs. 304-5-9 with interest thereon at 6 per cent. from the dates of the respective payments until this date with further interest at 6 per cent. on the aggregate amount including costs until date of payment.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Russell.

1903. October 23.

PUTHUKUDI ABDU AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

PUVAKKA KUNHIKUTTI (DEFENDANT), RESPONDENT.*

Letters Patent, art. 15—"Judgment"—Dismissal of application under s. 25 of the Small Cause Courts Act—Appeal.

Where an application is made to the High Court to exercise its discretionary power under section 25 of Act IX of 1887, and a single Judge dismisses the application, no appeal lies from that order of dismissal, under article 15 of the Letters Patent.

Such an order is not a "Judgment" within the meaning of that section. The word "dismissed" in such a case does not necessarily imply a decision as regards any right.

APPEAL against the order of a single Judge. The order, which merely dismissed the application, was made on a petition under section 25 of Act IX of 1887,—the Small Cause Courts Act. Against that order petitioner preferred this appeal under article 15 of the Letters Patent.

Mr. *C. Krishnan*, for respondent, raised the preliminary objection that no appeal lay.

Mr. *T. Richmond* for appellant.

JUDGMENT.—When an application is made to the High Court to exercise its discretionary power under section 25 of Act IX of 1887, and a single Judge merely dismisses the application, there is in our opinion no appeal under article 15 of the Letters Patent, for there is no "Judgment" within the meaning of that section. The word "dismissed" in such a case does not necessarily imply a decision as regards any right or alleged right of the petitioner. It is only a statement that the Judge will not, in the exercise of his discretion, interfere with the order of the Small Cause Court. He is not bound to interfere even if he thinks the judgment appealed against is wrong and even if the Judge has sent for the record before

* Appeal No. 37 of 1903 under section 15 of the Letters Patent against the order of Mr. Justice Boddam in Civil Revision Petition No. 436 of 1902 presented under section 25 of Act IX of 1887 to revise the decree of the District Munsif of Panur in Small Cause Suit No. 741 of 1902.

dismissing the application that makes no difference. He may wish to do so and even to hear the parties before deciding whether the case is one in which he ought to exercise the discretionary powers vested in him. There being no "Judgment" to be appealed against we dismiss this appeal with costs.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice.

1903. November 4.

KUPPUSWAMI CHETTY (PLAINTIFF), APPELLANT,

v.

ZAMINDAR OF KALAHASTI (DEFENDANT), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, s. 220—Costs—Discretion of Court—Grounds for depriving successful plaintiff—Misconduct—Suit filed after admission of indebtedness by defendant.

The discretion given to the Court under section 220 of the Code of Civil Procedure is one which is to be exercised with reference to general principles. Where a plaintiff comes to enforce a legal right and there has been no misconduct on his part, no omission or neglect which would induce the Court to deprive him of his costs, the Court has no discretion and cannot take away the plaintiff's right to costs. The fact that a defendant has, previously to a suit being filed, admitted that the money sued for was due to the plaintiff is not a ground for depriving the plaintiff of his costs.

COSTS. Plaintiff sued to recover Rs. 3,509-7-6 due on two promissory notes executed by defendant. The defendant's written statement was as follows :—

"That it is true that the promissory notes referred to in paragraphs 1 and 2 of the plaint were executed by the defendant. That the plaintiff having preferred a claim to the Regulation Collector under Regulation V of 1804 as amended by the Madras Act IV of 1899 on the said two promissory notes the claim was allowed and the intimation of the Regulation Collector's decision was also sent to the plaintiff on or about the 22nd May 1901. The defendant is not therefore liable for the costs of the suit. It is therefore prayed that this Court will be pleased to exonerate this defendant from the payment of the costs of the suit."

* Appeal No. 87 of 1902 presented against the decree of K. C. Manavedan Raja, District Judge of North Arcot, in Original Suit No. 28 of 1901.

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The District Judge delivered the following judgment :—

"Suit to recover Rs. 3,509-7-6 due on two promissory notes executed by the defendant. Defendant accepts the claim; but says that the claim was allowed by the Regulation Collector and that the Collector's decision was communicated to the plaintiff long before the plaint was filed. It is therefore contended that he is not liable to pay costs of the suit. It is not denied that plaintiff received intimation of the decision. It seems to me therefore that there was no necessity to file the suit at all. Decree for plaintiff without costs. The defendant to pay plaintiff Rs. 3,509-7-6 the sum sued for, with subsequent interest at the contract rate from date of plaint to the date of decree and thereafter at 6 per cent. per annum. Plaintiff's costs disallowed. Defendant to bear his own costs."

Plaintiff preferred this appeal on the following grounds :—

"(1) The decree of the lower Court disallowing the plaintiff's costs of suit is contrary to law. (2) There are no good and valid grounds for disallowing the plaintiff's costs. (3) The lower Court erred in holding that there was no necessity to file the suit."

S. Kasturiranga Ayyangar for appellant.

Mr. *N. Subrahmaniam* for respondent.

JUDGMENT.—In *Cooper* v. *Whittingham*(1) the law as to award of costs was laid down by Jessel, M. R., thus (at page 504) : "Where a plaintiff comes to enforce a legal right and there has been no misconduct on his part, no omission or neglect which would induce the Court to deprive him of his costs, the Court has no discretion and cannot take away the plaintiff's right to costs. There may be misconduct of many sorts; for instance, there may be misconduct in commencing the proceedings or some miscarriage in the procedure, or an oppressive or vexatious mode of conducting the proceedings, or other misconduct which will induce the Court to refuse costs; but where there is nothing of the kind the rule is plain and well settled and is as I have stated it. It is, for instance, no answer, where a plaintiff asserts a legal right, for a defendant to allege his ignorance of such right and to say 'If I had known of your right I should not have infringed it.' . . . (page 507). I have often remarked that there is an idea prevalent that a defendant can escape costs by saying 'I never intended to do

(1) L.R., 15 Ch.D., 501.

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wrong.' That is no answer, for, as I have often said, some one must pay the costs and I do not see who else but the defendants who do wrong are to pay them." There can be no doubt that the discretion of the Court under section 220 of the Code of Civil Procedure is one to be exercised with reference to general principles such as the above. The direction in that section that in the event of the Court not directing the costs to follow the event, it shall record its reasons in writing, is a clear confirmation of the said view. Here it is not suggested that the plaintiff in suing for the debt decreed to him was guilty of any misconduct, neglect or omission which would warrant the Court refusing him his costs. The fact that the Court of Wards had previous to the suit admitted that the money sued for was due to the plaintiff affords as little ground for depriving the plaintiff of his costs as it does for holding that he has no right to sue.

In these circumstances the lower Court should have given the plaintiff his costs also. The appeal is allowed with costs, the lower Court's decree being modified as above.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Offg. Chief Justice, and Mr. Justice Bhashyam Ayyangar.

BANK OF MADRAS (PLAINTIFF), APPELLANT,

v.

MULTAN CHAND KANYALAL (DEFENDANT), RESPONDENT.*

1903. October 22, 23.

Limitation Act—XV of 1877, sched. II, art. 95—"Other relief" in consequence of fraud—Suit for damages caused by defendant's fraud.

Plaintiff claimed compensation from the defendant for damages caused to plaintiff by the fraud practised by the defendant. The suit had been brought more than two years but less than three years after the fraud complained of. The fraud was this: Defendant, a judgment-creditor of some debtors, had caused a Court seal to be fraudulently placed on the door of a warehouse in which perishable articles belonging to the debtors were stored. This deceived the plaintiff, also a judgment-creditor, who was thus prevented from obtaining the goods and selling them. The goods were ultimately obtained and sold at a loss.

* Appeal No. 80 of 1901 presented against the decree of C. G. Kuppuswami Ayyar, Subordinate Judge of Cocanada, in Original Suit No. 17 of 1900.

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Damages were now claimed because the goods had deteriorated in quality, diminished in quantity and commanded a lower price in the market. On the question of limitation being raised:

Held, that the suit was not barred, it being governed by article 95 of Schedule II to the Limitation Act. The "other relief" referred to in that article need not be of the same kind, as "setting aside a decree obtained by fraud," and the article is not thus limited to specific relief on the ground of fraud. The expression "other relief" is comprehensive enough to include compensation for damages caused to the plaintiff by the fraud practised by the defendant.

SUIT for damages. As the case is only reported on the point decided as to limitation, it is sufficient to state the finding of the High Court that the suit was one for compensation for damages caused to the plaintiff by the fraud practised by the defendant. A Court seal was, as the High Court found, placed on the outer door of a warehouse at the instance of defendant, who was a judgment-creditor of the owners of certain jaggery which was stored in the warehouse. The plaintiff also obtained a decree against the owners of the jaggery, and was, by the defendant's action, prevented from obtaining the jaggery and selling it. The jaggery was ultimately obtained, after a delay of many months, but by that time it had deteriorated in quality and diminished in quantity and the market price of jaggery had also fallen. The plaintiff sued to recover damages from the defendant under each of these heads. The suit was instituted more than two years and less than three years after the act complained of.

The Subordinate Judge held that it was not established by the evidence that the Court seal had been put on the door at the instance of the defendant.

Plaintiff preferred this appeal.

Mr. *Chamier*, for appellant, referred to *Kissorimohun Roy* v. *Harsukh Das*(1).

Mr. *C. Krishnan*, for respondent, contended that the claim was barred by limitation. He cited *Chunder* v. *Thirthanund*(2) as showing that the "other relief" referred to in article 95 must be of the same kind as the reliefs mentioned in the earlier part of the article.

JUDGMENT.—We cannot uphold the finding of the Subordinate Judge that it is not established by the evidence in the case that the Court seal was put on on the outer door of the warehouse at the

(1) I.L.R., 17 Calc., 436.

(2) I.L.R., 3 Calc., 504.

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instance of the defendant. He no doubt applied for attachment in the usual way under section 269 of the Civil Procedure Code, and the Amin returned the warrant of attachment unexecuted stating that the warehouse in which the jaggery was deposited was under the lock and key of the Bank of Madras. But as a matter of fact it is conclusively proved that the seal of the Court was affixed to the lock, and that this was done by an Amin of the Court, Thannikachallam, at the instance of the defendant's gumasta. It is also proved that when the Bank servants subsequently came to the warehouse with a view to open the warehouse the defendant's Vakil and the defendant's gumasta both told them that the warehouse was under Court seal and that should they remove the seal and open the warehouse they would do so at their own risk. We are clearly satisfied that the defendant in collusion with an Amin of the Court fraudulently and without the authority of the Court had the Court seal placed on the outer door of the warehouse in order to deceive the Bank into the belief that the property in the warehouse had passed to and remained in the custody of the Court and thereby prevented the Bank from taking possession of the jaggery, arresting its deterioration and wastage and selling it when the prices were favourable. In this view the gist of the action is fraud and the article of the Limitation Act applicable is neither article 29 nor article 36 but article 95.

We cannot accept the argument that the "other relief" referred to in article 95 must be of the same kind as setting aside a decree obtained by fraud and thus limit the operation of the article to specific relief on the ground of fraud. The relief claimed in this case is compensation for damages caused to the plaintiff by the fraud practised by the defendant and the expression "other relief" in article 95 is comprehensive enough to include such relief. The suit is therefore not barred by limitation, but before we dispose of the appeal we must call for a finding upon the third issue upon the evidence on record. [This issue had reference to the amount of damages.]

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Offg. Chief Justice, and Mr. Justice Bhashyam Ayyangar.

1903. October 22, 23.

MULTAN CHAND KANYALAL (FIRST DEFENDANT), APPELLANT,

v.

BANK OF MADRAS (PLAINTIFF), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *s.* 269—*Attachment—Causing Court seal to be affixed on door of warehouse—"Actual seizure"—Limitation Act—XV of* 1877, *sched. II, art.* 29.

A judgment-creditor obtained a warrant of attachment which was executed by affixing it to the outer door of a warehouse in which goods belonging to his judgment-debtors were stored. The door was not broken open, nor was physical possession taken of the goods inside:

Held, that this, in effect, was actual seizure, within the meaning of section 269 of the Code of Civil Procedure, and that the suit was, in consequence, barred, under article 29 of schedule II to the Limitation Act.

SUIT for damages. This suit was connected with the suit reported at page 343. In this suit a warrant of attachment was executed as sanctioned by the order of the Subordinate Court, by affixing the Court seal to the outer door of a warehouse. The attachment had been issued at the instance of the defendants, who were judgment-creditors of the owners of certain jaggery which was stored in the warehouse. The plaintiff Bank was also a judgment-creditor of the owners of the jaggery, and, prior to the attachment, the warehouse warrants relating to the jaggery had been assigned to the plaintiff, who thereby became entitled to the jaggery. The act of the defendants in attaching the jaggery prevented the Bank from selling or otherwise dealing with the jaggery for many months. The result was that the jaggery deteriorated in quality, diminished in quantity, and its market value fell. Plaintiff now brought this suit against the defendants for the damages so caused. The Subordinate Judge held that plaintiff's loss had been caused by the illegal conduct of the defendants, and that plaintiff had a cause of action against them. He held that the suit was governed by

* Appeals Nos. 231 of 1901 and 7 of 1902 presented against the decree of C. G. Kuppuswami Ayyar, Subordinate Judge of Cocanada, in Original Suit No. 18 of 1900.

article 42, and was, in consequence, not barred by limitation. He awarded damages.

Defendants preferred separate appeals.

Mr. *C. Krishnan*, *B. Govindan Nambiar* and *T. Balakrishna Bhat* for appellant in Appeal No. 231 of 1901.

P. Nagabhushanam for appellant in Appeal No. 7 of 1902.

Mr. *Chamier* for respondent in both appeals.

JUDGMENT.—In this case the Subordinate Judge finds that the article of the Limitation Act applicable is article 42 and the suit is therefore within time. We must, however, accede to the argument on behalf of the appellants that the article applicable is article 29 and that the suit was therefore barred by limitation. Here the warrant of attachment was executed as sanctioned by the order of the Court by affixing the Court seal to the outer door of the warehouse without breaking open the door and taking physical possession of the jaggery inside the warehouse. In our opinion the property was attached as property in the possession of the defendants and the attachment was effected by affixing the seal of the Court to the outer door. This, in effect, was actual seizure within the meaning of section 269, Civil Procedure Code. Upon the seal being affixed the jaggery passed into the custody of the Court and the suit having been brought more than one year after the date of seizure and there having been no fraudulent concealment of the fact of seizure from the knowledge of the Bank the claim, as already stated, is barred under article 29. The appeals are, therefore, allowed with costs and, reversing the decree of the lower Court, we dismiss the suit with costs.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Offg. Chief Justice, and Mr. Justice Bhashyam Ayyangar.

1903. October 28.

MUTHA VENKATACHELAPATI (DEFENDANT), APPELLANT,

v.

PYANDA VENKATACHELAPATI (PLAINTIFF), RESPONDENT.*

Registration Act—III of 1877, *s.* 7—*Registration of mortgage—Interest in land—Right to redeem immoveable property mortgaged—Transfer of Property Act—IV of* 1882, *s.* 59.

Two documents were produced in evidence; one of which was in terms an absolute sale. This document had been registered. The other document (which was not dated) had apparently been written contemporaneously with the first, but it had not been registered. This document purported to show that the transaction between the parties was a mortgage:

Held, that the second document could not be received as evidence of a mortgage transaction not below Rs. 100, and that the registration of the first document, which was on the face of it an absolute and unconditional sale, could not be regarded or operate as the registration of a mortgage.

Though there is nothing to prevent the whole of a mortgage transaction being reduced in any form to writing on different papers, whether attached together or detached, yet the requirements as to registration cannot be said to have been complied with if some of such papers are registered while others are left unregistered.

A document which gives a person a right to redeem a mortgage on immoveable property on payment of money creates an interest in immoveable property and its registration is compulsory under section 7 of the Registration Act.

SUIT to recover money by sale of immoveable property or for foreclosure. Plaintiff relied on two documents, filed as exhibit A, dated 29th July 1896, and exhibit K, a letter bearing no date but admittedly written and delivered by the defendant to the plaintiff. Plaintiff contended that defendant, by these documents, undertook to pay the amount of the debt sued for and redeem the mortgage, and that he was entitled to institute this suit for foreclosure or for sale. The defendant contended that the documents contained no covenant to pay, and that no cause of action had accrued to plaintiff. It is not necessary, for the purposes of this report, to set out the terms of the documents. Exhibit A was registered;

* Appeal No. 210 of 1901 presented against the decree of C. G. Kuppuswami Ayyar, Subordinate Judge of Cocanada, in Original Suit No. 53 of 1900.

exhibit K was not. The Subordinate Judge held that exhibit A was an absolute sale. He, however, also considered exhibit K, which, he said, gave a different colour to the whole transaction and converted it into a mortgage, and he stated that there was oral evidence which, combined with the conduct of the parties, showed that plaintiff was not a purchaser but a mortgagee. He decreed that plaintiff should recover the amount due from the defendant and by sale of the mortgaged property.

Defendant preferred this appeal.

P. R. Sundara Ayyar and *V. Ramesam* for appellant.

V. Krishnaswami Ayyar for respondent.

JUDGMENT.—It is contended on behalf of the appellant that exhibit A, on which the suit is based, is a sale-deed and not a mortgage and that therefore the plaintiff is not entitled to sue for the recovery of the money and for sale of the property for realising the mortgage debt. In our opinion this contention is well founded. Exhibit A is an absolute sale-deed. But the Subordinate Judge, relying on exhibit K, held that reading A and K together the transaction was one of mortgage with a covenant to pay and that therefore the plaintiff was entitled to a decree for sale on the footing of mortgage. We assume that exhibit K records the contemporaneous terms agreed to at the time of the execution of exhibit A. So far as section 92 of the Evidence Act is concerned, there can be no objection to the admissibility of exhibit K, notwithstanding that it contradicts, varies, adds to, or subtracts from the terms of exhibit A, and if K had been registered the decision of the Subordinate Judge could be upheld. But it has not been registered, and in our opinion it cannot be received as evidence of a mortgage transaction not below Rs. 100. Such a transaction can be created only by a registered instrument. The registration of exhibit A alone which, on the very face of it, is an absolute and unconditional sale, cannot be regarded or operate as the registration of a mortgage.

Though there is nothing in law to prevent the whole of a mortgage transaction being reduced in any form to writing on different papers, whether attached together or detached from each other and the Court, in cases in which the terms as appearing in the different papers are contradictory or inconsistent, has to ascertain the intention of the parties by reading all the papers together as forming one document though each paper on the face

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of it purports to be a separate document, yet the requirements of the Transfer of Property Act making registration compulsory for the validity of such a transaction cannot be held to have been complied with if some of the papers are registered while the others are left unregistered. We are also of opinion that exhibit K, on its very face and according to its proper construction, creates an interest in immoveable property in favour of the defendant by entitling him to redeem on payment of the sums therein mentioned, and that its registration was compulsory under section 7 of the Registration Act. Excluding therefore exhibit K from consideration, the plaintiff cannot maintain this suit on the strength of exhibit A, which is an absolute sale-deed. On this ground we must allow the appeal, and, reversing the decree of the Subordinate Judge's Court, we dismiss the suit. Having reference to the pleadings of the parties and the contentions on which the case proceeded, especially in the Court below, we think each party must bear his costs throughout.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

1903. September 1, 2.

VENKATARATNAM NAIDU (COUNTER-PETITIONER), APPELLANT,

v.

THE COLLECTOR OF GODAVARI (PETITIONER), RESPONDENT.*

Land Acquisition Act—I of 1894, *ss.* 12, 18, 49,—*Award—Compulsory acquisition of buildings—Buildings adjacent and structurally connected—Onus on public body.*

When a public body seeks, under the Land Acquisition Act, to acquire any portion of a block of buildings which is structurally connected with the main block, the onus is on that body to show that the portion is not "reasonably required for the full and unimpaired use of the house."

ACQUISITION of land under the Land Acquisition Act. The Sub-Collector, in his award, stated that the Municipality of Rajahmundry had originally proposed to acquire an extent of 40—54 square

* Appeal No. 51 of 1902 presented against the award of F. H. Hamnett, District Judge of Godavari, dated 29th October 1901, in Civil Miscellaneous Petition No. 282 of 1901.

VENKATA-RATNAM NAIDU v. THE COLLECTOR OF GODAVARI.

yards of house, etc., together with the edifice and walls standing upon it for widening the Training College Street. As, however, that would have affected the main building and would have caused damage to it, the Council had resolved to acquire only 38—95 square yards so as to leave the main building unaffected. The site so proposed to be acquired contained a coach-house and a brick wall. The Sub-Collector awarded Rs. 3 per square yard as compensation for the site, Rs. 270 for the coach-house and brick wall, and a sum of Rs. 50 in all for re-constructing an enclosure wall and repairing the roof of the main building. Notice was served upon the owner of the site to accept the sum awarded, whereupon he filed a petition complaining that if any portion of the site should be acquired the whole house should be taken, as the house would be of no use if a portion of it were taken. He requested the case to be sent to the Civil Court for decision.

The Sub-Collector referred the case to the District Judge, under sections 18 and 49 of Act I of 1894. The owner of the site filed a counter-petition in the following terms :—

"(1) That the portion now sought to be acquired consists of three parts, viz., (*a*) a portion of the main building used as a kitchen (northern portion); (*b*) a small vacant site, the only portion available for the females of the house for bathing and other purposes (middle portion); (*c*) a coach-house attached to the main building (southern portion). (2) That the acquisition of the portion marked (*a*) above brings the case under paragraph 1 of section 49 of the Land Acquisition Act, while that of (*b*) and (*c*) brings it under paragraph 4 of the same section. (3) That the Sub-Collector has not, in his award, taken into consideration the provisions made in clauses 3, 4 and 5 of section 23 and that the counter-petitioner deserves more compensation than is actually awarded by the Sub-Collector under these clauses, in case (that is) your Honourable Court decides that the whole house need not be acquired. Counter-petitioner therefore prays that your Honourable Court may be pleased to decide that the whole house is to be acquired or to grant more compensation in case your Honour decides that a portion only may be acquired."

The District Judge said :—

"An extent of 38—95 square yards of house site together with the edifice and walls standing thereon was taken up at the instance of the Rajahmundry Municipality, for widening the Training College Street and an amount of Rs. 494-15-0 was awarded as

compensation. The claimant objected to the acquisition of the site alleging that it forms only a part of the house and that the whole house should be acquired. Hence the reference . . . ."

"The plan, exhibit B, shows the land to be acquired and the adjoining premises. It is clear from the plan and the evidence of petitioner's first witness that the main building is complete in itself and that the buildings on the site to be acquired are only out-houses. The building on the south of the site is a coach-house, with a terraced roof distinct from the roof of the main building, and no evidence has been adduced by the counter-petitioner to show that persons who occupied the house used the coach-house or that the house could not be used either as dwelling house or for any other purpose without the coach-house. Counter-petitioner's objection under section 49 to the coach-house being acquired must therefore clearly fail." He dealt with remaining buildings and found that the acquisition of the site proposed to be acquired would in no way interfere with the use of the main building either as a dwelling house, store-house or office, and decided the reference against the owner.

The owner of the site preferred this appeal.

K. Subrahmania Sastri, for *V. Ramesam*, for appellant, contended that the award of the District Judge was opposed to section 49 of Act I of 1894 (Land Acquisition Act). That section lays down that if a part of the house is to be acquired, the whole of it shall be acquired if the owner so desires. The portions now sought to be acquired formed not only a structural part of the house, but were necessary for the use of the house as a dwelling. Under the old Act X of 1870 it was held, in *Khairati Lal* v. *The Secretary of State for India*(1), that even out-houses situated within the compound of a dwelling house form a part of the house. Under section 55 of that Act the Government was held bound to acquire the whole of that property or none. This section corresponds with section 92 of the Land Clauses Consolidation Act (8 and 9 Vic., cap. 18). The same interpretation was placed on that section by the Courts in England—vide *Grosvenor* v. *The Hampstead Junction Railway Company*(2); *Cole* v. *The West London and Crystal Palace Railway Company*(3); *King* v. *The*

(1) I.L.R., 11 All., 378.

(2) 26 L.J., Ch., 731; 1 De G. & J., 446.

(3) 28 L.J., Ch., 767.

Wycombe Railway Company(1). The meaning of "part of the house" is no doubt more restricted in the new Act, but only to the extent of excluding out-houses, etc., within the compound and not so as to exclude even a structural part of the house from being "part of the house." The District Judge misunderstood the meaning of the phrase "part of the house" as used in section 49 of the Land Acquisition Act. He held that since the part which is sought to be acquired is not necessary for the enjoyment of the house, it is not a part of the house. The proviso to section 49 shows what is the test to be applied in cases like these, viz., that the Judge should consider whether the part to be severed is required for the full and unimpaired use of the house. Considering the uses to which this part is put, it is clear that the removal thereof will greatly diminish the material comfort of the house.

The Government Pleader for respondent.—The Judge and the Head Assistant Collector who inspected the house state that it is not a part of the house and not necessary for its enjoyment. The plan shows it is separate from the house and stands in the position of an out-house. The rule that any house within the compound is a part of the main building for which the authorities are quoted is now modified by the new Land Acquisition Act. The finding of the District Judge is one of fact and cannot be disturbed in an appeal under the Land Acquisition Act.

JUDGMENT.—This is an appeal under section 54 of the Land Acquisition Act, 1894, from an award made on a reference under section 49 of the Act. The question raised is whether a strip of land with the buildings thereon can be compulsorily acquired under the Act without the adjacent main building, with which the buildings proposed to be acquired are structurally connected so as to form one block, being also acquired. Section 49 of the Act of 1894 provides "the provisions of this Act shall not be put in force for the purpose of acquiring a part only of any house, manufactory or other building, if the owner desire that the whole of such house manufactory or building shall be so acquired." This portion of the section is a reproduction of section 55 of the Indian Act of 1870, which is in substantially the same terms as section 92 of the English Land Clauses Act, 1845. Section 49 of the Act of 1894

(1) 29 L.J., Ch., 462.

contains the following new provisions. "Provided that the owner may, at any time before the Collector has made his award under section 11, by notice in writing, withdraw or modify his expressed desire that the whole of such house, manufactory or building shall be so acquired.

"Provided also that, if any question shall arise as to whether any land proposed to be taken under this Act does or does not form part of a house, manufactory or building within the meaning of this section, the Collector shall refer the determination of such question to the Court and shall not take possession of such land until after the question has been determined.

"In deciding on such a reference the Court shall have regard to the question whether the land proposed to be taken is reasonably required for the full and unimpaired use of the house, manufactory or building."

It seems clear that the new provisions introduced into the new Act requiring the Court in deciding whether any land proposed to be taken does or does not form part of a house, to have regard to the question whether the land is reasonably required for the full and unimpaired use of the house, were inserted to meet the decisions in cases under the Land Clauses Act and the earlier Indian Act in which it was held that the word "house" included all that was necessary to the enjoyment of the house, whether attached to the main building or not—see for instance *Grosvenor* v. *The Hampstead Junction Railway Company*(1); *King* v. *The Wycombe Railway Company*(2); *Spackman* v. *G. W. Railway Company*(3); *Khairati Lal* v. *The Secretary of State for India in Council*(4).

It may be that, under the Act of 1894, a portion of a block of buildings is a part of a house in the sense that it is structurally connected with the rest of the block, but at the same time, is not necessarily required for the full and unimpaired use of the house, so as to impose on the public body which seeks to exercise compulsory powers of acquisition, the obligation to acquire the whole block. But when the public body seeks to acquire any portion of a block which is structurally connected with the main block, the onus is certainly on that body to show that the portion is not "reasonably

(1) 26 L.J., Ch., 731; 1 De G. & J., 446.
(2) 29 L.J., Ch., 462.
(3) 1 Jur. N.S., 790.
(4) I.L.R., 11 All., 378.

required for the full and unimpaired use of the house." On the evidence in the present case, we are of opinion that the Municipality failed to discharge this onus. We allow the appeal and set aside the award with costs throughout.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Offg. Chief Justice, and Mr. Justice Bhashyam Ayyangar.

KAMISETTI SUBBIAH AND OTHERS (DEFENDANTS), APPELLANTS,

v.

KATHA VENKATASAWMY (PLAINTIFF), RESPONDENT.*

1903. October 23, 26, 27.

Contract Act—IX of 1872, *ss.* 4, 5—*Place where contract is made—Proposal and acceptance by letter—Jurisdiction—Civil Procedure Code—Act XIV of* 1882 *s.* 17—"*Place where the contract was made.*"

Plaintiff, who resided at Kurnool, filed a suit in the District Court of Kurnool against the defendants, who resided in Madras, for damages. Plaintiff had been consigning goods for sale to the defendants as commission agents and he now complained that they had sold his goods at rates unnecessarily low. The contract of agency had been concluded by postal communications between plaintiff and defendants:

Held, that the suit was one arising out of contract within the meaning of section 17 of the Code of Civil Procedure, that, within the meaning of explanation III to that section, the cause of action arose at the place where the contract was made, *i.e.*, at Madras and that clause iii of the explanation was inapplicable to the suit inasmuch as the amount claimed was one payable not in performance of the contract, but as damages for its breach.

Under the Indian Contract Act, where the proposal and acceptance are made by letters, the contract is made at the time when and at the place where the letter of acceptance is posted, though the contract is voidable at the instance of the acceptor by communication of his revocation before the acceptance has come to the knowledge of the proposer.

SUIT for damages. Plaintiff, in his plaint, described himself as residing at Kurnool, and the defendants as residing at Madras. He alleged that the defendants were commission agents; that there

* Appeal No. 232 of 1901 presented against the decree of W. M. Thorburn, District Judge of Kurnool, in Original Suit No. 2 of 1900.

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had been dealings between him and the defendants in the course of which he had been sending goods to the defendants at Madras and the defendants had made advances or lent money or honoured his hundies drawn on them at Madras on the security of the goods, which were sold by the defendants in Madras as plaintiff's commission agents, at a commission, the sale-proceeds being appropriated by the defendants to the amount due to them. Plaintiff alleged that defendants had sold his goods at rates much below their value, and claimed that they were answerable for the damages sustained by him in consequence of their unwarranted action in selling the goods at rates at which they ought not to have sold them without the knowledge, consent and instructions of the plaintiff and contrary to the course of business which had always been followed. He laid the damages at Rs. 2,520-13-9, and brought the suit in the District Court of Kurnool. The written statement of the defendants, besides traversing the claim on the merits, raised the question of jurisdiction in paragraphs 13 and 14 as follows :—

"That there was neither an express nor implied contract between the plaintiff and the defendant's firm that the amount of damages to which this suit relates was payable at Kurnool within the jurisdiction of this Honourable Court. That the damages claimed by the plaintiff being those arising in consequence of the alleged unwarranted action of the defendants in selling his goods in Madras, the third defendant is advised and he therefore avers that the High Court of Judicature at Madras is the Court which has jurisdiction to entertain this suit and not this Honourable Court, under clause II, section 17, Civil Procedure Code."

The first issue raised the question of jurisdiction. The District Judge was of opinion that the suit might have been instituted either at Madras or at Kurnool, and held that the District Court at Kurnool had jurisdiction. He dealt with the claim on its merits and gave plaintiff a decree for Rs. 1,556-14-5. It appeared that the proposal had been sent by plaintiff by post to Madras, where it came to the knowledge of the defendants, and that the defendants had posted their acceptance of it at Madras.

Defendants preferred this appeal.

P. S. Sivaswami Ayyar, P. R. Sundara Ayyar, Sundara Sastri and *Kumarasamy* for appellants.

T. V. Seshagiri Ayyar and *Balamukunda Ayyar* for respondents.

KAMISETTI SUBBIAH v. KATHA VENKATA-SAWMY.

JUDGMENT.—The respondent, a resident of Kurnool, sues the defendants, who are commission agents carrying on business in Madras, for damages alleged to have been caused to the plaintiff in consequence of "the unwarranted action of the defendants in selling the plaintiff's goods at rates at which they ought not to have sold, without the knowledge, consent and instructions of the plaintiff and contrary to the course of business always followed." The contract of agency was concluded by postal communications between the plaintiff and the defendants and the dealings consisted "in the plaintiff sending goods to the defendants (at Madras) from time to time and the defendants making advances or lending moneys or honouring and paying plaintiff's hundies drawn on them in Madras, on the security of the said goods and selling the same in Madras as plaintiff's commission agents," and appropriating the balance of sale-proceeds (after deducting the commission due to them) towards the amounts due to them.

The suit was brought in the District Court of Kurnool, and the first issue framed in the case was whether the District Court of Kurnool had jurisdiction to entertain the suit. The District Judge held that he had jurisdiction inasmuch as the dealings of the parties were begun and carried on by letters written from Kurnool to Madras and from Madras to Kurnool and therefore the suit could be instituted at either place, and gave a decree in favour of the plaintiff on the merits. The only point argued in the appeal is the question of jurisdiction. We are unable to concur in the view taken by the District Judge and must hold that the District Court of Kurnool had no jurisdiction to entertain the suit. If the suit is regarded as one founded on tort, by reason of the defendants' neglect or misconduct in selling the plaintiff's goods at an undervalue, it is clear that the cause of action arose (*vide* section 17 (*a*), Civil Procedure Code) in Madras and not in Kurnool. But viewing the suit as one arising out of contract, within the meaning of explanation III to section 17, Civil Procedure Code, and this, we think, is the character of the suit for purposes of determining the forum—the question is whether it can be held upon the admitted facts that Kurnool was (I) "the place where the contract was made" or (II) "the place where the contract was to be performed" or its performance completed or (iii) "the place where in performance of the contract" the amount sued for was expressly or impliedly payable. Clause (ii) of explanation (iii) is clearly

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inapplicable to the case and the respondent's pleader did not rely upon it; but he relied upon both clause (i) and clause (iii). We are clearly of opinion that clause (iii) is also inapplicable to this suit, inasmuch as the amount sued for is really, as it purports to be, in the nature of damages for alleged breach of contract and not an amount payable in performance of the contract. The respondent's pleader argued as if the amount which the plaintiff seeks to recover in this action were a sum which the agent was bound, under section 218 of the Contract Act, to pay to his principal; and on this footing he contended that the agent was bound to seek the principal and pay or tender the money and that therefore the money was payable at Kurnool, in performance of the contract of agency. But a reference to sections 217 and 218 of the Contract Act will clearly show that the sum referred to in section 218 is the balance remaining with the agent out of the sums "received on account of the principal in the business of the agency" (after deducting therefrom all moneys due to the agent in respect of advances made or expenses incurred by him in conducting the agency business and also such remuneration as may be payable to him for acting as agent). The present suit is one brought really under section 212 of the Contract Act for compensation which the agent is bound to make to his principal "in respect of the direct consequences of his own neglect or want of skill or misconduct." It is therefore unnecessary to consider the various cases cited on both sides and decide in this appeal whether an agent is bound to render on demand proper accounts to his principal at the place of residence of the latter and seek his principal and pay at his residence, the sums payable to him under section 218 of the Contract Act. There is no authority whatever for the position that a party committing a breach of contract should seek the other party to the contract and pay him, at his residence, compensation or damages for such breach of contract—which of course is an unliquidated amount, not to say that clause (iii) of section 17, Civil Procedure Code, refers only to an amount payable in "performance of the contract." The only question that has to be decided therefore is whether the "contract was made" in Madras or in Kurnool; and this depends principally upon sections 4, 5 and 6 of the Contract Act. In our opinion the contract was made in Madras, where the plaintiff's proposal—sent by post—came to the knowledge of the defendants and where the defendants'

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acceptance was posted and was thus put in a course of transmission to the plaintiff so as to be out of the power of the defendants. Under the Indian Contract Act, it is true that the contract is not complete in the sense that neither party can recede therefrom, until the acceptance comes to the knowledge of the proposer. But at the time when the acceptance is posted, the contract becomes complete as against the proposer and any communication (from the proposer) which reaches the acceptor after this moment, revoking the proposal, is altogether inoperative. As against the acceptor, however, the contract is not complete at that moment and can be avoided by him by communicating to the proposer, a revocation of the acceptance, before the acceptance reaches him. Under the English law, this seems to remain still an open question (see Pollock on 'Contracts,' seventh edition, page 35), though in all probability, English Courts may now be bound to hold that an unqualified acceptance once posted cannot be revoked even by a telegram or special messenger outstripping its arrival (*ibid.*, page 36). The learned pleader, for the respondents, argues that the contract could not be held to have taken place at the moment of the posting of the acceptance inasmuch as the acceptor could have receded from it before the acceptance reached the proposer. There is, however, the anomaly—if it be an anomaly—that the other party could not recede from it. If a contract be not concluded, it should, of course, be open to either party to recede from it; and this being so it cannot successfully be contended that the contract is not concluded when the letter of acceptance is posted for admittedly the proposer is no longer at liberty to recede. The conclusion, we come to is that the contract is made at the time and at the place when and where the letter of acceptance is posted, but that, under the Indian Contract Act, at any rate, the contract is voidable at the instance of the acceptor by communication of his revocation before the acceptance has come to the knowledge of the proposer. In *Newcomb* v. *DeRoos*(1), the offer was made by the defendant from London by letter addressed to the plaintiffs at Stamford. It was received by the plaintiff at Stamford and the letter of acceptance also posted there. It was held that the contract was made at Stamford; and it was further held in that case that the whole cause of action, *i.e.*, the contract

(1) 2 E. & E., 271.

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as well as the work to be done thereunder, arose at Stamford. In *Taylor* v. *Jones*(1), the converse of this case, where an offer to buy goods was made by letter posted in the City of London and was accepted not by a letter but by sending the goods to the proposer's place of business in the city, it was held that the contract was made and the whole cause of action arose in the City of London. The question as to where a contract is made is fully considered and discussed by Savigny in his treatise on the Conflict of Laws—Guthrie's 'Translation,' second edition, pages 214 and 215, etc., and he answers it without hesitation, as follows:—

"The contract is concluded where the first letter is received and the assenting answer is dispatched by the receiver for at this place a concurrent declaration of intention has been arrived at The sender of the first letter is therefore to be regarded as if he had gone to meet the other, and had received his consent. This opinion has been adopted by several. But many have suggested the following doubts. The assenting letter, they think, may be recovered before its arrival, or annulled by a revocation; therefore the contract is first completed at the place where the sender of the first letter has received the answer, and has thus become aware of the other's agreement. But it is quite wrong to reject the true principle in consideration of such very rare cases. In far the greater number of instances both intentions will be declared without such a wavering of resolution; but where that does happen, the question can only be decided by taking into account a multitude of particular circumstances, so that, even then, the arbitrary rule proposed by our opponents is by no means sufficient" (*vide* also footnote (*c*) at page 215 in which all the authorities bearing on the question are summarised and collected).

We, therefore, allow this appeal with costs throughout, and setting aside the decree appealed against, direct the plaint to be returned to be presented to the proper Court.

(1) L.R. I., C.P.D., 87.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Bhashyam Ayyangar.

1903. September 2, 3, 4.

RAMASAMI CHETTI AND OTHERS (PLAINTIFF AND HIS LEGAL REPRESENTATIVES), APPELLANTS,

v.

ALAGIRISAMI CHETTI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Law—Partial partition—Lessee of shares of some lessors in entire village and of shares of other lessors in portion—Suit for partition as to portion jointly held by lessee and some lessors—Maintainability.

Plaintiff sued for partition of 100 kulis of land situated in the village of A. This village was, in 1883, in the possession of the second, ninth and tenth defendants and one L, as tenants in common and second defendant's share was one-half and the share of the others was one-sixth each. In 1887, the tenth defendant's one-sixth share and interest in the entire village (including the 100 kulis) was attached in execution of a decree against him. His interest in the 100 kulis was sold and purchased by the present first defendant, whilst one-half of his share in the rest of the village was purchased by the decree-holder N. In 1889 and 1891, respectively, N similarly purchased the one-sixth share in the village, including the 100 kulis, of L and of the ninth defendant, respectively. In 1894, N sold the entire interest acquired by him in the village to A, who, in 1897, sold the same in equal moieties to the ninth and tenth defendants. In 1897, plaintiff obtained a lease from second defendant of her one-half share in the entire village, exclusive of the 100 kulis, for a term of twenty-three years, and a similar lease from ninth and tenth defendants of their interest (amounting together to one-half share) in the village, without reservation. Plaintiff now sued for partition of the 100 kulis. His case was that by his leases he had acquired a right to the exclusive possession for twenty-three years of the entire village exclusive of the 100 kulis, and that in respect of the latter he was entitled to joint possession for the same period with the first and second defendants (the shares of the three being respectively one-third, one-sixth, and one-half), and that as he did not like such joint possession he desired a partition of his one-third share:

Held, that plaintiff was entitled to have partition, though he was only lessee for a term of years, and though that partition could only last for the period of his lease. The suit was not one for partial partition inasmuch as plaintiff was not entitled to partition of the rest of the village, to which he was entitled to exclusive possession, under his leases for twenty-three years. The only portion of the village he could demand partition of was the 100 kulis, to which he was only entitled to possession jointly with the first and second defendants.

* Second Appeal No. 893 of 1901 presented against the decree of H. Moberly, District Judge of Madura, in Appeal Suit No. 205 of 1900 presented against the decree of V. Swaminatha Ayyar, District Munsif of Tirumangalam, in Original Suit No. 168 of 1899.

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SUIT for partition. The facts are fully set out in the judgment of the High Court. The District Munsif dismissed the suit, and the District Judge upheld that order of dismissal, on appeal.

Plaintiff preferred this appeal.

P. R. Sundara Ayyar for appellant.

V. Krishnaswami Ayyar and *K. N. Ayya* for first respondent.

JUDGMENT.—The appellant sues for a partition of the 100 kulis of punja land mentioned in the plaint and for the recovery of his one-third share therein. The land is situate in the inam village of Attukkulam, which originally belonged in equal moieties to two brothers—the great-grandfather of the tenth defendant and the great-grandfather of one Lakshmana Ayyar, on whose death his half share devolved on his daughter, the second defendant. The half share of the great-grandfather of the tenth defendant devolved, share and share alike, upon the tenth defendant, his brother, one Peria Lakshmana Ayyar, and his brother's son, the ninth defendant. The village was thus in the possession of the second, the ninth and the tenth defendants and one Peria Lakshmana Ayyar, as tenants in common, the second defendant's share being one-half and those of the ninth and tenth defendants and Peria Lakshmana Ayyar being one-sixth each. These persons originally had only the melvaram right in the 100 kulis of land in question, the right of occupancy or kudivaram right being with certain ryots, who subsequently, from time to time, relinquished their rights of occupancy prior to 1883 and thus these defendants and Peria Lakshmana Ayyar became the full owners of the 100 kulis, *i.e.*, of both the varams therein. One Nagulusami Chetti obtained a decree against the tenth defendant in Original Suit No. 215 of 1887 and in execution thereof, he, on the 30th October 1888, attached (exhibit VI) the tenth defendant's share and interest in the village, describing the same under two items, the first item as the one-sixth share belonging to the defendant in the village (the extent being 100 cawnies of nanja and 900 kulis of punja) and the second item as the right to both the varams in the 100 kulis of punja (now in question) a note being added that the defendant's entire right and interest in the properties were attached. The boundaries given in respect of the first item are apparently the boundaries of the whole village (thus including the 100 kulis forming the second item). The boundaries given in respect of the second item are apparently the boundaries of the 100

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kulis alone. The second item was sold on the 5th February 1889 and purchased for Rs. 102 by the first defendant (in this suit), the sale being confirmed (*vide* exhibit XIII) on the 10th April 1889. The first item, or rather one-half of the first item, *i.e.*, half of one-sixth share belonging to the tenth defendant, was sold on the 1st April 1889 and purchased by the decree-holder Nagulusami Chetti for Rs. 75, the sale being confirmed on the 18th June 1889, (exhibit A). The same Nagulusami Chetti obtained a decree against the widow and legal representative of Peria Lakshmana Ayyar (aforesaid) the owner of an one-sixth share and in execution thereof brought to sale and purchased for Rs. 75, on the 1st July 1889, the one-sixth share in the village belonging to the judgment-debtor (exhibit B), the sale being confirmed on the 2nd September 1889. The description, extent and boundaries of the property are substantially the same as in exhibit A. The same Nagulusami Chetti obtained a decree against the ninth defendant and in execution thereof attached (exhibit L) his one-sixth share in the village, the description, extent and boundaries of the property being substantially the same as in exhibits A and B. The decree-holder himself became the purchaser (for Rs. 125) on the 14th April 1891, the sale being confirmed on the 29th June 1891 (*vide* exhibit C). The description of the property in exhibit C is identical with that in exhibit L. Both in L and in C, reference is made to the defendant's one-sixth share in the "beasts, trees, tittu, tidal tank, bund, &c." and in this respect they differ from exhibits A, B and XIII. While the ninth defendant's share was under attachment, the first defendant, on the 10th March 1891, preferred a claim under section 278, Civil Procedure Code, stating that he had become the purchaser of the 100 kulis of punja (now in question) in execution of the decree in Original Suit No. 215 of 1887 (already referred to), that the ninth defendant had no manner of right or enjoyment therein, that Nagulusami Chetti, the plaintiff, had fraudulently included the same in the attachment and that it should be released therefrom (*vide* exhibit O). The District Munsif fixed the 13th April 1891 to enable the parties to adduce evidence in regard to the claim petition, and, on the 14th April, he held that the evidence clearly established that the tenth defendant, the defendant in Original Suit No. 215 of 1887, had only a sixth share in the 100 kulis and, dismissing the claim preferred by the first defendant, ordered that the ninth defendant's one-sixth interest

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in the 100 kulis should also be sold; and on the same day, the one-sixth share of the ninth defendant in the village was sold and purchased by Nagulusami himself. After this sale, if, as alleged by the plaintiff, the tenth defendant had only a sixth share in the 100 kulis in question (as in the remaining portion of the village) and under exhibits B and C Nagulusami became the purchaser of the one-sixth share of Peria Lakshmana Ayyar and of the one-sixth share of the ninth defendant, in the whole village including the 100 kulis in question, the position of the various parties concerned in the village would be as follows:—The second defendant would continue to possess one-half share in the whole village. Nagulusami would be the owner of one-third share in the whole village and of a further one-twelfth share thereof exclusive of the 100 kulis in question; the tenth defendant would be the owner of the remaining one-twelfth share of the whole village exclusive of the 100 kulis in question, while the first defendant would have a sixth share in the 100 kulis in question.

If, however, as alleged by the first defendant, the tenth defendant was the separate and exclusive owner of the 100 kulis in question, the position would be as follows:—The first defendant would have the sole and exclusive ownership of the 100 kulis and the rest of the village alone would be owned by the second defendant, Nagulusami Chetti and the tenth defendant as tenants in common, their shares being respectively one-half, five-twelfths and one-twelfth.

Nagulusami Chetti sold the entire interest acquired by him in the village, under exhibits A, B and C, to one Alagappa Chetti on the 11th May 1894, for Rs. 500 (exhibit D) and the latter sold the same in equal moieties to the tenth and ninth defendants on the 11th October 1897 (exhibits E and F) for Rs. 540 each. The ninth defendant thus became the owner of five twenty-fourths and the tenth defendant the owner of seven twenty-fourths (five twenty-fourths *plus* a twelfth). Whether such ownership extended over the entire village including the 100 kulis in question or only over the rest of the village (excluding the 100 kulis) will be considered later on.

The plaintiff obtained a lease (exhibit G, dated the 21st September 1897) from the second defendant of her one-half share in the entire village (exclusive of the 100 kulis in question, or, at any rate, of the kudivaram right therein), for a term of twenty-three

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years in consideration of the payment of a premium of Rs. 1,960. It is perfectly clear from this document that the second defendant did not reserve anything but the 100 kulis in question, and that the waste lands in the village referred to by the Courts below as 250 kulis were included in the lease (*vide* paragraph 4). About the same time (on the 14th October 1897) the plaintiff obtained a similar lease (exhibit H) from defendants Nos. 9 and 10 of their interest (amounting together to one-half share) in the village, without any reservation, for the same term of twenty-three years, on payment of a premium of Rs. 1,950. Exhibits G and H have both been registered and the plaintiff's case in the present suit is that, by virtue of exhibits G and H, he has acquired a right to the exclusive possession for twenty-three years of the entire village exclusive of the 100 kulis in question, and that in respect of the latter he is entitled to joint possession for the same period, with the first and second defendants, the shares of the three being, respectively, one-third, one-sixth and one-half, and that, as he does not like such joint possession, he desires a partition of his one-third share.

Among others, the principal issues framed in the case were:—Whether the 100 kulis in question became the exclusive property of the tenth defendant or continued to be the joint property of the co-sharers (issue No. 3); whether the plaintiff is estopped by the conduct of Nagulusami Chetti from denying the first defendant's exclusive title to the 100 kulis in question (issue No. 2); whether the plaintiff is entitled to maintain a suit for the partition of the plaint 100 kulis alone (5th issue); whether the first defendant is concluded by the order of the District Munsif (exhibit O) passed in Original Suit No. 23 of 1890 (in which Nagulusami Chetti was the decree-holder) dismissing his claim petition, from claiming the one-sixth share in the 100 kulis in question, which was therein attached as the property of the ninth defendant, the judgment-debtor therein (issue No. 7).

The District Munsif found that the tenth defendant owned and enjoyed the 100 kulis as his exclusive property, that the plaintiff, who derives his interest in the plaint land from defendants Nos. 9 and 10, who in their turn derived their title from Nagulusami Chetti, is estopped from disputing the exclusive title of the first defendant, and that the plaintiff's claim is a claim for

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a partial partition and as such is not maintainable. He accordingly dismissed the plaintiff's suit without recording any finding on issue No. 7. The District Judge, on appeal, concurring with the District Munsif that the suit was one for a partial partition and that the plaintiff was estopped from denying the first defendant's exclusive title to the land, confirmed the decree of the District Munsif dismissing the suit, and expressly refrained from considering and deciding the third issue, viz., whether the plaint land was the exclusive property of the tenth defendant, though, from the tenor of certain observations made by him in paragraph 4 of his judgment, he seems to have been inclined to take the same view as the District Munsif on that question also. It is to be regretted that, in a complicated case of this sort, the Lower Appellate Court should not have considered and recorded its finding on this important issue which would go to the root of the plaintiff's case on the merits.

In support of this second appeal the pleader for the appellant contends that this cannot be regarded as a suit for partial partition inasmuch as upon his own case he is not entitled to any partition of the rest of the village to which, by virtue of exhibits G and H he became entitled to exclusive possession for the term of twenty-three years and that the only portion of which he can demand a partition is the 100 kulis in question, to which he is entitled to possession only jointly with the first and second defendants and that though he is only a lessee for a term of years of the interest of the ninth and tenth defendants, he is entitled to demand a partition. In our opinion this contention is well-founded, though the partition which he seeks to enforce can last only for the period of his lease. It is no doubt the law that the transferee from one or more co-shares of a portion only of the co-tenancy cannot maintain a suit for partition of the portion transferred to him, whether for a term or in perpetuity (*Parbati Churn Deb* v. *Ain-ud-deen*(1)), but in this case, the plaintiff is, so far at any rate as the one-sixth share of the ninth defendant is concerned, a lessee of that one-sixth interest in the whole of the village: and so far as that right is concerned he is not transferee of an interest in a portion of the village and though he has acquired only a limited term in such interest, we hold that it is competent to him to bring

(1) I.L.R., 7 Calc., 577.

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a suit for partition which is to last during that term (*Baring* v. *Nash*(1) and *Heaton* v. *Dearden*(2); see also 1 Washburn's 'Real Property,' pages 713, 715 and Freeman on 'Co-tenancy,' paragraphs 485, 440 and 421). In our opinion section 44 of the Transfer of Property Act adopts the same principle and provides that the transferee of an interest in the share of a co-owner may enforce a partition of the same so far as is necessary to give effect to such transfer. And the suit cannot be regarded as a suit for partial partition, inasmuch as the plaintiff cannot include in his claim for partition the remainder of the village of which he already has the exclusive possession under exhibits G and H with the consent of the second, ninth and tenth defendants who alone have any interest therein. We cannot accede to the contention made on behalf of the respondent that the plaintiff is not entitled to the exclusive possession of the remaining portion of the village, inasmuch as the lease of the share of the second defendant reserving a right in the 100 kulis in question will give him no right whatever. The plaintiff after obtaining a lease of the 21st September 1897 (exhibit G) from the second defendant of the rest of the village, obtained a lease on the 14th October 1897 (exhibit H) from the ninth and tenth defendants of their interest in the rest of the village and of their alleged interest in the 100 kulis also. In the very passage in Washburn's 'Real Property,' pages 687 and 688, relied on by the learned pleader for the respondent, it is laid down that "where one has conveyed a specific part of an estate of which he is tenant in common with others, the conveyance may be made good by the other co-tenants releasing to him their interest in such portion." Even assuming, for the sake of argument, that exhibit G, if it stood alone, would be inefficacious to give any right to the plaintiff, the subsequent lease, exhibit H, obtained by the plaintiff from the other co-tenants, the ninth and tenth defendants, would operate as a release to him of their interest in the remainder of the village and thus make good the lease given by the second defendant. The plaintiff, therefore, has a valid title to the possession of the remainder of the village for the term of twenty-three years with the consent of all the co-tenants. As, therefore, he cannot demand a partition of that, he has rightly brought his suit for the partition of the 100 kulis alone in which

(1) 1 Ves. & B., 551. (2) 16 Beav., 147.

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he admits that the first and second defendants are jointly entitled to possession with him. In this view the cases relied on in the Courts below, *Parbati Churn Deb* v. *Ain-ud-deen* (1) and *Koer Hasmat Rai* v. *Sunder Das* (2) are inapplicable. [The judgment then dealt at length with the other issues in the case and findings were called for.]

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Offg. Chief Justice, and Mr. Justice Boddam.

1903. September 17. October 6.

GOSETI SUBBA ROW AND OTHERS (DEFENDANTS), APPELLANTS,

v.

VARIGONDA NARASIMHAM (PLAINTIFF), RESPONDENT.*

Evidence Act—I of 1872, s. 92 (proviso 4)—Agreement in writing registered—Oral evidence of discharge—Admissibility.

An usufructuary mortgage deed was executed in favour of S, who took possession of the mortgaged land. The deed was registered. S died, and his adopted son brought the present suit to recover a portion of the land so mortgaged, alleging that, during his minority, the first defendant had taken wrongful possession of the property. The first defendant was the heir of the mortgagor. His defence was that the equity of redemption had become vested in himself and another as the heirs of the deceased mortgagor; that he, as a person thus entitled to a moiety of the estate, had entered into an oral agreement with plaintiff's adoptive mother and guardian for the redemption of his share only, and that, in pursuance of that agreement, he had paid her a moiety of the mortgage amount, and redeemed the lands in question as falling to his share:

Held, that he was not precluded by section 92 (proviso 4) of the Evidence Act from proving this oral agreement.

SUIT for land. The facts material to the decision were stated in the judgment of the Officiating Chief Justice as follows:—"An usufructuary mortgage dated the 16th May 1898 was executed in favour of one Subbarayudu, who took possession of the mortgaged lands and subsequently died. The plaintiff, who is Subbarayudu's

(1) I.L.R., 7 Calc., 577. (2) I.L.R., 11 Calc., 396.

* Second Appeal No. 189 of 1902, presented against the decree of M. D. Bell, District Judge of Vizagapatam, in Appeal Suit No. 78 of 1901, presented against the decree of C. Rappayya Pantulu District Munsif of Vizagapatam, in Original Suit No. 387 of 1900.

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adopted son, sues in the present suit for the recovery of the lands in dispute, which were part of the property comprised in the mortgage, alleging that, during his minority, the first defendant took wrongful possession of the property. The principal defence was that the mortgagor having died, the equity of redemption became vested in the first defendant and another, the daughter's sons and heirs of the mortgagor, and that the first defendant being entitled to a moiety of his grandfather's estate, entered into an oral agreement with the adoptive mother and guardian of the plaintiff for a redemption of his share only and in pursuance of such agreement paid her Rs. 600, being a moiety of the mortgage amount and redeemed the lands in question, as falling to his share."

The District Munsif held that the agreement could not be proved. He decreed in plaintiff's favour. The District Judge upheld that decision on appeal.

Defendants preferred this second appeal.

P. S. Sivasami Ayyar and *V. Ramesam* for appellants.

T. Venkatasubba Ayyar and *Narayana Sastri* for respondent.

Sir S. SUBRAHMANIA AYYAR, OFFG. C.J. [after stating the facts as above].—The District Munsif, as well as the District Judge, decreed possession to the plaintiff, holding that the agreement set up could not be proved, apparently on the ground that it was oral, while, in their opinion, it should have been by writing registered.

The latter supposition is obviously wrong and the only point for determination in this case is whether the defendant is precluded from proving the alleged agreement by the concluding part of the fourth proviso to section 92 of the Indian Evidence Act. I think he is not. No doubt if the agreement in question were an agreement between the parties to the mortgage or their representatives in interest within the meaning of the first paragraph of section 92, it could not be proved, the original transfer having been by a registered instrument while the subsequent agreement was oral. That, however, is not the case here. Of course, one party to the alleged agreement was the plaintiff, who is the representative of the mortgagee, but of the two representatives of the mortgagor, only one was party, acting merely with reference to his own interest in the property. Doubtless, it being open to the plaintiff to split the mortgage, the agreement,

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if true, had the result of bringing about a change in the rights of the plaintiff and the rights of the mortgagor's representatives (inclusive of the one not party to the agreement) as they originally stood under the mortgage, inasmuch as the plaintiff's rights would be confined to the lands retained by him, while the rights of the representative of the mortgagor not party to the agreement was merely to recover his share of the mortgaged land on payment of the proportionate share of the debt, with a right to contribution or other remedy as against the first defendant, in case the circumstances entitled him to such.

It is not agreements of this sort however that come within the provision under consideration. Only those agreements come within the section which affect the terms of the previous transaction, not indirectly, as here, as a consequence of an independent and valid contract between some only of the parties, but directly by virtue of the consensus of those who alone are competent to rescind or modify the original contract, viz., all the parties concerned or all their representatives.

The lower Courts were therefore in error in disallowing proof of the agreement. I would set aside their decree and remand the case for disposal according to law.

BODDAM, J.—I agree.

It is not necessary for me to re-state the facts of this case as they have already been stated in the judgment of the learned Officiating Chief Justice.

At the hearing of this appeal, the only argument raised before us was that as the agreement sought to be proved was an executed agreement, the exception at the end of proviso 4 to section 92 of the Evidence Act did not apply; that it only applied to executory agreements and not to executed agreements.

The words of the proviso are perfectly clear and in my opinion apply to *any* agreement whether executory or executed. The rule is stated in the first part of the proviso. The rule is that "the existence of *any* distinct subsequent oral agreement to rescind or modify any such contract grant or disposition of property may be proved." This applies equally to any agreement whether executed or executory. Then comes the exception "except in cases in which such contract grant or disposition of property is by law required to be in writing or has been registered according

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to the law in force for the time being as to the registration of documents." This being an exception to the rules stated in the earlier part of the proviso applies also in the same way to *any* agreement whether executed or executory, the intention of the legislature being, as it seems to me, to make an exception from the general rule that a subsequent oral agreement to rescind or modify any contract may be proved when the original contract is of such a nature as that the law requires it to be in writing or where its execution has been followed by the formality of registration. In such cases the only way of proving the rescission or modification of the original contract must be by proof of an agreement of the like formality and not by an oral agreement and this whether the agreement has been executed or is executory.

There is however another aspect of the case which has not been argued before us, though the facts alleged on the part of the defendant clearly raise it and, as the suit has not been heard but has been determined upon the preliminary question whether the defence raised by the defendant can be proved, it is right that we should deal with it.

The real question is whether the defendant is precluded by any provision of law from proving the alleged oral agreement made between himself and the plaintiff's adoptive mother and guardian whilst the plaintiff was a minor.

If the agreement between the defendant and the plaintiff's adoptive mother and guardian rescinds or modifies the original contract of mortgage, it cannot be proved because it is oral and the original contract of mortgage is registered. If, however, it does not rescind or modify it, it can be proved as there is no provision of law to prevent it. No contract can be rescinded or modified except by the consent of all the parties to it or their representatives, *i.e.*, all their representatives and the section and the fourth proviso to it only applies "as between the parties to any such instrument or their representatives in interest," that is necessarily all their representives. It is only the parties to a contract (or all their representatives) who can "contradict, vary, add to, or subtract from, its terms" or who can "rescind or modify such contract," and it is only when the contract is to be rescinded or modified, that the proviso (and the exception to the proviso) applies. Here the defendant does not contend that the original contract is rescinded or modified by the subsequent oral agreement

which he alleges was made between himself alone and the plaintiff's adoptive mother and guardian, for he does not pretend that it was made between all the representatives of the original parties to the contract but only between the representatives of the mortgagee and himself and he is only one of the representatives of the mortgagor and cannot act for and bind the other representatives of the mortgagor. The original contract remains and is not rescinded or modified; but he says that by an oral agreement made between himself alone and the plaintiff's adoptive mother and guardian (that is the plaintiff's representative) a new and separate agreement has been made between them whereby it has been agreed that he should be permitted to redeem half the mortgaged property by paying off half the mortgage money and receiving back possession of half the lands mortgaged. What he alleges is that as between himself and the plaintiff he is discharged from the contract so far as that is possible.

It is clear that without rescinding or modifying a contract some of the parties to the contract may agree that some one or more of the parties to the contract may be discharged from it and section 44 of the Contract Act provides for such a case and safeguards the rights of the other parties to the original contract. This section provides that "where two or more persons have made a joint promise a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors," that is, because the original contract remains and is not rescinded or modified by such a release.

Now, unless there is some provision of law which prevents proof of an oral agreement to discharge one promisor from the contract there is no reason that the defence set up should not be proved. The 92nd section of the Evidence Act does not apply to such a case. It only applies where the original contract is contradicted, varied, added to, or subtracted from and the proviso only applies where the original contract is rescinded or modified and does not apply where a subsequent contract is made independent of the original contract that one party shall be discharged from it so far as that can be done as between the parties to the subsequent contract and I know of no provision of law which prevents such a subsequent contract being proved even though it be an oral contract only.

In these circumstances as the plaintiff's suit is for trespass and to recover possession of the land which the defendant alleges has been redeemed under the oral contract which he sets up, I agree that the decrees of the lower Courts are wrong and should be set aside and the suit should be remanded to the Munsif's Court for hearing and disposal according to law.

The costs throughout should abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

MEPPATT KUNHAMAD (DEFENDANT), APPELLANT,

v.

CHATHU NAIR (PLAINTIFF), RESPONDENT.*

1903. January 23.

Malabar law—Revenue Recovery Act—(Madras) Act II of 1864, s. 32—Purchaser of land at Revenue sale—Liability to pay tenant for improvements before obtaining possession.

Where a kanom was granted for Rs. 5, the jenmi agreeing to pay the tenant the value of his improvements, and it was not alleged that the rent reserved was lower than the usual rent for such land, and the object of the lease was to bring waste land into cultivation:

Held, that, having regard to the small amount of the kanom, the transaction must be regarded as in substance a lease; and the engagement made by the jenmi to pay the tenant the value of his improvements was binding on the Collector under section 32 of (Madras) Act II of 1864. A purchaser of the land at a revenue sale was therefore bound to pay compensation to the tenant for improvements before he could obtain possession.

SUIT for possession of land. Plaintiff bought the land at a sale for arrears of revenue. The land was held by defendant on a kanom from the defaulter. The question was whether plaintiff was entitled to possession of the land without payment of compensation for improvements to the tenant under Act I of 1900. The kanom was filed as exhibit I and was in the following terms:—"Kanom deed executed, etc., ... I have hereby, this day, granted to you

* Second Appeal No. 1039 of 1901, presented against the decree of N. S. Brodie, District Judge of North Malabar, in Appeal Suit No. 241 of 1900, presented against the decree of A. Annasawmi Ayyar, District Munsif of Badagara, in Original Suit No. 551 of 1899.

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under renewal, in kanom and kuzhikanom right for twelve years, the Neettukotta mala and the grounds included therein which belong in jenm to me, which have been held by you and which are described in the subjoined schedule on receipt of Rs. 5 as kanom. Therefore you shall take the trees, bamboos, etc., from these grounds, and the amount of rent to be paid to me per year exclusive of interest on the kanom amount is Rs. 8. This amount of Rs. 8 you shall pay me annually and take receipt therefor. If you reclaim the aforesaid grounds and make kuzhikurs and improvements thereon, I shall pay you the value thereof according to the local custom along with kanom. The elephant pits that now exist on these grounds belong to you. Therefore, if elephants fall on the pits that now exist and as the pits which you may hereafter dig in these grounds you shall pay me as janma-bhogam ½ of the value estimated for each elephant after it is restored to its proper state, and take receipt therefor. If you make paddy lands in the south of Eripara Thodu canal, it is agreed that I shall receive the jenmi's varam due therefrom. As these grounds are very extensive tracts their measurements are not entered." The District Munsif ordered the defendant to restore the land to plaintiff with all improvements on it upon payment by the plaintiff of Rs. 906-8-0 as compensation. Plaintiff appealed to the District Judge, who reversed that portion of decree which related to payment of compensation by plaintiff to defendant.

Defendant preferred this second appeal.

J. L. Rosario for appellant.

Mr. *T. Richmond and K. P. Govinda Menon* for respondent.

JUDGMENT.—Having regard to the small amount of the kanom (Rs. 5) the transaction must be regarded as, in substance, a lease. It is not alleged or shown that the rent reserved is lower than the usual rent for such land, and the object of the lease is essentially to bring waste land into cultivation. In this view the engagement made by the jenmi to pay the tenant the value of his improvements is binding upon the Collector under section 32, Act II of 1864, Madras, extended to purchasers at a revenue sale by section 41. The operation of sections 2 and 42 is limited by the provisions of sections 32 and 41. The plaintiff, therefore, before he can obtain possession of the hill purchased by him at the revenue sale, must pay the tenant compensation for his improvements. The tenant has not objected to being evicted before the expiration of the term of twelve years fixed in his lease, but claims only compensation for improvements.

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We, therefore, reverse the decree of the District Judge and restore that of the District Munsif with costs in this and in the lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Bhashyam Ayyangar.

MANAKAT VELAMMA AND OTHERS (PLAINTIFFS), APPELLANTS,

1903. August 28

v.

IBRAHIM LEBBE AND OTHERS (DEFENDANTS), RESPONDENTS.*

Malabar Law—Debt incurred by Karnavan and senior Anandravan for benefit of Tarwad—Decree for money—Liability of moveable property of Tarwad to attachment under that decree.

A Tarwad consisted of plaintiffs and defendants Nos. 2 and 3. Defendants Nos. 2 and 3 were the Karnavan and senior Anandravan of the Tarwad. A money decree had been obtained as against the Karnavan and senior Anandravan on a debt which had been contracted by them for the benefit of the Tarwad, and, in execution of that decree, certain moveable property belonging to the Tarwad had been attached. In a suit for a declaration that the moveable property of the Tarwad was not liable to be attached and sold in execution of the decree:

Held, that the property was liable.

Ittiachan v. *Velappan*, (I.L.R., 8 Mad., 484) and *Govinda* v. *Krishnan*, (I.L.R., 15 Mad., 333), discussed.

SUIT for a declaration that certain moveable property attached in execution of a decree was not liable to be sold. The finding of both the lower Courts was that the moveable property in question belonged to the Tarwad of the plaintiffs and defendants Nos. 2 and 3. Defendants Nos. 2 and 3 were the Karnavan and senior Anandravan of the Tarwad. The decree under which the property had been attached had been obtained as against the Karnavan and Anandravan on a debt which they had contracted for the benefit of the family.

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* Second Appeal No. 113 of 1902, presented against the decree of K. Krishna Rau, Subordinate Judge of South Malabar, in Appeal Suit No. 523 of 1901, presented against the decree of V. Rama Sastri, District Munsif of Betatnad, in Original Suit No. 492 of 1900.

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The District Munsif held that the property was not liable to attachment. The Subordinate Judge reversed this decree, holding that it was so liable.

Plaintiffs preferred this second appeal.

V. Ryru Nambiar for appellants.

N. T. Shamanna for respondents.

JUDGMENT.—In execution of a money decree obtained against defendants Nos. 2 and 3 who were the Karnavan and the senior Anandravan of the Tarwad consisting of the plaintiffs and themselves certain moveable properties belonging to the Tarwad were attached and the plaintiffs objected. Their objection was disallowed and the present suit is brought by them for a declaration that the moveable properties of the Tarwad are not liable to be attached and sold in execution of the decree. The first defendant, the attaching creditor, has adduced evidence in this suit which has satisfied the lower Appellate Court that the debt was contracted for the benefit of the Tarwad and accordingly that Court dismissed the plaintiff's suit.

It is contended in this appeal that though the debt was contracted for the benefit of the Tarwad, yet the property of the Tarwad cannot be sold in execution of the decree in a suit to which they were not parties and in which the second and third defendants were not sued as representing the Tarwad and in support of this contention reliance is placed upon *Ittiachan* v. *Velappan*(1) and *Govinda* v. *Krishnan*(2). It is rightly conceded that if the Tarwad property now in question has been disposed of in satisfaction of the decree debt voluntarily by the Manager of the Tarwad (second defendant) such sale would be binding upon the plaintiffs. That being so it is difficult to see on what principle it can be contended that an involuntary sale of the same property for the discharge of the same debt will not equally bind the plaintiffs when apart from the decree it is affirmatively established as against the plaintiffs that the debt was of a binding character. We think that the authority of the cases cited is considerably shaken by the decision of the Full Bench in *Vasudevan* v. *Sankaran*(3). In cases governed by the ordinary Hindu Law there is a course of decisions both of this Court and of the Judicial Committee of the Privy

(1) I.L.R., 8 Mad., 484. (2) I.L.R., 15 Mad., 333.
(3) I.L.R., 20 Mad., 129.

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Council that in execution of a decree against a Hindu father or other managing member of a Hindu family the power of disposition (*vide* section 266, Civil Procedure Code) which he may exercise over joint family property for purposes sanctioned by law would be operative to pass to the purchaser not only his personal interest in the property sold, but also the interest of the sons or other members of the joint family in the property although they were not parties to the decree (*Nunna Setti* v. *Chidaraboyina*(1)). We can see no reason why the principle of these decisions is not equally applicable to Hindu families governed by the Marumakkatayam Alyasantana or Makkatayam Law in force on the West Coast, simply because the property of the joint family is impartible in the sense that there can be no compulsory partition among the members of the family.

We, therefore, affirm the decree of the lower Appellate Court and dismiss this appeal.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar.

DORASWAMI PILLAI (PLAINTIFF), PETITIONER, 1903. November 6.

v.

THUNGASAMI PILLAI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *ss.* 416, 462—*Next friend—Interest adverse to minor.*

A suit relating to the estate or person of an infant, and for his benefit, has the effect of making him a ward of Court, and no act can be done affecting the property of the minor unless under the express or implied direction of the Court itself.

Where a suit, which was being conducted on behalf of a minor, was withdrawn without leave being asked for or given to bring another suit, the order passed on the petition for withdrawal was set aside by the High Court, on

(1) I.L.R., 26 Mad., 214 at pp. 222, 223.

* Civil Revision Petition No. 62 of 1903, presented under section 622 of the Code of Civil Procedure, praying the High Court to revise the orders of W. Gopalachariar, Subordinate Judge of Madura (East), on Civil Miscellaneous Petition Nos. 361 and 435 of 1902, respectively (Original Suit No. 60 of 1901).

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revision, and the suit restored to the file of the lower Court for disposal according to law.

Where a Court finds that a next friend does not do his duty in relation to a suit, it is its duty not to permit him to prejudice the interests of the minor, but to adjourn the suit in order that some one interested in the minor may apply on behalf of the minor for the removal of the next friend and for the appointment of a new next friend, or in order that the minor plaintiff himself may, on coming of age, elect to proceed with the suit or withdraw from it.

WITHDRAWAL of suit filed on behalf of a minor. The circumstances under which this petition was filed are fully set out in the judgment.

C. Ramachendra Rao Saheb and *M. R. Sankara Ayyar* for petitioner.

P. S. Sivaswami Ayyar for respondents.

JUDGMENT.—This has been treated as a revision petition not only against the order of the Subordinate Judge, dated the 13th October 1902, but also against his order, dated the 28th July 1902. In passing both these orders it is clear that the Subordinate Judge failed to exercise the jurisdiction which the Court by reason of the petitioner (plaintiff in the suit) being an infant had over the conduct and disposal of the suit and to realize his responsibility in the matter. As observed by Scott, J., in *Karmali Rahimbhoy* v. *Rahimbhoy Habibbhoy*(1) "a suit relating to the estate or person of an infant and for his benefit has the effect of making him a ward of Court." That being so, no act can be done affecting the property of the minor unless under the express or implied direction of the Court itself. (Story's 'Equity Jurisprudence,' section 1353.)

Section 446 of the Code of Civil Procedure enacts that, if the interest of the next friend is adverse to that of the minor, or if the next friend does not do his duty, or for any other sufficient cause, application may be made on behalf of the minor or by a defendant for his removal, and the Court may order the next friend to be removed. It is, therefore, the duty of the Court, if it finds that the next friend does not do his duty in relation to the suit, not to permit him to prejudice the interests of the minor, but to adjourn the suit in order that some one interested in the minor may apply on behalf of the minor for the removal of the next friend and appointment of a new next friend, or in order that the minor plaintiff himself may, on coming of age, elect to proceed with the

(1) I.L.R., 13 Bom., 137.

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suit or withdraw from it. In the present case, on the 28th July 1902, when the case came on for final hearing after several adjournments, the junior vakil who was specially engaged on that very day, apparently in virtual supervision of the senior who was present in Court presented a petition stating that the plaintiff or rather his next friend was unable to conduct the further proceedings in the suit by meeting the necessary expenses and to prove that the whole of the plaint properties belonged to the plaintiff and praying that the Court might be pleased to strike the case off the file without further proceedings. This application was granted on that very day and the plaintiff ordered to pay the defendants' costs. It is established beyond all doubt by the evidence of the junior vakil who was examined as a witness on behalf of the respondents in connection with the review petition that he was engaged by the next friend's father, that the Judge asked him whether he was going to withdraw unconditionally or whether he wanted to withdraw with permission to bring a fresh suit, and that he, in reply, stated he did not want such permission.

Assuming that the next friend, the mother of the plaintiff, was aware of the contents of the vakalatnamah authorizing the vakil to withdraw the suit executed that very day outside the precincts of the Court and that she did authorize the vakil to withdraw the suit, it must have been obvious to the Subordinate Judge that, in withdrawing the suit without permission to bring a fresh suit, the minor's vakil, at the instance of the next friend, was acting most prejudicially to the interests of the minor; and that is apparently the reason why he pointedly asked the vakil if he wanted permission to bring a fresh suit. It is therefore clear that the Subordinate Judge was under the impression that he was bound to allow the withdrawal and dismiss the suit with costs for default of prosecution, and that he had no jurisdiction to adjourn the suit in the interests of its ward. The plaintiff's next friend in her deposition taken in connection with the review application states that she was not aware of the contents of the vakalatnamah, or of the withdrawal petition, both of which bear her mark, and that she became aware of the withdrawal only a day or two after it was withdrawn; and the evidence of the father of the next friend and one of the attesting witnesses to the vakalatnamah is to the effect that the withdrawal was brought about by the first defendant himself and that the suit was withdrawn by reason of the first

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defendant having promised to give to the plaintiff his share after the suit was withdrawn. The Subordinate Judge does not discuss the evidence bearing on this question. Under section 462, Civil Procedure Code, a withdrawal of the suit by the next friend in pursuance of an agreement or compromise entered into with the defendant, without the leave of the Court, will be voidable at the instance of the minor (*Karmali Rahimbhoy* v. *Rahimbhoy Habbibbhoy*(1)). In rejecting the application for review the Subordinate Judge has evidently overlooked the provisions of section 462. It is, however, unnecessary to call for a finding on this point. For the reasons already stated in connection with the unconditional withdrawal of the suit on the 28th July 1902, I set aside his order under section 622, Civil Procedure Code, following the decision of the Calcutta High Court in *Ram Sarup Lal* v. *Shah Latafat Hossein*(2) and direct that the suit be restored to file and proceeded with and disposed of according to law.

The respondents must pay the costs of the petitioner both here and in the application for review in the Court below.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice.

1903. November 17, 18.

PARANGODAN NAIR (PLAINTIFF), PETITIONER,

v.

PERUMTODUKA ILLOT CHATA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code Act XIV of 1882, s. 13—Suit for money paid on a contract—Breach of contract and failure of consideration—Previous suit for specific performance dismissed—Maintainability of present suit.

Plaintiff had paid the defendants a sum of money on a contract under which defendants undertook to renew a kanom, and had previously sued the defendants unsuccessfully for specific performance of that contract. Plaintiff now sued to recover the money. On its being contended that the suit was barred by section 43 of the Code of Civil Procedure:

(1) I.L.R., 13 Bom., 137. (2) I.L.R., 29 Calc., 735.

* Civil Revision Petition No. 328 of 1903, presented under section 25 of Act IX of 1887, praying the High Court to revise the decree of J. C. Fernandez, Subordinate Judge of South Malabar, in Small Cause Suit No. 56 of 1903.

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Held, that the suit was one for money paid on an existing consideration which had since failed; that this right of action was different from the right on which the suit for specific performance had been brought, and that section 43 did not apply.

SUIT for Rs. 60 paid on a consideration which failed. The present plaintiff had sued, in Original Suit No. 650 of 1898, on the file of the District Munsif of Betutnad, for specific performance of an alleged contract to renew a kanom which he held from the defendants, and on which, as he alleged, he had paid the defendant Rs. 60. That suit was unsuccessful. Plaintiff now sued to recover the Rs. 60 so paid. The Acting Subordinate Judge found that plaintiff had paid the Rs. 60 as alleged, on the consideration which had failed, but he also held that plaintiff could have claimed the amount in the previous suit, as compensation for the breach of contract, and that the present suit was, in consequence, barred by section 43 of the Code of Civil Procedure.

Plaintiff preferred this civil revision petition.

K. R. Subrahmania Sastri for petitioner.

V. Ryru Nambiar for respondents.

JUDGMENT.—The present suit is for the return of the money paid on account of renewal fees under the agreement which was held to be unenforceable in Original Suit No. 650 of 1898 and consequently for money paid on an existing consideration which has since failed. This right of action is clearly different from the right on which the suit for specific performance was brought. Section 43 of the Civil Procedure Code does not therefore apply (*Pachiakutti Udaiyan* v. *Panchanada Patten*(1)). The view taken in *Muthu Narayana Reddi* v. *Rayalu Reddi*(2) relied on on behalf of the respondent is in conflict with the current of decisions in this Court as well as the decisions of the Judicial Committee as will be seen from the judgment in *Ramaswami Ayyar* v. *Vythinatha Ayyar*(3), in which the whole subject has been recently examined at length. Section 29 of the Specific Relief Act also has no application, the present claim not being one for compensation for breach of the agreement to grant a renewal. The suit is in time since it was brought within three years from the decision in the suit

(1) S.A. No. 288 of 1899 (unreported).
(2) S.A. No. 181 of 1895 (unreported).
(3) I.L.R., 26 Mad., 760.

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for specific performance (*Venkata Narasimhulu* v. *Peramma*(1), *Venkatarama Ayyar* v. *Venkatasubramanian*(2) and *Sriramulu* v. *Chinna Venkatasami*(3)). The decree of the lower Court is reversed and there will be a decree in favour of the plaintiff for Rs. 60 with interest at six per cent. (per annum) from the 21st March 1902 to date of payment and costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Russell.

1903. October 7, 8, 14.

VYTHINATHA AYYAR AND OTHERS (DEFENDANTS NOS. 4 to 6, 8, 9 AND 11), APPELLANTS,

v.

YEGGIA NARAYANA AYYAR (PLAINTIFF), RESPONDENT.*

Hindu law—Suit for partition of property come to plaintiff's father from the father of his adoptive mother—Nature of property so devolved—Plaintiff joint owner with his father.

In a suit for partition brought by plaintiff against his father, as first defendant, and others, plaintiff sought to recover a share of property which had come to first defendant from the father of the first defendant's adoptive mother.

Held, that plaintiff was a joint owner with first defendant in the property, and was entitled to partition of it.

Venkayamma Garu v. *Venkataramanayyamma Bahadur Garu*, (I.L.R., 25 Mad., 687) and *Karuppai Nachiar* v. *Sankaranarayanan Chetty*, (I.L.R., 27 Mad., 300), followed.

SUIT for partition. The relationship of the parties was as follows: Plaintiff was the son of first defendant; defendants Nos. 2 and 3 were plaintiff's brothers; defendants Nos. 4 to 10 were first defendant's brothers and their sons. The remaining defendants were impleaded as persons in possession of portions of the property in question. The property in which plaintiff sued for a share had come to the first defendant (plaintiff's father) from the father of first defendant's adoptive mother. The

(1) I.L.R., 18 Mad., 173. (2) I.L.R., 24 Mad., 27.
(3) I.L.R., 25 Mad., 396.

* Civil Miscellaneous Appeal No. 31 of 1903 presented against the order of F. D. P. Oldfield, District Judge of Tanjore, in Appeal Suit No. 109 of 1902, presented against the decree of A. Ramalingam Pillai, District Munsif of Tiruvadi, in Original Suit No. 522 of 1900.

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District Munsif dismissed the suit. Plaintiff appealed to the District Judge, who said: "Of the various issues in the suit the lower Court only found it necessary to decide one, which may be very shortly stated. The partition sued for is of property alleged to have belonged to plaintiff's father's mother's father and plaintiff's father, a Sudra, consents to the partition. The lower Court referring to Mayne's 'Hindu Law' (3rd edition), section 25, said that property inherited by a man through or from a female could not be ancestral, and found against plaintiff. A much longer discussion than I intend would be necessary but for the existence of a very recent authority which was not before the lower Court (*Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu*(1)) and I do not think it necessary to go into cases which have been superseded by that decision. To leave out of consideration the wills referred to therein which are not held to be operative, the property passed from the original male holder through his widow and daughter to the sons of the latter, and the decision is that these sons held the property thus inherited, as ancestral property, as joint tenants with benefit of survivorship. I can find no reason for distinguishing from these facts those now before me or the position of two sons from that of a son and his father."

He dealt with the arguments raised, reversed the Munsif's order and remanded the suit to be disposed of on its merits.

Against that order, defendants Nos. 4 to 6, 8, 9 and 11 preferred this appeal.

T. V. Seshagiri Ayyar and *T. Narasimha Ayyangar* for appellants.

P. S. Sivaswami Ayyar for respondent.

JUDGMENT.—The facts, so far as they need be stated for the purpose of this appeal, are as follows. The plaintiff is the son of the first defendant. The second and third defendants are the plaintiff's brothers. Defendants Nos. 4 to 10 are the first defendant's brothers and their sons. The parties are governed by the Mitakshara Law of inheritance and the plaintiff is undivided from his father, the first defendant. The plaintiff sued for partition. The property in respect of which he sued for a share was property which came to the first defendant from the father of Kamakshi, the first defendant's adoptive mother. The District Munsif

(1) I.L.R., 25 Mad., 678 at p. 687.

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dismissed the suit on the ground that the plaintiff could not claim a share in property which came to his father from the maternal side. The District Judge set aside the District Munsif's order and remanded the suit, relying on the recent decision of the Privy Council in the Jaggainpett case (*Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu*(1)). The appeal is against this order. We think that the order of the District Judge is right. The Privy Council case relied on does not directly decide the point in issue, but that case has recently been explained and commented on in great detail by a Full Bench of this Court in *Karuppai Nachiar* v. *Sankaranarayanan Chetty*(2). The first defendant in the present case occupies precisely the same position *quoad* the property that the brothers, Niladri and Appa Rao, occupied in the Privy Council case. In that case it was held that though "the property was self-acquired property in the hands of their grandfather, yet in the hands of the grandsons it was ancestral property which had devolved on them under the ordinary law of inheritance" and that they took it as *joint* family property with right of survivorship and might have partitioned it if they had so desired.

In commenting on this decision the Full Bench of this Court pointed out that the right of survivorship referred to by the Privy Council was the right of survivorship as understood by the Mitakshara Law (*Jogeswar Narain Deo* v. *Ramachandra Dutt*(3)), according to which the right will not prevail in favour of the survivor as against the male issue of the deceased. They also laid stress on the fact that under the Mitakshara joint family system there can be no joint family property in respect of which the male issue of the joint owners do not by birth become joint owners with their father, as held in *Sudarsanam Maistri* v. *Narasimhulu Maistri*(4). It follows that in the present case the plaintiff is a joint owner with his father, the first defendant, in the property inherited from the first defendant's maternal grandfather, and the order of the District Judge is right. This being so, it is, perhaps, hardly necessary to deal with the various difficulties which, it was suggested at the Bar, would flow from the ruling of the Privy Council. For example it was asked, what would be the

(1) I.L.R., 25 Mad., 678 at p. 687. (2) I.L.R., 27 Mad., 300.
(3) I.L.R., 23 Calc., 670 at p. 679. (4) I.L.R., 25 Mad., 149 at p. 155.

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position of grandsons by several daughters? Would they take the grandfather's property as ancestral property with rights of survivorship *inter se*? The answer is that they belong to different families and there could be no joint property with right of survivorship between them. In the Privy Council case the grandsons were brothers and were members of a joint family. And again if there were two grandsons by one daughter and one grandson died leaving a son, before the property devolved, would the property devolve on the grandson and great-grandson jointly or would the grandson, being one degree nearer, exclude the great-grandson. In regard to this question it is sufficient to say that the solution will probably be found in considering the basis of the Privy Council decision suggested by the Full Bench, viz., the view of the ancient Hindu law that a son of an appointed daughter (putrikaputra) became by a fiction of law a son's son to his maternal grandfather and a member of his family, ceasing to be a member of his father's family, while under the present law a daughter's son, though not ceasing to be a member of his father's family is regarded as equal to a son's son of his maternal grandfather, entitled to perform his obsequies and take his property. But the grandson of an appointed daughter under the old law or of a daughter under the modern law is not regarded as equal to a son's son. In this view the ordinary rule of Hindu Law would prevail and the nearer grandson would exclude the more remote great-grandson.

We dismiss the appeal with costs.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, Mr. Justice Boddam and Mr. Justice Bhashyam Ayyangar.

1903. November 12. December 2.

MADATHAPU RAMAYA (PLAINTIFF), APPELLANT,

v.

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

Revenue Recovery Act—(Madras) Act II of 1864, ss. 1, 2, 3, 26 and 42—Land Revenue—Tax levied on trespasser—"Prohibitory assessment"—Legality.

Plaintiff had built a pial and shed to his house upon land which was part of a public road. Government thereupon imposed what is known as a "prohibitory assessment" and collected it from plaintiff, requiring him to remove his pial and shed and giving him notice that in future an enhanced rate would be charged. In a suit by plaintiff *inter alia* to recover the amount of the tax which he had paid:

Held, that the impost was not land revenue and the demand therefor as if it were such revenue was unauthorised and plaintiff was entitled to recover. Plaintiff possessed no interest in the land such as would constitute him a "landholder" within the meaning of the Revenue Recovery Act. He was improperly in possession of part of the surface of a public road, over which his right was merely one of passage; and the erection by him of the buildings was a wrongful act and a trespass. Government had no right to impose any assessment on him for such occupation.

Per SIR SUBRAHMANIA AYYAR (*Offg. Chief Justice*).—The provisions of the Revenue Recovery Act and of Madras Regulation XXVI of 1802 show that land in respect of which land revenue is exigible is vested in some person or persons other than the Crown; and that the Crown possesses nothing more than a charge (though a first charge) in respect of the revenue due to it, upon the interest of such person or persons, realizable by sale thereof. They preclude the supposition that any Crown demand is recoverable as land revenue unless it be something due from one who is a land-holder as defined by the Act.

Per BHASHYAM AYYANGAR, J.—Civil Courts have jurisdiction to decide whether or not the land or person is at all under liability to be assessed for land revenue. If such liability does exist, the rate or amount of assessment fixed by Government cannot be questioned or revised by a Civil Court. In the case of all lands, any demand which may be made on behalf of the Crown on the occupant with the avowed object of compelling him to surrender or vacate the land, is not the imposition of land revenue, and the machinery provided by the Revenue Recovery Act for the realization of arrears of revenue cannot be resorted to for enforcing such a demand.

* Second Appeal No. 166 of 1902, presented against the decree of I. L. Narayana Row Naidu, Subordinate Judge of Kistna at Masulipatam, in Appeal Suit No. 15 of 1901, confirming the decree of V. Subramanya Pantulu, District Munsif of Guntur, in Original Suit No. 211 of 1899.

SUIT to establish plaintiff's right to certain sites, and to recover 4 annas 1 pie "prohibitory assessment" collected from him by Government for encroaching on the sites. The defence was that the sites in question were portions of the public street belonging to Government and that the prohibitory assessment had been rightly levied. The short facts of the case were that plaintiff had built a pial and shed to his house on land which was part of a public road, and Government thereupon assessed him 4 annas 1 pie for occupying it and gave him notice to remove his pial and shed. Plaintiff was also informed that in future an enhanced rate would be charged. Plaintiff claimed the land upon which he had built the pial as his own, but both the lower Courts found that the land was part of a public road, and dismissed the suit.

Plaintiff preferred this second appeal.

P. Nagabhushanam for appellant.

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

SIR S. SUBRAHMANIA AYYAR, OFFG. C.J.—The question raised in this case is indeed a very important one, though the amount in dispute is but a trifle—4 annas and 1 pie—being the amount collected by Government from the appellant in connection with his having erected a platform and a shed over a portion of a path by the side of which his house is situated in a village in the Kistna district. The effect of the findings by the lower Courts I take to be that the owners of the houses adjoining the path, inclusive of the appellant, have only a right of way over it, the freehold in the soil being vested in the Government.

The point for determination is, whether the levy of the amount in question as land revenue payable in respect of the site of the platform and the shed, is lawful. A levy of the kind under consideration is known in the language of Revenue Standing Orders as a "prohibitory assessment." That the practice of making such collections has been allowed to prevail so long is to my mind entirely due to the phraseology adopted in describing it when it was introduced; and it strikingly illustrates how the true nature of a thing can be altogether obscured by a mere name unwittingly given to it and allowed to pass current without scrutiny.

The term "assessment" in the sense material to the present discussion means "the setting, fixing or charging a certain sum upon, as a tax." At first sight, therefore, the phrase "prohibitory assessment" when applied to an impost by Government with respect to land strongly suggests the notion that such imposition is in the due exercise of the prerogative possessed in this country by the Crown, viz., that of exacting from a subject holding arable land the Crown's proper share of the produce thereof or the equivalent of such produce, which is the modern land revenue. When, however, the matter comes to be examined the erroneous character of this suggestion becomes apparent.

Now, it is indisputable that the prerogative or right referred to rests entirely on the assumption that the subject on whom the demand is to be made is, as between the Crown and himself, a lawful holder of the land, having a substantial and well marked description of interest in it by virtue of which alone he becomes liable to the tax. In support of this statement it is no longer necessary to refer to authorities other than the provisions of two statutes which contain the whole law bearing on the subject, so far as land outside the town of Madras is concerned, viz., the Revenue Recovery Act, (Madras) Act II of 1864 and Madras Regulation XXVI of 1802.

Of the former, sections 1, 2, 3, 26 and 42 are alone material. The person who has to pay the land tax or revenue is referred to in the enactment as a "landholder" and section 1 explains the term as comprising "all persons holding under a Sannad-i-Milkeut istimrar, all other zamindars, shrotriemdars, jagirdars, inamdars, and all persons farming the land revenue under Government; all holders of land under ryotwar settlements or in any way subject to payment of revenue direct to Government." Section 2 provides that "the land, the buildings upon it and its products shall be regarded as the *security* of the public revenue"; and the next section speaks of the land in respect of which the revenue is due as "his" (the landholder's) land. Section 26, which authorizes attachment and sale of the land on account of arrears of revenue, uses similar language and describes it as the "defaulter's" land. Lastly, section 42 provides that out of the proceeds of such a sale any balance remaining after the discharge of the arrears, shall be paid over to the defaulter or on his account.

As to Regulation XXVI of 1802, it entitles every landholder to have his name registered in the public registers directed by that Regulation to be kept of landed property paying revenue to Government, and of transfers thereof from one proprietor to another; the effect of such registry, with reference to the Revenue Recovery Act being, on the one hand to secure to the proprietor the right of insisting on the observance in regard to him of the formalities to be attended to by the authorities engaged in the collection of the public revenue, and on the other, to entail on him certain responsibilities in respect of the revenue.

These various provisions show beyond the possibility of a doubt, that the land in respect of which land revenue is exigible is vested in some person or persons other than the Crown; and that the Crown possesses nothing more than a charge (though a first charge) in respect of the revenue due to it, upon the interest of such person or persons, realizable by sale thereof. They absolutely preclude the supposition that any Crown demand is recoverable as land revenue, unless it be something due from one who is a landholder as defined by the Act.

It may not perhaps be superfluous to point out that in the actual exercise of the prerogative of the Crown above referred to, the Crown is not supposed to proceed without any regard to definite and well-established principles; for neither in olden times nor now, has the Crown been held entitled to more than a fixed share of the produce—be it the theoretical one-sixth of the Hindu writings or the half-nett again and again proclaimed by the present Government as the share it takes or some other; section 58 of the Revenue Recovery Act having been enacted in order to save the Crown from endless litigation in Courts to which but for such a provision it would be exposed, having regard to the intricate details necessarily incident to a system of assessment, involving in theory at least the ascertainment of the produce of every acre of land in the country and the commutation of the Crown's share thereof with reference to market prices for a definite period such as the usual thirty years for which settlement money rates are fixed.

Such being the fundamental principles governing the assessment and collection of the land revenue, it will be plain that what is called prohibitory assessment rests on grounds diametrically and totally opposed to those principles. In the first place this kind

of assessment is professedly imposed only in cases where the land is not lawfully occupied by the party assessed; and it is to compel the immediate abandonment of such occupation that the assessment is made prohibitive. In other words it is imposed, not because the party assessed is a landholder, but because he is not. In the next place, the assessment is not with reference to the recognised half-nett principle applied in the case of a landholder, but avowedly in disregard thereof, it being often a hundredfold, for the obvious reason that the party has by his own wrong disentitled himself to invoke the application of that principle to his case.

In short, the levy is no assessment at all in the proper sense of the term, but a penalty and a fine under the misnomer of land revenue, and levied under such a guise by putting in force legislative provisions absolutely inapplicable to the collection of such a demand. The truth of this view can be easily realized if the matter be tested with reference to the cardinal principle that land-revenue forms a charge on the land. To apply this principle to cases of prohibitory assessment must lead to the manifest absurdity of one's own land becoming charged with a debt due to himself. And a sale of the land can confer nothing on the purchaser as, *ex hypothesi*, the person assessed possesses no interest in the property. The learned Government Pleader stated that land, in respect of which such assessment is imposed, is never brought to sale, the demand invariably being enforced by proceeding against the person of the party assessed or his property. This is virtually as clear an admission as can be on the part of the revenue authorities of the invalidity of the demand.

It only remains to observe that the decision of the question can in no way be affected either by the circumstance on which the learned Government Pleader laid so much stress, viz., that the system of prohibitory assessment has on the whole operated effectually to check encroachments on land which public interests require should remain unoccupied; or by the consideration, urged not without foundation, on behalf of the appellant, that the system, apart from its invalidity, is often worked in a way never contemplated by its inventors and, not infrequently, is made use of by low paid village and other officials for purposes of exaction. If the remedies available under the law as it stands, with reference to encroachments on the property of the Government or the public

be inadequate, that is a matter for the Legislature and not for the Courts to deal with.

Turning now to the facts of the present case, it is manifest that the appellant possessed no interest in the land such as would constitute him a landholder within the meaning of the Revenue Recovery Act, for, his right over the path was merely that of passage and the erection by him of the platform and the shed was purely a wrongful act and a trespass.

Consequently the impost in question was not land revenue and the demand therefor as if it were such revenue was altogether unauthorised.

I would therefore allow the second appeal in so far as the claim to the refund of 4 annas and 1 pie is concerned and amend decrees of the lower Courts by directing payment to the plaintiff by the defendant of the said amount but without costs.

BODDAM, J.—This action was brought to have the plaintiff's right declared to a certain piece of land and to recover 4 annas and 1 pie collected from the plaintiff by the Government as assessment for occupying the said land.

The plaintiff built a pial and shed to his house upon land which was part of a public road and the Government thereupon assessed him 4 annas and 1 pie for occupying the same and gave him notice to remove his pial and shed. They also informed him that in future they would charge enhanced cist.

In his action the plaintiff claimed that the land upon which he had built his pial was his own land, but it has been found that the site of the pial is part of a public road.

Both the lower Courts dismissed the plaintiff's suit and so far as the claim for a declaration that the land was the plaintiff's land their decree is right. The only question for our determination is whether the Government have any right to assess the defendant as an occupier of part of a public road.

The assessment of the plaintiff is said to be a penal assessment, but that is immaterial as Civil Courts are prohibited from going into the question of the amount of an assessment and can only deal with the general question of the liability to assessment. Penal assessment as such is unknown to the law and the only rights the Government have to impose assessment are under statute or by virtue of the prerogative of the Crown.

The statutory right of Government to assess for revenue depends upon Act II of 1864 (Madras).

That Act, after defining the word "landholder" as "all "persons holding under a Sannad-i-Milkeut Istimrar, all other "zamindars, shrotriemdars, jaghirdars, inamdars and all persons "farming the land revenue under Government, all holders of "land under ryotwar settlements or in any way subject to the "payment of revenue direct to Government" enacts that every "landholder" shall pay the revenue due upon his land and that the land and buildings upon it and its products shall be regarded as the security of the public revenue. It gives power to recover arrears by distraint and sale of the defaulter's moveable and immoveable property and on a sale all lands purchased are free of all encumbrances.

It is clear that the plaintiff was not a landholder within this Act. He was improperly in possession of part of the surface of a public road and the Government had no right to impose any assessment upon him under this Act for such occupation.

The only other right which the Government have to assess land is the prerogative of the Crown to take their share of the produce of the land occupied under any such right as can give a saleable interest to the occupier in the land and such as will enable him to be registered under Regulation XXVI of 1802. This prerogative cannot, however, justify the Government in assessing a person in the position of the plaintiff. The plaintiff in derogation of the rights of the public to have the use of the whole surface of the road for passing and re-passing has monopolised a portion of the surface to the exclusion of the public. He is a mere trespasser. His act is an injury to the public and his erection is a nuisance. He is not an occupier with any present or prospective saleable interest in the land and the fact that the freehold is in the Government can give them no right to interfere with the right of the public to the surface of the road so as to entitle them to raise revenue from one who obstructs that right or to in any way recognize him otherwise than as a wrong-doer and a nuisance. The acquisition of a right of way in the public presupposes that the right to the whole surface of the road is vested either by prescription or grant in the public free of any assessment for the use or occupation thereof as such so long as it exists as a public road and the fact that the freehold of the land

is in the Government can only give them the right to deal with so much of the land as is not required by the public for the purposes of a road. It certainly cannot give the Government a right to derogate from its own grant or to limit the rights of the public by assessing a person wrongfully occupying the surface of the land or otherwise recognising the illegal occupation of a portion of the surface of the road to the curtailment of the right of the public to pass and re-pass over the whole of the surface thereof. So far therefore as the claim for 4 annas and 1 pie the plaintiff is entitled to a decree and to that extent, but to that extent alone, the decree of the Court below is wrong and should be reversed.

As, however, the plaintiff's suit was based upon his right to the land alone and the issues raised were practically confined to this question, I should allow no costs to the plaintiff.

BHASHYAM AYYANGAR, J.—The case has been argued on both sides on the footing that the lane in question is, according to the concurrent findings of the Court below, a highway or "public street" as defined by section 3, clauses ix and x of Act V of 1884 —corresponding to section 3, clause xxiii—substituting "road" for "street"—of the Act as amended by Act VI of 1900—which under section 49 of that Act vested in the District Board of Kistna. The question for decision is whether it was legally competent for the Collector to levy from the plaintiff a "penal assessment" for his encroachment on the street by erecting two pials and a pandal. The penal assessment of Re. 0-4-1 was levied and collected on the 13th April 1898 as if the same were an arrear of revenue due on the land encroached upon and this action has been brought to recover the amount as having been illegally levied and collected (see *Narayanasami Reddi* v. *Osuru Reddi*(1)).

The lane in question is apparently a portion of the "Gramanattam" or "Village-site" and presumably the freehold in the soil is in the Government; and if, as was assumed during the argument, the lane or street had continued to vest in the District Board in 1898—when the penal assessment was imposed—then according to the decision in *Sundaram Ayyar* v. *The Municipal Council of Madura*(2), the street, *quâ*-street, *i.e.*, the surface and so much of the air space above and so much of the soil below the

(1) I.L.R., 25 Mad., 548. (2) I.L.R., 25 Mad., 635.

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surface as is reasonably necessary to enable the District Board adequately to maintain and manage the street as a street, was vested in and belonged to the District Board. In *Sundaram Ayyar* v. *The Municipal Council of Madura*(1), the legal effect of the statutory vesting of a street in a municipality (by Act (Madras) IV of 1884 as amended by Act III of 1897) was considered and the conclusion arrived at, on a review of various English and some Indian decisions, was that such vesting did not transfer to the municipality the ownership in the site or soil over which the street exists. This conclusion is fortified by the recent decision of the Court of Appeal in *Finchley Electric Light Company* v. *Finchley Urban District Council*(2) in which, after a review of all the English decisions, Collins, M. R., stated: "The conclusion to be derived from the authorities seems to me to be this; all the stratum of air above the surface, and all the stratum of soil below the surface which in any reasonable sense can be required for the purposes of the street as street, vest in and belong to the local authority" (at page 441).

The assumption, however, on which the argument proceeded, viz., that in 1898, the lane in question continued to vest in the District Board of Kistna, seems to be open to doubt. The proviso to section 49 of Act V of 1884 empowers the Governor in Council from time to time (by notification) to exclude any road or street from the operation of the Act. Though the wording of this proviso is somewhat inartistic and not sufficiently precise to give the notification the effect of divesting the District Board of roads or streets already vested in it under the Act, yet there can be little doubt that such was the intention of the Legislature and the proviso should be so construed. On reference to the list of 'Local Rules and Orders' I find that a notification (L. and M. No. 503, dated the 21st July 1896,—*Fort St. George Gazette*, 1896, Part I-A, p. 182) has been issued by the Local Government excluding from the operation of the Act all streets and roads then existing in the District of Kistna other than those specified therein, and I have little doubt that the lane in question is not among those thus specified, though there is nothing on the record to show what the name of the lane in question is if it at all has any name. If so, it must be taken that in 1898, when the penal assessment was levied,

(1) I.L.R., 25 Mad., 635.

(2) L.R., [1903], 1 Ch., 437.

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the lane or street did not continue to be vested in the District Board.

In the view I take of the case, it is however immaterial whether or not at the time in question the lane vested in the District Board of Kistna, nor is it even material whether it was in reality a "street" in the sense of being a highway. Neither the Settlement Register for the village nor the Ayacut or Pymash Register has been produced in the case, which would show whether or not the lane in question has been excluded as "road" (or "Bhatai Poramboke"); and I am not sure that the finding of the Courts below that the lane in question is a "public lane" is correct. A street in a "Gramanattam" between two rows of houses is not necessarily a highway and it may merely be—as it generally is in rural tracts—land belonging to Government, over which however there is a right of way to the houses or buildings on either side. Assuming, as found by the Courts below, that the freehold in the soil of the lane belongs to Government, the lane is either a highway—whether or not it was in 1898 vested in the District Board of Kistna—or land over which there was merely a right of way to the houses on either side. If it is a highway,—though not vested in the District Board, any obstruction or encroachment may be dealt with under the provisions of chapter X of the Code of Criminal Procedure; if it is a highway vested in the District Board it will be competent to the District Board, under sections 98, 98A and 98B of Act V of 1884 (as amended by Act VI of 1900), to take measures for the removal of encroachments thereon. But whether it is a highway or merely Crown land over which there is a right of way in favour of the inhabitants of the street, it is in the very nature of things land exempted from assessment; and any person encroaching thereon is a trespasser (civil) and in no sense a "landholder" either within the meaning of Act II of 1864 or otherwise. The Standing Orders of the Board of Revenue under which a "penal charge" or "prohibitory assessment" is imposed on and levied from such a trespasser expressly declare that the amount imposed should "be sufficiently heavy to compel the immediate surrender of the land" encroached upon and this amount is increased from year to year till such surrender. This practice though one of long standing has no legal origin and it is impossible to uphold its legality. It is in truth and fact what it candidly purports to be, viz., an effective mode of ejecting

supposed trespassers, not in due course of law but by imposing a crushing fine and realizing the same summarily under Act II of 1864, as if it were land revenue due to Government by a ryot holding assessed land. The custom is also unreasonable as it will equally compel a person who is in or has taken possession of his own land and is not really a trespasser—though supposed to be such by the Village or other Revenue authorities—to relinquish or vacate the land rather than pay a crushing assessment, which, if paid for some years, will even exceed the full value of the land.

It is assumed and argued that such action of Revenue officers cannot be questioned in Civil Courts, which, by section 58 of Act II of 1864, are prohibited from taking into consideration or deciding any question as to the rate of land revenue payable to Government or as to the amount of assessment to be fixed or to be hereafter fixed on the portions of a divided estate. Civil Courts do have full jurisdiction to decide whether or not the land or person is at all under liability to be assessed to land revenue (see *Sri Uppu Lakshmi Bhayamma Garu* v. *Purvis*(1), *Secretary of State for India in Council* v. *Ram Ugrah Singh*(2) and *Government of Bombay* v. *Sundarji Savram*(3)). If such liability does exist, the rate or amount of assessment fixed by Government cannot be questioned or revised by a Civil Court.

The right of Government to assess land to land revenue and to vary such assessment from time to time is not a right created or conferred by any statute, but, as stated in my judgment in *Bell* v. *Municipal Commissioners for the City of Madras*(4) is a prerogative of the Crown according to the ancient and common law of India. The prerogative right consists in this, that the Crown can by an executive act determine and fix the "Rajabhagam" or King's share in the produce of land and vary such share from time to time. This necessarily implies and presupposes that the occupant of the land has an interest in the land and is entitled to the occupant's or ryot's share of the produce as distinguished from the King's share. The same idea is often expressed in the words that the Crown is entitled to the melvaram in the land and the ryot to the kudivaram. It therefore necessarily follows that the Crown cannot impose land revenue upon lands in

(1) 2 Mad. H.C.R., 167. (2) I.L.R., 7 All., 140.
(3) 12 Bom. H.C.R., App. 275. (4) I.L.R., 25 Mad., 457 at p. 482.

which, according to its own case, the person in occupancy has no title or interest or kudivaram right. That such is the nature and extent of the prerogative right of the Crown is fully borne out by Regulation XXVI of 1802 and the provisions of (Madras) Act II of 1864. The definition of the term "landholder" in section 1 of the Act (II of 1864) would be inapplicable to persons in possession of land merely as trespassers and to cases in which the land is not subject to the payment of revenue to Government. Section 2, which declares that the land, the buildings upon it and its products shall be regarded as the security for payment of the public revenue, necessarily implies that the occupant of the land who has to pay the revenue has a right in the land and its products. Section 3 imposes upon the landholder the obligation to pay the revenue due upon the land and section 42—which provides for the sale of the defaulting ryot's land free of incumbrances created by him and for payment to him of the balance of the sale-proceeds after deducting the arrears of revenue—clearly shows that he has a substantial interest in the land.

The learned Pleader for the Crown says that when penal assessment is imposed, the land encroached upon is not brought to sale, but that the moveable and immoveable properties of the person on whom the penal or prohibitive assessment is imposed are distrained and brought to sale under the Revenue Recovery Act. This is a virtual admission that the so-called "prohibitive assessment" is not really revenue assessed upon the land but a fine imposed on and levied from the trespasser by the machinery of the Revenue Recovery Act. Under section 52 of Act II of 1864, all arrears of revenue due to Government—besides land revenue—and advances made by the Government for cultivation or other purposes connected with the revenue and all fees or dues payable to or on behalf of village servants employed in revenue or police duties and all cesses lawfully imposed upon land may be recovered under the Act in the same manner as arrears of land revenue. But the liability to pay these dues must be legally established. If, as already stated, the penal charge or prohibitory assessment cannot be legally regarded as the King's share of the produce or land revenue, much less can it be regarded as coming under any of the heads of dues mentioned in section 52, which can be collected in the same way as arrears of land revenue.

It is unnecessary to refer to other legal objections to the imposition of a penal charge or prohibitory assessment on trespassers in the various cases mentioned in the Standing Orders of the Board of Revenue as I consider it sufficient to base my conclusion on the following broad grounds :—

First, that highways and other poramboke lands set apart for public or communal purposes are not liable to be assessed to land revenue so long, at any rate, as they continue such and have not been lawfully transferred to the head of "Ayan" and thus incorporated with lands to be cultivated and assessed to public revenue;

Secondly, that a person encroaching upon highways or poramboke lands set apart for public purposes can in no sense be regarded as a "landholder" or ryot in respect of the land encroached upon;

Thirdly, that in the case of all lands, whether poramboke or Ayan, any demand which on behalf of the Crown may be made on the occupant thereof with the avowed object of compelling him to surrender or vacate the land is not the imposition of land revenue and the machinery provided by Act II of 1864 for the realization of arrears of revenue cannot be resorted to for enforcing such demand by Revenue officers choosing to give it the name of "assessment" (penal or prohibitory) and crediting it to the head of land revenue in the public accounts; and

Fourthly, that the immemorial and common law prerogative of the Crown in India is only to the Rajabhagam or King's *share* in the *produce* of the land and the land revenue or assessment now levied on land represents the King's share in the produce and the Courts have no jurisdiction to question the rate or share that the executive Government may fix at the periodical revision of assessments but a share of the produce—however high the share or rate may be in relation to the total produce—cannot *exceed the produce*. An assessment, therefore, which is prohibitive and manifestly in excess of what the land may produce and is professedly out of all proportion to such produce is clearly *ultra vires* of Government and such action of the executive is not exempted from the jurisdiction of the Civil Courts.

It is significant that in section 58 the word "rate" is used in the first part of the section and not "amount" which is used in the latter part of the section.

It is unnecessary to consider here the decision of this Court in *Muthayya Chetti* v. *Secretary of State for India*(1) cited on behalf of the Crown in which this Court upheld the legality of a levy of penal assessment upon some lands situate in the Town of Madras, which was found in the case to be the property of the Crown and at its absolute disposal. That decision is based entirely upon the construction of the two Acts XII of 1851 and VI of 1867 relating to the Town of Madras and it is inapplicable to the present case as the said Acts do not apply to it and the land in question is not land at the disposal of Government, but is either a public road or at any rate land subject to a right of way in favour of the inhabitants of the street.

It is however strongly urged on behalf of the Government that the imposition of a penal assessment is necessary and justifiable in the interests of the State and of the public as the most effective mode of checking encroachments on Crown lands, highways and poramboke lands set apart for public or communal purposes. As against this it is pointed out that this practice is highly oppressive and liable to considerable abuse—especially at the hands of village officers and other subordinate revenue officials; and attention is drawn to the facts of the case of *Sappani Asari* v. *Collector of Coimbatore*(2) in which it appears a prohibitory assessment of Rs. 100 a year was imposed on a village site of 4 cents with the object of ejecting the occupant therefrom, notwithstanding that—as was eventually decided in *Sappani Asari* v. *Collector of Coimbatore*(2)—the occupant had a valid grant of the same under the Darkhast rules and had erected a pucca building on the site relying on such grant.

Such considerations *pro* and *con* can carry no weight in deciding whether the imposition and levy of prohibitory assessment is or is not legal. But having regard to the importance of the question I think it right to make the following remarks with reference to the considerations that were pressed upon us. If the existing provisions of law contained in the Municipal and Local Boards Acts, the Code of Criminal Procedure, and other enactments, if any, are found inadequate to check the evil complained of, recourse must be had to special legislation for effectually checking encroachments and obstructions on or wrongful use or alienation of Crown lands

(1) I.L.R., 22 Mad., 100. (2) I.L.R., 26 Mad., 742.

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and poramboke lands set apart for public or communal purposes both in Government villages and Zamindaris—whether such encroachment, obstruction, wrongful use or alienation be by private individuals—including "landholders" specified in section 3 of Madras Act VIII of 1865 or by Municipal Councils or other local authorities. Any such legislation, if deemed necessary, will of course proceed on lines consistent with the just and constitutional principles of British legislation. I may add that for the effectual protection of public rights and claims in this country, provision must be made in the Code of Civil Procedure enabling two or more persons, with the previous sanction of a principal Civil Court of original jurisdiction or of the Collector of the district to institute a suit for the vindication of such right or claim when infringed, whether by a private individual or by a Municipal Corporation or other local authority or by the Crown. Such provision has been made in the case of Hindu and Muhammadan religious institutions by section 18 of the Religious Endowments Act (XX of 1863) and a similar provision is made by section 539, Civil Procedure Code, in regard to public religious or charitable trusts.

The law of limitation as regards public rights and claims as distinguished from Crown rights and claims is equally defective. Section 17 of Act XIV of 1859 saved from the operation of that Act "any public right, property or claim." When that Act was repealed by Act IX of 1871, care was taken to fix a period of 60 years in respect of any suit by or on behalf of the Crown, but no section was inserted in the Act corresponding to section 17 of Act XIV of 1859. The present Indian Limitation Act (XV of 1877) is the same in this respect except that by Act XI of 1900, a new article 146A was added prescribing a period of 30 years for a suit by or on behalf of any local authority for possession of any public street or road or any portion thereof of which it has been dispossessed or has discontinued possession. For the reasons mentioned in my judgment in the case of *Sundaram Ayyar* v. *The Municipal Council of Madura*(1) it is desirable to raise this period also to 60 years. A fresh article should be added prescribing a like period of 60 years for any suit to establish a public right or claim.

In the result I would allow this second appeal and reversing

(1) I.L.R., 25 Mad., 635 at p. 650.

the decrees of the Courts below decree the plaintiff's claim for the refund of 4 annas and 1 pie but without costs, as the plaintiff has failed to establish the title which he set up to the land covered by the pials and the pandal.

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APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Bhashyam Ayyangar.

EKAMBARA AYYAR AND TWO OTHERS (DEFENDANTS NOS. 3 TO 5), APPELLANTS,

v.

MEENATCHI AMMAL AND TWO OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

1903. September 15. October 6.

Landlord and tenant—Incumbrances by tenant and subsequent ejectment—Effect of ejectment on mesne incumbrances.

The ejectment of a tenant, under section 10 or 41 of the Rent Recovery Act operates not only as a determination of the tenant's right of occupancy, but also as an extinguishment of all mesne incumbrances and subordinate interests created by the tenant.

A tenant gave a usufructuary mortgage over his land and covenanted to repay the amount. About two years thereafter the shrotriemdar obtained a decree against the tenant directing him to accept patta as settled by the judgment. On his failure to do so the tenant was ejected. The mortgagee now sued the tenant and the shrotriemdar, claiming a personal decree as against the tenant and the sale of the mortgaged property as against the shrotriemdar, in whose possession it was:

Held, that the mortgagee was not entitled to an order for the sale of the mortgaged property.

SUIT on a mortgage. In Second Appeal No. 74 of 1902, plaintiff sued to recover Rs. 823-10-8 due under a deed of mortgage executed in his favour by defendants Nos. 1 and 2, claiming the amount personally as against these defendants and by sale of the mortgaged property. Defendants Nos. 1 and 2 were tenants of a maratham shrotriem village, of which defendants Nos. 3 to 5

* Second Appeals Nos. 74 and 236 of 1902, presented against the decrees of A. C. Tate, Acting District Judge of Chingleput, in Appeal Suit Nos. 95 and 100 of 1901 presented against the decrees of T. V. Venkateswara Ayyar, District Munsif of Conjeeveram, in Original Suit Nos. 800 and 841 of 1899.

were shrotriemdars. Defendants Nos. 1 and 2 had given a usufructuary mortgage to plaintiff, with a covenant to pay, defendants Nos. 1 and 2, the mortgagors, remaining in possession as lessees of plaintiff. About two years after the date of the mortgage, the shrotriemdars, defendants Nos. 3 to 5, obtained a decree under the Rent Recovery Act directing defendants Nos. 1 and 2 to accept pattas. They, however, having failed to do so were ejected. Plaintiff, as mortgagee, now sued to recover the mortgage amount from the tenants personally and by the sale of the property in the hands of the shrotriemdars. The District Munsif decreed in plaintiff's favour as against defendants Nos. 1 and 2 personally, but dismissed the suit as against the shrotriemdars, defendants Nos. 3 to 5. Plaintiff successfully appealed to the District Judge against that portion of the decree which dismissed the suit against defendants Nos. 3 to 5, the District Judge ordering the properties to be sold for the mortgage amount. Defendants Nos. 3 to 5 preferred this second appeal.

P. R. Sundara Ayyar for appellants.

P. S. Sivaswami Ayyar for first respondent.

In Second Appeal No. 236 of 1902, the facts were similar except that the usufructuary mortgagee was in possession of the mortgaged land when the order of ejectment was passed against the tenant. Plaintiff sued to recover possession of the land, from which he had been ejected by the shrotriemdars in execution of the order of ejectment. The District Munsif dismissed the suit, but the District Judge reversed that order and decreed in plaintiff's favour.

Defendants Nos. 1 to 3 preferred this second appeal.

P. R. Sundara Ayyar and *Sankara Ayyar* for appellants.

T. V. Seshagiri Ayyar for respondent.

BHASHYAM AYYANGAR, J. (*Second Appeal No. 74 of* 1902).—The important question of law arising in this appeal is whether a landholder (specified in section 3 of the Rent Recovery Act) ejecting a tenant under the provisions of section 10 of the Act, recovers possession of the land free of incumbrances created by the tenant or only subject thereto.

In the present case the incumbrance was a usufructuary mortgage with a covenant to pay, the mortgagor (tenant) however, continuing in possession as lessee of the mortgagee. About two years after the mortgage, the landholder, a shrotriemdar,

brought a suit against the tenant (under section 9) to enforce acceptance by him of a patta, and obtained a decree directing the acceptance of the patta as settled by the judgment. On an application made by the shrotriemdar under section 10, stating that the tenant had failed to accept the patta and execute a muchilika within ten days from the date of the judgment, the Collector passed an order for ejecting the tenant and the order was executed under section 73. The mortgagee now sues the tenant and the shrotriemdar for a personal decree against the former and for the sale of the mortgaged property now in the possession of the latter. The District Judge, reversing the decree of the District Munsif in so far as it dismissed the suit as against the shrotriemdar, gave a decree for sale of the mortgaged property on the ground that an order of ejectment under section 10 cannot stand on a different footing from a sale for arrears of rent under section 38 as regards its effect on mesne incumbrances and charges created by the tenant. As pointed out by the District Judge, the Collector was wrong in passing an order of ejectment in the circumstances of the case, there having admittedly been no tender of patta by the shrotriemdar after the judgment of the Collector (see the decision of the Full Bench in *Shanmuga Mudaly* v. *Palnati Kuppu Chetty*(1)). But the order not having been appealed against has become final, and its propriety cannot be questioned in this suit (*Manicka Gramani* v. *Ramachandra Ayyar*(2)).

After a very full and careful consideration I have been constrained to come to the conclusion that the decision of the District Judge cannot be upheld, and that the ejectment of a tenant, under section 10 or 41 operates not only as a determination of the tenant's right of occupancy, but also as an extinguishment of all mesne incumbrances and subordinate interests created by the tenant. The case relied upon by the District Judge of a sale under section 38 for arrears of rent, which, unlike land revenue, forms no charge upon the land, is not really analogous to an ejectment. In the former case, section 38 provides that, when by express contract or by the usage of the country, the tenant has a saleable interest in the land on which the arrear is due, the landholder may realize the arrears (with interest thereon) by selling

(1) I.L.R., 25 Mad., 613. (2) I.L.R., 21 Mad., 482.

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such interest. In construing this section, it was held by a Full Bench of this Court in *Rajayopal* v. *Subbaraya*(1) that the interest sold under that section is the saleable interest of the tenant as it exists at the date of the sale. A purchaser at such a sale therefore acquires the tenant's holding subject to incumbrances created by him prior to the sale. Taking the ordinary case of a lessor and lessee, under the general law, a sale of the lessee's leasehold interest for arrears of rent will of course be subject to any incumbrance created by the lessee on the leasehold whereas if the lease be determined by forfeiture (clause (*g*) of section 111 of the Transfer of Property Act) the land will revert to the lessor free of all incumbrances created by the tenant (section 115, Transfer of Property Act). If the legal relation between a shrotriemdar and a ryot under him were that of a lessor and lessee, there could be little doubt both under the English and under the Indian Law, that when the shrotriemdar re-enters on the land (under section 10 of the Rent Recovery Act for breach of a statutory condition therein referred to or under section 41 for non-payment of rent) the holding would become revested in the shrotriemdar as it was vested in him at the time he granted the lease and he might avoid all mesne charges and incumbrances, so that sub-lessees and other persons claiming under the ryot would lose their estates as well as the ryot himself (section 115 of the Transfer of Property Act; Foa's 'Landlord and Tenant,' 2nd Edition, page 513; *Timmappa* v. *Rama Venkanna*(2) and *Great Western Railway Company* v. *Smith*(3)). The case has been argued before us principally on such footing, but there is nothing to show that the relation between the shrotriemdar and the mortgagor (in the present case) was that of a lessor and lessee or landlord and "tenant", a word which standing by itself denotes in law "one who holds lands by any kind of title whether for years or for life or in fee" and does not necessarily mean a lessee unless it is used in opposition to landlord. The question therefore as to whether the estate of a ryot having a right of occupancy in his holding under a shrotriemdar is a conditional estate of the kind contemplated by section 31 of the Transfer of Property Act in which the interest of the ryot ceases on the happening of the contingency of his eject-

(1) I.L.R., 7 Mad., 31.
(2) I.L.R., 21 Bom., 311.
(3) L.R., 2 Ch.D., 235.

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ment under section 10 or section 41 of the Rent Recovery Act or whether with reference to his holding such a ryot can be regarded as *legitimus dominus pro tempore* so as to entitle him to create an estate in a mortgage which shall not be subject to forfeiture (on the ejectment of the mortgagor under section 10) in analogy to the case of the *Earl of Arundel*(1) (compare *Doldem Rayer* v. *Stridiland*(2)) quoted and explained in Bacon's 'Abridgment,' Vol. I, page 143, where the feoffee of a manor upon condition was held, notwithstanding that the condition had been broken, to have created enduring grants by copy because he was *legitimus dominus pro tempore*, (*Narayan* v. *Parshotam*(3)), has to be determined mainly with reference to the provisions of the Rent Recovery Act and the Indian decisions in analogous cases. The legal relation between landholders of the classes specified in section 3 of the Rent Recovery Act and their ryots or tenants corresponding to holders on ryotwari tenure under Government, has been fully considered by this Court in the two cases of *Venkatanarasimlu Naidu* v. *Danvamudi Kottayya*(4) and *Cheekati Zamindar* v. *Ranasooru Dhora*(5) and it was therein held that as a general rule such relation is not according to the common law of the land that of lessor and lessee. The present case therefore should be decided on the footing that the mortgagor's interest was that of a ryot with a right of occupancy and not a mere leasehold derived from the shrotriemdar. In determining the effect of an order of ejectment passed under section 10, it will be useful to bear in mind the corresponding provisions in the repealed Madras Regulations XXX of 1802 and V of 1822. It was enacted by section 10 of the former Regulation that if ryots persist in refusing to exchange pattas and muchilikas with the proprietors for the space of one month after the tender of a patta, the proprietor "shall have power to grant the lands of the ryots so refusing to other persons." This provision was modified by section 8 of the latter enactment which provided that the proprietor should apply to the Collector and obtain his leave for making over the land to others and that if the Collector was satisfied that the patta tendered by the proprietor was just and correct, the ryot should "be ejected under the

(1) Dyer, 344.
(2) 2 Q.B., 792.
(3) I.L.R., 22 Bom., 389 at p. 397.
(4) I.L.R., 20 Mad., 399.
(5) I.L.R., 23 Mad., 318.

Collector's order" unless he assented to the patta. It is therefore clear that the object of section 10 in requiring the Collector to pass an order ejecting a perverse tenant is to enable the landholder to have the lands cultivated under him or by others, and this object cannot be fully attained in cases in which the ryot has transferred possession to a lessee or mortgagee, if such incumbrances are not annulled by the ejectment of the tenant, but the ejectment is to have operation only subject thereto. Attention may be drawn to section 73 of the Rent Recovery Act which provides not only for the ejectment of the tenant, but expressly for the removal of others also offering opposition to the execution of the order. If the ryot has a saleable interest in the land and he transfers the holding by sale, he ceases to be the tenant of the landholder and the transferee becomes tenant in his place, liable to the landholder for the payment of rent accruing due subsequent to the sale. In such a case the suit under section 9 must be brought against the real tenant, *i.e.*, the person in whom the right of occupancy is vested and the order of ejectment passed under section 10 will have no validity, if the suit has been instituted against a person after he has transferred his holding by sale, except of course in cases where the vendee is estopped from denying that his vendor is the landlord's tenant. The difficulty as to the effect of an order in ejectment arises only when the order is passed against the real tenant, who has previous thereto, transferred possession to a lessee or mortgagee under him. If such a lease or mortgage is to subsist notwithstanding the ejectment of the tenant himself, the landholder cannot sue the lessee or mortgagee in possession as his tenant for acceptance of patta or for payment of rent, for the simple reason that there is neither privity of contract nor privity of estate between himself and them. The land will not be at his disposal for cultivation before the expiration of the term of the sub-lease or the redemption of the mortgage. In the case of a simple mortgage or charge, it may be that even if it should subsist after the ejectment, it may not be an obstacle to the landholder recovering possession of the land and having the same cultivated by others, though the existence of such incumbrance on the land might deter several persons who would otherwise be willing from taking up the land for cultivation and paying rent. In the absence of statutory provisions sanctioning such a distinction, it will not be possible on principle to recognize a distinction between the different

classes of incumbrances and maintain that the order of ejectment would annul certain incumbrances but not others. Though there is no decision on section 10 of Act VIII of 1865 or on any corresponding provision, if any, of similar enactments in other Provinces in India, as to the effect of an ejectment thereunder on incumbrances or subordinate interests which have been created by the (ejected) tenant, reference may usefully be made to two decisions of the Allahabad High Court which would have a bearing upon the effect of an order of ejectment of a tenant under section 41 of the Rent Recovery Act.

Under that section a tenant may be ejected from his holding for non-payment of rent if he has no saleable interest in the land. The fact, however, that a ryot having a right of occupancy cannot transfer it by sale will be no bar to his transferring temporary possession of his holding to a lessee or mortgagee.

In *Jafree Begum* v. *Hossein Zaman Khan*(1) it was held that a lease granted by an occupancy ryot against whom an order of ejectment had been obtained for non-payment of rent will be of no avail to the lessee to support his possession as against the Zamindar. In *Khiali Ram* v. *Nathu Lal*(2) a Full Bench of the Allahabad High Court while holding that a tenant with a right of occupancy can sub-let the whole or any part of his occupancy holding observed as follows (at page 230). "In order that the effect of our opinion may not be misunderstood and our decision be not misapplied, it is neccessary to say that it is obvious to us that the interest in an occupancy holding of any person to whom an occupancy tenant sub-lets, or to whom he grants a usufructuary mortgage of land comprised in his occupancy holding will determine, if it has not previously determined, on the termination of the right of occupancy, and can subsist no longer than the right of occupancy subsists. Such sub-tenant does not by the sub-letting become the tenant of the Zamindar who is entitled to receive from his occupancy tenant the rent due by him." The decision of the Bombay High Court in *Narayan* v. *Parshotam*(3), which was principally relied upon by the learned pleader for the respondent turned entirely upon the construction of certain sections of the Bombay Revenue Code and of certain rules framed

(1) 2 N.W.P.H.C.R., 6. (2) I.L.R., 15 All., 219.
(3) I.L.R., 22 Bom., 989.

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thereunder and it throws no light upon the question arising in this case.

It is unnecessary to consider and decide in this case the effect of a relinquishment under section 12 (at the end of the Revenue year) of his holding by a ryot as it is not analogous to an ejectment on forfeiture. The operation of such relinquishment on mesne incumbrances created by the tenant may stand altogether on a different footing and the relinquishment itself when the land relinquished is burdened with such an incumbrance, may be inoperative to terminate his liability, as tenant to the landholder until the incumbrance ceases by effluxion of time or is otherwise discharged by the tenant (*Sham Das* v. *Batul Bibi*(1), *Badri Prasad* v. *Sheodhian*(2)). The second appeal must therefore be allowed with costs in this and in the lower Appellate Court and, reversing the decree of the lower Appellate Court, I would restore the decree of the District Munsif.

BODDAM J.—I entirely agree.

In Second Appeal No. 236 *of* 1902.—The only difference between this case and Second Appeal No. 74 of 1902 is that in this case the usufructuary mortgagee was himself in possession when an order of ejectment under section 10 was passed against the tenant, the mortgagor, who did not retain possession of the holding as lessee under the mortgagee and the suit is for recovery of possession of the land from the shrotriemdar who, in execution of the order of ejectment, caused the ejectment of the mortgagee the plaintiff who was in possession of the holding. The reasoning on which our judgment in Second Appeal No. 74 of 1902 proceeds is equally applicable to the present case, and we therefore allow this appeal with costs in this Court and in the lower Appellate Court and, reversing the decree of the lower Appellate Court, we restore the decree of the District Munsif.

(1) I.L.R., 24 All., 538. (2) I.L.R., 18 All., 354.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Russell.

VENKATACHALAM CHETTIAR (PLAINTIFF'S REPRESENTATIVE), APPELLANT,

v.

ZAMINDAR OF SIVAGANGA AND OTHERS (DEFENDANTS), RESPONDENTS.*

1903. December 16. 1904. January 5.

Injunction—Riparian owners—Lands belonging to different owners situated near tank common to both—Ordinary overflow through channel between boundaries—Portion of overflow customarily inundating both lands—Attempt by one owner to erect bank for protection—Effect to increase inundation of opposite land—Injunction refused to restrain opposite owner from preventing erection.

Plaintiff and defendants owned adjacent lands, near which was situated a tank which was common to both and the surplus from which had flowed from time immemorial down a channel which lay between the plaintiff's land and that of the defendants. The channel was insufficient to carry off all the water, and some of it flowed over plaintiff's lands and some over those of the defendants. The flow was not the result of extraordinary flood but was the normal state of things. Plaintiff desired to erect a bank to protect his land from the water but defendants had prevented him. It was found that if plaintiff did erect such a bank, it would throw back on the land of defendants more water than had customarily flowed over it and would increase the damage to which it had hitherto been subject. On a suit being brought by plaintiff for an injunction restraining defendants from interfering with the erection of the proposed bank:

Held, that plaintiff was not entitled to an injunction.

Menzies v. *Breadalbane*, (3 Bligh N.S., 414), followed. *Gopal Reddi* v. *Chenna Reddi*, (I.L.R., 18 Mad., 158), distinguished.

SUIT for an injunction. Plaintiff was in possession of the Kurunthamput Inam Devasthanam village, while the Pilar village belonged to first defendant. The remaining defendants were either lessees or mirasidars of the last-mentioned village. Both villages were irrigated by a single tank which was common to both. In order to protect his property from inundation when the surplus water flowed from the tank as it had done from time immemorial, plaintiff desired to erect a bank, but defendants had prevented him from doing so, as the effect of it would be to throw more water on

* Second Appeal No. 348 of 1902, presented against the decree of H. Moberly, District Judge of Madura, in Appeal Suit No. 461 of 1901, presented against the decree of P. S. Sesha Ayyar, District Munsif of Sivaganga, in Original Suit No. 149 of 1900.

the defendants' land. Plaintiff prayed for a permanent injunction restraining defendants from objecting to his putting up a bank to protect his lands. The water against which plaintiff wished to protect his land was the surplus water of the tank, which, from time immemorial, had been discharged through a weir, and passed along a channel which was insufficient to carry it all off. The result was that some of the water passed over plaintiff's lands and some over that of the defendants. This flooding of the banks of the channel was the normal condition of things, and was not due to extraordinary flood. It was found that, if plaintiff put up the proposed bank, it would, as defendants contended, throw upon defendants' land more water than had customarily flowed on to it and would increase the damage to which defendants' land had hitherto been subject. Both the lower Courts held that plaintiff was not entitled to an injunction.

Plaintiff preferred this appeal.

K. Srinivasa Ayyangar for appellant.

K. N. Ayya for fourth, fifth, seventh, ninth and twelfth respondents.

Sir S. SUBRAHMANIA AYYAR, OFFG. C.J.—The plaintiff's inam village and the first defendant's zamindari village are irrigated by a common tank. As found by both the lower Courts, the surplus water of the tank has, from time immemorial, been discharged through a weir and the water thus discharged passes over some of the lands of both the parties and eventually escapes through a channel separating the two villages. It is further found that, if the plaintiff puts up the bund which he proposes to construct in order to save from inundation the portion of his property hitherto affected by the flow of the surplus water, such bund would throw back upon the defendant's land more water than has customarily flowed on to his property and increase the damage to which he has been hitherto subject.

In these circumstances there can be no doubt that the lower Courts were right in refusing to grant the injunction prayed for by the plaintiff, to restrain the defendants from interfering with the erection of the proposed bund.

Assuming the plaintiff was entitled to protect his land from inundation by erecting a bund, it would by no means follow that the Court would grant an injunction in his favour when there has been nothing more than mere assertions on the one hand and

denials on the other as to the right of the plaintiff to raise it. It is, however, unnecessary to say more on this point as the plaintiff has clearly no right to raise any bund in the way proposed by him. Now, having regard to the fact that the surplus waters of the common tank have from time immemorial been discharged so as to overflow certain lands of both the parties, an agreement must be implied as between the owners to the effect that neither can interfere with the accustomed flow of the surplus water so as to increase the burden of the other.

Apart from this and even were the parties not the owners in common of the tank, the plaintiff would not, according to the authorities, be at liberty to put up the proposed bund. It is quite true that every land owner exposed to the inroads of the sea has the right to protect himself by erecting such works as are necessary for that purpose and that if he acts *bonâ fide* he is not liable for any damage occasioned to his neighbours who must protect themselves (*Rex* v. *Pagham Commissioners*(1)). But I take it that the law does not, except in the case of extraordinary floods, give such large powers for protection to riparian owners, it having been distinctly laid down that such owners have a right to protect their lands with reference to ordinary floods, only if they do so without injury to others (*Rex* v. *Trafford*(2)); compare also *Ridge* v. *Midland Railway Company*(3), cited in Coulson and Forbes' 'Law of Waters,' 2nd Edition, page 155.

Here, however, the bund proposed would, as found by the lower Courts, affect the defendant's land injuriously. The case is therefore analogous to *Menzies* v. *Breadalbane*(4) where the House of Lords, speaking through Lord Lyndhurst, pointed out the similarity between the English, Scotch and Roman Laws bearing on the matter, and held that a proprietor of land on the bank of a river ought to be restrained from erecting a mound, which, if completed, would in times of ordinary flood throw the waters of the river on to the grounds of a proprietor on the opposite bank, so as to overflow and injure them.

This decision of the House of Lords is referred to in *Whalley* v. *Lancashire and Yorkshire Railway Company*(5) as illustrative of the

(1) 8 B. & C., 355; 32 R.R., 406.
(2) 8 Bing, 204; 34 R.R., 680.
(3) 53 J.P., 55.
(4) 3 Bligh N.S., 414; 32 R.R., 108.
(5) L.R., 19 Q.B.D., 131 at p. 136.

second of the four heads of the classification there adopted by the Master of the Rolls. He observed: "Then we come to the case of having property which is subject to this defect, that unless you can prevent the injury which the ordinary course of nature will bring upon it, by transferring that injury to your neighbour's property, your property must suffer as the natural consequence of its position. That is the case of *Menzies* v. *Breadalbane*(1) where property was so situated with regard to a river that if the river was left alone with its ordinary flow of water, it must, in the course of nature, eat away the property or occasionally overflow it. If the owner of such property, in order to cure that defect were to do something to his land which by turning the stream out of its ordinary course would throw that defect on his neighbour's land, he would, I think, according to the ordinary principles of law, become liable to pay the damages this would occasion, and further be prevented from continuing to do it by an injunction."

That is practically the case here. The land of the plaintiff, by its situation, has from time immemorial been exposed to the periodical overflow of the water discharged by the weir and therefore the owner of such land even if he had no interest in the tank would not be at liberty to construct an embankment such as that proposed, to the injury of the proprietor of lands on the other side.

The case of *Nield* v. *London and North Western Railway Company*(2) is not in point for the reason that, apart from the water sought to be turned away in that case being extraordinary flood water, neither party to the contest was responsible for the coming in of the water; while here the water which is sought to be kept off by the plaintiff, is the surplus of what comes into the tank in the interests of both the parties and has to be discharged for the safety of the common property—the tank. This circumstance would distinguish the present from the case of *Gopal Reddi* v. *Chenna Reddi*(3) also.

I feel some difficulty in understanding what the precise *ratio decidendi* of *Gopal Reddi* v. *Chenna Reddi*(3) is. In one part of his judgment, Shephard, J., observes: "It is found or admitted that it has long been the practice to have some sort of bunds." If this be the real reason for the final decision in the case, it would

(1) 3 Bligh N.S., 414; 32 R.R., 103. (2) L.R., 10 Ex., 4.
(3) I.L.R., 18 Mad., 158.

not be in conflict with *Menzies* v. *Breadalbane*(1) where the Lord Chancellor distinguished the case of *Farquharson* v. *Farquharson*(2), on the ground, among others, that the mound in question there was erected on old foundations and that it had been shown that there was a custom or practice of riparian owners in that part of the country to embank against each other. In another part of his judgment, however, Shephard, J., says that the stream, when in flood, spread itself over the defendant's lands and did not come in its full volume to the plaintiff's lands. If such spreading was the usual state of things in times of ordinary flood, so as to make the ground on which the spreading took place a part of the regular course of the river in certain seasons of the year, the construction of an embankment which would confine such ordinary flood waters within narrower bounds so as to damage the lands of others, would have been actionable according to *Menzies* v. *Breadalbane*(1), and the conclusion in *Gopal Reddi* v. *Chenna Reddi*(3) would be in conflict therewith; for a stream may have one course ordinarily and a wider course in particular seasons, and any work which interferes even with the latter wider course calculated to injure the property of others would be within the rule laid down by the House of Lords, as pointed out by the Lord Chancellor thus: "The ordinary course of the river is that which it takes at ordinary times; there is also a flood channel; I am not talking of that which it takes in extraordinary or accidental floods, but the ordinary course of the river in the different seasons of the year, must, I apprehend, be subject to the same principle" (*Menzies* v. *Breadalbane*(1)). The distinction thus drawn by the Lord Chancellor between usual or ordinary floods and accidental or extraordinary floods would seem to be denied by Shephard, J., when he observes: "I fail to understand why the periodical rising of a stream, consequent on the fall of rain, should any the less be considered an extraordinary danger." Though thus some portions of his judgment are calculated to create a doubt on the point, yet, I take it that Shephard, J., did not intend to lay down anything inconsistent with *Menzies* v. *Breadalbane*(1) since the learned Judge in terms says that the act complained of did not divert the stream from its natural course. Be this as it may, the

(1) 3 Bligh N.S., 414; 32 R.R., 103. (2) Cited in 3 Bligh N.S., 414 at p. 421.
(3) I.L.R., 18 Mad., 158.

facts of the present case are altogether different from those of *Gopal Reddi* v. *Chenna Reddi*(1) as will be clear from what has been already stated.

It now remains only to notice the argument on behalf of the appellant that his case was supported by the view of the law accepted by certain American authorities cited in Angell on 'Water Courses' and Washburn on 'Easements.' But those authorities relate to the improvement of one's land with reference to surface water strictly such—that is, water due to fall of rain or snow, percolation, etc.—and not flowing in a definite watercourse. On the contrary, the rule that the course of water in a stream including its course in times of ordinary flood should not be changed or obstructed for the benefit of one class of persons to the injury of another, seems to be generally admitted in the United States (Angell on 'Water Courses,' 7th Edition, section 334, and note). It seems to be admitted also that there is no liability in respect of extraordinary floods on the manifest ground that they are (to use the elegant language of Agnew, J., in *Pittsburg Railway Company* v. *Gillieland*(2), "unexpected visitations whose comings are not foreshadowed by the usual course of nature and must be laid to the account of Providence whose dealings, though they may afflict, wrong no one." In some of the States, however, the Courts have had, from the necessity of the case, to refrain from extending the recognised rule as to the ordinary flood-channel of a river, to the case of some great rivers which periodically bring down huge floods that, overflowing the banks, sweep down populous and fertile lowlands on either side for miles. In *Kansas City, &c., Railway Company* v. *Smith*(3), cited by a writer who has recently discussed the subject, the matter is put strikingly. There the Supreme Court of Mississippi said :—"If the waters of the Mississippi river which at flood times spread from twenty to forty miles and flow in a continuous and unbroken body down the valley are to be dealt with as the waters of a stream and the whole valley is to be given up as the course way of the stream, the most fertile portion of our state may at once be abandoned . . . . . There are farms innumerable and rail roads, villages, towns and cities situate in a watercourse if the usual course of the flood water of the Msisissippi river mark and define the course of that stream.

(1) I.L.R., 13 Mad., 158. (2) 94 Am. Dec., 97 at p. 105.
(3) 37 Am. L.R., 713 at p. 721.

It is manifest that to apply the strict rules of law controlling in cases of streams and the obstruction thereof, to such a stream and to such conditions, is in the very nature of things impracticable and impossible. Calling these overwhelming floods surface or channel water for the purpose of dealing with them under rules applicable to entirely different conditions advances us no step in the solution of the question involved. We must deal with things and not names, and conditions inherently and radically different cannot be assimilated by mere terminology." The gist of this argument is that conveyed by the observation of Dr. Hunter (Roman Law, 2nd Edition, page 313) that "occasional floodings do not change the legal extent of the bank, otherwise all Egypt would be a bank of the Nile."

But the special features of the Mississippi and Nile floods can constitute no good reason for discarding with reference to rivers and streams generally the well-established definition that the bank of a river is the furthest reach of the river so long as it keeps within its natural course (Hunter's 'Roman Law,' page 313); and it is scarcely necessary to say that, as the circumstances of rivers and streams in this Presidency are in no way comparable to those attending the Mississippi, the Nile and the like, they do not warrant a departure form the rule of law laid down by the House of Lords in the case already cited.

Further, River Conservancy Legislation (Madras Act VI of 1884) having provided for State interference where such would seem to be necessary for the definition, control and protection of waterways in the country, there would seem to be so much less reason for our Courts adopting, on the ground of any public policy, a rule different form that established by authorities ordinarily followed here.

I would accordingly dismiss this appeal with costs.

RUSSELL, J.—The District Judge has, I think, given good reasons for the opinion which he holds that this is not a case in which the injunction asked for should be granted. It is within the discretion of the Court to grant an injunction or refuse it. The plaintiff has refused to join the fourth defendant at the latter's request in order to deepen the channel F, which would then in all probability carry away all the surplus water of the tank A running in the direction of F in ordinary times and little or no damage would result to the plaintiff if this were done. Till the plaintiff has

done in this respect all that can reasonably be expected of him I do not think he is entitled to any relief except what the law allows him as a matter of absolute right.

This water which the plaintiff wishes to bund up and throw back on the defendant's land is either running in a defined stream or it is not. If it is running in a defined stream, then the case of *Menzies* v. *Breadalbane*(1) makes it quite clear that the plaintiff has no right to erect the bund referred to by him. The plaintiff does not seek to protect himself from an extraordinary flood. He wants to protect himself from the ordinary overflow of the common tank. This flow runs in a defined channel and owing to the fact, no doubt, that the surplus channel F is silted up, this ordinary surplus water runs on to the plaintiff's land and injures it. It is settled law that " a prescriptive right to throw back water and keep it standing on the land of another exists only in the case of water flowing in a defined stream. and cannot apply to surface water not flowing in such a stream, though it might ultimately, if not arrested, flow into a tank " (*Robinson* v. *Ayya Kristnama Chariar*(2). The plaintiff could in the present case be allowed to erect the bund proposed by him only if he had a prescriptive right to do so and if the water is running in a defined stream. He has no such right for no such bund has ever been erected before. Even, however, if the water is not running in a defined stream, the plaintiff would not under the circumstances be entitled to put up a bund, the effect of which would be to throw additional water on to the defendant's land and thus cause greater injury to the defendant than is caused at present. It appears that the surplus water escapes from tank A and runs in a defined channel for about 100 yards. It then divides into three branches and the waters in all the branches more or less diffuse themselves over the surface of the lands they pass through. It is with the southern branch this case is concerned. The watercourse is there clearly marked at intervals. Thus the case is as follows: There is a channel which, in its present state, is insufficient to carry away, without overflowing its banks, all the surplus water flowing into it from the tank A. The flooding of its banks is the normal condition of things. There is no extraordinary flood. The case of *Menzies* v. *Breadalbane*(1) just

(1) 3 Bligh N.S., 414; 32 R.R., 103.
(2) 7 Mad. H.C.R., 37, at page 47.

quoted shows that the plaintiff cannot be allowed to erect a bund and throw the water which would ordinarily flow on to his land over on to the defendant's land and thus cause an injury to the latter. This is what the plaintiff seeks to do. The obvious remedy is that proposed by the fourth defendant. The parties should join and deepen the common drainage channel.

The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Boddam.

KAVIPURAPU RAMA RAO (PLAINTIFF), APPELLANT,

v.

DIRISAVALLI NARASAYYA (DEFENDANT), RESPONDENT.*

1903. December 9, 10.

Rent Recovery Act—Madras Act VIII of 1865, ss. 9, 10, 11—Suit to compel acceptance of patta—Provision in patta for payment of rent in kind—Power of Court to amend patta by providing for payment in money—"Rent."

The term "rent," as used in section 11, paragraphs (1) and (2) of the Rent Recovery Act, includes rent of every description, whether payable in kind or in money. *Polu* v. *Rayavammal*, (I.L.R., 14 Mad., 52), explained.

Where rent is payable in money but a patta has been tendered which provides for the payment in kind, the Court has power to amend the patta. *Mahasingavastha Ayya* v. *Gopaliyan*, (5 Mad. H.C.R., 425), approved.

Whether a contract in terms to the effect that rent is payable in money but at a rate to be determined by the Court as reasonable would be a contract within the meaning of section 11 (1);—*Quære.*

Rent had been paid in money from fasli 1288 to fasli 1308, at rates which had varied. On its being contended that the Court could find, from the mere fact of these past payments, that there was an implied contract between the parties that rent was to be payable in money at a rate to be determined by the Court:

Held, that such an implied contract could not be found. To warrant such a finding, the circumstances should be such as to suggest an agreement to pay at some definite rate.

SUITS by a landholder to compel his tenants to accept pattas under section 9 of the Rent Recovery Act. The pattas provided

* Second Appeal No. 458 of 1902 presented against the decree of J. H. Munro, District Judge of Kistna, in Appeal Suit No. 53 of 1901, presented against the decision of K. V. Srinivasa Ayyangar, Head-quarter Deputy Collector of Kistna, in Summary Suit Nos. 293 to 320 of 1900, respectively.

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for the payment of certain rates of rent in kind. Defendants denied that they had ever been asked to accept the pattas and refused to accept them now, alleging that they were improper. They contended that the proper rates were the money rates which prevailed before fasli 1303, and, if not these, the rates which were accepted by both the parties in fasli 1303 and which were intended to be permanent. They also contended that a landholder was not entitled to compel acceptance of pattas for payment of rent in kind, under section 9 of the Act, and that, in consequence, the Court could not entertain the suits. The Deputy Collector said :—

"The various documents exhibited by both the parties show (1) that from fasli 1268 to fasli 1273 the system of payment in money has obtained in the village; (2) from fasli 1276 up to fasli 1284 the system of payment in kind has obtained and that from fasli 1285 to fasli 1307, the system of payment in money has again been acted upon. The defendants urge that the introduction of the Arsa system in the interim is the result of the damage done by the cyclone of 1864, in consequence of which the ryots could pay nothing and the landholders agreed to take what they could get in the shape of a share of the produce. The defendants stated that no regular system fixing definite shares prevailed in the village. While the plaintiff did not deny the explanation of the defendants for the introduction of the Arsa system, his cross-examination shewed that it was not any kaphara rental that the ryots paid, but a definite share accepted by both parties. The plaintiff has also produced documents to show that the Arsa system prevailed previous to fasli 1268. I consider that the Arsa system was introduced as being the most equitable under the circumstances of the damage done to the fields by the cyclone and that as soon as the fields had been improved, both the parties reverted readily to the previous existing money rentals. One can easily understand the readiness with which both the parties should have taken up the system of payment in money, seeing that it should be much more convenient to both. Even at present the plaintiff admits that he has offered Arsa pattas because the defendants refused to pay the increased money-rentals that he demanded. It is held out apparently as a threat to coerce the ryots into paying more if they should care to avoid the inconveniences of the Arsa system. Taking into account, however, the period

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from fasli 1268 to fasli 1308 a period of 41 years during which the system of payment in money has been in force except for nine years in the interval, taking into account the circumstances of exceptional nature which caused the change of system in those nine years and taking into account the continued payment in money even subsequently for 24 years, the reasonable inference is that both the parties intended to pay and accept rentals only in money and that an implied contract to that effect exists in this case. Under clause (1) of section 11 this has to be enforced and the present pattas are on that account improper."

Dealing with the rates to be paid he said :—

"The defendants contend for the rates that were in force previous to fasli 1303. These cannot be acted upon for the reasons (1) that they have not been in force uniformly for any length of time such as would reasonably raise the inference of an implied contract. One of the defendants admits the changes made now and then. (2) The defendants gave up these rates deliberately in fasli 1303 when they accepted other rates. This clearly is against any possibility of an inference that the previous rates had been intended to be acted upon by the parties for ever. I therefore find that the rates contended for by the defendants have not been found to be the proper rate. The defendants contend that the rate of Rs. 6–4–0 per acre arranged between the parties in fasli 1303 and according to which pattas and muchilikas for five years were written was intended to be a permanent arrangement. The plaintiff's contention is that there was no such understanding and while the defendants asked for a ten years' lease on these terms he gave them a lease only for five years and that the rates were liable to revision at the end of that period. The plaintiff has also collected rentals at the same rate for one fasli beyond those faslis, *i.e.*, in fasli 1308, but the circumstances under which this was made have been clearly explained. The plaintiff was sick and the defendants and he could not easily come to terms as to what rates should be agreed upon for that fasli. Whereas he demanded Rs. 10, the defendants offered to pay only Rs. 7–8–0 and the negotiation fell through. When the plaintiff subsequently went to the village and asked for payment at least at Rs. 7–8–0 per acre, the ryots pleaded inability to pay even at that rate the price of paddy having fallen considerably. They promised however to accept

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that rate in subsequent faslis and the plaintiff collected according to Rs. 6-4-0 as requested by the ryots."

He disbelieved the contention of the defendants as to a definite rate having been arranged, but held that the implied contract as to the form of the rent was enforceable. He considered the evidence and held that Rs. 8 per acre was a proper rate for the wet lands and directed pattas to be tendered accordingly. He directed all conditions relating to payment in kind to be omitted. Nine of the suits were dismissed on the ground that pattas had not been properly tendered. Various appeals were preferred, namely, by the landholder, contending that the tenders were proper and that payments in kind should have been directed, and by the tenants contending that all the suits should have been dismissed for want of proper tender. The District Judge held that none of the suits should have been dismissed on the question of tender. He considered there was ample evidence to justify the finding that there was an implied contract to receive rent only in money. He however doubted the power of the Court to alter the form of rent entered in the pattas which had been tendered, and then to proceed to determine what amount of rent should be paid and amend the pattas accordingly. The result was that, as the pattas could not be enforced as they stood, the suits must, he held, be dismissed. He referred to *Polu* v. *Ragavammal*(1) and dismissed all the suits.

Plaintiff preferred these second appeals.

V. Krishnasawmi Ayyar and *P. Nagabhushanam* for appellant.

P. R. Sundara Ayyar and *V. Ramesam* for respondent.

JUDGMENT.—This was a suit brought by a landholder against the defendant—a tenant to compel the acceptance of a patta under section 9 of the Rent Recovery Act. The patta tendered stated that the rent was payable in kind. The lower Appellate Court, having come to the conclusion that the landholder was not entitled to claim rent in kind, but only in money, dismissed the suit without determining what were the terms of a patta such as the landholder was entitled to enforce the acceptance of, the view of the lower Court being that the expression "such a patta" in section 9 meant a patta which, with reference to the nature of the rent, was correct though its terms might be otherwise not binding

(1) I.L.R., 14 Mad., 52.

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on the tenant, and that when the patta tendered was incorrect, with reference to the nature of the rent the Court had no jurisdiction to amend it under section 10 and pass a decree determining what the terms of the patta should be.

The learned Pleader for the respondent sought to support the decision of the District Judge on the ground that section 10 requires the decision to be in conformity with the terms of section 11 which, he urged, should be construed as referring only to disputes occurring in respect of rent payable in money and not to cases where the rent was payable in kind. If this contention were well founded it would follow that the Act fails to provide for a decision of disputes in cases where rent is payable in kind and as the power of the Revenue Courts is derived exclusively from the provisions of the Act, those Courts would have no power to deal with such disputes. Such a result would itself suggest serious doubts as to the soundness of the contention.

The language of section 11 however leaves no doubt upon the point. The term "rent" in the first and second paragraphs occurs without any limitation and must be understood to include rent of every description, whether payable in kind or in money. That the subsequent clauses refer to money rates would not warrant the restricted construction suggested. As to the case relied on by the District Judge (*Polu* v. *Ragavammal*(1), this was reviewed. The judgment on review was as follows:—

"The question in this case is what is the proper patta to be "given by the plaintiff to the defendants. The lower Courts "came to the conclusion that the facts relied on did not establish "an implied contract to pay the rent alleged by the defendants.

"In one part of his judgment the district judgment states "that the defendants do not deny that they have been paying "rents at varying rates. In another place he refers to the total "amounts paid as rent at different times apparently in support of "the conclusion arrived at by him. The defendants contend that "the variations were in consequence of the increase in the extent "of the lands held by the defendants. It is not quite clear "whether this was the case or whether the rates themselves were "raised or why they were raised. To establish an implied contract, "among other circumstances, payment of rent at a uniform rate

(1) I.L.R., 14 Mad., 52.

"for a number of years would have to be proved. The mere fact "that the rent has been paid in *money* for a long period is not in "itself sufficient evidence of an implied contract. We must ask "the Judge to find on the evidence on record whether the patta "tendered is a proper one and if not what is the proper patta." This judgment was, unfortunately, not reported and the case, therefore, having regard to the decision on review is no authority for the view adopted by the District Judge that the Court had no power to amend the patta where the rent, being payable in money only, a waram patta had been tendered. The point was however distinctly decided in *Mahasingavastha Ayya* v. *Gopaliyan*(1), the Court there holding that section 11 of the Rent Recovery Act applied to a case where a landholder brought a suit on a patta in which rent in kind was claimed in respect of dry land but with respect to which it was found a money rent alone was payable. We entirely agree with that decision and it follows that the decree of the District Judge dismissing the suit should be reversed, and the appeal remanded for disposal. In remanding it, it is necessary to point out that the first question for determination is whether the express contract set up by the defendant in paragraph 3 of the written statement as having been entered into in fasli 1303, is true. With reference to the course to be adopted by the District Judge in the event of his finding that the above contract is not true, it is necessary to consider the question which has been fully argued, whether upon the facts relied on it is open to the Courts to find an implied contract, the facts being that from faslis 1288 to 1308,—money rent had been paid under written khats at varying rates. The learned pleader for the respondent urged that even though these facts may imply that there is no contract to pay at any one particular rate, it is open to the Court to infer that there was an agreement that the rent was payable in money at a rate to be determined by the Court as reasonable in the circumstances. Whether a contract in terms to the effect that rent is payable in money, but at a rate to be determined by the Court as reasonable would be a contract within the meaning of section 11 (1) is open to question. For where there is no contract as contemplated in clause (1), the section lays down categorically the different rules to be followed by the Court in determining questions as to rent

(1) 5 Mad., H.C.R., 425.

arising in this class of suits and that it is only when the other rules are found inapplicable, rents considered just and reasonable by the Court have to be settled. Now, if the Court were to enforce the agreement to pay at a reasonable rate it would of course not be sufficient that the patta to be enforced should merely be made to say that the rent is payable at a reasonable rate. The Court must proceed to determine what that rate is to be, should it do so the Court would virtually be acting under the very last rule in section 11 and ignoring the rules which the section lays down shall be availed of, if possible, before that rule is resorted to. Assuming, however, that a contract to the effect suggested would be a valid express contract under the section; the question is whether the facts referred to would justify the Court in finding an implied contract between the parties with reference to the future. In the view hitherto adopted in this Court, to warrant the finding of an implied contract from mere past payments the circumstances should be such as to suggest an agreement to pay at some definite rate and the decision on review above referred to as well as the decisions in *Venkataramayya* v. *Ganganna*(1), and the unreported cases there referred to are direct authorities in support of this statement. And certainly there would be no more warrant for inferring from mere payments at varying rates an agreement to pay at a reasonable rate than there would be for inferring an agreement to pay at some definite rate. It is thus impossible to find any implied contract from the past payments of the character relied on in the present case. In the event of the District Judge finding against the truth of the alleged contract of fasli 1303 he should proceed to determine what is a proper patta with reference to the provisions of section 11 on the footing that there is no contract express or implied.

The costs will abide and follow the event.

In Second Appeals Nos. 459 *to* 504 *of* 1902.—These cases follow Second Appeal No. 458 of 1902 and for the like reasons as are recorded in our judgment therein the decrees of the District Judge of Kistna should be reversed and the appeal suits remanded for disposal accordingly.

(1) S.A. No. 235 of 1898 (unreported).

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Boddam.

1903. August 13. September 8.

NAGANADA DAVAY AND OTHERS (THIRD DEFENDANT'S REPRESENTATIVES), APPELLANTS,

v.

BAPPU CHETTIAR (PLAINTIFF), RESPONDENT.*

Contract Act—Act IX of 1872, s. 178—Jewel lent on hire—Pledge by hirer to third party—Bonâ fide advance of money by third party—Suit by owner for recovery—Liability of third party.

The owner of a jewel lent it on hire to first defendant, who pledged it with third defendant—the latter acting in good faith. In a suit by the owner against the hirer and the pledgee to recover the jewel:

Held, that the pledgee was liable to pay the owner the value of the jewel.

Per SUBRAHMANIA AYYAR, J.—Sections 178 and 179 of the Indian Contract contemplate mutually exclusive cases. Section 179 refers to certain cases where the pawnor has possession which is necessarily traceable to, and is an incident of, a limited interest he has in the goods pledged. Section 178 refers to cases where a pawnor has a document of title to goods or has possession of goods independently of any interest of his therein, though, as one invested with the symbol of property, he may, notwithstanding the absence of any interest, make a valid transfer of the goods in certain circumstances. Though the pawnor had possession, it was traceable to, and was an incident of, his right as the hirer of the jewel. It was not such possession as is contemplated by section 178.

SUIT to recover a jewel or its value. Plaintiff alleged in his plaint that first defendant had, in 1895, obtained a neck ornament called kasumalai from plaintiff on hire for four days, stipulating to pay 8 annas per diem; that as first defendant failed to return the jewel, plaintiff had prosecuted him, though unsuccessfully; that first defendant had dishonestly and illegally pledged the jewel with third defendant. Plaintiff now sued to recover the jewel or its value, Rs. 600, from first and third defendants, joining the son of first defendant as second defendant. Defendants Nos. 1 and 2 remained *ex parte*. Third defendant defended the suit, and contended that he believed first defendant to be the owner of the jewel and had *bonâ fide* lent him Rs. 350 on the pledge of the jewel. He said that, with first defendant's consent, he had sold the jewel,

* Second Appeal No. 1531 of 1901, presented against the decree of K. Ramachandra Ayyar, Subordinate Judge of Negapatam, in Appeal Suit No. 580 of 1900, presented against the decree of S. Runganadha Mudaliyar, District Munsif of Tanjore, in Original Suit No. 523 of 1898.

and from the proceeds of sale had repaid himself the sum advanced with interest, and that the jewel was only worth Rs. 425. He contended that at any rate plaintiff was not entitled to claim the jewel from him without redeeming it by paying him the amount he had advanced. The District Munsif found that plaintiff was the owner of the jewel, that the pledge to third defendant was not shown to have been otherwise than *bonâ fide*, and that the jewel was worth Rs. 536. He gave a decree against all the defendants for that sum and interest. Third defendant appealed to the Subordinate Judge, who held that third defendant, though he had acted in good faith, was not protected from liability to a claim by the real owner under section 178 of the Contract Act; inasmuch as the first defendant's possession was merely that of a hirer. He upheld the Munsif's finding that plaintiff was the owner of the jewel, and decreed in his favour, reducing the amount to Rs. 460 with interest.

Third defendant preferred this second appeal.

P. S. Sivaswami Ayyar for appellants.

Mr. *C. Krishnan* for respondent.

BODDAM, J.—I think that the protection given to pledgees by section 178 of the Contract Act is similar to that given to buyers under exception 1 to section 108 of the same Act, and that the possession intended is the same in both sections. In interpreting the section the English cases are of no assistance. The meaning of the section must be determined by a consideration of the statute and of the words of the section itself. The word "possession" in the section is clearly not intended to cover all cases in which the goods, etc., are in the physical control of the pledger, because the "possession" in the first part of the section is distinguished from the "custody" of them in the last paragraph of the same section. It has therefore been held that goods in the custody of a servant, though they are in his physical possession, cannot be pledged under the section (*Biddomoye Dabee Dabee* v. *Sittaram*(1) and *Shankar Murlidhar* v. *Mohanlal Jaduram*(2) and the same has been held to apply to jewels in the custody of a wife (*Seager* v. *Hukma Kessa*(3)). Moreover the possession intended is not the possession of a person who has a limited interest, because that case is specially provided or in section 179. The word "possession" is also used in section

(1) I.L.R., 4 Calc., 407. (2) I.L.R., 11 Bom., 704.
(3) I.L.R., 24 Bom., 458.

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108, exception 1, and though the words in that section are not identical with the words in section 178, they are very similar and I think that the possession intended is the same. Section 108 contains the words "notwithstanding any instructions of the owner to the contrary" which are not in section 178, and it has been held continuously ever since 1873, when *Greenwood* v. *Holquette*(1) was decided that the existence of these words in the section indicate that the possession meant in that section is a possession which is unqualified and not to be restricted otherwise than by the owner giving instructions to the person who has it. The section was therefore held not to apply to a person in possession of a piano under a hire-purchase agreement, but the possession intended must be similar to that of a factor or agent. The possession must be such a possession as an owner has, not a qualified possession such as the hirer of goods has or where the possession is for a specific purpose.

As the word "possession" in both sections is intended to be restricted and as the wording of both the sections is so similar, I think the word as used in section 178 of the Contract Act is intended to have the same meaning as in section 108, though the words "notwithstanding any instructions of the owner to the contrary" are not repeated in the former section. In these circumstances the pledgee of a jewel hired is not in my opinion protected.

I think, therefore, that the decree of the Subordinate Judge is right and would dismiss this appeal with costs.

SUBRAHMANIA AYYAR, J.—I agree. Sections 179 and 178 of the Indian Contract Act, which are the only sections bearing on the question under consideration, respectively, contemplate mutually exclusive cases. Section 179 refers to certain cases where the pawnor has possession which is necessarily traceable to, and is an incident of, a limited interest he has in the goods pledged. On the other hand, section 178 refers to cases where a pawnor has a document of title to goods or has possession of goods unconnected with, and independent of, any interest of his therein, though as one invested with the symbol or indicia of property he may, notwithstanding the absence of any interest, make a valid transfer of the goods in certain circumstances.

(1) 12 B.L.R., 42.

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In the present case the pawnor had, no doubt, possession, but as that possession was traceable to, and was an incident of, his right as the hirer of the jewel for four days, it was not such possession as is contemplated by section 178. In the course of the argument Mr. Sivaswami Ayyar referred to the case of a pledge by a factor in possession, who has made an advance thereon so as to make his agency one coupled with an interest, in favour of a pawnee acting in good faith and without any reason to believe that the pawnor was making the pledge improperly as an instance inconsistent with this view.

This argument however reverses the true relation of things and assumes that the possession of the factor in the case supposed is the consequence of his interest, while the fact is the possession is directly attributable to his character as agent, in other words, it is attributable to the agency irrespective of whether it is one coupled with an interest or not.

As to section 179 the language thereof assumes and necessarily implies that the limited interest contemplated therein is such as to make a pledge valid to some extent and not altogether invalid. That, however, is not the case here, for, though the pawnor had a right to retain and use the jewel for the very limited period of four days, yet such right, even if it were not merely personal, had terminated at the date of the pledge, which was consequently a wholly tortious act, a conversion for which the owner may maintain an action against the hirer as well as the person taking delivery from him (see Beal on 'Bailments,' pages 226 and 231). Section 179 also could not therefore apply.

As neither of the provisions of the Contract Act that could be relied on in support of the pledge in question applies, the second appeal fails and must be dismissed with costs.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Russell.

1903. November 23, 26.

IKKOTHA (PLAINTIFF), APPELLANT,

v.

CHAKKIAMMA AND SIX OTHERS (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, *s.* 99*—Mortgage of land—Subsequent sale of equity of redemption in execution of decree in favour of third party—Purchase of equity of redemption by mortgagee—Subsequent suit by mortgagor to redeem—Maintainability.*

In 1882, plaintiff's father mortgaged certain immoveable property belonging to the tarwad now represented by plaintiff; and, subsequently, the mortgagee purchased the equity of redemption of the lands at a sale which was held in execution of a decree in favour of a third party. Both the mortgage and the sale were binding on the tarwad. Plaintiff now sued to redeem the lands contending that she was entitled to do so inasmuch as the sale of the equity of redemption had not been effected in a suit for sale by the mortgagee on his mortgage:

Held, that plaintiff was not entitled to redeem.

Erusappa Mudaliar v. *Commercial and Land Mortgage Bank, Limited*, (I.L.R., 23 Mad., 377), not followed.

SUIT to recover land. Plaintiff and defendants Nos. 1 to 3 were the sons and daughters, respectively, of one Kittu, deceased. In 1882, Kittu gave a usufructuary mortgage over the land to sixth defendant for Rs. 200, retaining possession of the land as lessee under the mortgagee. Kittu died and, subsequently, a third party caused the land to be sold by auction in execution of a decree in Small Cause Suit No. 235 of 1883, which he had obtained against Kittu. The equity of redemption was purchased by sixth defendant. Plaintiff now sought to redeem the mortgage, on payment to sixth defendant of the Rs. 200. Sixth defendant contended that plaintiff was not entitled to redeem. The other defendants remained *ex parte*, except first defendant, who supported plaintiff's claim. The District Munsif held that the sale in execution of the decree in Small Cause Suit No. 235 of 1883 was binding on plaintiff and dismissed the suit. Plaintiff appealed to the Acting District Judge,

* Second Appeal No. 130 of 1902, presented against the decree of A. Venkataramana Poi, Acting District Judge of South Malabar, in Appeal Suit No. 391 of 1901, confirming the decree of V. Raman Menon, District Munsif of Chowghat, in Original Suit No. 161 of 1900.

who upheld the finding as to the execution sale being binding on plaintiff. He held that plaintiff was not entitled to redeem and dismissed the appeal.

Plaintiff preferred this second appeal.

J. L. Rosario for appellant.

P. R. Sundara Ayyar for sixth respondent.

JUDGMENT.—We must take it that the mortgage under which the sixth defendant claims as well as the sale of the equity of redemption under the money decree obtained by a third party against the Karnavan, purchased by the sixth defendant are binding on the tarwad now represented by the plaintiff. Nevertheless it is contended on the authority of *Erusappa Mudaliar* v. *Commercial and Land Mortgage Bank, Limited*(1) that the plaintiff is entitled to redeem inasmuch as the sale of the equity of redemption was not in a suit for sale brought by the sixth defendant on his mortgage. That decision, however, has been dissented from in *Sesha Ayyar* v. *Krishna Ayyangar*(2) and in *Kuttan Nayar* v. *Krishnan Mussad*(3). These latter rest on the authority of the Privy Council decision (*Raja Kishendatt Ram* v. *Raja Mumtaz Ali Khan*(4)), the principle of which is in conflict with the ground on which the decision in *Erusappa Mudaliar* v. *Commercial and Land Mortgage Bank, Limited*(1) rests.

We cannot, therefore, follow the last decision. The plaintiff is not entitled to redeem.

The second appeal fails and is dismissed with costs.

(1) I.L.R., 23 Mad., 377.
(2) I.L.R., 24 Mad., 96.
(3) S.A. No. 641 of 1901 (unreported).
(4) I.L.R., 5 Calc., 198.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Boddam.

1903. September 18.

VELAGALETI RAMAKRISHNAYYA (PLAINTIFF), APPELLANT,

v.

SURANENI PAPAYYA APPA ROW AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Rent Recovery Act—(Madras) Act VIII of 1865, s. 49—Summary suit for damages for wrongful distraint—No proper patta tendered—Jurisdiction of Summary Court.

A tenant sued his landlords summarily under section 49 of the (Madras) Rent Recovery Act for cancellation of a distraint and for restoration of the property distrained or its value. It appeared that there were three landlords who owned the village and that the patta had been tendered by only two of them for their shares, and was consequently not a proper one:

Held, that the defendants were landlords who, had they tendered a proper patta, would have been entitled to distrain under the Act. The fact that the patta which had been tendered was not a proper one did not cause the proceeding taken by them under the provisions of the Act to be a proceeding not taken under colour of the Act:

Held, also, that the suit was one for damages.

SUIT by a tenant, under the (Madras) Rent Recovery Act, for cancellation of a distraint and for restoration of property distrained or its value. The village belonged to three brothers, but patta had been tendered by only two of them, in respect of their shares. The Head Assistant Collector held and the District Judge agreed that the patta which had been tendered was not a proper one. The Head Assistant Collector assessed the damages at Rs. 350, being the value of grain which had been distrained. The landholders appealed to the District Judge, who considered that the suit was not one for damages but was for specific property or its value. He also held that owing to the fact that there was no tender of a proper patta, the proceeding of the defendants in seizing plaintiff's property could not be said to be proceedings taken under colour of the Act. He held that the defendants had no right to distrain and that the award of damages under section 49 of the Act was wrong,

* Second Appeal No. 953 of 1902, presented against the decree of J. H. Munro, District Judge of Kistna at Masulipatam, in Appeal Suit No. 569 of 1901, presented against the decision of R. Ashe, Head Assistant Collector of Kistna, in Summary Suit No. 92 of 1901.

as the plaintiff's claim for the recovery of his property or its value lay in the Civil Court.

Plaintiff preferred this appeal.

P. R. Sundara Ayyar for appellant.

P. S. Sivaswami Ayyar for respondents.

JUDGMENT.—We are unable to follow the District Judge when he says that this attachment was not a proceeding taken under colour of the Act (Madras Act VIII of 1865). The defendants are landlords who, had they tendered a proper patta, would have been entitled to distrain under the Act. The fact that the patta tendered was improper does not cause the proceeding taken by them under the provisions of the Act to be a proceeding not taken under colour of the Act. We are also unable to agree with the District Judge that the suit was not for damages (*Pamu Sanyasi* v. *Zamindar of Jayapur*(1)).

Whether a suit is for the return of specific moveable property or for damages is a question which must depend upon the averments and frame of the plaint in each case.

In this case the property attached was grain not capable of identification and that is a circumstance which goes far to show that the suit is not for the return of specific property, whilst the nature of the articles to which *Raja Goundan* v. *Rangaya Goundan*(2) refers was such as to show that the proper conclusion was that that suit was for the return of specific property.

We must, therefore, reverse the decree of the District Judge and restore that of the Head Assistant Collector with costs in this and in the lower Appellate Court.

(1) I.L.R., 25 Mad., 540.

(2) I.L.R., 20 Mad., 449.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Russell.

1903. December 15, 16, 22.

CHINNASAMI MUDALI (PLAINTIFF), APPELLANT,

v.

ARUMUGA GOUNDAN (DEFENDANT), RESPONDENT.*

Letters Patent, Art. 15—"Judgment"—Order not deciding question of right, but merely refusing to interfere on revision petition—Appeal.

An order of the Court passed in a proceeding in which the Court is not necessarily bound to enter upon a consideration of the controversy between the parties, but may abstain from doing so and does so abstain is not a "judgment" within the meaning of article 15 of the Letters Patent, and no appeal lies therefrom.

A case of revision under section 25 of the Provincial Small Cause Courts Act is of such a nature, and no appeal lies against an order passed on it unless the order is more than a mere refusal to entertain the case as one fit for revision.

A plaintiff whose suit in a Small Cause Court had been dismissed applied under section 25 of the Provincial Small Cause Courts Act for revision. The petition was heard by a single Judge who refused to interfere and dismissed it with costs. On an appeal being preferred under article 15 of the Letters Patent

Held, that no appeal lay as the order was a mere refusal to entertain the case as one fit for revision, and as such was not a "judgment" within the meaning of article 15 of the Letters Patent.

But where the Court is bound to decide one way or other any question of right or liability, such an order is a "judgment," irrespective of the language in which it is expressed, for it has the effect of concluding the parties with reference to the right or liability.

APPEAL under article 15 of the Letters Patent. Appellant had filed a suit on the Small Cause Side of a District Munsif's Court, which was dismissed. He then applied to the High Court, under section 25 of the Provincial Small Cause Courts Act, for a revision

* Appeal No. 40 of 1903 under article 15 of the Letters Patent, presented against the judgment of Mr. Justice Boddam in Civil Revision Petition No. 407 of 1902, preferred from Small Cause Suit No. 10 of 1902 on the file of the additional District Munsif's Court of Salem.

of that decree. The application came before a single Judge, when the following order was passed :—

"This petition coming on for hearing: upon perusing the petition, the judgment and decree of the lower Court and the record in the case; and upon hearing the arguments of K. S. Ramaswamy Sastri, vakil for the petitioner, and of Mr. C. Krishnan, counsel for the respondent, it is ordered that this petition be, and the same hereby is, dismissed, and it is further ordered that the petitioner do pay to the respondent Rs. 2-7-7 for his costs in opposing this petition."

Against that order the present appeal was preferred.

Mr. *C. Krishnan*, for respondent, raised the preliminary objection that no appeal lay, as the order appealed against was not a "judgment" within the meaning of article 15 of the Letters Patent.

K. S. Ramaswami Sastri for appellant.

JUDGMENT.—In this case, the plaintiff's suit filed on the Small Cause Side of the District Munsif's Court at Salem having been dismissed, the plaintiff applied under section 25 of the Provincial Small Cause Courts Act to have the decree against him revised. On the application coming on before Mr. Justice Boddam, it was dismissed, and the question is whether in the circumstances of the case, the present appeal, which purports to be an appeal against the decision of the learned Judge under section 15 of the Letters Patent, lies.

Unless the order of the learned Judge is a "judgment" within the meaning of the said section 15 there can, of course, be no appeal against it; and in the absence of anything in the context suggesting the contrary, the word itself has to be understood in its ordinary signification as a legal term. In Tidd's 'Practice' it is stated to mean "the conclusion of law upon facts found or admitted by the parties, or upon their default in the course of the suit" (page 930). Blackstone explains the word as "the decision or sentence of the law given by a Court of Justice or other competent tribunal as the result of proceedings instituted therein for the redress of an injury" (3 Bl. Com., 395). Another writer puts it thus well :—"Litigious contests present to the Courts facts to appreciate, agreements to be construed and points of law to be resolved. The judgment is the result of the full examination of

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all these." In other words "judgment" necessarily implies the determination of some question of right or liability in issue between the parties and it is hardly denied that that is the view uniformly adopted with reference to this term in construing the section referred to. Now there can be no ambiguity with reference to an order passed in a proceeding in which the Court is bound to decide one way or the other any question of right or liability; for every order in such a case, which would have the effect of concluding the parties with reference to the right or liability, would be a judgment irrespective of the form or language in which it is expressed. Where, however, the proceeding is one in which the Court is not necessarily bound to enter upon a consideration of the controversy but may abstain from doing so, an order which expresses such abstention is obviously not a judgment. As a case of revision under section 25 of the Provincial Small Cause Courts Act is a proceeding of the latter description, no appeal can be held to lie against an order passed thereunder unless it is more than a mere refusal to entertain the case as one fit for revision. And as there may be such a mere refusal notwithstanding the records are called for or the parties heard, neither of those circumstances nor the award of costs against the party applying for revision would necessarily make the order a judgment. Nothing more being relied on in the present case in support of the contention that there was a judgment, it follows there is no appeal.

The petition is accordingly dismissed with costs.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Bhashyam Ayyangar.

VIDYAPURNA TIRTHA SWAMI (PLAINTIFF), APPELLANT,

v.

VIDYANIDHI TIRTHA SWAMI ADJUDGED TO BE A LUNATIC UNDER ACT XXXV OF 1858 AND OTHERS (DEFENDANTS), RESPONDENTS.*

1903. November 12, 13, 23, 24, 25. 1904. January 6.

Religious endowments—Hindu law—Character of appointment as head of Mutt—Lunacy of office-holder—Effect on his position—Practice—Second counsel.

Prior to 1896, first defendant in the present suit had presided over a mutt as its "Swami" or head, having been duly appointed to that office. In 1896, he became and was adjudged a lunatic. Prior to his lunacy he had nominated Vidyasamudra as his successor. In 1898, Vidyasamudra died without nominating a successor. In the same year, and after Vidyasamudra's death, a person who claimed the right to fill the office in such circumstances purported to appoint plaintiff to it. First defendant was then still alive and only died after the institution of the present suit, which was brought by plaintiff for a declaration that he had been validly appointed and for the recovery of the property belonging to the mutt:

Held, that plaintiff had not been validly appointed. Assuming that the person who purported to appoint plaintiff had the power to do so (which was not decided), there was no vacancy to be filled, at the date either of the appointment or of the institution of the suit. The first defendant as head of the mutt was not a mere trustee, and (in the absence of evidence of custom) had not forfeited his position by reason of his having become lunatic. The appointment relied on by plaintiff in consequence conferred no right on him.

The custodian (or dharmakarta) of a temple is a mere trustee who is bound to apply the funds at his disposal in carrying out the object of the trust, such as the conduct of daily worship and the performance of ceremonies. The head of a mutt is not a mere trustee but a "corporation sole" having an estate for life in the permanent endowments of the mutt and an absolute property in the income derived from offerings, subject only to the burden of maintaining the institution. His power to alienate or charge the corpus of the endowment is limited to purposes necessary for the maintenance of the mutt, and alienations or charges will not be binding on the mutt or on his successors merely because they have been made for general religious and charitable purposes appropriate to the head of

* Appeal No. 227 of 1900, presented against the decree of O. S. R. Krishnamma, Acting Subordinate Judge of South Canara, in Original Suit No. 39 of 1899.

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a Mutt. *Sammantha Pandara* v. *Sellappa Chetti*, (I.L.R., 2 Mad., 175), commented on on this point.

Instances of "corporations sole" in India, both ecclesiastical and lay, considered.

Appellants as well as respondents have a right to be heard by two counsel.

SUIT for a declaration that plaintiff had been duly ordained and appointed "Swami," or head of the Bhandarkare Mutt, and for recovery of possession, from defendants Nos. 1 and 2, of property belonging to the mutt. The nature of the mutt, its property and endowments and the mode in which appointments are made to it, are fully dealt with in the judgments. The first defendant (who was still alive when the suit was instituted) had presided over the mutt until 24th June 1896, when he was adjudged a lunatic under Act XXXV of 1858. It was admitted that he had been duly appointed. Prior to his lunacy he had ordained one Vidyasamudra as his disciple and successor. On 9th October 1898, Vidyasamudra died without nominating a successor. On 23rd November 1898, the head of the Bhimasetu Mutt (who, in the circumstances, claimed the right to do so) purported to appoint plaintiff as "Swami" of the Bhandarkare Mutt. First defendant died during the pendency of the suit. Plaintiff's contention was that first defendant had vacated his office when he was adjudged lunatic, his position being analogous to that of a trustee; that thereupon he was succeeded by Vidyasamudra; that on the death of Vidyasamudra without nominating a successor the office had again become vacant, and that plaintiff's appointment which followed was a valid one, it having been made at a time when the office was vacant and by a person in whom the power to appoint was vested. The defence was that the position of first defendant was not analogous to that of a trustee; that his lunacy had not divested him of his right to the headship; that the office had not become vacant until his death (which occurred after suit); that the person who purported to appoint plaintiff had no power to do so; and that even if he had such power, he had exercised it at a time when there was no vacancy, and that the appointment was, in consequence, invalid. Defendants Nos. 4 to 6 were impleaded as they were sureties for second defendant.

The Subordinate Judge held that plaintiff had failed to establish that the head of a mutt forfeits or vacates his office by reason of his becoming a lunatic, and he held that the person who purported to appoint plaintiff had no power to do so. He dismissed the suit.

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Plaintiff preferred this appeal.

The Advocate-General (Hon. Mr. *J. P. Wallis*), Hon. Mr. *C. Sankaran Nayar*, *Narayana Row* and *P. Narasimhachariar* for appellant.

C. Ramachandra Row Sahib for second, third and eighth respondents.

P. R. Sundara Ayyar for second respondent.

K. N. Aiya for third respondent.

K. P. Madhava Row for fourth to sixth respondents.

Mr. *C. Krishnan*, *H. Narayana Row* and *Srinivasa Poi* for seventh respondent.

Sir S. SUBRAHMANIA AYYAR, OFFG. C.J.—The plaint mentioned mutts, Bhandarkare in South Canara and Bhimasetu in Mysore territory, are two ancient mutts presided over by Swamis or ascetic heads of the Madhwa persuasion. The case of the plaintiff—a minor—is that the two mutts are dwandva or interdependent mutts, the Swami of each being entitled to appoint to the other, in the event of the Swami of either dying without having appointed and leaving a successor, or a vacancy otherwise occurring; that he was appointed as the head of Bhandarkare Mutt by the present Swami of Bhimasetu Mutt on the death of one Vidyasamudra, who had been ordained and appointed by the first defendant the deceased Swami of Bhandarkare Mutt as his junior before he (the first defendant) became and was, on inquisition under Act XXXV of 1858, found to be a lunatic.

The argument on the plaintiff's behalf in the appeal was that the first defendant, as Swami, was in the position of a *trustee*, that on his becoming a lunatic he ceased to be the head of the mutt and that Vidyasamudra being dead at the date of the plaintiff's appointment, that appointment by the Bhimasetu Swami constituted the plaintiff the head of Bhandarkare Mutt. The contention on the other side was that there was no dwandva right as alleged, that the first defendant's position as Swami was void of real analogy to that of a trustee, that his lunacy did not divest him of his right to the headship, that until his death there was no vacancy and that the plaintiff therefore derived no right to the mutt by virtue of the appointment relied on by him, even granting that the

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Bhimasetu Swami had the power to fill up a vacancy should any such have occurred.

The first defendant having continued to be a lunatic down to his death pending the suit, the question for determination is, whether the appointment relied on by the plaintiff was made in circumstances which could confer on him the status claimed, assuming that the Bhimasetu Swami had a right to nominate as alleged—in short, whether at the date of the suit or prior to it there was a vacancy in the headship of Bhandarkare Mutt.

Now there can be no doubt that institutions of the class under consideration were established as centres of theological learning and in order to provide a line of competent teachers with reference to the established Hindu creeds of the country. If any proof of this statement were necessary, that is furnished by the unquestionable connection which exists between some of the more important of this class of institutions and the leading exponents of the tenets of those creeds. As pointed out in Mr. Ghose's 'Hindu Law,' page 680, no less than seven mutts, being among the most celebrated, owe their origin to the great Adwaita Philosopher Sankaracharya. Other mutts not less numerous or important following the tenets of the Vishishtadwaita system of Ramanujacharya are traceable to that teacher. The well-known eight mutts at Udipi, the centre of the Dwaita system of thought, are on all hands admitted to have been founded by Madhwacharya, the chief expounder of that system. The Sudra mutts of this Presidency, of which those at Dharmapuram and Tiruvaduthorai are the chief, represent what is known as the Saiva Siddhantam.

The influence exercised by mutts as centres of learning on the religious and other literature of the country cannot be denied. The varied and well-known contributions made thereto by the famous Vidyaranya Swami of the Sringeri or Sarada Mutt, or under his auspices, are among the most conspicuous examples of this kind. There is scarcely a branch of learning considered by Hindus as important, to which Vidyaranya or the scholars whom he gathered round him, did not make valuable contributions, and it is to his commentaries that the modern world owes its knowledge of the traditional meaning of the oldest of sacred books—the Rig Veda. Nor has the influence of the mutts at Dharmapuram, Tiruvaduthorai, &c., on the Dravidian literature been inconsiderable.

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Though in recent times the men who have succeeded to the headship of the mutts have generally been inferior, their predecessors, as a whole, were men of learning and piety, who adequately ministered to the spiritual wants of the community, and even now the heads of some of these mutts enjoy the esteem of the community and continue to serve more or less the purpose intended. Such having been the origin and object of these institutions, which have embraced the whole Hindu population of the country, and numbered, among their adherents and supporters, princes and noblemen, it goes without saying that the establishment of these mutts was followed by their being more or less well endowed.

As to the rights of the Swamis in relation to the mutts and their endowments there was on the one hand the cardinal principle of the law of the land that properties given for the maintenance of charities, religious or otherwise, were ordinarily inalienable (West and Bühler, 'Hindu Law,' pages 201 and 202 (*Maharance Shibessouree Debia* v. *Mothooranath Acharjo*(1), *Prosanna Kumari Debya* v. *Golab Chand Baboo*(2), *Narayan* v. *Chintaman*(3) and *Collector of Thana* v. *Harisitaram*(4)), and on the other, the fact that the Swamis were not mere employees or subordinates in the institutions, but heads thereof, whose duty it was to promote learning and further the interests of religion; such heads moreover as ascetics not prone to be affected by motives incident to worldly life, requiring less restraint in dealing with property than ordinary men. It followed therefore that the law gave them over what remained of the income after defraying the established charges of the institutions, a full power of disposition, while in respect of the *corpus* it treated the individuals composing the line of succession as in the position of tenants for life (*Baboo Unnoda Pershad* v. *Nil Madhub Bose*(5) and *Khusalchand* v. *Mahadevgiri*(6)). I think it right to add that I am unable to agree with the conclusion in *Sammantha Pandara* v. *Sellappa Chetti*(7), if that is to be understood as implying that a debt incurred by the head of a mutt, though proper and appropriate with reference to the head who incurred it, would bind the property of the institution in the hands of his successors even though the debt is not shown to have

(1) 13 M.I.A., 270.
(2) L.R., 2 I.A., 145.
(3) I.L.R., 5 Bom., 393.
(4) I.L.R., 6 Bom., 546.
(5) 20 Suth. W.R., (Cr.), 471.
(6) 12 Bom. H.C.R., 214.
(7) I.L.R., 2 Mad., 175.

been incurred for a purpose necessary for the maintenance of the institution as a mutt.

Nevertheless it must be admitted that there is no direct authority pointing out the precise jural character of the heads of institutions of the kind referred to above. In determining what that is, it is but right and necessary to refer to the view taken by the law with reference to another set of institutions which owe their origin to the same causes that operated to bring mutts into existence. Of course, I refer to temples which, along with mutts, in order that organized worship of God and spiritual knowledge might go hand in hand, the religious instinct of the people designed as places of public resort for worship, and which were endowed far more richly than mutts. No doubt those who have made and still make such endowments do not look upon what the endowments are dedicated to in the light the law views them. Even with reference to donors in countries where anthropomorphic ideas of God find little place, it has been observed: "His worshippers who gave him lands and goods regarded him, if in one sense as a supernatural person, yet in another and a very real sense, as a natural person; he was no creature of human thought, he lived and could hold property" (Pollock and Maitland's 'History of the English Law,' Volume I, 481). It is not strange therefore that in a country like this, where the sacred books of the people abound in personified descriptions of the deity, His powers and attributes, the belief of donors should be similar and even stronger, as will be seen from *Doorgá Pershad* v. *Sheo Proshad*(1), where Macdonnell and Tottenham, JJ., observed: "According to Hindu notions, when an idol has once been so to speak consecrated by the appropriate ceremony being performed and mantra pronounced, the deity of which the idol is the visible symbol resides in it." It is to give due effect to such a sentiment, widespread and deep-rooted as it has always been, with reference to something not capable of holding property as a natural person, that the laws of most countries have sanctioned the creation of a fictitious person in the matter, as is implied in the felicitous observation made in the work already cited: "Perhaps the oldest of all juristic persons is the God, hero or the saint" (Pollock and Maitland's 'History of English Law,' Volume I, 481).

(1) 7 C.L.R., 278.

That the consecrated idol in a Hindu temple is a juridical person has been expressly laid down in *Manohar Ganesh* v. *Lakhmiram*(1), which Mr. Prannath Saraswati, the author of the 'Tagore Lectures on Endowments,' rightly enough speaks of as one ranking as the leading case on the subject, and in which West, J., discusses the whole matter with much erudition. And in more than one case, the decision of the Judicial Committee proceeds on precisely the same footing (*Maharanee Shibessouree Debia* v. *Mothooranath Acharjo*(2) and *Prosanna Kumari Debya* v. *Golab Chand Baboo*(3)). Such ascription of legal personality to an idol must however be incomplete unless it be linked to a natural person with reference to the preservation and management of the property. Hence the treatment of idols as if they were infants perpetually, and the provision of human guardians for them variously designated in different parts of the country. In *Prosanna Kumari Debya* v. *Golab Chand Baboo*(3) the Judicial Committee observe thus: "It is only in an ideal sense that property can be said to belong to an idol and the possession and management must in the nature of things be entrusted with some person as shebait or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property at least to as great a degree as the manager of an infant heir"—words which seem to be almost an echo of what was said in relation to a church in a judgment of the days of Edward I: "A church is always under age and is to be treated as an infant and it is not according to law that infants should be disinherited by the negligence of their guardians or be barred of an action in case they would complain of things wrongfully done by their guardians while they are under age" (Pollock and Maitland's 'History of English Law,' Volume I, 483)—a principle which it were to be wished the law had held fast to in the matter of the application thereof to a greater extent than is now the case in connection with the law of limitation for suits.

Such being the position unequivocally taken up by the law with regard to one set of these kindred institutions, it seems but right to adopt a similar theory with reference to the other set of

(1) I.L.R., 12 Bom., 247. (2) 13 M.I.A., 270.
(3) L.R., 2 I.A., 145.

institutions also, with only so much modification as certain special features of the latter necessarily call for. In the case of temples, the ideal person being the idol itself the natural custodian of the property, who has no beneficial interest whatsoever in the endowments, but occupies the fiduciary position of a mere manager (*Juggodumba Dossee* v. *Puddomoney Dossee*(1)) may not improperly be looked upon as subject strictly to the liabilities of a trustee. In the case of the mutts, however, though there are idols connected therewith, the worship of such is quite a secondary matter, the principal purpose of such an institution being the maintenance, in circumstances likely to command due respect and estimation, of a line of competent religious teachers, who, as already shown, are given for the welfare of the foundation itself, a real and, so to speak, beneficial interest in the usufruct, the restrictions governing the disposition whereof by them being of the nature of a mere moral obligation. Having regard to these facts it is obvious that the correct view to be taken is that in the case of mutts the ideal person is the office of the spiritual teacher Acharya, which, as it were, is incarnate in the person of each successive Swami who, for the time, is a real owner and not a mere trustee.

He is, as he would be described in England, a corporation sole. The circumstance that some controversy hangs round this phrase of the English law need not deter one from applying to cases like the present the concept which underlies it; the objection is but to the name (Wooddeson's 'Vinerian Lectures on the Laws of England,' 471), while the concept itself is not peculiar to that system of law (Lord Mackenzie's 'Roman Law,' 7th edition, 163) and is, as Mr. Salmond rightly observes ('Jurisprudence,' 347 (note)), perfectly logical and capable of serious and profitable uses, as shown by the fact that modern legislation has in effect created similar legal persons with reference to certain public offices. The following observations of the learned author just referred to ('Jurisprudence,' 349) may be quoted as serving to clear up the source of error and confusion in regard to this particular kind of legal personality. "The chief difficulty," he says, "in apprehending the true nature of a corporation sole is that it bears the same name as the natural person who is its sole member and who represents it and acts for it. Each of them is the sovereign, or the bishop or the solicitor to the

(1) 15 B.L.R., 318 at p. 330.

treasury. Nevertheless under each of these names two persons live, one is a human being administering for the time being the duties and affairs of the office. He alone is visible to the eyes of laymen. The other is a mythical being whom only lawyers know of and whom only the eye of the law can perceive. He is the true occupant of the office. He never dies or retires; the other, the person of flesh and blood, is merely his agent and representative through whom he performs his functions. The living official comes and goes, but this offspring of the law remains the same person." And it seems to me the concept thus well explained is the one best adapted to carry out the objects and purposes of institutions of the character of these mutts.

This being my view as to the real and precise jural character of the head of a mutt of the kind under consideration, I must hold that the first defendant did not forfeit his position as head of the mutt by the mere fact of his lunacy, in the absence of any satisfactory evidence of custom with reference to this particular mutt—a point on which I am in entire agreement with the Subordinate Judge, considering that what evidence there is on the question points altogether against the existence of any such custom.

It is scarcely necessary to say that under the Hindu Law itself, lunacy does not operate to divest rights already acquired; and the analogy, so far as this question of lunacy is concerned, presented by the cases of a bishop and of a beneficed clergyman in England is distinctly in favour of the conclusion arrived at by me. As in them so here, lunacy could only result in the lunatic's power of action remaining suspended during the continuance of the distemper and the vicarious discharge of his functions being provided for in accordance with the established requirements of the institution (*cf.* Burn's 'Ecclesiastical Law,' Volume I, 306, Title 'Co-Adjutor' and Pope on 'Lunacy,' 2nd edition, 370 and 371)—a matter to which, as the evidence shows, due attention appears to have been paid by the committee appointed to take charge of the estate of the first defendant when the inquisition was found.

It is thus clear that neither on the date of the plaintiff's appointment as alleged by him, nor at the date of his suit, was there a vacancy in the headship of the mutt to be filled up by whomsoever such filling up may have had to be done. The appointment relied on by the plaintiff could not therefore be held to have conferred on him any right to the mutt, assuming the

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existence of the dwandva right, as to which, however, it is not in the circumstances necessary to give any opinion.

I would therefore dismiss the appeal with costs (one set).

BHASHYAM AYYANGAR, J.—The plaintiff (appellant), a minor, sues for a declaration that he has been duly ordained and appointed swami or head of the Bhandarkare Mutt by the Swami of the Bhimasetu Mutt, for recovery of possession of the mutt with all its properties and endowments from the second defendant, and for recovery, from the third defendant of some of the mutt idols and jewels in his possession. The plaint mutt, which is endowed with the landed property standing in the name of the presiding deity and an annual tasdik allowance from Government, is situate about ten miles from Udipi, the centre of Madhwa religion, and is one of a number of ancient mutts in that part of the country; the Bhimasetu (or Bhimanakatte) Mutt (about 54 miles from Udipi), situate in the present Mysore Province, is another of them. The plaint mutt was till lately presided over by the first defendant, who, admittedly, had been duly appointed to the office by his predecessor. On the 24th June 1896, the first defendant was, on inquisition, found a lunatic by the District Judge of South Canara, under Act XXXV of 1858. Some time prior to his lunacy he had selected and ordained his brother's son Vidyasamudra, his disciple and successor; and it is admitted that the said Vidyasamudra, a minor of about 15 or 16 years of age, continued to perform the worship of the deities of the mutt after the lunacy of his preceptor. The disciple, however, died on the 9th October 1898, and the head of the Bhimasetu Mutt, claiming that the two are dwandva mutts, purported to ordain and appoint the plaintiff as swami of the plaint mutt on the 23rd November 1898. It is not clear from the plaint whether the plaintiff's appointment was as successor to the first defendant or to the deceased young swami (the disciple of the first defendant). The Bhimasetu Swami, however, as the plaintiff's twentieth witness, declared that he appointed the plaintiff to succeed both the first defendant and his disciple. The position taken by the plaintiff apparently is that the first defendant by reason of his lunacy vacated his office, that thereupon he was succeeded by his disciple Swami Vidyasamudra, that on the death of the latter without nominating a successor, the office of head of the mutt became vacant and that the Bhimanakatte Swami, by reason of the two mutts being dwandva mutts, was entitled to appoint him

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successor. In this view it is contended that the appointment of the second defendant, under section 9 of Act XXXV of 1858, as 'manager' of the estate of the first defendant will be inoperative so far as the mutt and its properties are concerned—as these properties were held by the first defendant merely as trustee—though his appointment under section 10 of the Act as the 'guardian' of the person of the lunatic will hold good.

On the first of these points, the Subordinate Judge finds that the plaintiff has entirely failed to establish that the head of the mutt forfeits or vacates his office by reason of his becoming a lunatic. He further finds that there exist no dwandva rights between the plaint mutt and the Bhimanakatte Mutt and that the plaintiff's appointment was therefore invalid even if there was a vacancy of the headship of the plaint mutt. On these findings he has dismissed the plaintiff's suit; and the principal contentions raised in appeal are that the office has become vacant by reason of the first defendant's lunacy or that at any rate, in accordance with the principles of the law applicable to trustees, the appointment of the plaintiff as a new trustee or head of the mutt in place of the first defendant who has become lunatic is legal and valid and that the plaintiff has established the existence of dwandva rights between the plaint mutt and the Bhimanakatte Mutt.

In the view which I take of the case, it is unnecessary to consider and decide whether the plaint mutt and the Bhimanakatte Mutt are dwandva mutts. Having regard however to the fact that the first defendant died since the institution of this suit and thus a vacancy has, in any view, occurred, I should have preferred to decide this question also, if our decision thereon could bind all parties concerned. But I refrain from doing so—though the point was argued before us at considerable length—as any decision that we may come to on the point, in the present suit, will not bind the Bhimanakatte Mutt, the head of which is no party to this suit, nor the Paryaya Swami, for the time being, of the Udipi Srikrishna temple, on whose behalf a right of nomination is set up, though he is no party to the suit and who, in fact, has, on the death of the first defendant subsequent to this appeal, ordained and appointed a person as successor who for the purposes of this appeal has been joined as the (eighth respondent and) legal representative of the first defendant.

On the other question argued before us, I am clearly of opinion that the Subordinate Judge has come to a right conclusion in holding that the first defendant has not vacated his office by reason of his lunacy. His conclusion is fully supported not only by the evidence of the defendant's witnesses—some of whom are the heads of some of the Udipi Mutts—but also by the evidence of several of the plaintiff's witnesses—among whom also there are the heads of some others of the Udipi Mutts. An instance is also referred to, by the defendant's tenth witness, of a swami of the Puttige Mutt having been a lunatic for a time—during which his disciple performed the puja—and having resumed his office on recovery. In the present case too, the Subordinate Judge finds that the first defendant himself was on a former occasion a lunatic for about a year and then recovered for a short time and that even after he had been adjudged a lunatic in 1896, he has had lucid intervals. The evidence in the case as to the effect of lunacy is also in consonance with the principle of the Hindu law that insanity does not divest a person of rights and estates that have already vested in him. The Subordinate Judge has therefore rightly held that the disciple Vidyasamudra never became the head of the mutt or succeeded the first defendant, that in fact he was never installed in the Gadhi on the declaration of first defendant's lunacy and that the mere fact of the disciple worshipping the mutt deities during his guru's insanity does not amount to his installation, as it is shown by the evidence on both sides that any other swami also might on such occasions perform the puja.

I may add that the attempt made on behalf of the plaintiff to establish that the first defendant has also forfeited his office by reason of his immorality has entirely failed as the first defendant has not, for any such cause, been outcasted or excommunicated—as was once done in the case of the Puttige Swami (*vide* Appeal No. 66 of 1881)—in which case the head of the mutt can be properly deposed from his position.

No usage or custom having been proved regulating the procedure consequent on the lunacy of the head of a mutt, the important question to be decided is "what is the effect of it, under the general law, as regards his relation to the mutt and its endowment?" On behalf of the appellant it is urged by the learned Advocate-General that the head of a mutt is a trustee or at any rate his position is analogous to that of a trustee and that on the analogy of the

English Law of Trusts—which is compendiously reproduced in sections 73 and 74 of the Indian Trusts Act—should be held that a new head of the mutt may be appointed in his place, by the person, if any, entitled to do so or by the Court, if the former head, by reason of his lunacy, becomes personally incapable to act in the trust.

If the head of the mutt was a trustee and the trusts of the institution were of the class to which the general law of trusts relates, this argument will no doubt carry weight; and in a case, like the present, in which the head of the mutt has been on inquisition found a lunatic by the District Court, which is the "principal Civil Court of Original Jurisdiction" referred to in section 73 of the Indian Trusts Act—the person, if any, entitled to appoint a new head need not make any special application to such Court for an adjudication that the head of the mutt is, by reason of his lunacy, personally incapable of acting in the trust, but may without such application appoint a duly qualified person as head of the mutt in the place of the lunatic. The fact that a manager of the lunatic's estate has, in this case, been appointed under section 9 of Act XXXV of 1858, will make no difference (*cf.* Lewin on 'Trusts,' 10th edition, 8204; Pope on 'Lunacy,' 280–290) for the estate of the lunatic, whether the same be a trust estate or his own, will still continue vested in him and the manager can only manage the estate of the lunatic, but not execute the trust, which involves the exercise of discretion. The appointment of the second defendant, in this case, as guardian of the person and manager of the estate of the first defendant (vide *Sitarama Charya* v. *Kesava Charya*(1)), will be no impediment to the plaintiff's appointment as trustee and head of the plaint mutt, if the nomination of its head in cases of vacancy rested, according to usage and custom, with the head of the Bhimasetu Mutt.

I am, however, of opinion that the head of a mutt, as such, is not a trustee in the sense in which that term is generally understood in the Law of Trusts, and the decision of the question under consideration cannot therefore properly be governed by the principles regulating the appointment of new trustees or by analogies derived therefrom. I may also add that in the case of

(1) I.L.R., 21 Mad., 402.

hereditary trustees in India and other trustees having a beneficial interest in the trust property, the principles of the English Law of Trusts—embodied in the Indian Trusts Act—as to the appointment of new trustees, when a trustee becomes incapable of acting by reason of unsoundness of mind, &c., are inapplicable. So far, at any rate, as mahunts and heads of mutts are concerned, the real analogy is, in my opinion, to be derived from the law relating to Common Law 'Corporations' particularly 'Ecclesiastical Corporations Sole,' for in many respects there is a striking similarity between these English Ecclesiastical Corporations and the ancient and well-established mutts in India like the plaint mutt. I am unable to accede to the learned Advocate-General's contention that the idea of a corporation is an advanced conception of jurisprudence unknown to the Hindu Law. Without implying that 'Trusts' in the ordinary sense are unknown or foreign to Hindu Law (see the *Tagore Case*(1), I should say that the notion of a corporate body as a legal entity is clearly recognized and is decidedly more in conformity with the genius of the Hindu Law than the conception of "trusts" (*Webb* v. *Macpherson*(2) decided by the Privy Council on 1st July 1903. In *Manohar Ganesh* v. *Lakhmiram*(3), Sir Raymond West, a profound jurist and eminent Hindu lawyer, observed (at pages 263 and 264) that "the Hindu Law, like the Roman Law and those derived from it, recognizes not only corporate bodies with rights of property vested in the corporation apart from its individual members, but also the juridical persons or subjects called foundations. A Hindu who wishes to establish a religious or charitable institution may, according to his law, express his purpose and endow it, and the ruler will give effect to the bounty or at least protect it, so far at any rate as it is consistent with his own *dharma* or conceptions of morality. A trust is not required for this purpose; the necessity of a trust in such a case is indeed a peculiarity and a modern peculiarity of the English Law. In early times, a gift placed, as it was expressed, 'on the altar of god' sufficed to convey to the church the lands thus dedicated. Under the Roman Law of pre-Christian ages, such dedications were allowed only to specified national deities. After Christianity had become the religion of the Empire, dedications to particular

(1) L.R., I.A. Sup. Vol., 47 at p. 71. (2) 8 Calc. W.N., 41 at p. 47.
(3) I.L.R., 12 Bom., 247.

churches or for the foundation of churches and of religious and charitable institutions were much encouraged. The officials of the church were empowered specially to watch over the administration of funds and estates thus dedicated to pious uses, but the immediate beneficiary was conceived as a personified realization of the church, hospital or fund for ransoming prisoners from captivity. Such a practical realism is not confined to the sphere of law; it is made use of even by merchants in their accounts and by furnishing an ideal centre for an institution, to which the necessary human attributes are ascribed (*Dhadphale* v. *Gurav*(1)), it makes the application of the ordinary rules of law easy, as in the case of an infant or a lunatic. Property dedicated to a pious purpose is, by the Hindu as by the Roman Law, placed *extra commercium*, with similar practical savings as to sales of superfluous articles for the payment of debts and plainly necessary purposes. Mr. Macpherson admitted for the defendants in this case that they could not sell the lands bestowed on the idol Sri Ranchhod Raiji. This restriction is like the one by which the emperor forbade the alienation of dedicated lands under any circumstances. It is consistent with the grants having been made to the juridical person symbolized or personified in the idol at Dakor." Dealing with the same subject, the learned authors of the 'Digest of Hindu Law' (West and Bühler, 201 and 202) remark: "The idol, deity or the religious object is looked on as a kind of human entity and the successive officiators in worship as a corporation with rights of enjoyment but not generally of partition or alienation, except so far as this may be necessary to prevent greater injury. Such endowments are frequently founded by subscriptions and are augmented by gifts and bequests simply to the institution. No rules have, in a majority of these cases, been formally prescribed. The intention of the founders has to be gathered from the traditional practice and the succession is thus determined by the custom of each particular institution, though this may have become embraced in some more extensive custom. And as to the management of an endowment, it is not competent for the holders in one generation to impose rules on those of another. The endowment once made cannot be resumed, but performance of the duties may be enforced." Again (at pages 185 and 186, footnote) "The ideal

(1) I.L.R., 6 Bom., 122

personality of the idol is recognized in many cases. Under the Roman Law, the *res sacræ*, in the higher sense, were dedicated to the public divinities and this dedication required the concurrence of the public authority . . . . The sense of the dominant interest of the sovereign makes itself manifest, even amongst the pious Hindus, in Narada's rule that 'whoever gives his property away (*i.e.*, makes a religious dedication, as gifts for merely secular purposes were discountenanced) must have a special permission to do so from the King. This is an eternal law' ('Narada,' Transl., 115. See also Vyav. May, chapter IV, section VII, paragraph 23) . . . . . No legal restriction has been placed on the dedication of property to either public or private religious purposes . . . . . The inalienable character of land consecrated to religious purposes has been generally recognized, under the Roman, Christian and Muhammadan systems as well as by the Hindu Law and under all has sometimes been found as an embarrassment."

In *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo*(1), in which it was held that lands dedicated to the services of an idol cannot be alienated by a shebait, though he can create derivative tenures and estates conformable to usage (*cf.* Proviso 2 to section 11 of the Madras Rent Recovery Act, VII of 1865), their Lordships of the Privy Council virtually base their decision on the theory of the idol being a juristic person and they observe (at page 273) "that the rents constituted, therefore, in legal contemplation, its property. The shebait had not the legal property, but only the title of manager of a religious endowment." Again in *Prosanna Kumari Debya* v. *Golab Chand Baboo*(2), in which it was held that shebaits who succeed one another from a continuing representation of the *debuther* property, that though such property is generally inalienable, yet it is competent for the shebait to incur debts for the proper expenses of keeping up the religious worship, repairing the temple, &c., and that judgments obtained against a shebait in respect of such debts are binding upon succeeding shebaits, though the decrees could be executed only against the (current) rents and profits of the *debuther* property. Sir Montague Smith, in delivering the judgment of the Judicial Committee, referred to the idol as the owner of the property in an 'ideal sense,' though in the nature of

(1) 13 M.I.A., 270.

(2) L.R., 2 I.A., 145.

things, its possession and management must be entrusted to some person as shebait or manager. In *Juggodumba Dossee* v. *Puddomoney Dossee*(1) the High Court of Calcutta observed (at page 330) "the ownership of the *debuther* property is vested in the idols, the shebaits being, strictly speaking, not trustees for the idol, but managers." In *Narayan* v. *Chintaman*(2) and the *Collector of Thana* v. *Hari Sitaram*(3) it was held, on the authority of the decision of the Privy Council in *Prosanna Kumari Debya* v. *Golab Chand Baboo*(4), that religious endowments in this country whether Hindu or Muhammadan are not alienable, though the *annual* revenues of such endowments, as distinguished from the *corpus*, may be pledged for purposes essential to the institution endowed.

The religious foundations known as *debuther*, devastanams or temples are the most numerous in India and have the largest endowments, especially in the shape of lands, assignment of public revenue and jewellery. These institutions have been established for the spiritual benefit of the Hindu community in general or for that of particular sects or sections thereof. The management of these institutions is vested in one or more persons variously known in this Presidency as dharmakartas, panchayets, uralans, &c., but referred to in the Religious Endowments Act (XX of 1863) and in judicial decisions as trustees, managers or superintendents. Their office is either hereditary or for life and, as a general rule, they have beneficial interest in the endowments or their income. As already stated, the worshippers are beneficiaries only in a spiritual sense, and the endowments themselves are primarily intended for spiritual purposes, though indirectly and incidentally a good number of people derive material or pecuniary benefit therefrom as office-holders, servants or objects of charity. In the decisions above referred to at length, the presiding idol is treated as a juristic person in whom the properties constituting the endowments are vested. The question has not been suggested or considered, whether the community itself for whose spiritual benefit the institution was founded and endowed may not more appropriately be regarded as a corporate body forming the juristic person in whom the properties of the institution are vested and who *act*

(1) 15 B.L.R., 318.
(2) I.L.R, 5 Bom., 393.
(3) I.L.R., 6 Bom., 546 at p. 552.
(4) L.R., 2 I.A., 145.

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through one or more of the natural persons forming the corporate body,—these latter being the dharmakartas or panchayets, &c., charged with the execution of the trusts of the institution and possessing strictly limited powers of alienation of the endowments, as defined in the cases cited above. Though a fluctuating and uncertain body of men cannot claim a profit *a prendre in alieno solo*, nor be the grantee of any kind of real property (see *Goodman* v. *Mayor of Saltash*(1), yet there is high authority for treating such a community as a corporation or juristic person in relation to religious foundations and endowments. Dealing with the history of Church Endowments, Savigny says ('Jural Relations' translated by Rattigan, 196–198). "Since, then, under the Government of Christian princes, Church Institutions appeared as juristical persons, what is the precise point to which we have here to ascribe the personality, or how are we to form an accurate conception of the subject-matter of the Rights of Property existing in them? Above all, the following contrast to the earlier period is here unmistakeable. The ancient Gods were conceived as individual 'Persons' resembling individual visible men that one sees around one, and nothing was more natural than that each of them should have his own personal property, while it was only a further development of the same thought when the God who was venerated in a particular temple was represented as a Juristical Person and indeed even granted personal privileges. The Christian Church, on the other hand, rests on the belief in One God and it is united together by this common belief and by the distinct revelation of that one God to one Church. It was an easy matter therefore to import the same principle of unity also into Property-relations and this conception in fact finds expression in wholly different periods of time, as well in the teachings of writers as in the sentiments and mode of expression of the individual Founders of Endowments. Thus it happened quite commonly that at times Jesus Christ, at other times the Universal Christian Church or, her visible head, the Pope was designated as the Proprietor of the Church Estate. But a closer consideration must lead to the conviction that this conception is wholly inapplicable to the necessarily restricted province of law and that the recognition of individual juristical persons even with reference to Church Property must be

(1) L.R., 7 A.C., 633 at p. 648.

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substituted for it . . . . The subject of the succession (where a testator leaves property to a church) is therefore a particular Church Community, that is to say, the corporation of Christians appertaining to that church . . . . These writers uniformly recognize the particular Church Community as the possessor of the Church property, for instance, therefore, in regard to Parochial Estates, the Totality of the Parishioners." (See also Pollock and Maitland, 'History of the English Law,' Volume I, 4804.) For all practical purposes however it is immaterial whether the presiding idol or the community of worshippers is regarded as the corporation or juristic person in whom the properties are vested, though from a juristic point of view there may be a difference of opinion as to which theory is the more scientific. In the words of a recent writer on Jurisprudence (Salmond's 'Jurisprudence' (1902), 346) "the choice of the *corpus* into which the law shall breathe the breath of a fictitious personality is a matter of form rather than of substance, of lucid and compendious expression, rather than of legal principle," though, as pointed out by the same writer, the tendency of English law is to prefer the process of "incorporation" (of human beings) to that of "personification" (of objects, *e.g.*, a charity, or of institutions, *e.g.*, a church, &c.).

Next to these temples and devastanams, the most important religious foundations in this country are the ancient mutts presided over almost invariably by learned and pious *ascetics*. The origin and growth of these mutts is described in the judgments of this Court in *Sammantha Pandara* v. *Sellappa Chetti*(1) and in the recent work of Mr. Ghose on 'Hindu Law' (chapter VIII). As stated already, there is a considerable similarity between these mutts and ecclesiastical corporations in Europe, in respect of their origin, growth and object. Speaking of the early history of bishops in Europe, Cripps, in his 'Law of the Church and Clergy' (3rd edition, 74) observes: "For many centuries after the Christian era, the bishop was the universal incumbent of his diocese and received all the profits, which were then but offerings of devotion, out of which he paid the salaries of such as officiated under him as deacons and curates in places appointed. Afterwards, when churches became founded and endowed he sent out his clergy to reside and to officiate in those churches, reserving to himself a

(1) I.L.R., 2 Mad., 175 at p. 179.

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certain number in his cathedral to counsel and assist him." The origin and growth of mutts in this country is thus described in the two judgments of this Court already referred to: "A preceptor of religious doctrine gathers around him a number of disciples whom he initiates into the particular mysteries of the order and instructs in its religious tenets. Such of these disciples as intend to become religious teachers renounce their connection with the family and all claims to the family wealth and, as it were, affiliate themselves to the spiritual teacher whose school they have entered. Pious persons endow the schools with property which is vested in the preceptor for the time being and a home for the school is erected and mattam constituted" (*Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran*(1)). "The ascetics who presided over them were held, owing to their position as religious preceptors and often also in consequence of their own learning and piety, in great reverence by Hindu princes and noblemen who, from time to time, made large presents to them and endowed the mutts under their control with grants of land. Thus a class of endowed mutts came into existence, in the nature of monastic institutions presided over by ascetics or sannyasis who had renounced the world." The object of these mutts is generally the promotion of religious knowledge, the imparting of spiritual instruction to the disciples and followers of the mutt and "the maintenance and strengthening of the doctrines and tenets of particular schools of philosophy. These institutions have thus exercised considerable influence over the laymen in their neighbourhood, becoming centres of classical and religious learning." The two classes of institutions, viz., temples and mutts, are thus supplementary in the Hindu Ecclesiastical system, both conducing to spiritual welfare, the one by affording opportunities for prayer and worship, the other by facilitating spiritual instruction and the acquisition of religious knowledge—the presiding element being the deity or idol in the one, the learned and pious ascetic in the other. The position of the head of the mutt is thus not the same as or analogous to that of managers or dharmakartas of devastanams and temples, but resembles more that of Bishops and Archbishops in the Christian System of Europe. In the case of temples, the endowments, whether in the shape of landed property or tasdik allowances, have to be devoted to

(1) I.L.R., 10 Mad., 375.

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the carrying out of the specific purposes connected with the temple, *i.e.*, the daily worship and the periodical ceremonies and festival—purposes defined and settled by usage and custom and generally recorded in what is known as the 'dittam'—and the dharmakartas are mere trustees for the carrying out, or executing of such trusts. In the case of mutts, however, such defined and specific purposes immediately connected with the maintenance of the mutt as an institution, are, in the nature of things, very limited and a large part of the income derived from the endowments of the mutt as well as from the money-offerings of its disciples and followers—which offerings as a rule are very considerable—is at the disposal of the head of the mutt for the time being, which he is expected to spend, at his will and pleasure, on objects of religious charity and in the encouragement and promotion of religious learning. His obligation to devote the surplus income to such religious and charitable objects is one in the nature only of an imperfect or moral obligation resting in his conscience and regulated only by the force of public opinion and he is in no way, whether as a trustee or otherwise, accountable for it in law. A corporation, however, like any natural person, can act as a trustee (Lewin on 'Trusts,' 10th edition, 30; Kent's 'Commentaries,' Volume 2, 280), and it is not uncommon that a mahunt or head of a mutt, as a corporation sole, is appointed as a trustee, manager or superintendent of important temples, devastanams and katlais, and in that capacity he is accountable and responsible, like any other trustee, manager or superintendent of such religious institutions. In legal contemplation, therefore, the head of a mutt, as such, has an estate for life in its permanent endowments and an absolute property in the income derived from the offerings of his followers, subject only to the burden of maintaining the institution. Over the *corpus* of the endowment, however, his power of disposition is very limited, as in the case of managers of temples and devastanams. He cannot alienate or charge the *corpus* or the income beyond his own lifetime, so as to bind the mutt and his successors, except for purposes plainly necessary for the maintenance of the mutt. It should, however, be borne in mind that such necessity can arise but rarely in the case of mutts and at any rate not to the extent to which it may in the case of temples. And except under such circumstances, an alienation of the *corpus* or a charge thereon made by him and debts incurred by him will not bind the mutt or his successors

merely because the same was made or incurred for general religious and charitable purposes appropriate to an ascetic or the head of a mutt. If the decision of this Court in *Sammantha Pandara* v. *Sellappa Chetti*(1) is to be taken as a ruling that a debt incurred by the head of a mutt is binding upon his successor because it was incurred for such purposes, though it was not plainly necessary for the maintenance of the mutt as such, I am, with all deference, unable to concur in it.

It will thus be seen that the property of the mutt is, like the benefice of a bishopric of the Christian Church, substantially inalienable; the head of the mutt for the time being has, like the bishop (*vide* Stephen's 'Comm.,' Volume 2, 765; *Wall* v. *Nixon*(2); 'Enc. of the Laws of Eng.,' Volume IV, tit. 'Ecclesiastical Corporations') subject however to the limited burden of maintaining the mutt, absolute dominion over the revenues accruing during his life-time. Thus in *Knight* v. *Mosely*(3), Hardwicke, L.C., speaking of the estate of a person—which is even more analogous to that of the head of a mutt in India—said that he "has a fee simple qualified and under restrictions in right of the church, but he cannot do everything that a private owner of an inheritance can". To the same effect, but speaking more generally of all ecclesiastical corporations sole, Jessel, M. R., in *Mulliner* v. *Midland Railway Company*(4) said: "As regards ecclesiastical corporations sole, it was long since decided as to rectors, vicars and others that, though in a certain sense owners in fee simple, yet in many respects they had only the powers of tenants for life. Of course, no owner in the fee simple, can actually enjoy beyond his life and therefore to that extent, they were no better and no worse off than other owners in fee simple. But it was said that being seized in right of their churches, they had not the ordinary powers of other proprietors in fee simple . . . . and they were not allowed to use their property in the same way as ordinary owners of land." The Master of the Rolls then points out that "such restricted ownership and restricted rights" are nothing "new or remarkable" and by way of further illustration refers to charity corporations and municipal corporations. The head of the mutt

(1) I.L.R., 2 Mad., 175.
(2) 3 Smith, 316; 8 R.R., 725.
(3) Ambler, 175.
(4) L.R., 11 Ch.D., 611 at pp. 622, 623.

being an ascetic, there are no rights of inheritance between him and his blood relations and the unexpended portion of the revenues devolves, according to custom, on the succeeding head of the mutt, along with the *corpus* of the mutt property. In this respect the case of the bishop is different, as the properties belonging to him personally—including his savings from the revenues of the benefice—devolve upon his legal representatives or heirs, as the case may be, and not upon his successor in office. As regards succession, it is regulated in the case of mutts by the custom or usage of each particular mutt, but in most cases, especially in Southern India, the successor is ordained and appointed by the head of the mutt during his own life-time and in default of such appointment, the nomination may rest with the head of some kindred institution or the successor may be appointed by election by the disciples and followers of the mutt or in the last instance by the Court as representing the sovereign. But whatever differences of detail there may be between the head of a mutt in India and a bishop or other similar ecclesiastical person in Europe, there is a striking similarity between the two in respect of the corporate character of the office and the beneficial enjoyment of the income by the incumbent and in my opinion therefore the head of a mutt is as much a 'corporation sole,' as a bishop admittedly is, each being equally with the other "a body politic having perpetual succession and being constituted in a single person, who in right of some office or function, has a capacity to take, purchase, hold and demise (and in some particular instances, under qualifications and restrictions, power to alien) lands, tenements and hereditaments, to him and his successors in such office for ever, the succession being perpetual but not always uninterruptedly continuous." (Grant on 'Corporations,' 626; see also Kent's 'Commentaries,' Volume 2, 274.) As in the case of a bishopric, perpetual succession in a mutt is secured by the provision for nomination of a successor (whether by the head of the mutt or otherwise) and by the restriction against alienation—though owing to delay in the nomination of a successor, in cases in which the deceased head of the mutt has failed to ordain and nominate a successor, there may occasionally be periods of inter-regnum or vacancy during which there is none in existence in whom the corporation resides and is visibly represented (see Challis, 'Real Property,' 2nd edition, 91).

The continuity in the designation of the head of the mutt (though in some cases, with a slight variation to identify the natural person) and the use of a corporate seal, are other indicia of the corporate character of the institution (*cf.* a notable instance of an ecclesiastical coporation sole, in *Pakkiam Pillay* v. *Seetharama Vadhyar*(1) quite recently disposed of, being the spiritual office of 'Veda Vrithi' in a village, endowed with a small inam, the advowson or the right of presentation to the office belonging to the Brahman community of the village).

Far from being foreign to the Hindu Law, the conception of a 'corporation' was worked out not only in respect of religious foundations and establishments and eleemosynary institutions, but also in respect of lay institutions and offices. The king in India was as much a corporation sole as the King in England, and many subordinate chiefs of principalities and feudatories which were in the nature of a raj, were also, by custom, prescription and sometimes even by charter, 'corporation sole,' in analogy to the king; though the chiefs themselves were not really invested with sovereign authority. Several ancient zamindaris, both here and in the north,—which were in the nature of a raj or principality—and the ancient 'stanoms' of Malabar, really fall under this category. In two learned articles in the Law Quarterly Review (Volume XVI, 335, and Volume XVII, 131) Professor Maitland has made an attempt to criticise the 'concept' of a 'corporation sole,' and especially as regards the Crown, he suggests that the king is properly not a 'corporation sole,' but "the head of a highly complex and highly organised corporation aggregate of many," he and his subjects together forming the corporation. Referring to these articles, Mr. Salmond in his 'Jurisprudence' (edition of 1902, 347 footnote) points out that "corporations sole are not a peculiarity of English Law," that "the distinction between the two forms of incorporation (viz., aggregate and sole) is well known to foreign jurists" and that the conception of a corporation sole "is perfectly logical and capable of serious and profitable uses." Whichever may be the more correct theory as regards the Crown—and even as to this, the same learned writer explains (page 363) that under a monarchical system of Government, where "everything which is *public* in fact is

(1) S.A. No. 388 of 1902—See footnote at p. 465 (*infra*).

conceived as *royal* by the law, there is no need or place for any incorporate common wealth, *res publica* or *universitas regni*" and "the citizens of the State are not fellow-members (with the king) or one body politic and corporate, but fellow subjects of one sovereign-lord" who is a corporation sole. Whichever may be the more correct theory as regards the Crown, it is undoubted that the holders of several public offices have been constituted corporations sole by recent statutes and described as such (*vide* Pollock on 'Contracts,' 7th edition, 116; XVII, 'Law Quarterly Review' (1901), 144 to 146. For an instance, in India, see section 6 of the Charitable Endowments Act, VI of 1890). In a similar way a corporate character also formerly belonged to several important public offices in India, especially military and police, notably poligars. Except in the case of the 'stanoms' of Malabar,— which still preserve their original corporate character, the stanis still being corporations sole—the corporate character of ancient zamindars and poligars, has, by a long course of judicial decisions, been destroyed and an anomalous law of impartibility and of descent to a single heir based unscientifically on family custom substituted therefor, with the result that an issue is raised in each case as to whether the zamindari or poliem is partible or impartible—an issue altogether alien to and unmeaning in respect of a corporation,—the onus being thrown on the party affirming its impartibility. The incident of inalienability attaching to the corporate character has suffered still more. In the earlier decisions ending with the case of *Chintalapati Chinna Simhadri Raj* v. *Zamindar of Vizianagaram*(1) the principle that a zamindar had only an estate for life was generally recognised and acted upon. In the case last mentioned, Holloway, J., said: "The *ratio decidendi* of all the cases down to the two latest, *Pitchakutti Chetti* v. *Ponnamma Natchiyar*(2), and *Narayana Devu* v. *Harischendana Devu*(3) clearly is that the zamindar has really an estate analogous to an estate tail as it originally stood upon the statute *De Donis*. He is the owner, but can neither encumber nor alienate beyond the period of his own life. If he had sold, the sale would be inoperative beyond his life and would amount merely to an alienation of his life interest." It was most unfortunate that the estate of an

(1) 2 Mad. H.C.R., 128. (2) 1 Mad. H.C.R., 148.
(3) 1 Mad. H.C.R., 455.

ancient zamindar in India should have been likened by that eminent Judge to an estate tail under the English Law, as it stood under the statute *De Donis* instead of to the estate of a natural person constituting, with his predecessors and successors, a corporation sole. The result has been that the theory of an estate for life had to be gradually abandoned as the same was not based on any intelligible or sound legal basis. Until the decision of the Privy Council in *Sartaj Kuari's Case*(1) the trend of judicial decisions in India was to apply to alienations made by the holder of an impartible zamindari, the principles of the Mitakshara Law applicable to alienation of ordinary partible property. If the zamindar had no coparceners who if the property were partible would be entitled to a share, it was held that the zamindar could at his will and pleasure alienate the whole or any part of the zamindari, whether by act *inter vivos* or by will, notwithstanding that the zamindari was an ancestral one. Where however the zamindar had such coparceners he was regarded as occupying the position of managing member of an undivided Hindu family and his alienations were upheld only if they were within the powers of such managing member. Since the decision of the Privy Council in *Girdharee Lall* v. *Kantoo Lall*(2) even the doctrine of the pious obligation of the son to discharge the debts of his father, if they were not illegal or immoral, has been extended to the holders of impartible zamindaris. The restriction of the alienation of an impartible zamindari having been falsely based on the Mitakshara doctrine applicable to *joint family* property owned by *all* the coparceners, the result was that when the question was raised before the Judicial Committee in Sartaj Kuari's case it was decided that the Mitakshara doctrine was inapplicable, the coparceners not being joint owners with the zamindar and that the zamindar therefore could, as sole owner, alienate the zamindari or any portion thereof at his will and pleasure. If the succession of a single heir by a rule of primogeniture or the selection of the most competent among the heirs to succeed to the zamindari or poliem—subject in either case, to confirmation by the ruling power, the property of a corporation not being, in law, an estate of inheritance —and the incident of inalienability had both been based on what I consider was the sound jural basis, viz., that the zamindar or

(1) I.L.R., 10 All., 272. (2) L.R., 1 I.A., 321; 14 B.L.R., 187.

poligar was a civil corporation sole, charged (even now) with *quasi*-public duties (*vide* the judgment of Judicial Committee in the *Madras Railway Company* v. *Zamindar of Carvetinagaram*(1)), and that each natural person who for the time being was zamindar or poligar, had, as in the case of ecclesiastical corporations, only a life estate in the zamindari with a very restricted power of alienation for necessary purposes, but with absolute beneficial enjoyment of the revenues, subject only to the burden of maintaining or making suitable allowances for the members of the family, the question as to whether poliems and ancient zamindaris were in each case partible or impartible would not have arisen: the anomaly of resting their impartibility on family custom and of applying to zamindars and poligars the law regulating the powers of managing members of undivided Hindu families—powers which supplemented as they have been by the English equitable doctrine laid down in *Hanuman Prasad's Case*(2) are ample and elastic enough to bring about in course of time the disintegration of zamindaris and poliems, no less than of ordinary partible estates—and the decision in *Sartaj Kuari's Case*(3), which was but the logical outcome of basing the impartibility of those estates on the unsound principle of family custom regulating succession by primogeniture would have been averted. The corporate character of these institutions having however long been destroyed by judicial decisions, and by the fiscal laws relating to the sale of land for arrears of revenue due to Government and, in no small degree, by a stereotyped form of sannad which was indiscriminately issued under Regulation XXV of 1802 in the case of all estates, whether they were ancient zamindaris and poliems or merely mittahs or proprietary estates created under the regulation—in respect of which latter class alone the form of sannad was appropriate—it is unnecessary to elaborate any further the theory of "lay civil corporations" under the common law of this country and advert at any length to the origin and growth of these as important political and official institutions.

I confess that the theory of the ecclesiastical and lay institutions above referred to being "corporations sole" may seem an "old-fashioned sort of notion" not likely to commend itself readily to the modern mind imbued with the equitable doctrine of "trusts" on the one hand and the ideas of "municipal corporations" and

(1) 14 B.L.R., 209 at p. 217. (2) 6 M.I.A., 393. (3) I.L.R., 10 All., 272.

"joint-stock companies" on the other as well as with ideas of unfettered freedom of alienation both *inter vivos* and by will and of acquisition by a trespasser or wrongdoer of ownership and of limited interests in immoveable property under the operation of the law of limitation by the wrongdoer persevering in his wrong for over the statutory period whether he be conscious or unconscious of his wrong. But I sincerely trust that in the interests of the moral well-being of the people of this country and of its "peace and good government" the notion will not die out, in the case at any rate of ecclesiastical and eleemosynary institutions, as it has died out in the case of lay institutions, and that their corporate character will be preserved and their disintegration arrested by extending to them the beneficent provision of Madras Regulation X of 1831, which saves the landed estates of minors from liability to sale for arrears of revenue due to Government—the Collector, of course, being at liberty to realize the arrears by assuming management of the estate under Act II of 1864—, by prescribing in lieu of the existing period of 12 years from the date of the alienation or adverse possession (vide *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*(1), a period of limitation of 60 years for suits to recover possession of immoveable property forming the endowment of a public charitable or religious institution which has been improperly alienated or held adversely to the institution, and lastly, (though not least) by amending the Religious Endowments Act (XX of 1863) so as to better define the constitution of the committees established under it, the powers and duties of committees and trustees and their mutual legal relations, and render more effective the control of the judiciary over the administration of religious endowments, without in any degree departing from the fundamental principle of the Act, of severing the connection of the executive authorities with such administration.

Reverting now to the subject of religious or ecclesiastical corporations sole, the question to be next considered is the effect of lunacy on the status and rights of a mahunt or head of a mutt. He, no doubt, becomes incapable of discharging the spiritual as well as the temporal functions of his office, but his lunacy cannot divest him of the life-estate which he has in the properties of the mutt, nor can it divest him of his status as head of the mutt. The only

(1) I.L.R., 23 Mad., 271.

course for the purpose of securing the due discharge of the spiritual functions of the office and the management and preservation of the endowment and its income is to provide suitable agency for the purposes. Where, as in the present case, the head of the mutt has been found a lunatic on inquisition under Act XXXV of 1858, no difficulty will arise. Under section 9 of the Act, the Court appoints a "manager" of his estate; and as the lunatic has a life-estate in the endowments of the mutt—subject to the obligation of maintaining the mutt out of the income—the manager is entitled to take charge of such estate and manage the same on behalf of the lunatic and provide for the conduct of the necessary worship and the religious ceremonies of the mutt, by appointing persons duly qualified for the purpose. The surplus income left, after meeting the necessary and customary expenses of the mutt, will accumulate for the benefit of the lunatic and his successors. If the head of the mutt should recover his sanity and such recovery is declared by the Court under section 21 of the Act, he will of course be entitled to resume the rights and duties of the office and discharge his temporal and spiritual functions. This procedure is substantially the same as the one obtaining in Europe both under the Canon Law, and in the Church of England, when a bishop becomes insane. The author of the 'Praelectiones Juris Canonici' (Vol. II, p. 351) refers to the opinion of some who think that from the point of view of the '*jus naturalis*' a bishop loses his jurisdiction from the very fact that he falls into a state that he can never enjoy it; and, combating this view, he observes that this cannot be accepted inasmuch as human rights once lawfully acquired are retained even though he who holds them cannot exercise them himself, for they can be exercised in his name by delegating them—a principle which is in accordance with the genius of the Hindu Law. Under the Canon Law, when an archdeacon or any other person installed in an ecclesiastical office is attacked by lunacy or a disease by which he is rendered unfit to carry out the duties which appertain to him, his dignity or office or benefice does not fall vacant, nor is he to be deprived of it, but provision is to be made for a co-adjutor to him, a portion suitable for the livelihood of the co-adjutor being deducted from the returns. Moderate clothing and food should be provided for the co-adjutor in such a way that the whole of what is left of the profits (after such provision has been made) should remain to the incapacitated

prelate or beneficiary (*vide* The 'Juris Canonici Theoria,' Vol. 1, p. 84). In Burn's 'Ecclesiastical Law,' (Vol. I, p. 306 Tit. 'Co-adjutor') it is stated: "In cases of any habitual distemper of the mind whereby the incumbent is rendered incapable of the administration of his cure, such as frenzy, lunacy and the like, the laws of the church have provided co-adjutors." The procedure in the English Church is even now substantially the same and is regulated by the provisions of 6 & 7 Vict., Ch. 62 (see also Pope on 'Lunacy,' p. 370). Applying the above principles to the present case we find that after the first defendant was adjudged a lunatic and the second defendant was appointed manager of the mutt, the late disciple of the first defendant was, during his life-time, carrying on the ceremonies of the mutt and the worship of Gopinath, the idol installed in the mutt, and of Ramadeva, the personal God of the head of the mutt—he being qualified to perform the puja for both the idols. Subsequent to the death of the disciple, the second defendant has made due provision for the worship of Gopinath by employing a duly-qualified Grihastha (not an ascetic) and for the worship of Ramadeva—which can be done by an ascetic alone—by entrusting it to the third defendant, the head of one of the Udipi mutts; the manager himself attends to the secular and temporal affairs of the mutt. The manager appointed under section 9 of Act XXXV of 1858 being really an officer of the Court, it is of course competent to the District Judge to give him such directions as may be necessary from time to time for the due discharge of the spiritual and secular functions appertaining to the office of head of the mutt.

The appeal therefore fails and I would dismiss it with one set of costs.

[Their Lordships appended the following footnote to the judgment:—

"At the hearing of this appeal, when Mr. Sundram Ayyar, junior Vakil for the second respondent, began to argue the case, following his senior Mr. C. Ramachendra Row Sahib, objection was taken on behalf of the appellant to second counsel being heard for the same party. This objection we overruled as it is the well-established practice not only in England, including the Judicial Committee of the Privy Council, but also in this country, though this right is not frequently exercised in this Court, the only limitation being here as in England that a third counsel is not at liberty to address the Court on behalf of the party entitled to the reply. We are aware second counsel have been heard in this Court and some of the cases in which this was done were referred to by the learned Pleader for the second respondent."]

Second Appeal No. 388 of 1902.—The judgment, which was dated 22nd December 1903, was delivered by Benson and Bhashyam Ayyangar, JJ., as follows:—The inam appears to have been granted originally for the support of a spiritual office in the village, the right to appoint to the office being vested in the Brahman community of the village. At the time when the inam title-deed was issued, in 1865, the holder of the office was Rama Sastri, in whose name the title-deed was issued. But it is clear from the inam statement (exhibit H) of Rama Sastri that he did not claim the inam as his hereditary personal inam, but only as the then incumbent of the office. It is found that the first plaintiff is now the *de facto* and *de jure* holder of the office. The inam title-deed, no doubt, in terms declares that the inam is the absolute property of Rama Sastri which he may sell or dispose of as he thinks proper, but this must be construed as intended to operate only as between Rama Sastri and the Government, which could have resumed it under Regulation XXV of 1802. The inam title-deed, therefore, cannot confer on the first defendant anytitle or right which Rama Sastri had not got under the original grant.

The alienation to the second defendant by the first defendant (the son of Rama Sastri) is therefore void and the plaintiffs are entitled to a declaration that the first plaintiff, as the present holder of the office, is entitled to hold and enjoy the office, with its emoluments, viz., the inam and cash allowances so long as he is the holder of the office.

We vary the decree accordingly, but as the appellant has substantially failed he must pay the costs of this appeal.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Benson, Mr. Justice Bhashyam Ayyangar and Mr. Justice Russell.

NALLAYAPPA PILLIAN AND OTHERS (DEFENDANTS), APPELLANTS,

v.

AMBALAVANA PANDARA SANNADHI (PLAINTIFF), RESPONDENT.*

1903. November 26 December 7.

Rent Recovery Act—VIII of 1865, *s.* 12,—*Right of tenants to relinquish their lands at end of year—"Tenants"—Rights of permanent lessees of melvaram rights of Zamindar—Religious institutions—Alienability of endowments.*

By the proviso to section 12 of the Rent Recovery Act, tenants have the right to relinquish their lands at the end of a revenue year. The defendants, by a

* Second Appeal No. 167 of 1902, presented against the decree of S. Doraswami Ayyangar, Subordinate Judge of Tinnevelly, in Appeal Suit No. 205 of 1900, presented against the decree of A. Ramalingam Pillai, District Munsif of Ambasamudram, in Original Suit No. 125 of 1899.

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registered deed, became permanent lessees of the melvaram rights of the plaintiff, who was a Zamindar. On the question whether the defendants were entitled to relinquish their interest under the deed, under section 12 of the Rent Recovery Act:

Held, that the proviso to that section was not intended to apply to persons in the position of the defendants. Though the defendants were the "tenants" of the plaintiff in the sense that they were bound to pay rent to the plaintiff, yet they were not tenants in the sense in which that term is used in section 12. The defendants, being lessees of the melvaram, were farmers under an inamdar, and belonged to the class of landholders specified in section 3 of the Act. Sections 3 to 12 inclusive refer to the relations between these landholders and their tenants, and, for the purposes of section 12, the defendants were in the position, not of tenants but of landlords.

Lakshminarayana Pantulu v. *Venkatarayanam*, (I.L.R., 21 Mad., 116), and *Ramasami* v. *Bhaskarasami*, (I.L.R., 2 Mad., 67), followed.

Subbaraya v. *Srinivasa*, (I.L.R., 7 Mad., 580); *Appasami* v. *Ramasubba*, (I.L.R., 7 Mad., 262); *Ramachandra* v. *Narayanasami*, (I.L.R., 10 Mad., 229); *Bashkarasami* v. *Sivasami*, (I.L.R., 8 Mad., 196) (so far as they proceed on the supposition that the word "tenant," as defined in section 1 of the Rent Recovery Act, is applicable to an intermediate landholder who has to pay rent to a superior landholder), dissented from.

Per the Offg. C.J. and RUSSELL, J. (after the decision of the Full Bench).—According to the Indian Common Law relating to Hindu religious institutions of the kind before the Court the landed endowments thereof are inalienable. Though proper derivative tenures conformable to custom may be created with reference to such endowments they cannot be transferred by way of permanent lease at a fixed rent, nor can they be sold or mortgaged. The revenues thereof may alone be pledged for the necessities of the institutions. *Prosanna Kumari Debya* v. *Golab Chand Baboo*, (L.R., 2 I.A., 145), referred to.

SUIT for rent. Exhibit A, which is described in the Order of Reference to a Full Bench as a permanent lease of the plaintiff's melvaram right to the defendants, was dated 27th January 1886, and contained the following provisions:—

"While we were up to fasli 1294 last paying in the shape of paddy and of money the half share fixed by custom to the Ayan Mitta Zamin in respect of the cultivated lands in the Ardhamanyam village of Avudayapuram mentioned in the schedule hereto annexed and relating to our Kattalai in the said Zamin belonging to the said Adhinam, inconveniences were felt by both parties by reason of there being varam and tirvai between the Zamin and us. In consideration of which fact, it has been thought advisable that a Kattuguthagai (a lease for a number of years together) should be agreed upon; and the particulars of the determination come to (in this matter) are as follow:—We and our heirs shall from the current fasli 1205 perpetually and for

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ever enjoy the nanjai, punjai, garden, tank-bank, puramboke nattam (hamlet), sithadi and all other lands according to the total ayacut (area) of the said village of Avudayapuram mentioned in the schedule, together with the wells situated therein, all kinds of trees assessed or unassessed, and the tank fishery and all other properties, whether the lands are cultivated or left waste, even when act of State or act of God occurs (in respect of them), and whether the crops wither away or whether the kernel of the corn develops well, and on account of the half alone due to the said Zamin, we shall pay to the said Adhinam Guthagai (lease) amount at the rate of Rs. 350 a year, in 7 equal kists (instalments) from November to May of every fasli year irrespective of Kattu and Muchilika and obtain receipts (for such payments). If we fail thus to pay (the said amount) you will, according to the custom of the said Zamin, recover the kist which we fail to pay together with interest at the rate of 1 per cent. per month. No kind of maramat in the said village concerns the said Zamin. You will have no right to demand from us, on behalf of the Zamin, on any account, an amount greater than the said Kattuguthagai amount of Rs. 350, except the Circar levies. In case Government at any time makes repairs, etc., in Pappankal, and a total tax has to be collected in your Mitta including this village and paid, then we shall pay to you the rateable proportion due from the lands in this village."

The plaint recited that plaintiff was the mittadar of Kambaneri Puthukudi and that the defendants were Kalasandhi Kattalai (morning service) Hakdars of Sree Sankaranarayana Swami temple; that the produce of the village of Avudayapuram had formerly been divided between the plaintiff and the Kattalai, but that a fixed permanent money rent had been agreed upon by the registered perpetual agreement, exhibit A, under which rent was paid till the fasli 1305, when the defendants gave notice to the plaintiff's agents that they declined to be bound by the said agreement. Plaintiff claimed that defendants were bound by the agreement, and prayed for a decree for the rent due under it. The defendants alleged that they had relinquished the lands and maintained their right to do so, and denied their liability to pay rent subsequent to the date of relinquishment. The District Munsif held that the defendants had not in fact relinquished the lands, though he considered that they were entitled to do so under

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section 12 of the Rent Recovery Act. He was of opinion that the agreement was prejudicial to the Kattalai of which the defendants were the trustees, and that the defendants were bound to pay only one half of the rent actually collected by them but that as they had failed to prove how much they had collected in certain faslis they were bound to pay the full amount claimed. He gave a decree accordingly.

The Subordinate Judge, on appeal, said: "The defendants' objection that as the tenancy has been relinquished under the provision of section 12 of the Rent Recovery Act the plaintiff is not entitled to claim rent, cannot prevail. This section does not authorise the relinquishment of a permanent tenancy, which is created by contract entered into between the parties and applies only to cases not governed by any special contract but by the general law relating to landlord and tenant. Nor can the objection that the defendants are not bound to pay more than a moiety of what they succeed in collecting, as that was the understanding between the parties at the time of the lease, prevail, for this is against the terms of the lease, which are embodied in a registered document. The evidence shows that as some tenants did not pay, their holdings were brought to sale and purchased by the defendants, and there is nothing unfair in the defendants who have thus become entitled to the lands being made to bear the burden. Towards the close of fasli 1306 the notice IX was sent by the managers of the Kattalai to the plaintiff intimating that they did not want for fasli 1307 the lands which they became entitled to in various ways from the tenants with permanent occupancy right and relinquished their right, so far as the plaintiff's half share was concerned. It is doubtful whether this means an absolute relinquishment of the tenancy right, and the relinquishment does not also appear to have been given effect to. If the holdings are relinquished and, if owing to any altered circumstances the original lease ought not to be allowed to stand, the defendants must get it cancelled in due course, if they can, and are not entitled to refuse payment of rent to the plaintiff so long as the same remains uncancelled. The decree of the District Munsif must therefore stand, though on different grounds from those on which he bases his judgment."

He dismissed the appeal.

Defendants preferred this second appeal.

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P. R. Sundara Ayyar for appellants.

V. Krishnaswami Ayyar for respondent.

The case came in the first instance before Sir S. Subrahmania Ayyar, Offg. C.J., and Russell, J., who made the following

ORDER OF REFERENCE.—According to exhibits A and II the arrangement between the parties is a permanent lease of the plaintiff's melvaram right to the defendants. One of the questions raised in the case is whether the defendants are tenants entitled to relinquish under the proviso to section 12 of Madras Act VIII of 1865. There is a conflict on this point between the decisions in *Subbaraya* v. *Srinivasa*(1) and *Krishna* v. *Lakshminaranappa*(2). In the former a lessee in the position of the present defendants was held to come within the provisions of section 12 of the Act. In *Krishna* v. *Lakshminaranappa*(2) a mulgeni tenant was held not entitled to relinquish, one of the grounds being that section 12 did not apply to the case of such a tenant. Owing to the conflict we consider it necessary to refer for the decision of a Full Bench the following question:—

Are the defendants entitled to relinquish under section 12 of Act VIII of 1865 their interest under exhibit A?

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

P. R. Sundara Ayyar for appellants.

V. Krishnaswami Ayyar for respondent.

The Court expressed the following

OPINION.—The reference states that the defendants are permanent lessees of the melvaram rights of the plaintiff who is a Zamindar. Although the defendants are the "tenants" of the plaintiff in the sense that they are bound to pay rent to the plaintiff, yet the defendants are obviously, we think, not tenants in the sense in which that word is used in section 12 of the Act. The defendants being lessees of the melvaram are farmers under an Inamdar and belong to the class of landholders specified in section 3 of the Act. Sections 3 to 12 inclusive refer to the relations between these landholders and their tenants. For the purposes of section 12, the defendants are not in the position of tenants, but of landlords. The proviso in section 12 embodies

(1) I.L.R., 7 Mad., 580. (2) I.L.R., 15 Mad., 67.

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the common law rule with regard to tenants (*ryots*) holding under the landholders named in section 3, but was not intended to apply to persons who like the defendants are landholders though bound themselves to pay rent to a superior landlord for a term of years or in perpetuity under a lease.

This decision is in accordance with the views of the Full Bench in *Lakshminarayana Pantulu* v. *Venkatrayanam*(1) and of the Privy Council in *Ramasami* v. *Bhaskarasami*(2).

We think that the view taken in *Subbaraya* v. *Srinivasa*(3) relating to the reinstatement of an intermediate landholder who was ejected by a superior landholder and the decisions in *Appasami* v. *Ramasubba*(4) and *Ramachandra* v. *Narayanasami*(5) relating to distraints by a superior landholder for recovery of rent due by an intermediate landholder, and also the decision in *Bashkarasami* v. *Sivasami*(6) relating to a sale by a superior landholder for sale of the tenure of an intermediate landholder, so far as they proceed on the supposition that the word "tenant" as defined in section 1 of the Act is applicable to an intermediate landholder who has to pay rent to a superior landholder, are erroneous.

The second appeal came on for final hearing before Sir S. Subrahmania Ayyar, Offg. C. J., and Russell, J., after the expression of opinion of the Full Bench, when their Lordships delivered the following

JUDGMENTS:—Sir S. SUBRAHMANIA AYYAR, OFFG. C.J.—The plaintiff in this case is the Pandarasannadhi of Tiruvaduthorai Mutt in the Tanjore district having a branch establishment and endowments in the Tinnevelly district. The defendants are the present managers of the Kalasandhi Kattalai or the foundation for morning service in the temple of Sree Sankaranarayana Swami in Sankarannayinarkoyil taluk in the Tinnevelly district. The village of Avudayapuram, an inam village in the latter district, is held as an endowment in equal moieties by the mutt and the Kattalai respectively. From what is before us it must be taken that the lands of the village are in the possession of the ryots entitled to hold them permanently, subject to the payment of rent to the mutt and the Kattalai. Up to fasli 1291, the ryots appear to have paid

(1) I.L.R., 21 Mad., 116.
(2) I.L.R., 2 Mad., 67.
(3) I.L.R., 7 Mad., 580.
(4) I.L.R., 7 Mad., 262.
(5) I.L.R., 10 Mad., 229.
(6) I.L.R., 8 Mad., 196.

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only on account of lands actually cultivated, the payment in respect of wet lands consisting of a share of the produce of the lands cultivated. At this period it would seem the tenants paid the whole of the rent to the managers of the Kattalai who passed on a half of what they received to the head of the mutt. About fasli 1292, one Pannirugai Thambiran, who was an agent of the then head of the mutt, raised a question as to whether the managers of the Kattalai should not have collected from the ryots assessment in respect also of lands left by the ryots uncultivated according to *Sarasari* rates, *i.e.*, the average receipts from lands cultivated, and succeeded in obtaining a decision in his favour in a summary suit against the managers. That decision has not been produced and the ground thereof does not appear. But the materials on the record disclose absolutely nothing which would sustain what is said to have been established by that decision. Having regard, however, to that decision the managers of the Kattalai naturally desirous of saving themselves from further complications proposed to relinquish under the provisions of the Rent Recovery Act, section 12, the moiety of uncultivated lands in the village which would appertain to the mutt. The agent of the mutt in order to avoid the consequences of such a procedure on the part of the managers of the Kattalai, suggested a partition and this was carried out to the extent of preparing lists of what the mutt and the Kattalai were to take respectively and casting lots.

But for reasons not quite clear the partition arrangement does not appear to have been adhered to and the agent of the mutt induced the tenants to accept, in lieu of the system till then prevalent, the arrangement set forth in exhibit II, whereby a lump rent of Rs. 700 was made payable to the managers of the Kattalai in respect of the whole village and got the latter to agree to pay to the mutt for its share Rs. 350 per annum as specified in exhibit A, dated 27th January 1886.

The ryots having subsequently failed to make payments duly according to the terms of exhibit II to the managers of the Kattalai these intimated to the head of the mutt that they were not bound to and could not continue to make the payment as provided in exhibit A. They, further, on the footing that the relation which exhibit A purported to create between the mutt and the Kattalai was that of the landlord and tenant to which the provisions of section 12 of the Rent Recovery Act were applicable

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relinquished to the mutt the Kattalai's supposed interest in respect of the mutt's moiety of the village. The head of the mutt, demurring to the validity of such action on the part of the managers, brought this suit for the money claimed to be payable under the provisions of exhibit A in respect of faslis 1306, 1307 and 1308.

The District Munsif held that exhibit A was not binding on the Kattalai, but nevertheless decreed the claim on the ground that the managers of the Kattalai failed to show how much they actually collected on account of rents payable by the ryots for those faslis. The Subordinate Judge, on appeal, upheld the decree, being of opinion that exhibit A was binding on the Kattalai.

The important question for our determination is whether this opinion of the Subordinate Judge is sound.

The law as to the powers and duties of persons in the position of managers of the Kattalai admits of no doubt. According to the Indian Common law relating to Hindu religious institutions such as the present, the landed endowments thereof are inalienable. Though proper derivative tenures conformable to custom may be created with reference to such endowments they cannot be transferred by way of permanent lease at a fixed rent, nor can they be sold or mortgaged. The revenues thereof may alone be pledged for the necessities of the institutions. *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo*(1), *Narayan* v. *Chintaman*(2) and *Collector of Thana* v. *Hari Sitaram*(3) are direct authorities in support of this statement of the law. Nor do I think that *Prosanna Kumari Debya* v. *Golab Chand Baboo*(4) is to be understood as recognising any wider powers in the managers of such institutions. The Bombay cases just referred to apparently adopt the same interpretation of that decision of the Judicial Committee and the propriety of that construction is confirmed by the fact that the committee itself hold that decrees obtained against shebaits in respect of debts incurred for necessary purposes can be executed only against the current rents and profits.

If that decision of the Privy Council were to be understood as going further and recognising, in cases of absolute necessity, the validity of even a sale or a mortgage of the corpus, such a rule

(1) 13 M.I.A., 270.
(2) I.L.R., 5 Bom., 393.
(3) I.L.R., 6 Bom., 546 at p. 552.
(4) L.R., 2 I.A., 145.

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would have to be treated as providing for a case which can but rarely, if ever, happen.

For in the first place among temples possessing landed endowments, I believe there are scarcely any the expenses of whose customary services cannot be fully met from the income of the endowments. Even in cases where, owing to causes beyond the control of the managers, such as famine, etc., the income falls off, the uniform and approved practice of the country has been to regulate the scale of the services with reference to the diminished income until the income returns to its normal condition, and not to keep up the services on a scale rendering the incurring of debts necessary. Nor is money ever *borrowed*, even for the purpose of repairs. One reason why a manager never thinks of mortgaging or setting the corpus for such a purpose is that he will ordinarily not be able to find a mortgagee or purchaser among the members of the community since the principle that property dedicated to God ought never to be diverted for other purposes operates so strongly on the mind of the community that even innocent participation in such diversion is understood to be sinful and to forbode evil to the participator.

Another reason is that landed endowments are almost invariably granted for some specific service and a transfer thereof in order to raise money for repairs, etc., would be unauthorized. It does not follow however that any real difficulty is felt with reference to the matter under consideration inasmuch as when more funds than the temple can afford out of its revenues are wanted for making repairs, the almost invariable course is an appeal to the pious for subscriptions, which scarcely ever fail to come in. The truth of this observation cannot be better exemplified than by a reference to the many and costly renovations of temples big and small even now effected by the charity of the trading and money-lending classes of the country, a fact which itself attests the still continuing potency of the injunctions of the old Hindu law givers that the special dharma of the Vaisya or the wealth making class is to provide for these and like charities. Nor should it be forgotten that, as shown by the formula with which grants and donations to charities usually conclude, the people take that to renovate is even more meritorious than to found. In such circumstances it is obvious that the manager's powers are quite limited. He can only do what is necessary for the services of the

idol in a manner commensurate with its endowments and he need only preserve and duly manage what property may belong thereto. It is no part of his duty to effect improvements with reference to existing endowments when the funds in his hands do not admit of it, nor is he called upon to enter into transactions for the purpose of augmenting the funds of the institution. He cannot in any manner subject the institution in his charge to duties, obligations and burdens to which, with reference to the nature of the foundation or otherwise, the institution is not inherently or necessarily subject.

This being so, we have now to see, if the Kattalai was bound by the transaction evidenced by exhibits A and I, which in truth is a lease of the mutt's moiety of the village to the Kattalai. If the answer to this question is to be in the affirmative, that must be on the ground that the manager of a temple has the power to place the institution of which he is the representative in the position of a farmer of properties of others. Farming operations, to be successful, require capital, personal attention and skill and favourable seasons. Of course a manager cannot be called upon to provide the money or pay the attention needed. Skill he may possess none and the seasons he cannot control. How then can he be allowed to involve the institution in the risks and liabilities incident to such undertakings? Mr. Krishnaswami Ayyar, on behalf of the plaintiff, without going the length of saying that the managers of the Kattalai could, under ordinary circumstances, have lawfully taken a lease on behalf of the Kattalai, urged that the transaction in question ought to be held to have been within their competency having regard to the special circumstances of the case. It was said, so far as I followed the argument, that the mutt and the Kattalai, as owners of undivided moieties, having to deal with a number of ryots with reference to the collection of the rents, occupied a position attended with difficulties and that the arrangement in question must be looked on not so much as a lease of an outsider's property, as a transaction mainly intended to vest the power to collect rents in one of the two co-owners with a view to obviate those difficulties. No doubt the position of the two institutions with reference to dealings with the ryots in connection with the preliminaries to be adopted under the Rent Law was one attended with trouble and expense, but that surely would not warrant the managers in shifting the whole burden on the Kattalai

so as to constitute it the bailiff and agent in respect of the mutt's share of the rents, with the responsibilities incident to such a position.

Now though, having regard to the peculiar requirements of the Rent Law governing the action of landholders such as the mutt and the Kattalai, they were each bound to co-operate with the other in all necessary proceedings to be taken under the law for realization of the rents, it is clear that there was no further obligation *inter se* arising out of their tenancy in common. As held by the House of Lords in *Kennedy* v. *De Trafford*(1) there is no relationship of trust or agency in one co-owner of property towards the other, and when one collects the rents of the whole, he does so not in the capacity of agent but in that of owner, and, as held in *Henderson* v. *Eason*(2), is answerable to his co-tenant only if he receives more than comes to his just share and to the extent of the excess alone. Therefore even a mere undertaking by the managers of the Kattalai to make all the collections and to account for the mutt's share thereof so long as the parties were willing to follow such course would not bind the Kattalai, since thereby a duty would be imposed on it to which it was not, as a tenant in common, subject.

The present arrangement is infinitely more onerous. Though exhibit II was executed in March 1886, while exhibits A and I were executed in January of that year, it is clear and not denied that the very basis of exhibits A and I was the transaction evidenced by exhibit II. Indeed the case for the plaintiff is that it was Pannirukai Thambiran referred to above that brought about the whole arrangement, viz., on the one hand that between the ryots of the village and the Kattalai evidenced by exhibit II, and on the other, that between the Kattalai and the mutt evidenced by exhibits A and I. It was in respect of a moiety of the Rs. 700 expected to be received by the Kattalai from the ryots as regards the whole village, that the Kattalai was to be liable for to the mutt for all time to come, and whether the Kattalai in fact collected anything or not. Though anterior to exhibit II each ryot was severally responsible only for the rent of his actual holding, yet under it they were, as a body, made jointly liable for Rs. 700 nett assessed on the whole village, an amount which was more than the

(1) L.R., [1897], A.C., 180. (2) L.R., 17 Q.B.D., 701.

highest revenue ever before derived by the mutt and the Kattalai together from the village and which was made payable without reference to the extent of cultivation or adverse seasons. All future demands by Government, together with disbursements ordinarily borne by landlord, *e.g.*, the latter's share of the road cess, the cost of maintaining and repairing the irrigation works, etc., were thrown on the ryots. Even the power of relinquishment given to them by the law was curtailed, it being provided that they should not relinquish unless they did so with reference to their entire holding as constituted by exhibit II, *i.e.*, the village itself; in other words if any one of them wished to relinquish his particular lands, the other ryots must take them up or in effect quit the village in a body.

It is not a little surprising that the author of the arrangement come to by the execution of these singular instruments exhibits II-A and I should have persuaded himself and have succeeded in persuading the others concerned that the solution of the difficulties incident to the comparatively simple relation of the tenancy in common which subsisted between the mutt and the Kattalai was to be found in the creation of the immensely more complicated joint relation brought about among the whole body of ryots who, by their very position and circumstances, are presumably unfit for united action and co-operation of the kind contemplated. Such an arrangement was on the very face of it quite unworkable for any considerable time and bound to break down, as it did. Moreover, with reference to the very important matter of relinquishment of holdings wisely provided for by the statute law, the arrangement was essentially unjust to the peasantry who were thus tied up to each other hopelessly. No plan more calculated to sow dissension among the tenantry and demoralise them altogether could well have been devised. To have made the Kattalai the other party to such an arrangement was to involve that institution in certain dispute and contention, litigation and loss, and to have gone further and attempted to fasten on the Kattalai a liability for ever to pay to the mutt the fixed amount of Rs. 350 which was more than any amount which the mutt had at any time before realized on account of its interest in the village, was simply to compass the destruction of the Kattalai as an institution.

It is impossible therefore to hold that the transaction in question was such as the managers were competent to enter into

on behalf of that foundation. The opinion of the Subordinate Judge as to the validity of the transaction is therefore clearly erroneous and the decree as resting on that opinion cannot be upheld. Nor can the decree be sustained on the ground assigned by the District Munsif, for not only was the Kattalai as one of the two tenants in common, not bound to pay over to the mutt a moiety of what it received from the ryots so long as such receipts did not exceed its proper share, but in an action against the Kattalai to account for its receipts over and above what it was entitled to, it was for the mutt distinctly to allege and show that the Kattalai's receipts did in fact exceed its due share (*Sturton* v. *Richardson*(1)), see also *Purcell* v. *Harding*(2). No averment of that kind having been made, and no proof in support of it having been offered the suit necessarily failed except in regard to the sum of Rs. 43-4-8 admitted by the defendants to be due.

I would accordingly modify the decree by reducing the amount payable to that sum and otherwise dismiss the suit with costs throughout.

RUSSELL, J.—I concur.

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(1) 13 M. & W., 17.

(2) 15 W.R., 128, Ir.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Benson.

1904. February 25.

PARAMESHWARAN NAMBUDIRI (FIRST DEFENDANT), PETITIONER,

v.

VISHNU EMBRANDRI AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Provincial Small Cause Courts Act—IX of 1887, s. 16—Small Cause suit wrongly tried on regular side—Regular appeal preferred against decree—No question of jurisdiction raised—Civil Revision Petition raising question of jurisdiction—Discretion of High Court to interfere or not, according to the merits.

Petitioner presented this Civil Revision Petition to set aside a decree which had been passed against him by a District Munsif and upheld in the District Court, on the ground that the suit was one of a nature cognizable by a Small Cause Court, whereas it had been tried as a regular suit. Petitioner (who was defendant in the suit), had raised no objection before the Munsif to the mode of trial; nor had he done so in his grounds of appeal to the District Court:

Held, with reference to section 16 of the Provincial Small Cause Courts Act, that, even assuming that the case was one of a nature cognizable by a Small Cause Court, the High Court was not bound to set aside the decrees of the lower Courts, but had a discretion to interfere or not, according to the merits of the case.

Suresh Chunder Maitra v. *Kristo Rangini Dasi*, (I.L.R., 21 Calc., 249), approved and followed. *Ramasamy Chettiar* v. *Orr*, (I.L.R., 26 Mad., 176), not followed.

SUIT for Rs. 130 for wages due to plaintiffs for services in connection with a temple. The District Munsif tried the case as a regular suit and decreed in plaintiffs' favour as against first defendant alone. Defendant, who had raised no objection to the mode of trial by the District Munsif, preferred a regular appeal to the District Court, making no reference to the question of jurisdiction in his grounds of appeal. The Acting District Judge dismissed the appeal.

* Civil Revision Petition No. 391 of 1903, presented under section 622 of the Code of Civil Procedure, praying the High Court to revise the decree of A. Venkataramana Pai, District Judge of North Malabar, in Appeal Suit No. 196 of 1902, presented against the decree of K. Imbichunni Nair, District Munsif of Cannanore, in Original Suit No. 424 of 1901.

Defendant now preferred this Civil Revision Petition, in which he raised the question of jurisdiction for the first time.

Mr. *C. Krishnan* for appellant.

J. L. Rozario for respondent.

JUDGMENT.—Assuming that the suit was one of a nature cognizable by a Small Cause Court, the first question for our decision is whether we are bound, with reference to section 16 of the Provincial Small Cause Courts Act, IX of 1887, to set aside the decrees of the Courts, original and appellate, which tried the suit as a regular suit, or whether we have a discretion to interfere or not according to the merits of the case. The former view was taken by the learned Chief Justice in *Ramasamy Chettiar* v. *Orr*(1), but apparently the decision to the contrary by the High Court of Calcutta in *Suresh Chunder Maitra* v. *Kristo Rangini Dasi*(2) was not brought to his notice. In referred case No. 72 of 1903 the present Divisional Bench followed the decision in *Suresh Chunder Maitra* v. *Kristo Rangini Dasi*(2) and we have no doubt that that decision is as consonant with law as it is with convenience.

Section 16 of the Provincial Small Cause Courts Act must be read along with section 646-B of the Civil Procedure Code. The latter section gives the High Court a discretion to pass such orders as it thinks proper in cases referred for its orders under that section and such cases include a case like the present where the small cause suit has been irregularly tried by an ordinary Civil Court. The obvious object of the section is to enable the High Court to pass such order as the justice of the case requires without being compelled to decide the case solely with reference to jurisdiction, and thus perhaps put the parties to the expense and trouble of fruitlessly litigating the same question again before the very Judge, sitting as a Small Cause Court, who had already tried the case on the ordinary civil side, and with the greater formality thereby required and with the safeguard of an appeal.

Though the present case comes before us under section 622, Civil Procedure Code, it seems but reasonable that the principle of the express provision in section 646-B should be followed in the exercise of the discretion allowed by section 622, at least in cases like the present where the petitioner made no objection to the

(1) I.L.R., 26 Mad., 176. (2) I.L.R., 21 Calc., 249.

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trial in the Court of First Instance and raises the objection for the first time in this Court.

We therefore hold that we have a discretion to be exercised with reference to the merits of the case. On the merits we are unable to say that any ground for our interference has been made out.

We therefore dismiss the petition with costs.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Bhashyam Ayyangar.

1903. September 14.

CHINNAMMAL (PLAINTIFF), APPELLANT,

v.

MADARSA ROWTHER (DEFENDANT), RESPONDENT.*

Court Fees Act—Act VII of 1870, s. 7, IV (c)—Suit for cancellation and delivery of mortgage bond for Rs. 4,000—Valuation of relief by plaintiff at Rs. 50—Duty of Court to accept plaintiff's valuation in suits of this class.

Where cases fall under section 7, paragraph IV, clause (*c*) of the Court Fees Act, the plaintiff should make a verified statement in his plaint of the amount at which he values the relief sought. Where this has been done, the Court has no jurisdiction to decline to accept the valuation thus given or to revise it. Such a power of revision is limited to cases provided for by section 9, which relates to an estimate given by the plaintiff of the annual net profits of the land or the market value of the land, house or garden as mentioned in section 7, paragraphs V and VI.

Plaintiff sued for the cancellation and delivery up of a mortgage bond for Rs. 4,000, executed in defendant's favour, for which, it was alleged, no consideration had been paid by defendant. The relief claimed was valued in the verified plaint at Rs. 50:

Held, that the Court could not revise the valuation or decline to accept the plaint.

SUIT for the cancellation and delivery up of a mortgage bond for Rs. 4,000 executed by plaintiff to defendant. The relief sought was valued in the verified plaint at Rs. 50. Plaintiff's case was

* Civil Miscellaneous Appeal No. 77 of 1903, presented against the decree of Vernor A. Brodie, District Judge of Coimbatore, in Appeal Suit No. 157 of 1901, presented against the decree of T. T. Rangachariar, District Munsif of Erode, in Original Suit No. 542 of 1900.

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that she was in need of funds after her husband's death, that an agreement was entered into between her and defendant that plaintiff should execute a mortgage deed for Rs. 4,000 in defendant's favour mortgaging land to him, and that plaintiff should receive the consideration after the document had been registered. Plaintiff now alleged that she had executed the mortgage and that it had been registered, but that defendant had not paid the consideration and refused to return the document; she asked for a declaration that the mortgage had not been completed and for an order for the delivery of the document to her. The District Munsif held that in cases under section 7, paragraph IV (*c*) of the Court Fees Act, the valuation given by the plaintiff is the valuation to be accepted by the Court. He found that no consideration had been paid by defendant for the mortgage and ordered it to be delivered to plaintiff. Defendant appealed to the District Judge, who considered in the first instance the question of the value placed by plaintiff on the relief sought in the suit. He held that the suit fell under section 7, paragraph IV, clause (*c*) of the Court Fees Act, and that the proper valuation was Rs. 4,000, and that the lower Court had no jurisdiction to try it. He allowed the appeal and dismissed the suit, and ordered the plaint to be returned to plaintiff for presentation to the proper Court.

Plaintiff preferred this second appeal.

Rangachariar for appellant.

JUDGMENT.—The plaintiff sues, in effect, for the cancellation and delivery up of a mortgage bond for Rs. 4,000 executed by her to the defendant and for purposes of Court fees and jurisdiction the plaintiff valued in the plaint the relief sought at Rs. 50 and verified the same as part of the plaint.

The District Judge is right in holding that the suit falls under section 7, paragraph IV (*c*) of the Court Fees Act and not paragraph IV (*a*), but he holds that the valuation of Rs. 50 given by the plaintiff cannot be accepted, and that the true valuation is the amount of the mortgage bond, viz., Rs. 4,000, as mentioned in the plaint. We are clearly of opinion that in cases falling under section 7, paragraph IV, the law expressly provides (and only in that class of suits) that the plaintiff should state in the plaint itself under the sanction of verification the amount at which he values the relief sought, and the Court has no jurisdiction to decline to accept the same or to revise it, a power which is limited to cases

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provided for by section 9 which relates to an estimate given by the plaintiff of the annual net profits of the land or the market-value of the land, house or garden as mentioned in section 7, paragraphs V and VI. If the relief prayed for consequential upon the declaration be the recovery of any of the matters mentioned in paragraphs I, II, III, V, VI, VII, VIII, IX, X, and XI of section 7, the mode of valuing the relief is regulated by the legislature itself in those paragraphs and in such cases the plaintiff must value the relief sought accordingly.

Turning now to the Suit Valuation Act (Act VII of 1887) it will be observed that, under section 8, the valuation given by the plaintiff in the case of suits falling under paragraph IV of section 7 of the Court Fees Act, shall also be the *valuation* for purposes of jurisdiction. Section IX provides *inter alia* that it is competent to the High Court with the previous sanction of the Local Government to frame rules for the valuation of suits referred to in paragraph IV of section 7 of the Court Fees Act and for determining the jurisdiction of Courts, but no such rules have been framed applicable to the cancellation and delivery up of an instrument in writing. Until such a rule is framed the valuation given in the plaint by the plaintiff cannot be revised (*Samiya Mavali* v. *Minammal*(1) and *Guruvajamma* v. *Venkatakrishnama Chetti*(2)).

We therefore reverse the order of the District Judge dismissing the suit and returning the plaint and remand the case to him for hearing and disposal according to law.

The costs of this appeal will be costs in the cause.

(1) I.L.R., 23 Mad., 190. (2) I.L.R., 24 Mad., 34.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Benson, Mr. Justice Bhashyam Ayyangar and Mr. Justice Russell.

ZAMINDAR OF ETTAYAPURAM (SECOND DEFENDANT), APPELLANT,

v.

SANKARAPPA REDDIAR (PLAINTIFF), RESPONDENT.*

1903. October 30. November 10, 18.

Rent Recovery (Madras) Act—VIII of 1865, ss. 7, 38, 39, 40, 78—Landlord's right to sell by summary process—Dependent on observance of special provisions of Act— Infringement of tenant's rights at common law where special provisions not observed—Tenant's right of action—Effect of the Statute on that right.

Under the common law, a land-holder has no right to sell his tenant's interest in the land for arrears of rent in a summary way. That right is given only by the Rent Recovery Act, and prior to exercising it the landholder must have complied with the special provisions of the Act as to tender of proper patta and exchange of patta and muchilika. Where a landholder who has not complied with these provisions summarily sells his tenant's interest in the land, he violates the tenant's right. Such violation is actionable in a Civil Court as an infringement of a common law right, and that right of action is not taken away by the Statute. The special remedy given to a tenant by section 40 of the Rent Recovery Act is cumulative, and it is open to a tenant to adopt it if he prefers it to the ordinary proceedings in a Civil Court. Though section 78 of the Rent Recovery Act only refers to the recovery of damages, the ancillary remedies of declaration and injunction would lie even if the only right to object to an attachment were that which is given by that Act. These remedies are clearly available where the right is one at common law.

Mahomed v. *Lakshmipati*, (I.L.R., 10 Mad., 368), commented on.

Ramayyar v. *Vedachella*, (I.L.R., 14 Mad., 441), approved.

The question of limitation discussed.

Where the purchaser of a tenant's interest in land takes, without demur, patta in the name of his vendor, it will not be open to him to object to that patta (in a suit for a declaration that an attachment was invalid) unless he has given timely notice to the landlord claiming that his own name should be entered in the patta.

Ekambara Ayyar v. *Meenatchi Ammal*, (I.L.R., 27 Mad., 401), and *Sree Sankarachari Swamiar* v. *Varada Pillai*, (I.L.R., 27 Mad., 332), referred to.

SUIT by a tenant for a declaration that an attachment made by his landlord for arrears of rent was invalid. Plaintiff alleged that

* Second Appeal No. 283 of 1902 presented against the decree of S. Doraisamy Ayyangar, Subordinate Judge of Tinnevelly, in Appeal Suit No. 121 of 1901, presented against the decree of S. Authinarayana Ayyar, District Munsif of Satur, in Original Suit No. 318 of 1900.

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first defendant had sold his interest in the lands in suit to him 14 years ago, though the first defendant was still described as pattadar in the landlord's registers. Plaintiff contended that second defendant, the landlord, had improperly attached a portion of the land for arrears of rent, and that the attachment was invalid. He prayed for a declaration to that effect. First defendant remained *ex parte*. The District Munsif made the declaration, and the Subordinate Judge confirmed it, on appeal.

Second defendant preferred this second appeal.

V. Krishnasramy Ayyar and *M. R. Ramakrishna Ayyar* for appellant.

P. R. Sundara Ayyar and *K. N. Ayya* for respondent.

The case first came before the Officiating Chief Justice (Sir Subrahmania Ayyar) and Russell, J., who made the following

ORDER OF REFERENCE TO A FULL BENCH:—Sir SUBRAHMANIA AYYAR, OFFG. C.J.—Under the common law, the defendant, as landholder is, of course, not entitled to sell the plaintiff's interest in the land in respect of which rent is due, in a summary way. Such a right to sell by summary process is given to a landholder in the position of the defendant only by the Rent Recovery Act (VIII of 1865), sections 38 to 40. But the exercise of this right is, among other things, subject to the condition that prior to taking the process the landholder has followed the provisions of section 7 of the Act as to the exchange of patta and muchilika or the tender of such a patta as the tenant was bound to accept.

The substance of the plaint in the present case is that, though the defendant had not conformed to the provisions of the said section 7, he was yet proceeding to sell the plaintiff's interest in the land. If this be true, the defendant's action, in proceeding summarily against the plaintiff's land, would be a violation of the plaintiff's right as owner of the land and would be actionable in courts as an infringement of a common law right. This right of action will be available unless it is taken away by statute expressly or by necessary implication.

The provisions of section 40, which enable a tenant, whose interest in immoveable property the landholder is seeking to attach and sell, to institute a summary suit before the Collector by way of appeal against the attachment, obviously cannot be held to deprive the tenant of his remedies under the general law, in

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respect of what, in theabsence of a strict adherence to the provisions of the Rent Recovery Act, would be a derogation of the plaintiff's right under the common law. The special remedy of a summary suit before the Collector must, according to the well recognized canon of construction applicable to such cases (see per Willes, J., in *Wolverhampton Water Works Company* v. *Hawkesford*(1)), be held merely to be a cumulative remedy which it is open to the tenant to pursue if he think fit to do so in preference to proceeding in the ordinary courts.

That the legislature has left no room for doubt on the point is clear from section 78 of the Act, which provides that nothing in the Act shall be construed to debar any person from proceeding in the ordinary tribunals to recover money paid or to obtain damages in respect of anything professedly done under the authority of the Act. It is true this section does not refer to specific relief such as a declaration or an injunction. I cannot, however, agree in the contention that this section by implication takes away a party's right to obtain remedies other than that of an action for damages in cases where damages would not be the adequate remedy. The manifest object of the section was to lay down that a party aggrieved by proceedings taken under the Act is not confined to the special remedies given by it, but that he is at liberty to proceed in the Civil Courts; and the reference to damages only was probably because ordinarily award of damages would meet the requirements of justice. It would be most unreasonable to construe a provision intended to leave untouched a suit for damages, as depriving the injured party of a remedy by injunction or otherwise, even if the latter were the only adequate remedy in the circumstances of the case.

Suppose, for instance, a landholder is taking steps under section 45 to have the tenant arrested for alleged non-payment of rent, while the existence or the amount of arrears is not admitted, must the tenant wait to be arrested and after arrest claim under section 47 to be produced before the functionary who issued the warrant, to establish his contentions? Is it not open to him to anticipate the landholder's proceedings by suing in the ordinary courts for an adjudication on the points involved and pending such adjudication to restrain the landholder from

(1) 28 L.J.C.P., 242.

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proceeding under section 45? Surely the answer to this question must be in the affirmative. The arrest of a tenant at the instance of a landholder, when no rent was recoverable, as for instance where no proper patta had been tendered or where no rent was due, would, of course, be a serious violation of the tenant's personal right under the common law, and it would be impossible to contend that an injunction cannot be obtained against the threatened invasion of such a right, simply because a special remedy is given when, under colour of the Act, the invasion has been accomplished.

Cooper v. *Whittingham*(1) and *Hayward* v. *East London Water Works Company*(2) throw light upon the view that ought to be taken in such cases. In *Cooper* v. *Whittingham*(1) the plaintiff sued, among other things, for an injunction to restrain the defendants from importing certain pirated copies of a copyright work. Such importation was prohibited by the 17th section of the Copyright Act, 1842 (5 & 6 Vict., cap. 45), which section also enacted a particular penalty in respect of the act prohibited, viz., £10 for each offence and a sum double the value of the forfeited copies, half the former and the whole of the latter being made payable to the proprietor of the copyright. The objection that the imposition of such a penalty precluded the injured person from claiming the remedy by way of injunction was considered untenable by Jessel, M.R. His observations, so far as they are necessary here, were as follows:—"It was said . . . . that where a new offence and a penalty for it had been created by statute, a person proceeding under the statute was confined to the recovery of the penalty and that nothing else could be asked for. That is true as a general rule of law, but there are two exceptions. The first of the exceptions is the ancillary remedy in equity by injunction to protect a right. That is a mode of preventing that being done which if done would be an offence. Whenever an act is illegal and is threatened, the Court will interfere and prevent the act being done; and as regards the mode of granting an injunction the Court will grant it either when the illegal act is threatened but has not actually been done or when it has been done and seemingly is intended to be repeated." In *Hayward* v. *East London Water Works Company*(2) Chitty, J., adopted the same view of the law observing (at p. 146) "I see no reason why

(1) L.R., 15 Ch.D., 501.

(2) L.R., 28 Ch.D., 138 at p. 146.

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the Court should refuse to protect a right by injunction merely because it is a statutory right."

It follows that even if the right to object to the attachment were no more than a right under the Rent Recovery Act a suit to obtain the ancillary remedies of declaration and injunction would lie. That must be equally, if not *a fortiori*, so when the right is a common law right notwithstanding it is invaded under colour of the statute and notwithstanding that a particular remedy is given by the statute for what is done in contravention of its provisions.

If the construction of section 78 contended for were well-founded, a suit in a civil court to set aside a sale improperly brought about under sections 38 to 40 would also not be sustainable. But *Nattu Achalai Ayyangar* v. *Parthasaradi Pillai*(1) is a ruling to the contrary, the defect in the sale on which the judgment is rested being want of due service of the prescribed notice on the defaulter. If this decision is correct, as it certainly seems to be, it is difficult to understand why a tenant should not be at liberty to avert an improper sale by suing in the Court for a declaration of the invalidity of the attachment; in other words, to set it aside; though it was apparently held otherwise in *Mahomed* v. *Lakshmipati*(2). It must be confessed that it is not easy to follow the reasoning in the last mentioned case. Is the ground of the decision, that an improper attachment under sections 38—40 does not, in the absence of actual pecuniary loss, amount to an actionable wrong, or is it that the sole remedy available under the law in respect of such attachment is a summary suit before the Collector? In either case, for reasons already stated, I find myself unable to agree in the conclusion arrived at by the learned Judges.

It only remains, in this connection, to notice the argument founded on the fact that a suit such as the present would be subject, not to the special and short period of limitation prescribed by the Rent Recovery Act, but to the 6 years period under article 120 of the Limitation Act. Though at first sight this may seem calculated to countenance want of due diligence on the part of persons objecting to attachments like that under consideration, yet a moment's reflection will show that such will not be its practical effect; for the plaintiff in such a suit must be as prompt as if he were proceeding by way of appeal before the Revenue Courts

(1) I.L.R., 3 Mad., 114.

(2) I.L.R., 10 Mad., 368.

under section 40, and if no suit is instituted within the month to set aside the attachment and avert the sale, the landholder could get the land sold, and subsequent to the sale no suit in respect of the attachment would lie, for the simple reason that there is no subsisting attachment to be set aside. That a civil suit to set aside a sale which has taken place, lies, has, as already pointed out, been held; and the period of limitation for such a suit being one year only, I fail to see any real force in the above argument. Even if there were any force, it is difficult to perceive how that alone could warrant our adopting a different conclusion.

The next question is as to whether the patta relied on by the defendant was open to objection on the ground that it runs in the name of the plaintiff's vendor instead of that of the plaintiff. On behalf of the defendant it was alleged that notwithstanding the sale of the land to the plaintiff many years ago, pattas running in the name of the vendor had been tendered to and accepted by him till now. Probably the officers of the Court of Wards, who were in charge of the defendant's zamindari at the time of the sale and subsequently, following the practice prevailing in respect of Government ryotwary lands of not altering the registry except on the application of the parties concerned, continued to make out the patta in the name of the plaintiff's vendor, instead of that of the plaintiff, who, it is alleged, had not applied for the change. Be this as it may, if the plaintiff had, subsequent to the purchase, taken without demur, as asserted on behalf the defendant, pattas in the name of the vendor, it would not be open to him to object to the present patta unless he could show that he had given timely intimation to the defendant that his own name should be inserted in the patta (*Ekambara Ayyar* v. *Meenatchi Ammal*(1) and *Sree Sankaracharl Swamiar* v. *Varada Pillai*(2)).

Nor could the proceedings taken by the defendant to have the plaintiff's interest sold be invalid for the reason that the notice prescribed by section 38, which was actually served on the plaintiff, purported to be addressed to the vendor of the plaintiff instead of to him, for in so doing, the defendant acted but in conformity with the frame of the patta, and the plaintiff would be precluded from objecting to such a notice for the same reasons that would preclude his objecting to the patta itself. In the view that the

(1) I.L.R., 27 Mad., 401. (2) I.L.R., 27 Mad., 332.

service of the notice was the initiation of public proceedings for the sale of the plaintiff's interest in the land, such service may be taken to stand on the same footing as service of process in suits; and the present instance is not without analogy to cases of misnomer in judicial proceedings. In *Meredith* v. *Hodges*(1) it was long ago held that a defendant is estopped, by the recognizance of bail entered into for him by the name in which he issued, from pleading a misnomer, though he himself be no party to the recognizance, on the ground that the act of appearing by putting in bail must be considered as the defendant's own act. The matter was fully gone into in *Fisher* v. *Magnay*(2), where Tindal, C.J., and Coltman, Erskine and Cresswell, JJ., held that where a party is sued by a wrong name and suffers judgment to go against him without attempting to rectify the mistake, he cannot afterwards, in an action against the sheriff for false imprisonment, complain of an execution issued against him by that name. In the course of his judgment, Coltman, J., observed:—"It appears from *Crawford* v. *Satchwell*(3) that after judgment against a party by a given name the writ must issue in the same name, for the writ must follow the judgment." Similarly, therefore, it must be held that in proceedings taken under the Act with reference to a patta, no objection could be taken to the description of the tenant in such proceedings if it follows what is in the patta, and the tenant is precluded from objecting to the description in the patta itself.

RUSSELL, J.—The plaintiff in this case is a tenant with a saleable interest in his land. The second defendant is the landlord. The first defendant sold his interest to the plaintiff in 1885 but still remains the 'pattadar' in the landlord's registers.

The prayer in the plaint is that the Court will be pleased to pass a decree declaring the invalidity of the attachment made by the second defendant for arrears of rent for fasli 1308. The second defendant has proceeded under section 38 of Act VIII of 1865 to sell the plaintiff's interest in the land.

The relation of landlord and tenant, I think, admittedly exists between the plaintiff and the second defendant. The first defendant claims to have no interest in the suit. He has been *ex parte*. I

(1) 2 B. & P., 453. (2) 6 S.N.R., 588.
(3) 2 Str. R., 1218.

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do not agree with the District Munsif on this point. The plaintiff and the first defendant cannot both be tenants, and no one contends that the first defendant is. Hence the plaintiff must be.

The grounds on which the plaintiff asks for a decree are:—

(1) that the second defendant "did not grant patta to the plaintiff,"

(2) "improperly attached" the said land, still allowing the patta to stand in the name of the first defendant.

The issues raised in the case are:—

i. Whether the attachment for arrears of rent of the plaint lands is valid or not as against the plaintiff?

ii. Whether the plaintiff applied and the second defendant refused to transfer patta to the name of the plaintiff?

iii. Whether there is or is not the relationship of landlord and tenant between the second defendant and the plaintiff?

iv. Whether the plaintiff is estopped by his conduct from denying that he is the second defendant's tenant?

The two lower Courts have decreed in the plaintiff's favour. The landlord, the second defendant, appeals.

A point has been taken in appeal, which has not been raised in the Courts below to the effect that the plaintiff has no right to bring this suit in the Civil Court. It is argued that his only remedy is by way of appeal to the Collector under section 40, Act VIII of 1865. This point must be decided with reference to the principles laid down in the Full Bench ruling of this Court in *Ramayyar* v. *Vedachalla*(1): "Where a statute creates a new offence or gives a new right and prescribes a particular penalty or special remedy, no other remedy can, in the absence of evidence of a contrary intention, be resorted to; but where a statute is confirmatory of a pre-existing right the new remedy is presumed as cumulative or alternative unless an intention to the contrary appears from some other part of the statute." Again, "The key to the construction of Act VIII of 1865 is the existence of two coincident processes, one called summary and the other regular." No doubt the plaintiff has a remedy in the present case under section 41, Act VIII of 1865, but has he not also a remedy under the general or common law? His allegation, in substance, amounts to this, that the second defendant is interfering in an illegal manner with his interest in the

(1) I.L.R., 14 Mad., 441.

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lands in suit and he asks the Court for a declaration that such interference is improper. The plaintiff is, I think, unquestionably entitled to bring such a suit in the ordinary Civil Courts. He is also, I think, entitled to pursue his remedy under section 41, Act VIII of 1865, if he wishes.

That being so, the question is whether the plaintiff is entitled to succeed in this suit. It is admitted that the lands have never been transferred to the plaintiff's name by the second defendant. It is alleged by the second defendant that up till Fasli 1308, the patta, though issued in the name of the first defendant, was "received fasliwar by plaintiff, plaintiff's son and plaintiff's undivided brother Subbah Reddy" and the rent was being regularly paid without any arears till recently.

There is no issue and no finding on the question whether there was a tender to the plaintiff for the Fasli 1308. The only objection to the patta, I take it, is that the first defendant's name is entered therein instead of the plaintiff's name and both the Courts find that such a patta is not a proper one. Assuming that pattas drawn up in precisely the same manner had been accepted for a series of years previous to Fasli 1308, in respect of this holding, then, I consider that the plaintiff would in this suit be estopped from asserting that the patta is improper.

Under such circumstances, if there was a tender of the patta to the plaintiff, though it ran in the name of the first defendant, it would not be open to the plaintiff now to object to it. This seems to me to be in principle what was decided by the Court in *Sree Sankarachari Swamiar* v. *Varada Pillai*(1) and also in *Govinda Setti* v. *Sreenivasa Row Sahib*(2):

Before the appeal can be decided it is necessary to have findings on the following issues:—

i. Whether there was a tender of patta to the plaintiff such as is referred to in section 7, cl. 2, Act VIII of 1865.

ii. Whether the patta tendered to the plaintiff is the same as that tendered to, and accepted by, the plaintiff in previous years.

A further question is raised, namely, whether the procedure followed by the second defendant is valid with reference to section 39 of the Act.

(1) I.L.R., 27 Mad., 332. (2) Second Appeal No. 1331 of 1901 (unreported).

It is found that the "written notice" was served upon the plaintiff, but it ran in the name of the first defendant. With reference to the remarks made above, I would hold that if the plaintiff has allowed himself to be treated as the tenant for a series of years it would not now be open to him in this suit to say that he was not the "defaulter." On the contrary, I think if, as both the plaintiff and the second defendant admit, the plaintiff is the tenant, he must be the defaulter when there is an arrear. I would hold therefore that "written notice" has been served on the defaulter.

Another question raised is whether this written notice has been given by the "person to whom an arrear is due." The Subordinate Judge does not give a definite judgment on the point, but it appears to me the plaintiff had no doubt that the notice came from the landlord, though signed by the karnam, who is stated to be an amin of the second defendant. It has not appeared during the course of the suit that the notice was not issued in the regular manner usual in the zamindari. Provided, therefore, that there was a tender of such a patta as the plaintiff was bound to accept, it appears to me the second defendant's procedure has been quite regular and the plaintiff's suit must fail.

If there was no such tender, the plaintiff would succeed.

I would remand the case for a finding on the issues mentioned above. Costs would abide the result.

The case of *Mahomed* v. *Lakshmipati*(1) was not cited at the bar and did not come to my notice before I wrote the above judgment. I agree to the reference to the Full Bench.

Sir SUBRAHMANIA AYYAR, OFFG. C.J., and RUSSELL, J.—Before disposing of the case we must, as the view that the present suit is sustainable is in conflict with the case of *Mahomed* v. *Lakshmipati*(1) refer for the opinion of the Full Bench, the following question:—

Is the present suit sustainable in law?

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

V. Krishnaswamy Ayyar and *M. R. Ramakrishna Ayyar* for appellant.

(1) I.L.R., 10 Mad., 368.

P. R. Sundara Ayyar and *K. N. Ayya* for respondent.

The Court expressed the following

OPINION.—We are of opinion that the present suit is sustainable in law for the reasons stated in the order of reference. The correctness of the general principle stated in *Ramayyar* v. *Vedachalla*(1), viz., that "where a statute creates a new offence or gives a new right and prescribes a particular penalty or special remedy, no other remedy can, in the absence of evidence of a contrary intention, be resorted to; but where a statute is confirmatory of a pre-existing right the new remedy is presumed as cumulative or alternative unless an intention to the contrary appears from some other part of the statute" is not contested. The right which the plaintiff seeks to vindicate in this suit is undoubtedly a right which existed independently of Act VIII of 1865, and the only question, therefore, is whether the remedy by which he seeks in a Civil Court to protect his common law right of property against invasion by the defendant, under colour of Act VIII of 1865, which confers special rights on landholders, is clearly taken away, and the summary remedy provided by section 40 of that Act, is substituted therefor.

The chief argument is that under section 40 the landholder is authorized to take measures for bringing the tenant's property to sale for recovering arrears of rent, if and when no appeal has been made to the Collector against the attachment within one month from the date of the attachment, and that it, therefore, follows from this provision that the sale of the property in default of such appeal is lawful, and therefore cannot be forbidden by any Court.

In our opinion such a construction of the section is far-fetched and unwarranted. The object of the section simply is to authorize the landlord to send a notice to the Collector under section 16 of the Act, with a view to the property being brought to sale. Reliance also is placed on section 78 of the Act which, by way of precaution, saves the common law remedy by resort to the ordinary tribunals to recover money paid or damages in respect of anything purporting to be done under the authority of the Act. The argument is that the omission in the section to expressly save remedies other than the recovery of money or damages, does by implication take away any other remedy, such as by injunction or declaration. For the

(1) I.L.R., 14 Mad., 441.

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reason stated by the learned Officiating Chief Justice in the order of reference, we cannot accede to the contention that the common law remedy by way of specific relief is taken away by necessary implication.

In addition to the cases cited in the order of reference, we may refer to the decision in *Shuttrughon Das Coomar* v. *Hokna Showtal*(1) in which it was held that a suit for compensation for wrongful seizure of cattle will lie in a Civil Court notwithstanding that under the Cattle Trespass Act, I of 1871, a special remedy is provided for the recovery of compensation by resorting to the Magistrate. See also *Shankar Sahai* v. *Din Dial*(2).

If the decision in *Mahomed* v. *Lakshmipati*(3) is in conflict with our view in this case, we are unable to accept it as correct.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1903. November 30.

SESHAGIRI ROW (PLAINTIFF), APPELLANT,

v.

NAWAB ASKUR JUNG (DEFENDANT), RESPONDENT.*

Letters Patent—Art. 12—"Cause of action"—Promise made out of the jurisdiction of High Court to pay within the jurisdiction—Breach—Suit on Original Side—Jurisdiction.

Defendant, at Hyderabad, undertook (as was assumed for the purposes of the case) to pay plaintiff within the jurisdiction of the Madras High Court a sum of money alleged to be due for services which had been rendered at Hyderabad or other places outside the jurisdiction. The alleged promise had not been performed and plaintiff brought this suit on the Original Side of the Madras High Court, no leave having been obtained:

Held, that the Court had no jurisdiction to try the suit. The words "cause of action" in article 12 of the Letters Patent, mean all those things which are necessary to give a right of action, and in a suit for a breach of contract the High Court has no jurisdiction, where leave has not been obtained, unless it is proved that the contract as well as the breach of it occurred within the local limits of it jurisdiction.

(1) I.L.R., 16 Calc., 159. (2) I.L.R., 12 All., 409.
(3) I.L.R., 10 Mad. 368.

* Original Side Appeal No. 9 of 1903 presented against the decree of Mr. Justice Boddam in Original Suit No. 97 of 1902.

SESHAGIRI ROW v. NAWAB ASKUR JUNG.

SUIT for money. Plaintiff sued defendant for remuneration for services alleged to have been rendered by plaintiff to defendant. The case only came before the Court at this stage on the question of jurisdiction, the facts, for the purpose of deciding this question, being assumed to be as follows:—The alleged services had been rendered at Hyderabad and other places outside of the jurisdiction of the Original Side of the High Court. The alleged promise had been made in Hyderabad, and by it, defendant had undertaken to pay to plaintiff in Madras the amount due. This promise had not been performed. Leave to institute the suit had not been obtained. The learned Judge, sitting on the Original Side, delivered the following judgment:—"In this case, it is admitted that the contract was made in Hyderabad. The plaintiff's cause of action is stated to be a promise made in Hyderabad by the defendant to pay the plaintiff in Madras Rs. 25,000 for work said to have been previously done by the plaintiff for the defendant at Hyderabad and elsewhere outside the jurisdiction of this Court. The contention on the part of the plaintiff is that inasmuch as there has been a breach of the promise to pay in Madras, this Court has jurisdiction without leave having been obtained to sue here irrespective of where the promise was made, that the breach of contract constitutes the whole cause of action irrespective of where the contract was made. I am of opinion that the words in article 12 of the Letters Patent "cause of action" mean all those things which are necessary to give a right of action and that in a suit for breach of contract, this Court has no jurisdiction where leave has not been given unless it is proved that the contract as well as the breach of it occurred within the local limits of the Court." He dismissed the suit.

Plaintiff preferred this appeal.

Mr. *D. Chamier*, for appellant, cited the judgment of Holloway, J., in *DeSouza* v. *Coles*(1), *Luckmee Chund* v. *Zorawur Mull*(2), *Muhammad Abdul Kadar* v. *East Indian Railway Company*(3).

The Advocate-General (Hon. Mr. *J. P. Wallis*) for respondent, was not called upon.

JUDGMENT.—We think that the view of the learned Judge is correct (*Mulchand Joharimal* v. *Suganchand Shivdas*(4)) and is in

(1) 3 Mad. H.C.R., 384 at p. 407. (2) 8 Moo. I.A., 291.
(3) I.L.R., 1 Mad., 375. (4) I.L.R., 1 Bom., 23.

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accordance with the preponderance of authority as to the meaning of the words "cause of action" in article 12 of the Letters Patent. We dismiss the appeal with costs.

Attorney for the appellant—Mr. *S. Subbayya Chetti.*

Attorney for the respondent—Mr. *James Short.*

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Offg. Chief Justice, Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1903. December 2.

ISACK JESUDASEN PILLAI (PETITIONER), APPELLANT,

v.

DIVAN BAHADUR RAMASAMY CHETTY (OFFICIAL LIQUIDATOR OF THE MADRAS BUILDING SOCIETY), RESPONDENT.*

Indian Companies Act—VI of 1882, s. 156—Notice to creditors to prove claims—Failure by creditor to prove within time limited—Claimant excluded from benefit of previous distribution.

A creditor of a company in liquidation failed to bring in his claim by the date announced by the official liquidator for claims to be made. He subsequently applied that his claim might be admitted:

Held, that the creditor was not precluded from coming in at a later stage. The only penalty for failure to come in within the time stated in the notice was that prescribed by the latter part of the section, namely, that the claimant would be excluded from the benefit of any distribution made before his debt was proved.

CLAIM by a creditor of a company in liquidation to share in distribution of assets. The official liquidator of the company advertised on 7th April 1902 that creditors were required to prove their debts or claims on or before 4th August 1902, and that, in default, they would be excluded from the benefit of any distribution made before such debts should be proved. Petitioner failed to lodge his claim before the date fixed. Subsequently he applied by summons in Chambers to be permitted to rank as a claimant against the assets of the company. The summons was dismissed.

Petitioner preferred this appeal.

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* Original Side Appeal No. 16 of 1903, presented against the order of Mr. Justice Boddam, dated the 1st day of May 1903, on Miscellaneous Petition No. 4 of 1901.

ISACK JESUDASEN PILLAI v. RAMASAMY CHETTY

Mr. *D. Chamier*, for appellant, contended that the applicant was entitled to have his claim admitted. If assets should have been already distributed, the creditor would lose his share in the distribution. He referred to *General Rolling Stock Company's Claim*(1).

Mr. *Nugent Grant*, for the respondent, took the preliminary objection that the notice required by section 169 had not been duly given. He also contended that the petitioner should sue under section 136, with leave of the Court, and opposed the application.

JUDGMENT.—A preliminary objection is taken that notice was not given within the three weeks required by section 169 of the Company's Act VI of 1882. Without deciding what this "notice" is, we think that if such notice is necessary, the present is a fit case for extension of the time.

We accordingly extend the time to the 27th July 1903, the date on which notice was, in fact, given.

On the merits we think that the order of the learned Judge dismissing the petition is wrong.

The petitioner admittedly failed to bring forward his claim within the time fixed in the notice published under section 156 of the Act; but this omission does not preclude him from coming in at a later stage to prove his claim, nor does it necessitate his resorting to a suit to be instituted with special leave of the Court under section 136, as contended by Counsel for the official liquidator. The only penalty for failure to come in within the time stated in the notice is the penalty prescribed in the latter part of section 156, viz., that the claimant is "excluded from the benefit of any distribution made before such debts are proved," that is, he can only claim a proportionate share in such assets as may remain undistributed at the time when he proves his claim and without disturbing any distribution made before such proof. This was decided in the case of *General Rolling Stock Company Joint Stock Discount Company's Claim*(1) in regard to the English Companies Act, 1862, the provisions of which are substantially the same as those of the Indian Act. The claimant in the present case is admittedly a creditor of the company.

We must, therefore, set aside the order of the learned Judge and direct that the claim of the petitioner be entertained by the liquidator and disposed of according to law.

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(1) L.R., 7 Ch., 646.

ISAAK JESUDASEN PILLAI v. RAMASAMY CHETTY.

Each party will bear his costs hitherto incurred before the learned Judge and the taxed costs of this appeal will be paid to the appellant by the respondent. The taxed costs of the official liquidator as between attorney and client is to be paid out of the fund.

Messrs. *Grant & Grealorex*, attorneys, for the liquidator.

Messrs. *Branson & Branson*, attorneys, for petitioner.

APPELLATE CIVIL.

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

1902. December 19, 23.

MUTHUMEENAKSHI AMMAL (PLAINTIFF), APPELLANT,

v.

CHENDRA SEKHARA AYYAR AND TWO OTHERS (DEFENDANTS NOS. 2, 3 AND 6), RESPONDENTS.*

Hindu law—Partition between father and sons—Stipulation that father and junior wife should "hold and enjoy" the father's share—Effect—Construction of gifts to wives under Hindu law.

The general rule of Hindu law with regard to the construction of gifts by Hindus in favour of their wives is that the wife should not be deemed to take an absolute estate unless it is clear that this was the intention of the donor.

By a deed of partition, entered into between a father and his sons by a senior wife, after a recital that the junior wife had no issue up to date, it was declared that the father and his junior wife should hold and enjoy certain of the family properties perpetually from that day forward from generation to generation with powers of alienation by sale, gift, mortgage or otherwise:

Held, that the parties intended that the junior wife should acquire an estate in the properties. The fact that she may not have been a co-parcener was immaterial. It was competent for the co-parceners who were entitled to participate in the partition to agree that the share of one of the co-parceners should be held jointly or in common with a party who otherwise would not have been entitled to participate in the partition.

Jogeswar Narain Deo v. *Ram Chandra Dutt*, (I.L.R., 23 Calc., 670), followed. *Seshayya* v. *Narasamma*, (I.L.R., 22 Mad., 337), distinguished.

Held, also, that the junior wife took as a tenant in common with her husband and that, after the death of the latter, she was entitled to a moiety of the property.

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* Second Appeal No. 1061 of 1901, presented against the decree of H. Moberly, District Judge of Madura, in Appeal Suit No. 428 of 1900, presented against the decree of V. Swaminatha Ayyar, District Munsif of Tirumangalam, in Original Suit No. 106 of 1900.

MUTHUMEENAKSHI AMMAL v. CHENDRA SEKHARA AYYAR.

SUIT for land. Plaintiff was the second wife of one Subbaraya Ayyar, who died in 1897. Defendants were his sons by his deceased first wife. On May 3rd, 1895, a deed of partition was entered into between Subbaraya Ayyar and the present defendants. Third defendant, the youngest son, who was then a minor, was represented by his father, as guardian. The partition deed (which was filed as exhibit A) contained the following (among other) terms:—

"Whereas the other three individuals are the sons of Subbaraya Ayyar among us by his senior wife, whereas the junior wife has no issue up to date and whereas all of us four have already divided and taken the moveable properties worth Rs. 40 and there are no other properties ancestral or self-acquired than the immoveable properties specified in the schedules hereunto annexed, we have effected partition as follows:—Subbaraya Ayyar and his junior wife shall hold and enjoy the properties specified in Schedule A; Parameswarier, those specified in Schedule B; Chandrasekarier those in Schedule C; and minor Venkatachelamier those in Schedule D,—perpetually from this day forward from generation to generation with powers of alienation by sale, gift, mortgage or otherwise; Rs. 164 shall be paid in common for the expenses of the education, nuptials, sreemantham, etc., of minor Venkatachelamier; the mortgage money Rs. 400 due under a registered document and the mortgage money Rs. 80 due under an unregistered document—in respect of Subbaraya Ayyar's share, in all Rs. 480 shall be paid and the share redeemed by said Subbaraya Ayyar himself; the said Parameswarier himself shall pay the mortgage money Rs. 40 due under an unregistered document in respect of the lands which fell to his share and redeem them and minor Venkatachelamier shall himself pay the registered mortgage money Rs. 500 and unregistered mortgage money Rs. 20 in all Rs. 520 in respect of the lands which fell to his share and redeem the lands. Subbaraya Ayyar shall himself pay off and discharge the simple debts common to the family. In having adjusted the differences in the qualities of these (lands), all of us four have settled that Parameswarier shall execute a mortgage bond for Rs. 400 in favour of minor Venkatachelamier in respect of the two plots Ottakaran and Mettuvayal among the lands which fell to his share, that Chandrasekarier shall execute a mortgage bond to Subbaraya Ayyar for Rs. 470 in respect of the three plots—Thulavadi, Vandi

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Erakkam and Karayoram among the lands which fell to his share. As legal proceedings have to be taken in connection with the land worth Rs. 100 belonging to Subbaraya Ayyar junior aunt Meenammal, all of us four shall equally contribute to its Court costs, etc., conduct proceedings and divide whatever is realized therein. As we have thus effected partition, we have only blood relationship hereafter and we have nothing to do with one another in regard to properties. To this effect is the deed of partition which all of us four have of our own free-will executed."

It was alleged in the plaint, and not traversed in the written statement, that the properties had been enjoyed, in accordance with the deed by the parties, respectively interested in them, and that plaintiff and her husband had enjoyed in-common the properties specified in schedule A of the partition deed. Plaintiff alleged that after her husband died defendants trespassed on those properties, and she now sued to recover them. Defendants pleaded that plaintiff was not entitled to succeed to the share of her husband after his death, and claimed that though they were divided sons they were entitled to succeed to their father's share as his immediate heirs. They admitted that plaintiff was entitled to maintenance. The first issue was:—"Whether, under the agreement of 3rd May 1895 the plaintiff is entitled to the properties?" He found that she was. He held that the effect of the deed was to create a joint tenancy in plaintiff and her husband and that on her husband's death plaintiff became solely entitled to the properties. He passed a decree in her favour. On appeal, the District Judge held that it was not the intention of the parties to the deed that plaintiff should take an absolute estate in the properties in question. He considered that she acquired no estate or interest in them under the deed on the grounds that as she was not a co-parcener she was not entitled to any share in the family estate, and that the sons had no power to stipulate that their father should enjoy his share jointly with his wife. He reversed the decree and dismissed the suit.

Plaintiff preferred this second appeal.

S. Srinivasa Ayyangar for *V. Krishnaswami Ayyar* for appellant.

P. R. Sundara Ayyar and *K. Kuppusami Ayyar* for respondent.

JUDGMENT.—Two questions are raised in this appeal. First, did the plaintiff acquire under the partition deed (exhibit A) any

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interest in the land partitioned? Secondly, if she did, what was the nature of that interest? The Court of First Instance held that the effect of the deed was to create a joint tenancy in the plaintiff and her husband in the lands in question and that on the death of the husband she became solely entitled to them by right of survivorship. The District Judge took the view that the plaintiff acquired no estate or interest in the lands in question under the deed on the grounds that as the plaintiff was not a co-parcener, she was not entitled to any share in the family estate and that the sons had no power to stipulate that their father should enjoy his share jointly with his wife. The general rule of law is no doubt correctly stated by the learned Judge, viz., that in the construction of gifts by Hindus in favour of their wives the rule is that the wife should not be deemed to take an absolute estate unless it is clear that this was the intention of the donor. On the construction of the document in the present case, we think the parties intended that the plaintiff should acquire an estate in the lands in question. The fact that the plaintiff was not a co-parcener (assuming she was not) is immaterial. It was competent for the co-parceners who were entitled to participate in the partition to agree that the share of one of the co-parceners should be held jointly or in common with a party who otherwise would not have been entitled to participate in the partition. If the agreement to divide among the co-parcener had been contained in one document and a subsequent deed of gift had been executed by one of the parties in respect of his share the transaction could not have been impeached by his former co-parceners. It makes no difference that the transaction was carried out by means of one document instead of two. The recital in the document that the three sons of Subbaraya Ayyar were sons by his senior wife and that the plaintiff (the junior wife) had no issue up to date goes to show that it was the intention of the parties that special provision should be made for the plaintiff in substitution for, or in addition to, her rights as a widow under the Hindu law. Mr. Sundara Ayyar, on behalf of the respondents, argued that the object of the instrument, so far as the plaintiff was concerned, was merely to show that she was not to have a right of maintenance as against her stepchildren. We are asked, on behalf of the respondents, to construe the document so as to give no effect to the words "and his junior wife." We do not think the document ought to be so construed. The words

used with reference to the plaintiff are the words which admittedly create an estate of inheritance in favour of the father and the three sons and we think they ought to be construed as having the same effect with reference to the plaintiff as they have with reference to the parties to the deed. The decision of the Privy Council in the case of *Jogeswar Narain Deo* v. *Ram Chandra Dutt*(1) is a strong authority in support of this view. The operative words of the document are clear and unambiguous, and the fact that, in later parts of the instrument, the husband's share is referred to without mention of the wife is not enough to warrant the deed being construed in such a way as to render the words and his junior wife entirely ineffective.

We think the case of *Seshayya* v. *Narasamma*(2) is clearly distinguishable from the present case In *Seshayya* v. *Narasamma*(2) a Hindu testator dealt with his residuary estate in these words "my daughter-in-law and grand-daughter shall receive half of my whole estate, and my wife and my adopted son shall receive the other half." It was held that the wife was not intended to take an absolute estate, or any other estate than she would have taken if there had been an intestacy. As regards the adopted son and the wife there was held to be an intestacy on the ground that a Hindu testator would not contemplate an intestacy as to a portion of his property or omit mention of the persons upon whom he wished it to devolve and that he would be obliged as he would think to name at least his adopted son, and the association of the wife with the son would be only natural. Assuming such an obligation would exist in the mind of a testator who was dealing with his property by will we fail to see why such an obligation should be present to the minds of the co-parceners who, in the present case, were dealing with the family estate by way of partition. Further, in *Seshayya* v. *Narasamma*(2) beyond the words "my wife and my adopted son shall receive the other half," there was nothing to indicate an intention on the part of the testator to create an estate of inheritance in favour of the wife and son. In the present case the deed in express terms gives powers of alienation to the parties mentioned in the deed. This, in itself, as it seems to us, is enough to negative the supposition that the parties to the deed intended to act in accordance with the "ordinary notions

(1) I.L.R., 23 Calc., 670. (2) I.L.R., 22 Mad., 357.

and wishes of Hindus regarding the devolution and enjoyment of family property."

In the present case one of the sons was a minor at the time the deed was executed, and the deed was executed by his father as his guardian. We think it was competent to the father as guardian to do this so as to bind the son. The minors *quantum* of interest in the estate is not affected by the fact that the father agreed to divide his own share with his wife.

As regards the second question,—does the plaintiff take jointly with her husband with a right of survivorship or as a tenant in common without a right of survivorship,—we think the point is concluded by authority. We are unable to distinguish the terms of the instrument in the present case from the terms of the bequest in the Privy Council case of *Jogeswar Narain Deo* v. *Ram Chandra Dutt*(1) where it was held, in effect over-ruling *Vydinada* v. *Nagammal*(2), that the estate created was a tenancy in common and not a joint tenancy with a right of survivorship. The principle of this Privy Council decision has been applied in *Siva Rau* v. *Vitla Bhatta*(3), *Kanthu Punja* v. *Vittamma*(4) and *Bai Diwali* v. *Patel Bechardas*(5). On principle it may not be easy to distinguish the judgment of the Privy Council in *Narpat Singh* v. *Mahomed Ali Hussain Khan*(6) from that in *Jogeswar Narain Deo* v. *Ram Chandra Dutt*(1), but we are bound by the later decision. The question involved in the recent decision of the Privy Council in *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu*(7) was one of the right of inheritance not of the construction of a document. The decision had reference to the nature of the estate which devolves upon members of a joint family who succeed to self-acquired property. There is nothing in the judgment which is in any way in conflict with the judgment in the case of *Jogeswar Narain Deo* v. *Ram Chandra Dutt*(1).

We are of opinion that under the deed (exhibit A) the plaintiff became tenant in common with her husband and that she is now entitled to a moiety of the lands in question with mesne profits thereof. Subject to this modification we restore the decree of the Munsif and allow the appeal. The parties will pay and

(1) I.L.R., 23 Calc., 670.
(2) I.L.R., 11 Mad., 258.
(3) I.L.R., 21 Mad., 425.
(4) I.L.R., 25 Mad., 385.
(5) I.L.R., 26 Bom., 445.
(6) I.L.R., 11 Calc., 1.
(7) I.L.R., 25 Mad., 678.

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receive proportionate costs throughout. The question of the amount of mesne profits and the question as to which of the defendants is liable will be determined in execution.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Russell.

1903. October 21, 22. November 4.

PARASURAMA AYYAR AND ANOTHER (FIRST AND SECOND PETITIONERS), APPELLANTS,

v.

SESHIER AND OTHERS (FIRST AND THIRD COUNTER-PETITIONERS AND THIRD AND FOURTH PETITIONERS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 622—Sale of property to satisfy order for rateable distribution—Rate varied on appeal—Application for restitution of property sold—Refusal—Appeal—Revision—Restitution.

Petitioner and counter-petitioners held decrees against the same judgment-debtor. Petitioner having realized a large sum in execution, the District Court held that petitioner and counter-petitioners were each entitled, on a rateable distribution, to about one-half of the entire sum realized. The District Court realized from petitioner the amount ordered to be paid to counter-petitioners, six items of property being attached and sold, counter-petitioners being the purchasers, and the sale being subsequently confirmed. The High Court then decided an appeal which had meanwhile been pending, the result of which was that counter-petitioners were held to be entitled to much less than they had been awarded by the District Court, and had received from petitioner. This sum was also less than had been realized by the sale of the six items of property. Petitioner, in consequence, applied to the District Court for restitution of the six items of property which had been sold by the Court and for other relief. The District Court held that the sale could not be set aside as a nullity and that the petitioner was only entitled to receive back the balance which had been paid in excess. On an appeal being preferred to the High Court:

Held, (1) that no appeal lay from the order of the District Court. The order was not a decree; the parties were not parties to a suit; and the order was not one from which a special right of appeal was allowed by the Code. The right of appeal must not be assumed to exist in every matter which comes under the consideration of a Judge, but must be given by statute or by some authority equivalent to statute. Nor does section 647 of the Code of Civil Procedure confer any right of appeal not expressly given elsewhere by the Code;

* Civil Miscellaneous Appeal No. 22 of 1903, presented against the order of F. H. Hamnett, District Judge of Coimbatore, in E.P. No. 72 of 1901, in Original Suit No. 11 of 1886.

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(2) that the High Court had no power to revise the order. The District Court had jurisdiction to decide the matter and had done so, though, perhaps, wrongly;

(3) that petitioner should have been held entitled to some restitution. The principle which should have been followed was: "The Court in making restitution is bound to restore the parties, so far as they can be restored, to the position which they were in at the time when the Court, by its erroneous action, had displaced them from it." Inasmuch as the property sold had realized more than was due under the Court's order, the sale was illegal at any rate in so far as it was unnecessary; and

Semble, that it was entirely illegal.

EXECUTION PETITION. Application for restitution of six items of property, mesne profits, damages and compensation for loss of interest. First petitioner was a decree-holder in Original Suit No. 11 of 1886. First and third counter-petitioners were decree-holders in Original Suits Nos. 18 and 29 of 1887. These decrees were against the same judgment-debtor. Petitioners realized Rs. 22,944-5-0 in execution, of which Rs. 271-14-0 were the proceeds of sale of moveables and the balance Rs. 22,672-7-0 was realized by the sale of immoveables. On 4th October 1895, the District Judge decided that first petitioner was entitled on a rateable distribution to Rs. 11,727-12-4, and the counter-petitioners to Rs. 11,216-8-8, the latter including a share in the proceeds realized from the sale of moveables and immoveables. The High Court decided that in Original Suit No. 29 of 1887, the defendant was entitled to share only in the proceeds realized on moveable property; and that in Original Suit of 1887 the defendant was entitled to share in the entire amount realized. The entire amount realized in execution had been paid to the petitioners, and pending the decision of the High Court last referred to, the District Judge realized from petitioner the amount referred to in his order of 4th October 1895. Six items of property were attached and sold on 27th January 1896 for Rs. 8,710, the sale being confirmed on 28th August 1896, the counter-petitioners being the purchasers. The consequence of the decision of the High Court in Original Suit No. 29 of 1887, already referred to, was that only Rs. 6,739-0-7 was due to counter-petitioners instead of the Rs. 11,216-8-8 which had, on 4th October 1895, been decided by the District Judge to be due to them. Petitioners now applied to the District Court for the relief already stated.

The District Judge held that as the sale of immoveables had been held in order to realize an amount that was really due,

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though that amount was not so large as it was at first supposed to be, and as the sale had long previously been confirmed, it could not be set aside as being a nullity, as prayed for, and all that petitioners were entitled to, in his opinion, was the balance of the amount realized that remained after paying off the amount it had been rightly held to realize. In other words, he said, all that this Court has to do in respect of Original Suits Nos. 18 and 29 (A.A.O. Nos. 17 and 18 of 1896), is to make a redistribution of the assets realized in execution of the decree in Original Suit No. 11 of 1886. This he did in his order.

Petitioners preferred this appeal.

Ramachandra Ayyar and *Krishnaswami Ayyar* for appellants.

Sivaswami Ayyar, *Sankara Ayyar*, and *Neelakanta Ayyar* for respondents.

JUDGMENT.—The first appellant, first petitioner, was decree-holder in Original Suit No. 11 of 1886. The first and second respondents, first and third counter-petitioners, were decree-holders in Original Suits Nos. 18 and 29 of 1887. These decrees were against the same judgment-debtor. In execution, the petitioners realized a net amount of Rs. 22,944–5–0, of which Rs. 271–14–0 were the proceeds of sale of moveables and the rest, Rs. 22,672–7–0, was realized by sale of immoveables. The District Judge, proceeding under section 295, Civil Procedure Code, determined by his order dated the 4th October 1895, in Civil Miscellaneous Petitions Nos. 189 and 190 of 1895 that the first petitioner, Parasurama Iyer, was entitled to Rs. 11,727–12–4 and the counter-petitioners were entitled to Rs. 11,216–8–8 on a rateable distribution. In arriving at this conclusion the District Judge allowed the counter-petitioners a share as regards the two decrees in Original Suits Nos. 18 and 29 of 1887 in the proceeds realized from both moveables and immoveables. In appeals against orders Nos. 17 and 18 of 1896 this Court decided that as to Original Suit No. 29 of 1887 the defendant was entitled to share only in the proceeds realized on moveable property, but as to Original Suit No. 18 of 1887 the defendant was entitled to share in the entire amount realized.

The entire amount realized in execution had been paid to the petitioners (appellants), and pending the decision of the appeals against orders Nos. 17 and 18 of 1896, the District Judge proceeded to realize by summary process from the petitioner the

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amount referred to in his order dated the 4th October 1895. Six items of property were attached and sold on the 27th January 1896 for Rs. 8,710. The sale was confirmed on the 28th August 1896. The counter-petitioners are the purchasers. In consequence of the decision in appeals against orders Nos. 17 and 18 of 1896, it followed that a very much smaller sum was due to the counter-petitioners than was settled on the 4th October 1895, namely, Rs. 11,216–8–8. The actual sum now found to be due to the counter-petitioners on a correct rateable distribution is Rs. 6,739–0–7.

As regards the figure 6,739–0–7 we are of opinion that the District Judge is correct when he states in paragraph 4 of his order now under consideration;—"In other words practically all this Court has to do in respect of appeals against orders Nos. 17 and 18 of 1896 is to make a redistribution of the assets realized in execution of the decree in Original Suit No. 11 of 1886," and this the District Judge has done correctly in paragraphs 4, 5 and 6 of the order.

The main point now to be considered is whether this Court can now order restitution of the six items of property brought to sale and purchased by the counter-petitioners on the 27th January 1896. It will be observed that the sale took place to recover Rs. 11,000 and odd, whereas after appeal the amount really due has been found to be only Rs. 6,000 and odd and the proceeds of sale was over Rs. 8,000.

This District Judge is of opinion that, as the sale "was held in order to realize an amount that was really due, though this amount was not so large as it was then supposed to be, and was long ago confirmed, the sale cannot be set aside as having been a nullity as prayed for, and all that the petitioners are entitled to in respect of it is the balance of the amount realized that remains after paying off the amount it was rightly held to realize." That the petitioner is entitled to restitution is clear. In what way ought he to get it? Should the entire sale have been set aside or only so much of it as was not necessary to satisfy the claim (it appears the property was sold in lots), or is the view of the District Judge to be accepted? This is a case of restitution as between the parties to the proceeding. The principle to be followed is this: "The Court in making restitution is bound to restore the parties so far as they can be restored to the same position they

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were in at the time when the Court by its erroneous action had displaced them from it." The leading case on the point of restitution is *Zain-ul-abdin Khan* v. *Muhammad Asghar Ali Khan*(1). The actual point therein decided is that a sale in so far as it is unnecessary to satisfy the decree passed on appeal is illegal when the defendant is the purchaser. Following the principle laid down in this case, a Bench of this Court recently stated that, in the case of decree-holders purchasing, the purchase is subject to the final result of the litigation . . . . There is no authority for the contention on behalf of the appellant that, when the property is knocked down for a sum equal to, or less than, that eventually found due, the rule has no application (*vide Syed Nathadu Sahib* v. *Nallu Mudaly*(2)). In the particular case that we are now considering, the entire property sold realized more than was due under the District Judge's order. There can be no doubt therefore that, following the Privy Council decisions, at least, the sale must be considered illegal in so far as it was unnecessary, and it seems to us that probably it was entirely illegal.

But it is argued for the counter-petitioners that, even if the District Judge was wrong in holding that the sale was not invalid, his order cannot be appealed against or revised under section 622, Civil Procedure Code. We think that the objection that no appeal lies is well founded. We cannot "assume that there is a right of appeal in every matter which comes under the consideration of a Judge: such right must be given by statute, or by some authority equivalent to statute" (*Minakshi* v. *Subramanya*(3)). Section 647, Civil Procedure Code, does not confer any right of appeal not expressly given elsewhere by the Code (*Raja* v. *Srinivasa*(4)).

The order of the District Judge is not a decree. The parties are not parties to a suit. The order is not one from which a special right of appeal is allowed by the Code. *Kashi Ram* v. *Mani Ram*(5) is in point. It remains to be seen whether the matter can be dealt with under section 622, Civil Procedure Code. The respondents contend that it cannot; and seeing that the District Judge had jurisdiction to decide wrongly as well as rightly (*Malkarjun* v. *Narhari*(6)), we think there is no doubt this

(1) I.L.R., 10 All., 166.
(2) I.L.R., 27 Mad., 98.
(3) I.L.R., 11 Mad., 26 at p. 34.
(4) I.L.R., 11 Mad., 319 at p. 321.
(5) I.L.R., 14 All., 210.
(6) I.L.R., 25 Bom., 337.

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contention must prevail. In *Rajah Amir Hassan Khan* v. *Sheo Baksh Singh*(1), the Privy Council state "The question then is, did the Judges of the lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the question which was before them and they did decide it. Whether they decided it rightly or wrongly they had jurisdiction to decide the case; and even if they decided wrongly they did not exercise their jurisdiction illegally or with material irregularity." This decision of the Privy Council was considered by a Full Bench of five Judges of this Court (*vide Manisha Eradi* v. *Siyali Koya*(2)). "It was argued before the Privy Council that the words 'act illegally or with material irregularity in the exercise of its jurisdiction' did not comprehend cases of erroneous decision. The judicial committee upheld the contention." And again at page 229;—"There is also no doubt that the words 'act illegally or with material irregularity in the exercise of its jurisdiction' must be taken, on the authority of the Privy Council, not to comprehend erroneous decisions in cases which the Sub-Court has jurisdiction to decide but to refer to what goes before and to the mode in which the lower Court comes to the conclusion either that it has or has not the jurisdiction." If further authority is required the case of *Muhammad Yusuf Khan* v. *Abdul Rahiman Khan*(3) can be referred to. "Section 622, Civil Procedure Code, does not authorize the Court acting thereunder to order that a final judgment of a competent Court from which no appeal is allowed by law should be set aside."

The District Judge had jurisdiction in this case. He has decided wrongly, it may be. There is no right of appeal. This Court cannot revise the order. We dismiss the appeal with costs in this Court.

(1) L.R., 11 I.A., 237 at p. 239.
(2) I.L.R., 11 Mad., 220 at p. 228.
(3) L.R., 16 I.A., 104.

APPELLATE CRIMINAL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Russell.

1903. November 23, 30.

IN THE MATTER OF RAMASAMY CHETTY (PETITIONER), APPELLANT.*

Letters Patent, art. 15—"Criminal Trial"—Appeal—Order to furnish security for keeping the peace—"Judgment."

Petitioner had been ordered by a Head Assistant Magistrate to furnish security for keeping the peace, under section 107 of the Code of Criminal Procedure. The order was confirmed on appeal. An application to the High Court to revise the order came before a single Judge and was rejected. This appeal was filed against the last-mentioned order:

Held, that no appeal lay.

Per THE OFFG. C.J.—The order requiring security was an order in a criminal trial, and, in consequence, the order passed in revision was also an order in a criminal trial.

Per RUSSELL, J.—The order appealed against was not a "judgment" within the meaning of article 15.

ORDER requiring security for keeping the peace. The only question decided was whether an appeal lay. The facts are sufficiently set out in the judgment.

P. S. Sivaswami Ayyar for appellant.

Sir SUBRAHMANIA AYYAR, OFFG. C.J.—The petitioner was ordered by the Head Assistant Magistrate of Madura to furnish security for keeping the peace under section 107 of the Criminal Procedure Code. On appeal to the District Magistrate the order was confirmed. The application for revision of the said order came on before Mr. Justice Benson and was rejected, apparently on the ground that sufficient cause was not shown for the interference of the Court by way of revision. The present petition purports to be an appeal against the order of the learned Judge.

The first question is whether an appeal lies in the matter, and it depends upon whether the order as to security is or is not one in a *criminal trial* within the meaning of article 15 of the Letters Patent. In construing these words, it is scarcely necessary to

* Appeal No. 50 of 1903, presented under section 15 of the Letters Patent against the order of Mr. Justice Benson in Criminal Revision Case No. 330 of 1903, preferred against the order of the District Magistrate of Madura, dated 9th February 1903.

say that it is not admissible to refer and to rely on the provisions of the Code of Criminal Procedure to which we were referred in the course of the argument. I do not, however, wish it to be understood that if in interpreting the Letters Patent reference to the Code of Criminal Procedure were admissible that would lead to a variation of the conclusion at which I have arrived, independently of the Code. Turning now to the Letters Patent, there is nothing in article 15 or in any other article thereof to show that the words "Criminal" and "trial" are used in any other than their general and ordinary sense as used in law. That the proceedings of the Magistrate, with reference to the security taken from the petitioner, are proceedings in a *criminal* matter or cause admits of no doubt. The very object of the proceeding is the prevention of certain crimes about to be committed with reference to the public peace, and it is the likelihood of a disturbance of public tranquillity that gives the Court jurisdiction. It is obvious that proceedings of this character held before Criminal Courts can be nothing but criminal proceedings.

This was, if I understood Mr. Sivaswami Ayyar rightly, hardly denied. What he strongly contended for was that the investigation in question by the Magistrate was not a trial. Now, that term according to the passage from the Institutes quoted in Wharton's 'Law Lexicon' means "the examination of a cause, Civil or Criminal, before a Judge who has jurisdiction over it, according to the laws of the land." The explanation of the same term in 'Stroud' on the authority of the observations of Field, J., in *Gath* v. *Howarth*(1) is that it is the "conclusion by a competent tribunal of questions in issue in legal proceedings whether Civil or Criminal." Again in Bouviers' 'Law Dictionary' the term is stated on the authority of a decision in Massachussets to mean, "the examination before a competent tribunal, according to the laws of the land, of the facts put in issue in a cause, for the purpose of determining such issue." These citations express in different words precisely the same idea and testing the present case with reference to it, but one conclusion is possible. The person before whom the proceedings are conducted is a Judge in every sense of the term; they commence by information laid before him, the law prescribes notice thereof to the accused party;

(1) 28 S.J., 427; W.N. (84), 99.

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evidence has to be recorded in his presence and judgment given; if the security or bail required to be furnished is not forthcoming imprisonment follows as a matter of course; finally an appeal is allowed in the matter. If a proceeding involving these requisites and incidents is not a *trial*, it is impossible to see what it is. I have no hesitation, therefore, in holding that the order of the Magistrate requiring security was an order in a criminal trial and consequently any order which may be passed on appeal or in revision in connection with such a proceeding is also an order in a criminal trial. I would accordingly reject this appeal.

RUSSELL, J.—I am of opinion there is no "judgment" in this case, and therefore there is no appeal under article 15 of the Letters Patent—*vide* a decision of a Bench of this Court in *Puthukudi Abdu* v. *Puvakka Kunhikutti*(1) following previous reported decisions on the same point.

I express no opinion on the question whether the proceedings in the lower Court were a trial or not.

I think the appeal should be rejected.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Bhashyam Ayyangar.

1903. October 27. November 3.

SUBBA PILLAI (PLAINTIFF), APPELLANT,

v.

RAMASAMI AYYAR (DEFENDANT), RESPONDENT.*

Legal Practitioners Act—XVIII of 1879, *s.* 28—*Agreement not filed in Court—Contract Act—IX of* 1872, *ss.* 217, 218—*Lien.*

The Legal Practitioners Act does not enact that no claim by a pleader for professional services rendered or for recovery of out-fees advanced shall be sustainable unless an agreement in writing for the same has been entered into with the client and filed in Court, but only that an agreement, if any, in respect thereto, shall be void unless the same has been reduced to writing and filed in Court.

(1) I.L.R., 27 Mad., 340.

* Second Appeal No. 254 of 1902, presented against the decree of K. Ramachandra Ayyar, Subordinate Judge of Negapatam, in Appeal Suit No. 28 of 1901, presented against the decree of P. Narayana Chariar, District Munsif of Kumbakonam, in Original Suit No. 590 of 1899.

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A pleader (as the Court found), at the request of his client disbursed moneys for out-fees in a suit in which he was retained, and took a promissory note for the amount of the disbursements:

Held, that the promissory note was, within the meaning of section 28 of the Legal Practitioners Act, an agreement respecting the amount of payment for charges incurred or disbursements made by the pleader in respect of the suit in which he had been retained, and as it had not been filed in Court as required by the section it was invalid. But that, independently of the promissory note, the pleader was entitled to recover the out-fees advanced by him, and, under section 217 of the Contract Act, he was entitled to retain the same out of the sums received by him to the credit of his client.

Razi-ud-din v. *Karim Bakhsh*, (I.L.R., 12 All., 169), and *Sarat Chunder Roy Chowdhry* v. *Chundra Kanta Roy*, (I.L.R., 25 Calc., 805), commented on.

SUIT for money. Plaintiff alleged that defendant, a first-grade pleader, had received certain sums of money from Court on behalf of plaintiff's undivided brother Govinda Pillai, for whom defendant had acted; that Govinda Pillai had since died; that a portion of the money in question had been paid over to plaintiff, but that there was a balance remaining due of Rs. 498-12-1, which plaintiff now sued for, with interest. Defendant admitted having received the money, but pleaded that after the death of Govinda Pillai he had obtained a vakalat from plaintiff, and had acted for him. He claimed to hold Rs. 94-1-0 as a portion of the fees due in a partition suit which Govinda Pillai had instituted against plaintiff and which was pending when Govinda Pillai died. He also stated that Govinda Pillai had borrowed Rs. 200 from him in order to institute a suit and had given defendant a promissory note therefor; and he claimed to hold the balance of the amount sued for under an agreement with the plaintiff, who, he alleged, consented to his retaining it in settlement of other sums due to the defendant for fees. An issue was framed on this point, and another as to whether defendant was entitled to a lien on the money in respect of any unpaid fees and of the balance of debt due to him by Govinda Pillai. The District Munsif found against defendant on both issues, and decreed in plaintiff's favour.

The Subordinate Judge, on appeal, upheld the Munsif's finding on the first issue, but held that defendant had an equitable lien for the amount of the promissory note for Rs. 200 with interest. He allowed defendant to retain this out of the Rs. 498-12-1, as well as a sum of Rs. 94-1-0. This latter was a sum due under a decree to Govinda Pillai, and was drawn from Court, and the Subordinate Judge held that defendant was entitled to appropriate

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it for whatever was due to him from Govinda Pillai, in any suit, and that Govinda Pillai had authorized defendant to so appropriate it.

Plaintiff preferred this second appeal.

P. S. Sivaswami Ayyar for appellant.

V. Krishnaswami Ayyar for respondent.

JUDGMENT.—The two items allowed by the lower Appellate Court in favour of the respondent to which objection is now taken by the appellant's pleader are (i) an item of Rs. 94-1-0 being the share of Govinda Pillai, the appellant's deceased brother, in the sum drawn by the respondent from the Court in Small Cause Suit No. 1938 of 1895, and (ii) an item of Rs. 200 being the amount of a promissory note made by Govinda Pillai in favour of the respondent.

As regards the first item, the respondent's plea was that he appropriated the amount towards the fees due to him in Original Suit No. 14 of 1895, a suit for partition against the present appellant which abated on the death of Govinda Pillai, the plaintiff therein, and that he was also authorized by Govinda Pillai to do so. The lower Appellate Court refers to this question of authorisation as the third question for decision in the appeal before it and records (on it) a finding in the affirmative in favour of the present respondent. There is evidence in the case in support of this alleged authority and we accept the finding of the Subordinate Judge on this point. It is, therefore, unnecessary to consider whether even in the absence of such authority, the respondent would be entitled, as found by the Subordinate Judge, to appropriate this item, which was drawn in Small Cause Suit No. 1938 of 1895, for fees due to him (by Govinda Pillai) not in that suit but in another suit, namely, Original Suit No. 14 of 1895.

As regards the second item, if the amount of the promissory note were in reality a sum advanced by way of loan to Govinda Pillai, the respondent's remedy would be only on the promissory note and he would have no lien under section 217 of the Indian Contract Act, on any sums received by him (from Court) on behalf of Govinda Pillai, his client, and the promissory note would not be invalid under section 28 of the Legal Practitioners Act. But reading the promissory note (exhibit I, dated the 11th November 1896) along with the letter (exhibit II, dated the 7th October 1896) of Govinda Pillai to the respondent, it is clear that the

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amount of the promissory note was not an amount advanced by way of loan, but an amount which, at the request of his client, the respondent disbursed for out-fees in the suit in which he was retained as vakil. In this view the questions arising for decision are whether the promissory note is invalid under section 28 of the Legal Practitioners Act and whether the respondent is entitled, under sections 217 and 218 of the Indian Contract Act, to a lien in respect of the amount and can deduct the same out of the sum received by him (from Court) on account of his client; it being conceded that the respondent's claim, if any, on the promissory note, whether by suit or by set off, was barred at the date of the suit.

We are clearly of opinion that the promissory note for payment on demand of the sum of Rs. 200 with interest thereon at one per cent. per mensem is, within the meaning of section 28 of the Legal Practitioners Act, an agreement respecting the amount of payment for charges incurred or disbursements made by the respondent, in respect of the suit in which he had been retained as a vakil; and as the same has not been filed in Court as required by the section, it is invalid. The section is general and there is nothing to restrict its operation to agreements which prov de for the payment of a larger amount than the disbursements actually made for out-fees, or of any lump sum irrespective of such disbursements or for payment of pleader's fee in excess of what may be allowed as such on taxation between party and party in accordance with the rules framed under section 27 of the Legal Practitioners Act. We are, therefore, unable to concur in the contrary view taken by the Allahabad and the Calcutta High Courts (*see Razi-ud-din* v. *Karim Bakhsh*(1), *Sarat Chunder Roy Chowdhry* v. *Chundra Kanta Roy*(2)). The policy of sections 28, 29 and 30 of the Legal Practitioners Act, corresponding to sections 4, 9 and 6 of the English Attorney and Solicitors Act, 33 & 34 Vict., cap. 28, is that whenever an agreement is entered into between a pleader and his client respecting his remuneration or payment for out-fees, such agreement should be reduced to writing and not only so, but also filed in Court and that when a suit is brought upon such agreement, the Court should have the power if, in its opinion, the agreement is not fair and reasonable to reduce the amount payable thereunder

(1) I.L.R., 12 All., 169. (2) I.L.R., 25 Calc., 895.

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or order it to be cancelled, and, in the latter case, to award such amount only as would have been decreed in the absence of any agreement between the pleader and his client. Section 30, however, provides that a pleader shall not be entitled to claim anything beyond the terms of such agreement, except in respect of services, fees, charges or disbursements expressly excepted from the agreement.

It seems therefore clear that, though an agreement entered into will be invalid unless reduced to writing and filed in Court, yet the pleader is not disentitled, in absence of any agreement, to claim reasonable remuneration in respect of his professional services or the repayment of out-fees advanced by him. This is the view taken in the decision of this Court in *Rama* v. *Kunji*(1) in regard to a claim for pleader's fee; and the decision will be equally applicable to a claim for out-fees. The circumstance, however, that there was, in fact, an oral agreement or a written agreement which was not filed in Court, cannot, in our opinion, make any difference; and the pleader's rights and remedies will be just the same as if there had been no agreement at all. An oral agreement or a written agreement not filed in Court, being invalid under section 28 of the Legal Practitioners Act and therefore unenforceable, is 'void' (*vide* section 2, clause (*g*) of the Indian Contract Act), and cannot therefore preclude the pleader from maintaining a suit as if no agreement had been entered into at all. This is in accordance with the opinion expressed by this Court in *Krishnasami* v. *Kesava*(2).

The conclusion we, therefore, come to is that the Legal Practitioners Act does not enact that no claim by a pleader for professional services rendered or for recovery of out-fees (advanced) shall be sustainable, unless an agreement in writing for the same has been entered into with the client and filed in Court, but only that an agreement, if any, in respect thereto shall be void unless the same has been reduced to writing and filed in Court.

The promissory note (exhibit I) is therefore void and it hence becomes unnecessary to consider whether the lien which the respondent would otherwise have had (under section 217 of the Indian Contract Act) should be regarded as having been waived by his taking a promissory note, if the same had been filed in

(1) I.L.R., 9 Mad., 375. (2) I.L.R., 14 Mad., 63.

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Court under section 28 of the Legal Practitioners Act. Independently of the promissory note, the respondent is entitled to recover the out-fees advanced by him and, under section 217 of the Indian Contract Act, he is entitled to retain the same out of the sums received by him to the credit of his client. The appellant's pleader admits that the amount actually advanced by the respondent for out-fees was Rs. 200 and it is therefore unnecessary to remit an issue for the purpose of taking an account as to the sums actually advanced by the respondent for out-fees.

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

APPELLATE CIVIL.

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

1897. March 11, 12. September 27.

LAKSHMANA PADAYACHI AND OTHERS (DEFENDANTS), APPELLANTS IN SECOND APPEAL No. 1498.

SUPPA ASARI AND OTHERS (DEFENDANTS Nos. 1, 2, 4 AND 5), APPELLANTS IN SECOND APPEAL No. 1568.

v.

RAMANATHAN CHETTIAR (PLAINTIFF), RESPONDENT IN BOTH THE CASES. *

Tanjore custom—Free occupation of manaikats belonging to mirasidars by artizans—Conditional on rendering services.

There is a practice in the Tanjore district by which purakudis or artizans are allowed to occupy manaikats belonging to mirasidars, free of rent, so long as they cultivate the lands of the mirasidars or render them services in other ways.

SUIT(1) to recover possession of a manaikat, with mesne profits.

The plaintiff sued as a trustee of the Thulapureswaraswami temple, to recover possession of a manaikat and for the removal of the building thereon, alleging that the manaikat sued for belonged to the said temple, that defendants' ancestors were permitted to occupy it on condition that they should cultivate

(1) Directed to be reported.

* Second Appeals Nos. 1498 and 1568 of 1895, presented against the decree of V. Srinivasa Charlu, Subordinate Judge of Kumbakonam, in Appeal Suits Nos. 384 and 385 of 1894, presented against the decree of J. C. Fernandez, District Munsif of Shiyali, in Original Suit No. 93 of 1893.

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the temple lands and render other services to the temple and vacate the premises on failure to perform such conditions, that the conditions of their holding were performed by defendants and by their ancestors before them till December 1889 after which they failed to do so, and that defendants had failed to quit though called upon to do so. The plaintiff also claimed Rs. 6 on account of mesne profits for the two years prior to suit.

The defendants denied the conditions of occupation alleged in the plaint and claimed that the manaikat was their ancestral property. An issue was framed raising this question. The District Munsif found that defendants had failed to make out their title and had only succeeded in proving long possession. He held, from the facts which were proved and upon a practice which was spoken to by a witness called by the plaintiff, that a very strong presumption arose, in the absence of anything to rebut it, that the defendants' family had come into occupation of the manaikat in the manner alleged by plaintiff. The custom referred to was that purakudis were allowed house-sites free of rent so long as they cultivated the lands owned by mirasidars. He decreed in plaintiff's favour for recovery of possession of the manaikat, exclusive of the trees thereon, and ordered defendants to remove the building within two months of the date of decree. He gave defendants liberty to cut down and remove the trees within the same period.

Defendants appealed to the Subordinate Judge, who upheld the Munsif's finding, but modified his decree by ordering the trees also to be delivered to plaintiff (who had filed a memorandum of objections against this part of the Munsif's decree).

Defendants preferred this second appeal.

V. Krishnasvami Ayyar for appellants in Second Appeal No. 1498.

P. R. Sundara Ayyar for appellants in Second Appeal No. 1568.

T. Rangaramanuja Chariar for respondent in both appeals.

The Court passed the following

ORDER.—No doubt the manaikats were the property of the mirasidars at the time of the paimash many years ago, but before the defendants, who have been in possession for more than the statutory period, are ejected, the plaintiffs must show that their possession was as tenants of the plaintiff. There is evidence that

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the defendants were cultivating lands of the temple or were rendering services to the temple. The Courts below, having regard to these facts, and to the practice said to prevail in the district of purakudis (tenants), or artizans being allowed to occupy manaikats free of rent, so long as they cultivated the lands of the mirasidars or rendered services as artizans, found that the possession of the defendants was as tenants. There is little or no evidence in support of the alleged practice, but its existence appears to have been assumed by the Courts in consequence of evidence which came before the Courts in other cases. As the practice does not appear to have been admitted by the parties, or recognized by established authorities, it must be proved by satisfactory evidence. There was no issue as to the practice, and this may be the reason why the evidence as to it is so meagre. We must, therefore, direct the Subordinate Judge to take further evidence on both sides and return a finding within two months from receipt of this order, on the following issue, viz.:—

Whether there is a practice in the Tanjore district by which purakudis or artizans are allowed to occupy manaikats belonging to mirasidars, free of rent, so long as they cultivate the lands of the mirasidars or render them services in other ways.

In addition to evidence adduced by the parties, the Subordinate Judge may, of his own motion, record further evidence, oral or documentary, which appears to him to be of value in regard to the alleged practice.

In compliance with that Order the Subordinate Judge submitted a finding, material portions of which were as follows:—

I have been asked to try the following issue:—

"Whether there is a practice in the Tanjore district by which "purakudis or artizans are allowed to occupy manaikats belong-"ing to mirasidars, free of rent, so long as they cultivate the "lands of the mirasidars or render them services in other ways."

2. The plaintiff (respondent) now examined five witnesses and the appellants (defendants) three. Their evidence, as a whole, establishes the practice, mentioned in the issue, of purakudis and artizans and other servants being given, by the mirasidars, manaikats to build on and occupy, so long as they continue to do the work required of them by the landlords. The witnesses Nos. 1, 2, 3 and 4 examined by the plaintiff referred also to the practice which has

obtained in recent times of some landlords, particularly managers of temples, obtaining written evidence, in the form of leases for a term of years, of the holding of purakudis and artizans of manais left for their occupation and of their paying also "*some rent*" (as the first witness stated, evidently meaning a nominal rent) to obviate the difficulty, which sometimes exists, of proving their title to the manais, whenever disputes arise between them and their lessees. But the consideration for the letting is *not* this small rent that is promised by the tenant but his doing cultivation or other work, such as that of a carpenter or blacksmith and in temples that of a piper or drummer or even of a *dasi*, that is expected of these people. The fourth witness Dandapanyaier said it was "a small rent, nominally fixed and entered in the leases" but "was never collected."

3. The defendants' witnesses have also emphasized the existence of this custom in their evidence, while under cross-examination. Their first witness stated—

"Mirasidars own lands and manaikats appertaining to them. "On these manaikats dwell their Kudianavan, *i.e.*, such as cultivate "their land. These cultivators have occupied them from genera- "tion to generation and cultivated the lands of their landlords. "If the cultivators default to cultivate their lands, they used to be "ejected at once and other cultivators introduced into the manais "they occupied and moneys also recovered from them; they would "also cultivate their lands. For cultivating their lands, the "mirasidars give them their manais to live on. Similarly, to "artizans, village common manais are given for them to live on, "in order that they might do to the village people services that "they know of. If they default to do their work properly, they "used to be ejected."

In re-examination he added:—"From artizans who have long "remained on village manais, rent deeds used not to be had and "no rent used to be collected. From such as are introduced "newly, say, within the last 15 years, rent deeds used to be "obtained and rent collected."

Similarly deposed the defendants' second witness also.

The defendants' third witness, a man of the purakudi class, who has come to buy a small miras holding in a village called Sithankatterooppoo, while admitting the custom of mirasidars to grant manais to their purakudis to live on and of village common manais being similarly granted for the use of the village artizans, stated that they were not granted rent free but that rent was collected from such people: but he was not able to mention one instance in which it was collected within his *personal* knowledge.

4. In addition to this oral evidence, on the side of the plaintiff, a number of judgments passed by the different Courts of this district, in which this practice was alleged and proved, have been also produced. I have also called for, from the records of the District Court, similar judgments passed by the Courts in what are commonly known in this district as manaikat suits, which are similar to the present suits. The defendants filed no documentary evidence. It may not be necessary that every one of these documents should be specially noticed and discussed. It will be sufficient if reference be made to some of them.

[He set out the numbers and descriptions of about twelve cases.]

5. In Suit No. 183 of 1866 on the file of the District Munsif's Court of Shiyali, Mr. White, the then District Munsif, who heard that suit, remarked as follows in the penultimate paragraph of his judgment:—

"The evidence of plaintiff's witnesses with respect to the "ownership of the property is fully confirmed by the documents "adduced by the defendant himself, as they show that he held as "purakudi cultivators under the arrangement, so well known in "this district, by which such tenants occupy sites belonging to a "proprietor while cultivating for him." (Exhibit E.)

6. In suits Nos. 130 and 131 of 1893 of the same Court, the issue as to the custom was directly raised and tried: and Mr. Munsif Fernandez has ably discussed all sides of the question and arrived at the conclusion that it was proved. In paragraph 10 of his judgment in Suit No. 131 (exhibit L) he has referred to a judgment of Doctor Burnell, a late District Judge of Tanjore, in a suit of 1880, upholding the custom. The Judge remarked as follows: "House-sites like the one in dispute "always belong in this part of India to a mirasidar, but the "defendant (appellant) has admitted he is not a mirasidar in this "village, and the presumption is, therefore, against him. The "appellant puts in a paimash account; this, however, makes him "out to be a purakudi, as he is obliged to admit he is; and it is, "therefore, impossible he can have any property in the village.

"On the other hand, there is a considerable amount of oral "evidence (of mirasidars in the village) that the plaintiff (admit-"tedly a mirasidar) owns this house-site." In paragraph 11 of his judgment, Mr. Fernandez observed: "Not only is there "satisfactory evidence in this case to prove the alleged custom, "but the state of things I have pointed out above can only be "explained by some such recognized practice as that alleged. The "varam system of cultivation generally adopted in this district "renders it a matter of great importance to the mirasidars to "secure permanent cultivators for their lands, and among the "privileges which the mirasidars offer as an inducement to their "purakudis is that of providing them a place for their residence "free of rent. The purakudi has no claim to the place of residence "so provided for him, if he ceases to cultivate the mirasidar's "lands, to afford facilities for which such provision is made for "him."

6-A. This judgment of Mr. Fernandez was confirmed on appeal by Mr. Sewell, District Judge, in these words: "The custom is "not an unreasonable one and is found in many other countries. "It is proved by various instances in which the claim has been "asserted and upheld, before the Collector in 1845 (exhibits "S and T), by judgments of the Courts (exhibits O, Q and R) in "1887, 1888 and 1889 and the evidence of respectable mirasidars. "The rebutting evidence is very weak. I think the custom "clearly proved (exhibit L2)." In the judgment of the Munsif are described in detail the documents S and T. They are copies of two orders issued to two Tahsildars by two former Collectors, Messrs. Cotton and Cadell, setting out the respective rights of mirasidars and purakudis in manaikats occupied by the latter, which the Munsif found to fully bear out the custom now alleged. I make particular reference to them in this case to prove that this custom is not of recent origin, but has existed in this district all along, and had been asserted and proved even in those early times.

7. In a similar suit which arose in the Trivalore District Munsif's Court in 1889 (297 of 1889), the District Munsif in the Original Court and the Sub-Court of Tanjore on appeal, threw out the case as unsustainable (exhibits N and N1). But the High Court on second appeal passed the following order (exhibit N2):—[He set out the order of the High Court, which called for a finding.]

In his revised finding, the Subordinate Judge held the plaintiff's claim proved and remarked in paragraph 3 that "though there "was no evidence of the original contract of the tenancy, it seems "that purakudis are allowed to live in their landlords' manaikats "only so long as they cultivate their lands. This fact is established "on plaintiff's side by the oral evidence of his witnesses and is "not rebutted by any satisfactory evidence on the defendants' "side."

This finding was confirmed by the High Court and the plaintiff's claim for the manaikat sued for decreed with costs in all the Courts.

8. As I have stated already, I need quote no more from any other judgments which I have sent for and perused. Each judgment evidences an instance of a landlord asserting and proving a title for a manaikat let out either to a purakudi or other servant on condition of cultivating lands or doing services to him. If, in a few instances, the suits have failed, they failed not because no practice existed but because in those special cases, either the landlord had failed to prove his title to the specific manai claimed or his opponent was found to have acquired a title by adverse possession of over 12 years. Even in these cases, the ground of claim asserted was the same as alleged in the other cases.

9. True, the oral evidence establishes that purakudis occupying manais of one mirasidar and cultivating his lands are permitted to cultivate the lands of another mirasidar also. But that cannot disprove the practice of mirasidars having manaikats appurtenant to their lands, letting them out to their purakudis, when the latter are admitted to cultivate their lands.

10. There is also a document D filed on the plaintiff's side which is registered and proved by plaintiff's second witness. It is a lease of a manai to a drummer, who has agreed by it to occupy the manai rent free, so long as he served as a drummer and to pay a rent for it when he ceased to do that service or quit it if the landlord so desired.

11. As remarked by a Munsif in one of the judgments I have sent for, a manaikat is a matter of a necessity to a landlord. He may not be able to secure good and willing tenants to cultivate his lands without giving them a manai to live on near the lands which he undertakes to cultivate. These purakudis, once they are admitted, live on the manais given and continue to cultivate

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the mirasidars' lands from generation to generation. In one of the cases which have come before the Courts, it has been found that a landlord having no manai to let for his purakudi to live on had actually converted a part of his nanjah land for such purpose and gave it to be occupied by his purakudi; and the latter having afterwards refused to vacate it, when he ceased to cultivate the lands, was ejected from it by a suit in Court (exhibit K).

12. Similarly, the presence of an artizan in a village to mend the plough and other tools of husbandry is of equal necessity, and an artizan like a purakudi takes and occupies a village manai and carries on his business from generation to generation.

13. This practice is also referred to in the District Manual, page 382.

14. I hold for these reasons that the practice referred to, which is not unreasonable, has existed in this district for a long time and was repeatedly asserted by landlords and established by decisions of Courts also, though, in recent times, written leases in respect of these manais reserving a small rent have come to be taken in some localities to make the proof of title easy, when a dispute may arise about it. This is my finding upon the issue referred.

The second appeals came on for disposal after the return of the finding, when the Court passed the following

JUDGMENT.—No objection is taken to the finding. We accept it, and dismiss these second appeals with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Russell.

EMPEROR

v.

MUTHUKOMARAN.*

1903. December 1.

Criminal Procedure Code—Act V of 1898, s. 123—Committal to prison for failure to give security to be of good behaviour—"Sentence of imprisonment."

When a person is committed to prison under section 123 of the Code of Criminal Procedure for failure to give security to be of good behaviour, he is not undergoing a "sentence of imprisonment" within the meaning of section 397 of the Code.

AN accused was committed to prison for a year for failure to furnish security for good behaviour, and while undergoing imprisonment committed an assault on a warder. He was charged for this offence and convicted and sentenced to undergo rigorous imprisonment for six months, the sentence to "take effect as from the expiry of the sentence which the prisoner was then undergoing." The case was referred to the High Court for consideration whether the sentences should not run concurrently.

The Public Prosecutor in support of the reference.

JUDGMENT.—We are of opinion that when a person is committed to prison under section 123, Criminal Procedure Code, for failure to give security to be of good behaviour, he is not undergoing a "sentence of imprisonment" within the meaning of section 397, Criminal Procedure Code. When a person has been convicted of an offence, the code directs that "sentence" shall be passed upon him. The word "sentence" does not occur in section 123, Criminal Procedure Code. The language there is that he shall be "committed" to prison. We direct that the sentence of the Sub-Magistrate shall take effect from this date.

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* Criminal Revision Case No. 393 of 1903 referred for the orders of the High Court under section 438 of the Code of Criminal Procedure by E. B. Elwin, Acting District Magistrate of South Arcot, in his letter, dated 28th October 1903, Ref. on No. 1768.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Benson, Mr. Justice Bhashyam Ayyangar and Mr. Justice Russell.

1903. November 17.

KANGAYA GURUKAL AND OTHERS (DEFENDANTS), APPELLANTS,

v.

KALIMUTHU ANNAVI (PLAINTIFF), RESPONDENT.*

Transfer of Property Act—IV of 1882, ss. 58 (b), 67, 68, 98—Combination of simple and usufructuary mortgage—Personal covenant to pay—Right of mortgagee to decree for mortgage money and for sale.

A mortgage deed, after acknowledging receipt of the consideration and mortgaging the land with possession (the usufruct, apparently, being taken in lieu of interest), contained the following proviso as to redemption :—"Thereafter, on [naming a date] on paying [the amount advanced] we shall redeem our land. If on the date so fixed the amount be not paid and the land recovered back, in whatever year we may pay [the amount advanced] on [naming the date] of any year, then you shall deliver back our lands to us :"

Held, that this contained a promise by the mortgagor to pay on the date named, and that the mortgagee was entitled to a decree for the mortgage money, under clause (a) of section 68 of the Transfer of Property Act, and to a decree for sale under section 67, the right to cause the mortgaged property to be sold in default of payment being implied within the meaning of section 68 (b).

SUIT to recover money due on a mortgage. Plaintiff was a usufructuary mortgagee and brought the present suit to recover the amount due under the mortgage both personally from the mortgagor and by sale of the mortgaged property. Both of the lower Courts passed a decree as claimed. Defendants preferred this second appeal. The material portion of the deed is set out by the learned Judges (Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Bhashyam Ayyangar, J.), who made the following

ORDER OF REFERENCE TO A FULL BENCH.—The respondent, who is a usufructuary mortgagee, sues to recover the mortgage money both personally from the mortgagor and by sale of the mortgaged property. Both the Courts below have given a decree

* Second Appeal No. 288 of 1902, presented against the decree of T. M. Rangachari, Subordinate Judge of Madura (West), in Appeal Suit No. 261 of 1901, presented against the decree of V. K. Desikacharlar, District Munsif of Periyakulam, in Original Suit No. 209 of 1900.

as prayed for. The principal question raised in this second appeal preferred by the mortgagor is that there is no covenant to pay the mortgage money and the respondent being merely a usufructuary mortgagee cannot as such sue for the recovery of the money personally or by sale of the mortgaged property. The mortgage deed after acknowledging the receipt of the consideration of Rs. 200 for the mortgage and mortgaging the land with possession, the usufruct apparently going in lieu of interest, contains the following provision as to redemption :—

"Thereafter on the 30th Panguni Bhava year causing the aforesaid Rs. 200 to be paid (on paying the aforesaid Rs. 200) we shall (redeem) or [recover back] our land. If on the date so fixed the amount be not paid and the land recovered back, in whatever year we may pay the Rs. 200 in full on the 30th Panguni of any year then you shall deliver back our lands to us. The Tamil of which the above is a literal rendering, runs as follows." [Their Lordships caused it to be set out.]

Before disposing of this appeal we refer the following question for the opinion of the Full Bench :— "Whether the mortgagee is entitled under the mortgage deed on which the suit is brought to sue for the mortgage money personally and by the sale of the mortgaged property."

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

K. N. Ayya for appellants.

P. S. Sivaswami Ayyar for respondent.

The Court expressed the following

OPINION.—Our answer to the reference is in the affirmative. The first sentence of the extract from the mortgage instrument quoted in the order of reference does, in our opinion, contain a promise by the mortgagor to pay on the date named, in which case there shall be a right in the mortgagor to get back his lands.

The second sentence of the extract provides that in the event of the mortgagor not paying on the due date, but subsequently, he may pay only on the corresponding day of a future year, and there shall then be an obligation on the part of the mortgagee to give up the land.

The mortgage is therefore a combination of a simple and an usufructuary mortgage, within the meaning of section 98, Transfer

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of Property Act, and the mortgagee is entitled to a decree for the mortgage money under clause (*a*) of section 68, and to a decree for sale under section 67, the right to cause the mortgaged property to be sold in default of payment being implied within the meaning of section 58 (*b*) of the Transfer of Property Act.

APPELLATE CIVIL—FULL BENCH.

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

1902. December 11, 12.

MAHALINGA NADAR (PLAINTIFF), PETITIONER IN BOTH,

v.

GANAPATHI SUBBIEN (DEFENDANT), RESPONDENT IN C.R.P. No. 188 OF 1902,*

KAVERI (DEFENDANT), RESPONDENT IN C.R.P. No. 189 OF 1902. *

Contract Act—IX of 1872, s. 176—Suit for sale of property pledged—Pledger's right to sue for sale—Limitation Act—XV of 1877, sched. II, arts. 57, 120.

Plaintiff lent money on the pledge of jewels, and sued more than three years and less than six years from the date of the pledge, to recover the amount lent, by sale of the jewels and from defendant personally:

Held (*per* SUBRAHMANIA AYYAR and BENSON, JJ.) that plaintiff was entitled to sue for the sale of the property pledged to him notwithstanding that he was also entitled, under section 176 of the Contract Act, to sell the property without reference to the Court.

Held also, that the claim to proceed against the property pledged was governed by article 120, and the claim to proceed against the debtor personally was governed by article 57 of schedule II of the Limitation Act.

Per DAVIES, J.—That the claim to proceed against the debtor personally was governed by article 57 and was barred, but that in so far as the suit was for a sale of the pledged property that was merely an incident in the nature of an accessory to the right to recover the debt, which became barred with the right of suit for that debt. The right of sale, however, remained. *Vitla Kamti* v. *Kalekara*, (I.L.R., 11 Mad., 153), commented on.

SUITS to recover Rs. 109-3-6 due as money advanced to the defendants respectively on pledges of jewels in 1896. The suits

* Civil Revision Petitions Nos. 188 and 189 of 1902, presented under section 25 of Act IX of 1887, praying the High Court to revise the decrees of P. S Gurumurti, Subordinate Judge of Kumbakónam, in Small Cause Suits Nos. 2928 and 2927 of 1901.

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were filed on the Small Cause Side of the Subordinate Judge's Court in 1901. Defendants set up the plea of limitation. The Subordinate Judge, following *Vitla Kamti* v. *Kalekara*(1), upheld that plea. He held that article 57 was applicable, and not article 120. The allegations in the plaints in both suits were that the defendants, respectively, had pledged jewels with the plaintiff, had borrowed money on such pledges, and had promised to repay the amounts as soon as possible with interest. Plaintiff claimed the amounts from the respective defendants and from the proceeds of the sale of the jewels. The suits were dismissed.

Plaintiff filed these Civil Revision Petitions, which came before Sir Arnold White, C.J., who made the following

ORDER OF REFERENCE TO A FULL BENCH.—My view is that the case of *Vitla Kamti* v. *Kalekara*(1) was rightly decided and that the *ratio decidendi* of that case is applicable to the present case. A different view, however, has prevailed in Calcutta and Allahabad (see *Nim Chand Baboo* v. *Jagabundhu Ghose*(2), and *Madan Mohan Lal* v. *Kanhai Lal*(3)).

I accordingly refer to a Full Bench the question whether the period of limitation in this case is governed by article 57 or article 120 or any other and which article of the Limitation Act.

The petitions came on for hearing in due course before the Full Bench constituted as above.

R. Subrahmania Ayyar for petitioner.

K. Ramachandra Ayyar for respondent.

The Court expressed the following opinions:—

SUBRAHMANIA AYYAR and BENSON, JJ.—There can be no question but that the plaintiff is entitled to sue for the sale of the property pledged to him, notwithstanding that he is also entitled under section 176, Indian Contract Act, to sell the property without reference to the Court.

It is obvious that a right to sue for the sale of the property exists even in the absence of a right to sue for a personal decree against the debtor for the money lent. It would be clearly so if it had been agreed between the parties that no personal liability for the debt was to accompany the pledge of the jewels.

(1) I.L.R., 11 Mad., 153. (2) I.L.R., 22 Calc., 21.
(3) I.L.R., 17 All., 284.

It would follow therefore that in a case where both rights exist they are concurrent rights and the right to proceed against the property pledged is not merely accessory to the right to proceed against the debtor personally.

This has been clearly laid down in regard to the right to proceed against immoveable property hypothecated for a debt (*Chetti Gaundan* v. *Sundaram Pillai*(1) and *Kristna Row* v. *Hachapa Sugapa*(2)). We can see no distinction in principle between that case and cases of pledge, mortgage or hypothecation of moveable property. The attention of the Judges who decided the case of *Venkoba* v. *Subbanna*(3) was not drawn to these earlier decisions. They were followed in the Full Bench decision which is relied on in *Nim Chand Baboo* v. *Jagabundhu Ghose*(4), where the learned Judges dissented from *Vitla Kamti* v. *Kalekara*(5). We think that the law is correctly laid down by the Calcutta High Court in that case. It has been followed in Allahabad (*Madan Mohan Lal* v. *Kanhai Lal*(6)).

We accordingly answer the question referred to us as follows :—

The claim to proceed against the property pledged is governed by article 120, and the claim to proceed against the debtor personally is governed by article 57 of the second schedule of the Limitation Act.

DAVIES, J.—This suit was brought for the recovery of money lent to the defendant and a decree was prayed for (1) directing the defendant to pay the amount and (2) ordering the sale of the property pledged to the plaintiff by him and payment of the claim out of the sale-proceeds.

So far as the suit was for a personal decree against the defendant, it was admittedly barred under article 57 of the second schedule of the Limitation Act, and so far as it was for a sale of the pledged property, I am of opinion (as it was ruled in *Vitla Kamti* v. *Kalekara*(5), that this was merely "an incident in the nature of an accessory to the right to recover the debt" which became barred with the right of suit for that debt.

The case here is, however, different in one respect from that just quoted. There the property was only hypothecated. Here

(1) 2 Mad. H.C.R., 51.
(2) 2 Mad. H.C.R., 307.
(3) I.L.R., 11 Mad., 151.
(4) I.L.R. 22 Calc., 21.
(5) I.L.R., 11 Mad., 153.
(6) I.L.R., 17 All., 284.

there was a "pledge" within the meaning of section 172 of the Indian Contract Act, and the rights of the pawnee (the plaintiff) are governed by section 176 of that Act—that is the plaintiff could either sue upon the debt, retaining the pledge as a collateral security or he could sell the thing pledged, on reasonable notice to the defendant. His right of suit was barred by limitation, but his right of sale still remained and this was a right secured to him by law which he could exercise without suit. Hence the suit was not maintainable as there was no necessity for it. This point does not appear to have been considered in the cases of *Nim Chand Baboo* v. *Jagabundhu Ghose*(1) and *Madan Mohan Lal* v. *Kanhai Lal*(2).

My answer to the reference accordingly is that, so far as the suit was a suit for recovery of the money personally from the defendant, it was barred under article 57 of the second schedule of the Limitation Act, and so far as it was a suit for sale of the pledged goods it did not lie, and therefore no question as to limitation arises.

APPELLATE CRIMINAL—FULL BENCH.

Before Mr. Justice Davies, Mr. Justice Benson and Mr. Justice Russell.

SURI VENKATAPPAYYA SASTRI (COMPLAINANT), PETITIONER,

v.

MADULA VENKANNA (ACCUSED), COUNTER-PETITIONER.*

1904. January 18, 25. February 3.

Penal Code—Act XLV of 1860, s. 379—Theft—Dishonestly quarrying and removing stones from land in possession of another.

Stones, when quarried and carried away are "things severed from the earth" (within the meaning of section 378, explanation 1 of the Indian Penal Code) and are "moveable property" (within the meaning of section 22) and as such are capable of being the subject of theft.

(1) I.L.R., 22 Calc., 21. (2) I.L.R., 17 All., 284.

* Criminal Revision Case No. 385 of 1903, presented under sections 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the order of V. Venugopaul Chetty, Sessions Judge of Kistna Division, in Criminal Revision Case No. 12 of 1903, presented against the judgment of A. C. Kristna Row, Stationary Sub-Magistrate of Gunnavaram, in Calendar Case No. 33 of 1903.

SURI VENKATAPPAYYA SASTRI v. MADULA VENKANNA.

A person who quarries and carries away stones from land in the possession of another commits theft.

Queen-Empress v. *Kotayya*, (I.L.R., 10 Mad., 255), dissented from.

CHARGE of theft. The alleged theft consisted in the accused having dishonestly quarried and removed stones from land (a hill known as Sobhanadriswamy, at Agripalli) in possession of another. The Magistrate discharged the accused. Against that order of discharge the complainant presented this Criminal Revision Petition. The case first came before Sir S. Subrahmania Ayyar, Officiating C.J., and Russell, J., who made the following

ORDER OF REFERENCE TO A FULL BENCH.—Assuming that the accused in this case quarried and carried away the stones dishonestly from the hill, the property of the temple, the question is whether he could be convicted of theft under section 379 of the Indian Penal Code. The Magistrate, following the decision in *Queen-Empress* v. *Kotayya*(1) is of opinion that the offence of theft has not been committed.

This opinion seems to be at variance with the opinion expressed in *Queen* v. *Tamma Ghantaya*(2).

In the case of *Queen-Empress* v. *Shivram*(3), also, a different view is taken. It was therein held that, "Where a person dishonestly carried away 100 cart-loads of earth from the complainant's land he was guilty of theft." We are of opinion that this is the correct view of the law. We, therefore, refer for the decision of a Full Bench the question whether, on the assumption mentioned above, the accused could be convicted of theft.

The case came on in due course before the Full Bench constituted as above.

C. V. Krishnasami Ayyar (*V. Krishnasamy Ayyar with him*) for petitioner.

S. Kasturiranga Ayyangar (*P. S. Sivaswamy Ayyar with him*) for accused.

The Court expressed the following

OPINION.—In this case the accused was charged with theft in that he dishonestly quarried and carried away stones from land in the possession of another. The Sub-Magistrate discharged the

(1) I.L.R., 10 Mad., 255. (2) I.L.R., 4 Mad., 228.
(3) I.L.R., 15 Bom., 702.

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accused on the ground that the stones were not moveable property, and so could not be the subject of theft, and he relied on the ruling in *Queen-Empress* v. *Kotayya*(1).

The question referred for our decision is whether, assuming that the stones were quarried and carried away dishonestly, the accused could be convicted of theft under section 379, Indian Penal Code.

We have no doubt but that the answer to this question must be in the affirmative. Under section 378, Indian Penal Code, "Whoever intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft." The only question is whether the stones in this case are "moveable property." Section 22 enacts that these words "are intended to include corporeal property of every description, except land and things attached to the earth, or permanently fastened to anything which is attached to the earth" and in connection with this definition explanations 1 and 2 to section 378 provide that "A thing so long as it is attached to the earth, not being moveable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth," and "A moving effected by the same act which effects the severance may be a theft."

We have no doubt but that stones when quarried and carried away are "things severed from the earth" and are "moveable property" and as such are capable of being the subject of theft. Before they were quarried out they formed part of "the earth," and as such they were not moveable property, but as soon as they were quarried out they were "severed from the earth" and became "moveable property." This was the view taken by this Court in the case of *The Queen* v. *Tamma Ghantaya*(2). There the Court (Turner, C.J., and Kernan, J.) referring to salt formed spontaneously in a swamp said "We cannot distinguish this case from theft of wood in a reserved forest, except that salt is actually a part of the soil, while trees are not; yet things immovable become movable by severance, and this would apply to severed parts of the soil, *e.g.*, stone quarried, minerals, iron or salt collected,

(1) I.L.R., 10 Mad., 255. (2) I.L.R., 4 Mad., 228.

as well as timber which has grown, or edifices which have been erected on the land."

In the case of *Queen-Empress* v. *Kotayya*(1) Collins, C.J., and Kernan, J. (Brandt, J., dissentiente) held that soil dug up by a person not the owner of the land and carried away by him could not be the subject of theft on the ground that such soil was not a thing attached to the earth and then severed from it, but was a part of the earth or land itself, and therefore excepted by section 22 from the corporeal things which were moveable property, and they distinguished the case of *The Queen* v. *Tamma Ghantaya*(2) on the ground that the salt in the latter case was a natural efflorescence on the surface of the earth—a natural produce attached to the earth. We think that this decision was erroneous and that the learned Judges were misled by supposing that it was the intention of the framers of the Indian Penal Code to reproduce the English law of larceny. The terms of the section show that this was not their intention, and it is by the terms of the section that the law is determined. As recently remarked by the Privy Council in the case of *Gokul Mandar* v. *Pudmanund Singh*(3). "The essence of a Code is to be exhaustive on the 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." Section 22 of the Indian Penal Code does not except "earth and things attached to the earth" but "land and things attached to the earth." "Land" and "earth" are not synonymous, and there is a wide distinction between "earth" and "the earth." "Earth" may be severed from "the earth" and attached to it again. When "earth" is severed from "the earth" it becomes moveable property. A cart-load of "earth" may be bought any day in the bazaar. Can it be held for a moment that "earth" when thus carted about and sold by one person to another is not moveable property, and is incapable of being the subject of theft? Under the Indian Penal Code it does not matter by whom the severance from "the earth" was made, and the explanation to section 378 expressly provides that "a moving effected by the same act which effects the severance may be theft." It was on these grounds that the Bombay High Court, in *Queen-Empress* v.

(1) I.L.R., 10 Mad., 255. (2) I.L.R., 4 Mad., 228.
(3) I.L.R., 29 Calc., 707.

Shivram(1) held that "earth" might be the subject of theft, and the same reasoning applies, *a fortiori*, to stones that are quarried from "the earth." We think that the view of Brandt, J., in *Queen-Empress* v. *Kotayya*(2) is correct and we hold that any part of "the earth," whether it be stones or sand or clay or any other component, when severed from "the earth" is moveable property, and is capable of being the subject of theft. Our answer to the reference is, therefore, in the affirmative.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Offg. Chief Justice, and Mr. Justice Bhashyam Ayyangar.

1903. October 26, 27.

MANTHARAVADI VENKAYYA AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

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

Limitation Act—XV of 1887, arts. 18, 120—*Land taken under Land Acquisition Act —Refusal by Collector to give award—Possession taken by Government.*

Land had been taken under the Land Acquisition Act, possession having been taken by the Collector, before an award was made. The Collector subsequently refused to give an award, on the ground that the land belonged to Government. More than one year after the Collector's refusal to give an award, the present suit was instituted for a declaration that the land belonged to the plaintiffs and for recovery of possession, or, in the alternative, for damages for the wrongful refusal of the Collector to give the award. The finding was that the land was the plaintiffs'; but the plea of limitation was raised:

Held, that the suit was not barred by limitation. The land had vested absolutely in Government, and so plaintiffs were not entitled to recover possession but could only claim damages for breach of a statutory duty on the Collector's part. The suit contemplated by article 18 of the Limitation Act is one for compensation for non-completion, and that article does not apply to a case in which the land has vested in Government. Article 120, therefore, governed the suit.

(1) I.L.R., 15 Bom., 702. (2) I.L.R., 10 Mad., 255.

* Second Appeal No. 242 of 1902, presented against the decree of I. L. Narayana Row Naidu, Subordinate Judge of Kistna, in Appeal Suit No. 28 of 1901, presented against the decree of S. Hanumanta Row Pantulu, District Munsif of Bapatla, in Original Suit No. 297 of 1899.

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SUIT for land, or in the alternative for damages for the wrongful refusal by the Collector appointed to acquire the land for public purposes to make an award stating the amount of compensation payable to the plaintiffs. The land had been taken for railway purposes by the Government under section 17 of the Land Acquisition Act (I of 1894), and the Collector took possession of it after issuing the usual notices under sections 6 and 9. He, however, refused to pass an award, inasmuch as he held that the land was Government land, and that, in consequence, no compensation was payable to plaintiffs. Plaintiffs brought this suit for a declaration that the land was theirs, and for possession of it, and in the alternative as above. More than one year had elapsed since the Collector had informed plaintiffs that he would not give an award. The defence was that the land had become vested absolutely in Government under section 17 (1) even though no award had been passed, and that no suit lay to recover possession of it; and as to the claim for compensation, limitation was pleaded, article 18 of schedule II of the Limitation Act being relied on. The District Munsif held that a portion of the land belonged to the plaintiffs, and that the suit was not barred by limitation, it being governed by article 120, and he passed a decree in plaintiffs' favour for compensation in respect of that portion of the land. The Acting Subordinate Judge, on appeal, also found that the land belonged to the plaintiffs, but held that the suit was barred by limitation, being governed by article 18. He reversed the decree and dismissed the suit.

Plaintiffs preferred this second appeal.

V. Krishnasamy Ayyar and *K. Subrahmania Sastri*, for appellants, contended that inasmuch as possession had been taken and the land had vested absolutely in Government the acquisition had been completed. Article 18 only applies where the acquisition has not been completed and where Government has, for some reason or other, given up the land after the preliminaries have been gone through. As there was no special article to cover such a case as the one under appeal they contended that article 120 applied. They referred to section 54 (2) of the Land Acquisition Act X of 1870, which corresponded with section 48 of the present Act. The wording in the earlier Act was "decline to complete any such acquisition." The words "refusal to complete" in the third column in article 18 of the Limitation Act seemed to have been taken from section 54, clause (1) of the earlier Land Acquisition Act.

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The Government Pleader, for respondent, contended that article 18 applied to cases in which an award has not been made under the Act. Acquisition could not be complete until the proceedings prescribed by the Act are taken. He contended that the suit was barred.

JUDGMENT.—The suit in its alternative character is really a suit for damages for the wrongful refusal by the Collector appointed to acquire the land for public purposes to make an award settling the amount of compensation payable to the appellants in respect of the land which by virtue of a direction made by the local Government under section 17 of Act I of 1894 was taken possession of by the Collector before any award had been made and thus became vested absolutely in the Government. The reason for the Collector's refusal was that it had been subsequently discovered that the land belonged to Government and not to the appellants, and therefore the latter were not entitled to compensation. It is now found by both the lower Courts that the land was the appellants' property and not the property of Government. But as the land vested absolutely in Government under section 17 though in fact it was, as now found, the property of the appellants, they are not entitled to recover the land but can only claim damages for breach of statutory duty on the Collector's part, the measure of damages being such compensation as would have been recovered by the appellants if the Collector in due discharge of his duty had proceeded under the Land Acquisition Act to make the award. The suit, however, was brought more than one year after the Collector informed the appellants that he was not going to make the award as the property belonged to Government and the lower Appellate Court dismissed the suit as barred by limitation under article 18 of the Indian Limitation Act. This article 18 reproduces the corresponding article 20 of Act IX of 1871 which was passed shortly after the enactment of the Land Acquisition Act X of 1870, now replaced by Act I of 1894. It seems to us clear by comparing article 18 with section 54 of Act X of 1870 that the suit contemplated by the article is one for compensation for non-completion and the refusal to complete the acquisition referred to in the said section 54 which does not include a case in which the land has vested in Government. Section 48 of Act I of

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1894 corresponds to section 54 of Act X of 1870. In the present case the acquisition has been completed in the sense that the property has absolutely vested in Government and in our opinion article 18 does not govern such a suit and, there being no other article applicable to the case, the general residuary article 120 must be held to govern the case. That being so the suit is not barred by limitation. We must allow the appeal with costs in this and in the lower Appellate Court and, reversing the lower Appellate Court's decree, restore that of the District Munsif.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1903. December 15.

VEDAVALLI NARASIAH (THIRD DEFENDANT), APPELLANT,

v.

MANGAMMA AND FOUR OTHERS (REPRESENTATIVES OF PLAINTIFFS NOS. 1 AND 2, AND DEFENDANTS NOS. 1, 2 AND 4), RESPONDENTS.*

Construction of statutes—Enactments relating to substantive rights—Effect on pending suits—Enactments relating to procedure—Effect of—.

It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. An exception to this general rule is where enactments merely affect procedure, but do not extend to rights of action.

SUITS to recover karnikam kalavasam, or percentage of crops payable to persons performing the duties of village accountant in the Venkatagiri Estate. The suits were instituted on 30th June 1897. During their pendency, Madras Act II of 1894 was extended to the office of village accountant in the Venkatagiri Estate. That Act was enacted "to amend the law relating to village officers in permanently-settled and certain other estates," and provides for the appointment of village officers by the revenue officer. Section 33 provides that no Civil Court shall have

* Second Appeals Nos. 307 and 308 of 1902, presented against the decrees of T. M. Swaminatha Ayyar, District Judge of Nellore, in Appeal Suits Nos. 17 and 18 of 1900, presented against the decrees of T. Varadarajulu, District Munsif of Kanigiri, in Original Suits Nos. 250 and 249 of 1897.

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authority to take into consideration or decide any question regarding cess or payments under section 27, which last-mentioned section relates to the remuneration of village officers. The Acting District Judge, in modification of the District Munsif's decree, held that second plaintiff and fourth defendant were entitled equally to the kalavasam.

Third defendant preferred these second appeals.

C. V. Ananthakrishna Ayyar for appellants.

JUDGMENT.—In these cases the Court had jurisdiction to entertain and decide the suits when they were instituted, viz., on the 30th June 1897.

Madras Act II of 1894 was extended to the office of village accountant in the Venkatagiri Estate during the pendency of the suits; but this did not take away the jurisdiction of the Court to decide the suits then pending before it and thus take away the plaintiff's right of action in the ordinary Civil Courts.

It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. But there is an exception to this rule, namely, where enactments merely affect procedure, but do not extend to rights of action (per Jessel, M.R., *In re Joseph Suche and Co.*(1)).

There is nothing in the wording of section 21, Madras Act III of 1895, to negative the application of this general rule.

The only other point urged by the appellant is that the adoption of the second plaintiff by his uncle was invalid, because the natural parents and the adoptive father of the second plaintiff were under pollution owing to the birth of the second plaintiff and the death of the wife of the adoptive father.

The adoptive father and the second plaintiff being of the same *gotra*, the religious ceremony of *datta homam* was not necessary (*Govindayyar* v. *Dorasami*(2)). That being so, the adoption was not invalid. The second appeals fail, and we dismiss them.

(1) L.R., 1 Ch.D., 48 at p. 50. (2) I.L.R., 11 Mad., 5.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Bhashyam Ayyangar.

1903. September 14, 15. 1904. January 8.

KUTTAYAN CHETTY (PLAINTIFF), APPELLANT,

v.

PALANIAPPA CHETTY AND ANOTHER (FIRST DEFENDANT AND THE LEGAL REPRESENTATIVE OF THE DECEASED SECOND DEFENDANT), RESPONDENTS.*

Negotiable Instruments—Payment—Contract of purchase—Hundi in part payment.

Defendants agreed to sell paddy to plaintiff on the terms that the balance of the price, after giving credit for an advance of Rs. 1,000, should be paid by plaintiff on delivery at a place mentioned. It was agreed that an assignment of a debt for Rs. 100 and a hundi for Rs. 900 should be accepted as payment of the advance. Defendants sold the paddy to a third party at a higher price, and plaintiff now sued for damages for breach of contract:

Held, that plaintiff was entitled to damages. As the Rs. 100 assigned and the hundi for Rs. 900 were agreed to be the payment of the advance of Rs. 1,000, the acceptance of the hundi operated as payment, though it might be only conditional, and the right to receive the Rs. 900 as part of the price might revive if the hundi should be dishonoured, and notice of dishonour duly given.

Held also, that the property in the paddy had passed to the buyer under section 78 of the Contract Act, and under section 95 of that Act, the defendants, as vendors, would have a lien on the goods and would not be bound to deliver until the price had been paid, including the Rs. 900 due under the hundi if the latter were dishonoured.

SUIT for damages for breach of contract. Plaintiff alleged in his plaint that he had purchased paddy from the defendants for Rs. 16,913-10-0, agreeing to take delivery of it on its arrival in port, and to pay all duties and landing charges. He alleged that he had paid an advance of Rs. 1,001 in the following manner:—Re. 1 in cash: Rs. 100 by assignment to defendants of a debt due to plaintiff from a third party, and Rs. 900 by a hundi. Plaintiff contended that the ownership of the paddy had thus become vested in him though it was still in defendants' possession and he alleged that, though the ship reached port, defendants had

* Second Appeal No. 2 of 1902, presented against the decree of G. F. T. Power, District Judge of Tanjore, in Appeal Suit No. 978 of 1900, presented against the decree of Syed Tajuddin Sahib, District Munsif of Negapatam, in Original Suit No. 166 of 1899.

broken their contract and had sold the paddy to some one else at a higher price in spite of the fact that plaintiff was demanding delivery and that the drawee of the hundi was ready to pay the amount due under it. Plaintiff claimed Rs. 1,188-6-9 as damages.

The defendants pleaded that neither the Rs. 100 nor the Rs. 900 had been paid, and that the agreement was that delivery should only be made after the amount of the advance had been paid. Defendants contended that they were, in the circumstances, not bound to deliver, and that they were not liable in damages. Exhibit A, in which the contract was reduced to writing, was in the following terms:—"13th April 1898 . . . . Price settled for delivery at Jaffna ship port of . . . . paddy which were consigned to you in the port of Arakan in the ship called . . . . which has now arrived at Pamban port is . . . . For the advance of Rs. 1,000, agreed to be paid for it, leaving Rs. 100 assigned to be paid by broker Kasturi Aiyangar of Negapatam, the balance is Rs. 900; this amount of rupees in words nine hundred should be paid in Madura by . . . . to the order of . . . . with interest from this day at the current rate there, and he should receive this payment being endorsed. We shall also pay the cost of freight for the paddy at Arakan port and the deposit amount with the price of the paddy."

The District Munsif held that defendants had not committed a breach of contract in not delivering to plaintiff and dismissed the suit. This order of dismissal was upheld by the District Judge, on appeal.

Plaintiff preferred this second appeal.

V. Krishnaswami Ayyar and *K. Srinivasa Ayyangar* for appellant.

C. V. Ananthakrishna Ayyar for *P. R. Sundara Ayyar* for respondents.

JUDGMENT.—This is an action for damages for breach of contract. The terms of the contract are reduced to writing in the hundi, Exhibit A, which was given by the plaintiff to the defendants' agent. It sets forth the price agreed upon, the quantity of paddy sold and that the balance of the price after giving credit for the advance together with the freight should be paid by the plaintiff on delivery at Jaffna. The amount advanced as per Exhibit A is Rs. 1,000 and the Exhibit A recites that, after deducting Rs. 100 which was agreed to be paid to the defendants

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by a broker named therein who was indebted to the plaintiff, the balance of the advance is Rs. 900 and for this Rs. 900 Exhibit A, the hundi, was accepted (the hundi carrying interest upon the Rs. 900, from its date).

The Rs. 100 assigned and the hundi for Rs. 900 were agreed to be the payment of the advance of Rs. 1,000, and in law the acceptance of the hundi operates as payment though it may be only conditional, reviving the right to receive the Rs. 900 as part of the price if the hundi were dishonoured, and notice of dishonour were given either as required by section 93 of the Negotiable Instruments Act or under one or the other of the clauses of section 98.

No notice of dishonour was necessary in law (*Dargavarapu Sarrapu* v. *Rampratapu*(1)).

Upon the facts set forth in Exhibit A the property in the goods passed to the buyer under the penultimate paragraph of section 78 of the Indian Contract Act and under section 95 of the same Act the vendors, the defendants, would have a lien on the goods and would not be bound to deliver until the price was paid, including the Rs. 900, if the hundi were dishonoured. The defendants' agent at Jaffna, instead of delivering the goods to the plaintiff or re-selling the same under the provisions of section 107 (Indian Contract Act) if the price were not paid, rescinded the contract and sold the goods to third parties for prices higher than the contract price, retaining the purchase money.

The Courts below were under a misapprehension as to the passing of the property to the buyer and the defendants' lien thereon for unpaid purchase money and their decision proceeds upon the footing that inasmuch as the hundi was not honoured by payment the defendants were at liberty to rescind the contract. The defendants' written statements and the judgment of the District Munsif proceed on the footing that the giving and accepting of the hundi is not payment of that portion of the purchase money in advance. We are clearly of opinion that upon the terms of the contract as set forth in Exhibit A and the admitted facts, the defendants were guilty of a breach of contract and the plaintiff is entitled to damages.

As the lower Appellate Court has given no finding upon this issue we must call for a finding upon the second issue to be returned

(1) I.L.R., 25 Mad., 580 at p. 582.

in seven weeks upon the evidence already on record. [The second issue related to damages.]

KUTTAYAN CHETTY v. PALANIAPPA CHETTY.

A finding was duly returned and plaintiff was awarded damages.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Offg. Chief Justice, and Mr. Justice Boddam.

RAJA PARTHASARATHI APPA ROW (PLAINTIFF), APPELLANT,

v.

CHEVENDRA CHINA SUNDARA RAMAYYA (DEFENDANT), RESPONDENT.*

1904. January 25. February 4.

Rent Recovery Act—(Madras) Act VIII of 1865, ss. 2, 76.

The fact that the patta which has been tendered was a varam patta is no objection to a suit being sustained under the Rent Recovery Act by the landlord even if it be found that the proper rates were only money rates.

Nor is an agreement to pay a money rent to be implied from the mere circumstance that rent has been paid in money for a series of years but at varying rates.

Kavipurapu Rama Rao v. *Dirisavalli Narasayya*, (I.L.R., 27 Mad., 417), approved.

Having regard to section 76 of the Rent Recovery Act, no memorandum of objections lies against the finding of the Court of First Instance in cases under that Act.

A clause in a patta requiring the tenant to be responsible for theft of crops by him or his servants is not a proper term of a tenancy under the Act, especially having regard to section 83 of the Rent Recovery Act, which provides for clandestine removal of crops.

SUIT to enforce acceptance of patta. The facts and points decided by the lower Court are sufficiently set out in the judgment. With regard to the memorandum of objections (referred to in the judgment of the High Court), the Acting District Judge said:—"What purport to be objection memoranda under section 561, Civil Procedure Code, have been put in by the respondents who ask that

* Second Appeal No. 621 of 1902, presented against the decree of J. H. Munro, District Judge of Kistna, in Appeal Suit No. 238 of 1901, presented against the decision of K. V. Sreenivasa Ayyangar, Head-quarter Deputy Collector of Kistna, in Summary Suit No. 438 of 1900.

the suits should be dismissed altogether. There is no provision in the Rent Recovery Act for such memoranda. Section 76 of the Act lays down that no judgment of a Collector shall be open to revision otherwise than by appeal to the Zilla Court, and under section 69 such appeal must be presented within thirty days from the date of the Collector's judgment. The respondents have not appealed and the so-called memoranda of objection cannot be considered and are dismissed with costs."

He dismissed the suit.

Plaintiff preferred this second appeal.

Mr. *J. Krishna Rau* and *V. Krishnaswami Ayyar* for appellant.

Mr. *Joseph Satya Nadar* and *P. R. Sundara Ayyar* for respondent.

JUDGMENT.—For reasons stated in *Kavipurapu Rama Rao* v. *Dirisavalli Narasayya*(1) it must be held that the fact that the patta tendered was a varam patta was no objection to a suit being sustained under the Rent Recovery Act by the landlord even if it be found that the proper rates were only money rates; nor can we agree with the lower Appellate Court that it is open to Courts to imply from the mere circumstance that rent has been paid in money for a series of years but at varying rates an agreement to pay money rent (at reasonable rates to be determined by the Courts). As to the express contract stated to have been entered into in fasli 1299 we think we should, notwithstanding some of the reasons assigned for the conclusion of the District Judge being unsatisfactory, accept his finding that no such contract has been established. On the question of the implied contract to pay a fixed rent of Rs. 5 per acre it is clear that the District Judge has proceeded on entirely wrong grounds and his finding, such as it is, cannot be accepted and must be set aside. The matter is dealt with quite shortly in paragraph 12 of the judgment. The first ground stated is;—"now in the first place the payment of a fixed money rate for nine years does not prove a contract that the rate was agreed upon as the permanent rate." Whether from such payment a contract to pay is to be implied or not, depends upon the facts of each case. In certain circumstances such payment may be quite sufficient to prove such a contract, in others it may not be sufficient. Whether, having regard to the circumstances of

(1) I.L.R., 27 Mad., 417.

the present case an implied contract should be taken to have been established is a point to which the Judge has not addressed himself, as nothing more is added by him to the general proposition stated in the passage quoted above. The next ground taken by the Judge is;—"when from the past history it is evident that rents were fluctuating the mere fact that Rs. 5 was the rate for nine years does not raise any presumption that it is a permanent rate." The question for determination was having regard to what transpired in fasli 1299 when the uniform rent of Rs. 5 in respect of the whole of the lands in the village was agreed to instead of the different rates for different lands that obtained before and having regard to the fact that from that time for nine years continuously that rate was paid whether that rate should be taken as impliedly assented to as the rate to be paid, in future, and this was a question to be determined upon the evidence adduced and to which reference is made at length under the issue of express contract in the Judge's judgment. There was no question of presumption and the circumstance that *prior* to fasly 1299 rent was paid at fluctuating rates and sometimes in kind and sometimes in money was quite immaterial with reference to the determination of the said question of implied contract. As to the third and last ground stated by the Judge "again the defendants having failed to prove the express contract that Rs. 5 was agreed upon as the permanent rate cannot be allowed to put forward the plea of an implied contract to the same effect," it is difficult to understand why defendants were so precluded. These being all the reasons given for holding that there was no implied contract the finding must be treated as unwarranted by law.

On behalf of the respondents here before us it was contended with reference to those cases in which the suits were decreed in the Court of First Instance that certain of the defendant's contention having been disallowed, the District Judge was wrong in refusing to entertain the memoranda of objections filed in respect thereof. *Casperss* v. *Kishori Lal Roy Chowdhri*(1) is a clear authority against the contention that, as a matter of general law and apart from any specific statutory provision, the District Judge should have entertained the memoranda. We agree with the vakil for the appellant that having regard to section 76 of the Rent Recovery

(1) I.L.R., 23 Calc., 922.

Act no memorandum of objections lay, even with reference to section 561 of the Civil Procedure Code for, assuming a judgment of a Collector under the Rent Recovery Act to be a decree within the meaning of that term in the Civil Procedure Code, effect must, with reference to section 4, paragraph 2 of the Code, be given to the provisions of section 76 as a provision laying down a special procedure in suits between landholders and their tenants notwithstanding anything to the contrary in the Code itself. Section 76 provides that in proceedings under the Act no judgment of a Collector and no order passed by him after decree and relating to execution thereof shall be open to revision otherwise than by appeal to the Zilla Court except as allowed in section 58. To allow a memorandum of objections in the circumstances relied on by the respondents would virtually involve a revision otherwise than by an appeal preferred in accordance with the provisions of the Rent Recovery Act. Now as an appeal has to be presented under that Act within thirty days, if a memorandum of objections were allowed under section 561, Civil Procedure Code, that would, of course, be, in effect allowing a revision with reference to an application made after the thirty days prescribed, since all that section 561 requires is that the memorandum should be filed in the Appellate Court within one month from the date of the service on the party filing it, or his pleader, under section 553, Civil Procedure Code, of notice of the day fixed for hearing the appeal or within such further time as the Appellate Court may see fit to allow. In this view it is unnecessary for us to consider the decisions of this Court holding that a judgment of a Collector in a suit under the Rent Recovery Act, section 10, is a decree within the meaning of the definition of that term in the Civil Procedure Code or the decisions quoted on behalf of the appellants apparently militating against that view.

With reference to certain terms of the pattas objected to the objections as pressed before us in the argument relate to clauses 5, 7 and 9 of the patta. Clause 5 requires the tenant to be responsible for theft of crops by him or his servants. This could not in any sense be taken to be a proper term of the terms of a tenancy under the Act, considering more especially section 83 of the Rent Recovery Act which provides for cases of clandestine removal of crops. We agree therefore with the Court of First Instance that this clause should be struck out. The present patta introduces for

the first time an alteration in clause 7 which is unnecessary. We direct that in lieu thereof the following be inserted, "as the right to the palmyras and babul trees standing on the said lands belong to ourselves you have no concern with them and should not fell them;" and in lieu of clause 9 of the patta, "you should not make permanent encroachments or other works of any kind on the said land without our permission, you should not without obtaining cowle from us cultivate the land that is not included in this patta."

Before, however, we dispose of the cases finally, we must call upon the District Judge for a finding upon the evidence on record with reference to the question of implied contract to pay at the rate of Rs. 5 per acre with reference to the observations made above respecting the matter.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Offg. Chief Justice, and Mr. Justice Bhashyam Ayyangar.

MUNICIPAL COUNCIL OF MANGALORE (DEFENDANT), PETITIONER,

v.

THE CODIAL BAIL PRESS (PLAINTIFF), RESPONDENT.*

1903. November 23. December 3.

District Municipalities Act (Madras)—IV of 1884, ss. 53, 262—"Income."

The word "income" is used in schedule A of the District Municipalities Act (Madras) as meaning "net income" or profits derived from the business, and not the gross income or receipts.

By section 262 (2) of the Act, no suit shall be brought in any Court to recover any sum of money collected under the authority of the Act, provided that its provisions have been in substance and effect complied with. A municipality assessed a person under section 53 and schedule A, on his estimated gross income:

Held, that the word "income" meant "net income," and consequently the provisions of the Act had not been in substance and effect complied with, and that the Court could entertain a suit to recover the amount of tax paid under the assessment.

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* Civil Revision Petition No. 32 of 1903, presented under section 25 of Act IX of 1887 praying the High Court to revise the order of C. D. J. Pinto, District Munsif of Mangalore, in Small Cause Suit No. 430 of 1902.

MUNICIPAL COUNCIL OF MANGALORE v. THE CODIAL BAIL PRESS.

CLAIM for Rs. 13, being the amount of municipal tax alleged to have been illegally exacted by the defendant Municipal Council from plaintiff, as Manager of the Codial Bail Press. Plaintiff, as Manager of the Codial Bail Printing Press, had been placed by the Municipal Council of Mangalore in class IV of schedule A to the District Municipalities Act and a profession-tax of Rs. 25 had been levied from him for the year ending 31st March 1902 in two half-yearly instalments. He contended that the tax had been levied not upon his income but on the circulating capital invested in the business, and that in view of his income he ought to have been placed in class V and assessed only at Rs. 12, and sued to recover the excess alleged to have been illegally levied from him. Defendant pleaded that the suit was unsustainable in law, that the tax had been legally levied, that plaintiff had been rightly placed in class IV, that the income of the Press was considered and that the tax was not levied with reference to the invested capital. The District Munsif's predecessor framed the following issues:—I. Whether the assessment in question was illegally imposed? II. Whether the municipality imposed the assessment in question upon the gross income or the net income, and if on the gross income the assessment is opposed to law? III. Whether the suit as framed impeaching the assessment imposed by the municipality is sustainable? IV. Whether the assessment in question was imposed upon the circulating capital of plaintiff or upon the plaintiff's income?

The District Munsif said: "The first question for consideration is what ought to be the proper basis of the profession tax, the gross income or the net income. The Municipality of Mangalore seems to have adopted the gross income as the basis of the tax. Exhibit H is a printed copy of a requisition issued by the municipality calling upon persons exercising the professions specified in schedule A to the District Municipalities Act to submit true returns of their income. In this it is expressly stated that what is called for is the amount of gross income. Exhibit K is the report of the Ward Councillor in a printed form supplied by the municipality on the appeal preferred by the plaintiff to the Municipal Council against the assessment. The form contains various headings under which the Councillor is to report and one of the headings is 'probable income or profits (gross).' But nowhere in the Act is there any authority for the proposition that

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the tax should be levied upon the gross income. Schedule A (referred to in section 53 of the Act) which classifies persons exercising certain professions according to their incomes is silent as to whether gross income or net income is meant."

He was of opinion that the assessment should have been made with reference to net income. He decided that the net income of the plaintiff's Press was below Rs. 500 per mensem and held that plaintiff had been illegally placed in class IV of schedule A of the Madras District Municipalities Act, and had been illegally assessed at Rs. 25. He found the first issue in the affirmative. He also held that the amount of tax had been arbitrarily assessed and found the third issue in the affirmative. He gave judgment for plaintiff with costs. The defendant Council filed this civil revision petition.

K. Narayana Rao for petitioner.

Mr. *P. C. Lobo* for respondent.

JUDGMENT.—The preliminary question arising in this case is whether the cognizance of this suit by a Civil Court is barred by section 262, sub-section (2) of the District Municipalities Act (Madras) IV of 1884; and that depends upon whether, with reference to the proviso to that sub-section, it can be held that the provisions of the Act have been in substance and effect complied with by the municipality if, as contended by the respondent (the owner of a Printing Press in Mangalore), he is liable to be taxed under the Act with reference only to the profits of his business and not the gross receipts. Under section 53 and schedule A to the Act, the class under which he is liable to be taxed depends upon his "estimated income" and if the meaning of the word "income" in schedule A be "profits" or "net income" and not gross income, it will be impossible to maintain that the provisions of the Act have been in substance and effect complied with if the municipality have, as is admitted, taken the estimated gross income and not the net income as the basis for determining the class in which the respondent is to be placed. In our opinion the word "income" which occurs throughout schedule A must be taken to mean the "net income" or profits derived from the business and not the gross income or receipts. In *Lawless* v. *Sullivan*(1) the question raised with reference to section 4

(1) L.R., 6 A.C., 373 at p. 375.

of New Brunswick Act, 31 Vict., c. 36, was whether the tax thereby imposed upon the appellant bank was to be assessed upon the amount of income derived from its business within the city of St. John during the year in question without taking into account losses which had accrued during that period. The Privy Council, reversing the decrees of the Courts below held that "there can be no doubt that in the natural and ordinary meaning of language the income of a bank or trade for any given year would be understood to be the gain, if any, resulting from the balance of the profits and losses of the business in that year. That alone is the income which a commercial business produces and the proprietor can receive from it. The question is whether the word 'income' in the enactment to be construed is to be understood in a different and what, for the purpose of taxation, would be a more onerous sense" (pp. 378–379). After adverting at length to various provisions of the Act (then in question) and the arguments advanced in the case their Lordships came to the conclusion that "there is nothing in the enactment imposing the tax nor in the context which should induce them to construe the word 'income' when applied to the income of a commercial business for a year otherwise than in its natural and commonly accepted sense as the balance of gain over loss." The case of *Queen* v. *The Commissioner of the Port of Southampton*(1) is there distinguished on the ground that the context in which the word "income" in one of a series of special Acts (then in question) relating to the port of Southampton occurred clearly showed that the word was used to signify the total amount of dues and duties payable to the Commissioners under a former Act.

During the course of the argument in *Lawless* v. *Sullivan*(2) Sir Montague Smith observed that "the burden is on those who seek to put the most onerous meaning on words used to show clearly that that meaning was intended." We find nothing in the context in the schedule A (to the District Municipalities Act) or in any other part of the Act, which would lead to the conclusion that the word "income" is there used in the "more onerous sense" contended for on behalf of the municipality or otherwise than in its "natural and commonly accepted sense" as denoting the profits or net income derived from the business. The

(1) L.R., 4 H.L., 472.

(2) L.R., 6 A.C., 373 at p. 375.

fact that the tax leviable under section 53 is not an *ad valorem* tax upon "income," but a tax upon "arts, professions, trades and callings" is not a circumstance suggesting that the word "income" occurring in schedule A is not used in its ordinary acceptation above referred to, inasmuch as the amount of tax (ranging from Rs. 100 to 1) fixed under each of the nine classes in schedule A is regulated with reference to the estimated income derived from the exercise of the various arts, professions, trades and callings therein mentioned.

We therefore hold that the jurisdiction of Civil Courts to take cognizance of the suit is not barred by sub-section 2 of section 262 of Act IV of 1884 and that the decision of the District Munsif was right. The revision petition therefore fails and is dismissed with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Boddam.

[On Reference from Sir SUBRAHMANIA AYYAR, Offg. C.J., and RUSSELL, J.]

ANNAKUMARU PILLAI (COMPLAINANT), PETITIONER,

v.

MUTHUPAYAL AND OTHERS (ACCUSED), COUNTER-PETITIONERS.*

1903. November 20. December 22. 1904. January 4, 5, 12.

Penal Code—Act XLV of 1860, *s.* 379—*Theft—Charge of stealing chanks—Shell-fish taken from beds in sea*—Feræ naturæ—"*Possession*" *of complainant—Subject of theft.*

"Chanks" (popularly included among shell-fish, but really large molluscs) are found buried in beds of sand or in the sandy crevices of coral reefs in Palk's Bay,—a large bay landlocked by British ominions for eight-ninths of its circumference and containing numerous islands which form part of the districts to which they are adjacent on the shores of India and Ceylon. It was shown by evidence that this bay (as well as parts of the adjacent Gulf of Manaar) had been effectively occupied for centuries by the inhabitants of India and Ceylon, respectively; that the "chanks" found therein had for centuries been the monopoly of the rulers of the country, both in India and Ceylon, and that licenses to gather them had been granted by the sovereign; and that "chank royalty" was one of

* Criminal Revision Case No. 313 of 1903, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of J. R. Huggins, Head Assistant Magistrate of Ramnad, in Calendar Case No. 17 of 1903 (Criminal Revision Case No. 39 of 1903 on the file of the Sessions Court of Madura).

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the heads of revenue on which permanent assessment of an adjacent zamindari was fixed in 1802. Petitioner, who had leased from the Rajah of Ramnad the "chank beds" five miles off the coast of his zamindari, charged the counter-petitioners with having committed the offence of theft of "chanks" from these beds. On the defence being raised that "chanks" were fish, and were *feræ naturæ* and that those in question had been taken from beds in the open sea and had therefore not been taken from the possession of the complainant and could not be the subject of theft:

Held, that the "chanks" in question were capable of being the subject of theft.

CHARGE of theft. Complainant was the lessee from the Rajah of Ramnad of chank beds situated five miles off the coast of the zamindari. He charged the accused with theft of chanks from those beds. The Head Assistant Magistrate discharged the accused on the ground that chanks are fish and are *feræ naturæ* and that the chanks in question had been taken from beds in the open sea and were therefore not taken from the possession of any one and could not be the subject of theft. The facts are fully set out in the judgments of the High Court. Against the order of discharge the complainant presented this criminal revision petition. The case first came before Sir S. Subrahmania Ayyar, Offg. C.J., and Russell, J., who delivered the following judgments:—

THE OFFG. C.J.—The petitioner preferred against the accused a complaint of theft in that the latter had removed a quantity of chanks from a portion of the bed of the sea on the Ramnad coast, it being alleged by the petitioner that he was entitled to them as one claiming under the Rajah of Ramnad, and that the right to all chanks to be found in certain specified localities on the Ramnad coast, inclusive of the portion in question was, from time immemorial, vested exclusively in the holders of the Ramnad Zamindari. The Head Assistant Magistrate of Ramnad, after examining some only of the witnesses cited by the petitioner, dismissed the complaint on the analogy of decisions passed with reference to charges of theft of fishes in open waters.

The questions which arise for determination in the present case are—

1. (*a*) Whether live chanks not actually seized but remaining free in their natural habitat in the bed of the sea are the subject of property?

(*b*) Whether a taking of them would not constitute *theft* even if they are the subject of property?

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(*c*) Is "possession" within the meaning of section 379 of the Indian Penal Code predicable in respect of them, with reference to persons entitled to them?

2. If these questions are to be answered in the affirmative, whether in the circumstances of the present case, the complainant is in law precluded from establishing an exclusive right to such of them as exist beyond a marine league from low water mark?

3. Whether the Courts of this country have jurisdiction to try charges of theft of chanks when the removal of the chanks is from a locality outside the said marine league limit?

It is necessary to preface the discussion of these questions with a few general observations. Chanks are molluscs, being species of the genus *Turbinella*. They are found on the coast of the present districts of Madura and Tinnevelly on the one side and of Ceylon on the other (Balfour's 'Cyclopædia of India', 3rd edition, Vol. I, p. 656). They thrive in sand beds in the sea-bottom, the sand being of a special nature locally called "puchimanal" or sand breeding worms (on which the chanks feed)—'Report on Chank and Pearl Fisheries' by Mr. H. S. Thomas (1884), p. 16, sec. 45. Such beds exist all along the above-mentioned coasts in depths of 2 to 10 fathoms or thereabouts [Balfour's 'Cyclopædia', 3rd edition, Vol. I, p. 656, and Dr. Thurston's 'Notes on Pearl and Chank Fisheries and Marine Fauna of the Gulf of Manaar' (1890), pp. 11 and 31]. These beds, as well as the beds of pearl oysters (oysters unlike chanks affect rocky ground—Mr. Thomas' 'Report', p. 15, sec. 45), the two often lying not far from each other, are to be found at varying distances from the shore, the furthest being 20 miles, though they generally lie much nearer. (Dr. Thurston's 'Notes', pp. 17 and 109, 'Encyclopædia Britannica', 9th edition, Vol. V, p. 364.) The beds are of different sizes, some being of very considerable extent, as for instance, the Muttuwartu Par (5 miles of the coast off Ceylon in Dutch Bay) which is 3 miles by 1½ miles (Dr. Thurston's 'Notes', p. 103). The situation of the beds has been mapped out and details thereof recorded by the respective authorities—for Madras Fisheries, see App. B to Mr. Thomas' 'Report'—and the Ceylon Legislature have in respect of the beds belonging to that colony passed ordinances, the earliest, so far as appears, having been enacted in 1811.

The chanks are not fixed to the localities they are found in, but their power of locomotion is very limited, some experiments

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showing that they move a foot in 1¼ minutes to 2½ minute (Mr. Thomas' 'Report', p. 32, sec. 104), being in this respec similar to pearl oysters (Mr. Thomas' 'Report', p. 5, sec. 11) Chanks alive are known as green chanks, while shells of dead ones, also to be found in the beds, go by the name of white chank (Balfour's 'Cyclopædia', Vol. I, p. 656). They are fished up by divers who, with bags round their necks, dive and grope over the bottom, 20 chanks being reckoned a good haul. The divers never go beyond 12 or 13 fathoms and seldom over 9 (Mr. Thomas' 'Report', p. 26, sec. 85, and Mr. Emerson Tennent's 'Ceylon', 5th edition, Vol. II, p. 564).

Chank shells have long been used in this country for various purposes. Bracelets are made out of them and are worn largely by women in the Northern parts of India, workmen most skilled in making them being found at Dacca. Another use for them is in connection with Hindu temples and worship, the shells being considered to possess purity, while inferior shells find their use in native homes as vessels for feeding children. It may also be added that native medical men make preparations out of the shells and that the shells are sometimes buried with the bodies of opulent persons. *Valampuri* chanks or shells with the whorl on the right are specially prized and fetch high prices. A chank of this description was among the presents sent by one of the Kings of Ceylon to Asoka in B.C. 306 (Tennent's 'Ceylon,' Vol. I, p. 446). Naturally therefore there has been a considerable trade in chanks from very remote times, and the allusion to them in the Cosmos Indicopleustes and by Abu Zaid in his Voyages Arabes points to the existence of the trade as early as the 6th century (Balfour's 'Cyclopædia,' Vol. I, p. 656).

And chanks as well as pearl oysters while still in the beds have always been taken to be the exclusive property of the sovereign, by whom, consequently, they have been conserved; and the fishery operations connected therewith have always been carried on under State control and have formed a source of revenue to the exchequer. The Setupatis of Ramnad appear to have enjoyed both the pearl and the chank fisheries on the Ramnad coast while they were feudatory chiefs, but when they ceased to be such the right to pearl fisheries on the coast was apparently taken away, the right to the chank fisheries alone being continued to them. It has been viewed by some that chank fishery operations tend to injure pearl oysters

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and this view has led to the discontinuance of chank fisheries on the Ceylon coast. Such a notion, however, has been strongly controverted and has not been acted upon with reference to the fisheries on our coast (Mr. Thomas' 'Report,' page 15, sec. 44). Our chank fisheries are worth to Government from four to five times as much as our pearl fisheries and may, it is said, easily be raised to half the present value of the Ceylon pearl fisheries (Mr. Thomas' 'Report,' page 28, sec. 91). These latter brought in to the State in a certain year towards the close of the 18th century as much as £140,000 though, under subsequent management, the revenue has never exceeded £87,000 in any one year (Encyclopædia Britannica, Vol. V, p. 364). According to Dr. Balfour the rents received annually in respect of chank fisheries by the Government of Madras was about £1,000, those received by the Setupatis of Ramnad being £500 (Vol. I, p. 656). According to the latest information available the average revenue during the 25 years from 1876-77 to 1902-03 (not reckoning 1884-85 in which for some reason not apparent there was no fishery) derived by the Madras Government from the chank fisheries under the control of the Superintendent of Fisheries at Tuticorin amounted to Rs. 12,000 (in round numbers) the maximum derived in any one year being that of 1881-82, viz., Rs. 28,000 (G.O., No. 1025, dated 6th October 1903). It may not be superfluous to note that artificial culture of pearl oysters is not deemed to be impracticable, though whether that would be remunerative has been doubted (Mr. Thomas' 'Report,' p. 27, sec. 87).

With these observations I shall now proceed to discuss the questions stated above in their order.

Though undoubtedly what may properly be spoken of as fishes in the open sea are *feræ naturæ* and do not form the subject of property until actually seized, yet I am unable to accept the argument of Mr. Sivaswami Aiyar on behalf of the accused that chanks stand on an analogous footing. Certainly there can be no comparison between animals like fishes which roam over the wide expanse of the waters darting about with extreme rapidity and which are endowed with the power of eluding attempts to take them unaided by special contrivances, and such localized slow creatures as chanks which a diver can pick up with the same ease with which he can take pebbles at the sea-bottom. It seems to me that, with reference to the question of property under consideration, there is more

analogy between chanks and pearl oysters on the one hand, and, on the other, the ordinary edible oyster which has formed the subject of judicial determination with reference to that question. So far as that is concerned the circumstance that "edible oysters", borrowing the words of Mr. Thomas, "are from the time they are precipitated as spat immovably cemented for life to rock if they chance to fall on rock, or if they fall on mud lie by their weight helplessly on their heavy convex side," while pearl oysters are not so sedentary but can move very slowly about, is immaterial. The observations of Green, C.J., in *State* v. *Taylor* (1) (decided by the Supreme Court of New Jersey) where the prisoner was convicted of theft of oysters, deserve consideration. He said "It is objected that oysters being animals *ferœ naturæ* there can be no property in them unless they be dead or reclaimed, or tamed, or in the actual power or possession of the claimant, and that the want of such an averment is a fatal defect in the indictment . . . . The principle as applied to animals *ferœ naturæ* is not questioned. But oysters though usually included in that description of animals do not come within the reason or operation of the rule. The owner has the same absolute property in them that he has in inanimate things or in domestic animals. Like domestic animals they continue perpetually in his occupation and will not stray from his house or person. Unlike animals *ferœ naturæ* they do not require to be reclaimed or made tame by art industry or education, nor to be confined in order to be within the immediate power of the owner. If at liberty they have neither the inclination nor the power to escape. For the purpose of the present enquiry they are obviously more nearly assimilated to tame animals than to wild ones and perhaps more nearly to inanimate objects than to animals of either description" *State v. Taylor* (1). These observations seem to me to be substantially applicable to chanks and pearl oysters which may, therefore with perfect propriety, be treated as standing on a par with *ferœ domitæ* and like them the subject of absolute property. Supposing however they should be treated differently from *ferœ domitæ*, there ought, having regard to the extremely limited power of locomotion possessed by these creatures, to be no hesitation in holding, as contended for by Mr. Srinivasa Aiyangar for the petitioner, that they are the subject of property *propter*

(1) 72 Am. Dec, 347; 3 Dutcher, 117.

impotentiam. As to the extent of the property, however, the result should be the same, in view of their weakness in the matter of locomotion being, unlike as in the case of the young of birds, to which reference was made in the argument, not a temporary but a permanent condition. If it would be going too far to ascribe absolute property on the said ground they would certainly be the subject of qualified property, *i.e.*, they would belong to him on whose land they exist so long as they do not migrate therefrom and pass away elsewhere, even supposing they are likely to do so. Apart, too, from this view it would be impossible to ignore the fact that for ages in this country, chanks and pearl oysters have been owned and enjoyed by the sovereign as belonging by prerogative right exclusively to him—a fact from which it must, with reference to the Crown and persons having similar right, be held that they *ratione privilegii* are the subject of property absolute or qualified according to the view to be taken with reference to the nature and capacity of the animals themselves. If, with reference to such considerations, the animals are only the subject of qualified property the owner of the exclusive right can claim them of course only so long as they do not migrate beyond the limits within which the right is exercisable.

Turning now to branch (*b*) of the question under consideration, the objection that live chanks even if a subject of property are not the subject of larceny would seem to have reference to the rule of English Criminal Law thus stated in Hale's 'Pleas of the Crown': "Larceny cannot be committed in some things whereof the owner may have a lawful property and such whereupon he may maintain an action of trespass, in respect of the baseness of their nature, as mastiffs, spaniels, grey-hounds, blood hounds, or of some such things wild by nature yet reclaimed by art or industry as bears, foxes-ferrets, etc., or their whelps or calves, because, though reclaimed, they serve not for food but pleasure, and so differ from pheasants, swans, etc., made tame, which though wild by nature, serve for food." But surely it would not be right to impute baseness within the meaning of the said rule to creatures like those in question so harmless during life and so useful after death, one description of them leaving what, as already stated, lends itself to so many uses in this country and the other containing what on account of their beauty and rarity have always been among the choicest objects of the jeweller's art. If a place must be found for such members of

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the animal kingdom in the classification of English Criminal Law, they ought certainly to be treated as animals highly serviceable to man, though otherwise than as food, and such serviceableness must, according to the principle of the authorities, be held to make them the subject of larceny, considering how the law views the case of another animal prized not as food, the rule as to which is expressed quaintly enough thus: "Only of the reclaimed hawk in respect of the nobleness of its nature and use for princes and great men, larceny may be committed" (Hale's 'Pleas of the Crown', p. 512). However this may be, it is scarcely necessary to say that, under our own criminal law, subject only to the exception provided for by section 95 of the Indian Penal Code, an animal which is recognised as property is *ipso facto* capable of being stolen.

Now as to the last branch of the question I cannot see what difficulty there can be in holding that chanks and pearl oysters while still in the beds are, within the meaning of section 397 of the Indian Penal Code, in the possession of persons who may show a title thereto. The circumstance that the subjects of His Majesty and others may navigate the waters could not preclude the predicability of possession in the largest sense of the term with regard to beds forming the subject of these fisheries, on the part of those entitled exclusively to carry on the fisheries. The right of such persons being admitted, it follows that so long as chanks and pearl oysters have not actually been manually taken hold of by strangers, the animals, notwithstanding their continuance in their natural habitat, must, on the principle that "property in personal chattels draws after it the possession" (see *State* v. *Taylor*(1)), be held to be in the possession of the owner and of none else. That, here, the thing owned lies buried under the waters of the sea, operates rather as a security of the owner's possession than otherwise, as that in many ways interposes serious obstacles in the way of unobserved intrusion on the rights of the proprietors. The bed of the sea being vested in the Crown the soundness of postulating possession in the Crown in regard to chanks and oysters belonging to it is too obvious to require further discussion.

As regards the Ramnad proprietor also the same conclusion would follow if he has the immemorial right claimed. Without

(1) 72 Am. Dec., 348; 3 Dutcher, 117.

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intending or seeming to introduce into this country the highly technical distinctions peculiar to the law of England connoted by such terms as common fishery, common of fishery, free fishery and several fishery one may admit that there is force in the suggestion made by Mr. Srinivasa Aiyangar that the alleged right of the Ramnad proprietor would not stand on a worse footing than that of a person entitled to a several fishery in England which, it has been held, is a right capable of being vindicated by possessory remedies (*Holford* v. *Bailey*(1) and *Hanbury* v. *Jenkins*(2)). And in favour of the contention that the dishonest removal of chanks even with reference to such a proprietor would constitute theft under the Indian Penal Code, I may cite *Reg* v. *Downing*(3) where a conviction for larceny was sustained by the Court of Criminal Appeal (presided over by Cockburn, C.J., Channell, B., Keating, J., Brett, J., and Cleasby, B.) under 24 and 25 Vict., Cap. 96, which enacted that "whoever shall steal any oyster or oyster brood from any bed laying or fishery being the property of any other person and sufficiently marked out, shall be guilty of a felony", the whole evidence as to the prosecutor's right having been that for a period of 45 years he and his father had, as of right, exercised the right of fishing oysters in the bed from which the prisoner had removed them and which was situated in a tidal navigable river.

Apart from any statute, in *State* v. *Taylor*(4) referred to above, dishonest removal of oysters was held to be theft, though the removal was from a sound accessible to the public for navigation and fishing, because the oysters remained the property of the prosecutor, he having planted them in the spot wherefrom they were removed, the common law as understood in that country permitting such planting subject to the liability of the oysters being destroyed or removed if they should prove a nuisance or interfere with the public rights of navigation and fishing. Obviously the fact that the Ramnad proprietor claims the chanks not *per industriam* but by immemorial privilege, referring as it does only to the source of his right, cannot affect the question of possession when once the right is allowed.

Before concluding my observations on the present matter it may not be amiss to draw attention to a provision in one of the

(1) 13 Q.B., 426.
(2) L.R., [1901], 2 Ch., 401.
(3) 11 Cox C.C., 580.
(4) 72 Am. Dec., 347; 3 Dutcher, 117.

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several Australian statutes passed for the protection and regulation of the pearl fisheries in Western Australia, as showing the unmistakeable trend of legal thought on the subject. I refer to 50 Vict. No. 14, the 'Shark's Bay Pearl Shell Fishery Act', 1886, section 8, of which runs thus: "All pearls and pearl shells lying or contained within the limits of any licensed area shall, during the continuance of the license, be deemed to be the absolute property of the licensee for all purposes, civil or criminal; and all and every person or persons who shall gather, collect, or remove any pearl or pearl shells within or from the limits of a licensed area, without the authority of the licensee or his agent, shall be deemed guilty of larceny and shall, on summary conviction of such offence before two or more Justices of the Peace in Petty Sessions, be liable to be imprisoned for any term not exceeding two years with or without hard labour".

As to the cases of *The Queen* v. *Revu Pothadu*(1), *Subba Reddi* v. *Munshoor Ali Saheb*(2), *Horimoti Moddock* v. *Deno Nath Malo*(3), *Bhusun Parui* v. *Devonath Banerjee*(4), *Empress* v. *Charu Nayiah*(5) and *Bhagiram Dome* v. *Abar Dome*(6) to which our attention was drawn on behalf of the accused, I take their *ratio decidendi* to be that fishes being *feræ naturæ* and the waters concerned in the particular cases having been unenclosed waters operating in no way to curtail the power of unrestricted movement and escape of the fishes, a taking of them could not amount to theft as, in the circumstances, they were not, until actually caught, the subject of property. These cases have no application here for the reason that live chanks are not *feræ naturæ* properly so called (see the observations of Westbury, L.C., in *Blades* v. *Higgs*(7) and have already been held to be at least the subject of qualified property even in their natural habitat, shells of dead chanks being of course absolute property in every sense.

I pass on to the next question which involves considerations of no small importance. In dealing with it, I wish, before going further, to say that *Queen* v. *Keyn*(8) relied on by Mr. Sivaswami Aiyar is distinguishable from the present case for reasons which would be best stated in the words of Mr. Justice Blatchford who

(1) I.L.R., 5 Mad., 390.
(2) I.L.R., 24 Mad., 81 at p. 82.
(3) 19 Suth. W.R. (Cr. R.), 47.
(4) 20 Suth. W.R. (Cr. R.), 15.
(5) I.L.R., 2 Calc., 354.
(6) I.L.R., 15 Calc., 388.
(7) 11 H.L.C., 612 at. p. 631.
(8) L.R., 2 Ex. D., 63 at pp. 162, 193.

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delivered the judgment of the Supreme Court of the United States in *Manchester* v. *Massachussets*(1), viz., that "the question there (in *Queen* v. *Keyn*(2)) was not as to the extent of the dominion of Great Britain over the open sea adjacent to the coast, but only as to the existing jurisdiction of the Court of Admiralty in England over offences committed in the open sea, and the decision had nothing to do with the right of control over fisheries in the open sea or in bays or arms of the sea." See also *Direct United State's Cable Company* v. *Anglo-American Telegraph Company*(3).

Passing then to the question in hand it is to be observed that having regard to the fact that the rule as to the territorial waters of a country is founded on the principle that a proper margin is absolutely necessary for the safety and convenience of every country bordering on the sea, and having regard to the fact that the limit of a marine league was arrived at with reference to the shooting power of cannons in former times, while those now in use are of a much longer range, doubts have been raised as to the propriety of maintaining this any longer as the proper limit (Hall's 'International Law,' 4th edition, p. 160). "In 1894 the *Institut de droit International* exhaustively discussed the question and there was no division of opinion as to the necessity of giving a greater breadth to the zone—a decided majority favouring a zone 6 miles from low water mark as territorial for all purposes with the right in a neutral state to extend it in time of war to a distance from shore equal to the longest range of modern guns." (Taylor's 'International Public Law,' p. 294; see also Hall's 'International Law,' p. 161, note.) But, in the absence of a distinct international concert on the point, the ordinary limit of territorial waters in the open sea should, I presume, be taken to be that referred to above subject perhaps to the qualification, according to the decision of the Supreme Court of the United States in *Manchester* v. *Massachussets*(1) (already referred to), that "all Governments for the purpose of self-protection in time of war or for the prevention of frauds on its revenue, exercise an authority beyond this limit."

Be this as it may, certain parts of the sea spoken of as gulfs, bays, etc. (Taylor's 'International Public Law,' sections 229 and

(1) 139 U.S. App., 240 at p. 257.
(2) L.R., 2 Ex. D., 63 at pp. 162, 193.
(3) L.R., 2 A.C., 394 at p. 416.

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230; see also p. 138 *ibid.*), though few in number would seem to be recognized as standing on an exceptional footing, the reason for the exception, as I understand it, being that while in regard to waters truly oceanic exclusive dominion by any particular nation is, in the very nature of things, impossible, such is not the case with reference to the parts of the sea referred to. From the instances of such waters occurring in the books, it is to be gathered that an important element in the determination of the question whether particular waters come within the exception, is the position thereof with reference to the territory of the nation or the territories of the nations claiming special rights therein; for, it is obvious that if waters are encircled to a great extent by the land of one or more States, that conduces to and facilitates the springing up of exclusive rights. Whether in fact such rights have grown up must, in the absence of treaties and compacts, be a question of user acquiesced in by other nations. The law on this point was fully examined by Lord Blackburn who delivered the judgment of the Judicial Committee in a case which related to Conception Bay in Newfoundland; and I cannot do better than quote his observations (*Direct United State's Cable Company* v. *Anglo-American Telegraph Company*(1)). His Lordship said: "Passing "from the Common Law of England to the general law of nations "as indicated by the text writers on international jurisprudence, "we find an universal agreement that harbours, estuaries and "bays landlocked, belong to the territory of the nation which pos-"sesses the shores round them, but no agreement as to what is "the rule to determine what is 'bay' for this purpose.

"It seems generally agreed that where the configuration and "dimensions of the bay are such as to show that the nation occupy-"ing the adjoining coasts also occupies the bay, it is part of the "territory; and with this idea most of the writers on the subject "refer to defensibility from the shore as the test of occupation; "some suggesting therefore a width of one cannon shot from shore "to shore or three miles; some, a cannon shot from each shore or "six miles; some an arbitrary distance of ten miles. All of these "are rules which, if adopted, would exclude Conception Bay from "the territory of Newfoundland, but also would have excluded "from the territory of Great Britain that part of the Bristol

(1) L.R., 2 A.C., 394 at pp. 416, 419, 420.

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"Channel which in *Reg* v. *Cunningham*(1) was decided to be in the "county of Glamorgan. On the other hand, the diplomatists of "the United States in 1793 claimed a territorial jurisdiction over "much more extensive bays, and Chancellor Kent, in his comment-"aries, though by no means giving the weight of his authority to "this claim, gives some reasons for not considering it altogether "unreasonable.

"It does not appear to their Lordships that jurists and text "writers are agreed what are the rules as to dimensions and con-"figuration which, apart from other considerations, would lead to "the conclusion that a bay is or is not a part of the territory of "the State possessing the adjoining coasts and it has never, that "they can find, been made the ground of any judicial determina-"tion. If it were necessary in this case to lay down a rule, the "difficulty of the task would not deter their Lordships from "attempting to fulfil it. But in their opinion it is not necessary "so to do. It seems to them that in point of fact the British "Government has, for a long period, exercised dominion over this "bay and that their claim has been acquiesced in by other nations "so as to show that the bay has been, for a long time, occupied "exclusively by Great Britain; a circumstance which in the "tribunals of any country would be very important."

Now the question is whether the circumstances of the present case warrant the view that those parts of the sea which contain beds of chank and beds of pearl oyster forming the subject of fishery operations therein, come within the exception already adverted to. The beds referred to lie all along the Indian coast as well as the coast of Ceylon in the Gulf of Manaar. This gulf is no doubt quite open towards the south, but is otherwise almost wholly surrounded by land, *i.e.*, on the west by the Indian main-land, on the east by Ceylon and on the north by Adam's Bridge and its contiguous islands forming one continuous barrier separat-ing the gulf from Palk's Bay. The latter is comparatively much smaller, and is difficult of navigation owing to its shoals, currents and sunken rocks. The passage from the bay into the gulf lying between the mainland and Rameswaram is quite a narrow one, being only 1,350 yards in breadth (Dr. Thurston's 'Bulletin' No. III, p. 82) and 10 to 15 feet deep in low water notwithstanding

(1) Bell's Cr. C., 72.

its having been deepened by our Government some years ago. The gulf itself was similarly deepened by our Government to admit of ships of greater draught. (Balfour's 'Cyclopædia,' Vol. I, p. 1263.) The gulf at its widest (between Point de Galle in Ceylon and Cape Comorin) is 200 miles, while in its northernmost parts its width is only 17 miles; from north to south the gulf is about 130 miles.

Such being the position and circumstances of the gulf and the surrounding country having, from very early times, been inhabited by comparatively civilized races, the gulf, moreover, being as it were stocked with the already mentioned rich sources of wealth and commerce, the rulers of those races who were shrewd enough to make revenue out of the sea water by making the manufacture of salt a State monopoly, were of course not slow in making revenue out of those sources as well. The fisheries in question were thus established and have been handed down from sovereign to sovereign until, about the end of the 18th or the beginning of the 19th century, they became vested in the British. All this is clearly told by authentic historians and travellers and for the present purpose it is not necessary to make more than a few references.

"Friar Jordanus, a quaint old missionary bishop," says the author of the article on Pearl in Balfour's 'Cyclopædia,' "who was in India in 1330 says that 8,000 boats were engaged in this fishery and that of Ceylon and that the quantity of pearls was astounding and almost incredible. The head-quarters of the fishery was then, and indeed from the days of Ptolemy to the 17th century continued to be, at Chayl or Coil, literally, the temple, on the sandy promontory of Ramnad, which sends off a reef of rocks towards Ceylon known as Adam's Bridge. And Ludovico de Varthema mentions having seen the pearls fished for in the sea near the town of Chayl in about A.D. 1500; and Barbosa, who travelled about the same time, says that the people at Chayl are jewellers who trade in pearls. This place is, as Dr. Vincent has clearly shown, the Koru of Ptolemy, the Kolkhi of the author of Periplus, the Coil or Chayl of the travellers of the middle ages, the Ramanakoil (temple of Rama) of the natives, the same as the sacred promontory of Ramnad and the isle of Rameswaram the head-quarters of the Indian pearl fishery from time immemorial." Though in this passage no express allusion is made to the fisheries

being King's monopoly, that undeniable and well-known fact is mentioned elsewhere. For example, Sir James Emerson Tennent in his work on Ceylon observes: "Monopolies are to the present day a prominent feature of the Ceylon revenue. The fishery of pearls and chanks has been, from time immemorial, in the hands of the sovereign" (5th Edition, Vol. II, p. 169). That this was also the case with regard to the fisheries on the opposite coast (that of Tinnevelly and Madura) while the country was still in the hands of Hindu rulers and down to a period not long anterior to the accession of the Nawab of the Carnatic to power, will be seen from the following extracts which I make from Nelson's 'Manual of the Madura Country':—"Another and productive source of revenue was the great pearl fishery which was carried on annually from Cape Comorin to the island of Pamban. A rough idea of its value may be formed from a statement in a Jesuit letter of the year 1700 which describes the fishery, to the effect that the Dutch used to grant licenses to fish for pearls to all applicants at a uniform rate of about 60 Ecus for each vessel employed in the fishery, and that sometimes as many as 6 and 700 vessels were so employed. The net sum realized must, therefore, have been about 36,000 Ecus. And it was realized from the fishery along the Tinnevelly coast only: the Ramnad coast being then fished by the Sethupathi, to whom it belonged" (p. 154, Part III, Nelson's 'Madura Manual'). "They durst not attempt to coerce either the Sethupathi or the King of Madura and they took nothing by an embassy which they sent to the former, together with some valuable presents, for the purpose of inducing him to make over to them all his right and title to the profits of the pearl fishery on his coasts. They had obtained from the King of Madura the monopoly of the fishery of the Tinnevelly coast and drew a considerable revenue from licenses to fish which they granted to all applicants" (p. 227 *ibid.*). "And the conch shell fishery must also have produced a considerable revenue if, as seems probable, the king enjoyed the monopoly of it" (p. 154 *ibid.*). "The conch shell fishery was also theirs (belonging to the Dutch) within the same limits as the pearl fishery and yielded a considerable profit" (p. 227 *ibid.*). It is scarcely necessary to add that it is matter of quite recent history that the fisheries on the said coast of the mainland passed into the hands of the East India Company on the cession to it by Nawab of the Carnatic of the revenues thereof, while

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the Ceylon fisheries vested in the British Crown on the conquest of Ceylon from the Dutch.

Now, considering that the various European maritime powers, who from about 16th century were contending for supremacy in the Indian seas, raised no question as to the right of the sovereigns for the time being of the Carnatic and Ceylon to their respective fisheries, there can be little doubt that such right was regarded by one and all of them as unassailable. Nor is high authority in terms referring to and recognizing it wanting. Vattel, himself a strong adherent of the doctrine that the open sea is not susceptible of exclusive dominion, while dealing with the question of special appropriation of part of the sea, writes thus in a well-known passage: "The various uses of the sea near its coast render it very susceptible of property. People there fish and draw from thence shells, pearls, amber, etc. Now in all these respects its use is not inexhaustible; so that the nation to whom the coasts belong may appropriate to itself an advantage which it is considered as having taken possession of and make a profit of it in the same manner as it may possess the domain of the land it inhabits. Who can doubt that the pearl fishery of Bahrem and Ceylon may not lawfully be enjoyed as property? And though a fishery for food appears more inexhaustible, if a nation has a fishery on its coast that is particularly advantageous and of which it may become master, shall it not be permitted to appropriate this natural advantage to itself as a dependence on the country it possesses?" (Book I, ch. XXIII, sec. 287, p. 115, Translation of 1759).

With so emphatic a pronouncement by such a publicist as to the lawfulness of the exclusive possession of the fisheries in question unbrokenly enjoyed from ancient times and with instances of exclusive occupation which have taken place almost under our own eyes with reference to pearl fisheries in Shark's Bay, etc., in Western Australia and which include pearl banks beyond the marine league limit, one may with confidence lay down that, to say the least, the parts of the sea falling between the respective coasts and the lines opposite each connecting the extreme points seawards of the limits of the fisheries in question, are British territorial waters. It, therefore, follows that the petitioner is not precluded in law from making out a good title to chanks in the localities specified by him, by the mere fact that they lie beyond the distance of a marine league from low water mark, if he can

show that the immemorial right under which he claims extends to such localities.

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As regards the last question, in the view I take as to the territorial character of the waters in which the fisheries exist, it would, from *Reg* v. *Cunningham*(1) where it was held that an offence committed in a part of the Bristol Channel more than 3 miles from the shore was within the jurisdiction of the authorities of the county of Glamorgan, of course, follow that our Courts likewise have jurisdiction over offences committed in the parts of the sea in question, though the spots in which the offences are committed lie beyond a marine league from the shore. I would therefore set aside the order of the Head Assistant Magistrate, direct him to restore the complaint to his file and dispose of it in accordance with law.

RUSSELL, J.—This is a criminal revision petition against the order of discharge by the Head Assistant Magistrate of Ramnad.

The question raised is whether "chanks" in the open sea can be the subject of theft.

The Magistrate holds that a chank is a fish and is *feræ naturæ* and as it was not shown that the chanks in the present case were removed from an enclosed space or that breeding operations were carried on in regard to them, the conclusion arrived at by the Magistrate was that those chanks cannot be said to be in the possession of any one until they are removed—therefore they were not stolen from the petitioner.

The Sessions Judge, before whom the matter came in revision, declined to interfere, on the ground that the open sea could not be said to belong to the petitioner and chanks caught in the open sea could not be the subject of theft.

The Government Pleader appears in support of the order of the Magistrate and has argued that no exclusive right by prescription as to fishing in the open sea could be acquired by the Rajah of Ramnad—it is as a lessee of the Rajah of Ramnad that the petitioner asserts his rights.

The chank and pearl fishery beds along the coast of Tinnevelly and Madura have all been located and mapped out. It is matter of common knowledge that these fisheries are a source of some revenue to Government, but Government, I take it from the

(1) Bell's Cr. C., 72.

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appearance of the Government Pleader in this case, does not take up the position that chanks can be the subject of theft.

My conclusion in this case is based upon three simple propositions—

(1) The Gulf of Manaar is part of the high seas in which the Crown claims no special rights or jurisdiction.

(2) The Rajah of Ramnad is not the owner of the bed of the sea below low water mark.

(3) Chanks are *ferœ naturæ*.

I say the Gulf of Manaar is part of the high seas from its size, configuration and geographical position. In the present case the Crown has not asserted any special rights in respect of any portion of the Gulf; and in this revision case I do not think we are entitled to assume that the Crown would, in fact, under any circumstances, assert any such right.

As to the ownership of the bed of the sea it may be admitted that the authorities are not uniform on the subject. I, however, accept the reasoning and conclusion of Cockburn, C.J., in *Queen* v. *Keyn*(1) and following pages. This no doubt was a case which applied only to the coasts of Great Britain, but the reasoning and conclusion, I consider, applies equally to this country. I hold that the Crown does not own the bed of the sea below low water mark. The Government Pleader does not now assert that any such ownership vests in the Crown either by right of user or legislation. The argument on behalf of the petitioner is that he is the owner of the "several fishery" in respect of chanks on the Ramnad littoral shores and that this right carries with it the ownership of the soil of the sea. I do not admit the validity of this argument. In this case I do not wish to say anything which might unnecesarily interfere with any civil rights possessed by the petitioner. It is not necessary for me to deny that the petitioner may have a right to fish for chanks, though I may point out that there is authority for the position that a grant of the "several fishery" claimed could not be presumed, as it would be invalid if the soil of the bed of the sea does not vest in the Crown; which is the view I take (Coulson on 'Waters', 2nd edition, p. 358).

If this view be correct it follows that chanks before they are caught could not be looked upon as being in the possession of the

(1) L.R., 2 Ex. D., 63 at pp. 162, 193.

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petitioner and, therefore, there is no property in them either absolute or qualified till they are caught. Hence the following cases referred to by Mr. Srinivasa Ayyangar for the petitioner cease to be in point (*Queen* v. *Shickle*(1) and *Blades* v. *Higgs*(2)).

My third proposition is that chanks are in the same category as fishes and are, like the latter, *ferœ naturæ*. Chanks are free to move as they like. No doubt their movements are slow but they are probably more difficult to catch than most fish. To catch chanks experienced divers are necessary and even then considerable difficulty must be felt in catching them. The difficulties experienced in catching chanks compared with fish must therefore be a question of degree. I do not see how chanks can be considered as tame creatures.

If the chanks in the present case are to be classed in the same category as fish, as I think they must be, there are decisions without number to the effect that they cannot be the subject of theft as there is no property in them till they are caught.

I have not been able to find any case analogous to the present in which it has been held that a theft has been committed. I may here remark that I think the case of *State* v. *Taylor*(3) is clearly distinguishable from the present one. Taylor was convicted of larceny in respect of oysters. The oysters were bred by the complainant in the sea at a place between high and low water mark where the public generally had a right to fish. "The jury were instructed that if the same oysters which were planted by Hildreth,"—who was the complainant—"were unlawfully taken by the defendant with the intent to steal them; if the oysters so planted could be easily distinguishable from others oysters that grew in the sound; if they were planted in a place where oysters did not naturally grow; if the place where they were planted was marked and identified, so that the defendant and others going into the sound for clams and oysters naturally growing there could readily know that these oysters were planted and held as private property and were not natural oysters, then the oysters were the subject of larceny and the defendant might be convicted." No doubt the decision is an authority for the proposition that oysters under certain circumstances can be the subject of theft; but it is

(1) L.R., 1 C.C.R., 158. (2) 11 H.L.C., 621.
(3) 72 Am. Dec., 347; 3 Dutcher, 117.

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also an authority for the proposition that if oysters grow naturally in the sea they are not the subject of theft.

Reg v. *Downing*(1) practically turns on the same point as *State* v. *Taylor*(2) and unquestionably decides that oysters can be the subject of theft if dishonestly removed from a private oyster bed. Before, however, these decisions could be applied to the facts of this case, it would have to be found that the chanks were produced by breeding operations—much like oysters—in places in the sea which the petitioner had appropriated for that purpose. There is no suggestion in the present case that the chanks were produced by breeding—they, in fact, are the natural product of the sea. So that it appears to me the cases cited are not all on all fours with the present case. I may assert, therefore, I think, that no case has been brought to notice where a person has been convicted of larceny or theft in respect of an oyster or chank produced naturally in the sea.

The special legislation which has taken place in Australia does not, in my opinion, affect the position. It has there been enacted that, under certain circumstances, a person who removes oysters from the open sea shall "be deemed" to be guilty of larceny. It does not follow therefore that in the absence of such legislation a person who removes chanks has committed theft as defined in the Indian Penal Code.

I might support the general conclusion at which I have arrived by asserting the broad proposition that in the high seas where these chanks have been caught all subjects of the Crown have an equal right to fish; but I do not wish to complicate the discussion unnecessarily. In my view no theft has been committed, because the chanks in the present case are *ferœ naturæ*, as fish are, and they have been produced naturally in the sea in beds which the Rajah of Ramnad cannot claim to be his in exclusive right.

I agree with my learned colleague in the opinion that if an offence has been committed the Courts have jurisdiction to try it.

I think the petition should be dismissed as no offence has been committed.

(In consequence of this difference of opinion, the case was posted for hearing before Benson, Boddam and Bhashyam Ayyangar, JJ.)

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(1) 11 Cox C.C., 580. (2) 72 Am. Dec., 347; 3 Dutcher, 117.

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S. Srinivasa Ayyangar for petitioner.

The Public Prosecutor for the Crown.

T. R. Venkatarama Sastri (*P. S. Sivaswami Ayyar* with him) for the accused.

The Court delivered the following.

JUDGMENT.—In this case the complainant charged certain persons with having committed the offence of theft of chanks from the chank beds leased to him by the Rajah of Ramnad off the coast of his zamindari.

The Head Assistant Magistrate discharged the accused on the ground that chanks are fish and are *ferœ naturæ* and in this case were taken from beds in the open sea and were therefore not taken from the possession of any person and could not be the subject of theft. The case came up for revision before a Bench of this Court composed of the Offg. C.J. and Russell, J., but, as they were unable to agree, the case was posted before us and our late colleague Sir Bhashyam Ayyangar for argument and disposal. We have no doubt that the grounds on which the accused were discharged are untenable, and that the chanks in question were capable of being the subject of theft.

The offence of theft under the Indian Penal Code is committed if there is a dishonest taking of moveable property out of the possession of another; and the questions for our decision are whether the chanks in question were capable of being regarded in law as the property of the lessee of the chank beds, and of being in his possession before their alleged taking by the accused. We have no doubt that both these questions must be answered in the affirmative. It was agreed before us that the beds from which the chanks were taken are situated in Palk's Bay, not the Gulf of Manaar, as supposed by Russell, J. Palk's Bay is a large stretch of sea water lying between the coasts of India and Ceylon. It is roughly 70 miles long by 50 or 60 broad. It is bounded on the north, west and south by the Indian districts of Tanjore and Ramnad, and on the east by Ceylon. There is a narrow passage, three-fourths of a mile wide, connecting it on the south with the Gulf of Manaar, which also lies between India and Ceylon. This passage is known as the Straits of Pamban and it separates the mainland from the large island of Rameswaram which forms part of the Indian district of Ramnad, and from which a continuous line of coral reefs, known as Adam's Bridge, extends to the island

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of Ceylon. "The passage was deepened some years ago but is even now only 10 to 15 feet in depth. At its north-eastern extremity Palk's Bay opens into the Bay of Bengal by a strait which is not more than one-ninth of the circumference of the bay. It will thus be seen that Palk's Bay is a bay, or arm of the sea, landlocked by His Majesty's dominions for eight-ninths of its circumference, and it also contains a great number of islands which form part of the districts to which they are adjacent on the Indian and Ceylon sides, respectively. There is ample historical evidence, which has been referred to in the judgment of the learned Offg. C.J., and which we need not recapitulate, to show that this bay, and also parts of the adjacent Gulf of Manaar, have been effectively occupied for centuries by the inhabitants of the adjacent districts of India and Ceylon, respectively.

We do not think that Palk's Bay can be regarded as being in any sense the open sea and therefore outside the territorial jurisdiction of His Majesty. We regard it rather as an integral part of His Majesty's dominions, the portions adjacent to India being within the jurisdiction of the Indian authorities, and the portions adjacent to Ceylon being within the jurisdiction of the authorities of that place. That this is the correct view is, we think, clear from the case of *Reg* v. *Cunningham*(1) in which it was decided that the Bristol Channel, lying between England and Wales, was a part of Great Britain. Cockburn, C.J., in delivering judgment said: "The principle on which we proceed is that the whole of this inland sea, between the counties of Somerset and Glamorgan, is to be considered as within the counties by the shores of which its several parts are respectively bounded." Referring to this judgment Lord Blackburn in delivering the judgment of the Privy Council in the *Conception Bay Case*(2) said "This much was determined, that a place in the sea, out of any river, and where the sea was more than ten miles wide, was within the county of Glamorgan, and consequently in every sense of the words within the territory of Great Britain. It also shows that usage and the manner in which that portion of the sea had been treated as being part of the county was material." His Lordship then proceeded: "Passing from the Common Law of England to the general law of nations, as indicated by the text writers on international

(1) Bell's Cr. C., 86.

(2) L.R., 2 A.C., 394 at p. 419.

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jurisprudence, we find an universal agreement that harbours, estuaries and bays landlocked belong to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is "bay" for this purpose. It seems generally agreed that where the configuration and dimensions of the bay are such as to show that the nation occupying the adjoining coasts also occupies the bay it is part of the territory." He then stated that no precise rule had been laid down or was required to be laid down in the case before their Lordships as "it seemed to them that, in point of fact, the British Government had for a long period exercised jurisdiction over this bay and that their claim had been acquiesced in by other nations so as to show that the bay had been for a long time occupied exclusively by Great Britain, a circumstance which in the tribunals of any country would be very important" and which we may add would be conclusive as against a subject of Great Britain. Applying these considerations to the present case and comparing the configuration and dimensions of Palk's Bay with those of the Bristol Channel and of Conception Bay, and considering the evidence that exists as to the occupation of Palk's Bay by the British with the acquiescence of other nations, we have no hesitation in holding that it is just as much an integral part of His Majesty's dominions as are the Bristol Channel and Conception Bay, and that the chank beds where the alleged offence was committed, which are five miles off the coast of Ramnad at Mudiampatnam are part of the territories of British India.

The decision in the case of *The Queen* v. *Keyn*(1) relied on by the respondents, referred to the jurisdiction of the Court of Admiralty in England over offences committed in the open sea, and has no application to such a state of facts as exists in the present case.

Such, then, being the correct view as to the character of the place where the alleged offence was committed we proceed to consider whether chanks taken from it can be the subject of theft.

It is, of course, quite incorrect to regard chanks as, in any sense, fish. No doubt they may be popularly included among "shell fish," but neither zoologically nor legally have they any of

(1) L.R., 2 Ex.D., 63 at pp. 162, 193.

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the essential characteristics of fish. They are large molluscs. The shells in which the living mollusc resides is six or seven inches long, and may weigh as much as a couple of pounds. They are found buried in a particular kind of sand bed, or in the sandy crevices of the coral reefs which abound in the bay. They can crawl slowly, a foot or two in a minute, but they are incapable of rapid motion or of saving themselves from being captured by any one who proceeds to take them. They are gathered by divers, who sometimes collect as many as twenty at a haul. The chank beds on which they lie are all carefully mapped out and full details respecting them are recorded by the authorities. They lie at various depths in the water from 2 to 10 or 12 fathoms. Live chanks are known as green chanks, and the shells of the dead animals are known as white chanks. Both are collected and are articles of very considerable utility and commercial value. The evidence shows that for many hundreds of years they, like the pearl oysters which are generally found in adjacent beds, have been the monopoly of the rulers of the country both in India and Ceylon, and that licenses to gather them have been granted by the sovereign. In addition to the facts stated by the Offg. C.J. in his judgment we may say that, when it was determined to make a permanent settlement of the revenue of the Ramnad zamindari in 1802, we find the "Chank royalty" named as one of the eight heads of revenue on which the permanent assessment was fixed (Nelson's 'Manual,' part IV, p. 155), and it appears that in 1803 this chank royalty was hypothecated to Government as security for arrears of revenue. In 1874 the chank royalty "in the seaports mentioned in the margin" (which included Mudiampatnam now in question) was attached for arrears of revenue, and so lately as 1899 and 1900 Government itself leased the chank fisheries from the zamindar. A great deal of learned argument has been addressed to us on the subject of animals *ferœ naturæ* and the English law of larceny in regard to them. If it were necessary to decide whether chanks should be classed as *ferœ naturæ* or as *domitæ naturæ* we should certainly hold that they belong to the latter class. It is not easy to regard a chank as being of a "wild disposition," (*ferœ naturæ*). There is no evidence that it ever migrates from the bed in which it is born and its power of locomotion is so small that it is powerless to escape from any one who desires to take it.

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It has been judicially held in America that for legal purposes oysters "are obviously more nearly assimilated to tame animals than to wild ones, and perhaps more nearly to inanimate objects than to animals of either description" *State* v. *Taylor*(1). In this view we concur and we think that chanks may properly be placed in the same category with oysters. The fact that fish in a river or in an open and unenclosed tank have been held by the Courts in India not to be the subject of theft is irrelevant, because they are so held by reason of their power to escape up or down the river or out of the tank and cannot therefore be regarded as in the possession of the owner of the tank. But even fish if in an enclosed tank, so as to be under the control of the owner of the tank, are capable of being the subject of theft (*Queen Empress* v. *Shaik Adam Valad Shaik Farid*(2); and even the young of wild birds, such as hawks or herons, if found on a man's land may be the subject of larceny *propter impotentiam* owing to their inability to escape capture, or to pass from the possession of the owner of the land, though the old birds may not be the subject of larceny (Stephen's 'Com.', 13th edition, Vol. 2, p. 6). Even if chanks are in a certain sense *ferœ naturæ*, we think that they should still be regarded as in possession of the owner of the chank bed *propter impotentiam* and therefore capable of being the subject of larceny. The Indian Penal Code, however, in dealing with theft has no special provisions regarding animals *ferœ* or *domitæ naturæ*. The question in each case is whether the animal is the property of another and was dishonestly taken out of his possession. It seems to us that there is nothing in the nature of a chank, whether it be the dead shell or the living mollusc, which prevents it from being the subject of property, and that when it lies in its sand bed under the sea it is as much in the possession of the owner of the sand bed as are the coal that lies buried in the ground and the snail that crawls on the dry land and the worm that burrows in the earth in possession of the owner of the land where they are found. The exclusive property in these chanks has in fact been held by Government from time immemorial and has been leased out for the benefit of the public revenue, and this is in accordance with the common law of the country which recognizes the power of Government to make settlements or grants for

(1) 72 Am. Dec., 347; 3 Dutcher, 117. (2) I.L.R., 10 Bom., 193.

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purposes of revenue of all unsettled and unappropriated lands whether covered by water or not covered by water and, therefore, of the produce or portions of the produce of such lands (*Hori Das Mal* v. *Mahomed Jaki*(1)), *per* Garth, C.J., on behalf of the Full Bench, and *Viresa* v. *Tatayya*(2).

In our view, then, the chanks which the accused in this case are alleged to have stolen were capable of being the subject of theft and were taken, not from the bed of the high seas, but from an arm of the sea which is part of the territory of British India, which has been in possession of the Crown from time immemorial. It is not denied that the Crown has included the revenue derivable from the chanks in the permanent settlement of the zamindari under Regulation XXV of 1802 and that the Ramnad Zamindar has leased them to the complainant. If the taking of the chanks was dishonest it would be theft.

We must, therefore, set aside the order of discharge and direct the Head Assistant Magistrate to restore the case to his file and dispose of it according to law. In order to prevent misapprehension we may add that if the beds from which the chanks were taken had been off the coast of Ramnad in the Gulf of Mannar (as supposed by the Judges who first heard the petition) instead of in Palk's Bay, our decision would have been the same, since the evidence of effective occupation of the chank beds in both localities is very similar.

Our learned colleague Sir Bhashyam Ayyangar does not sign this judgment as he is no longer a member of the Court, but he has expressed his concurrence in it.

(1) I.L.R., 11 Calc., 434 at p. 444. (2) I.L.R., 8 Mad., 467.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Davies, Mr. Justice Benson and Mr. Justice Russell.

1904. March 16, 25, 29.

VISALAKSHI AMMAL (FIRST DEFENDANT), APPELLANT,

v.

SIVARAMIEN AND ANOTHER (PLAINTIFF AND SECOND DEFENDANT), RESPONDENTS.*

Hindu Law—Adoption—Agreement limiting property to be taken by minor adopted son—Validity.

A Hindu widow, in pursuance of authority given by her husband, since deceased, adopted plaintiff, a minor. A registered document was executed by the widow on the day of the adoption, wherein the fact of the adoption was recited, and certain terms were set forth as to the manner in which the property of the deceased adoptive father should be enjoyed as between the plaintiff and the widow. By those terms it was declared that, in the event of disagreement between plaintiff and his adoptive mother, the property described in the second schedule should be enjoyed by the latter during her life, and should be taken by the plaintiff after her death. The authority under which the widow adopted had been given orally, and merely enabled her to adopt a son, and made no reference to the manner in which the estate of the deceased should be enjoyed either by the son or the widow. The effect of the arrangement was to vest in the widow, on the contingency mentioned, for her life, about a moiety of the property inherited by her from her husband. The terms embodied in this agreement were consented to by the plaintiff's natural father prior to the adoption, and it was in consequence of such consent that the adoption took place and the document was executed. Disagreements arose between plaintiff and the widow, and plaintiff, still a minor, now sued through his natural father as next friend to recover all the property of his deceased adoptive father:

Held, that the provision in the document in favour of the widow was binding on the plaintiff and the widow was entitled to enjoy the property in the second schedule during her lifetime.

AGREEMENT limiting the property to be taken by an adopted son. First defendant, a widow, had taken plaintiff in adoption to her deceased husband in pursuance of his authority. On the day of the adoption the following document (which was filed as exhibit I) was executed by first defendant:—

"Deed executed on 30th December 1893 by me, Visalakshi Ammal (first defendant), wife of Rengasami Aiyar, deceased,

* Appeal No. 223 of 1901, presented against the decree of O. S. R. Krishnamma, Subordinate Judge of Trichinopoly, in Original Suit No. 42 of 1901.

Brahmin, to Sivaraman *alias* Veeraraghavan, aged 5 (plaintiff), Brahmin by caste, Mirasidar. According to my husband's permission I have on this date taken you in adoption and you have become son to me. Consequently you yourself shall inherit all the undermentioned land, house-sites, etc., which are my properties. And you shall also protect me. In case of disagreement between you and myself, I shall thenceforward till my lifetime enjoy, paying the Circar assessment, the property mentioned in paragraph 2 out of the undermentioned properties, and you shall after my lifetime perform the obsequies, etc., that should be done for me and inherit also those properties yourself."

The document was registered. Plaintiff, who was still a minor, now sued through his natural father as his next friend, to recover the properties left by his adoptive mother's deceased husband and mentioned in exhibit I. First defendant, among other defences, pleaded that plaintiff was not entitled to claim possession of those properties which, by the terms of exhibit I, were to be enjoyed by first defendant during her lifetime. The Subordinate Judge passed a decree in plaintiff's favour practically as prayed for. Further facts as to the adoption and the claim are set out in the Order of Reference to a Full Bench. First defendant preferred this appeal with regard to the properties specified in schedule II to exhibit I.

P. R. Sundara Ayyar and *T. V. Vaidyanatha Ayyar* for appellant.

S. Subrahmania Ayyar and *S. Venkataramana Ayyar* for first respondent.

The appeal came, in the first instance, before Sir S. SUBRAHMANIA AYYAR, Offg. C.J., and BENSON, J., who made the following

ORDER OF REFERENCE TO A FULL BENCH.—The plaintiff, a minor, through his next friend, his natural father, brought the present suit for the recovery of certain properties stated to have vested in him by virtue of his having been adopted to one Rengasami Aiyar, deceased, by his widow, the first defendant. The Subordinate Judge gave a decree to the plaintiff practically as prayed for. In the present appeal by the first defendant no question is raised as to the plaintiff's adoption. The dispute here relates only to the properties specified in schedule II to exhibit I, dated 30th December 1893, executed by the first defendant on the day of the adoption in proof of it and setting forth the terms and

arrangements as to the enjoyment of the property of the adoptive father as between the plaintiff and the first defendant, and whereby the property described in the said schedule II to the instrument was, in the event of disagreement between the plaintiff and the first defendant, to be enjoyed by the first defendant for her life and, subsequent to her death, to be taken by the plaintiff. The permission by the first defendant's husband in pursuance of which the adoption of the plaintiff took place was oral, and it appears to have merely enabled her to adopt a son, and made no reference as to the terms of enjoyment of the estate by either. There is also no doubt that the terms embodied in exhibit I were consented to by the plaintiff's natural father prior to the adoption, and that it was in consequence of such consent that the adoption took place and exhibit I was executed. The effect of the arrangement was to vest in the first defendant, on the contingency mentioned, for her life, almost an exact moiety of the property inherited by her from her husband, each moiety being of the value of about Rs. 10,000.

The question for determination is whether the decree in favour of the plaintiff in so far as it relates to the property mentioned in the said schedule II to exhibit I is sustainable.

Now, the effect of an adoption in the Dattaka form is to transfer the person adopted from his natural family to that of the adoptive father, such transfer necessarily carrying with it on the one hand the cessation of whatever right the adopted son possessed in the property of the natural family, and, on the other hand, under the Mitakshara law, the acquisition, among other things, by him of the right that accrues to an aurasa son on his birth in respect of the ancestral property of the father. Though a person may, at his discretion, give away a son of his in adoption, or refuse to do so, and though a sonless man may, according to his choice, accept, or refuse to accept, a son in adoption, yet once the giving and the accepting have taken place, the change of status, with the incidents as to property annexed thereto by the law, follows without the slightest reference to the volition of the party giving or the party taking. No doubt the adoptive father can simultaneously with the adoption make such arrangement in respect of the joint property of himself and the adopted son as under the law a man can lawfully make notwithstanding the existence of an aurasa son. For example, as a part and parcel of the transaction of adoption the adoptive father may, of his own will, effect a partition of the

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property between himself and the adopted son—cf. *Kandasami* v. *Doraisami Ayyar*(1). He may likewise provide for the maintenance of those who under the law would be entitled to be provided with maintenance from the joint property. Such arrangement for maintenance may be made independently of any partition and would be an act within the scope of the father's paternal authority under the law, and the circumstance that the father refrains from exercising his paternal authority to the fuller extent of effecting a partition could not, in reason, detract from the validity of the arrangement made merely in respect of the maintenance of those who have a right thereto. So long as the partition, or the provision for maintenance, is fair and just, the adopted son cannot raise any question in respect of either; and it may be added that even when the provision for maintenance made by an adoptive father to a party entitled thereto seems to the Court more liberal than what, if the matter were litigated, it would itself award as maintenance, the provision will presumably be upheld if it was made *bonâ fide* and not for the purpose of alienating joint property under the guise of a provision for maintenance.

In cases of adoption after the death of the adoptive father by his widow under his authority, every lawful disposition of his property made by him even by a will would be binding on the adopted son for the obvious reason that those dispositions become operative from the moment of the death of the testator, while the adoption must necessarily take place at some time subsequent to the death, and the rights accruing by virtue of such adoption are only in that part of the estate which remains undisposed of at the moment of the adoption. For like reasons alienations by a widow of her life-interest made before the adoption will also bind the adopted son (*Sreeramulu* v. *Kristnamma*(2)). But no transfer made or agreement entered into, even though simultaneously with the adoption, or as a condition thereto, can bind the adopted son if they are inconsistent with his rights under the law as they would stand at the time of the adoption apart from any agreement between the parties giving and receiving. Take, for example, a case where a natural father, in well-to-do circumstances, gives a son of his in adoption to a divided brother, who is comparatively poor, and enters into an agreement that the adopted son shall,

(1) I.L.R., 2 Mad., 317.

(2) I.L.R., 26 Mad., 143.

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notwithstanding the adoption, continue to be entitled to the property belonging to the members of the natural family. Would such an agreement be binding upon the members of that family? Would the adopted son in such a case enjoy the benefits accruing from survivorship incident to membership in that family? Take, again, the case of an adoptive father subject to the Mitakshara law arranging at the time of adoption that the adopted son is to have no interest in the ancestral property during the lifetime of the adoptive father, would that prevent the springing up of co-ownership between the adoptive father and the adopted son which is the inevitable incident of the relation of father and son under that law, while unseparated? These and similar conditions and agreements would not in any way touch the validity of the adoption itself as that altogether depends upon other considerations (compare *Bhaiya Rabidat Singh* v. *Maharani Indar Kunwar*(1)). They must necessarily be looked upon as agreements or conditions essentially repugnant to the status created by adoption, and therefore not binding.

To attempt to support them on the footing of agreements by a person representing the adopted son is hardly possible. For, before the adoption the natural father of the person to be adopted could represent the latter only in regard to the property vested in him at the time and no consent of his could operate on property coming to the son after the adoption, since the natural father's power to represent his son ceases with the giving away of him (cf. *Bhaiya Rabidat Singh* v. *Maharani Indar Kunwar*(1)). Similarly, the adoptive father could not purport to act on behalf of the person to be adopted before the adoption. And as soon as the adoption takes place the two become joint owners and the adoptive father can make transfers and enter into agreements so as to bind the adopted son only for purposes which make them binding on him under the law. Nor can weight be attached to the argument that the test of the validity of agreements entered into between the party giving and the party receiving a person in adoption simultaneously with it, is whether such agreements are beneficial to the adopted son. For, though where some one duly empowered to represent a minor in a matter enters into agreements on his behalf, the validity of such agreements will depend on whether they are for the minor's

(1) I.L.R., 16 Calc., 556; S.C. L.R., 16 I.A., 53 at p. 59.

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benefit, yet inasmuch as neither the party giving nor the party receiving in adoption can lawfully represent him in agreements or things forming part and parcel of the transaction of adoption, no question of benefit or no benefit can legitimately arise for determination in such cases.

Nor, again, does the doctrine of approbating and reprobating with reference to the same thing seem to be capable of being rightly invoked against the adopted son in these cases. Except where the person given in adoption is of full age and assents to the conditions and agreements between the parties giving and receiving, a case which would be very rare, and in which such assent would preclude any question like the present being raised, the transaction would take place without any reference to the adopted son's will and consent. No doubt, when a thing is capable of being rejected or accepted in its entirety the doctrine referred to should be applied if good faith requires its application. Now, the transaction of adoption is in the nature of a sacrament, or, at all events, it creates a status. If the condition attached is such as to invalidate the adoption itself, then there is an end of the matter, and there is nothing to affirm or disaffirm. If, on the contrary, the condition leaves the adoption valid, the legal relation created thereby cannot possibly be renounced and the adopted son must be held entitled to repudiate conditions sought to be attached to the adoption by the parties giving and receiving when the conditions are inconsistent with his rights under the law.

It is to be observed that the arrangements in the present case cannot be supported to any extent as a provision for maintenance for the first defendant, as the adoptive mother had, under the law, no power to reserve or provide maintenance for herself. When occasion for such provision arises the same must be made by the adopted son or under an order of Court.

In this view the reservation of a life-interest to the widow in the property in dispute will not bind the plaintiff, who can, therefore, on attaining age, avoid the arrangement (*Ramasamiayyen* v. *Venkataramaiyen*(1), though, until then, the possession of the widow, it would seem, cannot be disturbed.

That the plaintiff is not bound by the arrangement is in accordance with the conclusion in *Jagannadha* v. *Papamma*(2), where

(1) I.L.R., 2 Mad., 91; 8.C.L.R., 6 I.A., 196. (2) I.L.R., 16 Mad., 400.

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the facts, so far as the present question is concerned, were practically on all fours with those here. But to the extent to which that decision is supported by reference to an alleged absence of power of alienation in the widow, the reasoning can hardly be treated as satisfactory, inasmuch as if the power of alienation possessed by a sonless man until he makes an adoption were a sufficient argument for upholding arrangements or directions such as were in dispute in *Lakshmi* v. *Subramanya*(1) and *Narayanasami* v. *Ramasami*(2), the unquestionable power of alienation which a widow possesses in respect of her life estate must likewise have gone to support the arrangement pronounced against in *Jagannadha* v. *Papamma*(3). But it is difficult to see how the power of alienation possessed by a man prior to his adopting a son or by a widow prior to her adopting one has any real bearing on the matter. If that power has been availed of and if property has been alienated before the adoption such alienation will, of course, not be affected by what takes place afterwards. But when no alienation has actually taken place up to the time of adoption, it is as futile to refer to what the adoptive father or the adoptive mother could have done, but for the adoption, as to argue against an aurasa son acquiring by birth an interest in his father's ancestral property, on the ground that before such birth the father could have given away all his property as he pleased.

It will be seen, therefore, that *Jagannadha* v. *Papamma*(3) is, in truth, in conflict with the *ratio decidendi* in *Lakshmi* v. *Subramanya*(1) and *Narayanasami* v. *Ramasami*(2) which *ratio decidendi*, as far as it can be gathered from the judgments, seems scarcely reconcilable with the fundamental principles underlying the law of adoption.

The following question is therefore referred for the opinion of a Full Bench:—

Whether the provision in exhibit I in favour of the first defendant in regard to the property described in the second schedule thereto will bind the plaintiff?

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

(1) I.L.R., 12 Mad., 490. (2) I.L.R., 14 Mad., 172.
(3) I.L.R., 16 Mad., 400.

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P. R. Sundara Ayyar and *T. V. Vaidyanatha Ayyar* for appellant.

S. Subrahmania Ayyar and *S. Venkataramana Ayyar* for first respondent.

Their Lordships expressed the following opinion :—

BENSON, J.—The facts of the case referred for our decision are stated in the Order of Reference in the following terms [This has been set out above] :—

I understand that the plaintiff's natural father agreed to give his son in adoption and the first defendant made the adoption on the condition that the disposition of the property in exhibit I should be binding on the plaintiff.

The question for determination is " whether the provision in exhibit I in favour of the first defendant in regard to the property described in schedule II thereto will bind the plaintiff."

This question is one of no small difficulty. Notwithstanding the view expressed in the Order of Reference to which I was a party, further argument and consideration has now led me to the conclusion that the answer must be in the affirmative.

It is argued for the plaintiff that the matter is decided by the authority of the Privy Council and that was the view taken by this Court in the case of *Jagannadha* v. *Papamma*(1), where the facts were on all fours with those in the present case. In that case the learned Judges relied on the observation of their Lordships of the Privy Council in *Bhaiya Rabidat Singh* v. *Maharani Indar Kunwar*(2) that it was difficult to understand how an agreement by the natural father " could prejudice or affect the rights of his son which could only arise when his parental control and authority determined." In that case, however, the question was whether the adoption itself was invalid, and the decision was that it was not. Their Lordships expressly point out that no trace of any reservation or condition is to be found in the deed of adoption and that no conditions were attached to the adoption.

The case, therefore, can hardly be regarded as deciding that a condition made at the time of adoption and entered in the instrument evidencing the adoption, as in this case, is void. On the contrary, it is clear from the decision of the Privy Council, in the case of *Ramasamiayyen* v. *Venkataramaiyen*(3) that such an agreement by the natural father is, at all events, not void.

(1) I.L.R., 16 Mad., 400 at p. 404. (2) I.L.R., 16 Calc., 556 ; S.C.L.R., 16 I.A., 53.
(3) I.L.R., 2 Mad., 91 ; S.C.L.R., 6 I.A., 196.

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Their Lordships there say (at p. 101) :—" How far the natural father can by agreement before the adoption renounce all or part of his son's rights, so as to bind that son when he becomes of age, is also a question not altogether unattended with difficulty ; although the case of *Chitko Raghunath Rajadiksh* v. *Janaki*(1), certainly decides that an agreement on the part of the father that his son's interest shall be postponed to the life interest of the widow is valid and binding. In this case their Lordships think it enough to decide that the agreement of the natural father which has been set out was not void, but was, at the least, capable of ratification when his son became of age."

The concluding words seem to indicate that in their Lordships' opinion the natural father was not legally incapable of acting as guardian of his son, and of making an agreement on his behalf with regard to the property to be acquired by the adoption. If that is the true position, then the question in each case would be whether the agreement so made by the natural father should or should not be upheld, and this, I take it, would depend on whether the agreement in regard to the property was in itself a fair and reasonable one, and one which, taken as part of the contract for the adoption, was for the minor's benefit, as being a condition on which alone the adoption would be made. This is the principle that was adopted in the case of *Ravji Vinayakrav Jaggannath Shankar Sett* v. *Lakshmi Bai*(2) and I think that it accords with the general practice of the people in this Presidency and their consciousness of what their law allows.

No doubt in the case of *Lakshmi* v. *Subramanya*(3), this Court went further and held that when the disposition of property was one which the person adopting could make immediately prior to the adoption the agreement as to the property must be taken to be part of the contract for the adoption and be valid apparently in all cases. SHEPHARD, J., put the case in these words :—

" In the present case the adoption was made not by a widow, as in the case of *Lakshmana Rau* v. *Lakshmi Ammal*(4) but by the plaintiff's husband who, before the adoption took place, was unquestionably at liberty to alienate his property as he pleased, subject only to the plaintiff's right of maintenance. If being thus

(1) 11 Bom. H.C.R., 199. (2) I.L.R., 11 Bom., 381.
(3) I.L.R., 12 Mad., 490. (4) I.L.R., 4 Mad., 160.

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full owner he might before the adoption have disposed of his property in part or in whole in favour of the plaintiff, I fail to see why he should not, when making the adoption, stipulate with the other party to the adoption that a certain part of his property should be set apart for the maintenance of his wife and to that extent taken out of the category of property in which his intended son should have the full right of a co-parcener. It seems to me a mistake to say that the infant adopted son on whose behalf the natural father consents to such a stipulation can only be bound by that consent on the principle on which he might be bound by other agreements made on his behalf, viz., on the principle that the agreement is made for a necessary purpose (*Lakshmana Rau* v. *Lakshmi Ammal*(1)) for the supposition is that, but for the consent of the natural father, the adoption would never have taken place. To object to the agreement is therefore tantamount to objecting to the adoption. The adoption and the disposition of his property by the father being part of one transaction, the son never acquired any interest in the property disposed of and therefore no question can arise as to his guardian's competency to deal with it."

We may add that a reservation made by a widow in regard to her life interest, which she had the right to alienate before the adoption, would stand on the same footing.

The above case was followed in *Narayanasami* v. *Ramasami*(2) and *Ganapati Ayyan* v. *Savithri Ammal*(3) and the decision is in accordance with the decision in *Vinak Narayan Jog* v. *Govindrav Chintaman Jog*(4), *Chitko Raghunath Rajadiksh* v. *Janaki*(5) and *Basava* v. *Lingan Gauda*(6). Among the Judges who decided these cases were such distinguished Hindu lawyers as Sir T. Muthusami Ayyar, Nanabhai Haridas and Ranade, JJ. I think that great weight must be attached to the decisions of such men on a question like the present which I regard as one of Hindu Law modified by Hindu custom and usage developed in accordance with the conceptions of the present time. It is to be observed that there is no text of Hindu law which either recognizes or prohibits such an agreement as the present being entered into, and it is certain, as remarked by West and Buhler, 'Hindu Law,' 3rd edition, page 1106, that in actual practice "fair arrangements

(1) I.L.R., 4 Mad., 160.
(2) I.L.R., 14 Mad., 172.
(3) I.L.R., 21 Mad., 10.
(4) 6 Bom. H.C.R., 224.
(5) 11 Bom. H.C.R., 199.
(6) I.L.R., 19 Bom., 428.

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for the protection of the widow's interest during her life, are commonly made, and are always supported by the authority of the caste."

This is the principle on which Farran, J., proposed to decide cases like the present. He says "By Hindu law an infant will be bound by the act of his guardian when *bonâ fide* and for his interest, and when it is such as the infant might reasonably and prudently have done for himself if he had been of full age, but not where the act appears not to have been for his benefit unless he has ratified it on reaching majority. I cannot but think that this principle ought to guide the Courts in considering whether agreements like the one under consideration can be upheld or not. If the stipulations are unreasonable such as giving to the widow an absolute power of disposition over the property, they should be rejected as *ultra vires* of the father; if reasonable, such as only to define and limit the son's enjoyment of the property, they should be upheld" (*Ravji Vinayakrav Jaggannath Shankar Sett* v. *Lakshmi Bai*(1)). The validity of the adoption, if legally made, is quite independent of the validity of any agreement as to the property. If the agreement is such as to be inconsistent with the fundamental idea underlying adoption and the purpose for which it is sanctioned by Hindu law, as, for instance, if it deprived the adopted son of all right to the property of the adoptive father and so left him without any means of performing the necessary religious offices towards the manes of his adoptive father and his ancestors, it may well be that the Courts would regard the condition as essentially repugnant to Hindu law and would refuse to uphold it. But it would seem that a fair and reasonable disposition of the property is not essentially repugnant to Hindu law, or the purposes for which adoption is allowed, and is nowhere forbidden by that law. Such dispositions are commonly made, and are upheld by the authority of the caste and the consciousness of the people. In these circumstances, I think that the Courts ought not to refuse to recognize them as binding on the minor, for whose benefit the adoption, coupled with the agreement as to the disposition of the property, was really made. It may be assumed that the natural father would not have agreed to the adoption, coupled with the disposition of the property, unless it was for the benefit of his

(1) I.L.R., 11 Bom., 381 at p. 402.

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son to do so: nor would the adoptive father have taken the son in adoption except on the condition agreed to. The adoption, of course, cannot be set aside, and to set aside the condition which was coupled with the adoption, while maintaining the adoption, would require the justification of strong grounds of legal necessity or public policy.

In the present case the condition as to the property is a reasonable one, and such as the Courts should uphold. I would, therefore, answer the question referred to us in the affirmative.

DAVIES, J.—I concur.

RUSSELL, J.—I concur.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Offg. Chief Justice, and Mr. Justice Boddam.

1904. February 29. March 1.

SAKYAHANI INGLE RAO SAHIB (PLAINTIFF), APPELLANT,

v.

BHAVANI BOZI SAHIB AND OTHERS (DEFENDANTS), RESPONDENT.*

Abatement of appeal—Practice—Personal right to sue—Suit dismissed—Appeal by plaintiff—Decease pending appeal—Abatement.

A suit was brought by a plaintiff who claimed to be the sister's son of a deceased, and as such the nearest reversioner, to set aside alienations made by the widow. The suit was dismissed on the ground that plaintiff had failed to establish the legitimacy of his mother, and the plaintiff appealed. While the appeal was pending, the plaintiff died. His son thereupon applied by petition to carry on the appeal, and his petition was allowed without notice being issued to the other parties. At the hearing of the appeal it was objected that the alleged right on which the suit was based was personal to the plaintiff, even assuming that he was the reversioner, and that such right having ceased with plaintiff's death, the appeal abated:

Held, that the right to sue in the case was a personal right and ceased with the death of the plaintiff, and the appeal abated.

ABATEMENT of appeal. Plaintiff in the suit had instituted it, as the sister's son of the late Rajah Ekojee, the deceased husband of first defendant, and as such, next reversioner, to set aside

* Appeal No. 116 of 1901, presented against the decree of P. S. Gurumurti Ayyar, Subordinate Judge of Kumbakonam, in Original Suit No. 5 of 1899. (Civil Miscellaneous Petition No. 734 of 1903.)

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certain alienations made by the first defendant. The Subordinate Judge dismissed the suit, holding that plaintiff had failed to establish the legitimacy of his mother. Plaintiff appealed, but died while the appeal was pending. His son applied by petition to carry on the appeal, alleging that he was the next reversioner. The petition was allowed without notice being given to the other parties to the suit. The question raised and decided was whether the appeal abated with the death of the plaintiff.

P. R. Sundara Ayyar and *K. Ramachandra Ayyar* for appellant.

V. Krishnaswami Ayyar and *S. Srinivasa Ayyar* for respondents.

JUDGMENT.—In this case the plaintiff, alleging himself to be the sister's son of Ekojee, the deceased husband of the first defendant, and the nearest reversioner, sued to set aside certain alienations made by first defendant. The Subordinate Judge, being of opinion that the plaintiff had failed to establish the legitimacy of his mother, dismissed the suit. The plaintiff appealed and, pending the appeal, died. His son, petitioner in Civil Miscellaneous Petitioner No. 996 of 1902, asserting that he is the next reversioner, applied to carry on the appeal, and his petition was allowed, without notice to the opposite party by the Registrar.

On behalf of the first respondent (first defendant), the widow, a preliminary objection has been taken to the effect that the alleged right on which the suit was based was personal to the plaintiff, even assuming that he was the reversioner and that such right having ceased with the plaintiff's death, the appeal abates. On behalf of the petitioner it was urged that a suit by a presumptive reversioner, if he is the sole presumptive reversioner, or by all the presumptive reversioners, is one in which such plaintiff or plaintiffs represent the whole body of possible reversioners, and consequently the right of suit must be taken to survive to those who are presumptive reversioners at the death of the deceased plaintiff and the petitioner was therefore entitled to prosecute the appeal.

The weight of authority, in our opinion, is clearly in favour of the contention on behalf of the first respondent. So far as the opinions expressed by the Judicial Committee are concerned, the observations of their Lordships in *Isri Dut Koer* v. *Mussumut Hansbutti Koerain*(1) and in *Mussummat Chand Kour* v. *Partab Singh*(2) cited for the respondent are clearly to the effect that

(1) L.R., 10 I.A., 150 at p. 157. (2) L.R., 15 I.A., 156.

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adjudications in suits by reversioners to set aside alienations by a qualified proprietor will not bind reversioners who are not actual parties to the litigation. The decision of the Alahabad High Court in *Chhiddu Singh* v. *Durga Dei*(1) is a direct ruling upon the point. The reasoning in the Full Bench case of *Bhagwanta* v. *Sukhi*(2) and in *Gannamaneedi Audilakshmi* v. *Gannamaneedi Venkatramayya*(3) is also to the same effect. The decision in *Ayyadorai Pillai* v. *Solai Ammal*(4) would however seem to be not quite reconcilable with the second appeal just referred to, but even there, suits for setting aside alienations are treated as cases in which a reversioner, such as a daughter, would not be entitled to represent remoter reversioners. Now, as to the contention on behalf of the petitioner, it is to be observed that the learned vakil does not go so far as to argue that, whenever a reversioner sues and there is an adjudication, such adjudication would be binding upon every other reversioner. He limits the supposed representative character of the suits only to those instituted by the sole presumptive reversioner or all the presumptive reversioners. Now, if there is any reason for holding that suits for setting aside alienations are to be treated as representative suits at all, why should there be such a limitation? The principle of finality of litigation, which alone could be the foundation of the rule, would apply equally to suits by remote reversioners when once they are allowed to institute and carry on such suits.

There is no analogy between the case of widows and other qualified female holders entitled to present possession of property and the case of reversioners, presumptive or otherwise, whose rights are absolutely contingent. The vested right to the estate and possession in the case of the former renders it necessary and proper to invest them with the right to bind those who may come in succession to them by any adjudication duly made in litigation to which they were parties. Having regard to the peculiar position of reversioners who possess no more than a contingent right, there would not be enough warrant to treat any one reversioner as having sufficient interest to bind others who do not join in the litigation, and there is absolutely no authority to support the ingenious distinction put forward on behalf of the petitioner.

(1) I.L.R., 22 All., 388.
(2) I.L.R., 22 All., 33.
(3) S.A. No. 746 of 1901 (unreported).
(4) I.L.R., 24 Mad., 405.

Stress was laid upon the form of the declaration granted in such cases according to the decisions in *Shurut Chunder Sein* v. *Muthooranath Pudatick*(1), *Brojo Kishoree Dassee* v. *Sreenath Bose*(2) and other similar cases. That form of declaration seems to have been adopted to prevent any supposition that the declaration in any way affected the right of the alienee during the lifetime of the alienor to what was transferred in circumstances not rendering the alienation valid beyond the lifetime of the alienor. Even if it were otherwise, those cases cannot, in the face of the later authorities above referred to, be understood as being sufficient to support the view contended for. Illustration E to section 42 of the Specific Relief Act, to which our attention was drawn, must of course be read with section 43, and when so read points to the same conclusion.

We must therefore hold that the right to sue in the case was a personal right and ceased with the death of the plaintiff. The appeal abates and the respondents are entitled to their costs out of the estate of the deceased. The Civil Miscellaneous Petition No. 734 of 1903 asking to have the name of the petitioner in Civil Miscellaneous Petition No. 936 of 1902 removed and to declare that the appeal has abated, is allowed.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Boddam.

VEDANAYAGA MUDALIAR (PLAINTIFF), APPELLANT,

v.

VEDAMMAL (DEFENDANT), RESPONDENT.*

1904. March 16, 30, 31. April 6, 12.

Hindu Law—Succession to property of deceased—Death caused by murder—Participation in crime by next heir—Effect on right of succession—Specific Relief Act I of 1877, s. 42—Failure to claim consequent relief—Property in custodia legis—Plaintiff being the custodian.

Plaintiff sought for a declaration of his right to property without asking that the property should be delivered to him. The property had belonged to S deceased. Prior to the death of S, who was a minor, proceedings had been

(1) 7 W.R., (C.R.), 303.
(2) 9 W.R., (C.R.), 463.

* Appeal No. 88 of 1902, presented against the decree of B. Cammaran Nair, Additional Subordinate Judge of Tinnevelly, in Original Suit No. 10 of 1901.

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taken for the appointment of a guardian for him under the Guardian and Wards Act. Pending those proceedings the District Court appointed plaintiff Receiver and placed him in possession of the property, removing the minor's mother, the present defendant, from the charge thereof. The High Court reversed that order and directed that possession of the property should be handed back to the defendant. This order had not been carried out to any extent at the date of suit. On the objection being raised that the suit was not maintainable by reason of section 42 of the Specific Relief Act:

Held, that the suit was maintainable. The possession of the property was, at the time, neither with the defendant nor with the plaintiff, it being in *custodia legis* and in the hands of an officer of the Court and it being a mere accident that that officer was the plaintiff. Inasmuch as the defendant was not in possession, plaintiff could not, as against her, have consequential relief, and nothing more was required to be done to secure to the plaintiff all his rights than to obtain an order of the Court enabling him to retain possession in his own right.

Defendant, the mother of S had been charged, with another accused, with having murdered S. Defendant was acquitted, but the other accused was convicted. Plaintiff, as the next in succession to S (after the defendant) now sued for a declaration of his right to the property of S on the ground that the defendant was not entitled to the property, inasmuch as she had, as plaintiff alleged, been a party to the murder. The Subordinate Judge dismissed the suit without trying the question whether the defendant had been a party to the murder:

Held, that the question should have been tried. The question whether a Hindu who has been party to a murder is prevented from succeeding to the estate of the person murdered is not answered by the Hindu law. But the principle that no one shall be allowed to benefit by his own wrongful act is of universal application. If the defendant was a party to the murder her wrongful act, while not preventing the vesting in her of the inheritance, disentitled her to any beneficial interest in it. Such beneficial interest would vest in those who would be entitled to it were the guilty heir out of the way.

The text of Yagnavalkya, which is the foundation of the Mitakshara law of inheritance, enunciates but a general rule, the effect of which is liable to be nullified more or less by facts other than the two postulated therein, namely, the demise of a male owner of property without co-parceners and the survival of the relation specified in the text. What such facts are has to be ascertained either with reference to the rules embodied in other Hindu texts or with reference to principles which it is the duty of the Court to follow as a tribunal bound to administer the law of justice, equity and good conscience in cases not provided for specifically.

SUIT for a declaration. The facts material to the points of law decided are set out in the judgment. The Subordinate Judge dismissed the suit. Plaintiff preferred this appeal.

Sir *V. Bhashyam Ayyangar*, *M. R. Ramakrishna Ayyar*, *P. R. Sundara Ayyar* for appellant.

Mr. *Joseph Satya Nadar*, *V. Krishnaswami Ayyar*, and *T. V. Vaidyanatha Ayyar* for respondent.

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JUDGMENT.—The plaintiff, as the paternal aunt's son and *bandhu* of the deceased Sankaramoorti Mudaliyar, sues for a declaration of his right to the property left by the deceased, on the ground that the defendant, the deceased's mother, is not entitled to the property, she having been a party to his murder, but that the plaintiff, as the next in succession, is the person that has the right thereto. The defendant and a Muhammadan, by name Shaik Abdul Kadir Ravuthan, with whom she is alleged to have been criminally intimate prior to the death of her son, were tried for the murder in the Sessions Court of Tinnevelly. She was, however, acquitted while her alleged paramour was convicted of the offence.

The Subordinate Judge, without trying the question whether the defendant was concerned in the murder, dismissed the suit.

The first question for consideration is whether the plaintiff can ask for a mere declaration; and if so, whether, as urged for the defendant, the Court should, in the circumstances to be referred to, refuse the relief prayed for. Now as to the first point. Prior to the death of Sankaramoorti, he having been a minor, proceedings regarding the appointment of a guardian for him had been taken under the Guardian and Wards Act. Pending those proceedings the District Court of Tinnevelly appointed the plaintiff as Receiver and put him in actual possession of the properties of the minor, removing the defendant from the charge thereof. This Court held that the District Court had no power to appoint a Receiver in the course of the guardianship proceedings, and directed that possession of the property should be handed back to the defendant. This order for re-delivery to the defendant was no doubt passed subsequent to the death of her son, but it had not been carried out to any extent at the date of the suit. Consequently the possession of the property was, at the time, neither with the defendant, nor with the plaintiff, the property having been in *custodia legis* and in the hands of an officer of Court, it being of course a mere accident that that officer was the plaintiff himself. The defendant not having been in possession the plaintiff could not, as against her, have claimed as consequential relief an order for delivery, and if, as alleged, he is the person entitled, nothing more was required to be done to secure to the plaintiff all his rights than the revocation of the order of this Court referred to above directing delivery of the property to the defendant; and that would have enabled

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the plaintiff to retain possession in his own right. In these circumstances, it must be held that the proviso to section 42 of the Specific Relief Act is not applicable to the case, and that the suit is not open to objection on the ground that nothing more than a mere declaration of the plaintiff's right is sought for.

As to the next point it was contended for the defendant that the plaintiff had been guilty of contempt in not obeying the order of this Court directing delivery of the property to the defendant, that such contempt remained unpurged at the date of the suit and consequently that the relief sought for should, in the proper exercise of the discretion vested in the Court in cases like the present, be refused to him.

[Their Lordships dealt with the evidence on this point and held that plaintiff was not in contempt.]

The real point for our decision is, assuming the defendant was a party to the murder, whether it in any way affected her succeeding to his estate. On behalf of the plaintiff one argument was, that the commission of such a sin by a Hindu rendered the person committing it a "*patita*" or degraded person and that the degradation involved, among other consequences, a loss of the right of inheritance. Acts or omissions which entailed degradation under the Hindu system of life were indeed many. They included not only heinous sins and crimes but numerous other things which are looked upon as innocent or are tolerated in these times. It may well admit of doubt whether the injunctions connected with degradation were ever enforced otherwise than by expulsion from caste now relieved against by legislation. However this may be it is quite certain that even so far back as the days of the Dayabhaga commentator Srikrishna Tarkalankara, loss of proprietary rights as an incident to degradation had begun to disappear. (See Tagore 'Law Lectures' for 1884–85, page 426.) Since the establishment of British Rule in this country, no one seems to have ventured to suggest in judicial proceedings that the sin attaching to the commission of even such serious crimes as robbery, murder, etc., entailed by itself forfeiture of civil rights as a matter of Hindu Law, for though innumerable persons have from time to time been convicted by the Courts of such offences, the reports contain no case recognizing any such doctrine. Plaintiff's case, therefore, derives no support from the rules dealing with the matter of degradation which, even assuming that they

were at one time more than mere moral injunctions, cannot now be treated as otherwise than obsolete.

It will next be convenient to dispose of the American cases referred to in the argument with reference to the effect of murder on the right of the murderer to take as heir or legatee of the murdered person. In *Riggs* v. *Palmer*(1) decided by the New York Court of appeals in 1889, the facts, so far as they are material for the present purpose, were these. One Francis B. Palmer possessed of personal and real property had made his will giving certain legacies to his two daughters and the remainder of his estate to his grandson Elmer E. Palmer with a gift over to the daughters in case Elmer should survive him and die unmarried and without issue. Elmer, who knew of the provisions made in his own favour in the will, murdered the testator by poisoning him in order to prevent the testator from revoking those provisions (which he had manifested some intention to do) and in order that he might obtain the immediate possession and enjoyment of the property. A majority of the Court held that the devise and bequest to Elmer should be treated as *revoked* by reason of the crime of the devisee (notwithstanding that the statute of wills in force in the state, made no express mention of the commission of such a crime as a fact operating to revoke a will), that the daughters were the true owners of the real and personal estate left by the testator, and restrained the administrator and Elmer from using any of the personality or real estate for Elmer's benefit. The majority in effect held it is competent to a Court to import into a statute, on grounds of public policy, what the plain and unambiguous words of the enactment do not in any way cover. The next case was that of *Schellenburger* v. *Ransome*(2) which came before the Supreme Court of Nebraska first in 1891 and then on review three years later. There a female child of tender years was entitled to a certain estate in fee simple, subject to her father's life interest. The father, who, had the child died a natural death at the time she was murdered, would have been her heir, killed her in order that the fee simple might then and there vest in him as such heir. The Court in 1891 held on the analogy of *Riggs* v. *Palmer*(1) that the transferees from the murderer acquired no interest in the estate which had been owned by the deceased child,

(1) 115 N.Y., 506; 12 Am. St. R., 819. (2) 31 Neb., 61; 28 Am. St. R., 500.

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as the transferor himself had nothing to convey, since no one could take by inheritance the estate of a person whom he murders for the purpose of removing the life standing between him and that estate. But on the review the Court went to the opposite extreme by holding that the transferees were entitled to the estate of the murdered child notwithstanding it was found that they had taken with the knowledge that their transferor was the murderer. The last case was *In re Carpenters' Estate*(1) that came before the Supreme Court of Pennsylvania in 1895 and in which a majority of the Court held that a son who had murdered his father for the purpose of securing the latter's estate, nevertheless took the estate as heir under the statute of descents and distributions.

None of these rulings has, as might be expected, given entire satisfaction in that country. (See Harward 'Law Review,' vol. IV, p. 394, and vol. VIII, p. 170.) Notwithstanding that the Judges who took part in the second decision in *Schellenburger* v. *Ransome*(2, as well as those who formed the majority in *In re Carpenters' Estate*(1) felt, as they could not but do, that the conclusion reached by them was not what to be desired, they seem to have considered themselves bound to arrive at it lest otherwise they would be importing into the statutes they had to deal with, viz., the statutes relating to descent and distribution of property in force in the states respectively, exceptions which it was beyond the legitimate bounds of judicial interpretation to introduce. Whether, without infringing established canons of construction of statutes, the Nebraska and the Pennsylvania Courts could not have avoided the result admitted by them to be undesirable, and whether even a more satisfactory conclusion than that arrived at by the majority of the Court in *Riggs* v. *Palmer*(3) from the point of view of those who object to the latitude claimed by that majority in the matter of interpreting written laws, by following the course suggested in the periodical already cited, *i.e.*, by fastening a trust upon the guilty party on whom the statutes cast the legal estate, is well worthy of consideration. (See Harward 'Law Review,' vol. IV, p. 394, and vol. VIII, p. 170.)

Be this as it may, how does the matter stand with reference to the law to be administered by this Court in cases like the present?

(1) 50 Am. St. R., 765. (2) 31 Neb., 61; 23 Am. St. R., 500.
(3) 115 N.Y., 506; 12 Am. St. R., 819.

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No doubt the personal law of the parties to the dispute is the Hindu Law of Succession. If that law lays down any definite rule with reference to the question to which the facts of the present case give rise, it is of course not open to this Court to decline to enforce that rule on the ground that it would be more equitable in its opinion so to decline. If, however, in regard to such a question the Hindu Law is altogether silent, the rule to be applied would be that of equity, justice and good conscience. Now does the Hindu Law lay down any rule in regard to the precise point at issue, viz., whether a person murdering another for the purpose of accelerating the succession to him is or is not entitled to the succession? If the well-known text of Yagnavalkya, "The wife, and the daughters also, brothers likewise, and their sons, gentiles, cognates, a pupil, and a fellow student; on failure of the first among these the next in order is indeed heir to the estate of one, who departed for heaven leaving no male issue," (Stokes' 'Hindu Law Books,' p. 427) which is the foundation of the Mitakshara law of inheritence to the property of a male dying separated, is to be read as containing an explanatory clause negativing every possible exception, then doubtless the defendant must succeed. That however is indisputably not the case. For take the very first instance mentioned in the text, that of the wife. Supposing she had been unchaste during the lifetime of her husband, it cannot of course be argued that by virtue of the text she would be his heir in spite of her misconduct. Idiocy, lunacy, certain incurable diseases entry into the order of *yati*, etc., are, like unchastity in the case of the wife, circumstances that would in the case of those with regard to whom they are predicable preclude the operation of the rule embodied in the text. No doubt such cases are provided for by rules of Hindu Law to be found in other texts. But that does not derogate from the soundness of the view that the text under which the defendant claims enunciates but a general rule whose effect is liable to be nullified more or less by facts other than the two postulated therein, viz., the demise of a male owner of property without co-parceners and the survival of the relation specified in the text. What such facts are has to be ascertained either with reference to the rules embodied in other Hindu texts or with reference to principles which it is the duty of the Court to follow as a tribunal bound to administer the law of justice, equity and good conscience in cases not provided for specifically.

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Consequently, whether the fact that a person who would be heir by virtue of that text murders him to whom he would thus be heir detracts from his right of succession is a question to be decided in the first place with reference to the provisions, if any, of the Hindu law to be found elsewhere than in that text, and in the absence of such provisions according to recognised general principles which it is legitimate for the Court to resort to in such a contingency.

In the argument addressed to us our attention was not drawn to any Hindu authority that may be said specifically or directly to bear upon the matter. Texts relating to degradation attaching to a person by reason of the sin involved in the commission of murder which is a crime of the highest degree according to the classification of Hindu lawyers cannot, for reasons adverted to in a previous part of this judgment, avail in the discussion of this question. The text purporting to exclude from the succession a son "hostile to the father" undoubtedly shows how repugnant to the spirit of the Hindu Law must be the contention that the estate of a deceased person passes to the heir who murders him, as if it were a reward for his unnatural act. But whether from the extreme generality of the expression, which has been interpreted by different commentators to include a variety of things from abuse of, to murderous attacks on the father and even what takes place after his death such as failure to offer the customary oblations (see Jolly's 'Narada,' vol. XXXIII, Sacred books of the East, p. 194, Note on verse 21), or on some other ground, this text has never been acted upon and it also must be considered obsolete. Even were it otherwise, relating as the text does to the case of *father and son* there would be no warrant for treating the words importing that relation as merely illustrative and virtually comprehending all cases of heritable relations, the foundation of the rule being most probably the special reverence and regard to the father as head of the family inculcated by the Hindu Sastras.

The point under consideration is clearly therefore one untouched by the Hindu Law. Turning then to the general law how does the matter stand? The answer is absolutely plain, for the principle expressed by, among others, the maxim "*nemo ex suo delicto meliorem suam conditionem facere potest*" is one almost of universal law. Some of the comments of Bronchorst on this maxim in his work on the rules of the Roman Law (p. 106) seem

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to have peculiar appositeness here. "This rule" he writes "is replete with justice and equity, for it is not agreeable to reason that any one should derive advantage from that which deserves punishment. Thus, if a husband shall have agreed in the marriage articles that the dowry of the wife shall be restored to him in the event of her death and if he shall contrive to bring about that event either by destroying her or by not calling in a physician when she is sick or by fraudulently employing an unskilful one in order to hasten her death, he shall not be entitled to the restitution of the dowry. For it is not agreeable to equity that the husband should thus benefit by his crime." The case dealt with in the above extract is no doubt one of contractual relation. That the application of the maxim is, however, not confined to such a relation only is manifest from the decision of the Queen's Bench in *Cleaver* v. *Mutual Reserve Fund Life Association*(1), where the Court refused to enforce a trust in favour of one who had brought about the conditions essential to its fulfilment by killing the person whose death made it operative. The principle of this decision has been extended in this country with reference to the legal relation of decedent and heir in the case of *Shah Khanam* v. *Kalhandharkhan*(2), where the Chief Court of Punjab held that a Muhammadan who had murdered his half brother could not be allowed to claim the deceased's property as his heir. This decision cannot but commend itself as right considering that the legal relation to which the maxim in question was thus in effect extended is one pre-eminently calling for such extension, implying as it does reciprocal affection and kindliness attributable to the natural tie subsisting between persons so connected, and that to hold otherwise would be to outrage every feeling of humanity.

This being so, the only question is as to the proper theory of giving effect to the maxim in cases like the present, that is to say, whether the wrongful act of the person standing in the position of heir is to exclude him from the inheritance so as to prevent the very vesting in him thereof, or is it to be treated as a fact that should merely disentitle him to any beneficial interest in the inheritance. It is the latter view that would seem to be supported not merely by the analogy of the Civil Law, but also by a provision of our own legislature in a not dissimilar case. It

(1) L.R., [1892], 1 Q.B., 147. (2) Vol. I, Punjab Rep., 455.

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has also a practical advantage which the theory of non-vesting of the inheritance does not possess and which makes it therefore the more acceptable from the point of view of a tribunal administering both law and equity.

Now according to the Civil Law the killing of the decedent by the heir, intentionally or even negligently, was among the causes which rendered the heir unworthy of the inheritance. This doctrine of unworthiness was, however, not given effect to by intercepting the vesting of the inheritance itself. In Mackeldey's work, to which reference was made in the course of the argument, the law on the point is thus succinctly stated: "There are a number of cases in which the heirs or legatees are deprived for unworthiness of the property left to them. In these cases, which are termed cases of unworthiness (indignity), the law says *heres vel legatarius capere non potest* (the heir or legatee is incapable of taking) or *ei eripitur* (wrested from)," p. 550. Dropsie's 'Translation of Mackeldey's Roman Law.') This last phrase of the learned author points to the view that in such cases what really happens is not that the vesting of the succession is prevented but that what was vested in accordance with the law is wrested away on ground of justice and equity. And Sohm in his Institutes (p. 472) says "The unworthiness does not prevent either *delatio* or *acquisitio*. But the law declares that the property which has vested in an indignus shall be divested again (*eripi*) either in favour of the fiscus or in favour of a third party entitled (*bona ereptoria*). He is considered unworthy to *keep* the inheritance." The unmistakeable clearness and directness with which the matter is stated in the passage just quoted renders it superfluous to refer to other authorities, citing some of which it was pertinently pointed out in regard to the references to the Civil Law made in *Riggs* v. *Palmer*(1), *ereptio propter indignitatum* is a case not of revocation but of restitution. (8 Harward 'Law Review,' p. 170.)

The provision of the legislature alluded to above is section 85 of the Indian Trusts Acts, paragraph 2, which says "where property is bequeathed and the revocation of the bequest is prevented by coercion the legatee must hold the property for the benefit of the testator's legal representative." Such being the theory adopted by the law in the case of coercion used for the purpose of

(1) 115 N.Y., 506; 12 Am. St. R., 819.

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preventing revocation of dispositions under a will, that must necessarily be the theory to be followed when the same end is compassed by murder as also when the succession secured by the same unlawful means is intestate instead of testamentary.

The practical advantage attending the view under consideration to which also allusion was made above is this;—it is not impossible, especially in cases where the murder is secret, that the guilty *primâ facie* heir may succeed in passing himself off for a time as an innocent possessor and make transfers to third parties without notice. In such cases, if the doctrine of exclusion were to prevail *bonâ fide* purchasers from him would be unprotected. The theory of trust however, while saving the law from the reproach of permitting a person to retain the fruits of an act superlatively wrongful or of enabling purchasers with notice to take from him with impunity, would amply protect *bonâ fide* purchasers.

It only remains to add that the beneficial interest in the inheritance vests in those who would be entitled to it were the guilty heir out of the way, on the manifestly equitable ground stated by Domat that those who would come in by reason of his exclusion should not be affected by his wrongful act. (Domat's 'Civil Law,' Part II, Book I, see III, section 2547.)

The question of conviction or acquittal, on which some stress was laid on behalf of the defendant, would no doubt be relevant were the matter one of punishment for a crime, but here the Court is concerned only with private rights of parties as affected by a wrongful act, though such wrongful act may, from the point of view of the Criminal Law, be a punishable act. Attainder for murder under the English Law, to which allusion was made in the argument, no doubt presupposes a conviction, but this Court cannot possibly resort to so special and peculiar a doctrine of that law in laying down a rule of justice, equity and good conscience, as it is here called upon to do.

In the view taken by us the lower Court ought to have tried the question whether the defendant did commit the wrongful act imputed to her. The decree of the lower Court is reversed and the suit remanded for disposal according to law. The costs will abide the event.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Benson.

1904. February 10, 25.

RAMANADHAN CHETTI (FOURTH DEFENDANT), APPELLANT,

v.

NARAYANAN CHETTY (PLAINTIFF), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *ss.* 540, 623—*Practice—Review petition followed by appeal—Decision of review petition during pendency of appeal—Position and power of Court of First Instance after an appeal has been filed against its decree.*

A plaintiff sued by an agent, who compromised the suit, one of the terms of the compromise being that the agent should withdraw the suit. The agent failed to do this, whereupon the defendant brought the compromise to the notice of the Court and the suit was dismissed on 10th September 1901. Plaintiff on the succeeding day applied for a review (alleging fraud and collusion on the part of his agent) and, on 13th December 1901, preferred an appeal to the High Court against the decree dismissing the suit. While that appeal was pending, namely, on 17th March 1902, the Subordinate Judge heard and allowed the review petition, set aside the decree and restored the suit to the file:

Held, that the order was *ultra vires*. A pending appeal, without annulling the judgment appealed against, leaves it subsisting as a valid adjudication governing the rights of the parties, but the further litigation and all matters connected with it are transferred to and placed under the control of the Appellate Court. The power of the inferior Court in any way to deal with the litigation is completely in abeyance, except to carry out the decree, which it is the duty of the Court to do, as section 545 of the Code of Civil Procedure provides that the execution of the decree is not stayed by the mere fact that an appeal has been preferred against it.

Held, also, that an appeal lay against the order of the Subordinate Judge.

REVIEW PETITION and subsequent appeal. Plaintiff sued fourth defendant, with others, through an agent who held a general power of attorney from him. Whilst the suit was pending, the agent entered into a compromise, one of the terms of which was that the suit was to be withdrawn. The agent failed to withdraw the suit, whereupon the fourth defendant brought the compromise

* Civil Miscellaneous Appeal No. 80 of 1902, presented against the order of T. Varada Rao, Subordinate Judge of Madura (East), on Miscellaneous Petition No. 496 of 1901 and Civil Revision Petition No. 344 of 1901, also presented against the same order (in Original Suit No. 14 of 1901).

to the notice of the Court and the suit was dismissed on 10th September 1901. On the next day, plaintiff applied for a review of this order dismissing the suit. On 13th December 1901, whilst the review petition was still pending, plaintiff preferred an appeal to the High Court against the same order. On 17th March 1902, the lower Court heard and allowed the review petition and the suit was restored to the file. Against that order, the fourth defendant preferred this appeal and revision petition. The facts are more fully set out in the judgment. The chief question raised was whether it was competent to the lower Court to pass the order on the review petition, having regard to the existence of the appeal from the order which was in fact reviewed.

S. Srinivasa Ayyangar for appellant (fourth defendant).

P. R. Sundara Ayyar and *C. V. Anantakrishna Ayyar* for plaintiff (respondent).

JUDGMENT.—The respondent, Narayanan Chetti *alias* Renganadhan Chetti, while residing in Saigon, brought a suit in the Subordinate Court of Madura (East) through Venkusami Aiyangar who held a general power of attorney from him, and who was his recognised agent, against, among others, the appellant Ramanadhan Chetti as fourth defendant, with reference to certain disputes connected with the temple in Ariyakudi in the Sivaganga Zamindari, of which institution the respondent claimed to be one of the Managers. Pending the suit the recognized agent and the appellant entered into a compromise, in accordance with one of the terms of which the suit was to be withdrawn. The recognised agent not having in accordance with the compromise applied for the withdrawal of the suit, the appellant, under section 375 of the Civil Procedure Code, brought the compromise to the notice of the Subordinate Judge, who thereupon dismissed the suit on the 10th September 1901.

On the succeeding day the respondent applied for a review on the grounds that the recognised agent had no authority to enter into the compromise and that he acted fraudulently and in collusion with the respondent in the matter.

On the 13th December following, the respondent preferred an appeal to this Court against the decree dismissing the suit, which appeal is still pending.

The application for review of the decree came on finally before the Subordinate Judge on the 17th March 1902 and was allowed,

he being of opinion that the recognised agent had exceeded his authority in entering into the compromise though the allegation of fraud and collusion between the agent and the appellant had been given up. The decree was set aside and the suit was restored to the file with a view to its being proceeded with.

This order is impeached in the present appeal and in Revision Petition No. 344 of 1902 which it is necessary to consider with it.

The first point for determination is whether it was competent to the Subordinate Judge to pass the order in question, having regard to the existence of the appeal preferred by the respondent against the decree to which the order related and this question depends upon the view to be taken as to the effect of an appeal against a final decree, duly filed and pending, upon the power of the Court passing the decree, in connection with the litigation which is the subject of the appeal.

One and, as it would seem, a somewhat extreme theory in the matter is that adopted in the New Hampshire Statute referred to in *Stalbird* v. *Beattie*(1), according to which such an appeal actually vacates the judgment appealed from, leaving the case with its incidents as it stood before rendition of judgment, the pleadings and evidence remaining unaffected and it being the duty of the Appellate Court to hear and try the case as if no judgment had been pronounced or rendered in the Courts below.

The case of the United States Court of Claims is peculiar in another way as that Court is empowered to grant a new trial pending an appeal against its decision, thereby in effect putting an end to the appeal and resuming jurisdiction over the cause. This "anomalous" power, as Chief Justice Waite of the Supreme Court of the United States described it in *United States* v. *Young*(2), is one conferred by an express enactment of the Legislature with reference apparently to the very special character of the claims capable of being brought before that Court, viz., claims founded upon any law of the Congress or upon any regulation of an executive department or upon any contract with the United States.

But the more generally received theory and the one which has hitherto been acted on in this country, is that a pending appeal,

(1) 72 Am. Dec., 317; 36 N.H., 445. (2) 49 U.S., 258.

without annulling the judgment appealed against, leaves it subsisting as a valid adjudication governing the rights of the parties, but that the further litigation and all matters connected therewith are transferred to and placed under the control of the Appellate Court. In this view it follows that when an appeal has been duly filed the lower Court has, pending the decision of the appeal, no jurisdiction over the cause and can, as a rule, pass no order therein. In other words, the action of the inferior Court is, of necessity, suspended by the appeal until the Appellate Court has disposed of it, for, as observed in *Helm* v. *Boone*(1) "there could not be a greater absurdity in judicial proceeding than that a cause should be progressing at the same time in the inferior and appellate tribunals of the country."

The dictum of Lord Eldon in *Huguenin* v. *Baseley*(2) cited on behalf of the respondent, referring, as it does, to a bill of review, which is the commencement of litigation distinct from that in which the appeal has been preferred, is not in point. As to the observation of Sir James Bacon, Chief Judge in Bankruptcy, in *Ex parte Keighley*(3) to the effect that the pendency of the appeal to himself from the order of the County Court Judge did not affect the latter Judge's jurisdiction to re-hear the case in the County Court, that opinion was expressed with reference to the very wide terms of section 71 of the Bankruptcy Act (32 and 33 Vict., Cap. 71), viz., "every Court which has jurisdiction in bankruptcy under this Act may review, rescind or vary any order made by it in pursuance of this Act." Moreover in *Ex parte Banco de Portugal*(4), whether, notwithstanding the provision quoted above, the Court of Appeal had power to re-hear a bankruptcy case after an appeal therein to the House of Lords, was treated as an open question.

So far as appears, then, there seems to be no direct English authority available with reference to the point under consideration. The ruling of the Judicial Committee in *In the matter of Candas Narrondas Navivahu* v. *Turner*(5) to which Mr. Srinivasa Aiyangar drew our attention, that the amendment by the High Court (though not upon a review) of the order appealed against, after the appeal to Her Majesty had been presented was beyond

(1) 22 Am. Dec., 75; 6 J. J. Marshall, 351. (2) 15 Ves., 180.
(3) L.R., 9 Ch., 667. (4) L.R., 14 Ch. D., 1.
(5) I.L.R., 13 Bom., 520 at p. 533.

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the competence of the High Court, is one which, so far as it goes, is distinctly in favour of the view taken above as to the position of an inferior Court after an appeal, in regard to the matter under appeal. Sections 545 and 546 of the Civil Procedure Code clearly imply that an appeal incapacitates the inferior Court from dealing with the litigation since even the power of staying execution is, once an appeal is made, taken away from the Court and is exercisable by the Appellate Court only. Section 623 of the Code, relating to review, even more plainly points to this view instead of, as contended for the respondent, to the contrary. Not only is an application for review by a party who has already appealed disallowed by that section, but even in the case of a party not appealing no review lies when there is an appeal by some other party on a common ground, or where the former as a respondent is in a position to bring before the Appellate Court the matter to be reviewed. The manifest intention of the provision is to avoid a conflict of jurisdiction and to prevent any action on the part of the inferior Court which would have the effect of controlling the powers of the higher Court with reference to the matter actually under appeal. Though a party who has applied for a review is, for obvious reasons, not precluded from appealing, the Code does not provide for the procedure to be followed when an appeal is preferred after the review. Of course both proceedings could not go on simultaneously. If the review proceeding is to be continued and the appeal stayed, expediency would require that the party affected by the final order in the review should be enabled to obtain a remedy in the pending appeal notwithstanding that such remedy would be in respect of what was not in existence on the date of the appeal. Anomalous as such a course would be with reference to what was said by Brett, L.J., in *Ex parte Banco de Portugal*(1) already cited, it may be open to the Legislature to introduce it into our procedure by a provision like that proposed in clauses 3 and 4 of section 623 in the Civil Procedure Code Bill now before the Viceroy in Council and referred to in the argument before us on behalf of the respondent. But in the absence of such an express enactment it must on principle be held that after the due filing of the appeal and during its pendency, the power of the inferior Court in any way to deal with the litigation is completely in

(1) L.R., 14 Ch. D., 1 at pp. 4, 5.

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abeyance, except to carry out the decree which, of course, it is the duty of the Court to do, as section 545 of the Civil Procedure Code in terms provides that the execution of the decree is not stayed by the mere fact that an appeal has been preferred against it.

The two cases relied on on behalf of the respondent are clearly distinguishable. In *Bharat Chandra Mazumdar* v. *Ramgunga Sen*(1), when the matter of review was finally dealt with by the lower Court no appeal was pending, as the one which had been presented had already been withdrawn. In *Thacoor Prosad* v. *Baluck Ram*(2) though an application for leave to appeal to the Judicial Committee had been made, yet it had not been granted at the time of the disposal of the review and therefore no appeal can be said to have been then pending. It follows, therefore, that the order of the Subordinate Judge granting the review, setting aside the decree and re-opening the litigation in his Court was *ultra vires*.

In this view it remains to decide whether an appeal against the order granting the review is sustainable on the ground that the order was passed without jurisdiction in circumstances such as those of the present case. Notwithstanding that this ground is not one of those referred to in section 623, Civil Procedure Code, the answer to the question must, it would seem, be in the affirmative, for the reason that where an appeal is allowed the question of jurisdiction is necessarily an appealable ground. Compare observations of Jessel, M.R., in *In re Padstow Total Loss and Collision Assurance Association*(3). Should this view not be correct, it must be held that this Court has power to revise the order of the Subordinate Judge in question under section 622 of the Civil Procedure Code, for if the words of section 629, Civil Procedure Code, viz., "such objection (*i.e.*, any of those mentioned in the section) may be made at once by an appeal against the order granting the application or may be taken in any appeal against the final decree or order in the suit," would preclude an objection as to jurisdiction being taken in an appeal against an order granting the review, they would equally preclude such objection from being urged in an appeal preferred against the final decree or order made in the suit (see *Baroda Churn Ghose* v. *Gobind Proshad Tewary*(4)) and if it

(1) B.L.R., F.B., 362.
(2) 12 Calc. L.R., 64.
(3) L.R., 20 Ch.D., 137 at p. 142.
(4) I.L.R., 22 Calc., 984.

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be held that he is not entitled to apply for revision under section 622, the party will be altogether without a remedy.

For these reasons the order of the Subordinate Judge in question must be set aside. The respondent will pay the costs of the appellant in this and in the lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

1904, February 18.

KUPPUSAMI CHETTY (PETITIONER), APPELLANT,

v.

RENGASAMI PILLAI AND ANOTHER (COUNTER-PETITIONERS), RESPONDENTS.*

Limitation Act XV of 1877, s. 20—*Application to execute decree.*

The provisions of section 20 of the Limitation Act are not applicable to applications in execution of a decree. *Rama Row v. Venkatesa Bhandari* (I.L.R., 5 Mad., 171), followed.

EXECUTION PETITION. The petition was presented on 27th September 1902, the decree being dated 31st August 1899. This was the first petition for execution. It was contended *inter alia* that the petition was not barred by limitation inasmuch as fourth defendant had made a payment of Rs. 58 towards the decree on 23rd April 1901. The District Munsif held that it was barred. He said:— "The pleader for the representatives of the plaintiff relies on an alleged payment by fourth defendant. His contention is that the suit payment will save limitation even in the case of a decree-debt. The rulings in *Rama Rau* v. *Venkatesa Bhandari*(1) and *Kader Buksh Sarkar* v. *Gour Kishone Roy Chowdry* 2) are clear authorities for the proposition that the provisions of sections 19 and 20 of the Limitation Act do not apply to decree-debts. The pleader for the plaintiffs-representatives quoted a number of rulings relating to decrees providing for payments in instalments. As those rulings do not apply to the facts of this

* Appeal No. 66 of 1903 under article 15 of the Letters Patent presented against the judgment of Mr. Justice Bhashyam Ayyangar in Civil Revision petition No. 115 of 1903.

(1) I.L.R., 5 Mad., 171.

(2) 6 Calc., W.N., 766.

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case, I do not refer to them at any length. I am clearly of opinion that this petition is barred by the 3 years' limitation."

He dismissed the petition.

Plaintiff preferred a Civil Revision Petition to the High Court, which came on for hearing before Bhashyam Ayyangar, J., who held that the Full Bench decision in *Rama Rau* v. *Venkatesa Bhandari*(1) with reference to section 19 of the Limitation Act, was equally applicable to section 20. He dismissed the petition.

Against that order, petitioner preferred this appeal, under Article 15 of the Letters Patent.

R. Shadagopachariar for appellant.

C. Ramachandra Row Sahib for respondents.

JUDGMENT.—We agree with the learned Judge that the reasoning in the Full Bench case in *Rama Row v. Venkatesa Bhandari*(1) equally applies to section 20 of the Indian Limitation Act (XV of 1877). This appeal is dismissed with costs.

(1) I.L.R., 5 Mad., 171.

