9

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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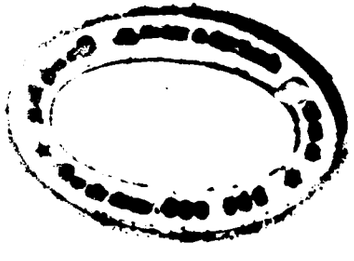

JUDGES OF THE HIGH COURT.

1st January—31st December 1905.

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The Hon'ble Sir Charles Arnold White, *Kt.* (Bar.-at-Law). (*On furlough for* 7 *months, from* 17*th March* 1905.)

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The Hon'ble Mr. L. Moore, I.C.S.

The Hon'ble Mr. C. Sankaran Nayar, B.A., B.L. (*Offg. from* 20*th March* 1905 *to* 17*th October* 1905).

ADVOCATE-GENERAL.

The Hon'ble Mr. J. E. P. Wallis, M.A.

A TABLE

OF THE

NAMES OF CASES REPORTED

IN THIS VOLUME.

PRIVY COUNCIL.

	PAGE
Goura Chandra Gajapati Narayana Deo (Rajah of Parlakimedi) *v.* Secretary of State for India in Council	130
Kachi Kaliyana Rengappa Kalakka Thola Udayar *v.* Kachi Yuva Rengappa Kalakka Thola Udayar	508
Maharaja of Jeypore *v.* Gunupuram Deenabandhu Patnaick	42
Veerabhadra Raju Bahadur Garu *v.* Chiranjivi Raju Garu	173

FULL BENCH.

Kenath Puthen Vittil Tavazhi *v.* Narayanan	182
Panangupalli Seetharamaya *v.* Nanduri Ramachendrudu	152
Somasundara Mudali *v.* Kulandaivelu Pillai	457
Suppa Reddiar *v.* Avudai Ammal	50
Swaminatha Ayyar *v.* Vaidyanatha Sastri	466
Vaidhinadasamy Ayyar *v.* Somasundaram Pillai	473

APPELLATE CIVIL.

Abdul Karim Sahib *v.* Badrudeen Sahib	216
Abdul Kureem Sahib *v.* The Official Assignee of Madras	168
Abdulla Sahib *v.* Doctor Oosman Sahib	224
Aiyappa Reddi *v.* Kuppusami Reddi	208
Aiyavu Mooppan *v.* Sawminatha Kavundan	236
Akula Paradesi *v.* Dhelli Jagannadha Row	157
Alayakammal *v.* Subbaraya Goundan	493

PAGE

Ambalavana Pandara Sannathi *v.* The Secretary of State for India in Council ... 539
Annamalay Chettiar *v.* Pitchu Ayyar ... 122
Arumugam Chetti *v.* Raja Jagaveera Rama Venkateswara Ettappa ... 444
Arunachellam Chetti *v.* Ganapathi Ayyar ... 379
Bhavadasan *v.* Narayana Somayajipad ... 202
Chettikulam Venkitachala Reddiar *v.* Chettikulam Kumara Venkitachala Reddiar ... 377
Etyati Pooparambil Bava *v.* Matalakat Krishna Menon ... 211
Fisher *v.* Ramaswamy Udayan ... 393
Gopalasami Chettiar *v.* Fischer ... 328
Gopu Kolandavelu Chetti *v.* Sami Royar ... 517
Govinda Pillai *v.* Thayammal ... 57
Hajee Ismail Sait *v.* The Company of the Messageries Maritimes of France. 400
Ibrahim Khan Sahib *v.* Rangasami Naicken ... 420
Jagannatha Charry *v.* Rama Rayer ... 238
Johnson *v.* The Madras Railway Company ... 479
Jumna Boi Ranee Saheb *v.* Solai Kavundan ... 553
Kandasamy Chetty *v.* Annamalai Chetty ... 67
Konchadi Shanbhogue *v.* Shiva Rao ... 54
Kondura Runga Reddi *v.* Subbiah Setty ... 394
Krishnamarazu *v.* Marraju ... 495
Kulaikada Pillai *v.* Viswanatha Pillai ... 229
Kurnam Butchayya *v.* The Secretary of State for India in Council ... 551
Lakshmakka *v.* Nagi Reddi ... 500
Lakshmana Sasamallo *v.* Siva Sasamallayani ... 425
Latchmanan Chetty *v.* Ramanathan Chetty ... 127
Linga Reddy *v.* Hussain Reddy ... 117
Maturi Subbayya *v.* Kota Krishnayya ... 227
Meenakshi Ginning and Pressing Company (Ld.) *v.* Mylo Sreeramulu Naidu ... 19
Mothi Rungaya Chetty *v.* The Secretary of State for India in Council ... 213
Muthar Sahib Maraikar *v.* Kadir Sahib Maraikar ... 544
Muthunaiyan *v.* Sinna Samavaiyan ... 526
Naraina Naika *v.* Vasudeva Bhatta ... 389
Narasimha Chari *v.* Gopala Ayyangar ... 391
Narayanan Chetty *v.* Kannammai Achi ... 338
Narayana Pattar *v.* Gopalakrishna Pattar ... 355
Narayanasami Naick *v.* Mangammal ... 315
Narayanasami Pillai *v.* Esa Abbayi Sait ... 351
Nawab Ajajuddin Alli Khan *v.* Secretary of State for India ... 69
Pachiappa Achari *v.* Poojali Seenam ... 557
Pamulapati Ankinudu *v.* The Secretary of State for India in Council ... 312
Parambath Manakkal *v.* Puthengattil Moosamu ... 406
Paru *v.* Variangattil Raman Menon ... 359
Pasupathy Ayyar *v.* Kothanda Rama Ayyar ... 64
Prayag Doss Ji Varu, Mahant *v.* Tirumala Srirangacharlavaru ... 319
Pullanappally Sankaran Nambudri *v.* Vittil Thalakat Muhamod ... 505

PAGE

Pydigantam Jagannadha Row *v.* Rama Doss Patnaik ... 197
Raja of Venkatagiri *v.* Raja Muddukrishna ... 15
Raja of Vizianagaram *v.* Dantivada Chelliah ... 84
Rajarathna Naidu *v.* Narasimha Chariar ... 301
Ramalinga Mudali *v.* Ayyadorai Nainar ... 124
Ramanuja Ayyangar *v.* Sadagopa Ayyangar ... 205
Ramchode Doss *v.* Rukmany Bhoy ... 487
Ranga Reddi *v.* Narayana Reddi ... 423
Rangasamy Naicken *v.* Thirupati Naicken ... 26
Reference under Presidency Small Cause Court's Act ... 240
Sambasiva Chetti *v.* Veera Perumal Mudali ... 361
Sandhu Taraganar *v.* Hussain Sahib ... 87
Sankaravadivelu Pillai *v.* Secretary of State for India in Council ... 72
Saramma *v.* Seshayya ... 396
Saravanai Perumal Pillai *v.* Poovayi ... 436
Singarappa *v.* Talari Sanjivappa ... 349
Sivarama Sastrial *v.* Somasundara Mudali ... 119
Sokkanadha Vannimundar *v.* Sokkanadha Vannimundar ... 344
Somasundara Mudaliar *v.* Ganga Bissen Soni ... 386
Somu Pillai *v.* The Municipal Council, Mayavaram ... 520
Sreenivasa Chariar *v.* Ponnusawmy Nadar ... 40
Subba Narayana Vathiyar *v.* Ramaswami Ayyar ... 244
Subbaraya Mudaliyar *v.* Vedantachariar ... 23
Subramanian Chetti *v.* Arunachelam Chetti ... 1
Subroya Chetty *v.* Ragammall ... 161
Thasi Muthukannu *v.* Shunmugavelu Pillai ... 413
The Manager of the Court of Wards, Kalahasti Estate *v.* Ramasami Reddi. 437
The Receiver of Nidadavole Estate *v.* Vegasena Subbaraju ... 427
The Regulation Collector of Kalahasti and Karvetnagar Estates *v.* Ramasami Chetti ... 489
The Secretary of State for India in Council, by the District Forest Officer, South Canara *v.* Manjeshwar Krishnayya ... 257
Vakkalagadda Narasimham *v.* Vahizulla Sahib ... 498
Vakulabharana *v.* Rangaiayan Chetty ... 357
Vangala Dikshatulu *v.* Vangala Gavaramma ... 13
Veerabadran Chetty *v.* Nataraja Desikar ... 28
Venkatachella Chetty *v.* Srinivasa Varada Chariar ... 555
Venkata Row *v.* Venkatachella Chetty ... 452
Vibudhapriya Tirthaswami *v.* Yusuf Sahib ... 380
Vijiaraghavalu Naidu *v.* Srinivasulu Naidu ... 399
Vijiasamy Tevar *v.* Sasivarma Tevar ... 560
Yandamuri Jagannadham *v.* Yandamuri Seshachelam ... 404
Yethirajulu Naidu *v.* Mukunthu Naidu ... 363

APPELLATE CRIMINAL.

	PAGE
Algarasawmi Tevan *v.* Emperor	304
Alingal Kunhinayan *v.* Emperor	454
Chinnathambi Mudali *v.* Salla Gurusawmy Chetty	310
Emperor *v.* Jonnalagadda Venkatarayudu	565
In the matter of Anusoori Sanyasi	37
Kamachinathan Chetty *v.* Emperor	308
Kotamraju Venkatrayadu *v.* Emperor	90
Mahomed Abdul Mennan *v.* Panduranga Row	255
Venkatrama Chetti *v.* Emperor	17

TABLE OF CASES CITED

IN THIS VOLUME.

A

	PAGE
Abboy Chetti *v.* Ramachandra Rau. I.L.R., 17 Mad., 461	545
Abdulla Sahib *v.* Doctor Oosman Sahib. I.L.R., 28 Mad., 224	475, 476
Abdul Rahim *v.* Kirparam Daji. I.L.R., 16 Bom., 186	343
Abdul Rahiman Saheb *v.* Ganapathi Bhatta. I.L.R., 23 Mad., 517 at p. 521	129
Adhar Chandra Dass *v.* Lal Mohan Dos. I.L.R., 24 Calc., 778	559
Ahinsa Bibi *v.* Abdul Kader Saheb. I.L.R., 25 Mad., 26	486
Ahmad Yarkhan *v.* Secretary of State for India. L.R., 28 I.A., 211 at p. 218	143
Akhoot Rumanah *v.* Ahmed Eusooffee. 15 W.R., 538	118
Akkanna *v.* Venkayya. I.L.R., 25 Mad., 351	5
Akora Suth *v.* Boreani. 2 B.L.R., 199	426
Alangamonjori Dabee *v.* Sonamoni Dabee. I.L.R., 8 Calc., 157, 637	367, 375
Alimannissa Khatoon *v.* Syed Hossain Ali. 6 C.L.R., 267	68
Amanat Bibi *v.* Imdad Husain. I.L.R., 15 Calc., 800	409
Amar Chundra Banerjee *v.* Guru Prosunno Mukerjee. I.L.R., 27 Calc., 488 at p. 489	468, 472
Amava *v.* Mahadganda. I.L.R., 22 Bom., 416	319
Ambica Pershad Singh *v.* Surdhari Lal. I.L.R., 10 Calc., 851	400
Anangamanjari Chowdhrani *v.* Tripura Soondari Chowdhrani. 14 I.A., 101	266
Anderson's Case. L.R., 3 Eq., 337	243
Annaji *v.* Narayan. I.L.R., 21 Bom., 556	324
Annaji *v.* Subramanya. I.L.R., 13 Mad., 442 at p. 444	552
Annoda Prosad Chatterjee *v.* Kalikrishna Chatterjee. I.L.R., 24 Calc., 95.	164
Ayerst *v.* Jenkins. L.R., 16 Eq., 275 at p. 284	416, 417, 418, 419
Ayyadorai Pillai *v.* Solai Ammal. I.L.R., 24 Mad., 405	59, 60

B

Baboo Beer Pertab Sahee *v.* Maharajah Rajender Pertab Sahee. 12 M.I.A., 1 at pp. 29, 34	511
Bailey *v.* Onandaga Ins. Co. 6 Hill, 476	250
Bai Motivahoo *v.* Bai Mamoobai. L.R., 24 I.A., 93	375
Bai Somi *v.* Chokshi Ishvardas Mangaldas. I.L.R., 19 Bom., 245	164, 167
Balaram *v.* Ramchandra. I.L.R., 22 Bom., 922	219, 223
Baldwin *v.* Bank of Newbury. 1 Wallace, 234	248

PAGE

Bamundoss Mookerjea v. Mussamut Tarinee. 7 M.I.A., 160 367
Bank v. White. Denio, 608 250
Bank of United States v. Lyman. 20 Vt. (U.S.C.C.), 666 246
Banks v. Easton. 3 N.S., 201, 392 251
Barnaby v. Newcombe. 9 Cush, 46 249
Beck v. Pierce. L.R., 23 Q.B.D., 316 254
Beckham v. Drake. 9 M. & W., 79 at p. 96 246
Beni Parshad v. Puranchand. I.L.R., 23 Calc., 262 8
Berdan v. Greenwood. L.R., 20 Ch.D., 764 36
Bhagwanta v. Sukhi. I.L.R., 22 All., 33 at p. 40 ... ... 59, 60
Bhaiya Ardawan Singh v. Udey Pratab Singh. (1896), L.R., 23 I.A., 64 at p. 73 ; I.L.R., 23 Calc., 838 at pp. 849, 850 176
Bhaskarappa v. The Collector of North Kanara. I.L.R., 3 Bom., 452 at pp. 524, 583, 584, 586, 727, 728, 739 ... ... 258, 260, 262, 263, 266, 269, 271, 276, 284, 285, 286
Bhimawa v. Sangawa. I.L.R., 22 Bom., 206 319
Bhugwan Das Mitharam v. Rivett Carnac. L.R., 26 I.A., 32 347
Bhupathi v. Rajah Rangayya Appa Rau. I.L.R., 17 Mad., 54 at p. 57 ... 433
Binda v. Kaunsilia. I.L.R., 13 All., 126 437
Biru Mahata v. Shyama Churu Khawas. I.L.R., 22 Calc., 483 66
Bishen Singh v. Harbhagat Singh. Punjab Rev. No. 71 of 1876 204
Bishun Churn Roy Chowdhry v. Jogandra Nath Roy. I.L.R., 26 Calc., 114 233
Blake v. Midland Railway Company. 18 Q.B., 93 at p. 110 482
Bojjamma v. Venkata Ramayya. I.L.R., 21 Mad., 31 206
Bommanapatti Veerappa v. Chintakunta Srinivasa Rao. I.L.R., 26 Mad., 264 51
Bommee Chetti Ramiah Chetti v. Visvanatha Pillai. 6 Mad. Jurist, 305. 253
Brij Indar Bahadur Singh v. Rani Janki Koer. L.R., 5 I.A., 1 ... ... 7, 11
Brikaji Apaji v. Jagannath Vithal. 10 B.H.C.R., 351 62
Bryan v. Twigg. L.R., 3 Eq., 433 ... ... 370, 374

C

Cally Nath Naugh Chowdhry v. Chunder Nath Naugh Chowdhry. I.L.R., 8 Calc., 378 367
Calvert v. Gordon. 7 B. & C., 809 167
Canadian Pacific Ry. Co. v. Parke. L.R., [1899], A.C., 535 ... ... 76, 78
Canadian Pacific Ry. Co. v. Roy. L.R., [1902], A.C., 220 at p. 230 ... 76
Castrique v. Buttigieg. 10 M.P.C., 94 549
Chamanlal v. Bapubhai. I.L.R., 22 Bom., 669 519
Chamar Haru v. Kashi. I.L.R., 26 Bom., 388 427
Chandu v. Kunhamed. I.L.R., 14 Mad., 324 ... ... 459, 460, 461, 462, 463, 465
Chappan Nayar v. Assen Kutti. I.L.R., 12 Mad., 219 186
Chathappan Nayar v. Kunhammed Kutti. C.M.A. No. 108 of 1895 (unreported) 58

PAGE

Cheekati Zamindar v. Ranasooru Dhora. I.L.R., 23 Mad., 318 554
Cherukomen v. Ismalu. 6 M.H.C.R., 145 and 401 ... ...183, 184, 185, 186, 190, 193, 194
Cherukuri Venkanna v. Mantravathi Lakshmi Narayana Sastrulu. 2 M.H.C.R., 327 14
Chhaganram Astikram v. Bai Motigavri. I.L.R., 14 Bom., 512 ... ... 58, 60
Chhedi v. Lalu. I.L.R., 24 All., 300 213
Chhiddu v. Naubat. I.L.R., 24 All., 67 8
Chinnappa Mudaliar v. Sikka Naickan. I.L.R., 24 Mad., 36 80
Chinnasami Mudali v. Tirumalai Pillai and the Right Honourable the Secretary of State for India. I.L.R., 25 Mad., 572 422
Chinniya Mudali v. Venkatachella Pillai. 3 M.H.C.R., 320 411
Chintaman Bajaji Dev. v. Dhondo Ganesh Dev. I.L.R., 15 Bom., 612 ... 824
Chintaman Damodar Agashe v. Balhastri. I.L.R., 16 Bom., 294 52
Chokkalinga Naicken v. Muthusami Naicken. I.L.R., 21 Mad., 53 ... 263
Chunni Lal v. Harnam Das. I.L.R., 20 All., 302 212
City of Bloomington v. Whal. 46 Illinois, 469 524
Court of Wards v. Raja Mohessur Roy. 16 Suth. W.R., 76 8

D

Dadoba v. Krishna. I.L.R., 7 Bom., 34 266
Dagdu v. Kalu. I.L.R., 22 Bom., 733 342
Damodarbhat v. Bhogilal. I.L.R., 24 Bom., 45 327
Darbo v. Kesho Rai. I.L.R., 9 All., 364 129
Dayal Jairaj v. Khatav Ladha. 12 B.H.C.R., 97 347
Debi Pershad Singh v. Joynath Singh. I.L.R., 24 Calc., 865 237
Degumbery Dossee v. Rajah Annundnath Roy. W.R., (1864), 43 342
Dhanjibhoy Bomanji v. Hirabai. I.L.R., 25 Bom., 644 at p. 646 437
Dugan v. The United States. 3 Wheaton, 172 at p. 183 548
Dwar Buksh Sirkar v. Fatik Jali. I.L.R., 26 Calc., 250 89
Dwarka Nath Mondul v. Beni Madhab Banerjee. I.L.R., 28 Calc., 652 ... 312
Dwarka Nath Misser v. Barinda Nath Misser. I.L.R., 22 Calc., 425 ... 129

E

Eagleton v. The East India Railway Company. 8 B.L.R., 581 303
Eastern R. R. Co. v. Benedict. 5 Gray, 561 250
Edmunds v. Bushell. [1865], L.R., 1 Q.B., 97 246
Ellsworth v. Brewer. 11 Pickering, 320 548
Emly v. Lye. 15 East, 7 246
Empress v. Dhunum Kazee. I.L.R., 9 Calc., 53 at p. 60 94
Erambapalli Korapen Nayar v. Erambapalli Chenen Nayar. 6 M.H.C.R., 411 at p. 414 189
Esubai v. Damodar Ishvardas. I.L.R., 16 Bom., 552 at p. 559 497
Ex parte Bhikaji Vithal Ambekar. 4 B.H.C.R., 119 118
Ex parte Bolton School. 2 Brown, 662 324
Ex parte Butters. *In re* Harrison. L.R., 14 Ch.D., 265 443

F

PAGE

Fairfield *v.* Adams. 16 Pick, 381 ... 249
Fazal Shau Khan *v.* Gafer Khan. I.L.R., 15 Mad., 82 ... 441
Fernandez *v.* Madappa. S.A. No. 36 of 1886 (unreported) ... 263, 287
Firingee Sahoo *v.* Sham Manjhee. 8 W.R., (C.R.), 373 ... 342
Fischer *v.* Kamakshi Pillai. I.L.R., 21 Mad., 136 ... 332, 333, 448
Folger *v.* Chase. 18 Pick, 63 ... 250
Ford *v.* Williams. 21 Howard, 289 ... 249
Forester *v.* The Secretary of State for India. I.A. Sup., 10 ... 266
Framji Cursetji *v.* Goculdas Madhowji. I.L.R., 16 Bom., 338 ... 263
Frothingham *v.* McKusick. 24 Me., (11 Shep.), 403 ... 210

G

Gaekwar Sarkar of Baroda *v.* Gandhi Kachrabhai. I.L.R., 27 Bom., 344. 76, 77
Ganapathy Naiker *v.* Saminatha Pillai. C.R.P., No. 578 of 1895 (unreported) ... 206, 207
Gann *v.* Free Fisheries of Whitstable. 11 H.L.C., 192 at p. 193 ... 450
Gauri Datt *v.* Shankar Lal. I.L.R., 14 All., 358 ... 153, 155
Geddis *v.* Proprietors of the Banu Reservoir. L.R., 3 A.C., 430 ... 76
Ghoree Laljha *v.* Sheo Narain Singh. 8 W.R., 24 ... 118
Gnanasambanda Pandara Sannadhi *v.* Velu Pandaram. I.L.R., 23 Mad., 271 ... 200
Goading *v.* Shea. 103 Mass., 360 ... 210
Gomatham Alamelu *v.* Komandur Krishnamacharlu. I.L.R., 27 Mad., 118. 28, 441
Gopalasami Chettiar *v.* Fischer. I.L.R., 28 Mad., 328 ... 448
Gopalayyan *v.* Raghupati Ayyan *alias* Aiyavayyan. 3 M.H.C.R., 217 ... 459, 463
Gopal Chunder Sircar *v.* Kurnodhar Moochee. 7 W.R.C.R., 349 ... 31, 35
Gopal Dai *v.* Chunni Lal. I.L.R., 8 All., 67 ... 383
Gopal Reddi *v.* Chenna Reddi. I.L.R., 18 Mad., 158 ... 16
Gurulingaswami *v.* Ramalakshmamma. I.L.R., 18 Mad., 53 at p. 57 ... 62
Gurumurti *v.* Sivayya. I.L.R., 21 Mad., 391 ... 206
Guru Prasad Roy *v.* Nafar Das Roy. 3 B.L.R., 121; S.C., 11 Suth. W.R., 497 ... 8

H

Habib Bakhsh *v.* Baldeo Prasad. I.L.R., 23 All., 167 ... 440
Haggard *v.* Pelicier Freres. L.R., [1892], 2 A.C., 61 at pp. 67, 68 (J.C.)... 32, 565
Hammersmith Ry. Co. *v.* Brand. L.R., 4 H.L., 215 ... 76
Hanmantray *v.* The Secretary of State for India. I.L.R., 25 Bom., 287 ... 263
Hara Lall Banerjee *v.* Nitambini Debi. I.L.R., 29 Calc., 315 ... 220, 222
Haridas Purshotam *v.* Henry Gamble. 12 B.H.C.R., 23 at pp. 41 and 46. 263, 266, 276
Haridas Ramdas *v.* Ramdas Mathuradas. I.L.R., 13 Bom., 677 ... 488
Hari Kissen Bhagat *v.* Veliat Hossein. I.L.R., 30 Calc., 755 ... 556
Harinath Chatterjee *v.* Mothurmohun Goswami. I.L.R., 21 Calc., 8 ... 201
Hart *v.* Tara Prasanna Mukherji. I.L.R., 11 Calc., 718 ... 477
Hartford Bank *v.* Barry. 17 Mass., 94 ... 250

PAGE

Haycraft *v.* Creasy. [1801], 2 East, 92 ... 97
Henning *v.* Raymond. 35 Minn., 303 ... 159
Higgins *v.* Senior. 8 M. & W., 844 ... 249
High Court Proceedings, dated 29th March 1865. Weir's 'Law of Offences,' 445 ... 38
Hirachand Harjivandas *v.* Kasturchand Kasidas. I.LR., 18 Bom., 224 ... 468, 471
His Highness Shrimant Maharaj Yashvantray Holkar *v.* Dadabhai Cursetji Ashburner. I.L.R., 14 Bom., 353 ... 228
Hudson *v.* Basdeo Bajpye. I.L.R., 26 Calc., 109 ... 233
Hunt *v.* Hunt. 31 L.J.Ch., 161 at p. 175 ... 185
Huri Doyal Singh Sarmana *v.* Grish Chunder Mukerjee. I.L.R., 17 Calc., 911 ... 11
Hurrish Chunder Chowdry *v.* Kali Sundari Debia. L.R., 10 I.A., 4 at pp. 15, 16, 17 ... 129, 559

I

Innasi Pillai *v.* Sivagnana Desikar. C.R.P. No. 643 of 1893 (unreported). 239
In re Burnham National Schools. L.R., 17 Eq., 246 ... 323
In re Cavander's Trusts. L.R., 16 Ch.D., 271 ... 235
In re Jones *v.* James. 19 L.J. (Q.B.), 257 ... 441
In re Kitter. I.L.R., 11 Mad., 332 ... 39
In re Lowe. 54 Kansas, 757; 27 Lawyer's Reports annotated, 546 ... 524
In the matter of Hormarji Ardeshir Hormarji. I.L.R., 19 Bom., 778 ... 172
In the matter of the charity called Storey's Almshouses in the town of Cambridge. 9 L.J. Eq., 93 ... 324
Ishan Chunder Behara *v.* Ram Lochun Behara. 9 W.R., 79 ... 263
Ishan Chunder Sirkar *v.* Beni Madhub Sirkar. I.L.R., 24 Calc., 62 ... 89
Isri Dut Koer *v.* Mussumut Hansbutti Koerain. L.R., 10 I.A., 150; I.L.R., 10 Calc., 324 at p. 333 ... 559

J

Jacobs *v.* Seward. L.R., 4 H.L., 464 ... 263
Jagdish Bahadur *v.* Sheo Partab Singh. L.R., 28 I.A., 106 ... 11
Jairam Narayan Raje *v.* Atmaram Narayan Raje. I.L.R., 4 Bom., 482 ... 217, 218, 219, 220, 222
Jairam Narronji *v.* Kuverbai. I.L.R., 9 Bom., 491 at p. 506 ... 367
Janki Kunwar *v.* Ajit Singh. I.L.R., 15 Calc., 58 ... 350
Jan Mahomed *v.* Queen-Empress. I.L.R., 10 Calc., 584 ... 93
Janson *v.* Driefontein Consolidated Mines, Ltd. L.R., [1902], A.C., 484. 105
Jhamman Lal *v.* Kewal Ram. I.L.R., 22 All., 121 ... 66
Jogemaya Dassi *v.* Thackomoni Dassi. I.L.R., 24 Calc., 473 at p. 480 ... 227
Jogendro Deb Roy Kut *v.* Funindro Deb Roy Kut. 14 M.I.A., 367 ... 461
Jogeswar Narain Deo *v.* Ram Chund Dutt. L.R., 23 I.A., 37 ... 373
John Young *v.* Mangalapilly Ramaiya. 3 M.H.C.R., 125 ... 228
Joytara Dassee *v.* Mahomed Mobaruck. I.L.R., 8 Calc., 975 ... 263

K

PAGE

Kadir Mohideen Marakkayar *v.* Muthukrishna Ayyar. I.L.R., 26 Mad., 230. 422
Kalianasundram Ayyar *v.* Umamba Bayi Saheb. I.L.R., 20 Mad., 421 at p. 432 ... 201
Kalyanbhai Dipchand *v.* Ghanasham Lal Jadunathji. I.L.R., 5 Bom., 29. 52
Kamakshi *v.* Nagarathnam. 5 M.H.C.R., 161... 416
Kamakshi Nayakan *v.* Ramasami Nayakan. S.A. No. 929 of 1895 (unreported) ... 424
Kamaraju *v.* The Secretary of State for India. I.L.R., 11 Mad., 309 at p. 314 ... 263, 289
Kandoth Mammi *v.* Neelancherayil Abdu Kalandan. 8 M.H.C.R., 14 ... 441
Kanhaiya Lal *v* Domingo. I.L.R., 1 All., 732 ... 546
Kannam Naidu *v.* Latchanna Dhora. I.L.R., 23 Mad., 492 ... 84
Kanna Pisharodi *v.* Kombi Achen. I.L.R., 8 Mad., 381 ... 193
Karim Nensey *v.* Heinrichs. (1901), L.R., 28 I.A., 198 at p. 201; I.L.R., 25 Bom., 563 ... 176
Kasinatha Ayyar *v.* Uthumansa Rowthan. I.L.R., 25 Mad., 529 ... 88, 89, 121
Katama Natchiar *v.* The Rajah of Shivaganga. 9 M.I.A., 543 ... 564
Katchi Kaliyana Rungappa Kalaka Tola Oodiar *v.* Kachivijaya Rungappa Kalakka Tola Oodiar. 12 M.I.A., 495; 2 B.L.R.P.C., 72 ... 510
Katrick Nath Pandey *v.* Juggernath Ram Marwari. I.L.R., 27 Calc., 285. 225, 226
Kattayat Pathumayi *v.* Raman Menon. I.L.R., 26 Mad., 740 ... 88
Kedar Nath Chatterjee *v.* King-Emperor. 5 Calc., W.N., 897 ... 94
Kery Kolitany *v.* Moneeram Kolita. 13 B.L.R., 1 ... 3
King-Emperor *v.* Srinivasan. I.L.R., 25 Mad., 726 ... 93, 101, 113
King-Emperor *v.* Takasi Nukayya. I.L.R., 24 Mad., 660 ... 39
Knox *v.* Gye. L.R., 5 H.L., 656 ... 347
Komal Chandra Pal *v.* Gour Chand Audhikari. I.L.R., 24 Calc., 286 ... 256, 312
Kommachi Kather *v.* Pakker. I.L.R., 20 Mad., 107 ... 225, 226, 476, 477
Komu *v.* Krishna. I.L.R., 11 Mad., 134 ... 193
Kooer Goolab Sing *v.* Rao Kurun Sing. 14 M.I.A., 193 ... 62
Kottasawmy *v.* Sandama Naik. 5 M.H.C.R., 294 ... 432
Krishna *v.* Venkatasami. I.L.R., 8 Mad., 164 ... 337
Krishna Ayyan *v.* Vencatachella Mudali. 7 M.H.C.R., 60 ... 75, 543
Krishna Ayyar *v.* Krishnasami Ayyar. I.L.R., 23 Mad., 597 ... 253
Krishna Behary Sen *v.* The Corporation of Calcutta. I.L.R., 31 Calc., 406 ... 488
Krishna Doss Balamukunda Doss *v.* Guruva Reddi. S.A. No. 831 of 1898 (unreported) ... 380
Krishtokishore Dutt *v.* Rooplall Dass. I.L.R., 8 Calc., 687 ... 471
Kristocomul Mitter *v.* Suresh Chunder Deb. I.L.R., 8 Calc., 556 ... 171
Kristoromoni Dasi *v.* Narendro Krishna Bahadur. (1888), L.R., 16 I.A., 29 at pp. 42, 43; I.L.R., 16 Calc., 383 at p. 395 ... 176
Kunhacha Umma *v.* Kutti Mammi Hajee. I.L.R., 16 Mad., 201 ... 194
Kunhi *v.* Seshagiri. I.L.R., 5 Mad., 141 ... 559
Kunhi Moossa *v.* Makki. I.L.R., 23 Mad., 478 at p. 482 ... 385
Kuppusami Chetty *v.* Rengasami Pillai. I.L.R., 27 Mad., 608 ... 41, 42

L

PAGE

Lakshmanan Chettiar *v.* Kannammal. I.L.R., 24 Mad., 185 ... 88
Lakshmanaswami Naidu *v.* Rangamma. I.L.R., 26 Mad., 31 ... 28
Lakshmi *v.* Kuttunni. I.L.R., 10 Mad., 57 ... 385
Land Mortgage Bank *v.* Ludurudeen Ahmed. I.L.R., 19 Calc., 358 ... 228
Latchanna *v.* Saravayya. I.L.R., 18 Mad., 164 ... 459, 460, 461, 462
Ledgard *v.* Bull. L.R., 13 I.A., 134 at p. 145 ... 441
Leigh *v.* Jack. L.R., 5 Ex. D., 264 ... 263
Lindus *v.* Bradwell. (1848), 5 C.B., 583 ... 246, 252
Lloyds *v.* Harper. L.R., 16 Ch.D., 290 ... 167
Logan *v.* Pyne. 43 Iowa, 524; 22 Am. Rep., 261 ... 524
Lolit Mohan Sarkar *v.* Queen-Empress. I.L.R., 22 Calc., 313 ... 97
Long *v.* Colburn. 11 id., 97; 6 Am. Dec., 160 ... 250
Lord Advocate *v.* Lord Blantyre. L.R., 4 A.C., 770 ... 263
Lord Advocate *v.* Young. L.R., 12 A.C., 544 ... 263
Low *v.* Bouverie. L.R., [1891], 3 Ch.D., 82 ... 143
Ludlow (Corporation of) *v.* Greenhouse. 4 E.R., 803 ... 324
Lyell *v.* Ganga Dai. I.L.R., 1 All., 60 ... 482

M

Mackillican *v.* The Compagnie Des Messageries Maritimes De France. I.L.R., 6 Calc., 227 ... 403
Madathapu Ramaya *v.* The Secretary of State for India in Council. I.L.R., 27 Mad., 386 ... 314
Madhavan *v.* Keshavan. I.L.R., 11 Mad., 191 ... 461, 465
Madhavi *v.* Kelu. I.L.R., 15 Mad., 264 ... 461
Madhusudan Das *v.* Gobinda Pria Chowdhurani. I.L.R., 27 Calc., 34 ... 88
Magaluri Garudiah *v.* Narayana Rungiah. I.L.R., 3 Mad., 359 at p. 360... 353, 354
Mahabala Bhatta *v.* Kunhanna Bhatta. I.L.R., 21 Mad., 373 at p. 383 ... 459, 460, 463
Mahadaji Hari Limaye *v.* Ganpatshet Dhondshet. I.L.R., 15 Bom., 257 ... 556
Mahadeo *v.* Budhai Ram. I.L.R., 26 All., 358 at p. 360 ... 204
Maharaja Jagadindra Nath Roy Bahadur *v.* Rani Hamanta Kumari Debi. L.R., 31 I.A., 203 at p. 207 ... 507
Maharajah of Jeypore *v.* Papayyamma. I.L.R., 23 Mad., 329 ... 44, 45, 48
Mahomed Abdul Mennan *v.* Panduranga Row. I.L.R., 28 Mad., 255 ... 312
Mahomed Khumar Ali *v.* Runga Rao. I.L.R., 24 Mad., 654 ... 545
Mallikarjuna *v.* Pathaneni. I.L.R., 19 Mad., 479 ... 440
Mallikarjunadu Setti *v.* Lingamurti Pantulu. I.L.R., 25 Mad., 244 at p. 288 ... 212, 477
Mallikarjuna Sastri *v.* Narasimha Rao. I.L.R., 24 Mad., 412 ... 475, 476, 478
Maluk Chand *v.* Bechar Natha. I.L.R., 25 Bom., 639 ... 400
Manilal Rewadat *v.* Bai Rewa. I.L.R., 17 Bom., 758 at p. 761 ... 8, 10
Manilal Umedram *v.* Nanabhai Maneklal. I.L.R., 28 Bom., 264 ... 384
Manohar Das *v.* Ram Autar Pande. I.L.R., 25 All., 431 ... 385
Maruti *v.* Krishna. I.L.R., 23 Bom., 592 ... 218
Mauladan *v.* Rughunandan Pershad Singh. I.L.R., 27 Calc., 7 ... 126

PAGE

Mayandi Chettiar *v.* Chokkalingam Pillay. I.L.R., 27 Mad., 291 at p. 295 ... 392
McCartney *v.* Londonderry and Lough Swilly Railway Co. L.R., [1904], A.C., 301 at p. 313 ... 81, 238
M'Dermott *v.* Wallace. 59 R.R., 411 ... 370
Mechanics' Bank *v.* Bank of Columbia. 5 Wheat, 326 ... 248
Meda Bibi *v.* Imaman Bibi. I.L.R., 6 All., 207 ... 350
Merwanji Hormusji *v.* Rustomji Burjorji. I.L.R., 6 Bom., 628 ... 347
Metropolitan Asylum District Board *v.* Hill. L.R., 6 A.C., 193 ... 80
Miles Claim. L.R., 9 Ch., 635 ... 246
Mir Ahwad Hussain *v.* Mahomed Askari. I.L.R., 29 Calc., 726 ... 256, 312
Mohesh Chandra Dass *v.* Jamiruddin Mollah. I.L.R., 28 Calc., 324 ... 440
Mohin Chundar Sanyal *v.* Kashi Kant Sanyal. 2 Calc., W.N., 161 ... 7
Moore *v.* Gamgee. L.R., 25 Q.B.D., 244 ... 441
Mountford *v.* Gibson. 4 East, 441 ... 354
Muhammad Ismail Ravuthan *v.* Sinnaveerana Kone. C.M.S.A. No. 96 of 1903 (unreported) ... 475
Muhammod Khumarali *v.* Ranga Rao. I.L.R., 24 Mad., 654 ... 253
Mussumat Buhuns Kowur *v.* Lalla Buhooree Lall. 14 M.I.A., 496 at p. 520. 528, 535
Mussamut Doorga Koonwar *v.* Mussamut Tejoo Koonwar. 5 Suth. W.R., Mis., 53 ... 8
Mustapha Saheb *v.* Santha Pillai. I.L.R., 23 Mad., 179 at p. 182 ... 266
Muthayya Chetty *v.* The Secretary of State for India. I.L.R., 22 Mad., 100 at p. 107 ... 266
Muthumadeva Naik *v.* Sevattamuttumadeva Naik. 7 M.H.C.R., 160 ... 412
Mutta Vaduganatha Tevar *v.* Dorasinga Tevar. L.R., 8 I.A., 99 ... 564
Muttia *v.* Appasami. I.L.R., 13 Mad., 504 ... 88

N

Nabin Chandra Mazumdar *v.* Mukta Sundari Debi. 7 B.L.R., App., 38 ... 460, 464
Nagasami Kamia Naick *v.* Iyodi Rama Goundan. 6 Mad., R.R., 5 ... 449
Nallatambi Mudaliar *v.* Ponnusami Pillai. I.L.R., 2 Mad., 400 ... 441
Naraganti Achammagaru *v.* Venkatachalapati Nayanivaru. I.L.R., 4 Mad., 250 ... 512
Naragunty Lutchmeedavamah *v.* Vengama Naidoo. 9 M.L.A., 66 at p. 85. 511, 513
Narayan *v.* Sono. I.L.R., 24 Bom., 345 ... 52
Narayana *v.* Chengalamma. I.L.R., 10 Mad., 1 at p. 7 ... 511
Narayana Chettiar *v.* Chokkappa Mudaliar. I.L.R., 25 Mad., 655 at p. 656. 527, 528, 532, 538
Narayana Kamti *v.* Nandu Shetty. S.A. No. 89 of 1900 (unreported) ... 391
Narayana Nambi *v.* Pappi Brahmani. I.L.R., 10 Mad., 22 ... 52, 53
Narayana Row *v.* Dharmachar. I.L.R., 26 Mad., 514 ... 266
Narayan Khandu Kulkarni *v.* Kalgaunda Birdar Patel. I.L.R., 14 Bom., 404 ... 86
New Jersey Steam Navigation Co. *v.* Merchants' Bank. 6 Howard, 381 ... 249
Newton *v.* Turner. 25 Am. Dec., 173 ... 250
Nichols *v.* Marsland. L.R., 2 Ex. D., 1 ... 75

PAGE

Nilratan Sen *v.* Jogesh Chundra Bhutta Charjee. I.L.R., 23 Calc., 983 ... 256, 312
Nistarini Dassi *v.* Nundo Lall Bose. I.L.R., 26 Calc., 891 ... 221
North-Eastern Railway Company *v.* Lord Hastings, L.R., (1900), A.C., 260 ... 511

P

Pakala Balakristnama Patrulu *v.* Sree Naraina Mardaraz Devu. 10 M.I.A., 60 at p. 63 ... 48
Pandharinatha *v.* Shankar. I.L.R., 25 Bom., 586 ... 453
Paras Ram *v.* Gardner. I.L.R., 1 All., 355 ... 53
Parthasaradi *v.* Chinna Krishna. I.L.R., 5 Mad., 304 ... 519
Pattaravy Mudali *v.* Audimula Mudali. 5 M.H.C.R., 419 ... 219, 223
Pattat Ambadi Marar *v.* Krishnan. I.L.R., 11 Mad., 290 ... 545
Pearce *v.* Edmeades. 51 R.R., 369 ... 370
Periasami *v.* Krishna Ayyan. I.L.R., 25 Mad., 431 ... 360, 361, 485
Periasami Mudaliar *v.* Seetharama Chettiar. I.L.R., 27 Mad., 243 at pp. 246 and 253 ... 254
Perumbra Nayar *v.* Subrahmanian Pattar. I.L.R., 23 Mad., 445 ... 440
Phillips *v.* Probyn. (1899), 1 Ch.D., 811 at pp. 816, 817 ... 419
Plimmer *v.* Mayor of Wellington. L.R., 9 A.C., 699 at pp. 710, 712 ... 143
Ponnayya Goundan *v.* Muttu Goundan. I.L.R., 17 Mad., 146 ... 126
Ponnusawmi Tevar *v.* The Collector of Madura. 5 M.H.C.R., 6 ... 542
Pooley's Trustee in Bankruptcy *v.* Whetham. L.R., 28 Ch.D., 38 ... 159, 161
President of the Taluq Board, Shivaganga *v.* Narayanan. I.L.R., 16 Mad., 317 ... 552
Proctor *v.* Bennis. L.R., 36 Ch.D., 740 ... 143
Prosonnomoyi Dassi *v.* Sreenauth Roy. I.L.R., 21 Calc., 809 ... 384
Pudmanund Singh *v.* Hayes. (1901), L.R., 28 I.A., 152 at p. 157; I.L.R., 28 Calc., 720 at p. 732 ... 176
Puuja Kuvarji *v.* Bai Kuvar. I.L.R., 6 Bom., 20 ... 77
Purshotamdass Tribhovandass *v.* Mahanant Surajbharthi Haribharthi. I.L.R., 6 Bom., 588 ... 383
Pym *v.* The Great Northern Railway Co. 4 B. & S., 396 ... 484

Q

Queen-Empress *v.* Abbas Ali. I.L.R., 25 Calc., 512 ... 94, 96, 100, 102, 106, 112, 115
Queen-Empress *v.* Adam Khan. I.L.R., 22 All., 106 ... 256
Queen-Empress *v.* Appasami. I.L.R., 12 Mad., 151 ... 93, 94, 101, 108
Queen-Empress *v.* Ganesh Khanderao and Ganesh Dault. I.L.R., 13 Bom., 506 at p. 515 (note) ... 94, 99, 105, 108
Queen-Empress *v.* Haradhan. I.L.R., 19 Calc., 380 ... 93, 96, 98, 110, 113
Queen-Empress *v.* Khandusingh. I.L.R., 22 Bom., 768 ... 94

PAGE

Queen-Empress v. Muhammad Saeed Khan. I.L.R., 21 All., 113 ... ... 97, 102, 108
Queen-Empress v. Soshi Bhushan. I.L.R., 15 All., 210 ... ...94, 98, 99, 108
Queen-Empress v. Vithal Narayan. I.L.R., 13 Bom., 515 (note) 97, 108

R

Raghunath Sahay Singh v. Lalji Singh. I.L.R., 23 Calc., 397 52
Rajagopala Ayyangar v. The Collector of Chingleput. 7 M.H.C.R., 98 ... 507
Rajah of Vizianagram v. Rajah Setrucherla Somasekharararaz. I.L.R., 26 Mad., 686 at p. 708 494
Rajah Venkata Narasimha Appa Row v. The Court of Wards. L.R., 7 I.A., 38; I.L.R., 2 Mad., 128 510
Rajaram v. Bappu Chettiar. C.M.S.A. No. 9 of 1903 (unreported) ... 118
Raja Satyasaran Ghosal v. Mahesh Chandra Mitter. 2 B.L.R., 23 at p. 30 263
Raj Narain Mookerjee v. Ful Kumari Debi. I.L.R., 29 Calc., 68 ... ... 163, 164, 166
Rajrup Koer v. Abul Hossein. I.L.R., 6 Calc., 394 77
Rakhmabai v. Radhabai. 5 B.H.C.R., (A.C.J.), 181 at p. 192 318
Ramachandra v. Narayanasami. I.L.R., 16 Mad., 333 75
Ramachandra v. Pitchaikanni. I.L.R., 7 Mad., 434 421
Ramachandra Rao v. Abeeb Rowthan. I.L.R., 24 Mad., 657 (note); Appeal No. 175 of 1897 (unreported) 545
Ramanuja Ayyangar v. Sadagopa Ayyangar. I.L.R., 28 Mad., 205 ... 253, 255
Rama Rau v. Venkatesa Bhandari. I.L.R., 5 Mad., 171 ... ... 41, 42
Ramaswami Ayyar v. Vythinatha Ayyar. I.L.R., 26 Mad., 760 at p. 778. 408, 409
Ram Kamal Shaha v. Ahmad Ali. I.L.R., 30 Calc., 429 124
Ram Nundun Singh v. Maharani Janki Koer. L.R., 29 I.A., 178; I.L.R., 29 Calc., 828 511
Ramsden v. Dyson. L.R., 1 E. & I. App., 129 at pp. 140 and 170 143
Rangasami Pillai v. Krishna Pillai. I.L.R., 22 Mad., 259 409
Rani Anund Koer v. The Court of Wards. L.R., 8 I.A., 14 at p. 22 ... 61
Rani Kattama Natchiar v. Dorasinga Tevar. L.R., 8 I.A., 99; I.L.R., 3 Mad., 290 511
Raymond v. Tapson. L.R., 22 Ch.D., 430 at p. 434 32
Re Browne's Hospital v. Stamford. 60 L.T., 288 325
Reg v. Bertrand. L.R., 1 P.C., 520 at p. 529 48
Reg v. Hodgson. [1856], Dearsley and Bell, 3 93
Regina v. Toshack. 4 Cox Crl. C. 38 at p. 41... ... ... 94, 100, 105, 106, 108, 114
Remmington v. Scoles. L.R., (1897), 2 Ch.D., 1 565
Re Ross. L.R., 2 P. & D., 274 165
Re Shakleton, 6 Mor., 304 172
Re Stark. L.R., 1 P. & D., 76 ... ... 165, 166, 167
Revell v. Blake. L.R., 8 C.P., 533 ... ... 28, 441
Rex v. Burbage. 3 Burrows, 1440 32
Rivett Carnac v. Goculdas. I.L.R., 20 Bom., 15 347
Rossi v. Edinburgh Corporation. L.R., (1905), A.C., 21 524
Rughu Nath Singh Manku v. Pareshram Mahata. I.L.R., 9 Calc., 635 ... 68
Runchordas v. Parvatibai. I.L.R., 23 Bom., 725 201

PAGE

Rungiah Gounden v. Nanjappa Row. I.L.R., 26 Mad., 780 162
Rup Jaun Bibee v. Abdul Kadir Bhuyan. I.L.R., 31 Calc., 643 ... ... 233, 236
Rutland, &c., R.R. Co. v. Cole. 24 Vt., 33 250

S

Sadagopa Ayyangar v. Ramanuja Ayyangar. C.R.P. No. 12 of 1904 (unported) 255
Sadashiva Raghunath v. Ramachandra Chintaman. 5 Bom. Law Reporter, 394 558
Sadashiv Lalit v. Jayantibai. I.L.R., 8 Bom., 185 86
Sakkaji Rau v. Lutchmana Goundan. I.L.R., 2 Mad., 149 266
Samalbhai Nathubhai v. Someshvar, Mangal and Harkisan. I.L.R., 5 Bom., 38 346
Sangu Ayyar v. Cumarasami Mudaliar. I.L.R., 18 Mad., 61 126
Sankaravadivelu Pillai v. Secretary of State for India. I.L.R., 28 Mad., 72 543
Saodamini Dasi v. The Administrator-General of Bengal. L.R., 20 I.A., 12 at p. 24 5
Sarat Chunder Dey v. Gopal Chunder Laha. L.R., 19 I.A., 203; I.L.R., 20 Calc., 296 143
Sardarmal v. Aranvayal Sabhapathy. I.L.R., 21 Bom., 205 at p. 211 ... 28, 441
Saroda Prosaud Mullick v. Luchmeeput Sing Doogur. L.R., 14 M.I.A., 529 at p. 540 471
Sasivarna Tevar v. Arulanandam Pillai. I.L.R., 21 Mad., 261 53
Sayad Nasrudin v. Venkatesh Prabhu. I.L.R., 5 Bom., 382 342
Searle v. Sewyer. 127 Mass., 491 210
Secretary of State v. Ashtamurthi. I.L.R., 13 Mad., 89 537
Secretary of State for India v. Nellakutti Siva Subramania Tevar. L.R., 18 I.A., 149; I.L.R., 15 Mad., 101 142
Senning v. Ralston. 23 Perm. St. R., 137, Vol. VII, col. 43, Century Digest 22
Seshagiri Rau v. Rama Rau. I.L.R., 19 Mad., 448 ... ... 217, 218, 219, 220, 222
Seth Shapurji Nana Bhai v. Shankar Dat Dube. I.L.R., 17 All., 431 ... 468, 471
Seton, Laing & Co. v. Lafone. L.R., 19 Q.B.D., 68 143
Sew Bux Bogla v. Shib Chunder Sen. I.L.R., 13 Calc., 225 384
Shamanna v. Krishna Ayyangar. O.S.A. No. 27 of 1901 (unreported) ... 221
Sham Lal Pal v. Modhu Sudan Sircar. I.L.R., 22 Calc., 558 ... ... 468, 471, 472
Shaw v. Stone. 1 Cush., 254 249
Sheik Budan v. Ramchandra Bhunjgaya. I.L.R., 11 Bom., 537 357
Shek Suleman v. Shivaram Bhikaji. I.L.R., 12 Bom., 71 118
Sheo Narayan Sing v. Harbans Lal. 5 B.L.R., 497 471
Sheo Partab Bahadur Singh v. The Allahabad Bank. I.L.R., 25 All., 476. 10, 11
Sheo Shankar Lal v. Dobi Sahai. I.L.R., 25 All., 468 at p. 473 ... ... 9, 10, 11, 12
Siriparapu Ramanna v. Mallikarjuna Prasada Nayudu. I.L.R., 17 Mad., 43 at p. 46 ... ... 432, 433
Sitaramayya v. Venkatramanna. I.L.R., 11 Mad., 373 378

PAGE

Sivasubramanya *v.* Secretary of State for India. I.L.R., 9 Mad., 285 ... 142, 266
Soiru Padmanabh Rangappa *v.* Narayan Rao Bin Vithal Rao. I.L.R., 18 Bom., 520 ... 233, 235
Sorabji Edulji Warden *v.* Govind Ramji F. N. Wadia. I.L.R., 16 Bom., 91 ... 384
Sorolah Dossee *v.* Bhoobun Mohun Neoghy. I.L.R., 15 Calc., 292 ... 8
Sovereign Life Assurance Company *v.* Dodd. I.L.R., (1892), 2 Q.B.D., 573. 243
Srihary Mundul *v.* Murari Chowdhry. I.L.R., 13 Calc., 257 ... 471
Srimantu Raja Yarlagadda Mallikarjuna *v.* Srimantu Raja Yarlagadda Durga. L.R., 17 I.A., 134 at p. 144; I.L.R., 13 Mad., 406 ... 511, 515
Srinivasa *v.* Rathnasabhapathi. I.L.R., 16 Mad., 474 ... 552
Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur *v.* The Court of Wards. L.R., 26 I.A., 83 at p. 95; I.L.R., 22 Mad., 383 at p. 396 ... 512
Sri Raja Viravara Thodhramal Rajya Lakshmi Devi Garu *v.* Sri Raja Viravara Thodhramal Surya Narayana Dhatrazu Bahadur Garu. L.R., 24 I.A., 118 at p. 121; I.L.R., 20 Mad., 256 at p. 263 ... 510
Stephenson *v.* Garnett. L.R., (1898), 1 Q.B.D., 677 ... 565
Stuart Skinner *alias* Nawab Mirza *v.* William Orde. I.L.R., 2 All., 241 ... 495
Subba Naidu *v.* Nagayya. S.A. No. 604 of 1900 (unreported) ... 14
Subba Narayana Vathiar *v.* Ramasami Ayyar. I.L.R., 28 Mad., 244 ... 549
Subbarayar *v.* Asirvatha Upadesayyar. I.L.R., 20 Mad., 494 ... 532, 538
Subba Rau *v.* Rama Rau. 3 M.H.C.R., 376 ... 219, 223
Subbaraya *v.* Krishnappa. I.L.R., 12 Mad., 422 ... 260, 263, 287
Subbiem Pillay *v.* Arnachala Irungol Pillay. 5 M.H.C.R., 444 at p. 450. 188
Subrahmania Ayyar *v.* King Emperor. I.L.R., 25 Mad., 61 at p. 97 ... 440
Subrahmanyam *v.* Venkamma. I.L.R., 26 Mad., 627 ... 319, 503
Subramaniya Ayyar *v.* Ramachandra Rau. I.L.R., 1 Mad., 335 ... 77
Sundaram *v.* Sithammal. I.L.R., 16 Mad., 311 ... 343, 350
Surender Nath Pal Chowdhry *v.* Brojo Nath Pal Chowdhry. I.L.R., 13 Calc., 352 ... 460, 461, 464
Suryanarayana Pandarathar *v.* Gurunada Pillai. I.L.R., 21 Mad., 257 ... 53
Sutaput Roy *v.* Syed Ali Hossein. 24 W.R., 11 ... 65
Swan *v.* Park. 1 Fairf, 441 ... 250
Syed Ameer Sahib *v.* Venkatarama. I.L.R., 16 Mad., 296 ... 552
Syed Hussain *v.* Madankhan. I.L.R., 17 Mad., 265 ... 124

T

Tagore case. (1872), L.R.I.A., Sup. vol. 47; 9 B.L.R., 377 at p. 397 ... 173, 176, 177, 181, 367, 375, 376
Taqui Jan *v.* Obaidulla. I.L.R., 21 Calc., 866 ... 398
Tarokessur Roy *v.* Soshi Shikhuressur Roy. L.R., 10 I.A., 51; I.L.R., 9 Calc., 952 ... 177
Tawangar Ali *v.* Kura Mal. I.L.R., 3 All., 394 at p. 396 ... 350
Taylor *v.* Corporation of Oldham. L.R., 4 Ch.D., 395 at p. 408 ... 18
Tej Ram *v.* Harsukh. I.L.R., 1 All., 101 ... 34
Tekait Doorga Persad Singh *v.* Tekaitni Doorga Konwari. L.R., 5 I.A., 149 at p. 163 ... 63

PAGE

Thakurain Jaipal Kunwar *v.* Bhaiya Indar Bahadur Singh. L.R., 31 I.A., 67 at p. 69, para. 4 ... 562
Thakur Prasad *v.* Abdul Hasan. I.L.R., 23 All., 13 ... 52
The Collector of Madura *v.* Moottoo Ramalinga Sathupathy. 12 M.I.A., 397 at p. 442 ... 319
The Collector of Trichinopoly *v.* Lekkamani. L.R., 1 I.A., 282 at p. 283; 14 B.L.R., 115; (S.C.), 6 M.H.C.R., 208 ... 261, 511
The Delhi and London Bank, Ld. *v.* Chaudhri Partab Bhaskar. I.L.R., 21 All., 29 at p. 40 ... 531
The Government of Bengal *v.* Senayat Ali. I.L.R., 27 Calc., 317 at p. 318 ... 519
The Madras Railway Company *v.* The Zamindar of Carvatenagarum. L.R., 1 I.A., 364 ... 78, 542
The Municipal Commissioners *v.* Sarangapani Mudaliar. I.L.R., 19 Mad., 154 at p. 156 ... 507
The Municipality of the City of Poona *v.* Vaman Rajaram Gholap. I.L.R., 19 Bom., 797 ... 497
The Queen *v.* Bishop of Oxford. L.R., 4 Q.B.D., 245 ... 471
The Queen *v.* Periannan and The Queen *v.* Naraina. I.L.R., 4 Mad., 241. 566, 567
The Ramnad case. I.L.R., 24 Mad., 613, note (631) ... 511
The Secretary of State for India *v.* Ashtamurthi. I.L.R., 13 Mad., 89 ... 266
The Secretary of State for India *v.* Bavotti Haji. I.L.R., 15 Mad., 315 ... 263, 266
The Secretary of State for India *v.* Kota Bapanamma Garu. I.L.R., 19 Mad., 165 ... 266
The Secretary of State for India *v.* Nellakutti Siva Subramania Tevar. I.L.R., 15 Mad., 101 at p. 109 ... 263
The Secretary of State for India *v.* Vira Rayan. I.L.R., 9 Mad., 175 at pp. 179, 184, 187 ... 263, 266, 288
The Udayarpalayam case. I.L.R., 24 Mad., 562 ... 509
Thirumalai *v.* Ramayyar. I.L.R., 13 Mad., 1 ... 118
Tillatson *v.* Tillatson. Parson on 'Contracts,' 7th edition, Vol. II, 716 ... 22
Timmayya *v.* Lakshmana. I.L.R., 7 Mad., 215 ... 232
Tirumalayappa Pillai *v.* Swami Naikar. I.L.R., 18 Mad., 469 at p. 470 ... 532, 537, 538
Tukarambhat *v.* Gangaram. I.L.R., 23 Bom., 454 ... 378
Tukaram Gopal *v.* Pandurang Sadaram. I.L.R., 25 Bom., 584 ... 453

U

Unni *v.* Kunchi Amma. I.L.R., 14 Mad., 26 ... 424

V

Valia Kaimal *v.* Velluthadatha Shamu. 6 M.H.C.R., 401 at p. 406 ... 185, 189, 195
Vallabhan *v.* Panguni. I.L.R., 12 Mad., 454 ... 88
Vappakandu Maracayan *v.* Hamid Beevi Ammal. C.M.A. No. 25 of 1903 (unreported) ... 357
Vasanji Haribhai *v.* Lallu Akhu. I.L.R., 9 Bom., 285 at p. 288 ... 86
Venkatagiri Ayyar *v.* Sadagopachariar. A. No. 69 of 1900 and C.M.A. Nos. 105 and 109 of 1902 (unreported) ... 356

PAGE

Venkatagiri Raja *v.* Pitchana. I.L.R., 9 Mad., 27 ... ... 332, 333
Venkatagopal *v.* Rangappa. I.L.R., 7 Mad., 365 ... ... 330, 335, 337
Venkatanarasimha Naidu *v.* Dandamudi Kotayya. I.L.R., 20 Mad., 299 ... 450
Venkatappiah *v.* Jagannatha Rao. C.M.S.A. No. 64 of 1900 (unreported) . 468
Venku *v.* Mahalinga. I.L.R., 11 Mad., 393 519
Venning *v.* Pray. 2 B. & S., 502 303
Vestry of St. Mary Islington *v.* Barrett. L.R., 9 Q.B., 283 18
Vidyapurna Tirtha Swami *v.* Vidyanidhi Tirtha Swami. I.L.R., 27 Mad., 435 392
Vijiarangam *v.* Lakshuman. 8 B.H.C.R.O.C.J., 244 at p. 272 10
Vinayak Raghunath *v.* The G.I.P. Railway Company. 7 B.H.C.R., 113 ... 482
Viraraghava *v.* Venkata. I.L.R., 5 Mad., 217 88
Virasami *v.* Athi. I.L.R., 7 Mad., 596 52
Virasangappa Shetti *v.* Rudrappa Shetti. I.L.R., 19 Mad., 110 at p. 118... 10
Vishnu *v.* Ramling. I.L.R., 26 Bom., 25 at p. 30 519
Vithai *v.* Hari. I.L.R., 25 Bom., 78 350
Vithal Janardan *v.* Vithojirav Putlajirav. I.L.R., 6 Bom., 586 129
Vyakunta Bapuji *v.* The Government of Bombay. 12 B.H.C.R., App. 1 at pp. 53 *et seq.*, 58, 125, 159, 194, 220 ... ... 258, 259, 261, 262, 266, 276, 283, 293

W

Warwick and Birmingham Canal Navigation Company *v.* Burman. 63 L.T., (N.S.), 670 441
Watson & Co. *v.* The Government. 3 W.R., 73 at p. 80 263
West Cumberland Iron and Steel Company *v.* Kenyon. L.R., 11 Ch.D., 782 ... ... 16, 81
Whalley *v.* The Lancashire and Yorkshire Railway Company. L.R., 13 Q.B.D., 131 ... ... 16, 75
Willmott *v.* Barber. L.R., 15 Ch.D., 96 at p. 105 143
Wilson *v.* Wilson. 1 Barb. Ch., 592 159
Winter *v.* Round. 1 M.H.C.R., 202 22
Withen *v.* Moulton. 127 Mass., 509 210
Wright *v.* Boyd. 3 Barb., 523 249
Wutzler *v.* Sharpe. I.L.R., 15 All., 270 at p. 281 497
Wyatt *v.* Larimer Weld Irrigation Co. 36 Am. S.R., 280 81

Y

Yerrabalu Viraraghava Reddi *v.* Abdul Khadir Sahib. 4 M.H.C.R., 26 ... 124

Z

Zamindar of Merangi *v.* Sri Rajah Satrucharla Ramabhadra Razu. L.R., 18 I.A., 45 at p. 54; I.L.R., 14 Mad., 237 at p. 245 ... ... 510, 511
Zamorin of Calicut *v.* Sitarama. I.L.R., 7 Mad., 405 at p. 406 537

GENERAL INDEX

FOR

1905.

PAGE

ABKÁRI ACT I OF 1886 (MADRAS), s. 28, SALE FOR ARREARS UNDER—
Effect on prior encumbrances—'As if they were arrears of land revenue,' meaning of—Limitation Act XV of 1877, sched. II, art. 12:

A sale for arrears of abkári revenue of immoveable properties belonging to the defaulter under section 28 of Act I of 1886 has not the effect of discharging encumbrances created prior to the sale. *Ramachandra* v. *Pitchaikanni*, (I.L.R., 7 Mad., 434), followed. The words 'as if they were arrears of land revenue' in the new Act have the same meaning as the words 'in like manner as for the recovery of arrears of land revenue' in the old Act. *Chinnasami Mudali* v. *Tirumalai Pillai and the Right Honourable the Secretary of State for India*, (I.L.R., 25 Mad., 572), followed. *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar*, (I.L.R., 26 Mad., 230), followed. Where lands subject to mortgage are sold under section 28 of Act I of 1886, the mortgagee's suit to enforce his mortgage right against the purchaser does not fall within article 12 of schedule II of the Limitation Act when the plaint contains no prayer for setting aside the sale.

Ibrahim Khan Sahib v. *Rangasami Naicken* 420

ACCOUNT, SUITS FOR:

See PROVINCIAL SMALL CAUSE COURTS ACT.

ACTS:

1802, XXV:
See (MADRAS) REGULATION.

1805, V:
See MADRAS COURT OF WARDS REGULATION.

1848, 11 & 12 VICT., CAP. 21:
See INSOLVENCY ACT.

1855, XII:
See LEGAL REPRESENTATIVES' SUITS ACT.

1855, XIII:
See FATAL ACCIDENTS ACT (INDIAN).

1856, XV:
See HINDU WIDOWS' RE-MARRIAGE ACT.

1859, XIII:
See CRIMINAL BREACH OF CONTRACT ACT.

1860, XLV:
See PENAL CODE.

1864, II (MADRAS):
See REVENUE RECOVERY ACT.

1865, VIII (MADRAS):
See RENT RECOVERY ACT.

1872, I:
See EVIDENCE ACT.

1872, IX :
See CONTRACT ACT.
1874, XIV :
See SCHEDULED DISTRICTS ACT.
1877, I :
See SPECIFIC RELIEF ACT.
1877, IX :
See PROVINCIAL SMALL CAUSE COURTS ACT.
1877, XV :
See LIMITATION ACT.
1881, V :
See PROBATE AND ADMINISTRATION ACT.
1881, XXVI :
See NEGOTIABLE INSTRUMENT ACT.
1882, IV :
See TRANSFER OF PROPERTY ACT.
1882, V :
See EASEMENT ACT.
1882, VI :
See INDIAN COMPANIES ACT.
1882, XIV :
See CIVIL PROCEDURE CODE.
1882, XV :
See PRESIDENCY SMALL CAUSE COURT ACT.
1884, IV (MADRAS) :
See DISTRICT MUNICIPALITIES ACT.
1886, I (MADRAS) :
See ABKÁRI ACT.
1887, IX :
See PROVINCIAL SMALL CAUSE COURTS ACT.
1889, III (MADRAS) :
See DISTRICT MUNICIPALITIES ACT.
1889, IV :
See MADRAS SALT ACT.
1895, III (MADRAS) :
See HEREDITARY VILLAGE OFFICES ACT.
1898, V :
See CRIMINAL PROCEDURE CODE.
1898, VI :
See INDIAN POST OFFICE ACT.
1899, IV :
See MADRAS COURT OF WARDS REGULATION (AMENDMENT ACT).

ALIENATION BY WIDOW OF TEMPLE PROPERTY—*Suit to declare alienation invalid and not binding on those entitled to succeed the widow as trustees after her death—Bar by limitation—Limitation Act XV of 1877, sched. II, arts. 124, 141—Claim for the recovery of an hereditary office—Succession by Hindu widow to trusteeship of temple :*

A temple was built and dedicated to the public by one Jagayya, who acted as trustee of it during his lifetime. He died childless and his widow succeeded him as trustee. She continued to manage the affairs of the temple until October 1885, when she transferred the right of trusteeship together with certain temple properties to the first defendant. In 1897 the widow died. The plaintiffs as the persons entitled to be trustees in succession to her brought this suit in December 1900, to establish their rights as trustees and to have the transfer in favour of the first defendant declared invalid :—*Held*, that the suit was barred under article 124 of the Limitation Act. The property transferred with the trusteeship was only recoverable by the plaintiffs in their right as trustees, which right had

PAGE

ceased to exist through the operation of the Law of Limitation. *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*, (I.L.R., 23 Mad., 271), referred to. The possession by the defendants during the lifetime of the widow was adverse to the plaintiffs, who derived their title "from and through" the widow notwithstanding the fact that they were not her heirs in the strict sense of the word.

Pydigantam Jagannadha Row v. *Ramadoss Patnaik* 197

APPEAL—*Order refusing application for appointment of commissioner to effect division of property by metes and bounds in partition suit—Limitation Act—XIV of 1877, sched. II, art. 178 :*

The parties to a suit for partition entered into a compromise which was recorded by the Court and by which their respective shares in the family property were agreed upon. An application was subsequently made for the appointment of a commissioner to effect an actual division of the property, but the Subordinate Judge dismissed it on the ground that the right to claim further relief in the matter had become barred by limitation. This order was reversed on appeal and the case was remanded by the District Judge for disposal according to law. An appeal was then preferred to the High Court against the order of remand, when it was contended that no appeal lay to the District Judge against the order of the Subordinate Judge :—*Held*, that an appeal lay. The order of the Subordinate Judge on the face of it purported to decide a question to be dealt with under section 244 of the Code of Civil Procedure and was therefore a decree within the meaning of that term in the Code, and that the party against whom it was passed was entitled to appeal therefrom. Even if there was no decree to be executed, and the Subordinate Judge erroneously supposed the matter to be one in execution, and held the application to be barred, such usurpation of jurisdiction could not make the order passed in consequence thereof less appealable than would have been the case had the order been passed in execution proceedings under a decree duly passed. *Hurrish Chunder Chowdry* v. *Kali Sundari Debia*, (L.R., 10 I.A., 4) and *Abdul Rahiman Saheb* v. *Ganapathi Bhatta*, (I.L.R., 23 Mad., 517), followed. Such an application is not an application of the description contemplated by article 178.

Latchmanan Chetty v. *Ramanathan Chetty* 17

ATTACHMENT —*See* "HEREDITARY VILLAGE OFFICES ACT."

BENAMI TRANSACTION :—*See* "NEGOTIABLE INSTRUMENT ACT XXVI OF 1881."

CARRIERS BY SEA, LIABILITY OF, UNDER COMMON LAW—*Foreign carrier contracting in Calcutta, Law applicable to—Negligence and misfeasance :*

Carriers by sea, for hire, are common carriers by the Common Law of England; and, where the contract is made in Calcutta, whatever be the nationality of the carriers they will be governed by the *lex loci contractus*, which is the Common Law of England. *Mackillican* v. *The Compagnie Des Messageries Maritimes De France*, (I.L.R., 6 Calc., 227), not followed. Under the English Common Law, a common carrier may protect himself from liability for deliberate acts of misfeasance on the part of himself or his servants, but he must do so by clear, definite unambiguous words. Landing goods in rainy weather instead of delaying delivery is negligence and not misfeasance.

Hojee Ismail Sait v. *The Company of the Messageries Maritimes of France* ... 400

CASES :—

Abboy Chetty v. *Ramachandra Rau*, (I.L.R., 17 Mad., 461), not followed ... 544
Abdul Rahim v. *Kirparam Daji*, (I.L.R., 16 Bom., 186), followed 339
Abdul Rahiman Saheb v. *Ganapathi Bhatta*, (I.L.R., 23 Mad., 517), followed... 127
Abdul Rahiman Saheb v. *Abdul Kader Saheb*, (I.L.R., 25 Mad., 26), distinguished ... 479
Ahinsa Bibi v. *Abdul Kader Saheb*, (I.L.R., 25 Mad., 351), approved 2
Akkana v. *Venkayya*, (I.L.R., 25 Mad., 351), approved

PAGE

Alimannissa Khatoon v. *Syed Hossein Ali*, (6 C.L.R., 267), followed ... 67
Amava v. *Mahadgauda*, (I.L.R., 22 Bom., 416), referred to and followed ... 315
Ambica Pershad Singh v. *Surdhari Lal*, (I.L.R., 10 Calc., 851), followed ... 399
Anderson's Case, (L.R., 3 Eq., 337), followed 240
Annaji v. *Narayan*, (I.L.R., 21 Bom., 556), followed 320
Ayerst v. *Jenkins*, (L.R., 16 Eq., 275), distinguished 414
Bai Motivahoo v. *Bai Mamoobai*, (L.R., 24 I.A., 93), referred to 364
Bai Somi v. *Choksh Ishvardas Mangaldas*, (I.L.R., 19 Bom., 245), followed and approved 162
Beni Parshad v. *Puranchand*, (I.L.R., 23 Calc., 262), commented on ... 2
Bhagwanta v. *Sukhi*, (I.L.R., 22 All., 33), approved 57
Bhaskarappa v. *The Collector of North Kanara*, (I.L.R., 3 Bom., 452), approved and followed 258
Bhimawa v. *Sangawa*, (I.L.R., 22 Bom., 206), referred to and followed ... 315
Bhupathi v. *Rajah Rangayya Appa Rau*, (I.L.R., 17 Mad., 54 at p. 57), commented on 428
Binda v. *Kaunsilia*, (I.L.R., 13 All., 126), dissented from 436
Bryan v. *Twigg*, (L.R., 3 Eq., 433), referred to and distinguished 364
Chamanlal v. *Bapubhai*, (I.L.R., 22 Bom., 669), referred to and followed ... 517
Chamar Haru v. *Kashi*, (I.L.R., 26 Bom., 388), referred to and followed ... 425
Chandu v. *Kunhamed*, (I.L.R., 14 Mad., 324), overruled 457
Cherukomen v. *Ismala*, (6 M.H.C.R., 145), commented on 182
Cherukuri Venkanna v. *Mantravathi Lakshmi Narayana Sastrulu*, (2 M.H.C.R., 327), followed 13
Chhaganram Astikram v. *Bai Motigavri*, (I.L.R., 14 Bom., 512), discussed ... 57
Chhiddu v. *Naubat*, (I.L.R., 24 All., 67), commented on 2
Chinnasami Mudali v. *Tirumalai Pillai and the Right Honourable the Secretary of State for India*, (I.L.R., 25 Mad., 572), followed 420
Chintaman Bajaji Dev v. *Dhondo Ganesh Dev*, (I.L.R., 15 Bom., 612), followed 320
Dagdu v. *Kalu*, (I.L R., 22 Bom., 733), referred to 338
Damodarbhat v. *Bhogilal*, (I.L.R., 24 Bom., 45), followed 320
Degumbery Dossee v. *Rajah Annundnath Poy*, (W.R., (1864), 43), referred to. 338
Dhanjibhoy Bomanji v. *Hirabai*, (I.L.R., 25 Bom., 644 at p. 646), followed ... 436
Esubai v. *Damodar Ishvardas*, (I.L.R., 16 Bom., 552 at p. 559), not followed. 495
Firingee Sahoo v. *Sham Monjhee*, (8 W.R.C.R., 373), referred to 338
Fischer v. *Kamakshi Pillai*, (I.L.R., 21 Mad., 136), followed 445
Gann v. *Free Fisheries of Whitstalle*, (11 H.L.C., 192 at p. 193), referred to. 445
Gnanasambanda Pandara Sannadhi v. *Velu Pandaram*, (I.L.R., 23 Mad., 271), referred to 197
Gomatham Alamelu v. *Komandur Krishnamacharlu*, (I.L.R., 27 Mad., 118), approved 26
Gopal Dai v. *Chunni Lal*, (I.L.R., 8 All., 67), referred to and approved ... 381
Gopalasami Chettiar v. *Fischer*, (I.L.R., 28 Mad., 328), referred to 445
Gopalayyan v. *Raghupati Ayyan* alias *Aiyavayyan*, (3 M.H.C.R., 217), referred to and followed 457
Haggard v. *Pelicier Freres*, (L.R., (1892), A.C., 61 at pp. 67 and 68), referred to 560
Haridas Ramdas v. *Ramdas Mathuradas*, (I.L.R., 13 Bom., 677), followed ... 487
Hart v. *Tara Prasanna Mukherji*, (I.L.R., 11 Calc., 718), referred to and approved 473

PAGE

High Court Proceedings, dated 29th March 1865, (Weir's 'Law of Offences,' 445), approved 37
Hirachand Harjivandas v. *Kasturchand Kasidas*, (I.L.R., 18 Bom., 224), approved 466
His Highness Shrimant Maharaj Yashvant Ray Holkar v. *Dadabhai Cursetji Ashburner*, (I.L.R., 14 Bom., 353), referred to and distinguished 227
Hudson v. *Basdeo Bajpye*, (I.L.R., 26 Calc., 109), referred to 229
Hurrish Chunder Chowdry v. *Kali Sundari Debia*, (L.R., 10 I.A., 4), followed 127
Innasi Pillai v. *Sivagnana Desikar*, (C.R.P., No. 643 of 1893, unreported), followed 238
Isri Dut Koer v. *Mussumut Hansbutti Koerain*, (L.R., 10 I.A., 150), distinguished 2
Jogemaya Dassi v. *Thackomoni Dassi*, (I.L.R., 24 Calc., 473), approved ... 224
Jogeswar Narain Deo v. *Ram Chund Dutt*, (L.R., 23 I.A., 37), referred to and distinguished 364
John Young v. *Mangalapilly Ramaiya*, (3 M.H.C.R., 125), referred to and distinguished 227
Kadir Mohideen Marakkayar v. *Muthukrishna Ayyar*, (I.L.R., 26 Mad., 230), followed 420
Kamakshi v. *Nagarathnam*, (5 M.H.C.R., 161), referred to 414
Kamakshi Nayakan v *Ramasami Nayakan*, (S.A. No. 929 of 1895, unreported), distinguished 423
Kasinatha Ayyar v *Uthumanser Rowthan*, (I.L.R., 25 Mad., 529), discussed ... 119
Katrick Nath Pandey v. *Juggernath Ram Marwari*, (I.L.R., 27 Calc., 285), differed from 224
King-Emperor v. *Takasi Nukayya*, (I.L.R., 24 Mad., 660), approved 37
Knox v. *Gye*, (L.R., 5 H.L., 656), followed 344
Komanachi Kather v. *Pakker*, (I.L.R., 20 Mad., 107), followed 224
Kommachi Kather v. *Pakker*, (I.L.R., 20 Mad., 107), referred to and approved. 473
Kottasawmy v. *Sandama Naik*, (5 M.H.C.R., 294), approved 428
Krishna Behary Sen v. *The Corporation of Calcutta*, (I.L.R., 31 Calc., 406), referred to and approved 487
Krishna Doss Balamukunda Doss v. *Guruva Reddi*, (S.A. No. 831 of 1898, unreported), referred to and followed 379
Kuppusami Chetty v. *Rengasamy Pillai*, (I.L.R., 27 Mad., 608), followed ... 40
Lakshmi v. *Kuttunni*, (I.L.R., 10 Mad., 57), referred to 381
Latchanna v. *Saravayya*, (I.L.R., 18 Mad., 164), not followed 457
Logan v. *Pyne*, (43 Iowa, 524; 22 Am. Rep., 261, 262), followed 521
Mackillican v. *The Compagnie Des Messageries Maritimes De France*, (I.L.R., 6 Calc., 227), not followed 400
Madathapu Ramaya v. *The Secretary of State for India*, (I.L.R., 27 Mad., 386), followed 313
Madhavan v *Keshavan*, (I.L.R., 11 Mad., 191), distinguished 457
Magaluri Garudiah v. *Narayana Rungiah*, (I.L.R., 3 Mad., 359), referred to. 351
Mahadeo v. *Budhai Ram*, (I.L.R., 26 All., 360), commented on 202
Mallikarjuna v. *Pathaneni*, (I.L.R., 19 Mad., 479), referred to 438
Mallikarjuna Sastri v. *Narasimha Rao*, (I.L.R., 24 Mad., 412), overruled ... 473
Mallikarjunadu Setti v. *Lingamurti Pantulu*, (I.L.R., 25 Mad., 244), referred to and approved 473
Maluk Chand v. *Bechar Natha*, (I.L.R., 25 Bom., 639), distinguished ... 399
Manilal Umedram v. *Nanabhai Maneklal*, (I.L.R., 28 Bom., 264), distinguished 381

PAGE

Mayandi Chettiar v. *Chokkalingam Pillay*, (I.L.R., 27 Mad., 295), followed ... 391
M'Dermott v. *Wallace*, (59 R.R., 441), referred to and distinguished ... 364
Merwanji Hormusji v. *Rustomji Burjorji*, (I.L.R., 6 Bom., 628), followed ... 344
Mir Ahwad Hussein v. *Mahomed Askari*, (I.L.R., 29 Calc., 726), differed from ... 255
Mohesh Chandra Dass v. *Jamiruddin Mollah*, (I.L.R., 28 Calc., 324), referred to ... 438
Mountford v. *Gibson*, (4 East, 441), referred to ... 351
Mussumat Buhuns Kowur v. *Lalla Buhooree Lall*, (14 M.I.A., 496), followed. 526
Muthumadeva Naik v. *Sevattamuthumadeva Naik*, (7 M.H.C.R., 160), referred to and approved ... 406
Nabin Chandra Nazumdar v. *Muktasundari Debi*, (7 B.L.R., App. 38), referred to and followed ... 457
Naraganti Achammagaru v. *Venkatachalapati Nayanivaru*, (I.L.R., 4 Mad., 250), approved ... 508
Narayana Chettiar v. *Chokkappa Mudaliar*, (I.L.R., 25 Mad., 655), dissented from ... 526
Narayana Kamti v. *Nandu Shetty*, (S.A. No. 89 of 1900, unreported), referred to and followed ... 390
Narayana Nambi v. *Pappi Brahmani*, (I.L.R., 10 Mad., 22), overruled ... 51
Pandharinath v. *Shankar*, (I.L.R., 25 Bom., 586), referred to and distinguished ... 452
Parthasaradi v. *Chinna Krishna*, (I.L.R., 5 Mad., 304), referred to and followed ... 517
Pattat Ambadi Marar v. *Krishnan*, (I.L.R., 11 Mad., 290), not followed ... 541
Pearce v. *Edmeades*, (51 R.R., 369), referred to and distinguished ... 364
Periasami v. *Krishna Ayyan*, (I.L.R., 25 Mad., 431), followed ... 359
Periasami v. *Krishna Ayyan*, (I.L.R., 25 Mad., 431), followed ... 479
Prosonnomoyi Dassi v. *Sreenauth Roy*, (I.L.R., 21 Calc., 809), approved ... 381
Purshotamdass Tribhovandass v. *Mahanant Surajbharthi Haribharthi*, (I.L.R., 6 Bom., 588), referred to and approved ... 381
Rajah of Vizianagram v. *Rajah Setrucherla Somasekhararaz*, (I.L.R., 26 Mad., 686 at p. 708), followed ... 493
Raj Narain Mookerjee v. *Ful Kumari Debi*, (I.L.R., 29 Calc., 68), not followed. 162
Rakhmabai v. *Radhabai*, (5 B.H.C.R., (A.C.J.), 181 at p. 192), referred to and followed ... 315
Ramachandra v. *Pitchaikanni*, (I.L.R., 7 Mad., 434), followed ... 420
Ramaswami Ayyar v. *Vythinatha Ayyar*, (I.L.R., 26 Mad., 760), followed ... 406
Rangasami Pillai v. *Krishna Pillai*, (I.L.R., 22 Mad., 259), dissented from ... 406
Re *Browne's Hospital* v. *Stamford*, (60 L.T., 288), referred to ... 320
Rossi v. *Edinburgh Corporation*, (L.R., (1905), A.C., 21), referred to ... 521
Raghu Nath Singh Manku v. *Pareshram Mahata*, (I.L.R., 9 Calc., 635), followed ... 67
Rungiah Goundan v. *Nanjappa Row*, (I.L.R., 26 Mad., 780), approved ... 211
Rup Jaun Bibee v. *Abdul Kadir Bhuyan*, (I.L.R., 31 Calc., 643), referred to and commented on ... 229
Sadashiva Raghunath v. *Ramachandra Chintaman*, (5 B.L.R., 394), dissented from ... 558
Samalbhai Nathubhai v. *Someshvar, Mangal and Harkisan*, (I.L.R., 5 Bom., 38), referred to ... 344
Saodamini Dasi v. *The Administrator-General of Bengal*, (L.R., 20 I.A., 12), followed ... 2
Sardarmal v. *Aranvayal Sabhapathy*, (I.L.R., 21 Bom., 205), approved ... 26

PAGE

Sew Bux Boyla v. *Shib Chunder Sen*, (I.L.R., 13 Calc., 225), approved ... 381
Sayad Nasrudin v. *Venkatesh Prabhu*, (I.L.R., 5 Bom., 382), followed ... 338
Seth Shapurji Nana Bhai v. *Shankar Dat Dube*, (I.L.R., 17 All., 431), approved ... 466
Shan Lal Pal v. *Modhu Sudan Sircar*, (I.L.R., 22 Calc., 558), not followed ... 466
Sheik Budan v. *Ramchandra Bhunjgaya*, (I.L.R., 11 Bom., 537), referred to. 355
Sheo Shankar Lal v. *Debi Sahai*, (I.L.R., 24 All., 468), commented on ... 2
Siriparapu Ramanna v. *Mallikarjuna Prasada Nayudu*, (I.L.R., 17 Mad., 43 at p. 46), commented on ... 428
Sitaramayya v. *Venkatramanna*, (I.L.R., 11 Mad., 373), followed ... 377
Soiru Padmanabh Rangappa v. *Narayan Rao Bin Vithal Rao*, (I.L.R., 18 Bom., 520), distinguished ... 229
Sorabji Edulji Warden v. *Govind Ramji F. N. Wadia*, (I.L.R., 16 Bom., 91), referred to ... 381
Sorolah Dossee v. *Bhoobun Mohun Neoghy*, (I.L.R., 15 Calc., 292), commented on ... 2
Sovereign Life Assurance Company v. *Dodd*, (L.R., (1892), 2 Q.B.D., 573, followed ... 240
Srimantu Raja Yarlagadda Mallikarjuna v. *Srimantu Raja Yarlagadda Durga*, (L.R., 17 I.A., 134; I.L.R., 13 Mad., 406), followed ... 508
Stuart Skinner alias *Nawab Mirza* v. *William Orde*, (I.L.R., 2 All., 241), followed ... 493
Subba Naidu v. *Nagayya*, (S.A. No. 604 of 100 unreported), commented on ... 13
Subbaraya v. *Krishnappa*, (I.L.R., 12 Mad., 422), approved ... 258
Subbarayar v. *Asirvatha Upadesayyar*, (I.L.R., 20 Mad., 494), referred to and followed ... 526
Subrahmania Ayyar v. *King-Emperor*, (I.L.R., 25 Mad., 61 at p. 97), followed. 438
Subrahmanyam v. *Venkamma*, (I.L.R., 26 Mad., 627), distinguished ... 315
Subrahmanyam v. *Venkamma*, (I.L.R., 26 Mad., 627), referred to ... 500
Sundaram v. *Sithanmal*, (I.L.R., 16 Mad., 311), followed ... 339
Surender Nath Pal Chowdhry v. *Brojo Nath Pal Chowdhry*, (I.L.R., 13 Calc., 352), referred to and followed ... 457
Sutaput Roy v. *Syed Ali Hossein*, (24 W.R., 11), referred to ... 64
Tagui Jan v. *Obaidulla*, (I.L.R., 21 Calc., 866), distinguished ... 396
The Municipality of the City of Poona v. *Vaman Rajaram Gholap*, (I.L.R., 19 Bom., 797), not followed ... 496
The Queen v. *Periannan* and *The Queen* v. *Naraina*, (I.L.R., 4 Mad., 241), distinguished ... 565
Tirumalayappa Pillai v. *Swami Naicker*, (I.L.R., 18 Mad., 469), referred to and followed ... 526
Tukarambhat v. *Gangaram*, (I.L.R., 23 Bom., 454), followed ... 377
Tukaram Gopal v. *Pandurang Sadaram*, (I.L.R., 25 Bom., 584), referred to and distinguished ... 452
Unni v. *Kunchi Amma*, (I.L.R., 14 Mad., 26), distinguished ... 423
Vappakandu Maracayan v. *Hamid Beevi Ammal*, (C.M.A. No. 25 of 1903, unreported), referred to ... 355
Venkatagiri Ayyar v. *Sadagopachariar*, (Appeal No. 69 of 1900 and C.M.A. Nos. 105 and 109 of 1902 unreported), distinguished ... 355
Venkatanarasimha Naidu v. *Dandamudi Kotayya*, (I.L.R., 20 Mad., 299), referred to ... 445
Venku v. *Mahalinga*, (I.L.R., 11 Mad., 393), referred to and followed ... 517
Vidyapurna Tirtha Swami v. *Vidyanidhi Tirtha Swami*, (I.L.R., 27 Mad., 435), followed ... 391

PAGE

Vishnu v. *Ramling*, (I.L.R., 26 Bom., 25 at p. 30), referred to and followed ... 517

Winter v. *Round*, (1 M.H.C.R., 202), referred to 19

Wutzler v. *Sharpe*, (I.L.R., 15 All., 270 at p. 281), followed 495

CIVIL PROCEDURE CODE—ACT XIV OF 1882—*Suit for determination of any right to or interest in immoveable property—Suit for the recovery of purchase money under contract for the sale of land—Jurisdiction :*

A suit for the recovery of unpaid purchase money under a contract for the sale of land is a suit "for the determination of any right to or interest in immoveable property" within the meaning of section 16, clause (d) of the Code of Civil Procedure. *John Young* v. *Mangalapilly Ramaiya*, (3 M.H.C.R., 125), and *His Highness Shrimant Maharaj Yashvant Ray Holkar* v. *Dadabhai Cursetji Ashburner*, (I.L.R., 14 Bom., 353), referred to and distinguished.

Maturi Subbayya v. *Kota Krishnayya* 227

2. ——————————, **s. 11**—*Suits of a civil nature—Right to property or to an office—Jurisdiction of Civil Courts—Suit for declaration of right to recite texts—Maintainability :*

A suit is not cognizable in a Civil Court where the subject of the plaintiffs' claim is confined to rights in religious ceremonies without a claim to any office or any emolument. A right to recite sacred texts in a temple is a matter of ritual or ceremony in a religious matter with which a Civil Court has nothing to do.

Subbaraya Mudaliar v. *Vedantachariar* 23

3. ——————————, **s. 13**—*Decision on a question of law not* res judicata *when the object-matter of the subsequent suit different—Hindu law—Charitable Trust—Trustee of, has no power to appoint a co-trustee in place of a deceased trustee :*

The provisions of the Indian Trust Act do not apply to charitable trusts. In the absence of provision in the instrument creating such trust or of some statutory provision, a trustee, as such, has no power to appoint any person as trustee either in his own place or to act jointly with him. A decision on a question of law in a previous suit is not *res judicata* in a subsequent suit between the same parties when the object-matter of the two suits are different. *Quære.*—Whether such a decision can be *res judicata* against a party who could not have prosecuted an appeal against it. *Parthasaradi* v. *Chinna Krishna*, (I.L.R., 5 Mad., 304), *Venku* v. *Mahalinga*, (I.L.R., 11 Mad., 392), *Chamanlal* v. *Bapubhai*, (I.L.R., 22 Bom., 669), *Vishnu* v. *Ramling*, (I.L.R., 26 Bom., 25 at p. 30), referred to and followed.

Gopu Kolandavelu Chetty v. *Sami Royar* 517

4. ——————————Res judicata—*Findings necessary to support decree—Limitation Act XV of* 1877, *s.* 14—*'Unable to entertain suit'—'Other causes of a like nature'—Dismissal of previous suit for non-joinder—Sched. II, arts.* 142 *and* 144 *of Act XV of* 1877—*Possession under decree subsequently reversed—Act XV of* 1877, *sched. II, art.* 93 :

An appellate judgment operates by way of estoppel as regards all findings of the lower Court, which though not referred to in it, are necessary to make the appellate decree possible only on such findings. A plaintiff is not entitled under section 14 of the Limitation Act to exclude the time spent in prosecuting a previous suit when such suit was dismissed for non-joinder on findings arrived at after trial and not without trial because the Court was unable to entertain the suit. Under article 142, schedule II of the Limitation Act, limitation runs from the date of dispossession, and no fresh starting point is given because the party dispossessed subsequently obtains possession under a decree and is ousted from possession when the decree is reversed. *Sayad Nasruain* v. *Venkatesha Prabhu*, (I.L.R., 5 Bom., 382), followed. *Degumbery Dosse* v. *Rajah Annundnath Poy*, (W.R. (1864), 43), *Firingee Sahoo* v. *Sham Manjhee*, (8.W.R. Civil Rule, 373), and *Dagdu* v. *Kalu*, (I.L.R., 22 Bom., 733), referred to.

PAGE

Schedule II, article 93, does not apply when the suit is substantially for possession of property, though the plaintiff avers that an instrument relied on by the defendant is a forgery. *Sundaram* v. *Sithammal*, (I.L.R., 16 Mad., 311), and *Abdul Rahim* v. *Kirparam Daji*, (I.L.R., 16 Bom., 186), followed.

Narayanan Chetty v. *Kannammai Achi* 338

5. ——————————, **Expl. v, s. 26**—Res judicata—*'Right to relief' under section* 26 *in previous suit essential to bar under explanation V of section* 13 :

Where some co-sharers sue to recover the whole property joining as a defendant a sharer who refused to join as plaintiff and who remained *ex parte* and a decree was passed in favour of the plaintiffs awarding to them their shares alone, such suit must be considered to have been brought by the plaintiffs for their shares alone and the defendant-sharer or his representative cannot as a plaintiff in a subsequent suit against a co-defendant in the prior suit rely on the judgment as a bar under section 13, explanation V of the Code of Civil Procedure, on the ground that the plaintiffs in the previous suit claimed a relief common to them and the defendant co-sharer. *Chandu* v. *Kunhamed*, (I.L.R., 14 Mad., 324), overruled. *Latchanna* v. *Saravayya*, (I.L.R., 18 Mad., 164), not followed. A right to relief can be said to be 'claimed in common' under explanation V to section 13 of the Code of Civil Procedure, only as between parties who would be benefited by such relief if granted and who have such an interest in the relief claimed that they could join as co-plaintiffs under section 26 of the Code of Civil Procedure. A suit cannot be maintained by one person on behalf of others standing in the same relation with him in the subject of the action, unless the relief sought by him is benefical to those whom he seeks to represent and such others are necessarily interested in the relief sought. *Gopalayyan* v. *Raghupati Ayyan* alias *Aiyavayyan*, (3 M.H.C.R., 217), *Nabin Chandra Mazumdar* v. *Muktasundari Debi*, (7 B.L.R., App. 38), *Surender Nath Pal Chowdhry* v. *Brojo Nath Pal Chowdhry*, (I.L.R., 13 Calc., 352), referred to and followed. *Madhavan* v. *Keshavan*, (I.L.R., 11 Mad., 191), distinguished.

Somasundara Mudali v. *Kulandaivelu Pillai* 457

6. ——————————, **ss. 13, 43**—*Former suit to redeem kanam, no bar to subsequent suit based on the kanam and title, so far as the latter is based on title :*

A previous suit to redeem four out of six items of land mortgaged under a kanam deed on the ground that the kanam was split up by a subsequent demise, and which suit was dismissed on the ground that such demise was not valid, will be a bar to a subsequent suit to redeem under the same kanam, so far as such suit is based on the kanam. Section 13 of the Code of Civil Procedure will be a direct bar to any claim on the demise and sections 13 and 43 of the Code of Civil Procedure will bar a claim on the original kanam as an alternative claim on it might have been made in the prior suit. But where in the subsequent suit the plaintiff relies as well on his title, such title is a distinct cause of action, and neither section 13 nor section 43 of the Code of Civil Procedure will bar his claim on such title. A claim on a kanam is a claim arising *ex contractu* while a claim on title against a trespasser is founded on tort. *Ramaswami Ayyar* v. *Vythinatha Ayyar*, (I.L.R., 26 Mad., 760), followed. *Rangasami Pillai* v. *Krishna Pillai*, (I.L.R., 22 Mad., 259), dissented from. *Per* BODDAM, J.—Estoppel by judgment cannot be avoided by suing on a new form of claim or on a ground of relief which might have been, but was not raised in the former suit, if such claim or ground arises out of and depends on the same right or title as that which was directly in question in the former suit. *Chinniya Mudali* v. *Venkatachella Pillai*, (3 M.H.C.R., 320). *Muthumadeva Naik* v. *Sevattamuthumadeva Naik*, (7 M.H.C.R., 160), referred to and approved.

Parambath Manakkal v. *Puthengattil Moosamu* 406

PAGE

7. ——————————————, s. 17—Explans. II and III—*Jurisdiction—Place where contract was made—Promissory note, dated and signed within the jurisdiction of one Court, and sealed and countersigned elsewhere :*

A negotiable promissory note, drawn on behalf of a Company, was signed by the Secretaries and Treasurers and dated at Bellary. The note was then sent to another place, where the Agent countersigned and affixed the seal to it and posted it, addressed to the payee at Madras, who received it there. A suit was subsequently brought on the note in the Court at Bellary :—*Held*, that the Court had jurisdiction. A statement of the place of execution is not essential to the validity of a negotiable promissory note, nor are the parties precluded from dating it at a place different from that at which it is actually made, if, for any purpose of theirs, they consider it necessary to do so. Where, therefore, a negotiable note is dated with reference to a specified place, and the justice of the case does not necessitate a different conclusion, the parties should be presumed to have agreed to that place being taken to be the place of the contract. *Winter* v. *Round*, (1 M.H.C.R., 202), referred to.

Meenakshi Ginning and Pressing Company (Ld.) v. *Myle Sreeramulu Naidu* ... 19

8. ——————————————, ss. 26, 53—*Amendment of plaint—Amendment may be allowed when such amendment does not raise a case essentially different from that first set up—Mis-joinder of parties and causes of action :*

Where in a suit brought by four members of a Hindu family against the widow of a fifth to recover the property of the deceased by right of survivorship, the plaint contained the further allegation that one of the plaintiffs was the adopted son of the deceased, and the defendant pleaded division and also denied the adoption, it is open to the Court on finding the adoption proved, to pass a decree in favour of the adopted son alone, even in the absence of a prayer in favour of such adopted son, without trying the question of division between the plaintiffs and the husband of the defendant. Such a course in no way contravenes the provisions of section 53 (c) of the Code of Civil Procedure, as the object of the proviso to that section is only to prohibit amendments which involve the trial of issues substantially different from those raised by the original pleadings. Where the finding on one of the issues negatives any right in the defendant to hold the properties on the case set up by such defendant, it is not open to such defendant to insist on the trial of other issues, which can only affect the rights of the plaintiffs *inter se* and probably other rights of the defendant and plaintiffs not in issue in the suit. *Semble* : A plaint will not be bad as contravening section 26 of the Code of Civil Procedure, because it prays for a decree in favour of all the plaintiffs on certain allegations, or in the alternative, in favour of one of them, if other allegations should be proved. *Subrahmanyam* v. *Venkamma*, (I.L.R., 26 Mad., 627), referred to.

Lakshmakka v. *Nagi Reddi* 500

9. ——————————————, ss. 108, 234, 368—*Death of defendant after ex parte decree—Application by representatives of the defendant to be brought on record :*

Section 368 of the Code of Civil Procedure only applies to the case of a defendant who dies before a decree is passed. Where, therefore, a defendant dies after a decree *ex parte* has been passed against him, his representatives cannot apply to set aside the *ex parte* decree unless the plaintiff has brought them on the record as representatives under section 234 of the Code of Civil Procedure. Section 108 of the Code of Civil Procedure applies only to the defendant against whom the *ex parte* decree is passed.

Sambasiva Chetti v. *Veera Perumal Mudali* 361

10. ——————————————, ss. 230, 295—*Mortgage decree—Decree for money—Application for execution—Limitation :*

Where a decree directs a defendant to pay money to the plaintiff and in default the property mortgaged is to be sold and the balance, if any, is to be realised from the other properties of the defendants :—*Held*, that this was a 'decree for money' with the meaning of section 230 of the Code of Civil Procedure. *Kommachi Kather* v. *Pakker*, (I.L.R., 20 Mad., 107), followed. *Katrick Nath Pandey* v. *Juggernath Ram Marwari*, (I.L.R., 27 Calc., 285), differed from. An application for attachment of certain property cannot be treated as an application to execute a decree which directs the sale of that property. *Jogemaya Dassi* v. *Thackomoni Dassi*, (I.L.R., 24 Calc., 472), approved.

Abdulla Sahib v. *Doctor Oosman Sahib* 224

PAGE

11. ——————————————, ss. 232, 244—*Power of Court, discretionary :*

Where the right of a party applying for execution as transferee is *sub judice*, it is not obligatory on the Court, under the last clause of section 244 of the Code of Civil Procedure, to stay execution until the question has been determined by separate suit. The Court may in its discretion either stay execution or dismiss the application.

Vakulabharana v. *Rangaiayan Chetty* 357

12. ——————————————, ss. 232, 244—*Transferee decree-holder—Mesne profits and costs not included in transfer—Suit to enforce right under transfer—Maintainability—Plaint treated as application in execution :*

A decree had been passed against the present defendant in a previous suit for the surrender of possession of certain lands and also for mesne profits and costs. The interest of the decree-holders in these lands was then sold in execution of a decree which had been passed against them, and was purchased by the present plaintiff. The present plaintiff applied for execution of the original decree and to be placed in possession of the property he had purchased. The petition was rejected, and he now sued to obtain possession of the properties he had purchased. On the question being raised whether the suit was barred by section 244 of the Code of Civil Procedure :— *Held*, that plaintiff was entitled to relief. He was not a transferee of all that had been decreed in the original suit, inasmuch as the right to mesne profits and costs had not passed to him. If, for that reason, he was not entitled to be recognized as the transferee of the decree, and to execute it as such, he was entitled to enforce his right by suit. Assuming, however, that no separate suit lay, and that he should have proceeded by way of execution, the case was one in which the plaint should be treated as an application for execution. *Sutaput Roy* v. *Syed Ali Hossein*, (24 W.R., 11), referred to.

Pasupathy Ayyar v. *Kothanda Rama Ayyar* 64

13. ——————————————, ss. 234, 244, 248, 578—*Application to execute decree against representative to be made to Court which passed decree—Application to Court executing decree not an irregularity which can be cured under s. 578—Construction of statute :*

On a reference as to whether an application under section 234 of the Code of Civil Procedure to bring the legal representatives of a deceased judgment-debtor on record can be made to the Court to which the decree had been transferred for execution : —*Held by the Full Bench*, that, where a decree of one Court had been transferred to another Court for execution, an application by the decree-holder under section 234 to execute the decree against the legal representatives of the deceased judgment-debtor must be made to the Court which passed the decree and not to the Court executing the same. *Hirachand Harjivandas* v. *Kasturchand Kasidas*, (I.L.R., 18 Bom., 224), approved. *Seth Shapurji Nana Bhai* v. *Shankar Dat Tube*, (I.L.R., 17 All., 431), approved. *Sham Lal Pal* v. *Modhu Sudan Sircar*, (I.L.R., 22 Calc., 558), not followed. *Per* Sir ARNOLD WHITE, C.J.—The provisions of sections 234 and 244 (c) are not irreconcilable. The last paragraph of section 244 only applies when a question arises as to who is a 'representative' of a party for the purpose of that section, and ought not to be construed as cutting down the power given to the Court which passed the decree by the express words of section 234. There is no difficulty in reconciling sections 234 and 248 : they can be construed together and due effect given to the provisions of each. The word 'representative' in section 244 has a much wider meaning than the

PAGE

words 'legal representative' in section 234. An order under section 234 is not made in exercise of the powers 'in executing a decree,' but as a preliminary step towards those powers being exercised by the Court to which the decree has been transferred. Section 234 contemplates the making of an order. The legislature in enacting section 244 (c) were not distinguishing cases, where a decree had been transferred for execution, between the powers to be exercised by the Court which passed the decree and the powers to be exercised by the Court to which the decree has been transferred respectively, and effect must be given to the express provisions of section 234. A statute ought to be construed so that, if it can be prevented, no clause, section or word shall be superfluous, void or insignificant. The *Queen* v. *Bishop of Oxford* (L.R., 4 Q.B.D., 245). *Per* DAVIES, J.—There is a direct and irreconcilable conflict between the provision in the first paragraph of section 234 and that in clause (c), section 244, read with the last paragraph of that section. *By the Divisional Bench.*—An application under section 234 made to the Court to which the decree is transferred for execution cannot, when objection is taken by the other party to its being entertained, be treated as a mere irregularity under section 578 of the Code of Civil Procedure.

Swaminatha Ayyar v. *Vaidyanatha Sastri* 466

14. ——————————————, s. 244—*Application in execution—Person entitled to represent estate—Representative of party to decree—Purchaser from judgment-debtor:*

Plaintiffs in a suit obtained a decree for the sale of mortgaged lands which had belonged to S, deceased. The defendants to that suit were a person whom S was alleged to have adopted, and the two widows of S's father, who would represent the estate if the adoption failed. One widow died after suit. After her death part of the mortgaged property was put up for sale and purchased by plaintiffs, who applied for an order for delivery of possession. D, the nearest reversioner to S, objected, and claimed to be in possession in his own right. He contended that S had been adopted only in conjunction with the widow who had died, and that in consequence his reversionary interest had fallen into possession at her death, the surviving widow having no rights. In the alternative he claimed also as a purchaser from the surviving widow under a release deed executed by her after the mortgage decree and before the sale. The Subordinate Judge refused to make an order for delivery of possession, and the plaintiffs appealed to the High Court, when a preliminary objection was raised that no appeal lay:—*Held*, that an appeal lay. If the inheritance passed to D on the widow's death, he would be the person entitled to represent the estate, and the present question related to execution and should be dealt with under section 244 of the Code of Civil Procedure. If D, relied on the release from the surviving widow, he was a representative of one of the parties to the decree and the same result followed. *Kasinatha Ayyar* v. *Uthumanser Rowthan*, (I.L.R., 25 Mad., 529), discussed.

Sivarama Sastrial v. *Somasundara Mudali* 119

15. ——————————————, s. 244—*Execution of decree—Decree passed* ex parte *against father and son on promissory note signed by father alone—Application in execution for arrest of son—Objection to arrest on ground that decree was wrongly passed against son—Maintainability:*

A judgment-creditor sued a Hindu father and his son on a promissory note signed only by the father. Neither defendant appeared or defended the suit and a decree was passed against both. The father died and the judgment-creditor made the present application in execution and asked for the arrest and imprisonment of the son. The latter asked the Court to direct that he was not liable to arrest under the decree:—*Held*, that the decree had not been passed without jurisdiction and the judgment-debtor was precluded, in execution proceedings, from impeaching the decree, which had been passed without opposition and which had not been set aside. If a decree is passed by a Civil Court which had absolutely no jurisdiction to pass it, even a party to the proceeding may impeach it as a nullity, though it has not been set aside in appeal or otherwise. This was

PAGE

not such a case, as the District Munsif was competent to pass a personal decree against the present judgment-debtor if the evidence required to establish the personal liability had been then produced. The fact that a decree had been passed in the absence of such evidence would not make it a decree passed without jurisdiction. *Sardarmal* v. *Aranvayal Sabhapathy*, (I.L.R., 21 Bom., 205), and *Gomatham Alamelu* v. *Komandur Krishnamacharlu*, (I.L.R., 27 Mad., 118), approved.

Rangasamy Naicken v. *Thirupati Naicken* 26

16. ——————————————, s. 244—*Question relating to the execution, discharge or satisfaction of decree—Parties to the suit or their representatives:*

A decree-holder in a suit purchased land at a Court auction which was held in execution of his decree. He made an application for delivery of possession which was dismissed. His heirs, after his death, made further applications, which were also dismissed. The heirs then sold the land to the present plaintiffs who thereupon brought the present suit to recover possession of the land:—*Held*, (1) that the right of the plaintiffs to recover possession of the land was a question relating to the execution, discharge or satisfaction of the decree; (2) that the question arose between the parties to the suit in which the decree was passed, or their representatives; and (3) that the suit was not maintainable, having regard to section 244 of the Code of Civil Procedure.

Sandhu Taraganar v. *Hussain Sahib* 87

17. ——————————————, s. 244—*Surety becoming liable for decree in a suit—Decree for plaintiff—Execution orders against surety—Suit by surety for declaration of non-liability as to portion of decree amount—Maintainability—Proceeding in execution:*

The property of a defendant in another suit having been attached before judgment, the present plaintiff became surety for any sum that might be decreed. A decree was passed and an order was made for its execution against the present plaintiff, and that order was not appealed against. Prior to execution plaintiff brought the present suit against the decree-holders in the previous suit, for a declaration that they were not entitled to execute a portion of their decree as against him:—*Held*, that the suit did not lie, the matter being one to be litigated only in execution proceedings. The surety should be treated as a party to the suit, and as the question raised was one relating to the execution of a decree, section 244 of the Code of Civil Procedure applied and the suit was barred.

Linga Reddy v. *Hussain Reddy* 117

18. ——————————————, ss. 258, 230, 295—*Decree for sale with personal remedy for balance unsatisfied governed by section* 258, *even before sale of mortgage property—Section* 258 *applicable even to decrees for sale alone but not to receipt by mortgagee in possession—Mortgage decrees under section* 88 *of the Transfer of Property Act:*

A decree directing the sale of mortgaged properties in default of payment of money is a decree for money, whether there is a direction to pay personally or not and whether the remedy against the property is exhausted or not. Such decrees will be money decrees under sections 230, 258 and 295 of the Code of Civil Procedure, although they will not be so under sections 220 and 222 of the Code. *Konmachi Kather* v. *Pakker*, (I.L.R., 20 Mad., 107), and *Hart* v. *Tara Prasanna Mukherji*, (I.L.R., 11 Calc., 718), referred to and approved. The provisions of the Code of Civil Procedure relating to execution of decrees apply with a few exceptions to mortgage decrees under the Transfer of Property Act. There is no conflict between the provisions of section 258 of the Code of Civil Procedure and the provisions of the Transfer of Property Act. *Mallikarjunuda Setti* v. *Lingamurti Pantulu*, (I.L.R., 25 Mad., 244), referred to and approved. Receipts by a mortgagee in possession after decree, though payments to the mortgagee under section 20 of the Limitation Act will not be "moneys payable under the decree" within the meaning of section

PAGE

258 of the Code of Civil Procedure and consequently the provisions of that section will not apply to such receipts. *Mallikarjuna Sastri* v. *Narasimha Rao*, (I.L.R., 24 Mad., 412), overruled.

Vaidhinadasamy Ayyar v. *Somasundram Pillai* 473

19. ——————————————, ss. 276, 295—"*Assets realised by sale or otherwise in execution of a decree,*" *what are :*

The words "assets realised by sale or otherwise in execution of a decree" in section 295 of the Code of Civil Procedure mean that the assets must be realised by some process of Court in execution and can apply only to a sale by the Court and not to a private sale by the judgment-debtor of properties attached. The assets are not realised by the attachment but by the sale. The realisation must be by sale by the Court in execution or by one of the other remedies prescribed by the Code of Civil Procedure. The fact that the money is paid into Court in satisfaction of the attaching creditor's debt does not make such money assets realised under section 295 of the Code of Civil Procedure. *Gopal Dai* v. *Chunni Lal*, (I.L.R., 8 All., 67), and *Purshotamdass Tribhovandass* v. *Mahanant Surajbharthi Haribharthi*, (I.L.R., 6 Bom., 588), referred to and approved. *Lakshmi* v. *Kutlunni*, (I.L.R., 10 Mad., 57), and *Sorabji Edulji Warden* v. *Govind Ramji F. N. Wadia*, (I.L.R., 16 Bom., 91), referred to. *Manilal Umedram* v. *Namabhai Meneklal*, (I.L.R., 28 Bom., 261), distinguished. *Sew Bux Bogla* v. *Shib Chunder Sen*, (I.L.R., 13 Calc., 225), and *Prosonnomoyi Dassi* v. *Sreenauth Roy*, (I.L.R., 21 Calc., 809), approved. An attachment ceases to be operative from the moment money is paid into Court or at the latest from the time satisfaction is entered. *Kunhi Moossa* v. *Makki* (I.L.R., 23 Mad., 482).

Vibudhapriya Tirthaswami v. *Yusuf Sahib* 380

20. ——————————————, s. 322 (a), (b) and (d) :—*See* "MADRAS COURT OF WARDS REGULATION."

21. ——————————————, ss. 351, 355, 357—*Insolvency of judgment-debtor—Receiver appointed but no order of discharge—Application by creditor to execute decree by arrest of insolvent—Maintainability :*

S applied to the Court of a District Munsif to be declared an insolvent. After notice to his creditors, amongst whom was the present petitioner, the holder of a decree against S, the District Munsif passed an order declaring S insolvent. A receiver was appointed to take charge of the insolvent's properties and he was put in possession of all of them excepting two items, one of which was not included in the schedule. The receiver realized assets and made distributions among the creditors entitled, but no order was passed by the Court either discharging or refusing to discharge the insolvent. The present petitioner then applied to the Court for the arrest of the insolvent in execution of his decree :—*Held*, that in the circumstances the insolvent could not be arrested. If an insolvent prevents the receiver from obtaining possession of his properties or if it subsequently transpires that he has committed some act of bad faith, then the Court may refuse his discharge, under section 355 of the Code of Civil Procedure. *Semble*, that in such a case it might be open to creditors to apply to execute their decrees.

Panangupalli Seetharamaya v. *Nanduri Ramachendrudu* 152

22. ——————————————, s. 368—*Appeal by guardian, abatement of—Laches of guardian, effect of—Application on behalf of minors to restore appeal—Right to apply joint and not several—Limitation Act XV of 1877, s. 7 :*

Where two majors and the guardian of two minors jointly preferred an appeal in which they were jointly interested, and on the death of the sole respondent the appeal was allowed to abate under section 368 of the Code of Civil Procedure, the minor appellants cannot on the application of another guardian have the appeal restored and proceeded with. *Per* DAVIES, J.—The order of abatement under section 368 of the Code of Civil Procedure is absolute. The minors being bound by the acts of their guardian, there was no appeal pending and the application could not be

PAGE

treated as an application under section 368 of the Code of Civil Procedure to which the provisions of section 7 of the Limitation Act might be applied, as section 368 of the Code of Civil Procedure contemplates an appeal pending. Even if it could be so considered, the application would be barred as the minors were interested jointly with others who laboured under no disability. *Periasami* v. *Krishna Ayyan*, (I.L.R., 25 Mad., 431), followed. *Per* SUBRAHMANIA AYYAR, J.—On the death of the respondent, the right to have his representatives added as parties vested *jointly* and not *severally* in the appellants, whatever may be the nature of their interests in the subject matter of the appeal. *Periasami* v. *Krishna Ayyan*, (I.L.R., 25 Mad., 431), followed.

Paru v. *Variangattil Raman Menon* 359

23. ——————————————, ss. 368, 582, 587—*Limitation Act XV of 1877, sched. II, arts. 175 (c), 178—Article 175 (c) applies to applications made in second appeals as well as first appeals :*

Section 587 of the Code of Civil Procedure authorises an application to bring in a plaintiff-respondent in second appeals and extends to such appeals the provisions of sections 368 and 582 of the Code of Civil Procedure. Such applications, however, are really made under sections 368 and 582 and for the purposes of limitation fall under article 175 (c) of schedule II of the Limitation Act and not under article 178.

Vakkalagadda Narasimham v. *Vahizulla Sahib* 498

24. ——————————————, ss. 383, 386—*Power of Courts to issue commission— Cases enumerated in sections exhaustive—Court may prevent abuse of its process :*

The present appellants obtained a decree against the late head of a mutt, and, in execution thereof, attached certain gold and silver articles. The respondent, the present head of the mutt, who had been made a party to the execution proceedings as the representative of the deceased, contended that the attached articles were not liable to be sold in execution of the decree as they were not assets of the deceased but property belonging to the mutt. The appellants thereupon applied to the Subordinate Judge to summon the respondent as a witness for the appellants. The respondent, who resided within the jurisdiction of the Court, then applied to the Subordinate Judge to take his evidence on commission, stating that he was unable, of his own personal knowledge, to give any evidence material to the questions at issue, and alleging that the appellants were insisting on his appearance in Court to put pressure upon him to relinquish or compromise his claim, as it was considered derogatory to a person in his position to appear in Court as a witness. The Subordinate Judge refused to issue a commission. On a revision petition being filed, a single Judge of the High Court set aside the order of the Subordinate Judge and ordered the respondent to be examined on commission. On an appeal being preferred under article 15 of the Letters Patent :—*Held*, that an appeal lay. *Held also*, that the issue of commissions for the examination of witnesses by the Courts of this country is governed solely by the provisions of the Code of Civil Procedure, and section 386 is exhaustive, and provides for all the cases in which the legislature intended that it should be competent to a Court to issue a commission for the examination of witnesses resident within its jurisdiction. *Held further*, that a litigant's privilege of taking out summonses to witnesses is subject to the control of the tribunal which is called upon to enforce their attendance, though such control will be exercised sparingly and only in exceptional cases. This control is an instance of the authority of every Court of competent jurisdiction to prevent abuse of its process. In the present case, the appellant's application was not *bonâ fide*, and the respondent's attendance in Court was required not for the purpose of obtaining material evidence but from other motives, and the order for the issue of commission was therefore rightly made.

Veerabadran Chetty v. *Nataraja Desikar* 28

PAGE

25. ——————————————————, s. 503—*Receiver—Appointment of new receiver in place of original Receiver—Civil proceedings instituted by original receiver and pending at date of appointment of new receiver—Necessity for making new receiver party :*

Where a receiver appointed under section 503 of the Code of Civil Procedure institutes Civil proceedings and is then replaced by another Receiver, it is necessary that the new Receiver should be made a party to those proceedings. Observations on the mode and circumstances in which a new Receiver will be made a party.

Akula Paradesi v. *Dhelli Jagannadha Row* 157

26. ——————————————————, s. 539—*'Under the trust' meaning of—Power of appointing additional trustees or controlling body :*

Under section 539 of the Code of Civil Procedure, the Court in sanctioning a scheme, may provide for the appointment of additional or new trustees, though such appointment may not be in conformity with the original constitution of the trust or with the rules in force in respect to it. The words 'under the trust' in section 539 of the Code of Civil Procedure have no reference to such original constitution or the rules. The Court of Chancery in England has always exercised such powers, and in the absence of express words restricting the powers of Courts in this country, the Legislature must be presumed to have conferred similar powers upon them by section 539 of the Code of Civil Procedure. *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev*, (I.L.R., 15 Bom., 612), and *Annoji* v. *Narayan*, (I.L.R., 21 Bom., 556), followed. A scheme framed by the Court may be liable to variation for good cause shown. Re *Browne's Hospital* v. *Stamford*, (60 Law Times, 288), referred to. The directions in a scheme framed under section 539 of the Code of Civil Procedure may be enforced in execution on application by persons interested. *Damodarbhat* v. *Bhogilal*, (I.L.R., 24 Bom., 45), followed.

Prayag Doss Ji Varu, Mahant v. *Tirumala Srirangacharlavaru* 319

27. ——————————————————, s. 544—*Appeal by one of several defendants—Ground common to all :*

Plaintiffs sued on a mortgage bond. The defence, which was common to all the defendants, was that the mortgage was a sham. The Subordinate Judge upheld the mortgage bond and decreed in plaintiffs' favour. The fifth defendant, a subsequent mortgagee, alone appealed to the District Judge, who reversed the decree and dismissed the suit. Plaintiffs appealed to the High Court :—*Held*, that the decree of the Subordinate Judge proceeded on a ground common to all the defendants and that the decree of the lower Appellate Court enured for the benefit of the defendants who did not appeal.

Annamalay Chettiar v. *Pitchu Ayyar* 122

28. ——————————————————, ss. 544, 561—*Practice—Appeal—Appeal by one defendant making co-defendants and plaintiffs party respondents—No appeal or memorandum of objections filed by plaintiff—Relief granted to plaintiff-respondent in decree of Appellate Court—Appellate Court—Procedure—Jurisdiction :*

Where a respondent to an appeal fails to give the notice required by section 561 of the Code of Civil Procedure, it is not open to the Appellate Court to grant any relief to that respondent, in a case, where the granting of such relief is not necessarily incidental to the relief granted to a party who has appealed. *Soiru Padmanabh Rangappa* v. *Narayan Rao Bin Vithal Rao*, (I.L.R., 18 Bom., 520), distinguished. *Hudson* v. *Basdeo Bajpye*, (I.L.R., 26 Calc., 109), referred to. *Rup Jaun Bibee* v. *Abdul Kadir Bhuyan*, (I.L.R., 31 Calc., 613), referred to and commented on.

Kulaikada Pillai v. *Viswanatha Pillai* 229

PAGE

29. ——————————————————, s. 561 :—*See* "RENT RECOVERY ACT, s. 11."

30. ——————————————————, s. 562—*Limit to remand—Custom opposed to Statutes, validity of—Rent Recovery Act VIII of 1865, s. 11—Cultivation by wells constructed at tenants cost, liability to enhanced rent for—Payment of enhanced rent for a number of years, whether an implied contract to pay—Agreement and contract, difference between—Tenant with right of occupancy, right of, to construct wells without permission of landholder :*

Ryots with permanent rights of occupancy in a zamindari constructed wells at their own cost without obtaining the permission of the Zamindar and cultivated dry lands with garden crops for periods ranging from 1 to 18 years. Suits were brought by the ryots before the Sub-Collector under section 8 of the Rent Recovery Act to compel the defendant, the Zamindar, to grant them proper pattas for fasli 1312, alleging that the pattas tendered were illegal as they charged the higher garden rate for dry lands cultivated by them with the aid of wells constructed at their own cost. The defendant pleaded that he was entitled to the enhanced rate (1) by custom, (2) by virtue of a contract to be implied from previous payments. No consideration for such a contract was however alleged. The Sub-Collector framed two issues—one as to the existence of the custom set up by the defendant, and another as to whether the previous payments by the plaintiffs operated as an estoppel or evidenced an implied contract to continue to pay the enhanced rates. The Sub-Collector did not record evidence as to custom, holding that such custom even if proved could not deprive the plaintiffs of the benefits expressly given by the Act. He also held that any such implied contract as that set up by the defendant would be illegal as opposed to the provisions of the Act. He passed a decree, that the defendant should grant pattas as claimed by the plaintiffs. On appeal the District Judge held that the payment of rent at the enhanced rate raised a presumption that there was a contract to pay such rent; and that if there was no contract express or implied, the rent must be fixed in accordance with the other provisions of section 11 of the Rent Recovery Act. He reversed the decrees of the Sub-Collector and remanded the cases for retrial under section 562 of the Code of Civil Procedure. On appeal to the High Court :—*Held, per* SUBRAHMANIA AYYAR, J., that the order remanding the case was not legal as all the questions raised between the parties and on which they went to trial, had been decided, and the questions so raised were purely questions of law. A custom can be upheld only so far as it is not in conflict with statute law; and a custom to pay enhanced rent for improvements effected by a tenant at his cost is illegal as opposed to the provisions of the Rent Recovery Act. *Fischer* v. *Kamakshi Pillai*, (I.L.R., 21 Mad., 136), followed. *Gopalasami Chettiar* v. *Fischer*, (I.L.R., 28 Mad., 328), referred to. It makes no difference whether a tenant constructed wells at his cost prior to or after the passing of Act VIII of 1865. In either case no additional rent can be claimed. *Nagasami Kamia Naick* v. *Iyodi Rama Goundan*, (6 Mad., R.R., 5). Payment for a number of years of enhanced rent may be evidence of an *agreement* to pay at that rate, but it will not be binding as a contract unless supported by consideration. *Quære*, whether when the enhanced rate had been paid for a large number of years and when the lapse of time is such as to make it unfair to call on the landlord to prove consideration, a lawful origin may not be presumed. *Gann* v. *Free Fisheries of Whitstable*, (11 H.L.C., 192 at p. 103), referred to. No such presumption can be made when the payments have been only for a period extending from one to eighteen years. Tenants with permanent rights of occupancy are entitled to construct wells without the permission of the landholder; and a custom requiring such permission may be bad, as unreasonable, and is certainly illegal as opposed to the policy of section 11 of the Rent Recovery Act. *Venkatanarasimha Naidu* v. *Dandamudi Kotayya*, (I.L.R., 20 Mad., 299), referred to. *Held, per* MOORE, J., that the Sub-Collector having disposed of the case on two preliminary issues, the District Judge was right in remanding the cases under section 562 of the Code of Civil Procedure.

Arumugam Chetti v. *Raja Jagaveera Rama Venkateswara Ettappa* 444

PAGE

31.——————————————, s. 564—*Whether consent of parties can validate an illegal remand under section 564 of the Civil Procedure Code—Waiver, effect of—Effect of illegal remand by lower Appellate Court on points properly decided:*

Where the Court of First Instance had framed all the necessary issues and decided all those issues, and the lower Appellate Court, reversing the decision of the Court of First Instance on one of the issues, remanded the case for retrial under section 564 of the Code of Civil Procedure, held, on second appeal. *Per* SUBRAHMANIA AYYAR, J.—An order of remand, contrary to the provisions of section 564, is not merely irregular but illegal; but it is not on that account absolutely void so as to render any consent of the parties of no avail. It can be objected to by a party if he has not given his consent to such a course, and even a party who has not consented may be equitably estopped by subsequent conduct from treating such an order as null and void. Such an order of remand does not necessarily vitiate the decision of the lower Appellate Court on questions properly decided by it, which can be attacked only on grounds legally open to the parties on second appeal. It cannot be treated as void for want of jurisdiction so as to be incapable of being validated by consent or waiver. *Mohesh Chandra Dass* v. *Jamiruddin Mollah*, (I.L.R., 28 Calc., 324), referred to. *Mallikarjuna* v. *Pathaneni*, (I.L.R., 19 Mad., 479), referred to. *Subrahmania Ayyar* v. *King-Emperor*, (I.L.R., 25 Mad., 61 at p. 97), followed. *Per* MOORE, J.—The order of remand was illegal and no consent of parties could make it valid.

The Manager of the Court of Wards, Kalahasti Estate v. *Ramasami Reddi* ... 437

CONSTRUCTION:—*See* "GRANT."

CONSTRUCTION OF GRANT—*Grant of village "with wells, tanks and waters," effect of—Irrigation works, rights of Government in—Proprietary right not proved by contribution of customary labour:*

A grant of village "with all wells, tanks and waters" within the boundaries will not pass to the grantee an artificial water-course then existing, which irrigated the village granted and other lands. Subsequent contribution of labour by the grantee for clearing the channel will not be evidence of proprietary right as such labour is customary and may be enforced under Madras Act I of 1858. The ruling power in India had from the earliest times the conservation and control of works of irrigation and Government has accordingly the right to carry out repairs and improvements in the irrigation works belonging to it provided that in doing so, it does not diminish materially the supply of water to which others may be entitled.

Ambalavana Pandara Sannathi v. *The Secretary of State for India in Council.* 530

CONTRACTS, LAW APPLICABLE TO:—*See* "CARRIERS BY SEA."

CONTRACT ACT—IX OF 1872, s. 23—*Immoral consideration, assignment of mortgage for—Right of one* in pari delicto *to set aside executed contracts—Completed gift cannot, but transfer for consideration may be set aside—Raising new points in second appeal:*

In 1898 the plaintiff, who was then young and inexperienced, assigned to the defendant, a dancing girl, a mortgage for Rs. 1,500, the consideration stated in the deed being payments in cash and jewels to the plaintiff and the discharge by the defendant of debts due by the plaintiff. The plaintiff sued in 1901 to set aside the assignment on the ground that no consideration passed as recited therein but that the real consideration was the future continuance of immoral relations between himself and the sister of the defendant. The defendant contended that the consideration stated in the deed actually passed, and further that the plaintiff who admitted that the assignment was for an immoral consideration, could not sue to set it aside. Both the lower Courts found that there was no consideration for the deed and set it aside. On second appeal to the High Court it was contended that the transaction being for an immoral consideration and

PAGE

completely executed, the plaintiff as a person *in pari delicto* could not sue to set it aside:—*Held*, that, where the transaction amounted to a voluntary gift, it cannot be set aside; but, where the transaction, though completed, was intended to be for consideration, it can be impeached if the consideration is immoral, and it makes no difference whether the transaction is executed or executory. *Ayerst* v. *Jenkins*, (L.R., 16 Eq., 272), distinguished. Whether what has been transferred has been transferred by way of gift or not will depend on the intention of the parties and the facts of the particular case; and the form of the transaction will be material in determining the question. *Phillips* v. *Probyn* (1899) 1 Ch.D., 811 at pp. 816 and 817). *Held also*, that on the facts, the transaction was between the plaintiff on the one hand and the defendant as the managing member of a joint family of dancing girls consisting of the defendant and her sister on the other. *Kamakshi* v. *Nagarathnam*, (5 M.H.C.R., 161), referred to. *Held further*, that considering the age and inexperience of the plaintiff and that he had no independent advice, he was not *in pari delicto*. A point not taken in the lower Courts, on which no issue was raised, and on which the parties had no opportunity of adducing evidence cannot be urged in second appeal.

Thasi Muthukannu v. *Shunmugavelu Pillai* 413

2.——————————, ss. 23, 65—*An agreement tending to create a monopoly void as opposed to public policy—Madras District Municipalities Act IV of 1884, s. 191, cl. 2, and s. 362, cl. 2—Construction of statutes, observations on—Refund of money obtained under a void agreement:*

Agreements having for their object the creation of monopolies are void as opposed to public policy under the English Common Law and under section 23 of the Indian Contract Act. The power conferred by section 191, clause 2 of Madras District Municipalities Act IV of 1884 on the Chairman of a Municipality to license places for selling meat, etc., only empowers him to consider the propriety of granting or withholding licenses in each case and not to enter into agreements which must preclude him from considering any such application except from a particular person or persons. A power to interfere with the ordinary rights of citizens will not be inferred in the absence of express grant unless it be necessarily implied as incidental to other powers expressly granted or is indispensable to repress the mischief contemplated and advance the remedy given. *Rossi* v. *Edinburgh Corporation*, (L.R., (1905), A.C., 21), referred to. *Logan* v. *Pyne*, (43 Iowa, 524; 22 Am. Rep., 261, 262), followed. Doubts as to the existence of such powers must be resolved against the Corporation and in favour of the public. Where a municipal body receives license fees under a void agreement, it must, when the agreement is set aside, refund the amount so received; and a suit to recover such amount will not be barred by section 262 (2) of Madras Act IV of 1884. Discretionary power to grant licenses conferred by section 191, clause 2, District Municipalities Act, does not empower Municipalities to refuse licenses unless clear grounds exist for so refusing.

Somu Pillai v. *The Municipal Council, Mayavaram* 520

3.——————————, s. 130—*Revocation of continuing guarantee—Application to a contract of suretyship under administration bond—Probate and Administration Act—V of 1881, s. 78—Administration bond entered into by surety—Allegations by surety against administratrix of waste and mismanagement—Suit by surety against administratrix seeking to be discharged from liability regarding future acts of administratrix—Maintainability:*

First defendant was administratrix of her husband's estate. Plaintiff became one of her sureties under section 78 of the Probate and Administration Act. Plaintiff brought this suit alleging that first defendant as administratrix was wasting and mismanaging the estate. He asked that he might be discharged from his recognisance as a surety as regards future transactions on the part of the administratrix, that in the alternative the administratrix might be directed to complete her administration of the estate, and that his surety bond might then be vacated:—*Held*, that the plaintiff was not entitled to the relief asked for. *Held*

PAGE

also, that section 130 of the Indian Contract Act does not apply to the special contract of suretyship which is entered into by a surety to an administration bond. *Ray Narain Mookerjee* v. *Ful Kumari Debi*, (I.L.R., 29 Calc., 68), not followed. *Bai Somi* v. *Chokshi Ishvardas Mangaldas*, (I.L.R., 19 Bom., 245), followed and approved.

Subroya Chetty v. *Ragammal* 161

CRIMINAL BREACH OF CONTRACT ACT—XIII OF 1859, s. 2—*Complaint against workman of failure to complete work—Completion of work by complainant prior to complaint—Maintainability of charge:*

An employer applied for an order under section 2 of Act XIII of 1859, alleging that a workman had received an advance on account of the work and had failed to perform his part of the contract. Prior to lodging the complaint, the employer had completed the work, and he claimed an order for the repayment of the advance—*Held*, that no order could be made. The section only applies when the work is uncompleted when the complaint is made. If the work has been completed when the complaint is made, the Magistrate has no jurisdiction under the section, though the employer has a remedy against the workman in the Civil Courts. *High Court Proceedings*, dated 29th March 1865, (Weir's 'Law of Offences,' 415), approved. The offence created by the act is not the neglect or refusal of the workman to perform his contract but the failure of the workman to comply with an order made by the Magistrate that the workman should repay the money advanced or perform the contract. *King-Emperor* v. *Takoo Nakoo*, (I.L.R., 24 Mad., 690), approved.

In re matter of Ana... v. Singa... 37

CRIMINAL PROCEDURE CODE—ACT V OF 1898, ss. 203, 435, 439—*Complaint—Complaint dismissal of—Revival of Proceedings—Illegality:*

When an original complaint is dismissed under section 203 of the Code of Criminal Procedure no fresh complaint on the same facts can be entertained so long as the order of dismissal is not set aside by a competent authority. *Mir Abwal Hussein* v. *Mahomed Askari*, (I.L.R., 29 Calc., 720), differed from.

Mahomed Abdul Mennan v. *Pandurangu Row* 255

2. ——————————, **s. 259**—*Complaint—Absence of complainant at hearing—Discharge of accused—Revival of proceedings on fresh complaint—Jurisdiction:*

Where an order of discharge under section 259 of the Code of Criminal Procedure has been passed by a Magistrate, such order will not preclude him from proceeding with the case on a fresh complaint. An order of discharge under section 259 of the Code of Criminal Procedure is not an acquittal nor has it the effect of an acquittal under section 403.

Chinnathambi Mudali v. *Sadla Gounden alias Chetti* 310

DECREE ALTERNATIVE:—*See* "RYOTWARY TENURE."

DISTRICT MUNICIPALITIES ACT—(MADRAS) ACT III OF 1889, s. 4—*Allowing offensive matter to flow into a "street"—Discharge into drains not forming part of street—Definition of street:*

A defendant was charged under section 4 of the Madras District Municipalities Act with allowing offensive matter to flow from his house into a street. The matter flowed into a drain or ditch constructed along the side of the roadway. On the question as to whether any offence had been committed—*Held*, that a "street" is any way or road in a city having houses on both sides; and that in consequence this definition excluded the drain or ditch on either side of the roadway; that the drain was not part of the "street," and that the offence charged had not been committed.

Venkatrama Chetti v. *Emperor* 17

PAGE

EASEMENTS ACT V OF 1882, s. 13, cls. (e), (f)—*Easement of necessity—No easement on the ground of convenience when there is other means of access—Evidence Act I of 1872, s. 92—Oral contemporaneous agreement cannot be set up to add to a written contract:*

Held, that if A has a means of access to his property without going over B's land, A cannot claim a right of way over B's land on the ground that it is the most convenient means of access. The law under section 13, clause (*e*) of the Easements Act is the same as the law in England. *Wutzler* v. *Sharpe*, (I.L.R., 15 All., 270 at p. 281), followed. *Esubai* v. *Damodar Ishvardas*, (I.L.R., 16 Bom., 552 at p. 559), not followed. *The Municipality of the City of Poona* v. *Vaman Rajaram Gholap*, (I.L.R., 19 Bom., 797), not followed. To sustain a claim under section 13, clause (*f*) of the Easements Act, the easement claimed must be apparent and continuous. A contract in writing cannot be added to by a contemporaneous oral agreement.

Krishnamarazu v. *Marraju* 495

EVIDENCE, ORAL TO EXPLAIN WRITTEN CONTRACT:—*See* "NEGOTIABLE INSTRUMENTS."

EVIDENCE ACT I OF 1872, s. 92—*Oral contemporaneous agreement cannot be set up to add to a written contract—Easements Act V of 1882, s. 13, cls. (e), (f)—Easement of necessity—No easement on the ground of convenience when there is other means of access:*

Held, that if A has a means of access to his property without going over B's land, A cannot claim a right of way over B's land on the ground that it is the most convenient means of access. The law under section 13, clause (*e*) of the Easements Act is the same as the law in England. *Wutzler* v. *Sharpe*, (I.L.R., 15 All., 270 at p. 281), followed. *Esubai* v. *Damodar Ishvardas*, (I.L.R., 16 Bom., 552 at p. 559), not followed. *The Municipality of the City of Poona* v. *Vaman Rajaram Gholap*, (I.L.R., 19 Bom., 797), not followed. To sustain a claim under section 13, clause (*f*) of the Easements Act, the easement claimed must be apparent and continuous. A contract in writing cannot be added to by a contemporaneous oral agreement.

Krishnamarazu v. *Marraju* 495

2. ——————————, **s. 115**—*Grant—Re-grant after confiscation—Exception of Maliahs in re-grant—Construction of exception—Title by adverse possession—Estoppel—Maliahs treated erroneously by Court of Wards as part of zamindari and acquiescence by officers of Government:*

Prior to 1799 the zamindari of Parlakimedi included certain tracts of forest land called "Maliahs" which were held by Bissoyees or local chiefs on service tenures in respect of which they paid to the Zamindar a sum as kattubadi or quit-rent, their duties being (*inter alia*) to keep up an establishment of guards at certain thanas for police purposes. Besides the Maliahs they held other lands which they occupied and cultivated for their own support. In consequence of a rebellion in 1799 in which the then Zamindar took part, the Government by a proclamation issued in 1800 declared that the zamindari was confiscated; and that the Bissoyees "were henceforward to pay their revenue directly to the Collector and to be for ever under the company's immediate authority"; but that they would in due course restore the son of the Zamindar "to the lands of his ancestors with the exception of those now held by the Bissoyees which are hereby declared separated from the zamindari for ever." This restoration was made in 1803, after the death of the rebellious Zamindar, to his son. What was excepted from that re-grant and from the assessment that formed the condition of the re-grant was variously described as "the lands held by the Bissoyees", "the possessions of the Bissoyees", and "all lands or russums or fees heretofore appropriated to the support of police establishments." In a suit against the Government by the Zamindar of Parlakimedi in 1894, claiming proprietary right in, and possession of, the Maliahs as appertaining to the zamindari:—*Held*, that

PAGE

the proper construction of the exception was that it included the Maliahs, and not only the lands occupied and cultivated by the Bissoyees; the Maliahs therefore did not pass under the re-grant but remained the property to Government as they had done since the forfeiture. In 1823 the Government transferred the Bissoyees, who had been placed in 1800 under the Collector, to the Zamindar, and directed that they should be required to pay their quit-rents to him: *Held*, that that arrangement conferred no proprietary right in the Maliahs upon the Zamindar who incurred thereby no liability for the quit-rents of the Bissoyees, but had only to account for what he succeeded in collecting. In 1835 certain villages not within the Maliahs were granted to the Zamindar in consideration of his undertaking liability for the quit-rents of the Bissoyees: *Held*, that such an express grant excluded the inference that the Zamindar obtained any proprietary right in the Maliahs. The Courts below had concurred in holding that the plaintiff had not proved the acquisition of a title against the Government by adverse possession for 60 years, and the Judicial Committee upheld that decision. From 1861 to 1893, in consequence of the disability or incapacity of successive Zamindars, the zamindari was in possession of the Court of Wards represented by the Collector of the district, and the Court of Wards erroneously treated the Maliahs as if they belonged to the zamindari, worked the forests on the Maliahs and constructed roads through them at the expense of the Zamindar, and the officers of Government under the same mistake acquiesced in that possession and encouraged such an expenditure of zamindari funds upon the Maliahs as seemed good in the public interest: *Held* (affirming the decision of the High Court), that there was in that conduct no such representation as could give rise to an estoppel which would prevent the defendant from denying the plaintiff's title.

Goura Chandra Gajapati Narayana Deo v. *Secretary of State for India in Council* 130

EXECUTION PROCEEDINGS—Res judicata in *Effect of non-appearance when notice silent as to relief claimed—Final decision:*

A applied in execution for restitution of money with interest thereon paid to B under a decree which was subsequently reversed. The notice to B did not specify the nature of the claim and an *ex parte* order allowing the claim was made. The application, however, was dismissed for default in payment of process fees and A subsequently put in a similar application. B appeared and objected to the interest claimed which was 12 per cent. The Subordinate Judge allowed the interest, which, however on appeal to the District Court, was reduced to 6 per cent. On appeal to the High Court: *Held*, that the order of the Subordinate Judge allowing interest was a final order, as it dealt with the only question at issue and did not contemplate a further order, and that the appeal to the District Judge was not premature. *Venkatagiri Ayyar* v. *Sadagopachariar*, (Appeal No. 69 of 1900 and Civil Miscellaneous Appeals Nos. 105 and 109 of 1902 unreported), distinguished. *Held, also*, that as the notice to B was silent as to the nature of the claim, the first order granting A's application *ex parte* had not the force of *res judicata* so as to estop B from disputing the claim in subsequent proceedings. Knowledge of the nature of the claim can be presumed only when the application is for execution of a decree or order directing a thing to be done. *Sheik Budan* v. *Ramchandra Bhangiyana*, (I.L.R., 11 Bom., 537) and *Vappakandu Maracayan* v. *Hamid Beari Ammal*, (Civil Miscellaneous Appeal No. 25 of 1903 unreported), referred to.

Narayana Pattar v. *Gopalakrishna Pattar* 355

EXECUTOR DE SON TORT *liability of, under Hindu Law, when there is a legal representative—Power of, to pay own debt out of assets—Consent of heir to such payment, how far a defence to creditor's action—Creditor, form of suit by:*

When A on the death of B pays off a debt due to C by B which he had guaranteed, and later on in the same day, removes goods belonging to B's estate, A becomes liable as *executor de son tort*. The Rule of English Law

PAGE

that no liability as *executor de son tort* can arise when there is another personal representative does not apply in India. *Magaluri Garudiah* v. *Narayana Rungiah*, (I.L.R., 3 Mad., 359), referred to. An *executor de son tort* cannot plead *plene administravit* if he retains the assets for his own use or pays his own debt. In this case A became a creditor of the estate when he paid off the debt, and when he removed the goods he paid a debt due to himself and not to C. The consent by the heir to the appropriation by the *executor de son tort* will not be a defence to a creditor's action. Where there is an *executor de son tort* a creditor may sue for his debt and is not confined to an administration action.

Narayanasami Pillai v. *Esu Abbayi Sait* 351

FATAL ACCIDENTS ACT (INDIAN) XIII OF 1855—*'Representative of the deceased,' who are—The right under the Act is distinct in each and is a several, not joint, right—Limitation Act XV of 1877, ss. 7, 8, art. 21, sched. II—Representatives under Act XIII of 1855 not persons entitled to sue within the meaning of section 7 nor 'joint creditors' or joint claimants within the meaning of section 8 of the Limitation Act—Construction of statute:*

The word 'representative' in Act XIII of 1855 does not mean only executors or administrators, but includes all or any one of the persons for whose benefit a suit may be brought under the Act and it makes no difference whether the deceased was a European or Eurasian. Under article 21, schedule II of the Limitation Act, the suit must be brought within one year from death unless the bar is saved by section 7 or 8 of that Act. The right of the beneficiaries under Act XIII of 1855 is not a joint right, but a distinct and several right in respect of the same cause of action enforceable at the suit of all or one of them suing for himself and the rest. *Pym* v. *The Great Northern Railway Co.* (4 B. & S., 396). The beneficiaries are in the position of joint decree-holders and the right of suit conferred by Act XIII of 1855 is analogous to the right to apply for execution conferred on one or more of several joint decree-holders by section 231 of the Code of Civil Procedure. The beneficiaries therefore are not persons 'entitled to sue' within the meaning of section 7 of the Limitation Act and limitation will run against all when any one is competent to bring the suit. The principle in *Periasami* v. *Krishna Ayyan*, (I.L.R., 25 Mad., 431), followed. They are also not joint creditors nor joint claimants under section 8 of the Limitation Act. Joint claimants are persons whose substantive rights are identical and not those who are permitted to enforce distinct and different rights under one judicial process. *Ahinna Bibi* v. *Abdul Kader Saheb*, (I.L.R., 25 Mad., 26), distinguished. Sections 7 and 8 of the Limitation Act must be held to apply to suits under article 21 if they are capable of being grammatically applicable to them. The previous state of the law and the absence of evidence to show that the Legislature meant to effect a change will not justify Courts in holding, in the absence of express words, that they do not so apply.

Johnson v. *The Madras Railway Company* 479

FOREST LANDS—*Claims for hills—Village and land made over to claimant's ancestor by Government—Hills situated within immemorial boundaries of village—Right of inamdar irrespective of evidence of actual enjoyment—Necessity for proving adverse possession against Government:*

A jaghirdar preferred a claim to certain hills. It appeared that in 1842 the uncontrolled management of a certain village and pieces of land was made over to the ancestor of the present claimant. Prior to such handing over, Government officers had been in possession on behalf of the Inamdar. It was not alleged that, when such possession was handed over, the hills in question were excepted; and it was not disputed that the hills were within the immemorial boundaries of the village:—*Held*, that upon these facts, apart from any evidence of actual enjoyments by the Inamdar, he should be held entitled to the hills. *Held also*, that it was not necessary for the claimant, in these circumstances, to prove adverse possession as against Government.

Nawab Ajajuddin Alli Khan v. *Secretary of State for India* 69

PAGE

GRANT—*Re-grant after confiscation—Exception of Maliahs in re-grant—Construction of exception—Title by adverse possession—Estoppel—Maliahs treated erroneously by Court of Wards as part of zamindari and acquiescence by officers of Government—Evidence Act—I of 1872, s. 115:*

Prior to 1799 the Zamindari of Parlakimedi included certain tracts of forest land called "Maliahs" which were held by Bissoyees or local chiefs on service tenures in respect of which they paid to the Zamindar a sum as kattubadi or quit-rent; their duties being (*inter alia*) to keep up an establishment of guards at certain thanas for police purposes. Besides the Maliahs they held other lands which they occupied and cultivated for their own support. In consequence of a rebellion in 1799 in which the then Zamindar took part, the Government by a proclamation issued in 1800 declared that the zamindari was confiscated; and that "the Bissoyees" were henceforward to pay their revenue directly to the Collector and to be for ever under the company's immediate authority; but that they would in due course restore the son of the Zamindar "to the lands of his ancestors with the exception of those now held by the Bissoyees which are hereby declared separated from the zamindari for ever." This restoration was made in 1803, after the death of the rebellious Zamindar, to his son. What was excepted from that re-grant and from the assessment that formed the condition of the re-grant was variously described as "the lands held by the Bissoyees," "the possessions of the Bissoyees," and "all lands or russums or fees heretofore appropriated to the support of police establishments." In a suit against the Government by the Zamindar of Parlakimedi in 1894, claiming proprietary right in, and possession of, the Maliahs as appertaining to the zamindari: *Held*, that the proper construction of the exception was that it included the Maliahs, and not only the lands occupied and cultivated by the Bissoyees: the Maliahs therefore did not pass under the re-grant but remained the property of Government as they had done since the forfeiture. In 1823 the Government transferred the Bissoyees, who had been placed in 1800 under the Collector, the Zamindar, and directed that they should be required to pay their quit-rents to him: *Held*, that that arrangement conferred no proprietary right in the Maliahs upon the Zamindar who incurred thereby no liability for the quit-rents of the Bissoyees, but had only to account for what he succeeded in collecting. In 1835 certain villages not within the Maliahs were granted to the Zamindar in consideration of his undertaking liability for the quit-rents of the Bissoyees: *Held*, that such an express grant excluded the inference that the Zamindar obtained any proprietary right in the Maliahs. The Courts below had concurred in holding that the plaintiff had not proved the acquisition of a title against the Government by adverse possession for 60 years, and Judicial Committee upheld that decision. From 1861 to 1893, in consequence of the disability or incapacity of successive Zamindars, the zamindari was in possession of the Court of Wards represented by the Collector of the district, and the Court of Wards erroneously treated the Maliahs as if they belonged to the zamindari, worked the forests on the Maliahs and constructed roads through them at the expense of the zamindar; and the officers of Government under the same mistake acquiesced in that possession and encouraged such an expenditure of zamindari funds upon the Maliahs as seemed good in the public interest: *Held*, (affirming the decision of the High Court), that there was in that conduct no such representation as could give rise to an estoppel which would prevent the defendant from denying the plaintiff's title.

Gowra Chandra Gajapati Narayana Deo v. *Secretary of State for India in Council* 180

HEREDITARY VILLAGE OFFICES ACT (MADRAS ACT III OF 1895), s. 5—*Emoluments of Village offices—Non-liability to attachment or sale by Courts:*

The prohibition in section 5 of the Madras Hereditary Village Offices Act (III of 1895) against attachment and sale by the Courts is absolute and deprives Civil Courts of all jurisdiction to give directions for sale of inam lands granted as emoluments for the performance of duties connected with the offices referred to in that section. A decree directing the sale of such lands is *ultra vires*.

Raja of Vizianagaram v. *Dantivada Chelliah* 84

PAGE

HINDU LAW:—*See* "LIMITATION ACT, s. 7."

2. ——— *Adoption by senior widow without consulting junior widow—Validity of:*

An adoption made after the death of a Hindu by his senior widow, after having obtained the consent of his sapindas but without consulting the junior widow, is valid and cannot be impeached on the ground that such adoption has the effect of divesting the estate of the junior widow or her infant daughter. *Rakhmabai* v. *Radhabai*, (5 B.H.C.R.) (A.C.J.), 181 at p. 192), *Bhimawa* v. *Sungawa*, (I.L.R., 22 Bom., 206), *Amava* v. *Mahadyauda*, (I.L.R., 22 Bom., 416), referred to and followed. *Subrahmanyam* v. *Venkamma*, (I.L.R., 26 Mad., 627), distinguished. The consent of kinsmen is required on account of the incapacity of women to act rather than to procure the consent of all whose interests will be defeated by the adoption. *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy*, (12 M.I.A., 397 at p. 442).

Narayanasami Naick v. *Mangammal* 315

3. ——— *Charitable Trust—Trustee of, has no power to appoint a co-trustee in place of a deceased trustee—Civil Procedure Code, Act XIV of 1882, s. 13—Decision on a question of law not* res judicata *when the object matter of the subsequent suit is different:*

The provisions of the Indian Trust Act do not apply to charitable trusts. In the absence of a power under the instrument creating a trust or by virtue of some statutory provision, a trustee, as such, has no power to appoint any person as trustee either in his own place or to act jointly with him. A decision on a question of law in a previous suit is not *res judicata* in a subsequent suit between the same parties when the object-matter of the two suits are different. *Quære.*—Whether such a decision can be *res judicata* against a party who could not have prosecuted an appeal against it. *Parthasaradi* v. *Chinna Krishna*, (I.L.R., 5 Mad., 304), *Venka* v. *Mahalinga*, (I.L.R., 11 Mad., 393), *Chamanlal* v. *Bajubhai*, (I.L.R., 22 Bom., 669), *Vishnu Ramling*, (I.L.R., 26 Bom., 25 at p. 30), referred to and followed.

Gopu Kulandavelu Chetty v. *Sami Rovar* 517

4. ——— *Enfranchisement of service inams—Grant of title-deed to widow in respect of personal inam given to her late husband—Widow's estate:*

Certain property was given to a widow's late husband by his maternal grandfather. It was enfranchised by the Inam Commissioner in the name of the widow, to whom a patta was issued. The widow alienated the property. In a suit by reversioners for a declaration that the alienation was not binding on them except during the lifetime of the widow: *Held*, that the grant of the inam title-deed to the widow did not constitute the property her absolute property. The inam was taken by inheritance by the widow as the widow of the previous holder. *Cherukuri Venkanna* v. *Mantravathi Lakshmi Narayana Sastrulu*, (2 M.H.C.R., 327), followed. *Subba Naidu* v. *Nagayya*, (Second Appeal No. 604 of 1900, (unreported)), commented on.

Vangalu Dikshatulu v. *Vangala Gavaramma* 13*

5. ——— *Liability of undivided son for surety debt contracted by father:*

Where a Hindu father having undivided sons incurs an obligation as surety for the payment of a debt and not for keeping the peace or for good behaviour, the whole ancestral property including the shares of the sons is liable for the discharge of such obligation. *Sitaramayya* v. *Venkatramanna*, (I.L.R., 11 Mad., 373), and *Tukarambhat* v. *Ganjaram*, (I.L.R., 23 Bom., 454), followed.

Chettikulam Venkitachala Reddiar v. *Chettikulam Kumara Venkitachala Reddiar* 377

PAGE

6. ——————*Mitakshara law—Descent of impartible property—Rule of primogeniture—Evidence—Palayam, nature of—Acceptance by palayagar of sanad under Madras Regulation XXV of 1802, effect of succession to palayam—Zamindari of Udayarpalayam—Maintenance, amount of—Privy Council, practice of:*

When impartible property passes by survivorship from one line of descent to another it devolves not on the co-parcener nearest in blood, but on the nearest co-parcener of the senior line. *Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru*, (I.L.R., 4 Mad., 250), approved. The question whether an estate is subject to the ordinary law of succession or descends according to the rule of primogeniture must be decided in each case according to the evidence given in it. *Srimantu Raja Yarlagadda Mallikarjuna* v. *Srimantu Raja Yarlagadda Durga*, (L.R., 17 I.A., 134; I.L.R., 13 Mad., 406), followed. The acceptance of a sanad in common form under Madras Regulation XXV of 1802 does not of itself and apart from other circumstances avail to alter the succession to an hereditary estate:—*Held*, in the evidence and circumstances of the case, and in accordance with the above principles that the zamindari of Udayarpalayam represented the ancient palayam of Udayar which was in its origin and up to the expulsion of the Palayagar in 1765 an impartible estate held by one member of the family only and not subject to the ordinary rule of Hindu law; and that notwithstanding the acceptance by the palayagar in 1817 of such a sanad and the fact that it was circumscribed in extent the palayam retained its character of impartibility and descended to the first defendant a grand nephew in the senior line, in preference to the plaintiff a nephew in a junior line of descent, as it was granted and accepted as equivalent in value to the ancient palayam. The Judicial Committee will not interfere in a question as to the amount of maintenance, which is a matter to be dealt with by the Courts in India.

Kachi Kalitana Rangappa Kalakka Thola Udayar v. *Kachi Yuva Rengappa Kalakka Thola Udayar* 508

7. ——————*Partnership with manager of joint family—Death of manager, effect of—Joint family and joint family business, nature of—Partner, right of, to sue for particular assets after suit for general account barred—Limitation Act XV of 1877, sched. II, art. 106:*

Where K, the manager of a joint Hindu family, enters into a partnership for the family benefit with S, a stranger to the family, the partnership is dissolved on the death of K, in the absence of any agreement with the survivors. How far a joint Hindu family resembles a corporation sole and how far a joint family business resembles a partnership considered. *Samalbhai Nathubhai* v. *Someshvar, Mangal, and Harkisan*, (I.L.R., 5 Bom., 38), referred to. Although a suit for general account of a partnership will be barred under schedule II, article 106 of the Limitation Act, if brought more than three years after the dissolution of the partnership, a suit will lie for recovering a share of any particular assets received by a partner after such dissolution, if such suit is brought within time and if such claim, having regard to previous dealings, is not inequitable. *Merwanji Hormusji* v. *Rustomji Burjorji*, (I.L.R., 6 Bom., 628), and *Knox* v. *Gye*, (L.R., 5 H.L., 656), followed.

Sokkanadha Vannimundar v. *Sokkanadha Vannimundar* 344

8. ——————*Religious endowment—Trustee, creation of tenure by—Cancellation by succeeding Trustee—Notice to tenure-holder—Tender of patta at end of fasli not reasonable notice:*

A trustee of a religious endowment cannot, except on special grounds, create a perpetual tenure binding on his successors in office. *Mayandi Chettiar* v. *Chokkalingam Pillay*, (I.L.R., 27 Mad., 295) and *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami*, (I.L.R., 27 Mad., 435), followed. Where however a long succession of trustees had acquiesced, a succeeding trustee cannot sue to eject the tenure-holder without giving him reasonable notice of the determination of the tenure; and the tender of a patta at the end of a fasli for which it is tendered is not a reasonable notice.

Narasimha Chari v. *Gopala Ayyangar* 391

PAGE

9. ——————*Savings or property purchased out of savings by widow out of money awarded to her by decree as maintenance—Sridhanam—Devolution on daughter and on daughter's daughters:*

K, a Hindu widow, purchased property with money received by her under a decree awarding maintenance made payable to her out of the revenues of a zamindari. She never had any right to or possession of her husband's estate, which was always in the hands of other persons who were entitled thereto. K died leaving a daughter M her surviving, who subsequently also died leaving three daughters. The three daughters of M sold the property to plaintiffs, who brought this suit for a declaration that they were entitled to certain shares in the property and for delivery of the same. For the defence it was contended that the property in question was not the sridhanam of K, that K had taken only a limited and qualified interest therein, and that on K's death it devolved on her husband's lineal male descendants and that, in consequence, the sale to plaintiffs conferred on them no title to the property:—*Held*, that the property was K's sridhanam, and, consequently, M was, on her death, heir to it. There is no necessary connection between the limited nature of the estate which a widow takes in her husband's property and the interest accruing to her in the income derived by her as such limited owner. That which becomes vested in her in her own right and which she can dispose of at pleasure is her own property, not limited but absolute, exclusive and separate, in every sense of the term, and devolves as such. As, in present state of the law, the income is completely dissociated from the corpus, there is no presumption that savings or purchases with savings effected by a widow are increments to the corpus of the husband's estate and pass together with it. *Akkanna* v. *Venkayya*, (I.L.R., 25 Mad., 351), approved; *Saodamini Dasi* v. *The Administrator General of Bengal*, (L.R., 20 I.A., 12), followed; *Isri Dut Koer* v. *Mussumut Hansbutti Koerain*, (L.R., 10 I.A., 150), distinguished; *Soorlah Dossee* v. *Bhoobun Mohun Neoghy*, (I.L.R., 15 Calc., 292), *Beni Parshad* v. *Puranchand*, (I.L.R., 23 Calc., 262); *Chhiddu* v. *Naubat*, (I.L.R., 24 All., 67); and *Sheo Shankar Lal* v. *Debi Sahai*, (I.L.R., 25 All., 468), commented on. *Held also*, that as a daughter's daughter is entitled to take (in preference to a daughter's son), the sridhanam of the grandmother, K's sridhanam, passed, on the death of her daughter M, to M's daughters, who took only a limited and qualified estate.

Subramanian Chetti v. *Arunachelam Chetti* I

10. ——————*Self-acquisition, power of acquirer over—Will, construction of—Words conferring absolute estate by subsequent terms held to confer only life estate—Devise, effect of, when devisees not in existence at testator's death:*

Properties acquired by a Hindu who had inherited no ancestral property, out of income derived by him in Government service are his self-acquisition and he has complete power of disposition over them by will or otherwise to the prejudice of his male issue. Where some terms of a will apparently give an absolute interest but subsequent provisions show that only a life interest was intended to be given, effect will be given to the intention of the testator by cutting down the effect of the former words and construing them as conferring a life estate only. When in making a provision for his sons, the testator uses words which if strictly construed would give them only a right to be maintained out of the income of certain moveable and immoveable properties, but subsequent portions of the will referred to them as 'donees' and directed such properties to be handed to them on coming of age:—*Held*, that the sons were given a life interest in such properties. Where a testator after giving a life interest in certain properties to his sons devised the residue 'in favour of the male issue of the sons, such issue failing, in favour of female issue and that again failing, in favour of the grand-daughters by his daughter' and where at the testator's death, there were no grand children by his sons, but one of his daughters had two daughters alive:—*Held*, that the sons did not take the residue as on an intestacy but that it was taken by the two daughters of the daughter, who were then alive.

Somasundara Mudaliar v. *Ganga Bissen Soni* 386

PAGE

11. ——————*Will, construction of—Effect of gift without words of severance to persons forming an undivided Hindu family—Gift 'in equal shares'—Tenant in common—Share of, will pass to his representatives—'Grandsons being sons' sons' include a grandson by adoption—Analogy between an adopted son and an appointee under a power:*

C died in 1881, leaving him surviving three sons, Y the plaintiff, M the first defendant and P. P died in 1896, leaving a son B who died in the same year. The second defendant was the son of the first defendant M, the third defendant was the adopted son of the plaintiff Y, and the fourth defendant was the widow of B. The second and third defendants and B were alive at the time of C's death in 1881. The third defendant was adopted by the plaintiff in 1897. C, by his last will and testament, dated 12th May 1881, disposed of three houses (referred to as Nos. I, II and III). The disposition in regard to No. I was in these terms, " . . . . therefore my three sons shall use and enjoy this house from son to grandson and so on in succession without power to give as gift or sell the same"—subject to a payment of a small rent in respect thereof for charity. As regards Nos. II and III the will provided 'that out of a total income of Rs. 530 (being the total amount of the income of rent per month) deducting the aforesaid expenses of Rs. 181 the remaining amount whatever it may be shall be divided and paid by my executors to my three sons in equal shares' . . . . 'my executors shall divide and give away these properties to my own grandsons being my sons' sons after my sons according to their respective shares. My sons shall have no right whatever to give as gift or to sell these properties.' The plaintiff brought this suit to have the will construed:—*Held, per* Sir ARNOLD WHITE, C.J., that under the will of C house No. I vested absolutely in his three sons as members of a joint Hindu family and that the law of inheritance in undivided Hindu families applied. B having died without male issue his interest passed by survivorship to Y and M to the exclusion of his widow, the fourth defendant. *Held further*, that the sons took a limited estate as tenants in common in the income of Nos. II and III in the nature of an estate for lives which subsists till the death of the last survivor, when this limited estate comes to an end and the provision for the division of the corpus will be carried out. On a proper construction of the will such limited estate of each son passed on his death to his representatives and not to the survivors. The interest of P went to his son B and on B's death his widow, the fourth defendant, took a widow's estate in her husband's interest. *Bryan* v. *Twigg*, (L.R., 3 Eq., 433), *Pearce* v. *Edmeades*, (51 R.R., 369), and *M'Dermott* v. *Wallace*, (59 R.R., 441), referred to and distinguished. *Held also*, that the third defendant, the adopted son of the plaintiff, took an interest under the will as grandson of C. *Per* SUBRAHMANIA AYYAR, J.—As regards item No. I the words from 'son to grandson' were words of purchase importing a grant of absolute property under the Hindu Law and the sons took an absolute estate. Having regard to the statement in the will that the testator formed an undivided family with his sons, and also to the fact that in disposing of the income and corpus of items Nos. II and III he had used the expressions, 'in equal shares' and 'according to their respective shares' to indicate a tenancy in common, the devise of item No. I without such qualifying words was clear evidence of an intention, that the sons should take as a Hindu co-parcenary with rights of survivorship. The fourth defendant therefore could claim no share in item No. I. *Jogeswar Narain Deo* v. *Ram Chund Dutt*, (L.R., 23 I-A., 37), referred to and distinguished. *Held further*, that as regards items Nos. II and III the sons took an interest in the income only as tenants in common. The gift of the income being in equal shares and not limited to each son for his life, the share of each on his death went to his representatives. The fourth defendant therefore took the share of her husband as his heir. The division of the income among those entitled will not cease until the time for the division of the corpus arrives which will not be so long as any of the sons of the testator is alive. *Held also*, that as regards the corpus of items Nos. II and III the words in the will 'my own grandsons being my sons' sons' include a grandson by adoption and that therefore the third defendant took an equal share with the other two grandsons. The right of the adopted son

PAGE

is analogous to that of an appointee under a power given by the donor, as regards the effectuation of the gift; and the gift to an appointee will be good if he be a person in existence at the testator's death. *Bai Motivahoo* v. *Bai Mamoobai*, (L.R., 24 I-A., 93), referred to.

Yethirajulu Naidu v. *Mukunthu Naidu* 363

HINDU WIDOWS' RE-MARRIAGE ACT XV OF 1856, s. 2—*Hindu widow, re-marriage of—Effect of re-marriage on rights of inheritance accruing after such re-marriage:*

The right of a Hindu widow who re-marries during the lifetime of her son, to succeed by inheritance to the ancestral property of such son on his death, is not within any of the exceptions referred to in section 2 of Act XV of 1856, and she is entitled to succeed notwithstanding her re-marriage. *Chamar Haru* v. *Kashi*, (I.L.R., 26 Bom., 388), referred to and followed.

Lakshmana Sasamallo v. *Siva Sasamalayani* 425

INDIAN COMPANIES ACT VI OF 1882, ss. 136, 177—*Voluntary liquidation—Loan made by Company prior to liquidation upon the security of deposit standing to credit of borrower—Action by liquidators to recover amount of loan—Plea—Set off—Validity—Presidency Small Cause Court Act XV of* 1882, *s.* 69—*Rules of Procedure of the Small Cause Court Rule* 428:

The plaintiffs were liquidators of a company which went into voluntary liquidation in June 1901. The defendant, after he had ceased to be a shareholder in the company, deposited with the company a sum of money for a period of twelve months. Before the expiry of this period, the defendant applied to withdraw this amount. Being unable to get it, he applied to and obtained from the company a loan on the security of his deposit with interest at 12 per cent. on 14th December 1900. The company went into liquidation in June 1901. On 20th September 1901 an interim injunction was obtained restraining all creditors from suing the company. On 9th October 1901 this injunction was made absolute. On 9th November 1903 the liquidators brought this action to recover the loan and interest. The defendant pleaded a set-off of the amount due to him from the company under his deposit made on 16th July 1900:—*Held*, that the defendant was entitled to set off the amount of his deposit against the sum claimed. *Anderson's case* (L.R., 3 Eq., 337) and *Sovereign Life Assurance Company* v. *Dodd*, (L.R. [1892], 2 Q.B., 573), followed.

Reference under Presidency Small Cause Court's Act 240

INDIAN POST OFFICE ACT VI OF 1898, s. 34—*Value-payable article—Liability of Government to sender when value not collected from addressee—Duty of Post Office to collect value payable—Liability for neglect to do so—Provincial Small Causes Act IX of* 1887—*Jurisdiction:*

The plaintiff delivered a parcel containing silver jewellery to the Postal authorities for transmission to Colombo as a value-payable article. He also registered and insured it for Rs. 115. The fees were duly paid, receipts obtained, and the Post Office took charge of the parcel. By the mistake of a clerk the parcel was delivered to and accepted by the addressee without its value being collected from him. This suit was brought to recover the value of the parcel from the defendant, as the Post Office would neither pay the money to plaintiff nor return the article. The defendant relied *inter alia* upon section 34 of the Indian Post Office Act, 1898. The proviso to section 34 runs as follows:—Provided that the Secretary of State for India in Council shall not incur any liability in respect of the sum specified for recovery unless and until that sum has been received from the addressee:—*Held*, that the defendant was liable. The effect of the proviso is that the Post Office does not guarantee the collection of the money, but the proviso does not absolve the Post Office from the common law liability to pay damages for delivering a parcel without collecting the money in pursuance of its undertaking to do so. By its contract the Post Office is bound to collect the money when it

PAGE

delivers the article. If, for any reason, it neglects to do so, it commits a breach of contract for which it is liable in damages. The measure of the damages being the value of the article lost. A Small Cause Court has jurisdiction to entertain such a suit, it being a suit on contract and not on tort.

Mothi Rungaya Chetty v. *The Secretary of State for India in Council* 213

INJUNCTION—*Calingula constructed by Government—Necessary effect to cause water to flood plaintiff's lands—Rights of Government in connection with the distribution of water—Limitation Act XV of* 1877, *s.* 24—*Continuing wrong :*

In 1882 a calingula was constructed by Government for the purpose of reducing the flow of water into a tank through a channel. The necessary effect of the calingula would have been to cause the water diverted from the channel to flood the plaintiff's land. To obviate this, a small drainage channel was formed by Government to carry off the surplus water. Plaintiffs contended that the drainage channel was not sufficient to carry off the water and that the water which flowed over the calingula stagnated on their lands and made them unfit for cultivation. They prayed for a mandatory injunction directing that the calingula be blocked up :—*Held*, that they were entitled to the relief claimed. Government have the right to distribute the water of Government channels for the benefit of the public, subject to the rights of a ryotwari land-holder, to whom water has been supplied by Government, to continue to receive such supply as is sufficient for his accustomed requirements. But the rights of Government, in connection with the distribution of water, do not include a right to flood a man's land because, in the opinion of Government, the erection of a work which has this effect is desirable in connection with the general distribution of water for the public benefit. The fact that the opening of the calingula was necessary for the protection of the tank, and the fact that there was no negligence in the construction of the calingula—so far as the calingula was concerned—did not deprive the plaintiffs of their right to have their property protected. Even if Government had been empowered by statute to construct the calingula in question it would be for Government to show that they could not exercise their statutory powers without injuring the plaintiffs' lands. The position of persons acting under statutory authority discussed. *Held also*, that the injury was a continuing one and that the suit was governed by section 24 of the Limitation Act and was not barred by limitation.

Sankaravadivelu Pillai v. *Secretary of State for India in Council* 72

2. ——— *Water-course—Construction of new channel—Prior to construction water flowed naturally or percolated without definite course—Material alteration :*

Plaintiff sued for an injunction to restrain defendant from making or using a water channel. Prior to the construction of the channel, all the water that flowed from the defendant's land on to the plaintiff's found its way there by natural flow or percolation and was not carried down by any definite water-course. The effect of the channel was to collect water which formerly flowed from a large tract of land at different points in a definite channel and to throw it all into a particular part of the plaintiff's channel :—*Held*, that plaintiff was entitled to the relief sought. Even though no greater quantity of water might eventually be carried into plaintiff's channel than had hitherto run into it, the new channel effected a material alteration in the mode of the passage of the water from the defendant's land into that of the plaintiff. Such a change plaintiff was entitled to object to.

Raja of Venkatagiri v. *Raja Muddukrishna* 15

INSOLVENCY ACT—11 & 12 VICT., CHAP. 21, 1848, s. 86—*Entering of judgment against insolvent :*

Semble, that there is no provision in the Insolvency Act of 1848 which imposes upon an insolvent, who has obtained his personal discharge, the duty of disclosing to the Official Assignee that he has become possessed

PAGE

of property since the making of the order of personal discharge, consequently the non-disclosure by an insolvent that he has become so possessed of a house cannot be regarded as a fraud either on the creditors or the Official Assignee so as to render section 18 of the Limitation Act applicable. Section 86 of the Insolvency Act is permissive and provides that the Court may enter up judgment against an insolvent if in the circumstances of the case it shall think fit. *Semble*, therefore, that following the rule of practice under the English Bankruptcy Acts judgment will not be entered up against a bankrupt as a condition of his discharge unless he has an income more than sufficient to keep his family in the enjoyment of the ordinary necessaries of life.

Abdul Kareem Sahib v. *The Official Assignee of Madras* 168

JURISDICTION :—*See* "INDIAN POST OFFICE ACT VI OF 1898, s. 34."

2. ——— *See* "LETTERS PATENT."

3. ——— *Civil Procedure Code—Act XIV of* 1882—*Suit for the determination of any right to or interest in immoveable property—Suit for the recovery of purchase money under contract for the sale of land :*

A suit for the recovery of unpaid purchase money under a contract for the sale of land is a suit "for the determination of any right to or interest in immoveable property" within the meaning of section 16, clause (*d*) of the Code of Civil Procedure. *John Young* v. *Mangalapilly Ramaiya*, (3 M.H.C.R., 125), and *His Highness Shrimant Maharaj Yashrant Ray Holkar* v. *Dadabhai Cursetji Ashbeener*, (I.L.R., 14 Bom., 353), referred to and distinguished.

Maturi Subbayya v. *Kota Krishnayya* 227

JURISDICTION OF CIVIL COURTS.—*Suit for declaration of right to recite text—Maintainability :*

A suit is not cognizable in a Civil Court where the subject of the plaintiffs' claim is confined to rights in religious ceremonies without a claim to any office or any emolument. A right to recite sacred texts in a temple is a matter of ritual or ceremony in a religious matter with which a Civil Court has nothing to do.

Subbaraya Mudaliar v. *Vedantachariar* 23

KUMAKI :—*See* "SOUTH CANARA."

LANDLORD AND TENANT—*Lease, forfeiture of, for non-payment of rent when period of grace allowed for payment—Transfer of Property Act IV of* 1882, *s.* 114 :

A Mulageni chit or permanent lease of 1866 for building purposes provided that the lessee should pay to the lessor a rent of Rs. 5 per annum by the 24th May of each year; and if any arrears remained due, they should be paid within a further period of three months or by the 24th August, and if not so paid, the Mulageni chit to stand cancelled. In a suit brought for cancelling the lease and recovering the demised premises on the ground amongst others that the rent due on the 24th May 1898 was not paid by the 24th August 1898 :—*Held*, affirming the decree of the lower Appellate Court, that the condition of forfeiture for non-payment was not penal as a period of grace was allowed and consequently no relief against forfeiture could be given. *Narayana Kanti* v. *Nandu Shetty*, (S.A. No. 89 of 1900), unreported, referred to and followed. The provisions of the Transfer of Property Act do not apply to the lease. Even under section 114 of the Transfer of Property Act, relief against forfeiture is discretionary and may depend on whether the lease allows a reasonable period of grace.

Naraina Naika v. *Vasudeva Bhatta* 389

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APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, Mr. Justice Benson and Mr. Justice Russell.

1904. January 27, 28, 29. February 2, 16.

SUBRAMANIAN CHETTI AND OTHERS (DEFENDANTS NOS. 1 TO 8), APPELLANTS,

v.

ARUNACHELAM CHETTI AND OTHERS (PLAINTIFFS NOS. 2 AND 3), RESPONDENTS NOS. 1 TO 4.*

Hindu Law—Savings or property purchased out of savings by widow out of money awarded to her by decree as maintenance—Sridhanam—Devolution on daughter and on daughter's daughters.

K, a Hindu widow, purchased property with money received by her under a decree awarding maintenance made payable to her out of the revenues of a zamindari. She never had any right to or possession of her husband's estate, which was always in the hands of other persons who were entitled thereto. K died leaving a daughter M her surviving, who subsequently also died leaving three daughters. The three daughters of M sold the property to plaintiffs, who brought this suit for a declaration that they were entitled to certain shares in the property and for delivery of the same. For the defence it was contended that the property in question was not the sridhanam of K, that K had taken only a limited and qualified interest therein, and that on K's death it devolved on her husband's lineal male descendants and that, in consequence, the sale to plaintiffs conferred on them no title to the property:

Held, that the property was K's sridhanam, and, consequently, M was, on her death, heir to it. There is no necessary connection between the limited nature of the estate which a widow takes in her husband's property and the interest accruing to her in the income derived by her as such limited owner.

* Appeal No. 155 of 1900, presented against the decree of M.R.Ry. T. Varada Rao, Subordinate Judge of Madura (East), in Original Suit No. 66 of 1868.

SUBRAMANIAN CHETTI v. ARUNACHELAM CHETTI.

That which becomes vested in her in her own right and which she can dispose of at pleasure is her own property, not limited but absolute, exclusive and separate, in every sense of the term, and devolves as such. As, in the present state of the law, the income is completely dissociated from the corpus, there is no presumption that savings or purchases with savings effected by a widow are increments to the corpus of the husband's estate and pass together with it.

Akkanna v. *Venkayya*, (I.L.R., 25 Mad., 351), approved; *Saodamini Dasi* v. *The Administrator-General of Bengal*, (L.R., 20 I.A., 12), followed; *Isri Dut Koer* v. *Mussumut Hansbutti Koerain*, (L.R., 10 I.A., 150), distinguished; *Sorolah Dossee* v. *Bhoobun Mohun Neoghy*, (I.L.R., 15 Calc., 292), *Beni Parshad* v. *Puranchand*, (I.L.R., 23 Calc., 262), *Chhidda* v. *Naubat*, (I.L.R., 24 All., 67), and *Sheo Shankar Lal* v. *Debi Sahai*, (I.L.R., 25 All., 468), commented on.

Held also, that as a daughter's daughter is entitled to take (in preference to a daughter's son), the sridhanam of the grandmother, K's sridhanam, passed, on the death of her daughter M, to M's daughters, who took only a limited and qualified estate.

SUIT for a declaration that plaintiffs were entitled to certain property, and for possession. The facts are sufficiently set out in the judgments.

Sir *V. Bhashyam Ayyangar*, Hon. Mr. *C. Sankaran Nair*, and *S. Srinivasa Ayyangar* for first to third and fifth to eighth appellants.

V. Krishnaswami Ayyar, *P. R. Sundara Ayyar*, *K. Srinivasa Ayyangar*, and *A. Nilakanta Ayyar* for respondents.

JUDGMENT—Sir S. SUBRAHMANIA AYYAR, OFFG. C.J.—The property in dispute in this appeal preferred by the defendants in the case, consists of ten shares and one share respectively in the inam villages of Karuvi Kanmoi and Silambathan in the Zamindari of Sivaganga, the holders of the shares being in the enjoyment of their interest by receipt of the melvaram or the rent in kind payable by the cultivators and ryots of the villages. The shares in question were originally acquired by Kunjara Nachiar, a widow of a former Zamindar of Ramnad. She died, possessed of them, in July 1881, leaving her surviving a daughter Mangaleswari Nachiar, who herself died in November 1886, leaving three daughters, Rani Nachiar, Kulandai Nachiar and Velu Nachiar, and a son Vijiasami Tevar.

The plaintiffs claim the shares as vendees through persons whose alleged title is ultimately based on a sale by the three daughters of Mangaleswari, dated the 1st January 1894. The defendants claim the property also as vendees but through parties whose alleged title rests on a Court sale held in September 1889

SUBRAMANIAN CHETTI v. ARUNACHELAM CHETTI.

in execution of a decree passed against Mangaleswari's son Vijiasami Tevar. Two contentions were raised on behalf of the defendants, and one of them was that the shares in question were not Kunjara's sridhanam, that she took therein only a limited and qualified interest and that on her death they devolved on her husband's lineal male descendants, that is to say, the then Raja of Ramnad and his brother who were the sons of Kunjara's husband's adopted son's adopted son, and consequently that the transaction relied on by the plaintiffs conferred on them no title whatsoever to the property.

The question of fact with reference to which this contention has to be decided is beyond doubt, it being established by all the evidence in the case that the property was purchased by Kunjara with money received by her under a decree awarding maintenance made payable to her out of the revenues of the Zamindari of Ramnad.

In support of the above contention the argument most strongly urged was that the present case was analogous to that of property purchased by a Hindu widow out of the savings from incomes of the estate inherited by her from her husband. No doubt property so purchased passes to the husband's heirs where the widow has made it an increment to her husband's estate; but where the widow making the purchase has, while not annexing it to her husband's estate, left it undisposed of, whether the descent thereof is to be to her husband's heirs or to her own, is a question which can hardly be treated as settled.

If the principle of law applicable to the case were that enunciated by Jimutavahana with reference to the interest taken by a widow succeeding to her husband, there can, of course, be no question as to what the conclusion should be. That principle, as pointed out by Mitter, J., in *Kery Kolitany* v. *Moneeram Kolita*(1) was, in effect, that the widow took in trust, as it were, for the spiritual welfare of her husband, and that accordingly so far as her own personal purposes were concerned, her control over the income derived therefrom was limited to such abstemious use as befitted the ascetic life to be led by her in her bereaved condition the corpus as well as the unspent income, without reference to the form which the latter stood saved, constituting but one inheritance,

(1) 13 B.L.R., 1.

SUBRAMANIAN CHETTI v. ARUNACHELAM CHETTI.

which, on her death, reverted to her husband's heirs. But even in the country of its birth this view, though emphatically relied on as the living law by Mitter, J., in the case referred to, has, so far as the widow's power of disposing at her pleasure of all the income derived by her during her limited ownership is concerned, been completely abandoned. Nevertheless it would seem that the spirit of the doctrine has not altogether ceased to exercise a subtle and unconscious influence on judicial opinion with reference to some of the matters connected with such income. And I take it, it is this that must account for the dicta to be found in the decisions in Bengal or those following them to the effect that until the contrary is shown, savings or purchases with savings effected by a widow should presumably be treated as increments to the corpus of the husband's estate and to pass together with it.

It is impossible to see how, consistently with the present state of the law, which in truth completely dissociates the income from the corpus in such cases, the presumption referred to could be supported. Now that it has definitively been established that the widow is entitled to use her entire net income at her pleasure or give away the whole or any part thereof as she chooses *inter vivos* or by testament, and that, with reference to the exercise of such right, it is immaterial whether the income is formed into a fund or kept invested in this or that form, how could it be supposed that *primâ facie* it merges in the estate merely because she has not actually disposed of it.

The true foundation of a presumption is either some policy or general conformity with fact (compare Thayer's 'Preliminary Treatise on Evidence,' page 314), but neither of these can possibly be invoked in favour of that supposition. For it cannot be said that the merging of the unalienated portion of the income of a widow with the estate out of which she derived it is required by any policy with reference to the community concerned. As to conformity with fact, who can doubt that if the wishes and intentions of widows in the class of cases under consideration have any relevancy in the matter they would in ninety-nine out of a hundred cases be found to be against a merger; such persons being of course naturally desirous that the income and the acquisitions made therewith should to the last remain within their power and pass on their death to their own heirs, especially the issue of their body.

SUBRAMANIAN CHETTI v. ARUNACHELAM CHETTI.

Nor could it be supposed that, as a matter of abstract reasoning, there is any necessary connection between the limited nature of the estate which a widow takes in her husband's property and the interest accruing to her in the income derived by her as such limited owner. In the absence of any clear provision of Hindu law, defining the character of her interest in the income, it must, on general grounds, be held that what becomes vested in her in her own right and what she can dispose of at pleasure is her own property, not limited but absolute, exclusive and separate in every sense and devolving as such.

Should the precise question which has been just discussed arise for determination in this Court, this would be the conclusion to be arrived at on principle, and it would be come to unhampered by the dicta expressive of what is but a lingering fragment of the notion engendered by Jimutavahana's doctrine already mentioned; these dicta being moreover in direct conflict with the recent case of *Akkanna* v. *Venkayya*(1), where this Court held that as an acquirer of property presumably intends to retain dominion over it, a Hindu widow acquiring property with funds at her absolute disposal derived from her husband's estate should not be presumed to have intended to part with her power of disposition for the benefit of her reversionary heirs.

As to the *obiter dictum* in *Isri Dut Koer* v. *Mussumut Hansbutti Koerain*(2) on which much stress was laid in the argument on behalf of the defendants, that is more than counterbalanced by the actual decision of their Lordships in the much later case of *Saodamini Dasi* v. *The Administrator-General of Bengal*(3), where it was held that the income which accrued from the husband's estate after his death for about eight years, and which amounted to about two lakhs of rupees and was paid to her by the executor of the husband's will as property undisposed of by the will, was her "absolute" property.

Be this as it may, obviously there is no true analogy between that relied on and the present case, inasmuch as the very basis for the theory of merger, increment or accretion, and the consequent reverter is entirely wanting here, Kunjara not having had any right to or possession of her husband's estate, which, as already

(1) I.L.R., 25 Mad., 351. (2) L.R., 10 I.A., 150.
(3) L.R., 20 I.A., 12 at p. 24.

SUBRAMANIAN CHETTI v. ARUNACHELAM CHETTI.

stated, was all the time in the hands of other persons entitled thereto. To extend to such a case the theory referred to would be to create a baseless fiction which is also purposeless, it being impossible to suggest that, in the view of the Hindu law, there is some higher end to be attained by making acquisitions such as those in question devolve on heirs of the husband instead of on the heirs of the woman herself. One can understand the corpus of the husband's estate being given to a female without the intention of diverting its eventual devolution from his family, the object being effected intelligibly enough by making the estate of such a taker a limited one. Where, however, what is given is current income not for mere use and return but for actual consumption, it would be almost absurd to talk of an intention that there should be any reverter, it being now thoroughly well established that what may not have been consumed may be disposed of by the female as she likes. In such circumstances, whether as a matter of common sense or of legal principle, but one view is possible, viz., that money so received is the absolute property of the woman descendible as such to her own heirs.

Nor is there any doubt that this alone is consistent with the highest Hindu authorities, including even Jimutavahana. Now from the standpoint of Vignaveswara, the paramount authority of the Benares as well as of the Southern School, all property coming to be owned by a woman devolves on her own heirs without any reference to the mode of its acquisition by her, the doctrine of reverter being entirely unrecognized by him. This, in substance, was what was meant when he laid down that he was using the term "sridhanam" in a non-technical sense, that is to say, not only property obtained by a female by way of gift in the specific circumstances referred to by writers using the term in a technical sense, but all other property howsoever acquired was comprehended in that term as understood by him. The comment he made on the term "adyam" (etc.) in the text of Yagnavalkya was by reference to a phrase expressive in the Hindu law of the general and recognized modes of acquiring property otherwise than by gift. No doubt it is now settled that, notwithstanding Vignaneswara's authority, property inherited by a female from a male or a female would not pass to her own heirs, that is to say, the woman so inheriting takes a limited and qualified estate with reverter annexed to it. But this is no reason for going further and

SUBRAMANIAN CHETTI v. ARUNACHELAM CHETTI.

holding that property vesting in a woman otherwise than by inheritance is also subject to such a devolution after her death. Suppose, for instance, a woman comes upon a treasure trove and becomes entitled to it with reference to the provisions of, say, the Indian Treasure Trove Act (Act VI of 1878) would it be possible to contend that according to Vignaneswara it is not properly obtained by her by "finding" and does not descend to her heirs?

Take again the case of a landed estate held by her under a claim of absolute title as against the true owner sufficient to give her a prescriptive title, would not that be property vesting in her in the language if Vignaneswara be "seizure" and, as such, likewise descending to her heirs, it having been held in similar circumstances that even under the Bengal Law such property would be sridhanam (*Mohin Chundar Sanyal* v. *Kashi Kant Sanyal*(1)).

Now turning to Jimutavahana, no doubt he employed the term sridhanam in the technical sense but the text he adopted for determining whether or not a particular acquisition came under that category was the extent of the power of disposition possessed by the female over it. If the acquisition was at her absolute disposal the property, according to Jimutavahana, was her sridhanam.

It was after considering both the theories thus propounded by these two leading authorities that the Judicial Committee in *Brij Indar Bahadur Singh* v. *Rani Janki Koer*(2) guarding against inherited property being taken to come within the scope of the ruling held that the estate of a deceased Hindu which had been forfeited to Government and by it granted after his death to his widow with full power of alienation become her sridhanam.

Still more to the point is the text of Dewala "Her subsistence, her ornaments, her perquisites and her gains are the separate property of a woman." This is quoted and relied on in the Digests of the Bengal, Benares and Southern Schools such as the Daya Bhaga (chapter IV, section I, verse 15). the Viramitrodaya (chapter V, part I, section 7), the Madhaviya (Burnell's 'Translation,' page 46) and the Saraswati Vilasa (Foulke's 'Translation,' section 276, p. 57). Compare also the Smriti Chandrika, chapter IX,

(1) 2 Calc., W.N., 161. (2) L.R., 5 I.A., 1.

SUBRAMANIAN CHETTI v. ARUNACHELAM CHETTI.

section 1, placita 6 to 10. This text is certainly not to be confined, as suggested on behalf of the defendants, to gifts for maintenance made out of affection, for, as pointed out by Dr. Jolly ('Hindu Law of Partition Inheritance and Adoption,' page 236), the Sanskrit term Vritti (subsistence) in the text has been understood by commentators to include what is given by the heirs, and in *Manilal Rewadat* v. *Bai Rewa*(1) arrears of maintenance recovered by a wife under a decree against her husband were held to be sridhanam, though Aparibhashika sridhanam with reference to the distinctions peculiar to the Mayukha. See also with reference to maintenance generally (*Mussamut Doorga Koonwar* v. *Mussamut Tejoo Koonwar*(2), *Guru Prasad Roy* v. *Nafar Das Roy*(3) and *Court of Wards* v. *Raja Mohessur Roy*(4)) cited for the plaintiffs. There is, lastly, the decision of this Court with reference to the very property now in dispute in a suit between Vijiasami and Mangaleswari where Kindersley and Muthusami Aiyar, JJ., held that the property was the sridhanam of Kunjara (exhibit 4). As to *Sorolah Dossee* v. *Bhoobun Mohun Neoghy*(5) and *Beni Parshad* v. *Puranchand*(6) which relate to the share taken by a mother in a partition between the sons and which were also relied on for the defendants, they are in conflict with *Chhiddu* v. *Naubat*(7) dealing with the same question. Considering that the right of a mother to a share in a partition between the sons is not enforced in this Presidency, the question whether the view of the Calcutta High Court or the Allahabad High Court is correct, in so far as this Court is concerned, is of no practical importance. Nevertheless it is to be observed that the decision in Allahabad does not rest on the general Mitakshara definition of sridhanam but upon a specific text occurring in an earlier part of the work—a text not referred to and considered in the later Calcutta case which was governed by the Benares Law. However this may be, and even assuming the Calcutta view on the point to be correct, the present case must be held to stand on a completely different footing as, unlike in the case of the mother's share, the question here is as to what is not a part of the corpus itself. It thus follows that the property in dispute

(1) I.L.R., 17 Bom., 758.
(2) 5 Suth. W.R., Mis., 53.
(3) 3 B.L.R., 121; S.C., 11 Suth. W.R., 497.
(4) 16 Suth. W.R., 76.
(5) I.L.R., 15 Calc., 292.
(6) I.L.R., 23 Calc., 262.
(7) I.L.R., 24 All., 67.

SUBRAMANIAN CHETTI v. ARUNACHELAM CHETTI.

was Kunjara's sridhanam, and that, consequently, on her death Mangaleswari was the heir.

The other contention on behalf of the defendants was as to the devolution of the property on Mangaleswari's death, taking her to have been the rightful heir. It was urged that, having regard to the actual termination before the Judicial Committee of the litigation in the recent case of *Sheo Shankar Lal* v. *Debi Sahai*(1) it necessarily followed that in the present case the heir entitled to take after Mangaleswari was Vijiasami and not Rani Nachiar, Kulandai Nachiar and Velu Nachiar. The argument was this: In that case the question was whether on the death of Jagarnath, the daughter of Jagarnath, the original owner, the property which was the sridhanam of Jadunath devolved on the sons of Jagarnath or on her daughter; the Subordinate Judge of Goruckpore had held that the sons were the heirs; on appeal the High Court had held that the daughter was the heir, the Judicial Committee having reversed the decree of the High Court and restored that of the Subordinate Judge, it must necessarily be understood that, in their Lordship's view, the sons and not the daughter were the rightful heirs, though according to the Mitakshara and other authorities it would be otherwise.

The explanation suggested on behalf of the plaintiffs was that though according to the *ratio decidendi* of the decision a plea of *jus tertii* founded on the right of the grand daughter might, on behalf of the respondents before their Lordships, have been successfully suggested, no such plea was actually raised, the respondents not having appeared before their Lordships, that consequently the turn which the case took in fact, whatever be its effect as between the parties to that litigation, could not possibly touch the specific conclusions of law distinctly arrived at and fully and clearly expressed in the judgment of their Lordships. This explanation seems to be amply supported both with reference to the circumstances in which the matter decided by their Lordships came to be presented before them and also with reference to the contents themselves of their judgment. Now as to the former, it is apparent from the record of the case to which our attention was drawn on behalf of the plaintiffs that the issue which involved the question eventually decided by their Lordships was raised at

(1) I.L.R., 25 All., 468.

SUBRAMANIAN CHETTI v. ARUNACHELAM CHETTI.

a very late stage of the case before the Subordinate Judge and was framed upon a petition presented on behalf of the defendants in the case, who, for some reason or other, relied on the title of the grand daughter as *jus tertii* with reference only to the view that the property in dispute was sridhaman in the hands of Jagarnath. It was on a plea thus circumscribed and limited that the Subordinate Judge held that it failed. On the appeal to the High Court also the case on behalf of the defendants (appellants there) was presented exactly in the same way, and that Court having come to the conclusion that the property was sridhanam in Jagarnath's hands, the plea of *jus tertii* as above stated, was upheld. On the further appeal by the plaintiffs before the Judicial Committee the appellants alone having appeared and argued, but one short point was presented to their Lordships as that which called for decision, viz., the question of sridhanam or no sridhanam in the hands of Jagarnath, and this being decided in the way in which their Lordships decided it, it was assumed that there was an end of the case as is obvious from the fact that their Lordships after giving final expression to the conclusion that the property was not the sridhanam of Jagarnath add "and this is sufficient to dispose of the present case."

Passing now to the judgment itself, it having been held that Jadunath's property was not sridhanam in the hands of Jagarnath and that the descent was no longer to be traced from her their Lordships, approving of and following the cases *Vijiarangam* v. *Lakshuman*(1), *Manilal Rewadat* v. *Bai Rewa*(2) and *Virasangappa Shetti* v. *Rudrappa Shetti*(3) decided in this country and cited by them in *Sheo Shankar Lal* v. *Debi Sahai*(4) adopted as they had to do the rule of reverter, that is to say, they held that on the death of a female inheriting sridhanam succession was to be traced again as from the last full owner and that the property devolved on that person who, at the death of the qualified owner, was the heir to the sridhanam of the full owner. This is patent not only from the direct reference in their Lordships' judgment to those cases, but also from a significant passage which occurs in *Sheo Partab Bahadur Singh* v. *The Allahabad Bank*(5), in which a cognate point

(1) 8 Bom. H.C.R.O.C.J., 244 at p. 272.
(2) I.L.R., 17 Bom., 758 at p. 761.
(3) I.L.R., 19 Mad., 110 at p. 118.
(4) I.L.R., 25 All., 468 at p. 473.
(5) I.L.R., 25 All., 476.

SUBRAMANIAN CHETTI v. ARUNACHELAM CHETTI.

was raised and which was decided on the same day as *Sheo Shankar Lal* v. *Debi Sahai*(1) judgment in both being delivered by his Lordship Sir Arthur Wilson. Now the property to which the dispute in the latter case related had formed part of the subject of litigation in *Brij Indar Bahadur Singh* v. *Rani Janki Koer*(2) referred to in a previous part of this judgment. As already stated it was held to be the sridhanam of the widow to whom the Government had made the grant, one Kablas Kunwari. In the litigation which arose after the death of Janki, the daughter of Kublas Kunwari, and which also came before the Judicial Committee, it had been observed (*Jagdish Bahadur* v. *Sheo Partab Singh*(3)). "It is not disputed that the succession must be to the heirs of her (Janki's) father." After quoting this passage his Lordship, Sir Arthur Wilson, adds a comment by way of explanation "presumably as the sridhanam heir of her mother" (*Sheo Partab Bahadur Singh* v. *The Allahabad Bank*(4)), a comment which decisively points to the conclusion that in *Sheo Shankar Lal* v. *Debi Sahai*(1) their Lordships unquestionably took the view that the succession to Jadunath's sridhanam property on Jagarath's death was to heirs of Jadunath's sridhanam and to none else. No doubt their Lordships refer to W. H. Macnaghten's view on the question discussed. But it is obvious that the learned author's view on the point was relied on only to the extent that sridhanam inherited by a female was in her hands also not sridhanam and not with reference to the further proposition stated by him to the effect that in regard to the devolution of the property on her death she was to be a stock of descent. That this latter proposition was rejected by their Lordships is not merely a matter of inference from its being inconsistent with the rule of reverter accepted by them, but is clear from the fact that in *Huri Doyal Singh Sarmana* v. *Grish Chunder Mukerjee*(5) referred to and approved of by their Lordships it is pointed out that Macnaghten was in error in treating a female taking sridhanam by inheritance as the stock of descent with reference to the devolution of the property on her death, and the observations of Mitter, J., to the same effect in a previous case are quoted *in extenso* in the part of the report cited by their Lordships. There can, therefore, be no

(1) I.L.R., 25 All., 468 at p. 473.
(2) L.R., 5 I.A., 1.
(3) L.R., 28 I.A., 106.
(4) I.L.R., 25 All., 476.
(5) I.L.R., 17 Calc., 911.

SUBRAMANIAN CHETTI v. ARUNACHELAM CHETTI.

doubt that no line of heirs different from that laid down by the recognized authorities with reference to the descent of sridhanam property in cases like the present was, or was intended to be laid down by their Lordships in *Sheo Shankar Lal* v. *Debi Sahai*(1) and as, according to those authorities (Mitakshara, chapter II, section XI, p. 9); the Smiriti Chandrika, chapter IX, section III, p. 22; the Madhaiya Burnell's 'Translation,' p. 43, and the Saraswati Vilasa (Foulke's 'Translation,' section 300, p. 60), a daughter's daughter is entitled to take in preference to a daughter's son the sridhanam of their grandmother it follows that on Mangaleswari's death the shares in dispute as Kunjara's sridhanam did not pass to Vijiasami but to Rani Nachiar, Kulandai Nachiar and Velu Nachiar who, of course, took only a limited and qualified estate.

The plaintiffs therefore, as claiming through them, are entitled to recover possession, it being clear that this suit is in time inasmuch as, apart from article 141 of the Indian Limitation Act, it is satisfactorily shown that on Kunjara's death Mangaleswari took and held possession during her life. She asserted her possession in exhibit XXIII, the power of attorney which she executed shortly after Kunjara's death in regard to some steps she wanted to take as against Vijiasami in reference to certain of her mother's properties said to have been in his charge in consequence of his having acted as the manager of Kunjara during her life time in the suit brought by Vijiasami himself claiming the shares under the alleged will of Kunjara, he apparently treated himself as out of possession, having admitted, as he did, that for one year the produce of the property had been taken away, and claimed mesne profits, an issue in respect of which was framed in the case (exhibit H_2). There is no doubt a conflict in the oral evidence on this question of possession, but the circumstances just adverted to render that adduced in favour of Mangaleswari's possession more entitled to weight. For all these reasons the appeal must be held to fail and accordingly I would dismiss it with costs.

BENSON, J.—I concur.

RUSSELL, J.—I concur.

(1) I.L.R., 25 All., 468 at p. 473.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Boddam.

VANGALA DIKSHATULU AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

VANGALA GAVARAMMA AND OTHERS (DEFENDANTS AND THIRD DEFENDANT'S LEGAL REPRESENTATIVES), RESPONDENTS.*

1903. November 5, 11. 1904. April 20.

Hindu Law—Enfranchisement of service inams—Grant of title-deed to widow in respect of personal inam given to her late husband—Widow's estate.

Certain property was given to a widow's late husband by his maternal grandfather. It was enfranchised by the Inam Commissioner in the name of the widow, to whom a patta was issued. The widow alienated the property. In a suit by reversioners for a declaration that the alienation was not binding on them except during the lifetime of the widow:

Held, that the grant of the inam title-deed to the widow did not constitute the property her absolute property. The inam was taken by inheritance by the widow as the widow of the previous holder.

Cherukuri Venkanna v. *Mantravathi Lakshmi Narayana Sastrulu*, (2 M.H.C.R., 327), followed.

Subba Naidu v. *Nagayya*, (Second Appeal No. 604 of 1900, (unreported)), commented on.

SUIT for a declaration that a certain sale by a Hindu widow was not valid and binding on plaintiffs beyond the lifetime of the widow. Plaintiffs sued as reversioners to the estate of one Brahmanna, the deceased husband of first defendant. The defence was, *inter alia*, that plaintiffs were not reversioners, as alleged by them. The Subordinate Judge so held and dismissed the suit, without deciding the second and third issues, which raised the questions as to whether the alienations in question were made for necessary and valid purposes and were binding, and whether the widow had an absolute right in the property alienated. The property in question had been given to the widow's late husband by his maternal grandfather and had been enfranchised by the Inam Commissioner in the name of the widow, to whom a patta was issued.

Plaintiff preferred this appeal, which came, in the first instance, before the Officiating C.J. and Bhashyam Ayyangar, J., who held that plaintiffs had established the relationship set up by them

* Appeal No. 69 of 1901, presented against the decree of M.R.Ry. C. G. Kuppuswamy Ayyar, Subordinate Judge of Cocanada, in Original Suit No. 38 of 1900.

VANGALA DIKSHATULU v. VANGALA GAVARAMMA.

and their right to succeed to the estate of the widow's late husband on the death of the widow. A finding was accordingly called for on the second and third issues. The Subordinate Judge found that the alienations in question were not justified by any necessity. On the third issue he found that the property was that of the widow's late husband, though it had been enfranchised in the name of the widow. He held that the widow took a limited, or restricted estate in it, and that it did not become her exclusive or absolute property simply because the inam title-deed had been issued in her favour.

The appeal came on for hearing after the return of these findings, before the Court constituted as above.

V. Krishnaswami Ayyar and *V. Ramesam* for appellants.

C. Ramachandra Rau Sahib, *S. Srinivasa Ayyangar* and *I. V. Ramanuja Rau* for first and second respondents.

JUDGMENT.—As regards the alienations under exhibit J, we agree with the Subordinate Judge that it is not an alienation binding upon the reversioner. We cannot accept the suggestion that the grant of the inam title-deed to the first defendant, the widow, constituted the property her absolute property. The inam was taken by inheritance by the first defendant as the widow of the previous holder. Though there has been some difference of opinion as to the effect of the enfranchisement of service inams, there never has been any doubt that enfranchisement or grant of title-deed in respect of personal inams in any way affects the right of parties entitled thereto. This was laid down so far back as 1865 in *Cherukuri Venkanna* v. *Mantravathi Lakshmi Narayana Sastrulu*(1). The law as laid down there was adopted by the legislature itself in Madras Act VIII of 1869. The case of *Subba Naidu* v. *Nagayya*(2) to which our attention has been drawn, if inconsistent with our view, cannot be held to be of any binding authority considering that it is opposed to *Cherukuri Venkanna* v. *Mantravathi Lakshmi Narayana Sastrulu*(1) which it does not notice, and to the terms of the enactment referred to above.

We must therefore accept the findings and, reversing the decree of the Subordinate Judge, pass a decree in terms of the prayer of the plaint with costs throughout inclusive of the costs incurred on the findings.

(1) 2 M.H.C.R., 327. (2) S.A. No. 604 of 1900 (unreported).

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Boddam.

RAJA OF VENKATAGIRI (PLAINTIFF), APPELLANT,

v.

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

1904. August 10.

Injunction—Water-course—Construction of new channel—Prior to construction water flowed naturally or percolated without definite course—Material alteration.

Plaintiff sued for an injunction to restrain defendant from making or using a water-channel. Prior to the construction of the channel, all the water that flowed from the defendant's land on to the plaintiff's found its way there by natural flow or percolation and was not carried down by any definite water-course. The effect of the channel was to collect water which formerly flowed from a large tract of land at different points into a definite channel and to throw it all into a particular part of the plaintiff's channel:

Held, that plaintiff was entitled to the relief sought. Even though no greater quantity of water might eventually be carried into plaintiff's channel than had hitherto run into it, the new channel effected a material alteration in the mode of the passage of the water from the defendant's land into that of the plaintiff. Such a change plaintiff was entitled to object to.

SUIT for a declaration that defendants had no right to make, maintain or use a new channel, for an injunction, for an order directing defendants to fill up the channel and for damages. The channel complained of was not an old channel but one recently dug by the defendants. Prior to its excavation, all the water that flowed from the defendant's lands on to plaintiff's found its way there by natural flow or percolation, and was not carried down by any definite water-course. The effect of the channel was to collect water which formerly flowed from a large tract of land at different points into a definite channel and to throw it all into a particular part of plaintiff's channel. The District Munsif held that defendant had no right to open or use the channel and he directed him to close and fill it up and to restore the site of the channel to the condition in which it was before the channel was dug. Defendant

* Second Appeal No. 1224 of 1902, presented against the decree of T. M. Swaminadha Ayyar, Esq., Acting District Judge of Nellore, in Appeal Suit No. 34 of 1901, presented against the decree of M.R.Ry. Y. Janakiramayya Garu, District Munsif of Nellore, in Original Suit No. 187 of 1899.

RAJA OF VENKATAGIRI v. RAJA MUDDU-KRISHNA.

appealed to the Acting District Judge, who reversed that decree and dismissed the suit.

Plaintiff preferred this second appeal.

V. Krishnaswami Ayyar and *S. Subrahmania Ayyar* for appellant.

Messrs. *T. Venkatasubba Ayyar* and *Narayana Sastri* for respondents.

JUDGMENT.—The facts found are that the channel in dispute is not an old channel but one recently dug by the defendants. Prior to its excavation, all the waters that flowed from the defendant's lands on to the plaintiff's found their way there by natural flow or percolation and were not carried down by any definite water-course. In these circumstances, even though no greater quantity of water might eventually be carried into the plaintiff's channel than hitherto ran into it, it is clear that the new channel effects a material alteration in the mode of the passage of the water from the defendant's land into that of the plaintiff. Such a change the plaintiff is entitled to object to (see *West Cumberland Iron and Steel Company* v. *Kenyon*(1)). In truth, the excavation of the present channel is an attempt to create a right of easement where none such existed. This, without the consent of the owner of the land affected by the new work, is, of course, not lawful. *Gopal Reddi* v. *Chenna Reddi*(2) has no bearing upon the present case as here there is no question of work done for the protection of one's own land against extraordinary flood in a natural stream. *Whalley* v. *The Lancashire and Yorkshire Railway Company*(3) referred to and relied on by SHEPPARD, J., in *Gopal Reddi* v. *Chenna Reddi*(2) is also, so far as it goes, an authority against the conclusion of the District Judge, as there the Railway Company was held liable because it had concentrated in a particular channel the flow of the water which even otherwise would have escaped on to the plaintiff's land but with less damage to that property.

It is scarcely necessary to say that the collection of the water which formerly flowed from a large tract of land at different points into a definite channel and the throwing of it all into a particular part of the plaintiff's channel, must lead to consequences

(1) L.R., 11 Ch.D., 782. (2) I.L.R., 18 Mad., 158.
(3) L.R., 13 Q.B.D., 131.

RAJA OF VENKATAGIRI v. RAJA MUDDU-KRISHNA.

very different from those which had been produced in the previous state of things. We must 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 CRIMINAL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Sankaran Nair.

VENKATRAMA CHETTI (APPELLANT), PETITIONER,

1904. July 13, 19.

v.

EMPEROR, RESPONDENT.*

~~District Municipalities~~ Act—(Madras) Act III of 1889, s. 4—Allowing offensive matter to flow into a 'street'—Discharge into drains not forming part of street—Definition of 'street'.

A defendant was charged under section 4 of the Madras ~~District Municipalities~~ Act with allowing offensive matter to flow from his house into a street. The matter flowed into a drain or ditch constructed along the side of the roadway. On the question as to whether any offence had been committed:

Held, that a 'street' is any way or road in a city having houses on both sides; and that in consequence this definition excluded the drain or ditch on either side of the roadway; that the drain was not part of the 'street', and that the offence charged had not been committed.

CHARGE of letting offensive matter from a house flow into a street, under section 4 of (Madras) Act III of 1889. The defendant was convicted and ordered to pay a fine of Rs. 2 and in default to undergo simple imprisonment for two days. The conviction and sentence were confirmed on appeal. Defendant preferred this criminal revision petition. The facts are sufficiently set out in the judgment.

* Criminal Revision Case Nos. 64 and 65 of 1904, presented under sections 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the judgments of M.R.Ry. V. Chappan Menon, Deputy Magistrate of Erode Sub-Division, in Criminal Appeals Nos. 119 and 120 of 1903, presented against the convictions and sentences of M.R.Ry. P. Tangavelu Mudaliar, Stationary Second-class Magistrate of Dharapuram, in Calendar Case Nos. 361 and 362.

VENKATRAMA CHETTI v. EMPEROR.

K. Narayana Row for petitioner.

The Public Prosecutor in support of the convictions.

ORDER.—In Criminal Revision Case No. 64 of 1904, the petitioner Venkatrama Chetti has been convicted of letting offensive matter from his house flow into a street, under section 4 of Madras Act III of 1889.

He contends that the matter discharged from his house is not offensive matter and has examined a witness who swears that the so-called offensive matter is "the water used for bathing purposes" in his house. He further contends that the water was not discharged into the street but only into a drain by the side of his house and that such drain does not form part of the street within the meaning of Act III of 1889.

It is found by both the lower Courts that the accused has allowed the water to flow into what is called in their judgments a 'drain' or 'ditch' constructed alongside the roadway.

The question therefore for decision is whether this 'drain' or 'ditch' forms part of the street.

The word 'street' is not defined in Act III of 1889, so we must take it to have been used in its ordinary and popular sense. We do not think it necessary to refer to the definitions of the word in other Acts as they do not exclude the ordinary sense of the word but only extend the term so as to include what otherwise would not be covered by it. See *Vestry of St. Mary Islington* v. *Barrett*(1).

What, then, is its ordinary meaning? Jessel, M.R., in *Taylor* v. *Corporation of Oldham*(2) accepts the following definition laid down in the Imperial Dictionary. "A street is properly a paved way or road but in usage any way or road in a city having houses on one or both sides."

This definition excludes what is called in this case the 'drain' or 'ditch' on either side of the roadway and we must hold therefore that this drain is not part of the street.

The accused has therefore not allowed any matter to flow into the 'street.'

On this ground the conviction must be set aside and the fine, if levied, refunded.

(1) L.R., 9 Q.B., 283. (2) L.R., 4 Ch.D., 395 at p. 408.

VENKATRAMA CHETTI v. EMPEROR.

Criminal Revision Case No. 65 *of* 1904;—This case follows our order in Criminal Revision Case No. 64 of 1904 and for the like reasons as are recorded in our order therein, we set aside the conviction and direct that the fine, if levied, be refunded.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Boddam.

MEENAKSHI GINNING AND PRESSING COMPANY (LD.) (DEFENDANT), APPELLANT,

1904. March 7, 8, 16.

v.

MYLE SREERAMULU NAIDU (PLAINTIFF), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *s.* 17, *Explans. II and III—Jurisdiction—Place where contract was made—Promissory note dated and signed within the jurisdiction of one Court, and sealed and countersigned elsewhere.*

A negotiable promissory note, drawn on behalf of a Company, was signed by the Secretaries and Treasurers and dated at Bellary. The note was then sent to another place, where the Agent countersigned and affixed the seal to it and posted it, addressed to the payee at Madras, who received it there. A suit was subsequently brought on the note in the Court at Bellary:

Held, that the Court had jurisdiction. A statement of the place of execution is not essential to the validity of a negotiable promissory note, nor are the parties precluded from dating it at a place different from that at which it is actually made, if, for any propose of theirs, they consider it necessary to do so. Where, therefore, a negotiable note is dated with reference to a specified place, and the justice of the case does not necessitate a different conclusion, the parties should be presumed to have agreed to that place being taken to be the place of the contract.

Winter v. *Round*, (I.M.H.C.R., 202), referred to.

SUIT on a promissory note. Plaintiff was the indorsee of a negotiable promissory note executed on behalf of a Company, and he sued in the District Court at Bellary. The question raised and decided was whether that Court had jurisdiction to entertain the suit, on the ground that the contract had been made at Bellary. The facts found were that the signatures of the Secretaries and

* Appeal No. 44 of 1902, presented against the decree of S. Russell, Esq., District Judge of Bellary, in Original Suit No. 22 of 1901.

MEENAKSHI GINNING AND PRESSING COMPANY v. MYLE SREERAMULU NAIDU.

Treasurers had been affixed and the note was dated at Bellary. The note was in the following terms :—

BELLARY,
Rs. 2,194-7-10. *22nd December* 1898.

One year after date from 1st January 1899 we promise to pay the Official Assignee, Madras, or order the sum of rupees two thousand one hundred and ninety-four, annas seven and pies ten only at six per cent. per annum for value received.

(Signed) ARUMUGAM and SAMBANDAM,
Secretary and Treasurer,
the Madura Meenakshi Ginning and Pressing Company (Ld.)

The note was then sent to Tirumangalam, where it was countersigned by the Agent and the seal was affixed to it. It was then posted at Tirumangalam, addressed to the payee, who received it at Madras. The District Judge held that the Court had jurisdiction, and decreed in plaintiff's favour. Defendants preferred this appeal.

K. Srinivasa Ayyangar for appellant.

Mr. *C. Krishnan* for respondent.

JUDGMENT.—The plaintiff, the indorsee of a negotiable promissory note, dated the 22nd December 1898, purporting to have been executed to the Official Assignee, Madras, on behalf of the Madura Meenakshi Ginning and Pressing Company (Limited), instituted the present suit in the District Court of Bellary and obtained a decree and the present appeal is by the Company. Article 96 M (*e*) and (*f*) of the articles of association show that the Company is authorized to issue a negotiable promissory note. The note in question is signed by the two Secretaries and Treasurers of the Company who, under article 123, had, among other things, the power of entering into and executing contracts on behalf of the Company. The evidence shows that, after the promissory note in question was signed by the Secretaries and Treasurers, the same was sealed with the Company's seal and countersigned by another officer called the "Agent" working under the supervision of the Directors at the head office in Tirumangalam, in the Madura district, while the Secretaries and Treasurers stayed in Bellary in the subordinate office in that station. No doubt article 96, already referred to, relates only to the powers and duties of Directors but the Directors have power to delegate all their functions to "the Secretaries and Treasurers or officers for the time being of the Company

MEENAKSHI GINNING AND PRESSING COMPANY v. MYLE SREERAMULU NAIDU.

or such other person or persons as the Board (of Directors) thinks fit," subject to two exceptions which are not material to the present case. There can be no doubt that the debt on account of which the promissory note in question was given is a debt of the Company, it being one of the debts mentioned in the special resolutions passed by the extraordinary general meeting of the shareholders of the Company on the 6th November 1898 and confirmed by the said body on the 27th idem (see exhibit A). No evidence was adduced on behalf of the Company to show that the note was not binding on it or to rebut the inference in favour of the execution of the note with the knowledge and consent of the Directors suggested by the fact of the affixing of the seal in the circumstances already stated. It may be added that the promissory note itself appears to have been given as the result of previous negotiations between the Official Assignee and the Secretaries and Treasurers with reference to the debt mentioned in the special resolution some reduction of interest and a year's time for payment having been granted by the Official Assignee as the result of the negotiations. It is therefore clear that the promissory note was a contract binding upon the Company and the only question for determination is whether the Bellary Court had jurisdiction to try the suit. And that Court must be held to have had jurisdiction under the provisions, of section 17, explanations II and III of the Code of Civil Procedure, if, as contended for the plaintiff, the contract should be taken to have been made in Bellary. As a matter of fact the signatures of the Secretaries and Treasurers were affixed to the note at Bellary. However, the note was thereupon sent to Tirumangalam and, after being countersigned by the agent and the seal affixed to it, it was posted there, addressed to the Official Assignee, who received it in Madras. It was urged for the Company that as the contract by the note became complete only when it was posted in Tirumangalam that was the place where the contract was made. The argument on behalf of the plaintiff was that the note having been dated at Bellary the contract should be treated as made in Bellary, and this seems correct.

Now a statement of the place of execution is, of course, not essential to the validity of a negotiable promissory note, nor are the parties precluded from dating the note at a place different from that at which it is actually made, if, for any purpose of theirs,

MEENAKSHI GINNING AND PRESSING COMPANY v. MYLE SREERAMULU NAIDU.

they consider it necessary to do so. Where, therefore, a negotiable note, as in the present instance, is dated with reference to a specified place and the justice of the case does not necessitate a different conclusion, the parties should be presumed to have agreed to that place being taken to be the place of the contract. In *Winter* v. *Round*(1) Bittleston, J., was apparently disposed to take the same view. In *Tillatson* v. *Tillatson*(2), it was held that a note dated in one State but made in another is presumed to be payable where dated and is governed by the laws of that State. In other words, the place of the dating was taken as the place of the contract. So, where a bill was drawn by a firm in Philadelphia and dated there but the time of payment and names of drawee and payee had been left blank to be filled in and negotiated by a partner of the firm in London who filled in and negotiated the bill there, the bill was held to be one drawn and indorsed in Philadelphia (*Senning* v. *Ralston*(3)). In the same case it was further held that, though actually negotiated outside Pennsylvania, *i.e.*, in London, the indorsees not having had notice, the bill was a Philadelphia bill so as to entitle the indorsees to the damages allowed by a Pennsylvania statute, on the principle that a contract is binding on the promisor in the sense in which he intended, at the time of making it, that it should be received by the promissee.

We dismiss the appeal with costs.

(1) 1.M.H.C.R., 202.

(2) Parson on 'Contracts', 7th Edition, Vol. II, 716.

(3) 23 Perm. St. R., 137, Vol. VII, col. 43, Century Digest.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

1904. February 25, 26.

SUBBARAYA MUDALIAR AND TWO OTHERS (DEFENDANTS Nos. 1 TO 3), APPELLANTS,

v.

VEDANTACHARIAR AND SEVEN OTHERS (PLAINTIFFS Nos. 1 TO 6 AND DEFENDANTS Nos. 6 AND 12), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *s.* 11—*Suits of a Civil nature—Right to property or to an office—Jurisdiction of Civil Courts—Suit for declaration of right to recite texts—Maintainability.*

A suit is not cognizable in a Civil Court where the subject of the plaintiffs' claim is confined to rights in religious ceremonies without a claim to any office or any emolument. A right to recite sacred texts in a temple is a matter of ritual or ceremony in a religious matter with which a Civil Court has nothing to do.

SUIT for a declaration and for damages. Plaintiffs, in their plaint, alleged that they and other Vadagalai Brahmins like themselves had from time immemorial been enjoying the privilege of reciting certain sacred texts in a temple and in the streets during the procession of the god and on other occasions. They alleged that they had, "in virtue of that office been receiving the honours in the form of tulasi, shadagopam, theertam, etc., as well as the distribution of prasadam, thosai, sugar and soondal." They further alleged that they had been receiving distributions of sandal, betel-nut, flowers and cash at feasts and on other occasions. They then alleged that the festivals had been suspended for a period of seven or eight years, and when they were recommenced disputes arose between the plaintiffs and the defendants, the Tengalais, as to the recital of the texts, and finally a razinamah was entered into as to the manner in which each sect should recite the texts respectively. They complained that defendant riotously obstructed them and that in order to prevent disputes the Head Assistant Magistrate had at last passed orders that the Vadagalais should establish their right in a Civil Court, and that in the meanwhile they should

* Second Appeals Nos. 516 and 517 of 1902, presented against the decree of M.R.Ry. P. S. Gurumurti Ayyar, Subordinate Judge of Kumbakonam, in Appeal Suits Nos. 1084 and 1085 of 1900, presented against the decree of M.R.Ry. V. Cuppusamy Ayyar, District Munsif of Tirutturaippundi, in Original Suit No. 22 of 1899 (Original Suit No. 339 of 1887) on the file of the District Munsif of Negapatam.

SUBBARAYA MUDALIAR v. VEDANTA-CHARIAR.

not recite the texts, etc. They contended that this order was contrary to law; that they and other Vadagalai Brahmins had the right to recite the texts in accordance with usage from time immemorial and with the razinamah, that the curtailment of their rights was unlawful, and that they had suffered damage; and prayed for a declaration of those rights and for compensation. The District Munsif decreed in plaintiffs' favour declaring the right of the Vadagalai Brahmins represented by plaintiffs as set out in the razinamah, but dismissed the rest of the claims. Defendants appealed to the Subordinate Judge, who dismissed the appeal and (on plaintiffs' cross-appeal) awarded one anna as damages to plaintiffs Nos. 1 to 6, and in other respects confirmed the Munsif's decree.

Defendants Nos. 1 to 3 preferred this second appeal.

T. Rangachariar for appellants.

V. Krishnaswami Ayyar and *P. R. Sundara Ayyar* for respondents.

JUDGMENT.—On the question which we have first to consider, namely whether this suit is cognizable by a Civil Court, we have no hesitation in deciding that it is not.

The explanation to section 11 of the Code of Civil Procedure which governs the question runs as follows: "A suit in which the right to property or to an office is contested is a suit of a Civil nature notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies."

Now, here the subject of the plaintiffs' claim was confined to rights in religious ceremonies, without a claim to any office or any emoluments. The plaintiffs did ask for damages on account of perquisites which they had been prevented from getting, but this was a mere fiction apparently put in to clothe the Court with jurisdiction for though both the Courts have declared the plaintiffs' rights in other respects neither Court has declared the plaintiffs' right to any office or to any emoluments. The Subordinate Judge has, it is true, made an addition to the Munsif's decree by giving the plaintiffs Nos. 1 to 6 one anna as nominal damages between them, but this was quite unjustifiable and is as fictitious as the plaintiffs' claim itself for damages. The plaintiffs' claim was on behalf of all the members of the Vadagalai community wherever residing, numbering many untold thousands and it is obvious that the whole of an ill-defined community cannot be

SUBBARAYA MUDALIAR v. VEDANTA-CHARIAR.

entitled to any particular office in a particular temple or to any emoluments or perquisites thereof. Hence there is no claim by the plaintiffs for an office, and their claim for damages is purely imaginary. The decree of the Courts below, after excising the hypothetical damages granted by the Subordinate Judge, is itself a confirmation of our view of what the plaintiffs' claim really was, as it only declares the right of the plaintiffs' community to recite certain sacred texts in the temple in question either after or apart from the Tengalai community. This is clearly a mere matter of ritual or ceremony in a religious matter with which a Civil Court can have nothing to do. The decree makes no declaration in respect to any "right to property or to an office" or to any general right of the Vadagalais to worship in this temple, which has never been disputed.

The mere fact that the plaintiffs have claimed the declaration they seek in the alternative under the terms of a razinamah (exhibit C) does not assist them, for this razinamah was entered into in May 1893 between the then heads of the rival sects of Vadagalais and Tengalais residing in Negapatam to enable certain ceremonies to be performed in the temple in question. That this was only a temporary arrangement, made with a view to prevent a breach of the peace, appears from the order of the Head Assistant Magistrate exhibit XVI, dated the 21st July 1893. This agreement cannot therefore be treated as a contract binding all the members of both communities wherever residing for all time. For these reasons we allow these second appeals and dismiss the plaintiffs' suit with costs throughout. The memoranda of objections that have been filed in the cases have not been argued by the plaintiffs' pleader.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Sankaran Nair.

1904. July 15.

RANGASAMY NAICKEN (PLAINTIFF COUNTER-PETITIONER), APPELLANT,

v.

THIRUPATI NAICKEN (SECOND DEFENDANT PETITIONER), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *s.* 244—*Execution of decree—Decree passed* ex parte *against father and son on promissory note signed by father alone—Application in execution for arrest of son—Objection to arrest on ground that decree was wrongly passed against son—Maintainability.*

A judgment-creditor sued a Hindu father and his son on a promissory note signed only by the father. Neither defendant appeared or defended the suit and a decree was passed against both. The father died and the judgment-creditor made the present application in execution and asked for the arrest of the son. The latter asked the Court to direct that he was not liable to arrest under the decree:

Held, that the decree had not been passed without jurisdiction and the judgment-debtor was precluded, in execution proceedings, from impeaching the decree, which had been passed without opposition and which had not been set aside.

If a decree is passed by a Civil Court which had absolutely no jurisdiction to pass it, even a party to the proceeding may impeach it as a nullity, though it has not been set aside in appeal or otherwise. This was not such a case, as the District Munsif was competent to pass a personal decree against the present judgment-debtor if the evidence required to establish the personal liability had been then produced. The fact that a decree had been passed in the absence of such evidence would not make it a decree passed without jurisdiction.

Sardarmal v. *Aranvayal Sabhapathy,* (I.L.R., 21 Bom., 205), and *Gomatham Alamelu* v. *Komandur Krishnamacharlu,* (I.L.R., 27 Mad., 118), approved.

EXECUTION PETITION, asking for relief by arrest of the judgment-debtor. The judgment-debtor applied for an order that he was not liable to arrest under the decree. The decree-holder had obtained a decree against the judgment-debtor in Original Suit No. 485 of 1901. The judgment-debtor was second defendant in that suit

* Civil Miscellaneous Second Appeal No. 100 of 1903, presented against the order of Vernor A. Brodie, Esq., District Judge of Coimbatore, in Appeal Suit No. 33 of 1903, presented against the order of M.R.Ry. P. Sadasiva Ayyar, District Munsif of Coimbatore, in Execution Petition No. 455 of 1902 (Original Suit No. 455 of 1901).

which was on a promissory note executed by the father alone. It was alleged that the money for which the promissory note was given had been advanced by plaintiff for the marriage expenses of the present judgment-debtor. In the plaint, relief was asked for personally against father and son, but neither appeared or contested the claim, and a decree was passed as prayed for. An application to set aside the decree was made by the present judgment-debtor, but it was rejected as he failed to comply with the terms of the order, which directed him to furnish security. The father was now dead. The District Munsif rejected the judgment-debtor's petition. The District Judge, on appeal, held that the present judgment-debtor was not liable personally for the debt.

The decree-holder preferred this appeal.

Hon. Mr. *P. S. Sivaswami Ayyar* for appellant.

S. Kasturiranga Ayyangar for respondent.

JUDGMENT.—The plaintiff, in Original Suit No. 485 of 1901, obtained a decree, against the respondent, who was the second defendant therein, and his father, for the payment of a sum of money lent to the father and alleged to have been paid for the marriage of the respondent. The suit was on a promissory note executed by the father alone. The plaint contained a prayer for a personal decree against both the defendants. Neither of them appeared or contested the claim. A decree was passed as prayed for. An application to set aside the decree was made by the respondent, but the application was rejected as he failed to comply with the terms of the order which directed him to furnish security. The father, the first defendant, is dead. An application was once before made to execute the decree against the second defendant and he was arrested in pursuance of the order then passed to execute the decree. The amount was not then realized. The plaintiff now applies to execute the decree and the District Judge has held that the decree making the second defendant personally responsible was not a valid decree, apparently on the ground that the circumstances which alone would warrant a personal decree against the second defendant did not exist and had not been proved.

If a decree is passed by a Civil Court which had absolutely no jurisdiction to pass it, even a party to the proceeding may impeach it as a nullity, though it had not been set aside in appeal or otherwise.

RANGASAMY NAICKEN v. THIRUPATI NAICKEN.

This, however, is obviously not such a case; as the District Munsif, in Original Suit No. 485 of 1901, was quite competent to pass a personal decree against the second defendant if the evidence required to establish the personal liability had been then produced.

The fact that a decree was passed in the absence of such evidence would not make it a decree passed without jurisdiction and a party to the suit is precluded in execution from impeaching the decree which was passed without opposition and which has not been set aside. (Cf. *Revell* v. *Blake*(1), *Sardarmal* v. *Aranvayal Sabhapathy*(2) and *Gomatham* v. *Alamelu Komandur Krishnamacharlu*(3)).

The case of *Lakshmanaswami Naidu* v. *Rangamma*(4) is clearly distinguishable. The decision proceeded on the footing that the decree there in question was on the face of it null and void.

We, therefore, reverse the order of the District Judge and direct that the application for execution be replaced on the file and proceeded with in accordance with law. The respondent will pay the appellant's costs in this and in the lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Sankaran Nair.

1904. July 13, 14, 22.

VEERABADRAN CHETTY AND OTHERS (RESPONDENTS), APPELLANTS,

v.

NATARAJA DESIKAR (PETITIONER), RESPONDENT.*

Letters Patent, Art. 15—Appeal—Order by single Judge ordering commission to issue to examine a witness—Civil Procedure Code—Act XIV of 1882, ss. 383, 386—Power of Courts to issue commission—Cases enumerated in sections exhaustive—Court may prevent abuse of its process.

The present appellants obtained a decree against the late head of a mutt, and in execution thereof, attached certain gold and silver articles. The respondent,

(1) L.R., 8 C.P., 533.
(2) I.L.R., 21 Bom., 205 at p. 211.
(3) I.L.R., 27 Mad., 118.
(4) I.L.R., 26 Mad., 31.

* Appeal No. 6 of 1904, presented under Article 15 of the Letters Patent, against the judgment of Mr. Justice Boddam in Civil Revision Petition No. 486 of 1903, presented against the order of the Subordinate Judge of Madura (East), in Miscellaneous Petition No. 115 of 1903.

VEERABADRAN CHETTY v. NATARAJA DESIKAR.

the present head of the mutt, who had been made a party to the execution proceedings as the representative of the deceased, contended that the attached articles were not liable to be sold in execution of the decree as they were not assets of the deceased but property belonging to the mutt. The appellants thereupon applied to the Subordinate Judge to summon the respondent as a witness for the appellants. The respondent, who resided within the jurisdiction of the Court, then applied to the Subordinate Judge to take his evidence on commission, stating that he was unable, of his own personal knowledge, to give any evidence material to the questions at issue, and alleging that the appellants were insisting onhis appearance in Court to put pressure upon him to relinquish or compromise his claim, as it was considered derogatory to a person in his position to appear in Court as a witness. The Subordinate Judge refused to issue a commission. On a revision petition being filed, a single Judge of the High Court set aside the order of the Subordinate Judge and ordered the respondent to be examined on commission. On an appeal being preferred under Article 15 of the Letters Patent:

Held, that an appeal lay.

Held also, that the issue of commissions for the examination of witnesses by the Courts of this country is governed solely by the provisions of the Code of Civil Procedure, and section 386 is exhaustive, and provides for all the cases in which the legislature intended that it should be competent to a Court to issue a commission for the examination of witnesses resident within its jurisdiction.

Held further, that a litigant's privilege of taking out summonses to witnesses is subject to the control of the tribunal which is called upon to enforce their attendance, though such control will be exercised sparingly and only in exceptional cases. This control is an instance of the authority of every Court of competent jurisdiction to prevent abuse of its process. In the present case, the appellant's application was not *bonâ fide*, and the respondent's attendance in Court was required, not for the purpose of obtaining material evidence but from other motives, and the order for the issue of a commission was therefore rightly made.

APPLICATION to the Court to summon a witness; and subsequent application by the witness that his evidence might be taken on commission. The facts are fully set out in the judgments. The Subordinate Judge refused to issue a commission. That order was set aside in revision by Boddam, J. Against the latter decision an appeal was preferred under Article 15 of the Letters Patent.

Hon. Mr. *P. S. Sivaswami Ayyar* and *K. N. Ayya* for appellants.

S. Srinivasa Ayyangar for *P. R. Sundara Ayyar* for respondent.

JUDGMENT—SUBRAHMANIA AYYAR, J.—The appellants obtained a decree against the late Pandara Sannadhi of Tiruvannamalai Mutt in the Madura district for moneys lent to him. In execution of the decree certain gold and silver pooja articles, etc., were attached and seized. The respondent, the present head of the

VEERA-BADRAN CHETTY v. NATARAJA DESIKAR.

mutt, who had been made a party to the execution proceedings as the representative of the deceased, raised a contention that the attached articles were not liable to be sold in execution of the decree as they were not assets of the deceased but property appertaining to the mutt. With reference to the investigation of the claim thus made, the appellants applied to the Subordinate Judge of Madura (East) to summon the respondent as a witness for the appellants. The respondent thereupon applied to the Subordinate Judge to take his examination on commission, suggesting at the same time that he was not in a position to give, of his own personal knowledge, any evidence material to the questions at issue and that the appellants insisted on his appearance in Court merely with a view to put pressure upon him and make him give up his claim or bring about a compromise, it being considered derogatory to heads of mutts in the position of the respondent to appear in Court as witnesses. The Subordinate Judge refused to grant the respondent's application on the ground that the respondent being resident within the jurisdiction of the Subordinate Court and not being a person legally exempted from appearing as a witness in Court nor incapacitated from doing so by illness or infirmity, it was not competent to the Court to issue a commission for the examination of the respondent. On revision Mr. Justice Boddam set aside the order of the Subordinate Judge and directed that the respondent be examined on commission.

It is contended for the respondent—

(1) That the order of the learned Judge did not amount to a judgment so as to allow of an appeal under the Letters Patent being preferred against it,

(2) that even in the circumstances relied on by the Subordinate Judge it is competent to the Courts of this country to direct the examination of a witness on commission if, for adequate reasons, it is thought fit to do so, and

(3) that assuming neither of these contentions is well founded, the circumstances of the case show that the appellants are seeking to compel the respondent's appearance not *bonâ fide*, but solely to obtain an improper advantage.

With regard to the first question I am unable to agree that the learned Judge's order does not amount to a judgment within the meaning of section 15 of the Letters Patent. A litigant is undoubtedly entitled to insist on the appearance of witnesses who

VEERA-BADRAN CHETTY v. NATARAJA DESIKAR.

could give evidence material to his case and, if the examination of a material witness with reference to whom the issue of a commission is not warranted by law, is wrongly ordered to be taken on commission in spite of the objections of the party entitled to examine him in the presence of the Judge and in open Court the order so passed must clearly be held to deal with the question of the right, on the one hand, of the party seeking the personal attendance in Court, and, on the other of the liability of the person claiming to avoid it.

Passing to the next question I feel constrained to hold that the respondent's contention here also fails. I do not consider it necessary to refer to and consider, as Mr. S. Srinivasa Aiyangar, on behalf of the respondent, invited us to do, the procedure of the Courts of Chancery in England and elsewhere in the matter of the issue of commissions to witnesses. The question of the issue of commissions for the examination of witnesses by Courts of this country governed by the Civil Procedure Code, is one to be dealt with entirely under the provisions of the Code and, obviously, section 386 provides for all the cases in which the legislature intended it should be competent to the Courts to issue a commission for the examination of persons resident within the jurisdiction of the Court. In the view that this provision is exhaustive on the point it is incumbent on the Court to insist on the attendance of a witness personally in Court if his evidence is material and the party entitled to adduce such evidence requires that course to be adopted. This construction of the section is supported by *Gopal Chunder Sircar* v. *Kurnodhar Moochee*(1) cited on behalf of the appellants and decided with reference to the Code of 1859, the provisions of section 175 of which did not, so far as the point under consideration is concerned, differ from the present law. The provisions of section 386 of the Civil Procedure Code are far from being of the comprehensive character of Order XXXVII, Rule 5 of the Rules of the Supreme Court and the explanation for this I take to be that it was not thought desirable to confer such wide powers on the general body of Judges presiding over the subordinate Courts in this country.

The last contention on behalf of the respondent, however, must, I think, prevail. No doubt, on the application of a party to a legal

(1) 7 W.R.C.R., 349.

VEERA-BADRAN CHETTY v. NATARAJA DESIKAR.

proceeding summonses to witnesses would ordinarily issue as a matter, of course, but even in the case of witnesses who are not parties to the proceeding, and who have no *locus standi* to object to their being called upon to appear, except on the ground that the Court has no jurisdiction to compel their attendance, a litigant's privilege of taking out summonses is unquestionably subject to the control of the tribunal which is called upon to enforce their attendance, though such control will be exercised very sparingly and only in exceptional cases. In *Raymond* v. *Tapson*(1), after pointing out that no leave of the Court was necessary for the issue of a subpœna to a witness Jessel, M.R., took care to point out: "of course there was always a power in the Court to prevent an abuse of this power (of summoning witnesses)." He again observed: "The Court has still the power to say when the witness attends that the witness shall not be examined or that he shall be examined in open Court. It can always restrain the abuse of the power to summon witnesses." Cotton, L.J., added: "I quite agree that the Court ought to see that the parties do not abuse their privilege." Reference may also be made to the early case of *Rex* v. *Burbage*(2) where Lord Mansfield, admitting that in general a *habeas corpus ad testificandum* will lie to remove a person in execution to be a witness, refused to issue the writ in the particular instance as the application for it appeared to be "a mere contrivance." It is hardly necessary to point out that the control in question is an instance of the general authority of every Court of competent jurisdiction to prevent abuse of its process, an authority affirmed by the Judicial Committee in *Haggard* v. *Pelicier Freres*(3) cited by Mr. Srinivasa Aiyangar. Turning to the case of a person who is not a mere stranger to the proceeding but who is party thereto, his situation obviously possesses a distinction which must not be lost sight of. In his case the other party requiring his attendance could compel a discovery of material information required by him with reference to the questions duly raised in the cause. Further, where cases are well conducted, each party is, of course, expected to go into the box to prove facts bearing on the case and within his knowledge, so as to give the other side an opportunity of testing the truth of such

(1) L.R., 22 Ch.D., 430 at p. 434. (2) 3 Burrows, 1440.
(3) L.R., [1892], 2 A.C., 61.

VEERA-BADRAN CHETTY v. NATARAJA DESIKAR.

evidence by cross-examination. Where, instead of waiting for and availing himself of this natural opportunity and leaving the Court to draw an inference adverse to one who fails so to appear and support his own case, an attempt is made to insist on the opponent appearing in Court, it is but reasonable to scrutinise the grounds of such an attempt and the opposition thereto. Viewing this case with reference to these considerations it is pretty clear that the appellant's application is not *bonâ fide*. It is well known that persons in the position of the respondent consider it derogatory to be examined in Court as witnesses and when such persons happen to be men worthily filling the position of the heads of mutts, their attendance as witnesses in Court is highly distasteful to their disciples and co-religionists. Consequently the suggestion on behalf of the respondent that his attendance in Court is required not for the purpose of obtaining any material evidence in the case, but from other and indirect motives which, if disclosed, would result in the dismissal of the application, is not altogether improbable. Had, however, the appellants been able to satisfy the Court that the respondent is personally aware of any facts or circumstances which would really help their case, the respondent ought, no doubt, to be compelled to appear, however inconvenient and disagreeable to him such appearance may be. The appellants, however, have failed to show anything of the kind, judging from the affidavits filed on their behalf. I would, therefore, dismiss the appeal on this ground with costs.

SANKARAN NAIR, J.—The appellants obtained a decree against the late Pandara Sannadhi of Tiruvannamalai Adhinam for a sum exceeding Rs. 7,000. On their application to execute the decree against the respondent as the legal representative of the deceased, the High Court directed that "execution do proceed against the appellant as the legal representative of the deceased defendant in respect of the moveable property of the deceased, if any, in his hands, which may be pointed out by the plaintiffs."

The appellants have attached in execution of their decree certain silver and gold articles on the ground that they were made by the deceased and form his property. The respondent claimed them as the property of the Adhinam. To prove their claim the appellants applied for a summons to the respondent to give evidence before the Court.

VEERA-BADRAN CHETTY v. NATARAJA DESIKAR.

The respondent contended that, on account of his position and sacred character, no summons ought to have been issued to him to give evidence in open Court. He alleged that the application was "simply malicious and vindictive" and made to "harass" him and to compel him to pay up the decree amount, as the appellant well knew that he would not attend to give evidence before a Court and further that his evidence was immaterial as he was living at Kumbakonam from 1894 to 1902 and consequently knew nothing personally of the nature of the property attached. And he prayed that the Court might issue a commission to take his evidence if required by the appellant. The respondent resides within the jurisdiction of the Subordinate Court before whom he is sought to be examined.

The Subordinate Judge refused the application of the respondent to issue a commission. A petition was filed in this Court to set aside the order.

The learned Judge of this Court who heard this petition held that the power to issue a commission is not confined absolutely to those cases mentioned in section 383 of the Civil Procedure Code and the Judge may, if he thinks it fit, issue a commission in other cases also. He held further that considering the peculiar position of the respondent it would be an act of unnecessary harshness to insist upon his appearance in Court in this case when he is not a primary party to the suit and is likely to cause the matter to be compromised rather than undergo the ordeal of an examination in Court and, being of opinion that the Charter Act gave him the power to interfere, reversed the order of the Subordinate Judge as made without the proper exercise of his judicial discretion and directed the examination of the witness by a Commissioner.

The decree-holder appeals and the same contentions that were raised before the learned Judge are insisted upon before us.

It is argued that the High Court has no power under the Charter Act to set aside the order passed by the Subordinate Judge and the case of *Tej Ram* v. *Harsukh*(1) is relied upon.

I agree with the learned Judge that this contention is unsound.

It is then argued for the appellant that the power of the Court to issue a commission to examine persons resident within its jurisdiction is confined to the cases mentioned in section 383 of the

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

VEERA-BADRAN CHETTY v. NATARAJA DESIKAR.

Civil Procedure Code. This is denied on behalf of the respondent, who relies also upon the English law in support of his contention. Under section 4 of 1 Will. IV, Cap. XXII and Rule 5 of Order 37 which only followed the old Chancery practice, the power to issue commissions to examine witnesses was unrestricted, though such power was usually exercised only when the Court was satisfied that the witness could not be produced before the Court at the time of hearing on account of age, dangerous illness, precarious state of health, or on the ground that he was to go out of jurisdiction. Section 10 of 1 Will. IV, Cap. XXII and Rule 18 of Order XXVII also declare that the deposition of a witness living within the jurisdiction may be read in evidence at the hearing only when he is unable to attend "from illness or other infirmity."

The Indian Procedure Codes in declaring the circumstances under which a commission may be issued seem to have accepted (sections 383 and 386 of the Civil Procedure Code) the rules that governed the practice in English Courts and adopted the grounds under which alone the depositions of witnesses could be given in evidence at the hearing and in addition, regard being had to the peculiar conditions of Indian society, further empowered a Judge to issue commissions to examine witnesses exempted from attendance in Court under sections 640 and 641 of the Civil Procedure Code. Section 640 exempts certain women, while under section 641 the Government must notify the exemption from attendance of any person in their opinion entitled to that privilege on account of his rank. No power to exempt is given to the Courts.

The enactment of these elaborate provisions in the place of the simple and comprehensive rule of English law that an order may issue "where it shall appear necessary for the purposes of justice", seems to show that the Courts have not the absolute discretion or inherent power claimed for them on behalf of the respondent and a Judge is not therefore justified in issuing a commission except when authorized by the provisions of the Code. The case of *Gopal Chunder Sircar* v. *Kurnodhar Moochee*(1) is also in favour of this view.

It is not to be understood that where these conditions exist the Judge is bound to issue a commission; where such examination may result in injustice to any party or where it is not calculated

(1) 7 W.R.C.R., 349.

VEERA-BADRAN CHETTY v. NATARAJA DESIKAR.

to permit of the evidence being fairly tested or where the application is made to avoid cross-examination before the Court, a commission need not be issued.

"Even if the Court should be of opinion that the refusal of a commission will prevent the evidence of the witness from being given at all, yet if the non-attendance of the witness before the tribunal which has to decide the case and the consequent inability of the tribunal to observe the demeanour and hear the answers of the witness shall lead to injustice towards one of the parties, the commission ought to be refused." See *Berdan* v. *Greenwood*(1) I am, therefore, of opinion that this contention of the pleader for the appellant ought to be upheld. But this appeal must be dismissed and the order of the learned Judge confirmed on the ground that on the facts disclosed, the plaintiff appellant is not entitled to obtain a summons for the attendance of this respondent.

No doubt under section 159 of Act XIV of 1882, as under section 149 of Act VIII of 1859, a party is entitled to obtain a summons for the attendance of any witness on application before the day fixed for disposal. The Judge has absolutely no discretion under this section and he cannot refuse the application. It is not for him to assume or infer that such witness is not likely to know anything of the matter in dispute or to be of any use to the party applying. That is a matter for the applicant himself to consider. But every Court has undoubtedly a right to prevent the abuse of its own process. It is true very strong evidence must be adduced by the party opposing an application for summons to show that it is not made *bonâ fide* and that the granting of such application would be permitting an abuse of the process of the Court. But after a careful consideration of the evidence I am not prepared to differ from the conclusion that this application for summons was really made for the purpose mentioned in the respondent's petition; the Court is not bound therefore to summon the witness and a commission may be issued, the respondent having consented to the same. The appeal in my opinion must be accordingly dismissed with costs.

(1) L.R., 20 Ch.D., 764.

APPELLATE CRIMINAL.

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

IN THE MATTER OF ANUSOORI SANYASI, ACCUSED.*

1904. April 18, 21.

Criminal Breach of Contract Act—XIII of 1859, s. 2—Complaint against workman of failure to complete work—Completion of work by complainant prior to complaint—Maintainability of charge.

An employer applied for an order under section 2 of Act XIII of 1859, alleging that a workman had received an advance on account of the work and had failed to perform his part of the contract. Prior to lodging the complaint, the employer had completed the work, and he claimed an order for the repayment of the advance:

Held, that no order could be made. The section only applies when the work is uncompleted when the complaint is made. If the work has been completed when the complaint is made, the Magistrate has no jurisdiction under the section, though the employer has a remedy against the workman in the Civil Courts.

High Court Proceedings, dated 29th March 1865 (Weir's 'Law of Offences,' 445), approved.

The offence created by the act is not the neglect or refusal of the workman to perform his contract but the failure of the workman to comply with an order made by the Magistrate that the workman should repay the money advanced or perform the contract.

King Emperor v. *Takasi Nukayya*, (I.L.R., 24 Mad., 660), approved.

CHARGE by an employer against a workman under Act XIII of 1859. The facts of the case appear from the following judgment of the Stationary Sub-Magistrate:—

"The complaint in this case is that the accused, having contracted with the complainant to cut survey stones and having received an advance for it from him, failed to fulfil the contract completely under section 2 of Act XIII of 1859.

"The complainant, who is the first witness, says that the accused executed a contract bond in his favour on 10th June 1902 binding himself to cut survey stone required by him within a fortnight and received an advance of Rs. 64 then, that, for this amount of advance, the accused worked and discharged his liability, that after this he again advanced to him on different

* Case referred No. 16 of 1904 (Criminal Revision Case No. 67 of 1904) for the orders of the High Court under section 438 of the Code of Criminal Procedure by F. H. Hamnett, Esq., Sessions Judge of Godavari, in his letter, dated 29th January 1904, No. 470.

ANUSOORI SANYASI.

occasions about Rs. 100 on condition that the accused might do the same work for three months more, but that the accused, having worked only a few days, went home as he fell ill and did not return to work again and that consequently he (complainant) completed his work some five or six months ago. The complainant says that he does not require the accused to work for him now as his work was completed but requires that the accused be ordered to repay him about Rs. 80 of advance still due to him.

"As the work for which this contract was entered into and the money advanced by the complainant was completed long prior to this complaint, this Act does not apply to this case(1).

He acquitted the accused under section 245 of the Code of Criminal Procedure. The Sessions Judge referred the case to the High Court after giving notice to the accused to show cause why it should not be reopened and tried on its merits.

ORDER—Sir ARNOLD WHITE, C.J.—In this case the complainant applied for an order under section 2 of Act XIII of 1859 alleging that the accused had contracted with him to cut stones, had received an advance on account of the work, and had failed to perform his contract. The Magistrate declined to make an order against the accused on the ground that the work for which the contract was entered into was completed prior to the complaint. I think the Magistrate was right.

Section 2 of the Act empowers the Magistrate, at the option of the complainant, either to order that the money advanced be repaid, or that the work be performed. I think the section only applies when the work is uncompleted when the complaint is made. In my opinion, if the work has been completed when the complaint is made, the Magistrate has no jurisdiction under the section. In other words, an employer, by doing the work himself or employing a third party to do it for him, loses his right to proceed under the section. In such a case the employer's civil remedy is, of course, open to him but he cannot avail himself of the penal enactment. I agree with the ruling of this Court(1). The records in that case show that the work was in fact completed by the party who made the contract but the ground of the decision was that the Act had no application

(1) High Court Proceedings, dated 29th March 1865, Weir's 'Law of Offences,' 445.

ANUSOORI SANYASI.

where the work had actually been completed at the date of the complaint. It seems to me that the case *In re Kitter*(1) has no bearing on the present case. I agree that limitation is no bar to a claim which a Magistrate has jurisdiction under the Act to enforce. In the present case there was, in my opinion, no enforceable claim.

Technically the Magistrate was wrong in acquitting the accused. The offence created by the act is not the neglect or refusal of the workman to perform his contract but the failure of the workman to comply with an order made by the Magistrate that the workman repay the money advanced or perform the contract (see *King-Emperor* v. *Tekasi Nukayya*(2)). In effect, however, the Magistrate declined to make any order against the accused.

I see no reason to interfere.

DAVIES, J.—I entirely agree with the learned Chief Justice. The plain object of the Act is to provide a speedy remedy when the work is not done. The complainant having got the work done had no ground for invoking the aid of the Magistrate. In other words he has put himself out of Court.

BENSON, J.—I cannot say that the ruling referred to by the Sessions Judge and reported in Weir's 'Law of Offences,' p. 455, is not in accordance with the strict letter of the Act. Section 2 presupposes that, at the time when the defaulter is brought before the Magistrate, the complainant has an option either to demand back his advance or to get an order to have the work completed.

But, if the work has been already completed, the complainant cannot ask for an order to have it completed. He has therefore no option, and the condition presupposed by section 2 does not exist, and the remedy by the Act cannot be applied.

It is true this view restricts the scope of the Act in a way for which I can see no reasonable ground, and shows that the Act fails to deal effectively with the mischief which the preamble recites that it is intended to remedy, but, as the Act is a penal Act, it must be construed strictly and in favour of the subject. The strict interpretation of the words of the Act is that stated above. If the Legislature considers that the Act as at present worded does not give effect to the true intention of the Legislature, the remedy is to amend the wording of the Act.

(1) I.L.R., 11 Mad., 332. (2) I.L.R., 24 Mad., 660.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Benson.

1904. March 4.

SREENIVASA CHARIAR AND ANOTHER (SECOND AND THIRD PETITIONERS AND REPRESENTATIVES OF PLAINTIFF, DECEASED), APPELLANTS,

v.

PONNUSAWMY NADAR AND OTHERS (JUDGMENT-DEBTORS AND DEFENDANTS, FIRST REPRESENTATIVE OF PLAINTIFF, DECEASED), RESPONDENTS.*

Limitation Act—XV of 1877, sched. II, art. 179—Application to take a step in aid of execution—Execution petition—Adjournment of sale on application of judgment-debtor consented to by decree-holder—Subsequent application within three years of date of adjournment but more than three years from previous application—Limitation.

A decree-holder applied for execution of his decree. The last preceding application had been made more than three years before the present one. In that application the decree-holder asked that the properties of the judgment-debtor might be sold. The judgment-debtor then applied for a postponement of the sale, to which the decree-holder consented. The present application was made within three years from the date of the judgment-debtor's application for a postponement of the sale. The sale had, in fact, not been carried out:

Held, that the application was barred by limitation. The mere consent by a decree-holder to the application made by the judgment-debtor was not 'an application' by the decree-holder, within the meaning of article 179 of schedule II to the Limitation Act.

Held also, that the acknowledgment of indebtedness in the application of the judgment-debtor for a postponement of the sale did not give a fresh starting point for limitation under section 19 of the Act; nor could a part-payment of the principal be relied upon under section 20, as the same principle applied to sections 19 and 20.

Kuppusami Chetty v. *Rengasami Pillai*, (I.L.R., 27 Mad., 608), followed.

EXECUTION PETITION. The date of the decree was October 10th, 1898. The present application for execution was presented on April 11th, 1902. Petitions in execution were presented in October 1898 and January 1899. The last preceding application had been presented on February 2nd, 1899, which asked that the property of the judgment-debtor might be sold. The Subordinate Judge held that the present application was not barred by limitation

* Civil Miscellaneous Second Appeal No. 62 of 1903, presented against the order of F. D. P. Oldfield, Esq., Acting District Judge of Tanjore, in Civil Miscellaneous Appeal No. 1515 of 1902, presented against the order of M.R.Ry. P. S. Gurumurthi, Subordinate Judge of Kumbakonam, in Execution Petition No. 126 of 1902 (Original Suit No. 51 of 1898).

because the judgment-debtors had on 14th April 1899 applied by miscellaneous petition for an adjournment of the sale to June 22nd, 1899, and for the sale to be held on that date without fresh proclamation. such application having been consented to by the decree-holders. The sale had not been carried out on the postponed date and the petition of February 2nd, 1899, was dismissed. The acting District Judge, on appeal, held that the present application was barred by limitation. He stated the question thus: "Is a consent by a decree-holder's pleader to the adjournment of a sale a step in aid of execution, such as will keep a decree alive?" He dealt with numerous cases, and continued:—"The decree-holder points out, first, that the debtor's application to which he consented was not merely one for a postponement but also one for sale on an adjourned date without fresh proclamation. He argues that having consented to this application it must be considered as having been made by him, and he must have the benefit of it." He dealt with the cases cited in support of this argument, and in the result held that the course of decisions is that some actual application by the decree-holder is necessary, and not a mere passive consent. He rejected the petition.

V. C. Desikachariar for appellant.

Mr. *C. Krishnan* for respondent.

JUDGMENT.—We agree with the District Judge that the mere consent of the decree-holder to the application, dated the 14th April 1899, made by the judgment-debtor is not in any sense 'an application' by the decree-holder. That being so, the consent cannot be pleaded under article 179, schedule II of the Limitation Act as saving the bar by limitation.

Further, the acknowledgment of indebtedness in the application of the judgment-debtor, dated the 14th April 1899, cannot be pleaded to give a fresh starting point for limitation under section 19 of the Limitation Act (*Rama Rau* v. *Venkatesa Bhandari*(1)) nor can the part-payment of the principal (proved by exhibit A) be pleaded under section 20 of the Act as giving a new period of limitation, as the same principle applies to both this section and section 19, as was recently decided by this Court in the case of *Kuppusami Chetty* v. *Rengasami Pillai*(2). We therefore dismiss this second appeal with costs.

(1) I.L.R., 5 Mad., 171. (2) I.L.R., 27 Mad., 608.

PRIVY COUNCIL.

P.C.*
1904.
November 16.
December 19.

MAHARAJA OF JEYPORE, PLAINTIFF,

v.

GUNUPURAM DEENABANDHU PATNAICK AND OTHERS, DEFENDANTS.

[On appeal from the Governor of Madras in Council.]

Res judicata—*Suit transferred from Agency Court to District Court without jurisdiction—Subsequent suit in Agency Court on same cause of action—Governor of Madras in Council, obligation of to decide appeal from Agency Court on judicial principles and not on grounds of political expediency.*

The High Court by consent of parties transferred a suit brought by the appellant from the Agency Court at Vizagapatam to the District Court, and afterwards decided that notwithstanding the consent they had no jurisdiction so to transfer a suit:

Held, that the decision of the District Court dismissing the suit, having been adjudged by the High Court to be without jurisdiction, could not be treated as being *res judicata* in a subsequent suit by the appellant in the Agency Court on the same cause of action.

Held also, (reversing the decision of the Governor of Madras in Council), that the legal right to bring a suit, and to have it determined by the proper Court, could not be barred by considerations of political expediency.

APPEAL from an order (2nd May 1902) of the Governor of Madras in Council upholding an order (8th December 1900) of the Court of the Agent to the Governor at Vizagapatam, whereby the plaint in a suit brought by the appellant in that Court was rejected.

The plaintiff was the Zamindar of Jeypore which was situated within the "Agency Tract" of the district of Vizagapatam, and his zamindari was a scheduled district under the Scheduled Districts Act (XIV of 1874). Previously to the passing of Act XXIV of 1839 the ordinary regulations for the administration of civil and criminal justice were in force in the Agency tract. By section 2 of that Act it was enacted that after 1st December 1839 "the operation of the rules for the administration of civil and criminal justice, as well as those for the collection of revenue, shall cease to have

* *Present:* The Lord Chancellor (HALSBURY), Lord MACNAGHTEN, Lord LINDLEY, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.

effect, except as hereinafter mentioned" within contracts included in the districts of Ganjam and Vizagapatam. Section 3 enacted that the administration of civil and criminal justice should within those districts be vested in the Collector of Ganjam and the Collector of Vizagapatam "and shall be exercised by them respectively as Agents to the Governor of Fort St. George": and section 4 enacted "that it shall be competent to the Governor in Council of Fort St. George to prescribe such rules as he may deem proper for the guidance of such Agents, and of all the officers subordinate to their control and authority, and to determine to what extent the decision of the Agents in civil suits shall be final, and in what suits an appeal shall lie to the Sadr Adalat, and to define the authority to be exercised by the Agents in criminal trials, and what cases he shall submit to the decision of the Fouzdary Adalat."

In pursuance of the authority so vested in him the Governor of Madras framed rules, of which the following are material to this report:—

Rule X, clause 2—

"Suits exceeding Rs. 5,000 in value shall be instituted in the Court of the Agent who may, however, when he thinks proper, refer any such suit for the decision of the Divisional Assistant."

Rule XII laid down the procedure to be adopted on the trial of civil suits, which was substantially the same as that provided by the Civil Procedure Code then in force. Rules XX and XXI provided for appeals from original decrees in certain cases, and Rule XXII was as follows:—

"From decrees of the Agent in suits wherein the landed possession of a zamindar, bissoye, or other feudal hill chief may have formed the subject of litigation, an appeal will lie to the Governor in Council alone, who may refer any such appeal for the decision of the Sadr Court, provided that the decree of the latter Court shall not be carried into execution without the permission of the Governor in Council."

The plaintiff succeeded to the zamindari in 1889, but until he attained majority in 1895 he was placed under the guardianship of the Agent to the Governor. On 2nd July 1892 a suit, 1 of 1892, was instituted on his behalf in the Court of the Agent to the Governor in Vizagapatam for the resumption of three villages forming part of the zamindari which had been given to the defendants' ancestors by the plaintiff's ancestors on service tenure, it

MAHARAJA OF JEYPORE v. GUNUPURAM DEENA-BANDHU PATNAICK.

being alleged that the defendants had discontinued and refused to perform the services. It was stated in the plaint that the cause of action arose on 30th June 1891. The defendants in that suit were the present first and third defendants and the husband of the second defendant, and they applied to the High Court at Madras to transfer the case from the Court of the Agent to the Governor at Vizagapatam to some other court: and on 23rd March 1893, with the consent of both parties, the High Court under section 15 of 24 and 25 Vict., chapter 104, transferred the case to the District Court of Vizagapatam, where it was numbered 4 of 1893. That suit was heard by the District Judge who, on 1st December 1893, holding that the plaintiff had failed to prove his case, dismissed the suit with costs. No appeal was preferred against that decree.

On 20th March 1900 the High Court of Madras, in the case of *Maharajah of Jeypore* v. *Papayyamma*(1) held that that Court had no jurisdiction to transfer a suit pending in the Court of the Agent to the Governor, Vizagapatam, to the District Court of Vizagapatam; that consent of parties made no difference; and that rule XXII of the rules made under Act XXIV of 1839 was a valid rule.

In August 1900 the plaintiff applied to the Court of the District Judge at Vizagapatam for a review of the judgment of that Court of 1st December 1893 in suit 4 of 1893. In his petition he stated that as the High Court had had no jurisdiction to transfer the suit to the District Court as it had done, the proceedings subsequent to the transfer were wholly without jurisdiction and the decree passed against him was of no effect. He further stated that his guardian in that suit had failed to produce material documents, amongst others, original documents in which the then defendants admitted that the three villages then in suit were held by them on service tenure. He prayed that the judgment of 1st December 1893 might be cancelled, and the suit re-transferred to the Court of the Agent to the Governor, so that that Court might proceed with the trial of the suit, or if that could not be done, then that the judgment of 1st December 1893 might be reviewed, the evidence above referred to might be admitted, and the suit re-tried on the merits. He also claimed the benefit of section 5 of the Limitation Act. The application was heard by the

(1) I.L.R., 23 Mad., 329.

MAHARAJA OF JEYPORE v. GUNUPURAM DEENA-BANDHU PATNAICK.

District Judge who, on 28th August 1900, dismissed it with the following order:—

"The suit to which this petition relates was transferred to this Court by the High Court and disposed of so far back as 1893. It is contended that the High Court's order was illegal and that this Court therefore had no jurisdiction. This is a matter into which this Court has no power to go. Apart from this the present petition is very much out of time. It cannot, therefore, be entertained."

Thereupon the plaintiff presented the plaint in the present suit in the Court of the Agent to the Governor at Vizagapatam. In the plaint, after setting out the above facts, he asserted that as the High Court had not had jurisdiction to transfer suit 1 of 1892 to the District Court, that Court had no jurisdiction to try it, and its decree could not therefore be *res judicata* in the present suit; and that his suit was not barred by limitation, the cause of action having arisen on 30th June 1891. He claimed to be entitled to have his right to resume the three villages tried on its merits, and prayed that it might be declared that the defendants held them on resumable service tenure, and for a decree for possession mesne profits and costs.

On 27th November 1900 the plaintiff's pleader received a notice calling on him to appear before the Court of the Agent to show cause why the plaint should not be rejected under section 54, clause (*c*) of the Code of Civil Procedure, it appearing therefrom that the suit "was barred by a positive rule of law." On 8th December the Agent to the Governor, after hearing the pleader in support of the plaint, made the following order:—

"This same suit was brought in the Court in 1892, and this High Court transferred it to the District Judge's Court, which Court duly decided it. It is now claimed that the High Court had no power to transfer the suit, and no doubt it had not—*vide* its ruling in *Maharajah of Jeypore* v. *Papayyamma*(1). But that does not authorise me to ignore the High Court's order of transfer and the District Judge's decision. The plaintiff should take measures to get the High Court to rescind its own order.

"So far as I am concerned this suit has already been decided by a Court, which, if not competent, the High Court held to be

(1) I.L.R., 23 Mad., 329.

MAHARAJA OF JEYPORE v. GUNUPURAM DEENA-BANDHU PATNAICK.

competent and it is therefore *res judicata*. Further it would be a gross injustice if, on a mere technical quibble of this sort, the plaintiff were able to have the considerable number of suits which he has brought in this Court at various times, and which the High Court has transferred to the District Court, re-tried to the loss and annoyance of the defendants. Plaintiff has had a fair trial of his case and I refuse to give him another. The plaint is rejected."

From this order the plaintiff appealed to the Governor of Madras in Council on the grounds that the Agent to the Governor had no jurisdiction to reject the plaint, as the judgment of the District Court of Vizagapatam in suit 4 of 1893 could not operate as a bar to the present suit; that the decree in suit 4 of 1893 had not yet been pleaded by the defendants as *res judicata*, and if they should advance such plea it could not avail them and would have to be overruled, because suit 4 of 1893 was not tried and decided by a competent Court having jurisdiction to decide it; and that the decree in suit 4 of 1893 could not operate as *res judicata* in the present suit, inasmuch as the plaintiff alleges and seeks to establish in the present suit that it was owing to the gross negligence of his next friend and guardian in the former suit that the decision therein was adverse to the plaintiff.

Without giving the plaintiff an opportunity of being heard this appeal was rejected.

The plaintiff then applied to His Majesty in Council for special leave to appeal against the order of the Governor of Madras in Council, and during the hearing of that application it was suggested to the plaintiff's counsel by the Judicial Committee of the Privy Council that he should communicate with the Secretary of State for India on the subject and request him to represent to the Governor of Madras that he had not complied with rule XXII of the rules made under Act XXIV of 1839 which required him to dispose of the appeal by judicial process. On this being done the Governor in Council heard the plaintiff's pleader in support of the appeal, and on 2nd May 1902 made an order rejecting it. The material part of the order was as follows:—

"The allegation of gross negligence on the part of the guardian can, in the circumstances of the case, carry little weight seeing that for five years after the Maharajah came into charge of his estate no attempt was made on the ground of this negligence to obtain a rehearing of the case. With this exception the

MAHARAJA OF JEYPORE v. GUNUPURAM DEENA-BANDHU PATNAICK.

arguments now put forward on behalf of the appellant are purely legal in character; in putting them forward the Maharajah relies on the view that the discretion which the Governor in Council exercises under section 4 of Act XXIV of 1839 is a judicial discretion, that is to say, that the present appeal should be treated in the same manner and decided upon the same principles as if it were heard in an ordinary Court of Justice.

"The Governor in Council is, however, unable to accept this view as to the manner of disposal of appeals from the Agency Courts. It is competent for the Governor in Council, under section 4 of Act XXIV of 1839, to prescribe rules for the guidance of his Agents and of their subordinates, and those rules have been prescribed. When, under rule XXI, an appeal to the Sadr or High Court is open that Court deals with it in the same manner as with appeals from other Courts subordinate to it, and it would, no doubt, similarly deal with appeals transferred to it by the Governor in Council under rule XXII. But so far as the Governor in Council retains appellate jurisdiction there is nothing to show that he is in any way fettered in the discharge thereof: the whole scope and purpose of the legislation governing the scheduled districts is to declare them as not included in or as removed from the operation of the general Acts and Regulations and the jurisdiction of the ordinary Courts of Judicature, and to place control in all matters in the hands of the executive authorities, subject to the provisions of 33 & 34 Vict., cap. 3. The obvious conclusion, therefore, is that in respect of the class of cases of which the present is one, the Governor in Council shall apply to each the principles of equitable jurisprudence, and these only so far as political expediency permits. In these wild tracts the absolute rights of the individual—as evolved by civilized communities—are of small consequence compared with the maintenance of the peace and order that make for social progress.

"The question then is, is it equitable or expedient that the decision of the District Judge in 1893, passed after a thorough trial of the case, should by reason of a legal defect imported into the whole proceedings by the High Court's order of 1900 now be permitted to come again before the Courts. The Governor in Council is clearly of opinion that to the unsophisticated minds of the uncivilized tribes of the Vizagapatam Agency the idea that a cause, tried and determined so long ago, could or should now be

MAHARAJA OF JEYPORE v. GUNUPURAM DEENA-BANDHU PATNAICK.

reopened at the instance of the Maharajah of Jeypore would be regarded as a gross infraction of the natural justice which they do understand and as truckling to the authority and resources which the Maharajah possesses. The result of compliance with the appellant's request would be to diminish the confidence of these hill tribes in the power and desire of Government to protect them and to do justice, and thus to create a political danger which there is absolutely no reason to incur.

"For these reasons the Governor in Council must decline to accede to the appellant's prayer. The order of the Agent rejecting the plaint will accordingly be upheld and the appeal dismissed."

From this order special leave to appeal to His Majesty in Council was granted.

On the appeal, which was heard *ex parte*.

Mr. *W. C. Bonnerjee* and Mr. *K. W. Bonnerjee*, for the appellant, contended that the Governor of Madras in Council had taken an erroneous view of Act XXIV of 1839 and the rules made under that Act in giving consideration to grounds of political expediency, and in deciding the case arbitrarily and not, as he should have done, on judicial and legal principles: in so doing he had wrongly exercised his discretion, and his decision should therefore be set aside on this appeal. Reference was made to rules 21 and 22 of the rules made under Act XXIV of 1839; statute 3 & 4 Will. IV., cap. 41, section 3; Safford and Wheeler's 'Privy Council Practice,' pages 32 and 769; *Reg* v. *Bertrand*(1); and *Pakala Balakristnama Patrulu* v. *Sree Naraina Mardaraz Devu*(2).

The plaint in the suit was not liable to be rejected as it had been under section 54, clause (*c*) of the Code of Civil Procedure as being for a cause of action decided in a former suit. The decision of the District Court was without jurisdiction and of no effect as the High Court had no jurisdiction to transfer the suit from the Court of the Agent to the Governor at Vizagapatam to the Court of the District Judge. This had been decided in the case of *Maharajah of Jeypore* v. *Papayyamma*(3). The decision of the District Judge did not therefore create any *res judicata* in the present suit which should be remitted for trial on the merits.

(1) L.R., 1 P.C., 520 at p. 529. (2) 10 M.I.A., 60 at p. 68.
(3) I.L.R., 23 Mad., 329.

MAHARAJA OF JEYPORE v. GUNUPURAM DEENA-BANDHU PATNAICK.

On 12th December 1904 the reasons for their Lordships report were delivered by

THE LORD CHANCELLOR.—This is an appeal by the Maharajah of Jeypore against the decision of the Governor of Madras in Council rejecting the claim of the Maharajah to have his suit determined under circumstances that may be shortly stated.

In the year 1892 a suit was instituted in the Court of the Agent to the Governor at Vizagapatam on behalf of the Maharajah, then a minor, for the purpose of establishing his right to resume possession of certain villages. On the 23rd March 1893 the defendants applied to the High Court of Madras for an order that the said suit should be removed from the Court of the Agent and transferred to some other Court, and no opposition being made to such application by the parties who represented the plaintiff, an order was made transferring the suit to the District Court of Vizagapatam. The suit then became Original Suit No. 4 of 1893 on the file of that Court, and on the 1st December 1893 the said Court gave judgment dismissing the suit, on the ground that no sufficient evidence had been given to establish the plaintiff's case, and that judgment was not appealed from. On the 29th March 1900 the High Court of Madras decided that it had no jurisdiction to order the transfer of a suit from the Court of the Governor's Agent to the District Court of Vizagapatam, and that the consent of the parties to the transfer could not cure that defect of jurisdiction. On the 27th October 1900 the Maharajah presented his plaint to the Court of the Governor's Agent against the present respondents for the same cause of action as was alleged in the former suit, stating the grounds on which he contended that the District Judge had no jurisdiction to decide the suit, and that the decision itself was a nullity. The plaint was rejected on the 8th December 1900, apparently on the ground that the decision upon the former suit precluded any further proceeding upon the same cause of action. From this an appeal was presented to the Governor in Council, who rejected the appeal on the ground that it would be inexpedient, and would set a bad example and encourage a multitude of suits for the same cause of action.

Their Lordships are of opinion that the former decision of a Court adjudged by the High Court to be without jurisdiction cannot be treated as *res judicata* against the claim of the Maharajah

MAHARAJA OF JEYPORE v. GUNUPURAM DEENA-BANDHU PATNAICK.

to have his rights decided by a Court of competent jurisdiction, and that the decision of the Governor in Council, affirming the decision of the District Court, cannot be supported. The legal right to bring a suit, and to have it determined by the proper Court created for the purpose of determining such suits, cannot be barred upon the considerations of policy or expediency which are urged by the judgment under appeal.

Their Lordships have already humbly reported to His Majesty as their opinion that the appeal ought to be allowed and consequential directions given, but their Lordships reserved their reasons, and also the question of the costs, as to which the parties were to be at liberty to apply to their Lordships for directions.

Mr. Bonnerjee, who appears for the appellant, now asks their Lordships to direct that the costs both here and below be costs in the cause, and their Lordships direct accordingly.

In the meantime the money deposited by the appellant in the Privy Council office as security for costs should be repaid to him.

Appeal allowed.

Solicitors for the appellant—Messrs. *Lawford, Waterhouse & Lawford.*

APPELLATE CIVIL—FULL BENCH.

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

1904. July 27, 28. September 20.

SUPPA REDDIAR (DEFENDANT—COUNTER-PETITIONER), APPELLANT,

v.

AVUDAI AMMAL (ASSIGNEE-PETITIONER), RESPONDENT.*

Limitation Act—XV of 1877, sched. II, art. 178—Obstruction to execution—Removal by decision in favour of decree-holder—Decree-holder's right to move the Court—Application to be regarded as a continuation of previous application.

A mortgage decree was obtained against the counter-petitioner on 28th February 1894. On 16th May 1895, the decree-holder assigned the decree to

* Civil Miscellaneous Second Appeal No. 11 of 1904, presented against the order of W. W. Phillips, Esq., District Judge of Tinnevelly, in Appeal Suit No. 118 of 1903, presented against the order of M.R.Ry. S. Raghava Ayyangar, District Munsif of Srivilliputtur, on Execution Petition No. 905 of 1902, in Original Suit No. 793 of 1903.

SUPPA REDDIAR v. AVUDAI AMMAL.

petitioner, who applied for execution on 6th December 1897. That application was struck off, and so was one which followed it. On 15th June 1898, petitioner again applied for execution, but counter-petitioner contended that the assignment was for his benefit and that, in consequence, petitioner was not entitled to execute the decree. The District Munsif held an enquiry under section 232 of the Civil Procedure Code and dismissed the application, being of opinion that counter-petitioner's contention was true. Petitioner thereupon brought a suit to establish her claim that the assignment was for her own benefit. On 20th February 1901, the Appellate Court declared that petitioner had obtained a valid assignment of the decree and was entitled to execute it. On 24th November 1902, petitioner filed the present execution petition. On the question of limitation being raised:

Held, that the petitioner's right to execute the decree was not barred by limitation on 24th November 1902. The application should be treated not as an application for execution, but as an application to revive or continue an application for execution that had been wrongly dismissed, as a competent Court has declared. Article 178 was, therefore, applicable, and time had begun to run from the date of the appellate decree declaring petitioner's right to execute, dated 20th February 1901.

Narayana Nambi v. Pappi Brahmani, (I.L.R., 10 Mad., 22), overruled.

EXECUTION PETITION. The case first came before Subrahmania Ayyar and Sankaran Nair, JJ. The facts are fully set out in the following

ORDER OF REFERENCE TO A FULL BENCH:—In this case the respondent's assignor obtained a mortgage decree against the appellant on the 28th February 1894.

On the 16th May 1895, the decree-holder assigned the decree to the respondent, who applied for execution on the 6th December 1897. After notice that application was struck off on the ground that the encumbrance certificate was not produced. Respondent again applied on the 25th February 1898 and sale was ordered. As batta was not paid, this application also was struck off on the 15th April 1898.

Then on the 15th June 1898 the respondent again applied for execution. The appellant having contended that the assignment was for his benefit and that therefore the respondent was not entitled to execute the decree, the District Munsif held an enquiry under section 232, Civil Procedure Code, and dismissed the application, being of opinion that the appellant's contention was true.

Thereupon the respondent brought a suit, as she was entitled to do (*Bommanapatti Veerappa* v. *Chintakunta Srinivasa Rau*(1)), to

(1) I.L.R., 26 Mad., 264.

SUPPA REDDIAR v. AVUDAI AMMAL.

establish her claim that the assignment was for her own benefit. The suit was dismissed in the first Court, but the Appellate Court on the 20th February 1901 "declared that the plaintiff (respondent) has obtained a true and valid assignment of the decree in Original Suit No. 793 of 1893 and is entitled to execute it."

The respondent then filed this application on the 24th November 1902, and the question is whether her right to execute the decree is barred by limitation. The effect of the order of the District Munsif passed under section 232, Civil Procedure Code, was, so long as it remained in force, to render the execution of the decree impossible, and it was after the appellate decree recognizing the appellant's right to execute the decree as assignee that it became competent to her to apply. If article 179 of the Limitation Act alone applied to the case in such circumstances, the right to execute the decree must be held to be barred in spite of the apparent injustice of such a view.

The High Courts of Calcutta, Bombay and Allahabad have declined to accept such a conclusion. In substance they adopt the view that when an obstruction to the execution of the decree arises necessarily involving litigation and such obstruction is removed by a decision in favour of the decree-holder, whether in execution proceedings or otherwise, the right of the decree-holder to move the Court with reference to the execution of the decree should be treated as governed by article 178 of the Limitation Act and where such application is made within the time fixed by that article and action taken thereunder, such action should be viewed as a continuation of the previous application and for the execution of the decree if any, even though the same has been dismissed in consequence of the obstruction subsequently removed (*Raghunath Sahay Singh* v. *Lalji Singh*(1), *Kalyanbhai Dipchand* v. *Ghanasham Lal Jadunathji*(2), *Chintaman Damodar Agashe* v. *Balhastri*(3), *Narayan* v. *Sono*(4), *Thakur Prasad* v. *Abdul Hasan*(5)).

In this Court, however, a different view of the law was adopted in *Narayana Nambi* v. *Pappi Brahmani*(6), notwithstanding the opinion of Turner, C.J., in *Virasami* v. *Athi*(7), which was in

(1) I.L.R., 23 Calc., 397.
(2) I.L.R., 5 Bom., 29.
(3) I.L.R., 16 Bom., 294.
(4) I.L.R., 24 Bom., 345.
(5) I.L.R., 23 All., 13.
(6) I.L.R., 10 Mad., 22.
(7) I.L.R., 7 Mad., 596.

SUPPA REDDIAR v. AVUDAI AMMAL.

accordance with his own view in *Paras Ram* v. *Gardner*(1), Mr. Justice Parker, who took part in the decision in *Narayana Nambi* v. *Pappi Brahmani*(2), apparently modified his views on the point. See *Chathappan Nayar* v. *Kunhammed Kutti*(3) referred to in *Sasivarna Tevar* v. *Arulanandam Pillai*(4). This decision in *Sasivarna Tevar* v. *Arulanandam Pillai*(4), and the one in *Suryanarayana Pandarathar* v. *Gurunada Pillai*(5), do not seem entirely to accept the decision in *Narayana Nambi* v. *Pappi Brahmani*(2).

In this state of authorities we refer to a Full Bench the question whether the respondent's right to execute the decree was, on the 24th November 1902, barred by the law of limitation.

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

V. Krishnaswami Ayyar for appellant.

M. R. Ramakrishna Ayyar for respondent.

OPINION.—We think that the application in this case should be treated not as an application for execution, but as an application to revive or continue an application for execution that had been wrongly dismissed as a competent Court has declared. The article applicable is therefore 178 of the second schedule of the Limitation Act and time began to run from the date of the appellate decree declaring the respondent's right to execute, which was the 20th February 1901. This application was therefore in time. We follow the decisions of the other High Courts cited in the order of reference and overrule the decision in *Narayana Nambi* v. *Pappy Brahmani*(2). Our answer to the reference is in the negative.

(1) I.L.R., 1 All., 355.
(2) I.L.R., 10 Mad., 22.
(3) C.M.A. No. 108 of 1895 (unreported).
(4) I.L.R., 21 Mad., 261.
(5) I.L.R., 21 Mad., 257.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Offg. Chief Justice, and Mr. Justice Boddam.

1904. March 4.

KONCHADI SHANBHOGUE AND OTHERS (DEFENDANTS), APPELLANTS,

v.

SHIVA RAO AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Transfer of Property Act—IV of 1882, ss. 54, 100—Agreement to execute a mortgage over immoveable property—Charge—Deposit of title-deeds—Mortgage.

Plaintiffs sued defendants for money lent and also claimed to be entitled to charge the debt on immoveable properties belonging to the defendants. Defendants had executed a document in which they recited that they had deposited the title-deeds of immoveable properties with the plaintiffs, and undertook to execute a deed of mortgage over those properties in favour of the plaintiffs whenever the latter should call upon them to do so. This deposit had been made outside of the town of Madras, and the document had not been registered:

Held, that plaintiffs were not entitled to a charge on the immoveable property, but only to a personal decree. A deposit of title-deeds creates a mortgage and not a mere charge, under the Transfer of Property Act, and inasmuch as section 59, paragraph (3), necessarily implies that a deposit of title-deeds not evidenced by a writing duly attested and registered is valid only if made in the towns specified in the paragraph, it follows that a grant of security by a mere deposit of title-deeds unaccompanied by writing, duly attested and registered, evidencing it, is invalid if it takes place outside of those towns.

SUIT for money as against defendants personally, and as against their joint family property. First defendant was the father of defendants Nos. 2 and 3, and these three defendants constituted a joint Hindu family. Defendants had borrowed money from plaintiffs for their trade, and executed two documents on 19th October 1894, which were in the following terms:

Exhibit M. "The following is the agreement or karar executed on the 19th October 1894 in favour of [plaintiff] by [defendants]:—In connection with the business of commission agents for coffee which we are carrying on for our family, besides the money which we have until nowo btained from you on interest at the rate of 10 per cent., we are in need of up to Rs. 25,000 more;

* Appeal No. 122 of 1902, presented against the decree of M.R.Ry. O. S. R. Krishnamma, Subordinate Judge of South Canara, in Original Suit No. 83 of 1901.

therefore as a security for the amounts which you have paid and will hereafter pay under the arrangement made, namely, that just as the amounts hitherto obtained from you have been entered in a book, the amounts to be hereafter obtained also must be entered in your book under the signature made by one of us and must be repaid by the end of March 1895, the amount repaid to you being also entered in that book under your signature or being paid into the Bank to your account. We have this day executed in your favour a promissory note payable on demand for Rs. 35,000. We have this day given into your hands the documents mentioned below as security for the said amount and we have hereby agreed to execute whenever you may ask for it a deed of mortgage for a period of one year upon the responsibility the immoveable properties appearing therefrom. We have agreed and consented to pay interest at the rate of 10 per cent. upon the amount of the said mortgage deed."

Exhibit II. "(Rs. 35,000) thirty-five thousand rupees only dated 29th October 1894. We do hereby promise to pay on demand to [plaintiff], or order, the sum of Rs. 35,000 with interest at the rate of 10 per cent. per annum. We have received the consideration herefor. (Signed) [Defendants]."

Neither of these documents had been registered. Plaintiffs contended that the effect of the agreement, exhibit M, was to make the debt a charge upon the properties to which the documents referred to in it related. The documents of title were deposited in a place outside the town of Madras. The first issue raised the question whether the plaintiffs were entitled to charge the debt on the properties, and the Subordinate Judge held that they were. He decreed in plaintiffs' favour against the defendants personally and passed the usual mortgage decree against the properties charged.

Defendants preferred this appeal.

C. Ramachandra Rau Sahib and *K. P. Madhava Rau* for appellants.

C. Sankaran Nair and *K. Narayana Rau* for respondents.

JUDGMENT.—A mere agreement in writing by an obligor to execute a mortgage of immoveable property to the obligee does not create an interest in the immoveable property so as to entitle our Courts to treat it as a charge. Compare section 17 (*h*) of the Registration Act (III) of 1877 and section 54, paragraph 4, of the Transfer of Property Act. Assuming the contract evidenced

KONCHADI SHANBHOGUE v. SHIVA RAO.

by exhibit II and exhibit M would constitute a mortgage of or a charge on immoveable property it is not valid, for, those exhibits not having been registered and the interest said to be created thereby being of the value of more than Rs. 100, those exhibits cannot in any way affect the immoveable property comprised therein. Looking at the transaction as one intended to be the grant of a security by deposit of title-deeds only, the deposit having been made outside the town of Madras and subsequent to the Transfer of Property Act the transaction in that view also must fail. No doubt, if the grant of security by deposit of title-deeds of immoveable property amounts to no more than the creation of a charge and is not a mortgage within the meaning of the latter term in the Transfer of Property Act, the decree of the lower Court would be altogether correct under section 100 of that Act. But section 59 of the Act prescribing the formalities to be attended to in making a mortgage speaks in explicit terms of the grant of such security as a 'mortgage,' consequently a deposit of the kind must, for the purposes of the Transfer of Property Act, be held to be a mortgage and not, within the purview of section 100, a mere charge not amounting to a mortgage. And as the third paragraph of section 59 already referred to necessarily implies that a deposit of title-deeds not evidenced by a writing duly attested and registered is valid only if made in the towns specified in the paragraph it follows that a grant of security by a mere deposit of title-deeds unaccompanied by writing duly attested and registered evidencing it is invalid if it takes place in the mufassil. The decree of the Subordinate Judge must therefore be set aside except in so far as it gives a personal decree for the money and costs as against the defendants.

In the circumstances of the case we direct that the parties do bear their costs in this Court.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Benson.

GOVINDA PILLAI (PLAINTIFF), APPELLANT,

v.

THAYAMMAL AND OTHERS (DEFENDANTS Nos. 1 TO 7), RESPONDENTS.*

1904. January 22. February 22, 23. March 2.

Limitation Act—XV of 1877, s. 7—Suit by minor for declaration of invalidity of widow's alienation—Omission by father of minor to sue—Father's right to sue barred—Hindu Law—Suit for declaration of invalidity of widow's alienation—Plaintiff not nearest reversioner—Maintainability—Specific Relief Act—I of 1877, s. 42—Discretion of Court to make declaratory decree.

Plaintiff, a minor, sued for a declaration that an alienation by a Hindu widow was invalid as against him after the death of the widow. Plaintiff was not the nearest reversioner, there being certainly one and apparently two sets of reversioners who would be entitled to take in succession before him. Plaintiff's father had not brought any suit, though he could have done so, and the father's right to bring such a suit had become barred. The nearest reversioner had concurred in the improper alienation and all the reversioners nearer than plaintiff had omitted to sue and were barred from doing so by limitation. They were all parties to the suit:

Held, that the suit was not barred by limitation. Where there are several reversioners entitled successively to succeed to an estate held for life by a Hindu widow, no one of such reversioners can be held to claim through or derive his title from another reversioner, even if that other happens to be his father, but each derives his title from the last full owner. Plaintiff was therefore entitled to the benefit of section 7 of the Limitation Act. There is no privity of estate between one reversioner and another as such, and, consequently, an act or omission by one reversioner cannot bind another reversioner who does not claim through him.

Bhagwanta v. *Sukhi*, (I.L.R., 22 All., 33), approved.

Chhaganram Astikram v. *Bai Motigavri*, (I.L.R., 14 Bom., 512), discussed.

Held also, that plaintiff was entitled to maintain the suit. A more distant reversioner may maintain such a suit when the reversioners nearer in succession are in collusion with the widow or have precluded themselves from suing.

The right given by section 42 of the Specific Relief Act to bring a declaratory suit is not limited by illustration (E) of that section or by article 125 of the Limitation Act to suits by a person presumptively entitled to possession. The general words of a section should not be limited to the illustrations given in the Act or by reference to the suits specially enumerated in the Limitation Act.

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* Second Appeal No. 411 of 1902, presented against the decree of R. D. Broadfoot, Esq., District Judge of South Arcot, in Appeal Suit No. 179 of 1901, presented against the decree of M.R.Ry. C. Krishnaswami Row, District Munsif of Chidambaram, in Original Suit No. 863 of 1900.

GOVINDA PILLAI v. THAYAMMAL.

Though it was doubtful whether the lower Court should, in the exercise of its discretion, have allowed the suit to proceed, having regard to the remoteness of plaintiff's interest, the High Court made the declaration prayed for, as the finding of fact was that the alienation had been made without necessity and was improper, and it might be that when the widow should die the plaintiff would be the presumptive reversioner, and the declaration now made would save him from having to prove the impropriety of the alienation again.

Per DAVIES, J.—The declaration made in the present suit would serve the purpose of perpetuating testimony for whomsoever might happen to be the next reversioner on the death of the widow.

SUIT by a reversioner for a declaration that an alienation by a Hindu widow was invalid as against him after the death of the widow. The widow's husband had died in 1870; the alienation was first made by a mortgage in 1871; that mortgage was supported by necessity only to the extent of Rs. 75; it was followed by another mortgage in 1875, in discharge of the earlier one, and by a Court sale in 1884 in execution of a decree obtained on the latter mortgage. Plaintiff was born in 1883, and was still a minor when the present suit was instituted in 1900. Plaintiff was not the nearest reversioner, there being certainly one set of reversioners, and apparently two, who were entitled to take successively before him. None of these had questioned the alienation in question and their right to do so by a declaratory suit had become barred by limitation. The High Court found that the nearest reversioner had concurred in the improper alienation and all those nearer than the plaintiff had omitted to sue and were now barred from doing so by limitation. The points raised and decided were whether the present suit was barred by limitation and whether the plaintiff could maintain the suit inasmuch as he was not the presumptive or immediate reversioner. The District Munsif made a declaration that the mortgages of 1871 and 1875 and the subsequent proceedings which arose out of the latter were not valid and binding against the reversionary interests of the minor plaintiff. On the question of limitation he said: "As regards limitation covered by the second issue, the decisions are conflicting. The Bombay High Court have held that the alienees should not be harassed by multiplicity of suits and that when the right of the nearer reversioner is barred a remote reversioner is equally barred. (*Vide Chhaganram Astikram* v. *Bai Motigavri*(1)); but the decision

(1) I.L.R., 14 Bom., 512.

GOVINDA PILLAI v. THAYAMMAL.

of the Full Bench of the Allahabad High Court that the remoter reversioner would not be barred under such circumstances is consistent with the accepted doctrine that one reversioner does not derive his title from another and nearer reversioner but from the last full owner of the estate and is also in conformity with the dictum of the Privy Council that a decision between the widow and one reversioner cannot operate as *res judicata* between her and another reversioner (*Isri Dutkoer* v. *Hansbutti Koerain*(1) and *Bhagwanta* v. *Sukhi*(2)). I follow therefore the Allahabad ruling and find that the suit is not barred."

The District Judge reversed the decree. On the question of limitation he said: "Second and third defendants are second grade reversioners. Fourth defendant and plaintiff are third grade. Second, third and fourth defendants are precluded from suing by limitation. Plaintiff is *primâ facie* not so barred, as he is still a minor. We must now consider whether he is barred in spite of his minority. As far as I can see, there are two opposing views taken of the question. The one adopted by the Allahabad Full Bench and followed by the Munsif is that plaintiff does not claim either through his brother or his uncle, but as a relative of the last male holder of the estate, in his own right and not through anybody else. Hence he has a right to sue which cannot be defeated by the fact that some one else has sued or has failed to sue. The other view is that the man in possession should not be troubled by a fresh suit on the same facts every time a male baby is born to the reversionary family. If the paternal uncle or father has sued and failed, or has neglected to sue and allowed a claim to become barred by limitation, the nephew or son may not be permitted to rake it up. If I understand the case rightly, the latter is the view taken in Madras recently (*Ayyadorai Pillai* v. *Solai Ammal*(3)). I therefore hold that plaintiff's suit is barred by limitation though he is a minor." He dismissed the suit.

Plaintiff preferred this appeal.

C. Ramachandra Rau Saheb for appellant.

V. Krishnaswami Ayyar for fifth and sixth respondents.

JUDGMENT.—The plaintiff, who is a minor, sued as reversioner, for a declaration that an alienation of the plaint property by the

(1) I.L.R., 10 Calc., 324 at p. 333. (2) I.L.R., 22 All., 33 at p. 40.
(3) I.L.R., 24 Mad., 405.

GOVINDA PILLAI v. THAYAMMAL.

first defendant, who is a Hindu widow is invalid as against him after the death of the widow. The District Munsif gave the declaration asked for, but the District Judge dismissed the suit on the ground that it was barred by limitation as the plaintiff's father did not bring any suit (though it was open to him to do so) and any such suit by the father would now be barred by time and a suit by the son must *a fortiori* be also barred.

The District Judge refers to the case of *Ayyadorai Pillai* v. *Solai Ammal*(1) as an authority for his view. But that case refers to an adoption, which introduces an heir into a family and effects a change of status and is thus very different from a mere transfer of property, and attention was specially drawn to this distinction by the learned Judges who decided *Ayyadorai Pillai* v. *Solai Ammal*(1). The District Judge seems also to have had in view the case of *Chhaganram Astikram* v. *Bai Motigavri*(2) which is referred to by the District Munsif and which is directly in support of the view taken by the District Judge. The correctness of that decision, however, may well be doubted for the reasons stated by the Full Bench of the Allahabad High Court in *Bhagwanta* v. *Sukhi*(3). It was there pointed out by a Full Bench of six Judges that where, as in this case, the plaintiff would not be entitled to immediate possession if the female having a life estate should die on the date of the institution of the suit, the article of the Limitation Act applicable is not No. 125, but No. 120 which allows a suit to be brought within six years from the date when the right to sue accrued. It was also pointed out that, when there are several reversioners, as in this case, entitled successively to succeed to an estate held for life by a Hindu widow, no one of such reversioners can be held to claim through or to derive his title from another reversioner,—even if that other happens to be his father—but each derives his title from the last full owner, that the right of each to sue for a declaration cannot accrue before he is born, and that a person who is a minor at the date of the alienation or who is born subsequently during the life of the widow is entitled to the benefit of section 7 of the Limitation Act.

We think that that decision is correct. There is no privity of estate between one reversioner and another as such, and, therefore,

(1) I.L.R., 24 Mad., 405. (2) I.L.R., 14 Bom., 512.
(3) I.L.R., 22 All., 33 at p. 40.

GOVINDA PILLAI v. THAYAMMAL.

an act or omission by one reversioner cannot bind another reversioner who does not claim through him.

The reasons, therefore, given by the District Judge for dismissing the plaintiff's suit are, we think, untenable.

It is, however, contended for the respondents that the decree of the District Judge ought to be sustained for other reasons, viz., (1) because the plaintiff, as a remote reversioner, has no right to sue while a nearer reversioner is alive and (2) because the suit is one in which the Court, in the exercise of its discretionary power, under section 42 of the Specific Relief Act, ought to refuse to make a declaratory decree in the plaintiff's favour even if he has the right to sue.

The widow's husband died in 1870. The alienation was first made by a mortgage in 1871. This mortgage, it is found by the Courts below, was supported by necessity only to the extent of Rs. 75. It was followed by another mortgage in 1875 in discharge of the former mortgage and this by a Court sale in 1884 in execution of a decree obtained on the mortgage. The plaintiff was born in 1883, some twelve years after the first mortgage. He is a remote reversioner of the third grade. There are reversioners (second and third defendants) of the second grade and apparently reversioners of the first grade also alive.

None of these have questioned the alienation and their right to do so by a declaratory suit is now in each case barred by limitation. The plaintiff, as a remote reversioner, cannot succeed to the property so long as a nearer reversioner is alive, and it is contended for the respondents that the plaintiff has no right to bring a suit for a declaration as he is not the presumptive or immediate reversioner.

The right to bring a declaratory suit is given by section 42 of the Specific Relief Act, 1877, and though illustration E of that section and article 125 of the Limitation Act refer only to suits by a person presumptively entitled to possession, it would be wrong, on principle, to hold that the words of a section in an Act must be limited to the illustrations given in the Act, or by reference to the suits specially enumerated in the Limitation Act. The principle which should guide the Court is laid down by the Privy Council in the case of *Rani Anund Koer* v. *The Court of Wards*(1) as follows: "Their Lordships are of opinion that although a suit of this

(1) L.R., 8 I.A., 14 at p. 22

GOVINDA PILLAI v. THAYAMMAL.

nature may be brought by a contingent reversionary heir yet that as a general rule it must be brought by the presumptive reversionary heir, that is to say, by the person who would succeed if the widow were to die at that moment. They are also of opinion that such a suit may be brought by a more distant reversioner if those nearer in succession are in collusion with the widow, or have precluded themselves from interfering. They consider that the rule laid down in *Brikaji Apaji* v. *Jagannath Vithal*(1) is correct. It cannot be the law that any one who may have a possibility of succeeding on the death of the widow can maintain a suit of the present suit of the present nature, for, if so, the right to sue would belong to every one in the line of succession, however remote. The right to sue must, in their Lordships' opinion, be limited. If the nearest reversionary heir refuses without sufficient cause to institute proceedings, or if he has precluded himself by his own act or conduct from suing or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue: see *Kooer Goolab Sing* v. *Rao Kurun Sing*(2). In such a case, upon a plaint stating the circumstances under which the more distant reversionary heir claims to sue, the Court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue and would probably require the nearer reversioner to be made a party to the suit."

That is the rule laid down by the Privy Council with regard to an adoption, but the same rule was laid down by this Court in suits like the present for a declaration in regard to an improper alienation (*Gurulingaswami* v. *Ramalakshmamma*(3)).

In the present case the nearest reversioner concurred in the improper alienation and all those nearer than the plaintiff have omitted to sue and are now barred from doing so by limitation. They are all made parties to the suit. We think that, in these circumstances, all the nearer reversioners must be held to have precluded themselves from suing and that the plaintiff is therefore entitled to maintain the suit. Whether the Court ought, in the first instance, in the exercise of its discretion, to have allowed the suit to proceed, seeing that there is only a small probability of the

(1) 10 B.H.C.R., 351.
(2) 14 M.I.A., 193.
(3) I.L.R., 18 Mad., 53 at p. 57.

GOVINDA PILLAI v. THAYAMMAL.

plaintiff becoming a presumptive heir, may well be doubted on the ground that the defendants ought not to be harassed and the time of the Courts wasted in litigation that may never have any practical result (*Tekait Doorga Persad Singh* v. *Tekaitni Doorga Konwari*(1)). But as the matter now stands before us the suit has been tried in three Courts and it has been found that the alienation by the widow was without necessity and was improper except to the comparatively small extent of Rs. 75. It may be that when the widow dies the plaintiff will be the presumptive reversioner, and in that case a decree in the present suit would save him from having to again prove the impropriety of the alienation, whereas if we now dismiss his suit on the ground that the District Munsif ought to have exercised his discretion and refused to hear it, the whole matter will have to be again litigated. As matters stand, our giving the plaintiff a decree on the facts proved cannot in any event do any harm but may, in the event of the plaintiff being the presumptive heir when the widow dies, save further litigation. For these reasons we set aside the decree of the District Judge and give the plaintiff a declaration that the alienation is not valid as against him beyond the lifetime of the widow save to the extent of Rs. 75 for which defendants Nos. 5 and 6 have a charge on the property.

The plaintiff must pay and receive proportionate costs throughout.

DAVIES, J.—I would simply add that by allowing the declaration in this particular case to stand it will (1) serve the purpose of perpetuating testimony for whomsoever may happen to be the next reversion on the death of the widow and (2) so prevent the time of our Courts from having been utterly wasted, which otherwise would be the case.

(1) L.R., 5 I.A., 149 at p. 163.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Sankaran Nair.

1904. July 28.

PASUPATHY AYYAR (FOURTH DEFENDANT), APPELLANT,

v.

KOTHANDA RAMA AYYAR (PLAINTIFF), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, ss. 232, 244—Transferee decree-holder—Mesne profits and costs not included in transfer—Suit to enforce right under transfer—Maintainability—Plaint treated as application in execution.

A decree had been passed against the present defendant in a previous suit for the surrender of possession of certain lands and also for mesne profits and costs. The interest of the decree-holders in these lands was then sold in execution of a decree which had been passed against them, and was purchased by the present plaintiff. The present plaintiff applied for execution of the original decree and to be placed in possession of the property he had purchased. The petition was rejected, and he now sued to obtain possession of the properties he had purchased. On the question being raised whether the suit was barred by section 244 of the Code of Civil Procedure:

Held, that plaintiff was entitled to relief. He was not a transferee of all that had been decreed in the original suit, inasmuch as the right to mesne profits and costs had not passed to him. If, for that reason, he was not entitled to be recognized as the transferee of the decree, and to execute it as such, he was entitled to enforce his right by suit. Assuming, however, that no separate suit lay, and that he should have proceeded by way of execution, the case was one in which the plaint should be treated as an application for execution.

Sutaput Roy v. *Syed Ali Hossein*, (24 W.R., 11), referred to.

SUIT for possession of lands with mesne profits and costs. A decree was passed in Original Suit No. 238 of 1895 against the present fourth defendant for the surrender of possession of certain lands and also for mesne profits and costs. The interest of the decree-holders in these lands was sold in execution of a decree in Small Cause No. 145 of 1896 against them and purchased by the present plaintiff. Plaintiff then applied for the execution of the decree in Original Suit No. 238 of 1895 and to be placed in possession of the property he had purchased. That application was rejected. He now brought this suit. Further facts are set

* Second Appeal No. 264 of 1903, presented against the decree of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Appeal Suit No. 101 of 1902, presented against the decree of M.R.Ry. K. Krishnamachari, District Munsif of Valingiman, in Original Suit No. 474 of 1900.

out in the judgment of the High Court. The District Munsif decreed in plaintiff's favour. The Acting District Judge upheld that decree.

Fourth defendant preferred this second appeal.

R. Subrahmania Ayyar for appellant.

V. Visvanadha Sastri for respondent.

JUDGMENT.—The facts of the present case are these. A decree was passed in Original Suit No. 238 of 1895 against the appellant for the surrender of possession of certain lands and also for mesne profits and costs. The interest of the decree-holders in these lands was sold in execution of a decree in Small Cause No. 145 of 1896 against them and purchased by the respondent before us.

The respondent then applied for the execution of the decree in Original Suit No. 238 of 1895 and to be placed in possession of the property he had purchased as he had "come into the shoes of the plaintiff and thus become entitled to be recognised as transferee under section 232, Civil Procedure Code." His claim to execute the decree was not recognised and the application was rejected by the District Munsif.

He now brings the suit in the same District Munsif's Court, to obtain possession of the properties he had purchased and the question that has been raised by this appeal is whether his suit is barred by section 244, Civil Procedure Code, and therefore ought to be dismissed.

It is now found that the lands, the right to which passed to the respondent by the sale, are the identical lands which the appellant was directed to surrender in Original Suit No. 238 of 1895 and if he were entitled to execute the decree as a transferee under section 232, Civil Procedure Code, it would be a question whether a separate suit to recover them would lie; though he may be entitled to bring a declaratory suit to establish his right as transferee when there is a dispute as to the same. Here, however, he was not a transferee of all that was decreed, the right to mesne profits and costs not having passed to him. It is pointed out in *Sutaput Roy* v. *Syed Ali Hossein*(1), cited for the respondent, with reference to section 208 of Act VIII of 1859, that a person who acquires only a partial interest in the rights created by the decree is not entitled to be recognised as the transferee of the decree under section 232,

(1) 24 W.R., 11.

PASUPATHY AYYAR v. KOTHANDA RAMA AYYAR.

Civil Procedure Code. If this view is correct the respondent, as a person not entitled to execute the decree, must be held entitled to enforce his right in the subject matter of the decree in so far as he is interested, by a separate suit.

Assuming, however, that no separate suit will lie, but that the respondent should have proceeded in execution only, the present case seems to us eminently one in which his plaint should be treated as an application for execution, following the view adopted in *Biru Mahata* v. *Shyama Churu Khawas*(1) and *Jhamman Lal* v. *Kewal Ram*(2).

For, soon after the sale to him, the respondent applied, as already stated, in due form for delivery of possession of the lands, and that was refused by the District Munsif by an order which was, having directed him to seek possession in the small cause suit in which the sale took place, obviously wrong. Within a few days after that order this suit was instituted in the same Court which had jurisdiction to execute the decree. The appellant in contesting the suit raised various questions which had to be gone into, whether the relief was to be granted in a suit or in execution and these contentions have been all found against him, so that there are no merits whatsoever in favour of the appellant nor any laches on the part of the respondent. The obstacles in the way of the respondent obtaining possession of the lands have arisen either from the error of the Court which was bound to execute the decree or untenable objections raised by the appellant. And as the plaint was presented within the period of limitation prescribed for applications to execute the decree and the contest continuously carried on, it would be absolutely unjust to deprive the respondent of the fruits of the purchase on the mere technical ground raised by the appellant.

We therefore dismiss the second appeal with costs.

(1) I.L.R., 22 Calc., 483. (2) I.L.R., 22 All., 121.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Sankaran Nair.

KANDASAMY CHETTY (DEFENDANT), APPELLANT,

v.

ANNAMALAI CHETTY (PLAINTIFF), RESPONDENT.*

1904. August 3.

Limitation Act—XV of 1877, s. 4—Duty of Court to dismiss suit if barred—Applicable where Court can dismiss entire claim—Position where portion of claim admitted.

The obligation cast upon a Court by section 4 of the Limitation Act to dismiss a suit, although limitation has not been set up as a defence, is only in cases where the Court is in a position to dismiss the whole claim or suit.

Alimannissa Khatoon v. *Syed Hossein Ali*, (6 C.L.R., 267), and *Raghu Nath Singh Manku* v. *Pareshram Mahata*, (I.L.R., 9 Calc., 635), followed.

SUIT for money. The defence of limitation had not been raised in the lower Courts. Plaintiff sued on a bond the terms of which was as follows :—

"Debt-bond executed on 7th June 1896, to [plaintiff] by [defendant]. Amount received from you by me in cash for my family expenses, is Rs. 300. I shall pay the interest accruing on this sum of rupees three hundred at 1 per cent. per mensem, in 12 months and the principal and the interest accruing at the rate aforesaid for the next 12 months on 7th June 1898 next, have the payment endorsed hereon, and get this bond back. If I make default in payment on any of these due dates, I shall, on your demand, pay off the principal and the interest accrued till then, with compound interest thereon at 1-4 per cent. per mensem calculated once in 12 months." The bond was signed by defendant.

In his written statement, defendant admitted having received Rs. 70 on the bond but pleaded that the remainder of the consideration had not been paid. He offered to pay the Rs. 70 and proportionate costs and asked that the suit might be dismissed as to the remainder of the claim. The District Munsif decreed in plaintiff's favour for the full amount mentioned in the bond

* Second Appeal No. 981 of 1902, presented against the decree of H. Moberly, Esq., District Judge of Madura in Appeal Suit No. 487 of 1901, presented against the decree of M.R.Ry. V. Swaminatha Ayyar, District Munsif of Tirumangalam, in Original Suit No. 14 of 1901.

KANDASAMY CHETTY v. ANNAMALAI CHETTY.

with interest and costs. Defendant appealed to the District Judge, who dismissed the appeal.

Defendant preferred this second appeal. In his grounds of appeal he raised the question of limitation.

K. Srinivasa Ayyangar for appellant.

S. Srinivasa Ayyangar for respondent.

JUDGMENT.—This suit is brought on a bond for the principal sum of Rs. 300 with interest. The principal amount was payable on the 7th June 1898 according to the first part of the bond, the interest being payable on the 7th June 1897 and the 7th June 1898, respectively. The bond also provided that if default in making payments were made on the due dates the principal and interest then due with compound rate at Rs. 1-4-0 per cent. per mensem with annual rents, should become payable on request or demand by the obligee.

Two arguments have been advanced before us by the plaintiff-respondent with reference to the ground taken on behalf of the appellant for the first time here, that the claim in so far as it was not admitted is barred by limitation and the Court is bound to dismiss it under section 4 of the Limitation Act.

The first is that the provision about the obligee making a request or demand is a condition to the money becoming payable, in accordance with the terms of this portion of the instrument. The cases to which our attention has been drawn as to this are not uniform, though the general principle applicable to the matter is clear, namely, whether upon the fair construction of the particular instrument the intention of the parties was to make the demand a condition. We do not consider it necessary to decide this point, as we think the appeal must fail with reference to the other argument put forward, *i.e.*, the obligation cast upon a Court by section 4 of the Limitation Act is only in cases where it is in a position to dismiss the whole claim or suit. *Alimannissa Khatoon* v. *Syed Hossein Ali*(1) and *Rughu Nath Singh Manku* v. *Pareshram Mahata*(2) are clear authorities in favour of this view.

Following those decisions we must hold against the appellant inasmuch as a decree had been passed against him for a part of the claim on his own admission and the appeals in the lower

(1) 6 C.L.R., 267.

(2) I.L.R., 9 Calc., 635.

KANDASAMY CHETTY v. ANNAMALAI CHETTY.

Appellate Court and here have had to be confined to the portion of the plaintiff's claim not admitted.

Apart from this, the case is not one in which we should permit any issue as to limitation to be taken at this stage, as the appellant is not in a position to offer any explanation whatsoever why the question was not raised in the Courts below.

We accordingly dismiss the second appeal with costs.

APPELLATE CIVIL.

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

1904. August 12.

NAWAB AJAJUDDIN ALLI KHAN (CLAIMANT), APPELLANT,

v.

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

Forest lands—Claim for hills—Village and land made over to claimant's ancestor by Government—Hills situated within immemorial boundaries of village—Right of inamdar irrespective of evidence of actual enjoyment—Necessity for proving adverse possession against Government.

A jaghirdar preferred a claim to certain hills. It appeared that in 1842 the uncontrolled management of a certain village and pieces of land was made over to the ancestor of the present claimant. Prior to such handing over, Government officers had been in possession on behalf of the Inamdar. It was not alleged that, when such possession was handed over, the hills in question were excepted; and it was not disputed that the hills were within the immemorial boundaries of the village:

Held, that upon these facts, apart from any evidence of actual enjoyment by the Inamdar, he should be held entitled to the hills.

Held also, that it was not necessary for the claimant, in these circumstances, to prove adverse possession as against Government.

CLAIM for land. The acting District Judge set out the facts thus, in his judgment on appeal from the order of the Forest Settlement-officer, Cuddapah: "The dispute relates to 12 small hills in the Yellutla extension (*vide* north-western portion of

* Second Appeal No. 1031 of 1901 presented against the decree of S. Gopalachariar, Esq., District Judge of Cuddapah, in Appeal Suit No. 112 of 1899 presented against the order of M.R.Ry. K. Ganapaya, Forest Settlement-officer, Cuddapah, in claim No. 1 of 1896.

NAWAB AJAJUDDIN ALLI KHAN v. SECRETARY OF STATE FOR INDIA.

the map exhibit B), and 2 in Sanga Samudram block (*vide* south-western portion of the map exhibit B). These and certain lands were claimed by the Jaghirdar of Cherlopalli, &c., appellant, as appertaining to his village of Cherlopalli. The lands were allowed by the Forest Settlement-officer, but the said hills were disallowed and hence this appeal. 2,112 and odd acres were enfranchised in favour of the jaghirdar in 1868 (see exhibit R I). In the survey map of 1875 (exhibit B), 6,087 and odd acres are entered as the extent of the said agraharam. Hence the claimant contends that the entire extent is his."

He found that the claimant had not proved adverse possession as against Government. He upheld the decision of the Forest Settlement-officer and dismissed the appeal.

The claimant preferred this appeal.

Mr. *John Adam* and *T. P. Kothandaramier* for appellant.

The Government Pleader for respondent.

JUDGMENT.—Though this case comes up on second appeal, the decision of the question at issue rests upon undisputed documents and findings of both the Courts that possession was with the appellant.

Exhibit A (Proceedings of the Board of Revenue of 1842) shows that the uncontrolled management of the village and pieces of land mentioned therein was made over to the appellant's ancestor. Prior to such handing over, the Government officers had been in possession on behalf of the Inamdar. It is not alleged that, when such possession was handed over, the hills now claimed by Government were excepted. It is undisputed that the hills are within the immemorial boundaries of the village. Upon these facts, even apart from any evidence of actual enjoyment by the Inamdar, he should be held entitled to the hills. In addition to this evidence, there is, however, proof of actual enjoyment by him. It was not necessary to adduce any evidence that the enjoyment was of right, possession being *primâ facie* evidence of ownership. On behalf of Government, the sole ground on which the appellant's right is questioned is that, in the document prepared at the Inam settlement, no express reference is made to the hills. Exhibit A and the standing orders show that the hills and similar uncultivated poramboke were not taken into account in estimating the income of the village for the purpose of fixing the quit-rent; nor does the circumstance that the survey made in 1803 was

NAWAB AJAJUDDIN ALLI KHAN v. SECRETARY OF STATE FOR INDIA.

confined to cultivable lands affect the question. On the other hand in 1869 when a question arose as to the boundary between this village and another adjoining Government village, there was a formal settlement with the knowledge of Government servants fixing the boundary as including the hills. Although this may not be binding upon the Government as the settlement of a question to which they were parties, it is evidence in favour of the appellant's contention that the hills are included in his property, and these boundaries were adopted as the right boundaries in the Government survey, which took place in 1875 to 1877, and the map prepared in pursuance of that survey expressly includes the hills in dispute as part of the village.

There is, on behalf of Government, nothing to meet or contradict the above evidence as to the title and possession of the appellant.

Both the lower Courts were clearly in error in holding that it lay on the appellant to prove adverse possession as against Government. The appellant having made out a strong *primâ facie* case of title backed up by possession, it lay on Government to establish their right, if any. This they have failed to do.

We must therefore reverse the decrees of the lower Courts and allow the claim of the appellant with costs throughout.

APPELLATE CIVIL.

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

1904. August 17, 30.

SANKARAVADIVELU PILLAI (PLAINTIFFS Nos. 1 AND 6), APPELLANTS,

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL, AND 9 OTHERS (DEFENDANT AND PLAINTIFFS 2 to 5, 7 to 11), RESPONDENTS.*

Injunction—Calingula constructed by Government—Necessary effect to cause water to flood plaintiffs' lands—Rights of Government in connection with the distribution of water—Limitation Act XV of 1877, s. 24—Continuing wrong.

In 1882 a calingula was constructed by Government for the purpose of reducing the flow of water into a tank through a channel. The necessary effect of the calingula would have been to cause the water diverted from the channel to flood the plaintiffs' land. To obviate this, a small drainage channel was formed by Government to carry off the surplus water. Plaintiffs contended that the drainage channel was not sufficient to carry off the water and that the water which flowed over the calingula stagnated on their lands and made them unfit for cultivation. They prayed for a mandatory injunction directing that the calingula be blocked up:

Held, that they were entitled to the relief claimed. Government have the right to distribute the water of Government channels for the benefit of the public, subject to the rights of a ryotwari land-holder, to whom water has been supplied by Government, to continue to receive such supply as is sufficient for his accustomed requirements. But the rights of Government, in connection with the distribution of water, do not include a right to flood a man's land because, in the opinion of Government, the erection of a work which has this effect is desirable in connection with the general distribution of water for the public benefit. The fact that the opening of the calingula was necessary for the protection of the tank, and the fact that there was no negligence in the construction of the calingula—so far as the calingula was concerned—did not deprive the plaintiffs of their right to have their property protected. Even if Government had been empowered by statute to construct the calingula in question it would be for Government to shew that they could not exercise their statutory powers without injuring the plaintiffs' lands.

* Second Appeal No. 1351 of 1902 presented against the decree of J. Hewetson, Esq., District Judge of Tinnevelly, in Appeal Suit No. 333 of 1901 presented against the decree of M.R.Ry P. S. Sesha Ayyar, District Munsif, Srivaikuntam, in Original Suit No. 540 of 1900.

The position of persons acting under statutory authority discussed.

Held also, that the injury was a continuing one and that the suit was governed by section 24 of the Limitation Act and was not barred by limitation.

SUIT for a mandatory injunction directing the removal of a calingula. The facts are fully set out in the judgments.

K. Srinivasa Ayyangar for appellants.

The Government Pleader for first respondent.

JUDGMENT—Sir ARNOLD WHITE, C.J.—In this suit the plaintiffs ask for a mandatory injunction directing the defendant (the Secretary of State) to block up a calingula or "bye-wash" in a certain channel known as the Korkai channel. The District Munsif dismissed the suit and the District Judge affirmed the Munsif's decree.

The calingula was constructed by Government in 1882. It was put up for the purpose of reducing the flow of water into the Korkai tank through the Korkai channel. The necessary effect of the calingula would have been to cause the water diverted from the channel to flood the plaintiffs' lands. To obviate this certain land was acquired by Government in 1882 and a small drainage channel formed to carry off the surplus water. The plaintiffs say that the drainage channel is not sufficient to carry off the water and that the water which flows over the calingula stagnates in their lands and makes them unfit for cultivation. There is no finding whether the water which flows over the calingula is in fact carried off by the small drainage channel. But the written statement does not allege that it is and apparently Government did not attempt to prove that it was. The written statement does not allege that the water is now in fact carried off by the drainage channel. It alleges that before 1895 the level of the plaintiffs' "lands was such that water escaping through the calingula could pass off freely without causing material damage to the plaintiffs."

The case for the Government is that the damage to the plaintiffs has been caused by the abnormal floods of 1895 and not by the calingula and the District Judge finds that the damage done to the plaintiffs' lands was due to the floods of 1895 and not to the erection of the calingula in 1882. The Judge observes "It is argued that but for the bye-wash the floods would have done no harm, but as the witnesses admit that the bunds of the Korkai channel were swept away [in the floods of 1895] the lands would have been submerged even if the bye-wash had not been built."

SANKARA-VADIVELU PILLAI v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

This, no doubt, is true but the plaintiffs' claim is based on the fact that since 1895, as the result of the floods of that year, the level of their land has been permanently lowered and the water which now flows on to this land over the calingula and which would not flow on to the land at all if the calingula had not been built, remains and stagnates to a greater extent than had been the case prior to 1895. There is evidence of complaints by the ryots in 1883 and 1888, but the damage (if any) done to their lands up till 1895 does not appear to have been substantial. Since 1895, however, the case is different. The Munsif finds that since 1895 the plaintiffs' lands have been practically under water, and it would appear that, from 1895 to 1900, the assessment on the lands in question was remitted.

For the purpose of this appeal, I am prepared to assume that the averment in the written statement, that up to 1895 no material damage had been sustained by the plaintiffs, is true. The proposition advanced by the Government Pleader on behalf of Government was that as, since 1895, there would have been no damage to the plaintiffs' lands except for the fact that, by the act of God, the level of the lands had been lowered, the Government were entitled to continue to allow water to flow on to the lands over their calingula. The short answer to this seems to be that notwithstanding the lowering of the level of the plaintiffs' lands, water would not flow over and stagnate on their lands, if the calingula, which admittedly causes water to flow on to the lands, had never been constructed. The Government Pleader in fact went further and was bold enough to suggest that it was the duty of the plaintiffs to meet the difficulty by raising their lands to the level at which they stood prior to 1895, and not the duty of the Government to provide means for protecting the Korkai tank without injuring the plaintiffs.

The question to be determined really resolves itself into this—were Government acting within their rights when in 1882 they erected a calingula which caused water from the channel to flow over the plaintiffs' lands. It seems to me there can only be one answer to this question. As I read the authorities it appears to me to be now settled law that Government have the right to distribute the water of Government channels for the benefit of the public, subject to the right of a ryotwari land-holder, to whom water has been supplied by Government, to continue to receive

SANKARA-VADIVELU PILLAI v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

such supply as is sufficient for his accustomed requirements. See *Kristna Ayyen* v. *Venkatachella Mudali*(1) and *Ramachandra* v. *Narayanasami*(2). But it cannot be said that the rights of Government in connection with the distribution of water include a right to flood a man's land because, in the opinion of Government, the erection of a work which has this effect is desirable in connection with the general distribution of water for the public benefit. That Government themselves did not take this view is shown by the fact that in 1882 at the time they constructed the calingula, they also constructed a drainage channel to counteract its effect as regards the flow of water over the plaintiffs' lands. The fact that the opening of the calingula was necessary for the protection of the tank and the fact that there was no negligence in the construction of the calingula—so far as the calingula was concerned—do not deprive the plaintiffs of their right to have their property protected. In the case of *Whalley* v. *The Lancashire and Yorkshire Railway Company*(3), an unprecedented rainfall had caused a quantity of water to accumulate against one of the sides of the defendants' railway embankment, to such an extent as to endanger the embankment. In order to protect their embankment, the defendants cut trenches in it by which the water flowed through and went ultimately on to the land of the plaintiff, which was on the opposite side of the embankment and at a lower level, and flooded and injured it to a greater extent than it would have done had the trenches not been cut. In an action for damages the Jury found that the cutting of the trenches was reasonably necessary for the protection of the defendants' property, and that it was not done negligently. It was held that, though the defendants had not brought the water on their land, they had no right to protect their property by transferring the mischief from their own land to that of the plaintiff and that they were therefore liable. The case of *Nichols* v. *Marsland*(4), on which the Government Pleader relied is wholly different from the present case. In *Nichols* v. *Marsland*(4) it was held that the injury caused was entirely due to the act of God.

Putting the case at the highest and treating it as if Government had been empowered by statute to construct the calingula

(1) 7 M.H.C.R., 60.
(2) I.L.R., 16 Mad., 333.
(3) L.R., 13 Q.B.D., 131.
(4) L.R., 2 Ex.D., 1.

SANKARA-VADIVELU PILLAI v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

in question, it would be for the Government to show that they could not exercise their statutory powers without injuring the plaintiffs' lands. See the judgment of Lord Cairns in *Hammersmith Ry. Co.* v. *Brand*(1) and the judgment of Lord Halsbury in *Canadian Pacific Ry. Co.* v. *Roy*(2).

Statutory powers authorizing the construction of works are granted "on the condition sometimes expressed and sometimes understood . . . —but if not expressed always understood—that the undertakers shall do as little damage as possible in the exercise of their statutory powers." See the judgment of the Privy Council in the *Gaekwar Sarkar of Baroda* v. *Gandhi Kachrabhai*(3). In his judgment in *Geddis* v. *Proprietors of the Bann Reservoir*(4), Lord Blackburn observes (page 455). "I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to any one; but an action does lie for doing that which the legislature has authorized, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented, it is, within this rule 'negligence' not to make such reasonable exercise of their powers. I do not think that it will be found that any of the cases (I do not cite them) are in conflict with that view of the law."

In the case of *Canadian Pacific Ry. Co.* v. *Parke*(5), the defendants had a statutory right to irrigate their soil by compulsory diversion of water from adjacent streams by conveying it over lands which did not belong to them and to run the surplus water through adjacent lands by means of drains. They brought water upon their lands in such manner as to damage the plaintiffs' land by causing a slide. It was held by the House of Lords that, in the absence of provisions showing an intention on the part of the legislature to take away the plaintiffs' right to protect the property from invasion, the plaintiffs were entitled to an injunction to prevent the defendant's user of the water in disregard

(1) L.R., 4 H.L., 215.
(2) L.R., [1902], A.C., 220 at p. 230.
(3) I.L.R., 27 Bom., 344.
(4) L.R., 3 A.C., 430.
(5) L.R., [1899], A.C., 535.

SANKARA-VADIVELU PILLAI v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

of their common law obligation to do no damage to the plaintiffs' land.

As regards the question of limitation I cannot agree with the view expressed by the District Judge, though he did not actually decide the point, that the case is governed by article 120. The injury is a continuing injury and section 24 of the Limitation Act applies. If authority for this were needed it is to be found in the judgment of the Privy Council in *Rajrup Koer* v. *Abul Hossein*(1), and in the cases of *Punja Kuvarji* v. *Bai Kuvar*(2), and *Subramaniya Ayyar* v. *Ramachandra Rau*(3).

To hold that article 120 applies would lead to the anomaly that Government would acquire a right by way of easement in six years.

In my judgment the plaintiffs are entitled to the relief which they claim. The decrees of the Lower Courts must be set aside and the appeal allowed. For the reasons stated by the Privy Council in *Gaekwar Sarkar of Baroda* v. *Gandhi Kachrabhai*(4), I think the injunction should be in general terms restraining the defendant from flooding the plaintiffs' lands by causing or permitting water to flow from the Korkai channel on to the plaintiffs' lands. The plaintiffs are entitled to their costs throughout.

SUBRAHMANIA AIYAR, J.—Notwithstanding that the judgments of both the Lower Courts proceed on a complete misconception of the real nature of the case, there is no difficulty in ascertaining the facts. The plaintiffs, who are the owners of certain lands held under the Government on ryotwary tenure, sue the Government on behalf of themselves and other persons holding similar lands, in respect of what causes common injury to them all, having obtained permission under section 30 of the Civil Procedure Code for such representative litigation. The lands of the plaintiffs lie on one side of a Government channel called the Korkai channel which, in addition to leading the water required for the supply of the Korkai irrigation tank, carries off the drainage from the Marudur anicut system. As about five times as much water flows down the channel as can be stored in the Korkai tank with safety to that reservoir, a bye-wash was constructed in the channel in 1882 by the

(1) I.L.R., 6 Calc., 394.
(2) I.L.R., 6 Bom., 20.
(3) I.L.R., 1 Mad., 335.
(4) I.L.R., 27 Bom., 344.

SANKARA VADIVELU PILLAI v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

Government, to drain off all the water over and above the maximum quantity to be led into the tank as fixed by the Public Works Department. At the same time a ditch also appears to have been made for conducting the water escaping through the bye-wash, into a water course called the Chillai Odai, so as to prevent the neighbouring lands being inundated and injured. But as the water has been running over the lands to a more or less extent ever since the construction of the bye-wash (see 5th paragraph of the Secretary of State's written statement) the ditch apparently did not fully answer the purpose intended. In this state of things a flood occurred in 1895 which breached the Tambrapurni river and the Korkai channel, as a result of which the lands were cut up and their condition altered, and since then they have been subject to much more inundation from the water sent by the bye-wash than had been the case previously. Consequently the cultivation of the lands has since ceased and the revenue assessed thereon had, as stated by the District Munsif, to be remitted from 1895 till the commencement of this litigation in 1900.

The questions in the case are (1) whether the plaintiffs have a cause of action, (2) if so, whether their right to relief is in any way barred and (3) if not barred, what relief should be granted to them.

The learned Government Pleader in the course of his argument, if I followed him correctly, contended with reference, on the one hand, to the position occupied by the Government in connection with public irrigation works and, on the other, to the tenure of ryotwary land-holders, that the throwing of water on to the plaintiffs' lands through the bye-wash to their detriment, did not render the Government liable to an action.

It is quite true that it is among the most important functions of the Government of this country to construct new works of irrigation and to maintain old ones according to means and circumstances. The position of the Government in regard to liability for damage caused to individuals by such irrigation works would, according to *The Madras Railway Company* v. *The Zamindar of Karvetnagaram*(1), be analogous to that of persons acting under statutory authority. The law with reference to the liability of such persons was considered in *Canadian Pacific Ry. Co.* v. *Parke*(2)

(1) L.R., 1 I.A., 364. (2) L.R., [1899], A.C., 535.

SANKARA-VADIVELU PILLAI v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

where the leading authorities on the point were referred to and explained by Lord Watson, who delivered the opinion of the Judicial Committee. The cardinal rules deducible from them may be formulated thus:—

(i) Wherever, according to the sound construction of a statute, the legislature has authorized a person to make a particular use of property and the authority given is in the strict sense of the law *permissive* merely and not *imperative*, the legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law right of others.

(ii) But where the authority given is *imperative* the person so authorized incurs no responsibility however much injury he may cause to another, so long as he is not convicted of negligence.

(iii) The burden lies on those who seek to establish that the legislature intended to take away the private right of individuals to show that by express words or necessary implication such an intention appears.

The task of arriving at a conclusion as to the permissive or imperative character of an authority in a given case being by no means free from difficulty even where it depends solely on the words of a statute, that must obviously be the more so where the conclusion has to be arrived at with reference to unrecorded custom and practice very rarely brought up for discussion and decision before Courts and with reference to which only the rights and obligations of the State in this country in regard to public irrigation have to be postulated. Having regard to all the considerations bearing on the question, the only correct conclusion would seem to be that so far as the construction of new works is concerned the authority is but *permissive*, while as regards the maintenance of works once completed so as not to interfere with the existing rights of other persons, the authority of the Government is *imperative*. The latter part of this conclusion results directly from the Karvetnagaram case, it having been there held that the Zamindar to whom the duty of the maintenance of the tank was transferred from Government could be made responsible for the damage done to the railway by the breach of the tank only if negligence on his part could be proved. Nor need this be taken to involve any real anomaly, for, it is not difficult to conceive similar cases even under a statute; for instance, an authority to establish a hospital of the kind in question in *Metropolitan Asylum*

SANKARA-VADIVELU PILLAI v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

District Board v. *Hill*(1) only under conditions and circumstances which prevent it from being a nuisance to anybody at the time of its establishment might well be coupled with the proviso that persons choosing to come in the neighbourhood subsequently shall not be entitled to complain of it as injurious to them. Be this as it may, it is clear that the imperativeness ascribable to the maintenance of irrigation works once lawfully brought into existence must be confined strictly to the conservation of the work as originally designed and executed, and cannot be extended to any material alterations and additions made in, or to, any existing old work. Such alterations and additions should, in reason, be held to stand on the same footing as that of perfectly new works and thus subject to the restriction applicable to the case of new works, viz., there should be no invasion thereby of the rights of others. In this view it is clear that the bye-wash in question here was essentially a new work and that so long as such work is made the instrument of throwing water on the plaint mentioned lands without the consent of the owners, they have a ground of complaint, unless it be that a different conclusion has to be arrived at with reference to the character of the tenure under which those lands are held by them.

But clearly there is absolutely nothing in the nature of the ryotwari tenure which affords in the remotest degree any support to the contention under consideration. For none of the special features of this tenure—(1) liability to periodical revision of assessment, (2) power to relinquish the whole or part of the holding, (3) power of the Government to alter the sources, means, works, etc., from or by which water for irrigation is supplied to ryots entitled thereto so long as their water right is not prejudicially affected so as to cause real damage—none of these have the slightest bearing upon the question whether in maintaining or constructing a work of irrigation, the Government can throw the waters thereof on the lands of the ryotwari holders against their will. It is therefore idle to say that, in this respect, there is any difference whatsoever between ryotwari land and land held on other tenures such as zamindari, inam and the like.

In passing I think it right to say that the case of *Chinnappa Mudaliar* v. *Sikka Naikan*(2), referred to by the Government Pleader in the course of his argument with reference to the last

(1) L.R., 6 A.C., 193.

(2) I.L.R., 24 Mad., 36.

SANKARA-VADIVELU PILLAI v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

of the abovementioned incidents of the ryotwari tenure, goes too far in treating of the irrigation rights of ryotwari holders in general as mere rights *in personam*, and that, having regard to the true character, they should on principle and authority be held to partake of the nature of rights *in rem*. (See *Wyatt* v. *Larimer Weld Irrigation Co.*(1).)

Reverting now to the point under consideration, it is scarcely necessary to add that to throw water on another man's land against his will, especially when it is claimed to do this as of right amounts to a trespass, and the party affected has a right of action even if no substantial damage is shown. Consequently the plaintiffs are entitled to object to their lands being inundated by water through the bye-wash even supposing they could make a profitable use of the lands in spite of the overflow, and to ask that such overflow be interdicted lest by lapse of time the Government acquire a right to flood the lands by way of easement (see *McCartney* v. *Londonderry and Lough Swilly Railway Co.*(2)).

The strictness of the law in a matter like the present will be seen from what Lords Justices James, Brett and Cotton took care to say in *West Cumberland Iron and Steel Co.* v. *Kenyon*(3) and which imply that where water has been passing say from A's land to that of B under circumstances which do not entitle the latter to object to such passage, yet where the former makes a change in the means by which, and the circumstances under which, the passage of water into B's land takes place, so as to make it flow while on B's land differently from how it did before such change, can be objected to even where there is no increase in the quantity of water sent on to his land. The parts which I have italicised in the following quotations from the judgment of Lord Justice James in that case are enough to bear out the above statement. "I have always understood that everybody has a right on his own land to do anything with regard to the diversion of water or storage of water or with regard to usage of water in any way he chooses, *provided* that when he ceases dealing with it on his own land, when

(1) 36 A.m. S.R., p. 280, Kinney on 'Irrigation', pp. 359, 430 and 739; and Mead on 'Irrigation Institutions,' pp. 22, 82, 83 and 364 to 367. Compare also Captain Baird-Smith's 'Report to the Court of Directors' in 1853 published under the title of 'Italian Irrigation,' Vol. II, ch. I, section I, particularly at pp. 138 and 139, and ch. 11, sec. 11, particularly at pp. 259 to 262.

(2) L.R., [1904], A.C., 301 at p. 313.

(3) L.R., 11 Ch.D., 782.

SANKARA-VADIVELU PILLAI v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

he has made such use of it as he is minded to make, *he is not to allow or cause that water to go upon his neighbour's land in some other way than the way in which it had been affected before.* That is the common use of water. A man receives the rain water from his roof, he does not allow it to settle upon the surface but he receives it on his roof and collects it into the pipes and then lets it to go down upon his own land and from his own land it gets into his neighbour's land. *But unless his neighbour receives that water in some different way or quantity from what he had done before, there is no legal right of action.* If a man chooses to make any quantity of fish ponds or mill ponds or artificial lakes or pleasure waters or fountains or anything of that kind on his own land he is at liberty to do so *provided that when he has finished doing so, he does not increase the burden upon his neighbour* . . . . If there is a lake on my property into which I drain my field and there is a passage from that lake into my neighbour's land, how can it signify whether I drain my field into the lake by one or two or three openings *provided the same overflow as before goes through the same outlet into my neighbour's land.*" This being the law in respect of property liable to an overflow, it is manifest that the throwing of water through the bye-wash on the plaint lands, which were never subject to any such burden before, is *a fortiori*, wrongful.

The next point is whether the plaintiffs' right to relief is barred. No question of limitation arises, since the overflow complained of is periodical and makes the wrong a continuing one. And certainly there has been nothing in the conduct of the owners of the lands disentitling them to relief. It is clear that from the very first complaints were made by some at least of the ryots with reference to water escaping through the bye-wash being allowed to come upon their lands. And when in consequence of nothing being done with reference to such complaints, a few of them tried to protect themseves by temporary bunds put up across the bye-wash, the only response they got was criminal prosecution against them followed by imprisonment. It is not surprising that persons in the position of these ryots are by no means anxious to embark on litigation against the Government until they find such a course unavoidable. And it may be that the ryots would have continued to submit, though quite unwillingly, to the infringement of their right which began when the water was allowed to overflow their

SANKARA-VADIVELU PILLAI v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

lands, but for the flood of 1895 and the consequent aggravation of the injury.

Stress was laid on behalf of Government on the fact that the ryots have not restored the lands to the condition in which they were before the flood, and that, had they done so, the overflow on their lands would be much smaller. But whether the overflow on their lands is only to a small depth as before the flood or to a greater depth as has been the case subsequently is not material, since what is complained of is, as already pointed out, actionable irrespective of the extent of damage inflicted. And surely the abstention on the part of the ryots from spending money upon the improvement of the lands pending their efforts to obtain redress against the invasion complained of, prudent as such a course obviously is, can neither better the position of the wrong-doer nor render that of the party wronged worse.

Lastly, as to the remedy, the blocking up of the bye-wash is not necessary. Of course in the circumstances of the present case, the construction of the bye-wash is not what the plaintiffs are entitled to complain of. The wrong is in the water passing through the bye-wash being allowed to overflow their lands. And as that could be prevented otherwise than by the blocking up of the bye-wash, as by the cutting of proper trenches or the construction of other works, a general injunction that the defendants shall not throw the waters of the channel on the plaint mentioned lands would meet all the requirements of the case. I accordingly concur in the order proposed in the judgment of the learned Chief Justice.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Sankaran Nair.

1904. July 27. August 10.

RAJA OF VIZIANAGARAM (COUNTER-PETITIONER—TRANSFEREE), DECREE-HOLDER—APPELLANT,

v.

DANTIVADA CHELLIAH (PETITIONER—FIRST DEFENDANT), RESPONDENT.*

Hereditary Village Offices Act—(Madras Act III of 1895), s. 5—Emoluments of Village offices—Non-liability to attachment or sale by Courts.

The prohibition in section 5 of the Madras Hereditary Village Offices Act (III of 1895) against attachment and sale by the Courts is absolute and deprives Civil Courts of all jurisdiction to give directions for sale of inam lands granted as emoluments for the performance of duties connected with the offices referred to in that section. A decree directing the sale of such lands is *ultra vires*.

EXECUTION PETITION. The decree, which had been obtained *ex-parte*, contained an order for the sale of certain mortgaged land, which was admittedly service inam land, being the emoluments attached to the office of village carpenter. The defendant filed a petition in the District Munsif's Court stating this fact and praying that the execution petition might be dismissed. The Munsif, in his order, said: "The decree sought to be enforced is a mortgage decree which directs the realisation of a certain sum of money by sale of the mortgage lands. The decree-holder now having applied for sale of the mortgaged lands the first judgment-debtor puts in this application under section 244 of the Civil Procedure Code, objecting to the sale of the lands on the ground that they are unenfranchised service inam lands and as such they are inalienable under section 5 of Act III of 1895 and relies on the case quoted in *Kannam Naidu v. Latchanna Dhora*(1), which forbids the attachment of crops raised on service inam lands. The pleader for the plaintiff argues that this Court which executes the decree cannot go behind

* Civil Miscellaneous Second Appeal No. 5 of 1904, presented against the order of J. J. Cotton, Esq., District Judge of Vizagapatam, in Appeal Suit No. 162 of 1903, presented against the order of M.R.Ry. P. N. Satagopa Nayudu, District Munsif of Vizianagaram, Miscellaneous Petition No. 120 of 1903, in Execution Petition No. 574 of 1902 (Original Suit No. 717 of 1897).

(1) I.L.R., 23 Mad., 492.

the decree which rightly or wrongly directs the sale of the property and this objection as regards the inalienability of the lands mortgaged ought to have been raised in the suit itself . . . . Now the point is whether this is a question coming under section 244 of the Code and whether contrary to the terms of the decree, this Court could direct the sale of the lands to be stopped on the grounds that the land is inalienable."

He considered that he could not refuse to order the sale of the lands and dismissed the application. The District Judge, on appeal, reversed that order. The decree-holder preferred this appeal.

T. Rangachariar for appellant.

V. Ramesam for respondent.

JUDGMENT.—The appellant, the Maharaja of Vizianagaram, obtained a decree *ex-parte* against the respondent on a mortgage, and it contained an order for the sale of the mortgaged land. Though the record prior to, and inclusive of, the decree makes no allusion to the fact, yet in the subsequent proceedings the land is admitted to be service inam, being the emoluments attached to the office of village carpenter, which is among the offices comprised in the Madras Hereditary Village Offices Act (Act III of 1895) Section 5 of that Act runs thus:—"The emoluments of village offices, whether such offices be or be not hereditary, and in the schedule districts as defined in the Scheduled Districts Act, 1874, all such emoluments and other emoluments granted or continued in remuneration for the performance of duties connected with the collection of the revenue or the maintenance of order, shall not be liable to be transferred or encumbered in any manner whatsoever, and it shall not be lawful for any Court to attach or sell such emoluments or any portion thereof." With reference to this section, the lower Appellate Court refused to cause the sale to be held, notwithstanding the direction for sale contained in the decree.

On behalf of the appellant, it is contended that, as between the parties to the decree, the order for sale therein contained must be carried out, notwithstanding the prohibition of law relied on by the lower Appellate Court. If the interdiction upon alienation by parties or attachment or sale by Court, were merely for the benefit of particular persons it would, no doubt, be open to them to waive the benefit, introduced in their favour, and, on such waiver, the transfer could be given effect to, and a sale, necessary for that

RAJA OF VIZIANAGARAM v. DANTIVADA CHELLIAH.

purpose, might take place. Again, even when enactments prohibiting transfers have had wider objects, such transfers have been held binding upon the actual individuals making the transfer, on the principle of a personal estoppel by reason of a personal interest possessed by these individuals. But where the prohibition has some object of public policy in view the rule is to enforce the prohibition literally and strictly (compare Hard Castle on 'Interpretation of Statutes,' third edition, pages 392 and 397). There can be no doubt that section 5 referred to has been framed on considerations of such a policy and in order to guard against the dissociation from the specified offices, to any extent whatever of the emoluments attached thereto, as that cannot but impair the efficiency of the services to be rendered by the officers and consequently affect injuriously the interests alike of the Government and of the sections of the public concerned.

In these circumstances the prohibition, in question, must be taken to be absolute and to deprive civil courts of all jurisdiction to give a direction for sale of such inam property as that in question. And the decree in so far as the direction for sale goes was altogether *ultra vires* and incompetent to confer the right intended (see *Vasanji Haribhai* v. *Lallu Akhu*(1) and Courts are bound on the matter coming to their notice, to abstain from enforcing the direction.

As to the cases of *Sadashiv Lalit* v. *Jayantibai*(2) and *Narayan Khandu Kulkarni* v. *Kalgaunda Birdar Patel*(3) cited for the appellant, the former of which, was the case of a right to officiate at religious ceremonies in a certain village, and the latter a case of *Kulakarni Vatan land* both apparently, fall under the second of the heads stated above, *i.e.*, cases of estoppel on the ground of personal interest of the individual transferers. The provisions of section 5 of the *Bombay Hereditary Offices Act* (Act III of 1864) bearing on the question of a vatandar's power to alienate vatan land, which was under consideration in the second of the above cases, differ indeed essentially from the provisions of section 5 of the Madras Act for they imply that a vatandar has unrestricted power of transfer of vatan lands when the transferee is a vatandar of the same vatan, and in other cases, that he could transfer, with

(1) I.L.R., 9 Bom., 285 at p. 288. (2) I.L.R., 8 Bom., 185.
(3) I.L.R., 14 Bom., 404.

RAJA OF VIZIANAGARAM v. DANTIVADA CHELLIAH.

the sanction of the Government. And Sarjent, C.J., and Telang, J., naturally enough, doubted whether provisions of the qualified character of section 5 of the Bombay Act should be construed as making an alienation to a person outside the family void, as between the grantor and the grantee. These cases are clearly distinguishable from the present.

The appeal fails and is dismissed with costs.

APPELLATE CIVIL.

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

SANDHU TARAGANAR AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

HUSSAIN SAHIB AND OTHERS (DEFENDANTS), RESPONDENTS.*

1904. August 22, 30.

Civil Procedure Code—Act XIV of 1882, s. 244—Question relating to the execution, discharge or satisfaction of decree—Parties to the suit or their representatives.

A decree-holder in a suit purchased land at a Court auction which was held in execution of his decree. He made an application for delivery of possession which was dismissed. His heirs, after his death, made further applications, which were also dismissed. The heirs then sold the land to the present plaintiffs who thereupon brought the present suit to recover possession of the land:

Held, (1) that the right of the plaintiffs to recover possession of the land was a question relating to the execution, discharge, or satisfaction, of the decree;

(2) that the question arose between the parties to the suit in which the decree was passed, or their representatives; and

(3) that the suit was not maintainable, having regard to section 244 of the Code of Civil Procedure.

SUIT for possession. The land in question had originally belonged to the defendants. A decree had been passed against them in Original Suit No. 131 of 1887, and the decree-holder had brought the land to sale and purchased it at a Court auction in execution of his decree. The decree-holder then made an application under section 318 of the Code of Civil Procedure for delivery of possession,

* Second Appeal No. 1586 of 1902, presented against the decree of J. Hewetson, Esq., District Judge of Tinnevelly, in Appeal Suit No. 82 of 1902, presented against the decree of M.R.Ry. P. Govinda Menon, Additional District Munsif of Tinnevelly, in Original Suit No. 225 of 1901.

SANDHU TARAGANAR v. HUSSAIN SAHIB.

which was dismissed. He died, and further applications were made by his heirs which were also dismissed. Plaintiffs purchased the land from the heirs and now sued the judgment-debtors for possession of the land, as stated above. The District Munsif decreed in plaintiffs' favour. The District Judge, on appeal, reversed that decree and dismissed the suit.

Plaintiffs preferred this second appeal.

P. R. Sundara Ayyar for appellants.

V. Krishnaswami Ayyar for respondents.

JUDGMENT—Sir ARNOLD WHITE, C.J.—In this case the decree-holder in a suit purchased certain lands at Court auction. An application made by him under section 318 of the Code of Civil Procedure for delivery of possession was dismissed. After his death further applications were made by his heirs. These applications were also dismissed. The heirs sold the lands to the plaintiffs and the plaintiffs now sue the judgment-debtors for recovery of possession. The point is—Is the suit barred by section 244, Civil Procedure Code. This involves two questions—

(1) Is the right of the plaintiffs to recover possession of the lands, a question relating to the execution discharge or satisfaction of the decree?

(2) If it is, does the question arise between the parties to the suit in which the decree was passed, or their representatives?

As regards the first question, if the matter were *res integra*, I should be disposed to hold that the question is not one "relating to the execution, discharge or satisfaction of the decree." It has been held, however, in a series of cases decided by this Court that proceedings between a decree-holder who has purchased at Court auction and the judgment-debtor are proceedings "relating to the execution, discharge or satisfaction of the decree." See *Viraraghava* v. *Venkata*(1), *Vallabhan* v. *Panguni*(2), *Muttia* v. *Appasami*(3), *Lakshmanan Chettiar* v. *Kannammal*(4), *Kasinatha Ayyar* v. *Uthumansa Rowthan*(5), *Kattayat Pathumayi* v. *Raman Menon*(6). The same view was taken by the Calcutta High Court in *Madhusudan Das* v. *Gobinda Pria Chowdhurani*(7). Although the decisions on the point are not altogether uniform, the balance of

(1) I.L.R., 5 Mad., 217.
(2) I.L.R., 12 Mad., 454.
(3) I.L.R., 13 Mad., 504.
(4) I.L.R., 24 Mad., 185.
(5) I.L.R., 25 Mad., 529.
(6) I.L.R., 26 Mad., 740.
(7) I.L.R., 27 Calc., 34.

SANDHU TARAGANAR v. HUSSAIN SAHIB.

authority certainly supports the view taken by the lower Appellate Court in this case.

On principle, I do not think any distinction can be drawn between a case where the proceedings are between the decree-holder who has purchased at Court auction and the judgment-debtor, and a case where, as here, the proceedings are between a party who derives title from a decree-holder who has purchased, and a judgment-debtor. The argument on behalf of the appellant was that section 318 only provides for the making of an order in favour of the certified purchaser, and that there is no provision of law whereby a party who derives title from a decree-holder who has purchased, can obtain delivery of possession from the judgment-debtor by execution proceedings in the suit in which the decree was obtained. This may be so, but it does not follow that proceedings between the party who derives title from the decree-holder who has purchased and the judgment-debtor are not proceedings relating to the execution discharge or satisfaction of the decree. It is open to the party who proposes to take a conveyance from the decree-holder who has purchased, to stipulate, that the latter shall take the necessary steps to obtain delivery of possession under section 318.

The second question is—Is the purchaser from a decree-holder who has purchased at Court auction a "representative" of the decree-holder for the purposes of section 244?

As to this the authorities appear to be all one way. In *Diwar Buksh Sirkar* v. *Fatik Jali*(1), it was held that the word "representative" included a purchaser of the decree from the decree-holder. In *Ishan Chunder Sirkar* v. *Beni Madhub Sirkar*(2), it was held that it included a purchaser of the interest of the judgment-debtor. In the case of *Kasinatha Ayyar* v. *Uthumansa Rowthan*(3), Moore, J., expressed the view from which Bhashyam Ayyangar, J., did not dissent, that a party who purchases from the decree-holder the lands which are the subject-matter of the decree is a "representative" for the purposes of the section. I see no reason to take a different view from that adopted in the cases above referred to. I think the District Judge was right.

The second appeal is dismissed with costs.

(1) I.L.R., 26 Calc., 250.
(2) I.L.R., 24 Calc., 62.
(3) I.L.R., 25 Mad., 529.

SANDHU TARAGANAR v. HUSSAIN SAHIB.

SUBRAHMANIA AYYAR, J.—It is now too late to contend that the question with respect to the delivery under section 318 of the Civil Procedure Code of property purchased in a Court sale by the decree-holder is not one relating to the execution of the decree. And as with reference to section 244 of the Civil Procedure Code the purchaser of the property from the decree-holder is a representative of the decree-holder within the meaning of that section, it follows that the bar to a separate suit laid down by that section applies to a question such as that raised in the present suit between the judgment-debtor and the purchaser from the decree-holder. I agree therefore that the appeal fails and should be dismissed with costs.

APPELLATE CRIMINAL.

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

1905. January 6, 9.

KOTAMRAJU VENKATRAYADU (ACCUSED), PETITIONER,

v.

EMPEROR, COUNTER-PETITIONER.*

Indian Penal Code—Act XLV of 1860, ss. 465, 471—Forgery and using as genuine a forged document.

In order to obtain admission to the Matriculation Examination of the Madras University as a private candidate, V was required to produce to the Registrar a certificate signed by the headmaster of a recognized high school that he was of good character and had attained his twentieth year. V fabricated the headmaster's signature to such a certificate and forwarded it to the Registrar:

Held (SUBRAHMANIA AYYAR and DAVIES, JJ., dissenting) that V was guilty of forgery.

Per Sir ARNOLD WHITE, C.J.—The offence of forgery is complete if a document, false in fact, is made with intent to commit a fraud, although it may not have been made with any one of the other intents specified in section 463. It was not necessary having regard to the wording of section 24 that the accused should have intended to cause both wrongful gain to himself and wrongful loss

* Criminal Revision Case No. 463 of 1904, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of W. E. Clarke, Esq., Presidency Magistrate, Egmore, Madras, in Calendar Case No. 26608 of 1904.

KOTAMRAJU VENKATRAYADU v. EMPEROR.

to the University. Both intentions, however, were present in this case. Moreover, the false document had been made with intent to support a "claim or title" within the meaning of those words as used in section 463. A claim to be admitted to a University examination is a "claim" within the meaning of section 463. It was more clearly so in the present case as the accused had a "claim" to be exempted from the production of an attendance certificate, upon satisfying certain conditions precedent. An intended deprivation of property is not an essential element of an intention to defraud.

Per BENSON, J.—Those decisions which proceed on the ground that an act is not fraudulent unless it causes or is intended to cause loss or injury to some one would seem to take too narrow a view of the meaning of the word "fraudulently" as used in the Code. The act of the accused was fraudulent not merely by reason of the advantage which he intended to secure for himself by means of his deceit, but also by reason of the injury which must necessarily result to the University and through it to the public from such acts if unrepressed.

Per SUBRAHMANIA AYYAR.—The document was not made fraudulently within the meaning of sections 464 and 463 of the Code. Deprivation of property, actual or intended, does not constitute an essential element in regard to offences falling under sections 465 and 471 of the Indian Penal Code; but the deception must involve some loss or risk of loss to an individual or to the public. It is not enough to show that the deception was intended to secure an advantage to the deceiver.

Per DAVIES, J.—It had not been shown that the accused in making the document had either of the intentions necessary to constitute it a false document within the meaning of section 464. A mere intention to deceive does not necessarily imply an intention to defraud or to cause wrongful loss to one person or wrongful gain to another. A person to be defrauded must suffer some harm or damage or injury and there was no evidence that the Registrar, as representing the University, had suffered in any of these respects. The University had been deprived of nothing and, on the other hand, had profited by the application by the accused. Moreover the intention of the accused was to subject himself to examination, which could not be deemed a thing of value, if he failed, it ended in nothing, if he passed, he became entitled to a certificate not in consequence of the false writing but on his own merits.

CHARGES of forgery and using as genuine a forged document, under sections 465 and 471 of the Indian Penal Code. The accused Kotamraju Venkatrayadu was a pupil at the A.E.L.M. College, Guntur, and presented himself for the Matriculation examination of the Madras University in 1902, but failed to pass. It appears that, according to the University Regulations, there are three ways in which candidates can obtain admission to the Matriculation examination. A candidate who has attended a recognised school, must apply for examination and support his application by a certificate signed by the headmaster of his school, stating certain facts as to his attendance at school, character, etc. In the case of private candidates, it seems that

KOTAMRAJU VENKATRAYADU v. EMPEROR.

the Syndicate has power to exempt the candidate altogether from producing a certificate of attendance at school, or if he produces a certificate from the headmaster of a recognized school to the effect that his character is good and that he has completed his twentieth year, he is exempted from producing a certificate of attendance at a school. The Chief Presidency Magistrate, before whom the case came, said:—"In the present case, it would seem that, after his failure, accused was either unwilling or unable to return to school and therefore resolved to endeavour to secure admission to a second Matriculation examination in 1903 by forwarding an application to the Registrar of the University as a private candidate, stating that his age was 21 in the current year, omitting to mention that he had already appeared for examination, and which embodied a certificate purporting to be signed by the Rev. Dr. Wolff, Principal of the A.E.L.M. College, Guntur, stating that Dr. Wolff believed accused would have completed his twentieth year on 15th September 1903 and was of good character. On this application, accused paid the prescribed fee of Rs. 14, and it was received by the Registrar on 14th September 1903. From the evidence of Mr. Patterson it seems that the University is the victim of so many tricks on the part of candidates for examination, that it keeps a regular mal-practice register and is constantly on its guard to frustrate their designs. It was speedily therefore discovered, that the accused had been up for examination in 1902 and had failed; that his previous application for examination had been made by him as a student of Dr. Wolff's College and that in it he had given his age as 17 and date of birth as 1885. Mr. Patterson accordingly wrote to the accused for an explanation, and to Dr. Wolff to enquire whether he had signed accused's second certificate. The accused replied stating he had made a mistake in saying his age was 17 in his first application and that he was really 19 in 1902; he denied any intention of deceiving the University and enclosed his horoscope to prove his alleged age. Dr. Wolff replied that the accused was under age and he could not find he signed his certificate, he therefore asked that accused's application should be sent to him for verification. Subsequently Dr. Wolff wrote to Mr. Patterson that he had seen accused, who had confessed that he had forged Dr. Wolff's name to his second application and begged for mercy. A complaint was then made by Mr. Patterson on the 16th February 1904, charging the accused

KOTAMRAJU VENKATRAYADU v. EMPEROR.

with forgery and using a forged document. On this, a warrant was issued and accused was arrested at Bonagiri in the Nizam's territories on 4th September 1904." Dealing with the defence, the Magistrate continued: "To these charges, accused pleads not guilty. He admits signing Dr. Wolff's name to exhibit D without his authority; that he forwarded that document to the Registrar of the University and that he acted as he did to obtain admission to a University examination; he says he is unaware he offended by these acts." On the facts proved and admitted the Chief Presidency Magistrate convicted the accused and sentenced him to four months' rigorous imprisonment. The accused preferred this criminal revision petition.

T. Rungachariar, for the petitioner, contended that the document or certificate was not a false document within the meaning of section 464 of the Indian Penal Code. There was no dishonesty here as there had been no wrongful gain of property to the accused or loss to the University (section 24 of the Indian Penal Code). The only question is whether the certificate was made fraudulently. This certificate would enable the Syndicate to decide whether the applicant should be permitted to appear at the examination. On the other hand, the University gained the amount of his entrance fee. The accused intended to deceive but not defraud. Mere intention to deceive is not an intention to defraud. He cited *Jan Mahomed* v. *Queen-Empress*(1), *Queen-Empress* v. *Appasami*(2) and Blackstone's 'Commentaries,' Vol. IV, p. 463. Section 25 of the Indian Penal Code contemplates an intention to defraud some one of something. The fraud must relate to some property or to some right (*Queen-Empress* v. *Haradhan*(3)), who is defrauded here and of what? There is a distinction between the word 'fraudulent' in section 464 and the word 'fraud' in section 463 of the Indian Penal Code. If the false certificate injured the University in any way, then it might be regarded as fraudulent, but the University has not been injured in mind, body, reputation, or property (see section 415 of the Indian Penal Code). He cited Archibald's 'Criminal Pleadings,' 672, *Reg* v. *Hodgson*(4), *King-Emperor* v. *Srinivasan*(5), and

(1) I.L.R., 10 Calc., 584.
(2) I.L.R., 12 Mad., 151.
(3) I.L.R., 19 Calc., 380.
(4) [1856], Dearsley and Bell, 3.
(5) I.L.R., 25 Mad., 726.

KOTAMRAJU VENKATRAYADU v. EMPEROR.

distinguished *Regina* v. *Toshack*(1), and *Queen-Empress* v. *Abbas Ali*(2), and *Queen-Empress* v. *Soshi Bhushan*(3).

He contended the offence of forgery had not been made out.

The Crown Prosecutor (Mr. John Adam) in support of the conviction cited the following cases: *Queen-Empress* v. *Ganesh Khanderao and Genesh Dault*(4), *Queen-Empress* v. *Appasami*(5), *Empress* v. *Dhunum Kazee*(6), *Queen-Empress* v. *Abbas Ali*(2), *Kedar Nath Chatterjee* v. *King-Emperor*(7), *Queen-Empress* v. *Khandusingh*(8).

JUDGMENT—Sir ARNOLD WHITE, C.J.—In this case one Kotamraju Venkatrayadu has been convicted by the Chief Presidency Magistrate of the offence of forgery. He applies to this Court on a revision petition and asks that the conviction may be set aside on the ground that he has committed no offence in law.

The facts are not in dispute. They are fully set out by the Presidency Magistrate. So far as they are material to the question we have to decide, they may be briefly stated as follows:—The petitioner was desirous of being admitted as a candidate for the Matriculation examination of the University of Madras. The regulations of the University which provide for the holding of the examination and the admission of candidates thereto are contained in bye-laws 128 to 134. Bye-law 129 provides that, except in certain cases, a candidate for admission must forward to the Registrar what is known as an "attendance certificate." bye-law 131, which provides for the excepted cases referred to in bye-law 129, provides that a candidate who produces a certificate from the headmaster of a recognised high school that he is of good character and has completed his twentieth year, shall be exempted from the production of the attendance certificate mentioned in bye-law 129.

In this case, the petitioner forwarded to the Registrar of the University a certificate that he was of good character and that he had completed his twentieth year. The certificate purported to be signed by the Rev. Dr. Wolff, who is a headmaster of a recognised high school. The certificate was not signed by

(1) 4 Cox Crl. C., 38.
(2) I.L.R., 25 Calc., 512.
(3) I.L.R., 15 All., 210.
(4) I.L.R., 13 Bom., 506 at p. 515 (note).
(5) I.L.R., 12 Mad., 151.
(6) I.L.R., 9 Calc., 53 at p. 60.
(7) 5 Calc., W.N., 897.
(8) I.L.R., 22 Bom., 763.

KOTAMRAJU VENKATRAYADU v. EMPEROR.

Dr. Wolff. It is admitted that the petitioner fabricated the signature of Dr. Wolff, that he forwarded the certificate to the Registrar, and that he did so for the purpose of being admitted to the examination.

The offence of forgery is defined in sections 463 and 464 of the Indian Penal Code. In order to constitute the offence, the document must be false in fact, it must have been made dishonestly or fraudulently within the meaning of these words as used in section 464, and it must have been made with one of the intents specified in section 463. There can be no question that the document in this case was false in fact. It has not been contended that it was made "dishonestly," within the meaning of this word as used in section 464. It is only, therefore, necessary to consider the meaning of the word "dishonestly" in so far as it throws light on the meaning of the word "fraudulently", with which, it is used in collocation. By section 24 "whoever does any thing with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing dishonestly." By section 23 "wrongful gain" is defined as "gain by unlawful means of property to which the person gaining is not legally entitled"; and "wrongful loss" is defined as "the loss by unlawful means of property to which the person losing it is legally entitled." The doing of a thing fraudulently is defined by section 25: "A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise."

Possibly a distinction may be drawn between doing a thing "with intent . . . . that fraud may be committed" (section 463) and doing a thing "fraudulently" (section 464). Such a distinction seems to be recognised in section 239 of the Code. But to my mind no distinction can be drawn between doing a thing "with intent to commit a fraud" (section 463) and doing a thing "fraudulently" (section 464). Although the words "with intent to commit a fraud" are not expressly defined, I think they mean the same thing as "fraudulently", *i.e.*, to say, "with intent to defraud." It follows that if it is established that a person does a thing "with intent to commit a fraud" he does it with one of the intents specified in section 463, and he also does it "fraudulently" within the meaning of section 464. It also follows, as it seems to me, that the offence is complete if a document, false in fact, is made with intent to commit a fraud, although it may not

KOTAMRAJU VENKATRAYADU v. EMPEROR.

have been made with any one of the other intents specified in section 463.

I am of opinion that in the present case the petitioner made a false document with intent to defraud. I entirely agree with the decision of the Full Bench of the Calcutta High Court in *Queen-Empress* v. *Abbas Ali*(1) where it was held that an intended deprivation of property was not an essential element of an intention to defraud. In this case the earlier Calcutta case of *Queen-Empress* v. *Haradhan*(2) was over-ruled and although the Chief Justice in giving the opinion of the Full Bench does not say so in so many words, I think it is clear that if the Full Bench had had to answer the question whether, on the facts in *Queen-Empress* v. *Haradhan*(2) the accused in that case had acted with intent to defraud, they would have answered it in the affirmative.

Intending to defraud means, of course, something more than deceiving. A tells B a lie and B believes him. B is deceived but it does not follow that A intended to defraud B. But, as it seems to me, if A tells B a lie intending that B should do something which A conceives to be to his own benefit or advantage, and which, if done, would be to the loss or detriment of B, A intends to defraud B. Sir James Stephen, in his 'History of the Criminal Law of England,' Vol. II, page 121, observes: "Whenever the words 'fraud,' or 'intent to defraud,' or 'fraudulently' occur in the definition of a crime, two elements at least are essential to the commission of the crime; namely, first, deceit or an intention to deceive, or in some cases, mere secrecy; and secondly, either actual injury, or possible injury, or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy." "This intent," he adds, "is very seldom the only, or the principal, intention entertained by the fraudulent person, whose principal object in nearly every case is his own advantage . . . . A practically conclusive test of the fraudulent character of a deception for criminal purposes is this: Did the author of the deceit derive any advantage from it which could not have been had if the truth had been known? If so, it is hardly possible that the advantage should not have had an equivalent in loss or risk of loss to some one else, and, if so, there was fraud." In his judgment in *Queen-Empress* v. *Muhammad*

(1) I.L.R., 25 Calc., 512.

(2) I.L.R., 19 Calc., 380.

KOTAMRAJU VENKATRAYADU v. EMPEROR.

Saeed Khan(1) Banerji, J., after citing the above passage from Sir James Stephen's work, observes: "Where, therefore, there is an intention to deceive and by means of the deceit to obtain an advantage there is fraud, and if a document is fabricated with such intent, it is a forgery." The Bombay High Court, in the case of *Queen-Empress* v. *Vithal Narayan*(2), which was followed by the Calcutta High Court, in *Lolit Mohan Sarkar* v. *Queen-Empress*(3) accepted the interpretation of Le Blanc, J., in *Haycraft* v. *Creasy*(4) "by fraud is meant an intention to deceive whether it be from any expectation of advantage to the party himself or from ill-will is immaterial."

It is not necessary to decide whether an intention to secure a benefit or advantage to the party deceiving by means of the deceit in itself constitutes an intention to defraud. I may observe, however, in this connection that by section 24 of the Code a person does a thing dishonestly who does it with the intention of causing wrongful gain *or* wrongful loss. It is not necessary that there should be an intention to cause both. On the analogy of this definition it might be said that either an intention to secure a benefit or advantage on the one hand, or to cause loss or detriment on the other, by means of deceit, is an intent to defraud.

I am of opinion that in the present case both elements are present, viz., an intention to secure a benefit or advantage to the party deceiving and an intention to cause loss or detriment to the other party.

The object which the petitioner had in view in making the false document was to get exemption from the production of an attendance certificate and to be admitted as a candidate for the examination. His intention was to pass the examination (for it cannot be presumed that he intended to fail) and his intention was to secure such advantages as are incidental to the position of a man who has passed the examination.

I do not see why all these intentions may not reasonably be inferred, but even if a narrower view be adopted, and the question of intention is limited to the direct result of the act of deceit, the petitioner intended, on the strength of the false document, to secure his registration as a candidate for the examination, and

(1) I.L.R., 21 All., 113.

(2) I.L.R., 13 Bom., 515 (note).

(3) I.L.R., 22 Calc., 313.

(4) [1801], 2 East, 92.

KOTAMRAJU VENKATRAYADU v. EMPEROR.

this itself would have been an advantage to him; at any rate, he cannot be heard to say it would not have been. As to the loss or detriment to the University, the University by their bye-laws prescribe certain qualifications for persons who desire to appear for the Matriculation examination. In the case of the candidates to whom bye-law 131 is applicable, who are known as "private candidates," the University say in effect, "We make it a condition precedent to your obtaining the exemption for which you ask, and being allowed to appear for the examination, that we should have before us a certificate, signed by a responsible person, with means of knowledge, as to your respectability." This, of course, is to protect the University against private candidates who are not respectable. If the candidate who fabricated the certificate did so with the intention that the University should take action on it, it seems to me it must be taken that he did so with the intention of causing loss or detriment to the University.

As I have stated, in my view, if a false document is made in fact and there is an intention to defraud, the requirements of the law are satisfied. But I may add that I am of opinion that in this case the petitioner made the false document with intent to support a "claim or title" within the meaning of these words as used in section 463. The University say: "If you satisfy us that you have complied with the requirements of bye-law 131 we will exempt you from the production of an attendance certificate and we will admit you to the examination." The candidate says: "I have complied with these requirements, exempt me and admit me." It is to be observed that, under bye-law 131, there is no discretion as to exemption when the certificate required by the bye-law is produced. The words are "shall be exempted from the production of the certificate of attendance required under bye-law 129." I see no reason for limiting the word "claim," as was the view of Mr. Justice Norris, to a claim with reference to property (see *Queen-Empress* v. *Haradhan*(1)), or, as it was argued on behalf of the petitioner, it ought to be limited to a claim which is enforceable at law. I agree with the view expressed by the Allahabad High Court in *Queen-Empress* v. *Soshi Bhushan*(2), that a claim to be admitted to a University examination is a claim within the meaning of section 463. Assuming, for the sake of

(1) I.L.R., 19 Calc., 380. (2) I.L.R., 15 All., 210.

KOTAMRAJU VENKATRAYADU v. EMPEROR.

argument, that the candidate has no claim to be admitted to the examination, it seems to me clear that he has "a claim" to be exempted from the production of the attendance certificate, since the University, by their own bye-law give him the right to be exempted when certain conditions precedent are satisfied.

As regards the question of intent to defraud, the balance of authority appears to me to be in favour of the view which I have indicated. The case (*Queen-Empress* v. *Soshi Bhushan*(1)) may, no doubt, be distinguished on the facts, upon the ground that the false document in that case, if its falsity had not been discovered, would have enabled the party to attend a law class without paying the fees. Sir John Edge points this out in considering whether the document was made "dishonestly." In dealing with the question whether it was made "fraudulently" the learned Judge says: "That document was further fraudulently made as having been made with the intention that the prisoner should, by the use of it, deceive a college authority and obtain admission to a second-year law class. Illustration (*k*) to section 464 of the Indian Penal Code shows that if A, without B's authority, writes a letter and signs it in B's name, certifying to A's character, intending thereby to obtain employment under Z, A commits forgery, inasmuch as he intended to deceive Z by the forged certificate and thereby to induce Z to enter into an implied or express contract of service. We can see no difference in principle between the case of a man making a false certificate in order to obtain employment and the case of a man making a false certificate in order to obtain admission to a law class. In each case the intention is to deceive another person, and thereby to obtain an advantage, or a privilege which, without such deception, could not have been obtained." The Bombay High Court in *Queen-Empress* v. *Ganesh Khanderao and Ganesh Daulat*(2) express the opinion that illustration (*k*) shows that the mere fabrication of a false certificate of character raises a presumption of fraud, and they seem to have been of opinion that the presumption arose independently of the question whether or not the object of the deception was to induce the party deceived to enter into a contract of service. It is not necessary to go as far as this, but as I have already pointed out, if the party who made the false document did so with an intent

(1) I.L.R., 15 All., 210. (2) I.L.R., 13 Bom., 506 at p. 515 (note).

KOTAMRAJU VENKAT-RAYADU v. EMPEROR.

to defraud, he acted with *one* of those intents specified in section 463 (and that is enough) and also acted fraudulently.

In *Queen-Empress* v. *Abbas Ali*(1) the certificate which was fabricated was a certificate which qualified a man to enter for an examination as a marine engineer.

In the English case of *Regina* v. *Toshack*(2) the certificate which was fabricated was a certificate which qualified a man to go up for an examination as a master mariner. In both those cases the man who fabricated the certificate was held guilty of forgery.

The Calcutta case cannot be distinguished on the ground that the intent there was an intent "to enter into any express or implied contract" (I assume for the moment this would be a ground of distinction, though for the reasons I have stated I do not think it would be), for this was not the ground on which the decision was based. Again in the English case the indictment does not allege that the act was done with an intention to obtain employment as a master mariner, but with intent to deceive, injure, prejudice and defraud the said Corporation of Trinity House, the Corporation being the examining body in that case.

The argument that there was no intention to defraud in the case before us, because it did not follow that the petitioner would pass the examination would have been equally applicable in the two cases referred to. I do not find that it was ever advanced. I do not think that any valid distinction can be drawn between cases where the interests of the public might have been injuriously affected by the deceit and cases where they could not have been so affected. In the case reported in Weir's 'Criminal Rulings,' page 332, the Court did not attempt to define what constitutes "an intent to defraud." They contented themselves by saying that it was not shown that the accused in that case acted with intent to defraud. On the facts of that case such an inference seems reasonable. Certain ryots wished to relinquish certain lands which stood in the names of their fathers. They were unable to find the karnam, and the accused in that case offered to prepare the necessary notices for them. In the notices he inserted the names of the fathers and added the countersignature of the karnam and the names of certain persons as attesting witnesses. There was certainly no forgery so far as the insertion of the fathers' names

(1) I.L.R., 25 Calc., 512.

(2) 4 Cox Crl. C., 38.

KOTAMRAJU VENKAT-RAYADU v. EMPEROR.

is concerned, since the *pattas* stood in their [illegible] The [illegible] signature of the karnam was no doubt fabricated [illegible] persons whose names were inserted as attesting witnesses had not in fact attested; but the report says that the countersignature of the karnam and the attesting witnesses was usual, but not compulsory. There is nothing to show that the lands could not have been relinquished without the countersignature of the karnam and the attestation of witnesses. The notices were no doubt false, but apparently the man who wrote them did not do so with the intention, on the strength of the false entries, of securing any benefit or advantage to himself or causing any loss or detriment to anybody else.

In the case of *Queen-Empress* v. *Appasami*(1) A falsely represented himself to be B at a University examination, got a hall ticket under B's name, attended the examination, answered the questions set and headed and signed the papers with B's name. A was held to have been rightly convicted of forgery. The Court found that the intent on the part of A was two-fold, (1) to lead the University authorities to believe that the examination papers were answered by B, (2) to procure the grant of a certificate to the effect that B had passed the examination. The Judges do not say that the first and primary intention would not have been enough to meet the requirements of section 463. Supposing it had not been the practice of the Madras University to grant a *testamur* or certificate to those who passed the examination, but contented themselves with keeping a record, I venture to think the decision of Sir Arthur Collins and Mr. Justice Parker would have been the same. Further, if it was a legitimate inference in that case that A, by using B's name, endeavoured to procure the grant of a certificate that B had passed the examination, why should it not be a legitimate inference in the case before us that the petitioner by fabricating Dr. Wolff's name, intended in the event of his passing to procure the grant of a certificate to himself.

As regards the case of *King-Emperor* v. *Srinivasan*(2), the learned Judges would appear to have decided the case rather with reference to the word "dishonestly" than with reference to "fraudulently." With the greatest respect to these learned Judges, I find myself unable to agree with their decision.

(1) I.L.R., 12 Mad., 151.

(2) I.L.R., 25 Mad., 726.

KOTAMRAJU VENKATRAYADU v. EMPEROR.

I think the conviction was right and should be upheld. As regards the sentence, taking into consideration all the circumstances, I think a less severe sentence than that which the learned Magistrate thought it his duty to pass, will meet the requirements of the case. For the sentence of four months' rigorous imprisonment I would substitute a sentence of six weeks' simple imprisonment.

SUBRAHMANIA AYYAR, J.—The petitioner forwarded in the prescribed form to the Registrar of the Madras University an application to be registered as a candidate for the Matriculation examination that was held in December 1903. The application contained on the face of it a certificate purporting to be signed by the Rev. Dr. Wolff, Principal of the A.E.L.M. College, Guntur, which ran as follows: "I hereby certify that the best of my knowledge and belief Kotamraju Venkatarayadu will have completed his 20th year before the 15th September 1903, and that he is of good character." That certificate is spurious, the whole of the writing thereof, including the signature, being in the petitioner's hand. The petitioner was charged with forgery and using a forged document as genuine and was convicted by the Chief Presidency Magistrate and sentenced to four months' rigorous imprisonment.

In the circumstances of this case the point for determination reduces itself into whether, in concocting this paper, the petitioner acted "fraudulently" within the meaning of the provisions of the Code on the point. It was contended on behalf of the petitioner that that term should be understood as involving something affecting specific property or right only. But in *Queen-Empress* v. *Abbas Ali*(1), it was held by the Full Bench of the Calcutta High Court that deprivation of *property*, actual or intended, did not constitute an essential element in regard to offences falling under sections 465 and 471 of the Indian Penal Code. This decision, there can be no doubt, is perfectly sound, and the narrow construction suggested cannot be accepted. At the same time it is equally clear to my mind that the view that "fraudulently" implies nothing more than a deception intended to secure an *advantage* to the deceiver goes too far. The observations of Banerjee, J., in *Queen-Empress* v. *Muhammad Saeed Khan*(2), carefully read, lend no support to such a view, and that the learned Judge could not have intended to lay down any such broad proposition is manifest

(1) I.L.R., 25 Calc., 512.

(2) I.L.R., 21 All., 113.

KOTAMRAJU VENKATRAYADU v. EMPEROR.

from the reference made by him to certain observations of Sir Fitz-James Stephen, which show, in a way absolutely unmistakeable, that the advantage sought to be gained by the deception should, to make it fraudulent, involve some distinct loss or detriment to another, or the likelihood of such loss or detriment, though, no doubt, it would ordinarily be so when an advantage would accrue to the deceiver. And the same eminent writer when dealing with the offence of forgery, remarks thus: "The meaning of the phrase (with intent to defraud) would be more exactly, though less neatly, expressed if it was with intent to deceive in such a manner as to expose any person to loss or risk of loss" (Stephen's 'History of Criminal Law,' ed. of 1883, Vol. III, page 187). To hold otherwise would be tantamount to saying that every deception effected by a spurious writing is fraudulent, and is, therefore, a forgery. Of course, no one has yet been so bold as to suggest such a definition of this well-known offence. It is impossible to conceive why the Legislature should have thought it fit to introduce the word "fraudulently" with such iteration when defining a "false document" in section 464, if it meant really to make every deception by writing that is not genuine, practised with intention to secure an advantage to the deceiver, *ipso facto*, a forgery. To have defined the offence in the latter way would have been far easier, and considering that the phrase "with intent to defraud" had again and again been the subject of discussion and consideration under the English Law, which our Code has followed (though not without improvements) in defining the offence, to accede to the view that a mere advantage to the deceiver amounts to fraud would really be to reject as mere surplusage what constitutes one of the essentials of the offence. I should not have thought it necessary to have so far dwelt upon this point but for the frequency with which the mere spuriousness of a document is confounded with the element of fraud required to make the writing the subject of the indictable offence of forgery, in spite of the pains taken by Judges and writers to accentuate the distinction between the two.

Bearing, then, that latter element in view, let us see how the present case stands with reference to the facts. Though the spurious paper referred to the age of the petitioner as well as to the matter of his character, yet the charge on which the petitioner was tried made mention only of the statement as to age, and,

KOTAMRAJU VENKATRAYADU v. EMPEROR.

curiously enough, this statement was altogether ignored by the Magistrate he having rested the conviction on the statement in the paper as to the petitioner's character alone. The first point for consideration, therefore, is whether having regard to the matter so relied on, it can be held that the deceit intended to be practised by the petitioner was such as to expose the University, at whose instance the prosecution was launched, to "*loss*" or to the "*risk of loss*." It is in relation to this aspect of the matter, I take it, that the Magistrate, in paragraph 10 of his judgment, introduced the words "at the expense of the University of Madras and to its detriment." The Magistrate, however, has not explained what it was in his opinion that constituted the "expense" or the "detriment"; nor did the learned Crown Prosecutor attempt to throw any light on the subject in the argument before us. We were left to fill up this gap in the prosecution case as we best could. Mr. Patterson, the Registrar, suggested in his evidence that the detriment to the University was the loss of its "prestige," in other words, of its reputation, of which the former is the consequence. Now it was not certainly a case of the University running the risk of being supposed to attach no importance to the character of its examinees, for it has erred at all in the matter, that could only have been in the other direction. Unlike its prototype, the London University, it insists on the production of a certificate even by a candidate for the lowest of its examinations—the Matriculation. It further confines the class of persons from whom the candidates are to produce certificates, to members of the Senate, and heads of recognised educational institutions. Again, instead of following the negative form of certificate prescribed by the Allahabad University, viz., "I know nothing against the character of the abovenamed candidate which ought to debar him from Matriculation," it requires the grantors of certificates to give a positive pledge as to the character of this class of young and immature persons, imposing thereby a duty not quite easy of fulfilment in strict consistency with the demands of truth and reminding one of the remark reported to have been made by the late Chief Justice of this Court on the occasion of the production of a certificate to the effect that an applicant for enrolment as a vakil—a young man of about 25—was a perfect gentleman, that he, the Chief Justice, should have thought no man of that age could by any one be pronounced with safety to be a perfect

KOTAMRAJU VENKATRAYADU v. EMPEROR.

gentleman. So far as one can understand Mr. Patterson's suggestion, the risk can only be that the appearance at an examination of a candidate, without good character, as if he were one possessed of it, would tend to detract from the prestige of the University. If Mr. Patterson were right, it might as well be said that a theft or a burglary tends to destroy the reputation of him whose property is, or is attempted to be, stolen. The suggestion, to my mind, is altogether fanciful. It follows, therefore, that the conviction cannot be supported on the ground put forward by Mr. Patterson.

If I rightly understood the Crown Prosecutor, reliance was placed by him on *Regina* v. *Toshack*(1), and the similar Calcutta Full Bench case as an alternative ground for supporting the conviction. No doubt, they are instances in which risk of specific injury to specific persons was absent, and the conclusion that the spurious documents amounted to forgeries was, as I understand, the *ratio decidendi* of those cases, on the ground that general interest rendered it proper to hold that the fabrications there in question were indictable as forgeries; that is to say, the fabricator must, from that point of view, be held to have in the eye of the law committed the act with intent to defraud within the meaning of that term in the definition of forgery, as is to be gathered from the reasons assigned by Alderson, B., in the former case. Referring to the examination by the Trinity House the learned Baron says it was "a very important public duty,* important to owners of property of this description and important to the lives of those entrusted to their care, and if inefficient seamen and persons otherwise than of good character and conduct are appointed the unfortunate subordinates of the ship are often subjected to harsh and improper treatment (*Regina* v. *Toshack*(1))." Among the observations of Jardine, J., in *Queen-Empress* v. *Ganesh Khanderao and Ganesh Dault*(2), also relied on in the same connection, those respecting the duty of Courts to attend to the policy of the law in determining whether or not particular acts should be held to fall under the category of crimes, have not in the circumstances here a direct bearing on the aspect of the case under discussion. But more in point is *Janson* v. *Driefontein Consolidated Mines, Ltd.*(3), where the

(1) 4 Cox Crl. C., 38 at p. 41. (2) I.L.R., 13 Bom., 506 at p. 515 (note). (3) L.R., [1902], A.C., 484.

KOTAMRAJU VENKATRAYADU v. EMPEROR.

House of Lords, after a review of the authorities, lay down that public policy is not a safe or trustworthy ground for legal decision. The Lord Chancellor, in the course of very strong observations on the view of Vaughan Williams, L.J., who had rested his decision on what he thought the interests of the State demanded, while fully recognising the propriety of the application by the Judges of established principles to new instances coming within the scope thereof, points out that no Court has power to invent a new head of public policy (see at pages 491 and 496). Bishop in his great work on 'Criminal Law' points out that the Judges in *Regina* v. *Toshack*(1), in deciding as they did, went to the "verge," 3rd ed., Vol. II, section 503, and it would seem therefore that the principle of that decision ought not to be extended any further. Even if it were otherwise, it is impossible to see any analogy in substance between that and *Queen Empress* v. *Abbas Ali*(2), on the one hand, and the present case on the other. For the risk of injury to life and property resulting from a person not possessing sufficient skill, training, etc., for exercising the calling of a master mariner, or of an engineer, being in charge of a ship or dangerous machinery, is so manifest and serious that no reasonable man can question its reality or gravity. But, surely, there is no comparison between such risk and the detriment supposed to accrue to the public from a candidate not of good character, appearing for the Matriculation examination as if he were possessed of such character, or from evasion of the conditions prescribed by the University as to pre-Matriculation studies, granting that the system in vogue as to that examination is flawless. How much less ground is there then for importing into the case any consideration of public requirement, having regard to the views authoritatively and quite recently expressed as to the deficiencies of the existing system. That the members of the University Commission condemn it is clear from their report. Its supposed special merit, viz., that the examination qualifies those who pass it for the lower ranks of the Government service, contributing as it does considerably to the finances of the University, is in the opinion of those members its chief defect requiring radical alteration (*vide* sections 160, 169 and 170 of their report), and that part of the system which relates to candidates

(1) 4 Cox Crl. C., 38 at p. 41.

(2) I.L.R., 25 Calc., 512.

KOTAMRAJU VENKATRAYADU v. EMPEROR.

in the position of the petitioner and known as private candidates, as obtaining in this and in the Bombay University, has been singled out for special animadversion and immediate abandonment (*vide* section 166). The very bye-law under which the petitioner applied for the examination affords an illustration of the justice of the criticism of the Commissioners, inasmuch as the exemption virtually provided for by it from the necessity of undergoing the prior instruction considered essential to fit a candidate for entering on the University course, is a departure dictated by reasons altogether unconnected with the University. Surely few will admit the expediency of enforcing, by the sanction of criminal punishment, rules relating to matters which have apparently not as yet passed the stage of experiment, conducted with not very marked success by bodies themselves in the throes of changes and busy gathering the experience so much needed to enable them to mould, so far as is permitted by the no means favourable circumstances under which they have to work, a fairly good system of University education.

Apart from all this, there is the consideration that to make the words "fraudulently" or "with intent to commit fraud" cover acts such as this which have come to be spoken of as "examination malpractices" would be to subject youths guilty of such acts, while still juveniles in the strict sense of the term, to the contaminating influences of the prison fit only for hardened offenders. To save persons of such impressionable age from the degradation attendant upon their being brought to trial and punishment in the usual way, it has been found necessary in countries, where the matter has received that attention it deserves, to establish a new tribunal called the "Juvenile Court" (see Reports of the Mosely Education Commission to the United States, October—December, 1903, Truant and Reformatory schools, pages 360 to 375). Referring to this tribunal it is observed in the report cited: "An institution of scorn at its origin, it is to-day respected as the greatest moral force in nipping the germ of crime and in the promise of reducing the number of penal settlements which form the blight of every nation." One of the features of this tribunal is that the public is not admitted while the Judge sits, a few seats only being provided at the back of the hall for parents of the person under trial and the witnesses in the particular case. The trial itself aims at making the

KOTAMRAJU VENKATRAYADU v. EMPEROR.

proceeding look like a private meeting for advice and exhortation, severe discipline being enforced only in cases calling for it. In pages 364 and 365 of the same report will be found an instructive account of other methods of such a Court, methods incapable of being brought in a line with the procedure of the ordinary tribunals. With such notable signs of the times before us one may well decline to invoke the argument of policy for the purpose of bringing within the clutches of the general criminal law the class of juvenile offenders referred to, in connection with delinquencies, the effect of which on the well-being of the community is so intangible.

I hold that the spurious document in question was not made fraudulently within the meaning of sections 464 and 463 of the Indian Penal Code. This conclusion is not, in my opinion, inconsistent with the actual decisions in the cases relied on by the prosecution. In *Queen-Empress* v. *Soshi Bhushan*(1) the facts established a *dishonest* intention within the meaning of the Code and the conviction was, therefore, right. In *Queen-Empress* v. *Muhammad Saeed Khan*(2), if the assumption there made by Banerjee, J., that the falsification of the character and the service roll to which the charge related would have effected other public servants injuriously be right, that certainly would distinguish that case from the present, since the suggestion of anything analogous to it in respect of other candidates could not be made here without resorting to extravagant fiction totally inadmissible, at least in the administration of the criminal law. In *Queen-Empress* v. *Ghanesh Khanderao and Ganesh Dault*(3), the charge was under the latter part of section 182 of the Indian Penal Code, and the decision proceeds directly and expressly on the ground that no question of injury arose in the case. *Queen-Empress* v. *Vithal Narayan*(4), considered in the light of the comments made thereon by Jardine, J., should be understood as capable of being rested on the ground that the entertainment of the party referred to in the case as Karkoon was so detrimental to public interests as to make the act fraudulent on the principle of *Regina* v. *Toshack*(5). In *Queen-Empress* v. *Appasami*(6) the risk of loss was risk of loss of the property of

(1) I.L.R., 15 All., 210.
(2) I.L.R., 21 All., 113.
(3) I.L.R., 13 Bom., 506 at p. 515 (note).
(4) I.L.R., 13 Bom., 515 (note).
(5) 4 Cox Crl. C., 38 at p. 41.
(6) I.L.R., 12 Mad., 151.

KOTAMRAJU VENKATRAYADU v. EMPEROR.

the University, viz., the certificate to which the learned Judges in terms refer. Unlike this last case no intention as to what would have happened had the petitioner been registered, that is to say, as to whether he would have actually appeared at the examination, and if he did, as to what further advantage it would have been possible for him to seek or obtain, can rightly be attributed to the petitioner; and with reference to the rule that a man must be taken to intend the natural consequences of his act, all that can properly be said in regard to the petitioner is that in making the false certificate he only intended to be placed in a position that would enable him to appear at the examination, everything beyond it being too remote to be treated as the natural consequence of his act. The passage cited from Mayne's 'Criminal Law' (edition 3, page 821) was, it appears to me, clearly not intended by the learned author to apply to such a case as the present. Were it otherwise, I must with all deference say I could not agree with him in the absence of anything in the passage to enable one to gather what could be the loss or the risk of loss in a case such as this.

I would, therefore, allow the petition, set aside the conviction and sentence, and direct the petitioner to be discharged.

DAVIES, J.—The accused, in order to obtain admission as a candidate at the Matriculation examination of the Madras University in 1903, forwarded with his application to the Registrar a certificate regarding his character and age without which he would not have been admitted to the examination. That certificate purported to be signed by the Rev. Dr. Wolff. But it was not signed by that gentleman. The accused himself had written Dr. Wolff's signature. For this act and for nothing else (because it is not proved that the statements made in the certificate were in themselves false) the accused has been convicted of the offence of forgery as defined in section 463 of the Indian Penal Code. It is needless to say that to convict a person of a crime it must be strictly proved that it has been committed in law. It is not enough to show that he has been guilty of immoral or sinful conduct. Now, the essential element in the crime of forgery is the making of a "false document." To constitute a document a "false document" within the meaning of section 464 of the Penal Code, it must be shown that it was made with such an intention as is implied in the term "fraudulently" or in the term "dishonestly." These terms are defined, the former as implying an intention to defraud, and the latter as

KOTAMRAJU VENKATRAYADU v. EMPEROR.

implying an intention to cause wrongful gain to one person or wrongful loss to another.

It is not shown that the accused had either of these intentions. His intention was, no doubt, to deceive the Registrar of the University into the belief that a certain gentleman had certified that he was a fit candidate for admission to the Matriculation examination. But a mere intention to deceive does not necessarily imply an intention to defraud or to cause wrongful loss to one person or wrongful gain to another. It was not alleged by the prosecution, and it was not found by the Chief Presidency Magistrate, that the accused had acted with the intention of causing wrongful loss to one person or wrongful gain to another, so that the accused did not act "dishonestly." So the only question is: Did the accused act "fraudulently," that is, with intent to defraud? Neither the Chief Presidency Magistrate in his judgment, nor the Crown Prosecutor in his argument before us, has shown in what way the accused intended to defraud, or in fact did defraud the University. A person to be defrauded must suffer some harm or damage or injury, and there is not a tittle of evidence that the Registrar as representing the University has suffered in any of these respects. The Chief Presidency Magistrate has found that the act of the accused was to the "detriment" of the University; but he does not explain of what that "detriment" consisted. I find it impossible to see in what way the University of Madras has been injuriously affected by the conduct of the accused. The University has been deprived of nothing. On the other hand, they have confiscated the examination fees of Rs. 14 paid by the accused without going to the expense of examining him and have thereby made a clear profit out of him. It is only the accused who has been damnified. In none of the cases cited before us are the facts on all fours with the facts in this case, except in the one case of *Queen-Empress* v. *Haradhan*(1) where it was held that the offence of forgery had not been committed. That is the view I must take here. I think I am correct in stating that in all the cases where convictions were held, the accused had obtained something that the Court considered to be of value.

The illustration (*k*) to section 464 of the Penal Code sets out the intention as one to "obtain employment." That is, of course,

(1) I.L.R., 19 Calc., 380.

KOTAMRAJU VENKATRAYADU v. EMPEROR.

a material or substantial advantage. But in this case the sole intention of the accused was to subject himself to the ordeal of an examination, which can hardly be deemed to be a thing of value and in which, if he had failed, it ended in nothing, and if he had passed, entitled him to a certificate, which certificate he would have obtained, not in consequence, be it observed, of the false writing but upon his own merits as an examinee. I am, therefore, clearly of opinion that the offence of forgery has not been committed and would reverse the conviction. In any case the sentence of rigorous imprisonment for four months should be reduced, as it seems to me unduly severe for a trick played by a youth of twenty who had already been disgraced and punished for his misconduct. I would reduce the term of imprisonment to that already suffered, namely, eleven days.

BENSON, J.—I have no hesitation in agreeing with the learned Chief Justice that the conviction is right and ought to be upheld. It is admitted that the accused himself wrote the certificate, which falsely purported to be signed by the Rev. Dr. Wolff, certifying the accused's age and character. It is also admitted that he sent it to the Registrar of the University, intending thereby to deceive the University authorities into the belief that he was qualified, in accordance with the bye-laws of the University, to appear for the Matriculation examination, whereas, in fact, he was not so qualified. The only question is whether this act of the accused was done "fraudulently" and "with intent to commit fraud" within the meaning of the Indian Penal Code. If the false certificate was written "fraudulently," the accused made a "false document" as defined in section 464 of the Indian Penal Code, and if he made a false document "with intent to commit fraud" he was guilty of forgery as defined in section 463 of the Indian Penal Code, and was rightly convicted. The word "fraudulently" is defined in section 25 of the Code in the following way: "A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise." The word "defraud" is not defined in the Code and the meaning of the word "fraudulently" is thus left open to argument with reference to the meaning of the word "defraud." The framers of the Code, conscious of the infinite diversity of fraud and of the protean forms it could assume, no doubt thought it best to attempt no more explicit definition but to leave it to the judicial consciousness

KOTAMRAJU VENKATRAYADU v. EMPEROR.

of the Judge to determine in each case whether the act alleged was one done with intent to defraud or without such intent. It was argued before us that the word implies that some person has been or is to be deprived of something, and some of the other earlier decisions of the Indian Courts lend support to this view, but it has been unanimously negatived by a Full Bench of five Judges of the Calcutta High Court in the recent case of *Queen-Empress* v. *Abbas Ali*(1) in which all the earlier cases were referred to in the argument. It is there pointed out that the word "defraud" is of double meaning, in that it either may or may not imply deprivation, and that its meaning in the Code must be found by reference to the context in which the word "fraudulently" occurs in the Code. It is pointed out that in the definition of a false document the making of the document must be "dishonestly" or "fraudulently"; that "fraudulently" is therefore something different from "dishonestly," but that "if it be held that fraudulently implies deprivation either actual or intended, then apparently that word would perform no function which would not have been fully performed by the word 'dishonestly,' and its use would be mere surplusage." In this connection I would refer to several sections of the Code (*e.g.*, sections 261, 263, 264), in which the expression used is "Whoever fraudulently or with intent to cause loss", etc. In these sections it is clear that "fraudulently" is not to be limited in its application to cases in which loss is caused. The learned Judges then go on to point out that there is even a stronger reason for their conclusions based on the terms of section 463 itself. They say "section 463 defines the offence of forgery, and in so doing prescribes the intent necessary to that offence." The words of the section are as follows: "Whoever makes any false document or part of a document with intent to cause damage or injury to the public, or to any person, to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud, or that fraud may be committed, commits forgery." The "section contemplates two classes of intents, and it is clear (especially if regard be had to the context) that it is not an essential quality of the fraud mentioned in the section that it should result in or aim at the deprivation of property. If this be so

(1) I.L.R., 25 Calc., 512.

KOTAMRAJU VENKATRAYADU v. EMPEROR.

it cannot be supposed that the definition of a false document which is but a part of the definition of forgery requires as a condition of criminality an intent different in its quality and its aims from that prescribed by section 463." To this reasoning I would add that a consideration of illustration (*k*) to section 464 necessarily leads to the same conclusion, and, in fact, actually covers the present case. In that illustration it is stated that it is forgery if A, without B's authority, writes a letter and signs it in B's name, certifying to A's character, intending thereby to obtain employment under Z. The obtaining of employment in this way does not necessarily deprive Z of anything or necessarily cause him any loss or injury, yet the Code declares that A's act is forgery. But to constitute forgery there must be a false document as defined in the Code, which implies that the document must be made "dishonestly or fraudulently". It follows that the framers of the Code regarded the writing of such a letter as a fraudulent act, though it did not necessarily involve any loss or injury or intended loss or injury to Z.

Those decisions, therefore, which proceed on the ground that an act is not fraudulent unless it causes or is intended to cause loss or injury to some one would seem to take too narrow a view of the meaning of the word "fraudulently" as used in the Code.

Can it be doubted for a moment that the act of the accused in the present case was at least as fraudulent as that of the person in illustration (*k*) who wrote the false character in order to obtain employment? To me it seems that it was every whit as fraudulent and even more deserving of repression under the penalties of the criminal law. No doubt a different view was taken by this Court in the case of *King-Emperor* v. *Srinivasan*(1) and in *Queen-Empress* v. *Haradhan*(2), but the latter has been over-ruled in the Full Bench case already referred to, and in the former no authorities are cited to support the view adopted. The decision seems to proceed on the ground that the word "fraudulently" bears the narrow construction contended for by the appellant's vakil in this case and which I have shown to be incorrect.

The act of the accused was undoubtedly fraudulent and a forgery in the popular acceptance of these terms and also in my opinion according to the strict letter and intention of the Indian Penal Code.

(1) I.L.R., 25 Mad., 726. (2) I.L.R., 19 Calc., 380.

KOTAMRAJU VENKATRAYADU v. EMPEROR.

The accused intended to deceive the University authorities into the belief that he was entitled in accordance with their bye-laws to appear for the Matriculation examination when, in fact, he was not so entitled, and thereby to gain an advantage for himself, viz., leave to appear for the examination, an advantage which he valued and would have purchased for a sum far above, let us say, Rs. 10. As Mr. Mayne remarks in dealing with similar cases :—"If then, it would have been an undoubted forgery if the document had been fabricated for the purpose of obtaining Rs. 10, how can it be less a forgery, because the object sought was something not measurable by money but of far greater value." (Criminal Law of India, 1896 ed., page 757.)

I am of opinion that the act was fraudulent not merely by reason of the advantage which the accused intended to secure for himself by means of his deceit, but also by reason of the injury which must necessarily result to the University, and through it to the public from such acts if unrepressed. The University is injured, if, through the evasion of its bye-laws, it is induced to declare that certain persons have fulfilled the conditions prescribed for Matriculation and are entitled to the benefits of Matriculation, when, in fact, they have not fulfilled those conditions, for the value of its examinations is depreciated in the eyes of the public if it is found that the certificate of the University that they have passed its examinations is no longer any guarantee that they have in truth fulfilled the conditions on which alone the University professes to certify them as passed, and to admit them to the benefits of Matriculation. It must not be forgotton that the Matriculation examination is one that qualifies those who pass it for a great number of appointments in the public service, and the public are liable to the gravest injury if, through deceit, the regulations made by Government and the University to secure a certain standard of qualifications in the servants of the State are rendered nugatory and futile. In the English case of *Regina* v. *Toshack*(1) the certificate fabricated was one which enabled a man to go up for an examination as a master mariner, and the indictment alleged that the act was done with intent "to deceive, injure, prejudice and defraud the said Corporation of Trinity House," which was the examining body in that case as the University is in this. In the

(1) 4 Cox Crl. C., 38 at p. 41.

KOTAMRAJU VENKATRAYADU v. EMPEROR.

Full Bench case of *Queen-Empress* v. *Abbas Ali*(1) the spurious certificate was one regarding service and character which was required as a qualification precedent to the accused being admitted to an examination for a certificate of competency as an engine-driver of ocean-going steamers. In both these cases the accused was convicted of forgery, and I do not think that any valid distinction can be drawn between those cases and the present. If the validity of the conviction requires that there should be a risk of injury to the public in consequence of the accused being improperly admitted to the examination, it can hardly be contended that the risk of injury to the public from the introduction of men of no character into the public service is less than from admitting such men to be master mariners and engine-drivers. The extent to which malpractices like the present prevail may be indicated by the fact that in a single recent issue of the *Fort St. George Gazette* a notification was published in which over fifty candidates were prohibited for a longer or shorter time from appearing for the University examination in consequence of having been found guilty of sending in false certificates, or of making false statements, in order to induce the University to accept them as qualified candidates. Such a state of things indicates a standard of morality which if not reprobated by the better men among the educated classes must be fraught with danger to the public welfare. I think it is well that the law does stigmatize acts like that of the accused in this case as offences.

The Courts have ample power to graduate the punishment according to the true requirements of justice in each case. I concur with the learned Chief Justice in holding that in all the circumstances of this case the requirements of justice will be met by the reduced sentence proposed by him in lieu of that imposed by the Magistrate.

BODDAM, J.—As I entirely agree with the learned Chief Justice and with Mr. Justice Benson that the conviction is right and should be confirmed for the reasons stated by them in their respective judgments, it is not necessary that I should go over the same ground again. It is clear to me that the accused, by making and sending the spurious certificate, made and sent it with the intention of deceiving the University authorities. He further intended

(1) I.L.R., 25 Calc., 512.

KOTAMRAJU VENKATRAYADU v. EMPEROR.

thereby to gain what he conceived to be an advantage to himself to the prejudice of the right of the University authorities to have a genuine and reliable certificate as to his age and character before permitting him to enter for the examination. He did it to support a claim or title to be permitted to enter for the examination, without in fact having any claim or title to do so under the bye-laws of the University, intending that the University authorities should be deceived by the belief that the spurious document which he had made and sent was a genuine and reliable certificate as to his age and character and that the requirements of the bye-laws of the University had been fully complied with in his case and the rights of the University thereby duly safeguarded. What he intended in making the document is proved by his sending it to the University authorities for the purpose of supporting his claim or title to enter for the examination. He, therefore, made a false document fraudulently; that is, with intent to commit fraud and not otherwise, and as he made it with intent to support a claim or title and with intent to commit fraud, he was properly convicted of forgery under section 473 of the Indian Penal Code. He also fraudulently used it as genuine and was, therefore, rightly convicted under section 471 of the Indian Penal Code. As regards the sentence I think in the circumstances of this case a sentence of six weeks' simple imprisonment will suffice.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Sankaran Nair.

LINGA REDDY (PLAINTIFF), APPELLANT,

v.

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

1904. August 4, 5.

Civil Procedure Code—Act XIV of 1882, s. 244—Surety becoming liable for decree in a suit—Decree for plaintiff—Execution orders against surety—Suit by surety for declaration of non-liability as to portion of decree amount—Maintainability—Proceeding in execution.

The property of a defendant in another suit having been attached before judgment, the present plaintiff became surety for any sum that might be decreed. A decree was passed and an order was made for its execution against the present plaintiff, and that order was not appealed against. Prior to execution plaintiff brought the present suit against the decree-holders in the previous suit, for a declaration that they were not entitled to execute a portion of their decree as against him:

Held, that the suit did not lie, the matter being one to be litigated only in execution proceedings. The surety should be treated as a party to the suit, and as the question raised was one relating to the execution of a decree, section 244 of the Code of Civil Procedure applied and the suit was barred.

SUIT for a declaration that the defendants Nos. 1, 2, 4 and 5 were not entitled to execute their decree in Original Suit No. 596 of 1897 against the plaintiff for the recovery of the costs incurred in the Court of First Instance and in the Appellate Court. Plaintiff had stood as a surety on behalf of the defendant in Original Suit No. 596 of 1897 during the pendency of that suit in the Court of First Instance. The security was taken after the attachment of property before judgment, but by the terms of the bond plaintiff consented to become liable for any sum which might be decreed. A decree was passed against the defendant in Original Suit No. 596 of 1897, and an order for its execution was made against the surety, the present plaintiff, which was not appealed against. Before

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* Second Appeal No. 991 of 1902, presented against the decree of M.R.Ry. A. Venkataramana Pai, Acting District Judge of Kurnool, in Appeal Suit No. 118 of 1901, presented against the decree of M.R.Ry. J. M. Nallaswami, District Munsif of Nandyal, in Original Suit No. 144 of 1901.

LINGA REDDY v. HUSSAIN REDDY.

actual execution, plaintiff filed the present suit for the declaration set out above. The District Munsif made the declaration. The Acting District Judge held that the surety bond was enforceable in respect of costs awarded by the decree in Original Suit No. 596 of 1897, but not in respect of the appeal. He dismissed the suit.

Plaintiff preferred this second appeal.

T. Veerabhadra Mudaliar for appellant.

P. Nagabhushanam for respondent.

JUDGMENT.—The appellant became surety on behalf of the defendant in Original Suit No. 596 of 1897 during the pendency of that suit in the Court of First Instance. Though the security was taken after the attachment of property before judgment yet by the security bond the appellant consented to become liable for any sum that might be decreed.

A decree having been eventually passed against the defendant in that suit, application for the execution of the decree was made and granted against the appellant. Before the actual execution of the decree the present suit was brought for a declaration that the appellant was not liable for a portion of the decree sought to be executed against him on certain grounds unnecessary here to be stated. The order for execution against the appellant was not appealed against.

The objection taken on behalf of the respondent that this suit does not lie, the matter being one to be litigated only in execution proceedings must, in our opinion be upheld on the authority of *Ex parte Bhikaji Vithal Ambekar*(1), *Ghoree Laljha* v. *Sheo Narain Singh*(2), *Akhoot Rumanah* v. *Ahmed Eusoofjee*(3), *Shek Suleman* v. *Shivaram Bhikaji*(4) and *Thirumalai* v. *Ramayyar*(5), see also *Rajaram* v. *Bappu Chettiar*(6).

In some of these cases it is expressly pointed out that the surety should be treated as a party to the suit and as the question sought to be raised by the appellant is one relating to the execution of the decree, the bar to a separate suit laid down by section 244, Civil Procedure Code, applies. On this ground, the suit ought to have been dismissed. We accordingly dismiss this second appeal with costs.

(1) 4 B.H.C.R., 119.
(2) 8 W.R., 24.
(3) 15 W.R., 538.
(4) I.L.R., 12 Bom., 71.
(5) I.L.R., 13 Mad., 1.
(6) C.M.S.A. No. 9 of 1903 (unreported).

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Sankaran Nair.

1904. August 3.

SIVARAMA SASTRIAL AND ANOTHER (PLAINTIFFS—PETITIONERS), APPELLANTS,

v.

SOMASUNDARA MUDALI AND TWO OTHERS (DEFENDANTS NOS. 1 AND 3 AND COUNTER-PETITIONER), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 244—Application in execution—Person entitled to represent estate—Representative of party to decree—Purchaser from judgment-debtor.

Plaintiffs in a suit obtained a decree for the sale of mortgaged lands which had belonged to S, deceased. The defendants to that suit were a person whom S was alleged to have adopted, and the two widows of S's father, who would represent the estate if the adoption failed. One widow died after suit. After her death part of the mortgaged property was put up for sale and purchased by plaintiffs, who applied for an order for delivery of possession. D, the nearest reversioner to S, objected, and claimed to be in possession in his own right. He contended that S had been adopted only in conjunction with the widow who had died, and that in consequence his reversionary interest had fallen into possession at her death, the surviving widow having no rights. In the alternative he claimed also as a purchaser from the surviving widow under a release deed executed by her after the mortgage decree and before the sale. The Subordinate Judge refused to make an order for delivery of possession, and the plaintiffs appealed to the High Court, when a preliminary objection was raised that no appeal lay:

Held, that an appeal lay. If the inheritance passed to D on the widow's death, he would be the person entitled to represent the estate, and the present question related to execution and should be dealt with under section 244 of the Code of Civil Procedure. If D, relied on the release from the surviving widow, he was a representative of one of the parties to the decree and the same result followed.

Kasinatha Ayyar v. *Uthumanser Rowthan*, (I.L.R., 25 Mad., 529), discussed.

EXECUTION PETITION. Appellants held a decree in Original Suit No. 31 of 1900 for the sale of certain mortgaged lands which had belonged to Somasundara Mudali, deceased. The defendants

* Civil Miscellaneous Appeal No. 83 of 1904, presented against the order of M.R.Ry. T. T. Rangachariar, Subordinate Judge of Kumbakonam, in Miscellaneous Appeal No. 795 of 1903 in Execution Petition No. 180 of 1903 (Original Suit No. 31 of 1901).

SIVARAMA SASTRIAL v. SOMASUNDARA MUDALI.

in that suit were a person alleged to be an adopted son of Somasundara Mudali, and Visalatchi and Bapu, the widows of Somasundara Mudali's father, who would have represented the estate if the alleged adoption should have been held to be invalid. Visalatchi died in June 1903. On 22nd October 1903 part of the mortgaged property was sold and purchased by the appellants, who applied for an order for delivery of possession to them. The third respondent objected on the ground that he was in possession in his own right. He claimed, first, as the nearest male reversioner to Somasundara Mudali, solely entitled to possession on the death of Visalatchi because as he alleged, the other widow, Bapu, had no interest in Somasundara Mudali's estate, the latter had been adopted in conjunction with Visalatchi alone. He also claimed on the footing of a release which had been executed in his favour by the surviving widow Bapu on 17th October 1903, so that even if Bapu had an interest in the estate (as she would have if the adoption of Somasundara Mudali had been made in conjunction with her also) he claimed to be entitled to possession. The Subordinate Judge held that the third respondent was *bonâ fide* in possession and that he resisted delivery of possession on his own rights. He rejected the applications.

The petitioners preferred this appeal, when a preliminary objection was raised that no appeal lay against the order of the Subordinate Judge. The case is only reported on this point.

V. Krishnaswami Ayyar and *T. R. Venkatarama Sastri* for appellant.

P. R. Sundara Ayyar, K. Sreenivasa Ayyangar and *T. V. Gopalasami Mudaliar* for respondent.

JUDGMENT.—A preliminary objection has been taken that no appeal lies against the order of the Subordinate Judge.

In Original Suit No. 31 of 1900 the appellants obtained a decree for the sale of certain mortgaged lands which had belonged to one Somasundara Mudali deceased and an order for the recovery of any sum not realized by the sale from any other property forming part of his estate. The defendants were an alleged adopted son of Somasundara Mudali and Visalatchi and Bapu, the two widows of Somasundara Mudali's father, who, if the adoption failed, would represent the estate. One of these widows, Bapu, alone contested the suit but after a time she ceased to continue her contest. An issue as to whether the debt was payable out of

SIVARAMA SASTRIAL v. SOMASUNDARA MUDALI.

Somasundara Mudali's estate was raised and decided in the appellants' favour. Visalatchi died in June 1903. On the 22nd October 1903 part of the mortgaged property was sold and purchased by the appellants themselves. They applied for an order for delivery of possession to them. The third respondent objected to the delivery on the ground that he was in possession of the property in his own right. His claim was two-fold. His first contention was that Somasundara Mudali's estate had vested, on his widow's death before the suit, in Visalatchi only and that after the latter he, as the nearest male reversioner, became entitled to Somasundara's estate, Bapu having no interest in the property at all, inasmuch as Somasundara had, as alleged by this respondent, been adopted by his father in conjunction with Visalatchi alone and Bapu consequently occupied the position of but a step mother of Somasundara.

His second contention rested upon a release deed executed by Bapu to him on the 17th October 1903 the real effect of which would be to vest in him the interest of Bapu in Somasundara's estate if, according to the case of the appellants, Somasundara's adoption by his father was in conjunction with both his wives. The Subordinate Judge finds and we think rightly that Bapu let the third respondent into possession.

If, as contended by the third respondent, the inheritance passed on Visalatchi's death to him he would be the person entitled to represent the estate.

In this view a question such as the present relating to execution will have to be dealt with under section 244, Civil Procedure Code, and an appeal will lie against the order passed in the matter. If, on the other hand, Bapu, as the surviving adoptive mother, be entitled to the inheritance for her life the rethi respondent as a person relying on the release by her executed after the mortgage decree in favour of the appellants against Bapu must be held to be a representative of one of the parties to the decree and the same result will follow.

Our attention has been drawn to *Kasinatha Ayyar* v. *Uthumansa Rowthan*(1). The conclusion of Moore, J., in that case with reference to the appeal therein in so far as it related to the fourth respondent, was that the case of obstruction by a purchaser from a mortgagor

(1) I.L.R., 25 Mad., 529.

SIVARAMA SASTRIAL v. SOMASUNDARA MUDALI.

after a decree had been passed against the latter to the execution of the decree by delivery of the property to the decree-holder and purchaser, would fall under section 335, Civil Procedure Code. Bhashyam Aiyangar, J., who took part in the case, makes no reference to the point. The judgment of Mr. Justice Moore contains no reasons for not treating the purchaser as a representative of the mortgagor within the meaning of section 244, Civil Procedure Code, in accordance with the decisions on the point in this and other High Courts. We are therefore unable to regard that case as compelling us to hold that the third respondent is not a representative and we accordingly overrule the preliminary objection.

APPELLATE CIVIL.

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

1904. August 30.

ANNAMALAY CHETTIAR AND ANOTHER (FIRST AND SECOND PLAINTIFFS), APPELLANTS,

v.

PITCHU AYYAR AND OTHERS (DEFENDANTS Nos. 1, 4 AND 5), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 544—Appeal by one of several defendants—Ground common to all.

Plaintiffs sued on a mortgage bond. The defence, which was common to all the defendants, was that the mortgage was a sham. The Subordinate Judge upheld the mortgage bond and decreed in plaintiffs' favour. The fifth defendant a subsequent mortgagee, alone appealed to the District Judge, who reversed the decree and dismissed the suit. Plaintiffs appealed to the High Court:

Held, that the decree of the Subordinate Judge proceeded on a ground common to all the defendants and that the decree of the lower Appellate Court enured for the benefit of the defendants who did not appeal.

SUIT for money alleged to be due on a mortgage bond. Plaintiffs claimed as the assignees of a mortgage executed by first defendant to one Rajagopala Ayyar. Defendants Nos. 2 and 3 were impleaded as they were in possession of some of the mortgaged property; fourth defendant as he had purchased a portion of it; and fifth defendant as he was a subsequent mortgagee. The defendants all pleaded that there was no consideration for the mortgage bond sued on and that the recitals in it were false and that the bond was a fictitious one got up for another purpose, and that plaintiffs had paid no consideration for the assignment of it to them. The Subordinate Judge decreed in plaintiffs' favour as against defendants Nos. 1, 4 and 5. Defendant No. 5 alone appealed to the District Judge, who held that the mortgage bond sued on was one of a nominal character, without consideration, and that plaintiffs were not entitled to recover anything under it. He allowed the appeal and dismissed the suit.

* Second Appeal No. 548 of 1902, presented against the decree of H. G. Joseph, Esq., District Judge of Trichinopoly, in Appeal Suit No. 155 of 1901, presented against the decree of M.R.Ry. O. Sivaramakrishnama, Temporary Subordinate Judge of Trichinopoly, in Original Suit No. 58 of 1901.

ANNAMALAY CHETTIAR v. PITCHU AYYAR.

Plaintiffs preferred this second appeal.

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

Mr. *Joseph Satya Nadar* for second respondent.

V. Krishnaswami Ayyar and *K. Srinivasa Ayyangar* for third respondent.

JUDGMENT.—The plaintiffs' case is that they are assignees of a mortgage executed by the first defendant to one Rajagopala Ayyar. The District Judge finds that the mortgage was a sham. There is evidence to support this finding, and we cannot go behind it in second appeal.

On behalf of the plaintiffs it has been contended that, even if the mortgage was a sham as between the mortgagor and the mortgagee, the plaintiffs took as *bonâ fide* assignees without notice. This is a new case.

It was not raised in the issues and was not taken in the lower Appellate Court. The appellants are not entitled to set up this new case on second appeal.

The appellants have taken a further point that inasmuch as the fifth defendant the subsequent mortgagee alone appealed, the lower Appellate Court had no power to set aside the decree for the benefit of the defendants who did not appeal. The ground of defence common to all the defendants was that the mortgage was a sham and the decree of the Subordinate Judge proceeded on the ground that the mortgage was not a sham. Following the decision of this Court in *Yerrabalu Viraraghava Reddi* v. *Abdul*

ANNAMALAY CHETTIAR v. PITCHU AYYAR.

Khadir Sahib(1) and the Calcutta case of *Ram Kamal Shaha* v. *Ahmad Ali*(2), we hold that the decree proceeded on a ground common to all the defendants and that the decree of the lower Appellate Court enures for the benefit of the defendants who did not appeal. The case of *Syed Hussain* v. *Madan Khan*(3) may be distinguished on the ground that one of the defendants in that case set up a title to an item of property which was not claimed by the other defendants. This being so there was good reason for holding that the decree did not proceed on a ground common to all the defendants. In the judgment in that case the Judges say that section 544 of the Code of Civil Procedure presupposes a common ground of decision affecting property in which both those who have appealed, and those who have not appealed have an interest either direct or indirect. In the present case those who have not appealed, viz., the first and fourth defendants certainly have an interest in the property which is the subject of the decision. The second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Boddam.

1904. September 21.

RAMALINGA MUDALI (SECOND PLAINTIFF), APPELLANT,

v.

AYYADORAI NAINAR AND ANOTHER (DEFENDANTS Nos. 2 AND 3), RESPONDENTS.*

Transfer of immoveable property—Registered deed of sale—Deed retained by vendor—Possession by vendor—Subsequent transfer by registered trust deed to temple—Suit for possession by original vendee—Failure of consideration—Effect not given to intention to transfer—No property passed.

S executed and registered what purported to be a sale deed in favour of first defendant. S retained the deed and also continued in possession of the property. He subsequently transferred the property to a temple, and held possession as tenant to the temple until his death. When S died, first defendant

(1) 4 M.H.C.R., 26. (2) I.L.R., 30 Calc., 429. (3) I.L.R., 17 Mad., 265.

* Second Appeal No. 1305 of 1902, presented against the decree of E. B. Elwin, Esq., District Judge of South Arcot, in Appeal Suit No. 316 of 1901, presented against the decree of M.R.Ry. A. Ramaswami Sastri, District Munsif of Cuddalore, in Original Suit No. 538 of 1900.

RAMALINGA MUDALI v. AYYADORA NAINAR.

took possession of the property, whereupon plaintiffs, the Dharmakartas of the temple, brought the present suit to recover possession of it. The finding was that the transfer by S to first defendant was intended to be effected only upon an event happening which did not, in fact, happen:

Held, that, as the event did not take place, effect was not given to the intention to transfer and no property passed to the first defendant.

SUIT for possession of a house. The property had belonged to one Sabapathy Pillai, who executed what purported to be a sale deed relating to it in favour of first defendant. Sabapathy Pillai, however, retained the document and also remained in possession of the property. He subsequently transferred the property by registered trust deed in favour of a temple, and continued in possession as tenant to the temple until his death. Subsequently to his death, first defendant took possession of the property. Plaintiffs were the Dharmakartas of the temple, and brought this suit to obtain possession of the property. Further facts are set out in the judgment. Second defendant was impleaded as he had obtained a sale deed of the property from first defendant and third defendant as he claimed to hold the property under a rental agreement from second defendant. The District Munsif decreed in plaintiffs' favour. Defendants Nos. 2 and 3 appealed to the District Judge, who reversed the decree, and dismissed the suit.

Second plaintiff preferred this second appeal.

T. Rangachariar for appellant.

V. Krishnaswami Ayyar and *S. Srinivasa Ayyar* for respondent.

JUDGMENT.—Both the Courts are agreed as to the important facts in the case. Though what purports to be a sale deed for money was executed and registered by Sabapathy Pillai to the first defendant, yet the instrument was not delivered to him, but retained by Sabapathy Pillai himself who also remained in possession of the property until he made the transfer in favour of the temple represented by the plaintiffs and subsequently held possession under the temple as their tenant until his death. It was subsequently to his death, ten years after the supposed sale to him that the first defendant took possession of the property. The defendant's plea that the intended transfer to him was in consideration of Rs. 300 actually paid was untrue. The explanation on behalf of the plaintiffs of the transaction was that Sabapathy Pillai intended to marry the first defendant's daughter and that the transfer was to be in consideration of such marriage

RAMALINGA MUDALI v. AYYADORAI NAINAR.

which in fact never took place and that the first defendant having refused to give his daughter in marriage, the transfer was never completed. Notwithstanding the by-no means clear language used by the Munsif in that part of his judgment to which our attention has been called on behalf of the first defendant, we cannot agree with the suggestion that the plaintiff's case was that the mere promise to give and not the actual gift of the girl formed the consideration for the execution of the deed by Sabapathy Pillai. It would be absurd to suppose that Sabapathy Pillai was willing to part with his property upon the mere promise to give the girl in marriage irrespective of whether that promise was to be carried out or not, and the unquestionable facts that the document was never delivered nor possession of the property given, are absolutely inconsistent with the suggestion referred to which has been accepted by the Judge. It is therefore clear that the transfer was intended to be effected only in the event of the marriage taking place and as it did not take place, effect was not given to the intention to transfer and no property passed to the first defendant (*Ponnayya Goundan* v. *Muttu Goundan*(1)) to which the District Judge refers has no application to cases of this kind and though, in the circumstances of that case, actual handing over of the instrument after registration was not essential to vest the property in the vendee it cannot be laid down as a general rule that mere registration of an instrument without reference to other circumstances operates to transfer the property. See *Sangu Ayyar* v. *Cumarasami Mudaliar*(2) and *Mauladan* v. *Rughunandan Pershad Singh*(3).

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.

(1) I.L.R., 17 Mad., 146. (2) I.L.R., 18 Mad., 61.
(3) I.L.R., 27 Calc., 7.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Sankaran Nair.

LATCHMANAN CHETTY (SECOND PLAINTIFF), APPELLANT,

1904. August 4, 10.

v.

RAMANATHAN CHETTY AND ANOTHER (FIRST PLAINTIFF'S L.R AND FIRST DEFENDANT), RESPONDENTS.*

Appeal—Order refusing application for appointment of commissioner to effect division of property by metes and bounds in partition suit—Limitation Act—XIV of 1877, sch. II, art. 178.

The parties to a suit for partition entered into a compromise which was recorded by the Court and by which their respective shares in the family property were agreed upon. An application was subsequently made for the appointment of a commissioner to effect an actual division of the property, but the Subordinate Judge dismissed it on the ground that the right to claim further relief in the matter had become barred by limitation. This order was reversed on appeal and the case was remanded by the District Judge for disposal according to law. An appeal was then preferred to the High Court against the order of remand, when it was contended that no appeal lay to the District Judge against the order of the Subordinate Judge:

Held, that an appeal lay. The order of the Subordinate Judge on the face of it purported to decide a question to be dealt with under section 244 of the Code of Civil Procedure and was therefore a decree within the meaning of that term in the Code, and that the party against whom it was passed was entitled to appeal therefrom.

Even if there was no decree to be executed, and the Subordinate Judge erroneously supposed the matter to be one in execution, and held the application to be barred, such usurpation of jurisdiction could not make the order passed in consequence thereof less appealable than would have been the case had the order been passed in execution proceedings under a decree duly passed.

Hurrish Chunder Chowdry v. *Kali Sundari Debia* (L.R., 10 I.A., 4) and *Abdul Rahiman Saheb* v. *Ganapathi Bhatta*, (I.L.R., 23 Mad., 517), followed.

Such an application is not an application of the description contemplated by art. 178.

* Civil Miscellaneous Second Appeal No. 34 of 1903 presented against the order of H. Moberly, Esq., District Judge of Madura in Appeal Suit No. 234 of 1902, presented against the order of M.R.Ry. T. T. Rengachariar, Subordinate Judge of Madura (West) in Civil Miscellaneous petition No. 56 of 1902 in Original Suit No. 49 of 1894.

LATCHMANAN CHETTY v. RAMANATHAN CHETTY.

APPLICATION for appointment of a commissioner to effect division of property. The application was made in a partition suit the parties to which had entered into a compromise which was recorded by the Court, whereby the first plaintiff was declared entitled to half a share, the first defendant to one-fourth and the second plaintiff to the remaining one-fourth. First plaintiff died before an actual division of the property was effected, and his son applied for the appointment of a commissioner to effect a division. The Subordinate Judge held that the first plaintiff's right to claim further relief in the matter had become barred by limitation, and dismissed the application. The District Judge, on appeal, reversed that order and remanded the case for disposal according to law.

Against that order, second plaintiff preferred this appeal.

V. Krishnaswamy Ayyar and *Rangaramanuja Chariar* for appellant.

The Hon. Officiating Advocate-General (Sir *V. Bashyam Ayyangar*), *S. Sreenivasa Ayyar*, and *C. V. Anantakrishna Ayyar* for respondents.

JUDGMENT.—The suit out of which the present appeal arises was brought for the partition of a house and some lands to which the parties to the suit were jointly entitled. The parties entered into a compromise which was recorded by the Court and according to it the first plaintiff was declared entitled to half a share, the first defendant to one-fourth and the second plaintiff who is the appellant before us to the remaining one-fourth. Steps for the actual partition and delivery of the respective plots or for the adjustment of the rights of the parties otherwise remained to be taken. The first plaintiff having died, his minor son and representative applied for the appointment of a commissioner to make a division of the property. The Subordinate Judge dismissed the application on the ground that the first plaintiff's right to claim further relief in the matter had become barred by the law of limitation. On appeal the District Judge reversed the order of Subordinate Judge and remanded the case for disposal according to law.

It was contended before us as it was in the lower Appellate Court also that no appeal lay to that Court against the order of the Subordinate Judge inasmuch as that order was not one passed in execution of a decree, a decree properly such having had to be passed in the suit after the steps required for division

LATCHMANAN CHETTY v. RAMANATHAN CHETTY.

by metes and bounds had been completed. This contention is clearly untenable for the order of the Subordinate Judge on the face of it purports to decide a question to be dealt with under section 244 of the Civil Procedure Code and is therefore a decree within the meaning of the definition of that term in the Code and the party against whom it is passed is therefore entitled to appeal therefrom. Assuming that there was no decree to be executed that the Subordinate Judge erroneously supposed the matter was one in execution and that he proceeded to decide that the right to obtain such execution was unenforceable by lapse of time, such usurpation of jurisdiction with the object of putting an end to litigation cannot make the order passed in consequence thereof the less appealable than would have been the case had the order been passed in execution proceedings under a decree duly passed (see *Hurrish Chunder Chowdry* v. *Kali Sundari Debia*(1), *Abdul Rahiman Saheb* v. *Ganapathi Bhatta*(2)). Nor can we agree with the argument that the application for the appointment of a commissioner was governed by article 178 of schedule II to the Indian Limitation Act. If the order passed on the compromise did not amount to a decree it is incumbent on the Court to bring the litigation to an end by causing such steps to be taken as will result in the due disposal thereof. The appointment of a commissioner is one which it was competent to the Court to make without being put in motion by any party to the litigation and therefore an application by a party with reference to such a matter is not an application of the description contemplated by the article relied on (see *Vithal Janardan* v. *Vithojirav Putlajirav*(3), *Darbo* v. *Kesho Rai*(4) and *Dwarka Nath Misser* v. *Barinda Nath Misser*(5)). If, on the other hand, the order on the compromise be regarded as the decree in the case and the application made to the Subordinate Court as one in execution, the article applicable would have been article 179 and upon the facts admitted the application was undoubtedly in time. The appeal is therefore dismissed with costs.

(1) L.R., 10 I.A., 4 at p. 17.
(2) I.L.R., 23 Mad., 517 at p. 521.
(3) I.L.R., 6 Bom., 586.
(4) I.L.R., 9 All., 364.
(5) I.L.R., 22 Calc., 425.

PRIVY COUNCIL.

P.C.*
1904.
November
15, 16, 17.
1905.
February 8.

GOURA CHANDRA GAJAPATI NARAYANA DEO (RAJAH OF PARLAKIMEDI), PLAINTIFF,

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL, DEFENDANT.

[On appeal from the High Court of Judicature at Madras.]

Grant—Re-grant after confiscation—Exception of Maliahs in re-grant—Construction of exception—Title by adverse possession—Estoppel—Maliahs treated erroneously by Court of Wards as part of zamindari and acquiescence by officers of Government—Evidence Act—I of 1872, *s.* 115.

Prior to 1799 the Zamindari of Parlakimedi included certain tracts of forest land called "Maliahs" which were held by Bissoyees or local chiefs on service tenures in respect of which they paid to the Zamindar a sum as kattubadi or quit-rent; their duties being (*inter alia*) to keep up an establishment of guards at certain thanas for police purposes. Besides the Maliahs they held other lands which they occupied and cultivated for their own support. In consequence of a rebellion in 1799 in which the then Zamindar took part, the Government by a proclamation issued in 1800 declared that the zamindari was confiscated; and that the Bissoyees "were henceforward to pay their revenue directly to the Collector and to be for ever under the company's immediate authority"; but that they would in due course restore the son of the Zamindar "to the lands of his ancestors with the exception of those now held by the Bissoyees which are hereby declared separated from the zamindari for ever." This restoration was made in 1803, after the death of the rebellious Zamindar, to his son. What was excepted from that re-grant and from the assessment that formed the condition of the re-grant was variously described as "the lands held by the Bissoyees", "the possessions of the Bissoyees", and "all lands or russums or fees heretofore appropriated to the support of police establishments." In a suit against the Government by the Zamindar of Parlakimedi in 1894, claiming proprietary right in, and possession of, the Maliahs as appertaining to the zamindari:

Held, that the proper construction of the exception was that it included the Maliahs, and not only the lands occupied and cultivated by the Bissoyees; the Maliahs therefore did not pass under the re-grant but remained the property of Government as they had done since the forfeiture.

In 1823 the Government transferred the Bissoyees, who had been placed in 1800 under the Collector, to the Zamindar, and directed that they should be required to pay their quit-rents to him:

* *Present:* Lord MACNAGHTEN, Lord LINDLEY, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.

Held, that that arrangement conferred no proprietary right in the Maliahs upon the Zamindar who incurred thereby no liability for the quit-rents of the Bissoyees, but had only to account for what he succeeded in collecting.

In 1835 certain villages not within the Maliahs were granted to the Zamindar in consideration of his undertaking liability for the quit-rents of the Bissoyees:

Held, that such an express grant excluded the inference that the Zamindar obtained any proprietary right in the Maliahs.

The Courts below had concurred in holding that the plaintiff had not proved the acquisition of a title against the Government by adverse possession for 60 years, and the Judicial Committee upheld that decision.

From 1861 to 1893, in consequence of the disability or incapacity of successive Zamindars, the zamindari was in possession of the Court of Wards represented by the Collector of the district, and the Court of Wards erroneously treated the Maliahs as if they belonged to the zamindari, worked the forests on the Maliahs and constructed roads through them at the expense of the Zamindar; and the officers of Government under the same mistake acquiesced in that possession and encouraged such an expenditure of zamindari funds upon the Maliahs as seemed good in the public interest:

Held (affirming the decision of the High Court), that there was in that conduct no such representation as could give rise to an estoppel which would prevent the defendant from denying the plaintiff's title.

APPEAL from a judgment and decree (9th October 1900) of the High Court at Madras which reversed a decree (5th July 1898) of the Agent to the Governor of Madras at Ganjam and dismissed the suit of the appellant.

The suit related to certain hill tracts known as "Maliahs" situate in the zamindari (now the Raj) of Parlakimedi of which the appellant was the Zamindar (and now the Rajah) the question in dispute being whether the "Maliahs" belonged to the Zamindar or the Government of India.

The circumstances out of which the suit arose were as follows:—

In February 1798 one Gajapati Deo, the then Zamindar of Parlakimedi, rebelled against the East India Company, and was joined in the rebellion by some of the Bissoyees, or hill chiefs from the Maliah tracts bordering on his estate. The rebellion having been put down in 1799 the Government decided to withdraw the Bissoyees entirely from the control of the Zamindar, and to place them under the direct authority of the company. This was done by a proclamation issued in January 1800 which also declared that Gajapati Deo had forfeited his estate. The document is set out in their Lordships' judgment.

The zamindari was up to February 1802 managed by the Collector. In that year Gajapati Deo died and his son Purushottam

GOURA CHANDRA GAJAPATI NARAYANA DEO v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

Narayana Deo was (in accordance with the proclamation of 1800) appointed Zamindar of Parlakimedi, and in May 1803 a sanad was granted to him under the provision of Madras Regulation XXV of 1802.

The assessment fixed by the sanad on the estate excluded all payments on account of the Maliah tracts held by the Bissoyees, the revenue on which amounting to Rs. 2,530, was to be paid by the Bissoyees direct to the Collector. The total claim on the estate was fixed at Rs. 93,557. Purushottam Narayana Deo died in December 1805 and his successor being a minor the estate was placed in charge of the Court of Wards, and so remained (with an interval from 1822 to 1830) until 1889. In 1835 the system by which the Collector received the revenue due to Government direct from the Bissoyees occupying lands in the Maliahs was given up, and the Government allowed the revenue to be collected by the Zamindar and paid over by him to the Collector on behalf of the Government; and as compensation for the trouble and responsibility of making the collection certain doratanam mokhasa villages forfeited by their owners were annexed to the zamindari of Parlakimedi.

In August 1891 the Zamindar of Parlakimedi put forward, through his Agent a Mr. Taylor, certain claims which were dealt with by the Government in an order, dated 3rd November 1891. The order stated—

"It is not the case that the right of investiture of a Bissoyee has always appertained to the Zamindar for this right was abolished by the proclamation of 1799, nor is it the case that the hill villages form any part of the estate, or that the kattubadi paid by the Bissoyees constitutes tribute paid to the Zamindar; it is tribute paid to Government through the Zamindar. Finally, it is impossible to question the right of Government to declare the estates of Bissoyees' forfeit."

On 8th February 1893 Mr. Taylor again wrote to the Collector of Ganjam "regarding the land in the Parlakimedi Maliahs." He asserted that large sums had been spent upon the Maliah forests by the Court of Wards whilst the estate was in its charge. On this the Government made the following order:—

"The Government is not prepared to grant the Zamindar of Parlakimedi a sannad for the Maliah tracts bordering on his estate, nor can any claim to the forests in those tracts on the part of the Zamindar be recognised.

GOURA CHANDRA GAJAPATI NARAYANA DEO v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

"2. With regard to the question of compensation for the expenditure incurred upon forests, roads and schools in the Maliahs during the period for which the estate was under management, the Government has consulted the Court of Wards and it is clear from the report received from that authority that the claim now put forward is inadmissible. The Court observes—

'It is perfectly true that for many years a special forest establishment was in existence in the Parlakimedi Estate and, as shown in the accompanying statement, a sum of Rs. 55,842 was spent upon 'forests' during the seventeen years following December 1862, when the matter appears to have first engaged attention. The receipts, however, during the same period amounted to Rs. 81,002, leaving a net profit to the estate of Rs. 25,160.

'In the year 1880 the establishment was dispensed with, and after that date there does not seem to have been any outlay at all under this head, with the exception of Rs. 16 per mensem for extra allowances for estate peons for special duty in guarding the ghats and in levying a seigniorage on timber passing down into the low country.'

"The Court goes on to say that the expenditure incurred in 1863 and in the following years was sanctioned with a view of obtaining revenue from the forests rather than of conserving them, and that the records of the Court do not show that any measures of conservancy were ever undertaken in respect of these Maliah forests. Finally, the Court expresses the opinion that Mr. Taylor's assertion that the forests in question owe their very existence to the care with which, for more than fifty years, they were nursed and preserved by the Court of Wards is not supported by the facts.

"3. So far then from the estate having suffered financially from the expenditure, it is now shown that it benefited to a very considerable extent from the sale of, and levy of seigniorage on, timber to which the Zamindar had in reality no right.

"4. No statistics have been supplied of the expenditure upon roads and schools in the Agency, but the amount must have been very small and far below the profits accruing to the estate from the use of the forests.

"5. The Agent may communicate a copy of this order to Mr. Taylor with the intimation that, under the circumstances, the Government cannot accede to any of the requests contained in his letter of the 8th February last.

"6. The attention of the Agent will be drawn to paragraph 3 of Mr. Taylor's letter. The Bissoyees have no right to the forests, and effectual measures must at once be taken to prevent them felling and disposing of timber."

GOURA CHANDRA GAJAPATI NARAYANA DEO v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

In September 1893 the Government took formal possession of the forests in the Maliahs and on 10th November 1894 the appellant brought against the Secretary of State for India in Council the suit out of which this appeal arose. In his plaint he claimed title to the Maliahs as being part of his estate of Parlakimedi, firstly, by express grant under the sanad given to Purushottam Narayana Deo after the forfeiture of the estate by his father Gajapati; secondly, by an implied grant by the Government which had been recognized by the defendant and his predecessors in title; and thirdly, by a prescriptive title to the Maliahs and the lands and forests therein, acquired by adverse possession against the defendant and his predecessors in title. A right in the nature of an easement or profit *à prendre* was also claimed. The plaintiff prayed for a declaration of his title, for delivery of possession of the lands in suit, and for an injunction restraining interference by the defendant.

The defendant's written statement stated (*inter alia*) the following defence:—

(*a*) That, by the proclamation of January 1800, the then zamindari of Parlakimedi was forfeited to Government as an act of State, owing to the disobedient and rebellious conduct of the plaintiff's ancestor, and that in consequence of such confiscation, all rights, title, or interest, which the ancestors of the plaintiff might have, up to that time, enjoyed, vested absolutely in the defendant, and that, at the time of confiscation, a hope of re-grant of the zamindari—the Maliahs being expressly excluded—was held out to the son of the rebel Gajapati Deo. (*b*) That on the 6th of May 1803, a deed of permanent settlement was, in conformity with that proclamation, granted to Purushottam Narayana Deo, the son of Gajapati Deo, the predecessor in title of the plaintiff, but that the said deed was not intended to, and did not in fact, include the Maliahs, nor was the revenue derived from the Maliahs included in the assets of the zamindari. (*c*) That there had been no subsequent grant by the defendant to the plaintiff, express or implied, of the Maliahs, and that the plaintiff never at any time had any proprietary or other right in the Maliahs, and that the Bissoyees subsequent to the permanent settlement never remained or were tributary to the Zamindar for the time being, and that the *kattubadi* or tribute of the Bissoyees was from 1835 onwards, merely paid to such person, as the Agent of Government.

GOURA CHANDRA GAJAPATI NARAYANA DEO v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

(*d*) That, if acts of ownership were exercised by the plaintiff or his predecessors in title, they were unauthorised by the defendant and done without the defendant's knowledge, and neither could nor did operate to create any title to the Maliahs in the Zamindar for the time being of Parlakimedi. (*e*) That neither the plaintiff nor any of his predecessors had acquired any title by prescription or otherwise to the Maliahs.

Issues were raised on which the main questions for determination were (1) whether the Zamindar was the owner of the lands in suit prior to confiscation? (2) Whether subsequent to confiscation they were restored to the Zamindar? (3) Whether the Zamindar has acquired a title by prescription? (4) Whether the defendant is estopped from disputing the plaintiff's title?

The Agent to the Governor of Madras at Ganjam as regards the first three questions decided in favour of the defendant, but on the fourth question he held that the defendant had recognized the right and title of the plaintiff and was estopped from denying it in this suit. The material portion of his judgment was as follows:—

"The next question is whether the defendant is estopped from denying the right of the plaintiff to the forests and waste lands of the Maliahs, under section 115 of the Indian Evidence Act.

"'Where one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he, nor his representative, shall be allowed in any suit or proceeding between himself and such person or his representative, to deny the truth of such thing.'

"This section appears to me to be peculiarly applicable to the present case. There appears to be this difference between ratification of contract and estoppel, viz., that in the case of a contract or of a grant, there can be no valid ratification by one whose knowledge of the facts are materially defective, even though such ignorance or want of knowledge may be due to his own carelessness or neglect; while in the case of estoppel it is not necessary that the person causing or permitting the belief of the other person should himself have been aware of its untruth; he may have been acting unwillingly and in perfect good faith—but if the belief has been intentionally caused and has been acted upon, the estoppel will come into force.

"Looking at the matter from the plaintiff's point of view, I do not think that, having reference to the complicated state of affairs which existed in regard to the Maliahs from the beginning of the century, and the arrangements in connection therewith, it would, in

GOURA CHANDRA GAJAPATI NARAYANA DEO v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

the absence of a subsequent assertion of its title by Government, be unreasonable for him to believe that the Government had intended to, or had, in fact, parted with its rights to the forests of the Maliahs in his favour and the absolute right to the forests being inseparable from the proprietary right to the soil on which those forests grow, the plaintiff might reasonably be induced to believe on the strength of the acts and omissions of defendant that he was the owner of the waste lands and forests of the Maliahs in proprietary right.

"It is, in fact, admitted in paragraph 8 of exhibit U, that the Court of Wards was under this mistaken belief and acted accordingly, and I hold it clear that this belief was caused and strengthened firstly by the omission on the part of Government to assert its rights, and secondly by the direct acts of Government, in calling for a report upon the forests and methods taken for their conservancy (series exhibits 171 to 284).

"Indeed, it is admitted on behalf of the defendant that the acts of Government are such as might give rise to an equitable estoppel, in the event of a claim being put forward for profits derived by the plaintiff from the working of the Maliah forests: it is however denied that such acts will bar the defendant's title to the waste lands and forests of the Maliahs.

"There is, I think, here a clear distinction to be drawn between the exercise of forest rights on the strength of the defendant's acquiescence and the expenditure of estate funds on roads in the Maliahs under the express direction of the defendant. I have already pointed out that there are no separate and satisfactory figures relating to the working of the Maliah forests as apart from the forests of the admitted zamindari, but that from the figures available, and the extra cost of working the Maliah forests, it would appear that no material profit was derived therefrom: in fact, it would seem that the receipts derived by plaintiff from the sale of timber and produce in the Maliahs would approximately balance the expenditure on establishment, cost of working, &c. On the other hand, it does not appear that, so far as the Maliahs were concerned, any capital was invested by the plaintiff in the permanent improvement of the forests as elsewhere in the zamindari proper, by the planting of teak, the formation of reserves, and the like.

"Under these circumstances, I do not think that mere acquiescence, or even a display of interest, by the defendant in the working of the Maliah forests by the plaintiff can amount to an estoppel so as to bar the title of defendant who was apparently acting in ignorance of his rights. If the plaintiff has not been the gainer by the working of these forests, he has certainly not been prejudiced by the defendant's

GOURA CHANDRA GAJAPATI NARAYANA DEO v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

action, or expended sums on the conservancy and improvement of forests, of which, if his title be affirmed, the defendant will, in the future, reap the benefit; nor would the mere sale of timber to an executive officer of Government in another district on a contract made without the defendant's knowledge operate as an estoppel, so as to prevent the defendant from denying the plaintiff's right and title to sell that timber. The fact, that these sales were being made to officers of Government, was not brought to the notice of Government until after they had ceased. Hence, so far as the mere working of the forests is concerned I hold that there is no estoppel, and that plaintiff must prove his title by prescription.

"The question, however, of expenditure on the Maliah roads appears in quite a different light. It is true, that, to some extent, the roads may have been of use to the plaintiff for the transport of timber, as well as to the general public: but it is equally clear that the roads so constructed were not merely forest roads. The principle kept in view from 1860 onwards has been the opening up of a tract to the forts of the various Bissoyees, for the purpose of the better control over those chiefs, as well as for the opening up and development of the country. It would be absurd to contend that the plaintiff would expend on these roads an annual grant of Rs. 2,000, besides large special grants (*e.g.*, Gumma ghat) merely for the purpose of collecting the Bissoyees' kattubadi amounting to some rupees 3,000 for which he is held responsible. The object and purpose for which these roads were constructed was essentially the interest of Government, and the interest of the public. If, as the defendant asserts, the plaintiff has no interest in the Maliahs beyond the assignment and the collection, as agent on behalf of defendant of the tribute payable by the Bissoyees, then it was the duty of the defendant to construct those roads and to incur that expenditure, whereas it is made abundantly clear from the evidence that the defendant regarded the construction of those roads or tracts as part of the plaintiff's duty and not only urged forward their construction at the plaintiff's expense, through the medium of the officers of its own Public Works Department, but also cavilled at the short work said to have been turned out by the plaintiff departmentally, on the Gumma ghat road.

"This seems to me to amount to a clear admission, on the part of the defendant, of the plaintiff's title, the plaintiff was clearly thereby induced to believe in his title to the forests and waste lands of the Maliahs, and on the strength of that belief, and in compliance with the injunctions of the defendant, to expend in the development of that country, both for the public good, and for what—assuming that he

GOURA CHANDRA GAJAPATI NARAYANA DEO v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

was entitled thereto—would have been his own interests—large sums of money, which, under the views and claims now put forward by the defendant, it was the clear duty of the latter to provide. Under these circumstances I must hold that the defendant is now estopped from denying the plaintiff's title to the waste lands and forests of the Maliahs in proprietary right.

"To sum up briefly I hold that whatever may have been the rights of the Parlakimedi family in regard to the Maliahs during the last century, those rights were forfeited to the defendant by the proclamation of 1799, whereby the entire zamandari, which, at that time, included the Maliahs, was declared forfeit as an act of State. I hold that exhibits A, D, F, G, are admissible in evidence for the purpose of explaining and defining exhibit I, and that the re-grant of the zamindari excluded the possessions or holdings of the Bissoyees, which must, for that purpose, be taken as including the waste lands and forests of the Maliahs. I hold that the plaintiff has not proved possession of the Maliahs, forests and lands from time immemorial, the same having been in the possession of defendant from 1799 to 1802 and again in 1834–35 and that the defendant has shown a subsisting title. The plaintiff has failed to prove a title to the Maliahs, forests and lands either by prescription, or by express or implied grant of the same to him by the defendant. I hold that the plaintiff neither has nor could acquire any right by way of easement or profits *à prendre* over the Maliahs, forests and lands, the acts on which he relies having been acts of full ownership and possession, which are inseparable from the ownership of the soil.

"I further hold, that while the plaintiff is not estopped from denying the right and title of the defendant to the Maliahs, forests and lands, the defendant is estopped from denying the right and title of the plaintiff thereto, owing to its recognition of such title, on the faith of which the plaintiff has, with the full knowledge and at the instance of the defendant, expended large sums on the opening up and development of the country by means of roads, for the benefit of the defendant, as representing the community at large. Finally, I hold that the plaintiff could acquire no right, title or interest to the Maliahs, forests and lands owing to the payment to the plaintiff of the tribute due by the Bissoyees, such tribute having been paid to the plaintiff as agent for the defendant, by whom the right and title to collect the same were delegated to the plaintiff. Moreover, the plaintiff is not entitled as of right to nominate and appoint or dismiss the Bissoyees and to resume their lands and holdings, nor is he entitled as of right or as against the defendant to receive from the Bissoyees, or from the Savaras, any payment or offerings other than

GOURA CHANDRA GAJAPATI NARAYANA DEO v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

in respect of those lands and holdings, the fixed tribute due by the Bissoyees to the defendants."

The Agent to the Governor at Ganjam accordingly passed a decree in favour of the plaintiff. On appeal by the defendant in which the plaintiff filed a memorandum of objections the High Court (*Shephard* and *Subrahmania Aiyar, JJ.*) reversed that decree and dismissed the suit. They said:

"The Agent to the Governor has given the plaintiff a decree for the forest and waste lands, described in the plaint, not on the ground that the plaintiff has proved his title, but on the ground that the defendant is by his conduct estopped from denying the plaintiff's title. The estoppel is supposed to arise in this way. Between 1861 and 1893, during which period the plaintiff's zamindari was in the charge of the Court of Wards, the officers of Government, including those immediately concerned with the zamindari, came to believe erroneously, as we must take it, that the Maliahs formed part of the zamindari. They treated the Maliahs and the zamindari proper as one estate, worked the forests on the Maliahs and constructed roads through them at the expense of the zamindari. According to the plaintiff the result of this confusion has been that the Zamindar has suffered, inasmuch as the expenditure on lands which are really the property of Government has exceeded the profits which have come from those lands to the exchequer of the zamindari. The Agent to the Governor does not distinctly find that there has been such loss, and the Government does not admit it. Assuming, however, that the confusion has caused a loss to the zamindari, we are unable to see how Government can on that account be estopped from claiming the Maliahs as their own property. In order to create an estoppel there must first be something in the nature of a representation made by the person to be estopped to the person who benefits by the estoppel. Here, during the period abovementioned, the zamindari was not in the charge of an owner or even of a guardian independent of Government—it was in the immediate charge of an officer of Government, who at the same time, was the local representative of the Government in the district. There were no two persons by one of whom a representation could be made to the other. The mistake must have been made by the Collector or at any rate he must have been the person responsible for giving it currency. We do not mean to say that cases may not arise in which the conduct of Government towards a ward under the Court of Wards may create an estoppel in favour of the ward. Such cases are possible as it is possible that litigation may occur between the Government and the ward or that

GOURA CHANDRA GAJAPATI NARAYANA DEO v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

the possession of the ward may be adverse to Government. In such cases there are distinct acts done by persons purporting to act exclusively in the interest and on behalf of the minor. In the present case no such distinction between the interests of the ward and those of the Government was maintained. The Government having taken upon itself the duty of protecting the interests of incapacitated persons was discharging that duty by means of the agency which it employed for other purposes. The Collector, as the local representative of the Government, was charged with the general superintendence of the district as well as with the duty of administering the Parlakimedi estate. From the evidence before us it is impossible to say that the mistake in dealing with the Maliahs as part of the estate was committed by him in the capacity of Collector of the district rather than in the capacity of custodian of the estate. The letters to which we are referred are written by him to the Court of Wards and therefore may be taken to have been written in the interest of the estate (exhibits 17 to 20, 43).

"If there was mal-administration of the estate, the plaintiff or his father had or has his remedy. That is not a question which is before us. But it is quite a novel proposition and one for which there is no foundation in law to hold that a guardian has lost his title to part of his own estate because in the course of management of his ward's estate he allowed that part to be dealt with as if it belonged to the ward's estate. In our opinion the judgment cannot be supported on the ground of estoppel. It follows that the decree must be reversed unless the Agent has erred in holding that the plaintiff had in other respects failed to prove his title.

"As we agree in the other conclusions arrived at by the Agent, it is unnecessary to deal with the other questions in any detail. There can be no doubt in our opinion that there was an effective forfeiture of the whole estate formerly known as the Parlakimedi zamindari. This is admitted in the plaint and proved by the documents produced on behalf of the defendant. It is also clear beyond doubt that when a fresh grant was made to Narayan Deo the Maliahs were not included in it. It is suggested on behalf of the plaintiff that notwithstanding the forfeiture the Zamindar still remained in possession of the Maliahs, and it may be true that up to 1821 the Government had not collected the kattubadi payable by the Bissoyees and in that sense had not taken possession. But it is not proved that in the meanwhile the kattubadi was paid to anybody else, and in 1821 it was resolved notwithstanding the determination to keep the Maliahs, apart from the zamindari, to collect the dues through the Zamindar. In 1835 that arrangement was confirmed and the Zamindar in consideration of

GOURA CHANDRA GAJAPATI NARAYANA DEO v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

the surrender to him of the doratanam mokhasas was charged with the duty of collecting the kattubadi. Thus at any rate since 1821 the possession of the Maliahs, in so far as it consisted in the collection of those dues, was with Government and until about 1860 when the value of the forests came to be recognized that was practically the only way in which an owner of the Maliahs could exercise his rights over them. It is impossible to reconcile the position assigned to the Zamindar under the arrangement of 1835 with the theory that his ownership of the Maliahs was then existent or recognized. From 1830 down till 1890 the zamindari was in thehands of Government and during the latter half of that period the Government officials failed to distinguish between the zamindari proper and the Maliahs which were the property of Government. On the first occasion when the matter is clearly put before the Government and a demand for a sanad is formulated (exhibit S) the claim is repudiated by Government, and there is no ground for suggesting that there ever was any intention to surrender the property to the Zamindar. For that reason, the argument in favour of acquiescence on the part of Government has no foundation in fact, while in point of law, it may be added, that such acquiescence, if proved, could not give the plaintiff a good title. The plaintiff has altogether failed to prove his case. It is true as alleged in the plaint that there was a forfeiture of the whole estate including the Maliahs. It is not true as is hinted rather than alleged in the plaint that the Maliahs were comprised in the grant made in 1803, nor is it true that since that date the Zamindars have been in possession or exercised acts of ownership over that tract of land. Nor again is it true that the plaintiff acquired a title by adverse possession or otherwise.

"Except on the ground of ownership no claim was made before us by the plaintiff's counsel. The plaintiff having failed to prove his case, the decree must be reversed and the suit dismissed with costs in this Court and in the Court below. The memorandum of objections is dismissed."

On this appeal, *Haldane, K.C.*, and *Kenworthy Brown* for the appellant contended on the construction of the sanad of 1803 that the Maliahs were included in the re-grant to the Zamindar. All that was excluded on that re-grant was the land actually occupied and cultivated by the Bissoyees who had no title to the Maliahs. Prior to the confiscation of the estate in 1799 the Maliahs formed part of the zamindari, and the Zamindar had a good title to them. The Bissoyees held them on mere service tenure, and there was nothing to show that there was any reservation in the grant to

GOURA CHANDRA GAJAPATI NARAYANA DEO v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

the Bissoyees of a tenure of that nature to prevent the Maliahs from coming back to the Zamindar on the restoration of the zamindari in 1803. Reference was made to the history of the Maliahs, and the position occupied by the Bissoyees prior to 1800, the 'Ganjam District Manual' by Mr. Maltby, 1882, pages 29, 32, and the definition of the word "Bissoyee" in Wilson's 'Glossary', page 381, being cited. The fifth report of the Select Committee, page 317, and the appendix, page 354, paragraph 27, and Madras Regulation XXV of 1802 were also referred to. The effect of the proclamation was to put the lands of the Bissoyees in the same position as they were in prior to 1800. Even if the Maliahs were not originally included in the re-grant to the Zamindar they were restored in 1823 or at latest in 1835. From that time there had been adverse possession on the part of the Zamindar as against the Government, and the appellant claimed title also on that ground. The case of *Siva Subramania* v. *Secretary of State for India*(1) and on appeal *Secretary of State for India* v. *Nellakutti Siva Subramania Tevar*(2), a case in which a similar sanad had been considered, was referred to. Acts of ownership done in the belief that the Maliahs formed part of the zamindari were evidence of adverse possession. It was also contended that the respondent was estopped by the conduct of the Court of Wards during the time the estate was in its charge from denying the right and title of the appellant to the Maliahs. The respondent had thereby recognized that right and title, and acquiescing in it had allowed the appellant, acting in that belief, to expend large sums of money upon the development of the Maliahs as if they were part of the zamindari. Having done this he could not now dispute the appellant's title. The Evidence Act (I of 1872), section 115, was referred to.

Cohen, K.C., and *G. E. A. Ross* for the respondent contended that the forfeiture of the estate in 1799 was effective as against the whole of the zamindari which thereupon became the property of the Government and that the Maliahs were not included in the fresh grant made to Purushottam Narayan in 1803. Since that time the title to the Maliahs had been in the Government who had been practically in possession notwithstanding that in 1823 they had allowed the Zamindar to collect the

(1) I.L.R., 9 Mad., 285. (2) L.R., 18 I.A., 149; I.L.R., 15 Mad., 101.

GOURA CHANDRA GAJAPATI NARAYANA DEO v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

revenue from the Bissoyees, and had confirmed that arrangement in 1835. That could not under the circumstances be considered as a recognition by the Government that the ownership of the Maliahs was in the Zamindar. There was therefore no possession of the Zamindar adverse to the Government; that was, moreover, a question of fact on which there were concurrent findings of the two Courts below in favour of the respondent. Reference was made to Madras Regulation XXV of 1802; Act XXIV of 1839; and the Scheduled Districts Act (XIV of 1874). As to the question of estoppel the High Court had rightly held that there could, under the circumstances, be no estoppel which would prevent the Government from denying the title of the appellant: there were no two independent persons of whom one could make such a representation to the other as would create an estoppel. The Court of Wards, in whose charge the zamindari had been from 1860 to 1893, was represented by the Collector of the district an officer of Government who could not act independently of the Government: there was no estoppel, and there had been no acquiescence in or recognition of the appellant's title to the lands in dispute. Reference was made to *Low* v. *Bouverie*(1); *Seton Laing and Co.* v. *Lafone*(2); *Willmott* v. *Barber*(3); *Ramsden* v. *Dyson*(4) per Lord Ganworth and Lord Kingsdown; *Proctor* v. *Bennis*(5); *Sarat Chunder Dey* v. *Gopal Chunder Laha*(6); *Plimmer* v. *Mayor of Wellington*(7); and *Ahmad Yar Khan* v. *Secretary of State for India*(8) per Lord Macnaghten.

Haldane, K. C., replied.

On the 8th February 1905 the judgment of their Lordships was delivered by Sir ARTHUR WILSON.

JUDGMENT.—This is an appeal from a judgment and decree of the High Court of Judicature at Madras reversing the decision of the Agent to the Governor of Madras at Ganjam. The question in dispute is whether the proprietary right in certain tracts, mainly hill tracts, known as the "Maliahs" of Parlakimedi, belongs to the appellant, the plaintiff in the suit, as Zamindar of Parlakimedi in the district of Ganjam, in whose favour the Agent decided, or to the Crown, as held by the High Court.

(1) L.R. [1891], 3 Ch.D., 82. (2) L.R., 19 Q.B.D., 68.
(3) L.R., 15 Ch.D., 96 at p. 105. (4) L.R., 1 E. & I., app., 129 at pp. 140, 170.
(5) L.R. 36 Ch.D., 740. (6) L.R., 19 I.A., 203; I.L.R., 20 Calc., 296.
(7) L.R., 9 A.C., 699 at pp. 710, 712. (8) L.R., 28 I.A., 211 at p. 218.

GOURA CHANDRA GAJAPATI NARAYANA DEO v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

Parlakimedi is an ancient zamindari, and the appellant's ancestors claimed descent, and appear to have originally derived title, from kings of Orissa, whose dominions once included the parts in question. The larger part at least of the zamindari is for all administrative purposes within the district of Ganjam and subject to the jurisdiction of the ordinary Courts. But on the north of the zamindari lie the Maliahs, which are and for many years have been separated for the purposes of jurisdiction from the Ganjam district, and form the Parlakimedi Agency. It is to these that the present suit relates.

The Maliahs appear to have been always organised on a special system, not unlike that which has been found to prevail in other hill countries of India. The inhabitants of the country are those known as Savaras, an indigenous hill race, once no doubt a turbulent people and dangerous neighbours to those dwelling in the plains. The Maliahs are divided into eleven muttas, each of which is controlled by a local chief or Bissoyee. Each Bissoyee has his fort (a term, sometimes at least, used as synonymous with the mutta) and his staff of officers and paiks. The Bissoyees were formerly responsible for controlling the Savaras within their jurisdiction, maintaining peace and good order, and defending the passes to the plains. In return for these duties they received certain advantages. It is not suggested by either side that a Bissoyee has ever had any proprietary right in the mutta under his control, or any part of it. On the contrary, it is agreed that whatever he has held has been held on a mere service tenure, not by right of ownership. In respect of what he has enjoyed he has paid a sum by way of kattubadi or quit-rent.

The Agent to the Governor, in his very careful judgment, summarises as follows the evidence as to the present position of the Bissoyee in his mutta and his relation to the Savaras, and there is no reason to suppose that these have been different in the past, except so far as will be noticed :—

"The general tenor of the evidence of the Bissoyees which is fairly consistent, is to the effect that they hold their Muttas or 'Forts' from Government on service tenure, that they have to keep up a certain establishment of Paiks and maintaining (maintain ?) guards at certain 'Thanas' or posts leading to the plains, and generally to assist Government officers in the maintenance of order and arrest of offenders. Each 'fort' has its own boundaries, including forest lands

GOURA CHANDRA GAJAPATI NARAYANA DEO v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

and is made up of a number of villages, each of which again has its own boundary. The remuneration of the Bissoyees is derived partly from land cultivated by themselves, to which the Savaras contribute a certain amount of 'Vetti' or 'customary' labour, while the Paiks are remunerated either by grants of land or by payment in cash and grain. The Savaras have permanent wet and permanent dry cultivation; they also practise 'Kumri' or 'Podu' cultivation. For the permanent cultivation they pay a fixed proportion of the produce to the Bissoyees, but in regard to the 'Kumri' cultivation they receive a fixed fee, either one rupee per house or one putti of grain per house, from each Savara family, besides 'Sambolos' or 'dallies' of fruit and vegetables six times in the year. A Savara residing in one village cannot practise 'Kumri' cultivation in another village, and permission must be obtained from the head of the village and the Bissoyee. The kattubadi is paid by the Bissoyee to the plaintiff, but, with the exception of this payment, the Bissoyee exercises absolute authority over the affairs of his Fort, subject to Government control."

In another passage the Governor's Agent correctly describes the situation of the Maliahs, and defines the subject-matter of this suit :—

"The term *Maliahs*, strictly speaking, means the 'Hill country' and is applied generally to the Eastern Ghats. For the purpose of this suit, however, the term 'Parlakimedi Maliahs' is synonymous with the term 'the Agency Tracts of the Parlakimedi Taluk' comprising the 11 forts of the Bissoyees. From the oral evidence and from Ex. W. (para. 2 of Russell's report), it is clear that many of the villages contained in this tract are situated in the plains, and are therefore not Maliahs in the proper sense of the term. Page 82 of the District Manual shows that the forts of Gandahatti, Narayanapuram, Namanagaram, and Lavaniakota are situated in the low country, while a considerable number of villages in other forts are similarly situated. Hence the term 'Maliahs' throughout this suit is not used in its literal sense as 'hill country' but as the country comprised within the 11 forts of the Bissoyees, and the terms 'Parlakimedi Maliahs' and 'Parlakimedi Agency' are interchangeable throughout wherever they are used in this judgment. At the same time there are hills, in the zamindari proper, outside the Maliahs, and Savaras also form a portion of the population of the ordinary tracts on these hills and on the country bordering on the Maliahs."

The Bissoyees were formerly appointed by the Zamindars of Parlakimedi, they were subject to their control, and they pai-

GOURA CHANDRA GAJAPATI NARAYANA DEO v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

their kattubadi to them; and this state of things continued until almost the close of the eighteenth century. At that time disturbances occurred in the district, culminating in actual rebellion, in which the then Zamindar of Parlakimedi, Gajapati Deo, and some at least of the Bissoyees of the Maliahs, took part. In consequence of these events the Government of the day arrived at a decision which was finally embodied in a proclamation of the Governor-General issued in 1800, the draft of which is in evidence, to the effect that:—

"Gajapetty Deo is declared to have forfeited his Zemindari for ever for the repeated breach of his engagements, for his disobedience of the orders of the Collector and finally for the withholding the Revenue collected by him under these circumstances of aggravation.

"The inhabitants of Kimidi District and all whom it may concern are hereby commanded to pay strict obedience to the orders of the Company issued by the Collector who is directed to make the necessary arrangements for the future peace of the country, and for the collection of the revenue until the arrears shall be paid as well as to make agreements with and grant the cowle of Government to the Bissoyees (their several *Maniam* and their villages to be inserted here—a blank to be left for the Collector to fill up) who are from henceforward to pay their revenue directly to the Collector and to be for ever kept under the Company's immediate authority.

"The Right Honourable the Governor in Council in publishing these resolutions which have in view the maintenance of the supremacy of Government and the protection of the inhabitants at large, is at the same time pleased to announce that, as soon as these arrangements for the future tranquillity of the zamindari and security of the Company's Revenue have been accomplished, he will be willing to temper this necessary exertion of the Company's power by an indulgent consideration for the descendants of Gajapetty Deo and to manifest his desire of maintaining these ancient families as far as the conduct of their principals may be consistent with the public safety, (in ?) the possession of their hereditary rights by restoring his son Proshotam Narrian Deo to the lands of his ancestors, with the exception of those now held by the Bissoyees which are hereby declared separated from the zamindari for ever."

GOURA CHANDRA GAJAPATI NARAYANA DEO v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

Prior to this forfeiture it would certainly have been difficult to regard the Maliahs in any other light than as forming part of the zamindari. The Zamindar as such appointed the Bissoyees, they were his servants and he received their quit-rents. Throughout the transactions which followed the Maliahs are treated as something to be separated from the zamindari and to be dealt with by way of exception from it. But there can be no doubt that by the proclamation of forfeiture the rights of the Zamindar over the Maliahs ceased to exist in him and passed absolutely to the Government. And the previous state of things is only material so far as it throws light on the subsequent proceedings.

Two years later, in 1802, Gajapati, the incriminated Zamindar, having died in the meantime, steps were taken to carry out the policy of liberality indicated in the proclamation just cited.

The first document of this period which it is necessary to notice is the report of a special commission for completing the permanent settlement of certain lands, dated the 29th April 1803. It recited the forfeiture incurred by Gajapati in 1800, and the intention then announced in favour of his son, the appointment in the interim of a manager on behalf of Government, the death of Gajapati in 1802, and the delivery of the zamindari to the authority of the young Zamindar. The report then proceeded to deal with the revenue to be permanently assessed on the zamindari. The details of the calculations were a good deal discussed during the argument of the appeal, but, in the absence of explanations which could not now be obtained, their Lordships do not venture to rely upon those details as affording assistance in the solution of the present question. They show clearly that in ascertaining the basis on which the zamindari was to be assessed, the quit-rents of the Bissoyees were left out of the account; but they do not show what it was in respect of which those quit-rents were payable. A certain jumma was recommended. The report proceeded—

"Your Lordship in Council having by a proclamation bearing date the——of January 1800 exempted the possessions of the Bissoyees from dependence in the zemindary of Kimidi, we have provided for that object by a separation to their payments from his jumma, and we beg leave to recommend with a view to arrange the future government of them with a due regard to their prejudices that the local authorities be from time to time required to gain correct information of the manners and customs of these people.

GOURA CHANDRA GAJAPATI NARAYANA DEO v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

"Mr. Cherry having paid much attention to clearing the passes in the country, we beg leave to recommend that an obligation be required from the Zamindar of Kimidi to keep open those means of communication; that the names of the passes to be kept open be inserted by the Collector in the obligation; and that if Mr. Cherry should deem it advisable to clear the passes in a more effectual manner, authority may be granted by your Lordship in Council for that purpose."

The Governor in Council, on the 6th May 1803, accepted the recommendations of the Commission as to the jumma, and added: "The recommendations of the Commission respecting the Bissoyees . . . . are conformable to the intentions of the Board."

In pursuance of this resolution a sanad was issued to the new Zamindar, *Purshottam Narain Deo*. It is no longer forthcoming, but it has been assumed, and no doubt rightly, that the corresponding kabulyat, which is in evidence, correctly represents the terms of the sanad. The kabulyat bears date the 21st April 1804. It refers to the sanad as of the 6th May 1803. It says that the executant is "duly sensible of the important advantages which, under the blessing of God, may result to myself and the people of my zamindari from the arrangements established for the administration of justice and of the public revenue on permanent foundations." It undertakes to pay the jumma as permanently settled. It states that the permanent assessment is exclusive of certain matters, among which are "all lands and russums or fees heretofore appropriated to the support of Police establishments." It contains a further clause: "The Government having charged itself with the maintenance of the police of the country is to defray the entire expense of that establishment; I nevertheless engage to aid and assist its officers in apprehending and securing offenders of all descriptions, and to inquire and give notice to magistrates of all robbers and disturbers of the public peace who may be found or who may seek refuge in my zamindari." And it concludes: "So long as I continue to perform the above stipulations and discharge the duties of allegiance to the British Government, its laws and regulations, which I now solemnly engage to do, I consider myself authorized and empowered to hold in perpetuity for myself, my heirs, successors and assigns, at the permanent assessment herein named, the zamindari of Kimidi."

GOURA CHANDRA GAJAPATI NARAYANA DEO v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

It is clear, therefore, that, while the zamindari generally was re-granted by Government in 1803 to the new Zamindar, some thing was excepted from that grant, and from the assessment that formed the condition of the grant, which is variously described as "lands held by the Bissoyees," "the possessions of the Bissoyees," and "all lands and russums or fees heretofore appropriated to the support of police establishments." The first and principal question argued upon this appeal is as to the extent of the exception thus loosely expressed.

For the appellant it was contended that the exception applied only to such lands (said to be small in amount) as were actually occupied and cultivated by the Bissoyees themselves, and that the Maliahs generally passed under the re-grant as part of the zamindari. And that is a possible construction and would perhaps give legitimate effect to the words used.

It was contended on the other side that the exception extended to all the lands under the control of the Bissoyees, that is to say, the Maliahs; and strong arguments were adduced in favour of this view. The mischief that led to the change of arrangement was a combination of Zamindar and Bissoyees hostile to Government. The object of the change was to separate the Bissoyees entirely from the Zamindar, and make them mere servants and under the complete control of Government, and as one of the means to that end to make them entirely dependent upon Government for their remuneration. But what has already been said shows that the benefits enjoyed by the Bissoyees, and held by them on service tenures, included not only the lands under their cultivation, but also fees and other dues received from the Savaras throughout the whole of their muttas. Both the Courts in India have adopted the latter view of the extent of the exception, and their Lordships are not prepared to dissent from their conclusion. It follows that the Maliahs did not pass under the re-grant of the zamindari in 1803, but remained the property of Government, as they had been since the forfeiture of 1800.

The next transaction calling for notice was in 1823. By that time it was found that the attempt to keep the Bissoyees under the immediate control of the Collector and to recover their quit-rents directly had proved a failure. And accordingly a new arrangement was made which was thus recorded in a Government Resolution of the 24th January 1823:—"The Governor in

GOURA CHANDRA GAJAPATI NARAYANA DEO v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

Council is of opinion that the Bissoyees and their dependent peons, who were a good many years ago separated from the jurisdiction of the Rajah of Kimedi in Ganjam and placed immediately under the Collector, should be transferred again to the Rajah and required to pay their quit-rent through him. In consequence of their local situation, the authority over them can only be exercised by the Rajah and not by the Collector and has consequently been lost."

This arrangement was carried out, but under it the Zamindar incurred no liability for the quit-rents of the Bissoyees, he had only to account for what he succeeded in collecting. It cannot be said that this arrangement conferred any proprietary right in the Maliahs upon the Zamindar.

The next change was in 1835, and its nature is stated in a resolution of Government of the 1st September in that year:—

"The Right Honourable the Governor in Council is pleased to grant authority for annexing to the Kimedi Zemindari the Doratanam Moccasah villages which have become forfeitures to the State by the rebellion of the Moccassadars, on condition of the Zemindari being charged in future with the tribute of the Bissoyees in addition to the peshcush, and of the villages being always retained directly under the Zemindar, otherwise they shall be liable to resumption."

Any argument that might otherwise have been urged in favour of inferring proprietary right from the responsibility for revenue imposed by this arrangement is excluded by the fact that the consideration to the Zamindar for his increased liability is expressly stated, and it consisted not in any rights conferred in the Maliahs, but in the grant of certain villages outside them. So far as concerns the question now in dispute, therefore, matters remained as they were before.

It was next contended that the appellant and his predecessors in title had acquired a title against the Crown by 60 years' adverse possession. Upon this question, which is one of fact, both Courts in India have found against the appellant; and their Lordships do not see how any other conclusion could have been arrived at.

The only question that remains for consideration is the question upon which the Courts in India have differed, that of estoppel. It appears that for some years, in consequence of the disability or incapacity of successive zamindars, the zamindari of Parlakimedi was under the charge of the Court of Wards. And during the

GOURA CHANDRA GAJAPATI NARAYANA DEO v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

whole or part of this time the view prevailed that the Maliah forests belonged to the zamindari. The officers acting under the Court of Wards, the principal of whom was, of course, the Collector of the district, worked those forests for the benefit of the zamindari, and no one on behalf of Government disputed the propriety of what was being done. But these facts could bear only upon the question of title by adverse possession, which has already been dealt with. It is further shown, however, that while the Court of Wards was in charge, money out of the funds of the zamindari was expended upon the making of roads in the Maliahs, partly, it would seem, to increase the profits derived from the working of the forests, and partly for objects of more general importance. And this expenditure was approved and encouraged by the Government.

The Agent to the Governor who tried this case thought that these facts estopped the defendant (respondent) from denying the appellant's title to the Maliahs. From this view the High Court dissented.

Their Lordships agree with the High Court. The Court of Wards on behalf of the Zamindar was in possession of the Maliah forests under the mistaken idea that they belonged to the zamindari. The Government officials, under the same mistake, acquiesced in that possession, and, while that state of things continued, they encouraged such an expenditure of zamindari funds upon the Maliahs as seemed good in the public interest. It seems impossible to put the appellant's case higher than this. And their Lordships can see in this no such representation as could give rise to the estoppel contended for.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the costs.

Appeal dismissed.

Solicitor for the appellant: Messrs. *Keen, Rogers & Co.*

Solicitor for the respondent: *The Solicitor, India Office.*

APPELLATE CIVIL—FULL BENCH.

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

1904. July 26, 27. September 19, 20, 23.

PANANGUPALLI SEETHARAMAYA (COUNTER-PETITIONER—SECOND DEFENDANT), APPELLANT,

v.

NANDURI RAMACHENDRUDU (PETITIONER—DECREE-HOLDER), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, ss. 351, 355, 357—Insolvency of judgment-debtor—Receiver appointed but no order of discharge—Application by creditor to execute decree by arrest of insolvent—Maintainability.

S applied to the Court of a District Munsif to be declared an insolvent. After notice to his creditors, amongst whom was the present petitioner, the holder of a decree against S, the District Munsif passed an order declaring S insolvent. A receiver was appointed to take charge of the insolvent's properties and he was put in possession of all of them excepting two items, one of which was not included in the schedule. The receiver realized assets and made distributions among the creditors entitled, but no order was passed by the Court either discharging or refusing to discharge the insolvent. The present petitioner then applied to the Court for the arrest of the insolvent in execution of his decree:

Held, that in the circumstances the insolvent could not be arrested.

If an insolvent prevents the receiver from obtaining possession of his properties or if it subsequently transpires that he has committed some act of bad faith, then the Court may refuse his discharge, under section 355 of the Code of Civil Procedure. *Semble*, that in such a case it might be open to creditors to apply to execute their decrees.

EXECUTION PETITION. The case came, in the first instance, before Subrahmania Ayyar and Sankaran Nair, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.—The circumstances of the present case, so far as we are able to gather them from the papers before us are these.

* Civil Miscellaneous Second Appeal No. 86 of 1903, presented against the decree of M.R.Ry. C. G. Kuppuswami Ayyar, Subordinate Judge of Cocanada, in Civil Miscellaneous Appeal No. 20 of 1903, presented against the order of M.R.Ry. T. Varadarajulu Naidu, District Munsif of Peddapur, on Execution Petition No. 702 of 1902 (Original Suit No. 50 of 1898).

In Original Suit No. 375 of 1897 on the file of the Peddapur District Munsif's Court a decree was obtained against the appellant and his brother by Multan Chand.

In execution of that decree, property was attached and subsequently the appellant applied to be declared an insolvent on the 18th November 1897. After notice to the other creditors, among whom was the respondent, the decree-holder in Original Suit No. 50 of 1898 on the file of the same Court, the Munsif passed an order declaring the appellant an insolvent.

This order was confirmed on appeal by the District Judge and an application for review was rejected.

A receiver was appointed to take charge of the appellant's properties and was put in possession of all the properties with the exception, it would seem, of two items about 4 or 5 acres of land, one of which, it is clear, was not included in the schedule.

The receiver realized considerable assets and distributed them among the creditors entitled. Whether all the properties have been sold and all available assets realized or whether anything more remains to be done by him does not appear. Be this as it may, it is clear that the receiver has not submitted any certificate under section 355, Civil Procedure Code, and no order has been passed by the Court either discharging or refusing to discharge the insolvent, after notice to the creditors concerned.

In this state of things, the respondent, the decree-holder in Original Suit No. 50 of 1898, one of the creditors entered in the schedule, applied to the Court to arrest the appellant, and an order has been passed by the Munsif to arrest him, though the execution thereof was stayed by the District Court.

In the argument before us, it was contended on behalf of the appellant that upon the correct construction of the provisions of the Civil Procedure Code bearing upon this matter once an order declaring the judgment-debtor an insolvent has been passed and is in force, pending further proceedings, with reference to the realization of assets by the receiver, who has taken charge of his property, and until some order is passed under section 355 as to the discharge of the insolvent, it is not competent to a scheduled creditor to proceed by way of execution against the person of the insolvent, and this was apparently the view adopted by Straight, J., in *Gauri Datt* v. *Shankar Lal*(1).

(1) I.L.R., 14 All., 358.

PANANGUPALLI SEETHARAMAYA v. NANDURI RAMACHENDRUDU.

It is perhaps necessary to add that the District Munsif in ordering the arrest, came to the conclusion that the insolvent had tried to screen the two items of property referred to above from being made available for the discharge of his debts by the receiver and had not done everything in his power for placing the receiver in possession of those items.

If the appellant's contention is right such conduct on his part, however relevant with reference to the decision about his discharge under section 355, would, apparently, be immaterial at this stage of the proceedings when the application to arrest was made. Having regard to the importance of the point raised we refer for the decision of the Full Bench the question, whether in the circumstances of the case stated above, it was competent to the respondent to proceed against the person of the appellant and to the District Munsif to order the arrest of the appellant.

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

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

T. V. Seshagiri Ayyar and *V. Ramesam* for respondent.

The Court delivered the following

OPINION.—When a judgment-debtor is declared an insolvent under section 351, Civil Procedure Code, after an enquiry under section 350, Civil Procedure Code, he is entitled to be discharged from jail and cannot again be arrested under the decree in execution of which he was imprisoned (section 341, Civil Procedure Code).

With the declaration of insolvency the Court may also discharge the insolvent under section 351, Civil Procedure Code, or if a receiver is appointed by the Court, he may be discharged under section 356, Civil Procedure Code, after a certificate from the receiver that the insolvent has placed him in possession of all his property or has done everything in his power for that purpose.

After he has obtained his discharge as above under section 351 or 355, Civil Procedure Code, he cannot again be arrested or imprisoned on account of any of the schedule debts (section 357, Civil Procedure Code).

PANANGUPALLI SEETHARAMAYA v. NANDURI RAMACHENDRUDU.

In the case before us, a receiver has been appointed and the question for decision is whether an insolvent who has not been discharged under section 355, Civil Procedure Code, can be arrested by a schedule creditor.

We are of opinion that he cannot be arrested. Under section 352, Civil Procedure Code, a schedule has to be framed of the creditors and their debts which they have to prove and the declaration of insolvency under section 351, Civil Procedure Code, after an enquiry to which they are parties, is to be treated as a decree in their favour for the scheduled debts. This schedule may be altered by the addition of the names of new creditors or striking out any names already in the schedule and also as regards the amount or nature of any debt.

The receiver in whom all the insolvent's property is vested by the Act is bound to possess himself of all his property and under the direction of the Court discharge the secured debts and make a rateable distribution of the balance among the scheduled creditors, section 356, Civil Procedure Code.

The intention obviously is to relieve the judgment-debtor by protecting him from being harassed by creditors and at the same time to pay the creditors as stated above.

That intention will obviously be defeated by allowing each scheduled decree-holder to pursue his remedy by arrest and imprisonment or by realizing his debt otherwise than through the receiver, see *Gauri Datt* v. *Shankar Lal*(1). It is clear that no scheduled creditor can proceed against the *property* to realize his debt as all the judgment-debtor's property is vested in the receiver by the declaration of insolvency. The arrest and imprisonment of the judgment-debtor is only a mode of executing the decree (section 235, Civil Procedure Code) and is intended to compel him to pay his debt. But he cannot pay it when the law vests all his property in a receiver and he is deprived of all control over his property and it must be presumed to be the intention of the legislature when so vesting his property by the order under section 351, Civil Procedure Code, to which the decree-holder was a party, that he must look from that date to the receiver and not to the judgment-debtor for payment of his debts. If any scheduled creditor is entitled and therefore allowed to execute his decree by

(1) I.L.R., 14 All., 358.

PANANGUPALLI SEETHARAMAYA v. NANDURI RAMACHENDRUDU.

arrest and imprisonment he will be in a more favourable position than the decree-holder who first arrested the judgment-debtor and who is prohibited by section 341, Civil Procedure Code, from again arresting him—a preference for which it is difficult to find any reason at any rate while the process of realization and distribution is going on.

The provision for rateable distribution also suggests that one scheduled creditor should not by his diligence be allowed to gain an advantage over the others. Further, the scheduled creditor by arresting the insolvent is pursuing an idle remedy so far as any special benefit to himself is concerned as anything realised by him has to be paid over to the receiver for the benefit of all the other creditors.

If it appears that the insolvent prevented the receiver from obtaining possession of his property or if it subsequently transpires that he has committed some act of bad faith, then the Court may refuse to discharge the insolvent under section 355, Civil Procedure Code. It may then be open to creditors to apply to execute their decrees.

It was argued before us that the right to arrest in execution conferred on a decree-holder by the Code of Civil Procedure can only be taken away by an express provision of law as by sections 245 (*a*), (*b*), and 357, Civil Procedure Code, and there is no prohibition by law that prevents a scheduled decree-holder from availing himself of that remedy.

The answer is that arrest is only a mode of executing the decree and the decree-holder cannot execute that decree for the reasons aforesaid.

It was also argued that section 357, Civil Procedure Code, shows that the insolvent may be arrested. The answer is that that section only declares the effect of the discharge of the insolvent under sections 351 and 355, Civil Procedure Code, and has therefore no bearing on the question whether the scheduled decree-holder can execute his decree while the property remains vested in the receiver.

We therefore answer the question in the negative.

The appeal came on for final hearing before Subrahmania Ayyar and Sankaran Nair, JJ., after the expression of opinion of the Full Bench, when their Lordships delivered the following judgment.

PANANGUPALLI SEETHARAMAYA v. NANDURI RAMACHENDRUDU.

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

T. V. Seshagiri Ayyar and *V. Ramesam* for respondent.

JUDGMENT.—In accordance with the decision of the Full Bench we allow the appeal, reverse the orders of the Courts below and dismiss the application to execute the decree by arrest with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Boddam.

AKULA PARADESI (DEFENDANT), APPELLANT,

v.

DHELLI JAGANNADHA ROW (PLAINTIFF), RESPONDENT.*

1904, April 7, 8, 15.

Civil Procedure Code—Act XIV of 1882, s. 503—Receiver—Appointment of new Receiver in place of original Receiver—Civil proceedings instituted by original Receiver and pending at date of appointment of new Receiver—Necessity for making new Receiver party.

Where a Receiver appointed under section 503 of the Code of Civil Procedure institutes Civil proceedings and is then replaced by another Receiver, it is necessary that the new Receiver should be made a party to those proceedings. Observations on the mode and circumstances in which a new Receiver will be made a party.

SUIT for rent instituted by Dhelli Jagannadha Row Pantulu, the Receiver in the Nidadavole estate. The District Judge decreed in plaintiff's favour. Defendant preferred this appeal. Since the presentation of the appeal Dhelli Jagannadha Row Pantulu ceased to be Receiver of the said estate, another Receiver having been appointed in his place. The question arose, whether, before the appeal was further prosecuted, the new Receiver should not be made a party to it.

V. Krishnaswami Ayyar for appellant.

Sir *V. Bhashyam Ayyangar*, *P. R. Sundara Ayyar* and *C. R. Thiruvenkata Chariar* for respondent.

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* Appeal No. 23 of 1902 presented against the decree of F. H. Hamnett, Esq., District Judge of Godavari, in Original Suit No. 13 of 1900.

AKULA PARADESI v. DHELLI JAGANNADHA ROW.

JUDGMENT.—The respondent in this appeal, one Dhelli Jagannadha Row, was a Receiver appointed by the District Court of Godavari for the management of the Zamindari of Nidadavole held by the late Ranee Papamma Row and which formed part of the subject of litigation before that Court. Since the presentation of this appeal Jagannadha Row has ceased to be Receiver with reference to the said estate, another person having been appointed in his place. The question raised for determination at present is whether, before the appeal is further prosecuted, the new Receiver should not be made a party thereto. It would seem that the late Receiver was concerned in many hundreds of cases still pending in the local Courts or in this Court. If it is necessary that the new Receiver should make himself a party to these numerous proceedings that would entail an expense on the estate comparatively large especially in regard to suits and appeals where the subject-matter consists of small amounts due on account of rent by tenants, as would seem to be the case to a considerable extent. The point has therefore been elaborately argued.

The view suggested on the one side was that where a Receiver is appointed under section 503, Civil Procedure Code, the property being *in custodia legis* the case is not one in which any interest is vested in the Receiver as an officer, that he is substantially in the position of a recognized agent by whom appearances, applications and acts may be made or done on behalf of another person, that consequently a change in the *personnel* of such officer does not really affect the pending litigation and that a proceeding once instituted by a Receiver might and should go on without reference to such a change. The contention on the other side was that a Receiver when empowered to sue is clothed distinctly with an interest in regard to the subject of the litigation, that such interest ceases when the authority to sue terminates and that though the litigation commenced by him does not thereupon abate it cannot proceed without the officer succeeding being impleaded so as properly to represent the interests concerned.

The latter is in our opinion the correct contention. In "Beach on Receivers," to which our attention was drawn by Mr. Krishnaswami Ayyar, will be found numerous statements of the law which go fully to support that contention. It is however sufficient to refer to but a few of them. First, in regard to the question of interest—at page 717 the author says that "as a general rule all rights of

AKULA PARADESI v. DHELLI JAGANNADHA ROW.

action which belong to the party whose property is put into the hands of a Receiver are transferred to the Receiver by virtue of his appointment." Then in regard to the position of a Receiver in litigation the learned author in dealing with the question whether the sound rule is not that he should proceed in his own name as Receiver, observes "he (the Receiver) in his representative capacity is indeed the real party in interest." An observation fully supported by the authorities cited, particularly by the following passage in *Henning* v. *Raymond*(1) (cited at p. 744), viz., "The Receiver as the officer of the Court which has taken control of the property is, for the time being and for the purposes of the administration of the assets, the real party in interest in the litigation." That is also the gist of what the Lords Justices say in *Pooley's Trustee in Bankruptcy* v. *Whetham*(2).

As to the case where a cause of action has already been sued on and the appointment of a Receiver in relation to the property of the plaintiff takes place subsequently, the rule as stated on the authority of several decisions is that the Court will not permit the cause to proceed until the Receiver is substituted as plaintiff; that it will make no order affecting his right to be substituted without notice to him; and that in granting a motion for substitution it may impose suitable conditions if necessary to protect the rights of other parties. Next, as to the case of Receivers appointed in relation to the property of a defendant in pending actions it was laid down in *Wilson* v. *Wilson*(3) cited by the author at page 757 that a suit properly commenced is neither barred nor abated by the appointment of a Receiver of one of the defendants *pendente lite;* that at most such appointment will only render the suit defective so as to make it irregular for the plaintiff to proceed until the Receiver is brought before the Court; and that where by the appointment of a Receiver of one of the defendants *pendente lite* a suit has become so defective that it is improper for the plaintiff to proceed until the Receiver is brought before the Court, the proper course for the other defendant is to apply for an order that the plaintiff bring the Receiver before the Court within a time to be fixed, or that the bill be dismissed; and that in the meantime all proceedings be stayed.

(1) 35 Minn., 203. (2) L.R., 28 Ch.D., 38. (3) 1 Barb. Ch., 592.

AKULA PARADESI v. DELHI JAGANNADHA ROW.

Further it being the law that in actions against a Receiver in his official capacity, the judgment should be entered against him as Receiver and must be made payable out of the funds held by him in that capacity, it follows that when there has been a change of officers the person in office at the time and having custody of the funds should be the person against whom the judgment is entered, so as to make it effective. And it may not be superfluous to point out that since in proceedings promoted or conducted by him, a Receiver may be made personally liable for the costs of the opposite party it is but proper that the officer really prosecuting a litigation should be actually before the Court so as to enable it to adjust such liability if it becomes necessary to do so.

It is scarcely necessary to say that there is nothing in the provisions of the Civil Procedure Code inconsistent with the view taken above. No doubt section 354 of the Civil Procedure Code relating to Receivers appointed in cases of insolvency, in terms vests the property of the insolvent in the Receiver, while section 503 says nothing about the vesting of any interest in Receivers appointed thereunder. But it does not therefore follow that in regard to the latter class of Receivers the law necessarily implies absence of all interest in the subject of the litigation. Of this class of Receivers some may have only quite a temporary charge having no occasion to sue, while others may have to hold and manage for a considerable time pending litigation, or under decrees, having a necessity to sue and being empowered to do so. Moreover apart from any express power to sue conferred by the Court, Receivers would have a right of action by virtue of mere possession or by virtue of their being contracting parties themselves. These differences in the cases of Receivers appointed under section 503 would seem to account for the framers thereof refraining from inserting any provisions therein regarding the interest which according to circumstances, may vest in such Receivers.

As to the argument based on section 372 of the Civil Procedure Code, it is sufficient to observe that that section, which is only an enabling provision, ought not to be construed as implying that in no case of an assignment, creation, or devolution of interest pending a suit otherwise than by marriage, death or insolvency, can the Court insist upon the person so acquiring the interest being brought before the Court, before the proceedings are further prosecuted. And the observations of Bowen, L.J., in *Pooley's Trustee in Bankruptcy* v. *Whetham*(1) at page 50 of the report, with reference to rules 3 and 4 of order XVII in so far as they would affect a question such as this, militate against such a construction of section 372 of the Civil Procedure Code being adopted.

AKULA PARADESI v. DELHI JAGANNADHA ROW.

In conclusion it must be added that even if it were possible to take a different view from that taken above as to the position of a Receiver empowered to sue and suing he cannot, with reference to the subject of the litigation, be reasonably supposed to stand in a worse position than that of an officer of a corporation competent to carry on legal proceedings on its behalf. This being so, the practice established with reference to the latter class of cases, which requires the substitution of the officer newly empowered where there has been a change of officers pending proceedings (see Seton on 'Judgments and Orders,' 6th edition, Vol. I, page 115, form 5) points to the propriety of similar procedure being followed in regard to Receivers also.

APPELLATE CIVIL.

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

SUBROYA CHETTY (PLAINTIFF), APPELLANT,

v.

RAGAMMALL (FIRST DEFENDANT), RESPONDENT.*

1904. September 6, 14.

Probate and Administration Act—V of 1881, s. 78—Administration bond entered into by surety—Allegations by surety against administratrix of waste and mismanagement—Suit by surety against administratrix seeking to be discharged from liability regarding future acts of administratrix—Maintainability—Contract Act IX of 1872, s. 130—Revocation of continuing guarantee—Application to a contract of suretyship under administration bond.

First defendant was administratrix of her husband's estate. Plaintiff became one of her sureties under section 78 of the Probate and Administration Act. Plaintiff brought this suit alleging that first defendant as administratrix was wasting and mismanaging the estate. He asked that he might be discharged from his recognisance as a surety as regards future transactions on the part of

(1) L.R., 28 Ch.D., 38.

* Original Side Appeal No. 1 of 1904 presented against the decree and judgment of Mr. Justice Moore in Original Suit No. 19 of 1903.

SUBROYA CHETTY v. RAGAMMALL.

the administratrix, that in the alternative the administratrix might be directed to complete her administration of the estate, and that his surety bond might then be vacated:

Held, that the plaintiff was not entitled to the relief asked for.

Held also, that section 130 of the Indian Contract Act does not apply to the special contract of suretyship which is entered into by a surety to an administration bond.

Raj Narain Mookerjee v. *Ful Kumari Debi*, (I.L.R., 29 Calc., 68), not followed.

Bai Somi v. *Chokshi Ishvardas Mangaldas*, (I.L.R., 19 Bom., 245), followed and approved.

SUIT by a surety under an administration bond claiming to be discharged from his recognisance as a surety to the first defendant in regard to all future transactions. The first defendant was administratrix to the estate of her deceased husband. Plaintiff, together with defendants Nos. 2, 3 and 4, had executed the surety bond required by section 78 of the Probate and Administration Act. Plaintiff now sought to be relieved from liability in regard to all future transactions of the administratrix on the ground that she had been guilty of maladministration. He prayed in the alternative that first defendant might be directed to complete the administration of the estate and that thereupon his bond might be vacated.

Further facts are set out in the judgment of Mr. Justice Moore as follows :—

The first defendant, as the administratrix with Letters of Administration of the estate of her late husband Arni Sanyasi Candaswamy Chetty, executed on the 12th October 1899 the bond required by section 78 of the Probate and Administration Act, the sureties being the plaintiff and second, third and fourth defendants. The present plaintiff on the 4th November 1901 by means of a Judge's summons applied to be allowed to withdraw from this surety bond on the ground that the first defendant in dealing with the estate had been guilty of maladministration. Mr. Justice Boddam rejected this application on the ground that maladministration had not been proved and that he had no power to discharge the surety. An appeal was preferred from this decision to a Bench of the High Court by which it was held that it was not necessary to decide whether under the Probate and Administration Act the Court had power to order the discharge of surety for an administrator so far as the future was concerned on the ground of maladministration of the estate by the administrator, inasmuch as the evidence before the Court did not show anything in the nature of maladministration (Original Side Appeal No. 2 of 1902, judgment, dated 8th September 1902).

SUBROYA CHETTY v. RAGAMMALL.

The plaintiff has now filed the present suit against the administratrix (first defendant) and his three co-sureties (second, third and fourth defendants) praying, *inter alia*, the Court to discharge the plaintiff from his recognizance as a surety for the first defendant in regard to all future transactions. The third issue is as to whether the plaintiff has any cause of action against the defendants or any of them, the fourth is as to whether the present suit is barred as *res judicata* by reason of the decision passed on the application to Mr. Justice Boddam already mentioned, while the fifth issue is as to whether the present suit is maintainable regard being had to No. 470 of the rules of the High Court on the Original Side. These issues have been argued together as preliminary issues. I cannot find anything in the Probate and Administration Act to warrant the inference that a suit such as the present one can be brought, nor have I been referred to any provision of law to be found elsewhere recognising the right of a surety in a bond such as that now under consideration to bring a suit against his co-sureties and the administrator of the estate and in such suit to call on the Court, for the benefit of which, a bond under section 70 has been executed to discharge the surety from his recognizance. A number of English cases have been cited at the hearing, but my attention has not been directed to any case in which a Court has granted relief such as that now prayed for. The Indian case that counsel for the plaintiff has mainly relied on is *Raj Narain Mookerjee* v. *Ful Kumari Debi*(1). There is no doubt a close analogy between that case and the one now under consideration, but it will be found that the surety in that case who prayed the Court to call on the administratrix to furnish a new surety and release him from his liability under the security, did so, not by a suit against the administration, but by an application to the District Judge for whose benefit the bond had been executed. I am decidedly of opinion that it must be held on the third issue that the plaintiff has no cause of action against the defendants or any of them. As I have alluded to the decision in *Raj Narain Mookerjee* v. *Ful Kumari Debi*(1) I think

(1) I.L.R., 29 Calc., 68.

SUBROYA CHETTY v. RAGAMMALL.

it advisable to state that I am unable to accept the conclusion arrived at by the learned Judge in that case as the powers of a Court which has once taken a bond with sureties to take a second bond with fresh sureties if necessity arises. Sections 50 and 51 of the Probate and Administration Act no doubt give the Court which has granted letters of administration power to annul the same for just cause, but I am prepared to follow the decision in *Annoda Prosad Chatterjee* v. *Kalikrishna Chatterjee*(1) to the effect that the explanation of the words "just cause" as given in section 50 is not illustration merely but exhaustive and there can be no question that a disinclination felt by one of the sureties to continue to be responsible under the administration bond is not one of the just causes there set out for annulling the letters of administration. I am further of opinion that the provision of section 130 of the Contract Act cannot be applied to a case such as this. Chief Justice Sir Charles Sargent, in dealing with a case where a person who had given security under section 12 of the Act XX of 1864 (Minors Act) applied to be released from his liability as surety, has pointed out that section 130 of the Contract Act was not applicable to such a case adding as follows:—

"The original applicant asks to be released from his obligation as surety on account of the guardian's maladministration of the minor's estate; but the very object of requiring such surety was to guarantee the minor against such misconduct or mismanagement on the part of the guardian (*Bai Somi* v. *Chokshi Ishvardas Mangaldas*(2))" I do not see how the case here dealt with by the learned Chief Justice can be distinguished from the present one. If, therefore, the plaintiff had brought this matter before the Court, not by a suit against the administratrix and his co-sureties but by an application as was done in the case dealt with at *Raj Narain Mookerjee* v. *Ful Kumari Debi*(3), I should, all the same, have been obliged to hold that I had no power to grant him the relief prayed for. The third issue is divided in the negative fourth issue. It does not appear to me that it can possibly be contended that the plaintiff's suit is barred *in toto* as *res judicata*. The very most that can

(1) I.L.R., 24 Calc., 95. (2) I.L.R., 19 Bom., 245.
(3) I.L.R., 29 Calc., 68.

SUBROYA CHETTY v. RAGAMMALL.

be urged is that the plaintiff is barred by the finding of Mr. Justice Boddam on the application of the 2nd November 1901 put in by the plaintiff from contending that the first defendant had been guilty of any maladministration up to that date. I must however hold that there is no bar as it is clear that no issue raised in the present suit has been heard and finally decided by any Court in any former suit (section 13, Civil Procedure Code), fifth issue. Rule No. 470 does not lay down a hard and fast rule that an application by a surety to vacate a bond or surety's recognizance must be by Judge's summons, but merely that it may be brought before the Court in that manner.

This issue must be decided in the negative.

In consequence of the finding that I have arrived at on the third issue, this suit is dismissed with costs.

Plaintiff preferred this appeal.

Mr. *Chamier* for appellant.

P. R. Sundara Ayyar and *M. Tangavalu Chettiar* for respondent.

JUDGMENT.—In this case the first defendant, who is the administratrix of her husband's estate, gave the bond required by section 78 of the Probate and Administration Act and the plaintiff became one of her sureties. The plaintiff brought a suit in which he alleged that the first defendant was wasting and mismanaging the estate, and he asked that he might be discharged from his recognisances as a surety as regards future transactions on the part of the first defendant, or, alternatively, that the first defendant might be directed to discharge certain specified claims against the estate and complete the administration. The learned Judge dismissed the suit and the plaintiff appeals.

As regards the plaintiff's first claim for relief that he may be discharged from future liability under his surety bond, we think the learned Judge was right in refusing to make the order asked for. In Williams on 'Executors,' Edition 1893, Volume I, p. 462, it is laid down that the Court will not discharge the original sureties to an administration bond and allow other sureties to be substituted for them and a similar statement of the law and practice is to be found in Dixon on 'Probate,' p. 271, and Tristrum and Cootes 'Probate Practice,' 2nd Edition, p. 105. The authority cited is *Re Stark*(1). The later case of *Re Ross*(2) where an

(1) L.R., 1 P. & D., 76. (2) L.R., 2 P. & D., 274.

SUBROYA CHETTY v. RAGAMMALL.

administrator having gone abroad and under an order in Chancery assets had accrued to the estate during his absence, a substitute was allowed to execute the fresh bond which was necessarily limited to the administrator's execution of a similar bond on his return—is in no way inconsistent with the rule of practice which was recognised in *Re Stark*(1).

Mr. Chamier, on behalf of the plaintiff, sought to distinguish the case of *Re Stark*(1) upon the ground that the basis of the decision in that case was that the substituted sureties could not be made responsible for past transactions and that the plaintiff in the present case only asked to be released from liability as regards future transactions. But the case of *Re Stark*(1) appears to have been accepted by practitioners as recognising the rule that the original sureties cannot be discharged either as regards past or future liability.

No precedent is to be found for the order which we are asked to make and on principle we do not think that any such order ought to be made. The making of such an order might defeat the object for which an administrator is required to find sureties to his administration bond. We are unable to agree with the decision in the case of *Raj Narain Mookerjee* v. *Ful Kumari Debi*(2). The attention of the learned Judge of the Calcutta High Court does not appear to have been drawn to the case of *Re Stark*(1). If, as we should be prepared to hold, the surety to an administration bond is not entitled to an order discharging him from future liability on an application in the probate proceedings to the Judge or officer who is the obligee under the bond of suretyship, it seems to follow *à fortiori* that he is not entitled to this relief where he claims it as here in a separate suit.

We are of opinion that section 130 of the Contract Act, which provides that a continuing guarantee may at any time be revoked by the surety as to future transactions by notice to the creditor, does not apply to the special contract of suretyship which is entered into by a surety to an administration bond. If the section applies the "creditor" would presumably be the obligee under the bond, *i.e.*, the Judge or Registrar, and the surety could, without action or any other legal proceeding, put an end to his liability by giving notice to the Judge or Registrar. This is contrary to

(1) L.R., 1 P. & D., 76. (2) I.L.R., 29 Calc., 68.

SUBROYA CHETTY v. RAGAMMALL.

the well-established practice and might lead to great inconvenience. Section 130 embodies the English rule of law and the proceedings in the case of *Re Stark*(1) show that, so far as the English practice is concerned, it has never been suggested that the general rule of law as to continuing guarantees applies in the case of a suretyship to an administration bond. In the Calcutta case the Chief Justice guards himself by saying that he was not dealing with the case of a person who becomes surety and then from mere caprice or for no sound reason desires to be discharged; but under section 130 the surety has an absolute right at any time to revoke his guarantee as to future transactions, and if that section is applicable it seems to us that it would not be open to the Court to inquire into the grounds upon which the surety had given notice of revocation. In *Calvert* v. *Gordon*(2), it was held that upon a bond conditioned for a clerk accounting for and paying over moneys received by him the obligor could not discharge himself from further liability by notice. In *Lloyds* v. *Harper*(3), it was held that a guarantee given to the committee of Lloyds could not have been withdrawn during the lifetime of the guarantor and was not determined by his death. In the case of *Bai Somi* v. *Chokshi Ishvardas Mangaldas*(4) where a surety for the guardian of a minor's estate applied to be released from his obligation on the ground of the guardians' maladministration, the Court held that the surety could not be discharged and that section 130 of the Contract Act was not applicable.

We entirely agree with this decision and with the reasoning upon which it was based.

As regards the plaintiff's alternative claim to relief as he is neither a creditor nor a legatee and is therefore not entitled to bring an administration suit it is clear that it is not open to him to obtain an order against the administratrix requiring her to administer the estate.

We think the decision of Moore, J., was right and we dismiss this appeal with costs.

(1) L.R., 1 P. & D., 76. (2) 7 B. & C., 809.
(3) L.R., 16 Ch.D., 290. (4) I.L.R., 19 Bom., 245.

APPELLATE CIVIL.

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

1904. September 8, 9.

ABDUL KAREEM SAHIB (INSOLVENT DEBTOR), APPELLANT,

v.

THE OFFICIAL ASSIGNEE OF MADRAS (PETITIONER), RESPONDENT.*

Insolvency Act 11 *and* 12, *Vict. chap.* 21, 1848, *s.* 86, *entering of judgment against insolvent.*

Semble that there is no provision in the Insolvency Act of 1848 which imposes upon an insolvent, who has obtained his personal discharge, the duty of disclosing to the Official Assignee that he has become possessed of property since the making of the order of personal discharge, consequently the non-disclosure by an insolvent that he has become so possessed of a house cannot be regarded as a fraud either on the creditors or the Official Assignee so as to render section 18 of the Limitation Act applicable. Section 86 of the Insolvency Act is permissive and provides that the Court may enter up judgment against an insolvent if in the circumstances of the case it shall think fit *semble* therefore that following the rule of practice under the English Bankruptcy Acts judgment will not be entered up against a bankrupt as a condition of his discharge unless he has an income more than sufficient to keep his family in the enjoyment of the ordinary necessaries of life.

ABDUL KAREEM SAHIB filed his petition in the Insolvency Court in Madras in 1876 and obtained his personal discharge later in the same year. His debts amounted to Rs. 732 and there were no assets. He was ordered to pay Rs. 3–8–0 a month to the Official Assignee out of a pension of Rs. 7, and he made payments amounting to Rs. 94–8–0 in all, making no further payments after 1879. The insolvent had only three creditors at the date of his insolvency, one being his wife whom he had since divorced and to whom he owed Rs. 653, and the other two being creditors for small amounts. In 1903 the Official Assignee received information that the insolvent had inherited a house said to be worth Rs. 5,000 and in December of that year applied under section 86

* Original Side Appeal No. 10 of 1904 presented against the order of Mr. Justice Moore, dated 7th December 1903, on Insolvent petition No. 92 of 1876.

of the Insolvency Act that judgment should be entered up against the insolvent for the balance of his schedule debts after deducting the sum which had been paid by way of dividends. The insolvent contended that he had inherited the house in question from his father in 1880, that he had no interest in the property at the date of his petition or when he was granted his personal discharge. He also alleges that his wife (who was the principal if not the only remaining creditor) had been aware since 1880 of the fact that he had inherited the said house, and that the house was subject to a mortgage. His case was that the divorced wife had, at the instigation of a son with whom he had quarrelled, set the Official Assignee in motion with the object of causing him annoyance and trouble. He had been in possession of the house since 1880. His allegations were not contradicted. Mr. Justice Moore passed the following order :—

"An affidavit has been filed by the insolvent in which it is stated that of his three creditors two are dead and that the insolvent fully paid off their debts. There is no proof that these debts were paid off. It is further urged that the Official Assignee is barred by limitation from making the present application. It is clear to me that there is no bar. Without considering other grounds for arriving at this opinion it may be sufficient to point out that the insolvent was bound to enter in his schedule the house belonging to his father in which it is clear that he had an interest. He did not do so and it was not till the Official Assignee received a letter on the 21st April last from the agent of creditor No. 1, that he was aware that this house had been inherited by the insolvent from his father and he was in possession of it. Such being the case it must be held that section 18 of the Limitation Act applies. Under section 86 of the Statute, judgment will be entered up in favour of the Official Assignee against the insolvent for the amount of his undischarged debts. No order as to costs."

Further facts and dates are to be found in the judgment.

The insolvent preferred this appeal.

Mr. *C. Krishnan* for appellant.

The Official Assignee for respondent.

JUDGMENT.—This is an appeal from an order made by the Honourable Mr. Justice Moore as a Commissioner in Insolvency

ABDUL KAREEM SAHIB v. THE OFFICIAL ASSIGNEE OF MADRAS.

on an application by the Official Assignee in the insolvency of one Abdul Kareem Sahib. The insolvent filed his petition on August 29th, 1876, and obtained his personal discharge in November of that year. His debts amounted to Rs. 732 and there were no assets.

At the date of the order for the insolvent's personal discharge, he was ordered to pay an allocation at Rs. 3-8-0 per mensem out of his pension of Rs. 7-0-0 and he made payments under this order amounting to Rs. 94-8-0 in all. By an order of Court of the 27th October 1879, a first dividend at the rate of Rs. 9-0-0 *per centum* was declared, under which the sum of Rs. 65-14-0 was ordered to be distributed among the creditors.

Subsequent to this order of Court the insolvent did not make any further payments under the allocation order.

At the date of his insolvency the insolvent had three creditors,—his wife, whom he had divorced who was a creditor for Rs. 653 odd on a judgment obtained by her against him in 1874; one creditor for Rs. 56, and a third creditor for Rs. 23. The insolvent alleges that these two last-named creditors have been paid off, but there does not appear to be any evidence of this.

On April 21st, 1903, the Official Assignee received information from the brother of the wife of the insolvent that the insolvent had inherited a house alleged to be worth Rs. 5,000. The insolvent states in his affidavit that he inherited this house from his father in 1880, that he had no interest in the property at the time of filing his petition or at the time of applying for his personal discharge and that his wife was aware of the fact that he inherited the house at the time, *i.e.*, in 1880. He also alleges that the house is subject to a mortgage for Rs. 1,680. In paragraphs 5 and 6 of his affidavit he alleges that he has a son by his first wife named Shaik Abdulla who is now about forty years old. This son lived with him in the said house until May 1903, but owing to misunderstandings between them by reason of the son's extravagant habits, they separated from each other, and the son commenced to live separately in the same house and set up his mother to take proceedings through the Official Assignee, with the sole object of annoying and putting his father to unnecessary expense and trouble. The father has been in possession and enjoyment of the house ever since he inherited it. The house

ABDUL KAREEM SAHIB v. THE OFFICIAL ASSIGNEE OF MADRAS.

is now under mortgage to Mohal Laul and another. This mortgage was effected by the insolvent, his son Shaik Abdulla, and another son and there is now due about Rs. 680 under this mortgage. These allegations are not contradicted.

On December 5th, 1903, the Official Assignee applied to the Commissioner in Insolvency for an order under section 86 of the Insolvency Act asking that judgment should be entered up against the insolvent for the balance of his scheduled debts, viz., Rs. 666 odd. The Court made the order and the insolvent appeals.

One of the grounds upon which the Court made the order was that at the time of filing his petition the insolvent had an interest in the house belonging to his father and was bound to enter it in his schedule. This does not appear to be so. The insolvent was a Muhammadan and there is nothing to show he had any interest in the house during his father's lifetime. The Court was also of opinion that section 18 of the Limitation Act applied. There appears to be no provision in the Act of 1848 which imposes upon an insolvent who has obtained his personal discharge the duty of disclosing to the Official Assignee that he has become possessed of property since the making of the order of personal discharge. Consequently the non-disclosure of the fact that he became possessed of the house cannot be regarded as a fraud either on the creditors or on the Official Assignee.

On behalf of the insolvent, our attention has been called to a case reported in *Kristocomul Mitter* v. *Suresh Chunder Deb*(1) where it was held that the possession of property by an insolvent, which has been acquired by him before he has obtained his final discharge, may be adverse to the Official Assignee so as to bar his title by lapse of time.

It is not necessary for us to consider whether we should be prepared to follow this decision in so far as it proceeds upon the ground of adverse possession because on the facts in the present case we think that the order ought not to have been made. The section provides that the Court may make the order if in the circumstances of the case it thinks fit. Under the English Acts of 1883 and 1890 the entry of judgment against a bankrupt in

(1) I.L.R., 8 Calc., 556.

ABDUL KAREEM SAHIB v. THE OFFICIAL ASSIGNEE OF MADRAS.

respect of assets provable in the Bankruptcy will not, as a rule, be made a condition of his discharge unless the bankrupt has an income more than sufficient to keep his family in the enjoyment of the ordinary necessaries of life according to his station, *Re Shakleton*(1). The rule of practice established under the English Acts was followed by the Bombay High Court in the case of an application under section 86 of the Act in force in this country. See in the matter of *Hormarji Ardeshir Hormarji*(2).

The insolvent alleges and it is not contradicted that he is mainly dependent on the income of the house for his means of subsistance.

However, in the case now before us the only creditor who would benefit by the making of the order is the former wife. She was aware of the fact that the insolvent had become possessed of the house in 1880. She took no steps for twenty-three years to give information of this fact to the Official Assignee and when she did give information it was only because she was instigated to do so by her son who had quarrelled with his father.

We must allow the appeal and set aside the order. We make no order as to costs.

Attorney for appellant Messrs. *Ranganadha Naidu & Tirumalai Pillai.*

(1) 6 Mor., 304. (2) I.L.R., 19 Bom., 778.

PRIVY COUNCIL.

VEERABHADRA RAJU BAHADUR GARU, DEFENDANT,

v.

CHIRANJIVI RAJU GARU, PLAINTIFF.

P.C.*
1905.
February 28
March 2, 16.

[On appeal from the High Court of Judicature at Madras.]

Will—Construction of will—Conditional bequest—Condition that legatees should "humbly apply for subsistence"—Condition precedent—Application made by letters not in substance or spirit "humble requests"—Hindu Law—Void bequest—Attempt to create perpetuity—Legacy for "as long as there are male heirs."

To his brother, the father of the respondent, and another relative by both of whom a suit against him was then pending for partition of his zamindari, the father of the appellant in his will made a bequest, not as a duty but as an act of grace, on the condition that, "should this suit which is brought by them under an illusion be disposed of against them, and should they after the final Court's decision humbly apply for subsistence," they should receive a certain allowance from land to be purchased for the purpose of maintaining them to be "enjoyed as long as there are male heirs and then revert to the zamin":

Held, by the Judicial Committee that this condition was not complied with by a letter from the respondent's father to the Collector of the district who was administering the estate, not containing any language of humility, but asserting the zamindar's duty to maintain the applicant and demanding a sum considerably larger than that given by the will; nor by another letter from the respondent to the Collector protesting against the inadequacy of the bequest, and demanding "something suitable to our dignity," the letters neither in substance or spirit evidencing a humble request for subsistence in the sense of the will.

In this view it was held unnecessary to decide a contention that the bequest was void as coming within the prohibition laid down in the *Tagore case*(1).

APPEAL from a judgment and decree (10th February 1903) of the High Court at Madras by which a decree (20th December 1900) of the District Judge of Vizagapatam was reversed and the respondent's suit decreed.

The main question involved in this appeal was whether under the circumstances and according to the true construction of the will of the appellant's father, Suryanarayana Raju, late Zamindar

* *Present:* Lord DAVEY, Lord ROBERTSON, and Sir ARTHUR WILSON.

(1) (1872) L.R.I.A. Sup. Vol. 47; 9 B.L.R., 377.

VEERA-BHADRA RAJU BAHADUR GARU v. CHIRANJIVI RAJU GARU.

of Kurupam, the respondent was entitled to the provision intended to be made for his father, the late Slaivamsam Bhoja Raju, by the 10th clause of the will which was dated 20th December 1890. The terms of clause 10 are set out in their Lordships' judgment, where the facts also are sufficiently stated.

The suit was brought *in formâ pauperis* by the respondent, and his brother who died during the pendency of the suit in the District Court. The plaint as originally filed contained a claim for maintenance at Rs. 500 a month but this was subsequently abandoned, and the present claim was the alternative one for lands yielding an increase of Rs. 500 a year to be allotted to the plaintiffs out of the zamindari or purchased for them for twenty times the above amount as provided by the will, together with Rs. 1,000 for arrears for the years 1897 and 1898, and for such other relief as to the Court might seem fit.

The written statement of the defendant (the present appellant) asserted that the will created no rights in favour of the plaintiffs with regard to any maintenance or any property; that the provision in the will was void and invalid for uncertainty and vagueness and created no legally enforceable right; that even if the provision of the will created such a right it was conditional on the plaintiffs humbly begging the defendant for maintenance which they had not done, and therefore they had no cause of action; and that as the plaintiff's father admittedly did not humbly beg for maintenance, nor had obtained any allowance or lands in his favour but died unprovided for, the right, if any, to obtain such maintenance or lands lapsed with his death and had not survived for the benefit of the plaintiffs, who were entitled to no relief from the defendant.

Issues were raised of which only three were material on this appeal, namely:

5. Does the provision in the will create any absolute right in favour of the plaintiffs, or is it intended solely to benefit the plaintiffs' father?

6. Did the rights created under the will become vested during the life-time of the plaintiffs' father, and have they passed to the plaintiffs after their father's death?

7. Does the condition "If they humbly ask for maintenance" operate, or was it intended to operate as a condition precedent for the rights under the will to become vested: if so, was it satisfied?

As to these issues the District Judge said:

VEERA-BHADRA RAJU BAHADUR GARU v. CHIRANJIVI RAJU GARU.

"The will states that the provisions therein contained with regard to the plaintiffs' father are to be carried out if he humbly asks for maintenance. Considering the state of things which existed when the will was made, I think there is no doubt that this condition was intended to operate as one which had to be fulfilled prior to the provisions of the will being carried into effect. Plaintiffs' father and another man were at the time harassing the executant with a suit. While disclaiming any legal obligation, he provides for their maintenance as an act of grace, because they are blood relations, on the above condition. There is no proof that this condition was complied with. Exhibit C is an unsigned letter purporting to be from the plaintiffs' father to the Collector asking for maintenance. There is no humble request for maintenance to the head of the family. Security was taken from first plaintiff and his father for threatening to take the life of the manager of the estate. This conduct is scarcely compatible with humility. I find this issue for first defendant. Issues 5 and 6 must, in view of the above finding, be found against plaintiffs. It is not necessary to consider the other issues. On the findings recorded above, the suit must be dismissed with costs."

On appeal by the plaintiff the High Court (BENSON and BHASHYAM AYYANGAR, JJ.) in reversing the decision of the District Judge, said:

"The plaintiff does not in this appeal claim any relief on the footing that he is a member of the first defendant's family. He claims only as legatee under the will of the late zamindar."

"We think that the District Judge has erred in holding that the condition precedent laid down in the will was not complied with by the legatee. The object of the testator was to deny and resist any claim as of right such as was then being made against him by his broher; but at the same time to grant him and his lineal male descendants as a matter of grace a maintenance allowance, so that they might not be degraded by being left entirely destitute. We think that exhibits C and D are 'humble requests' for the grant of maintenance such as were contemplated by the testator. The fact that the legatee put in a prayer for something more than the will allowed is immaterial. It was asked for only as a matter of grace."

Exhibits C and D referred to in the judgments of the District Judge, and the High Court are set out in their Lordships' judgment.

On this appeal.

W. C. Bonnerjee for the appellant contended first the provision in the 10th clause of the will in favour of the male heirs of the legatee was an attempt to create an estate unknown to the Hindu

VEERA-BHADRA RAJU BAHADUR GARU v. CHIRANJIVI RAJU GARU.

Law, and was therefore void. Reference was made to *Tagore case*(1), *Kristoromoni Dasi* v. *Narendro Krishna Bahadur*(2), and *Tarokessur Roy* v. *Soshi Shikhuressur Roy*(3). Therefore even if the High Court had rightly held that the condition in clause 10 of the will had been fulfilled, the respondent could not take under it. But, secondly, it was contended that the bequest in that clause was conditional upon the respondent's father "after the final Court's decision," making a "humble request" for subsistence before the legacy could vest in him. No such request had ever been made; and even in the present suit it was not asserted that that condition had been complied with, but the claim was made as of right. Exhibits C and D could not be considered as fulfilling the condition. The former was written to the Collector *before* the final Court's decision; it was not couched in terms of humility, nor claimed subsistence as an act of grace, but asserted that it was the duty of the zamindar to pay it, and demanded a considerably larger sum than that given by the will, nor was exhibit D in any sense a "humble application," it complained that the sum given by the will was insufficient, and demanded an increased allowance. The District Judge, it was submitted, was therefore right in dismissing the suit.

Kenworthy Brown for the respondent contended that the High Court had rightly held that exhibits C and D were requests which sufficiently complied with the conditions of the legacy. As to the validity of the bequest, it was contended that it was not wholly void, and might be upheld so far as it was a good bequest. Reference was made to *Bhaiya Ardawan Singh* v. *Udey Pratab Singh*(4) *Tagore case*(1), *Pudmanund Singh* v. *Hayes*(5), *Karim Nensey* v. *Heinrichs*(6), and *Tarokessur Roy* v. *Soshi Shikhuressur Roy*(3). As the respondent was alive at the death of the testator he could take under the will and the bequest was so far good. The Succession Act (X of 1865), sections 121 and 161 were also referred to.

(1) (1872) L.R.I.A. Sup. Vol. 47; 9 B.L.R., 377.
(2) (1888) L.R., 16 I.A., 29 at pp. 42, 43; I.L.R., 16 Calc., 383 at p. 395.
(3) (1883) L.R., 10 I.A., 51; I.L.R., 9 Calc., 952.
(4) (1896) L.R., 23 I.A., 64 at p. 73; I.L.R., 23 Calc., 838 at pp. 849, 850.
(5) (1901) L.R., 28 I.A., 152 at p. 157; I.L.R., 28 Calc., 720 at p. 732.
(6) (1901) L.R., 28 I.A., 198 at p. 201; I.L.R., 25 Bom., 563.

VEERA-BHADRA RAJU BAHADUR GARU v. CHIRANJIVI RAJU GARU.

Bonnerjee replied pointing out that section 121 of the Succession Act was not applicable. To hold the bequest partly good was not a proper interpretation of the will. The respondent was not *named*, in which case the bequest might have been held good so far as he was concerned: not being named he could only take as being a male heir, and so came within the prohibition laid down in the *Tagore case*(1).

16*th March* 1905.—The judgment of their Lordships was delivered by

Lord ROBERTSON.—The appellant is zamindar of the Kurupam estate, and the respondent is his first cousin. It had been finally settled by the High Court of Madras, so long ago as 1892, that these two persons belong to two distinct families, and that (apart from bequest) the respondent has no legal claim to maintenance from the appellant. The question raised in the present suit, when it came by appeal before the High Court of Madras, whose judgment is now under review, is thus stated by them. "The" respondent "does not in this appeal claim any relief on the footing that he is a member of the 'appellant's' family. He claims only as legatee under the will of the late zamindar." The contention of the respondent at their Lordships' Bar was to the same effect.

Now the bequest thus claimed was made under very singular circumstances and is expressed in very special terms. The testator was the appellant's father, Suryanarayana Raju, and the will was made at a time when there was actually depending the suit already referred to as having been decided by the High Court of Madras in 1892. In this litigation the respondent's father, Bhoja Raju, brother of the testator, and Nrisimha Raju, his nephew (son of another brother), were seeking to oust the zamindar from the sole and undivided possession of the zamindari, and this action was in the sequel fought out through the Indian Courts. Now the clause of the will, which is dated 20th December 1890, is as follows:—

"Sri Silavamsam Bhoja Raju, who is my natural born brother, and Nrisimha Raju, the son of my another natural born brother, the late Gajapati Raju, have, unnecessarily and without right, filed a suit with the advice and help of certain wicked persons, expecting

(1) (1872) L.R.I.A. Sup. Vol. 47; 9 B.L.R., 377.

VEERA-BHADRA RAJU BAHADUR GARU v. CHIRANJIVI RAJU GARU.

share to them in my Kurupam zamindari. On account of the fact that I have joined the family of Vairicherla Varu and have been taken in adoption and have assumed their gotra and names, and also on account of some other reasons, I have been unobstructedly and continuously enjoying the Kurupam zamindari for a long time, the same having been transferred to me after the dispute was so settled that no one else have anything to do with it and after the permanent enjoyment was confirmed by the Government. Under these circumstances, should this suit which is brought by them under an illusion be disposed of against them, and should they after the final Court's decision humbly apply for subsistence, they should be given either from my self-acquired lands or jirayati lands fetching cist at Rs. 500, five hundred rupees per head per year from that time (even though I am not in any way concerned as regards the support and maintenance of my brothers, but out of mercy and an account of the fact that they will become degraded and that they are my blood relations). Separate lands should be purchased for the amount, which is twenty times the said amount, and given. It is arranged that cash payments should continue to be paid until they are available, and that those landed properties should be enjoyed as long as there are male heirs and then revert to the zamin. If it should take place during the minority of my son, the managers and then my son should give effect to this."

On the face of this clause, this much is palpable, that the theory of the testator is (what the Courts ultimately held) that the legal pretensions of the brother and nephew were unjust, and that anything the testator would do for them was of mere grace. The testator accordingly purports to make his bequest contingent on two events, viz., first, the Court's decision being in his favour, and, second, the defeated litigants' humbly applying for subsistence. It cannot be said that the latter of these conditions was exacting or arrogant, or inappropriate to the situation. At the least, the words mean that the bequest is to go only to people who acknowledge that they have nothing to appeal to but the liberality of their successful adversary. Now the District Judge held that there was no proof that this condition had been complied with. The High Court, on appeal, reversed this decision and held that the condition had been complied with. Both Courts held the condition to be a condition precedent; but the High Court held that two documents, exhibits C and D, are "humble requests" for the grant of maintenance,

VEERA-BHADRA RAJU BAHADUR GARU v. CHIRANJIVI RAJU GARU.

such as were contemplated by the testator. These documents are as follows:—

PLAINTIFF'S EXHIBIT C.

"From the plaintiffs' father to the Collector of Vizagapatam District.—To W. A. Willock, Esquire, Collector of Vizagapatam District.

"Sri Vyricharla Silavamsam Bhoja Raju Garu offers salams.

"The late Zamindar of Kurupam is my natural born brother. It was his duty to maintain us. But I brought suit No. 1 of 1889 for partition of the taluk by virtue of my right as daughter's son, but that suit was, after enquiry, dismissed. We do not intend preferring an appeal again. The minor zamindar being our junior sister-in-law's son, we considered it safer to be friendly to him than being inimical; so I decided on continuing on friendly terms with my junior sister-in-law and with the minor zamindar, and I have been on friendly terms with them. Ours is a large family. It is difficult to maintain our family with small endowment. It was written in the will that we should be paid at the rate of Rs. 500 per annum, simply because of my having instituted the suit; but his free will was not that only so much should be paid. If we are granted Rs. 500 per month, it will be sufficient for the maintenance of our family. Otherwise, we will be obliged to undergo much hardship. I therefore pray that you will be pleased to sanction to that effect. Our late elder brother used from the beginning to celebrate the upanayanams, marriages, ceremony of initiation into letters, and other ceremonies that had to be performed in our family only from the funds of the estate itself. I therefore pray that you will accord your sanction for the expense being met with from the estate funds according to mamool whenever the respective festivals happen to be celebrated.

"15th October 1892. (Initialled in Monogram.")

PLAINTIFF'S EXHIBIT D.

"From the first plaintiff to the Collector and Agent of the Court of Wards, Vizagapatam District, Vizagapatam.—To W. O. Horne, Esquire, Collector of Vizagapatam District and Agent of the Court of Wards.

"Arzi submitted by Sri Raja Silavamsam Vyricharla Chiranjeevi Raja Bahadur Garu.

"According to the will executed by my senior paternal uncle, the late Zamindar of Kurupam, a Thoujee (allowance) at the rate of Rs. 500 per year has to be paid to our family from the Kurupam

VEERA-BHADRA RAJU BAHADUR GARU v. CHIRANJIVI RAJU GARU.

estate. But it is insufficient for us. Regard being had to the public proceedings of the year 1878 conducted between the late Zamindar of Kurupam and my father, Sri Raja Bhoja Raju Bahadur Garu, it would be suitable to our dignity if Rs. 500 per month is paid to us, our family being a large one. We are largely in debt. The said allowance has not been paid to us from the beginning. Our father Silavamsam Vyricharla Bhoja Raju Bahadur Garu died last year. Since then, the maintenance of our family has been a very difficult matter. There is no property whatever. We, therefore, pray that, considering our position, the allowance that was to be paid to us from the beginning may be ordered to be paid. We all depend only on this allowance itself and we have no other means to depend on. Recently we were removed from the fort. So, sanction should be accorded in accordance with the application in respect of a house. The famine at present is very severe. I, therefore, request you will be pleased to order payment of the full allowance considering the dignity of our family. All this responsibility rests only with the Agent. Please to issue early orders.

"Please to consider:

"4—8—97.

"(Signed) SRI RAJA CHIRANJEEVI,
"RAJA BAHADUR."

Of these two documents C is written by the respondent's father. It will be observed, on the face of it, that it is addressed to the Collector of the district, who was in administration of the estate. What humility there is, therefore, is primarily addressed to this official, and not to the offended brother, who was now dead. But when the substance of this document is examined, it is seen that there is no renunciation, but, on the contrary, a reassertion of the zamindar's duty to maintain the applicant; and the abstention from further appealing in the litigation is frankly ascribed to prudential reasons. Finally, the application is not for what was given in the will, but for twelve times as much. Their Lordships are entirely unable to find in this document either the language of humility, or, what is more important, the substance of a humble request for subsistence.

Exhibit D, apart from all other objections, is not a request (humble or otherwise) by either of the persons named in the will, but by a son of Bhoja Raju. It is, moreover, in substance a protest against the inadequacy of the bequest, and a demand for something "suitable to our dignity."

VEERA-BHADRA RAJU BAHADUR GARU v. CHIRANJIVI RAJU GARU.

It appears to their Lordships that, neither in substance nor spirit can either of these letters be taken as evidence of a humble request for subsistence in the sense of the will. Nor can it be forgotten that the suit which initiates the present proceedings does not even aver that any humble petition was ever made; and its primary claim was for an allowance, as of right, "suitable to their rank and the income of the zamindari."

The issues settled for the trial of the cause embrace many questions which were, in the view of the District Judge, as expressed in his judgment of 20th December 1900, superseded by his decision on the matter of the humble request. The judgment of the High Court on 10th February 1903 turned on the same question. Their Lordships prefer the decision of the District Judge.

Before their Lordships, the appellant raised a question as to the validity of the bequest, assuming the condition precedent to have been complied with, his argument being founded on the *Tagore case*(1). In the view which their Lordships take of the condition precedent, that question does not arise, and it does not seem to have been argued in either Court in India.

Their Lordships will humbly advise His Majesty that the appeal ought to be allowed, the judgment of the High Court reversed with costs, and the judgment of the District Judge restored. The respondent will pay the costs of the appeal.

Appeal allowed.

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

Solicitor for the respondent: Mr. *Douglas Grant.*

(1) (1872) L.R.I.A. Sup. Vol. 47; 9 B.L.R., 377.

APPELLATE CIVIL—FULL BENCH.

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

1904. April 12, 26. October 13.

KENATH PUTHEN VITTIL TAVAZHI (PLAINTIFF), APPELLANT,

v.

NARAYANAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

Malabar Law—Karnavan—Renunciation of right to succeed as karnavan—Validity.

It is open to a karnavan of a tarwad to renounce his right to manage the tarwad affairs.

Cherukomen v. *Ismala*, (6 M.H.C.R., 145), commented on.

SUIT by plaintiff, who was the senior member of the tarwad, to recover, with arrears of rent, possession of land orally leased on 27th March 1894 by a deceased co-manager of his taveri to defendants Nos. 1 to 4 who belonged to the same tarwad. The plaint stated that the plaintiff was removed from management by the decree in Original Suit No. 36 of 1900 on the file of the Sub-Court, Palghat, obtained by the then karnavan, Theyyunni Menon, who died between July and August 1902; and that plaintiff was the present karnavan and manager of his taveri. The defendants belong to the same tarwad. The first defendant contended *inter alia* that Madhava Menon (the supplemental fifth defendant), and not the plaintiff, was the manager of his taveri; and that plaintiff was not entitled to bring this suit. The supplemental fifth defendant supported the contentions of the first defendant. The other defendants were *ex parte*. On the first issue:—Is the plaintiff not the manager of his tarwad entitled to sue? The District Munsif said:—

"Plaintiff is now the senior male member of his tarwad. He was the manager of the tarwad while he was an anandravan, having been appointed such by the razi in Origina Suit No. 22 of 1888. In Original Suit No. 36 of 1900 on the file of the local Sub-Court Theyyunni Menon, the *de jure* karnavan, sued to remove

* Second Appeal No. 2492 of 1903, presented against the decree of M.R.Ry. S. Raghunathaiya, Subordinate Judge of Palghat, in Appeal Suit No. 58 of 1903, presented against the decree of M.R.Ry. P. J. Itteyerah, District Munsif of Palghat, in Original Suit No. 338 of 1902.

plaintiff from management. All the members of the tarwad were parties to the suit. It was referred for arbitration to Mr. K. P. Achuta Menon (exhibits A, B), before whom the parties filed a statement reciting an agreement that plaintiff should give up the management to Theyyunni Menon, and that when plaintiff became *de jure* karnavan on the death of Theyyunni Menon he should be placed in management only if 75 per cent. of the members of the tarwad should consent to it (exhibit I). A decree was passed by the Court in terms of the award (exhibit II).

"It is contended that the agreement by plaintiff to place a limitation on his right of succession as karnavan is illegal and cannot be enforced as he cannot by contract divest himself of his birth-right. Reliance is placed on *Cherukomen* v. *Ismala*(1). This case is governed rather by Second Appeal No. 357 of 1881. 'The whole of the members of a tarwad having a right by common consent to regulate the karnavan's agency, he cannot revoke a family settlement made or karar executed for the benefit of the family and in adjustment of disputes and litigation' (Ramachendra Iyer's Manual, 30).

"There is no evidence on plaintiff's side to show that he is supported by 75 per cent. of the members of his tarwad."

The District Munsif found that the plaintiff was not entitled to maintain the suit and accordingly dismissed it. Plaintiff appealed to the Court of the Sub-Judge, and his appeal was dismissed. On second appeal the case first came before Subrahmania Ayyar and Boddam, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.—The plaintiff was at the date of the suit the senior member of the tarwad to which the parties belong. Previously thereto he had been actually managing the affairs of the tarwad though one Theyyunni Menon was the then *de jure* karnavan. Disputes having arisen between the karnavan, the present plaintiff, and the other members of the family, a suit was brought by the karnavan for dispossessing the present plaintiff, and various questions had been raised for determination in that suit. The litigation was adjusted amicably on the terms and conditions stated in exhibit I filed by the parties before an arbitrator in the course of that litigation. Among other things it was then agreed that the present plaintiff should, unless

(1) 6 M.H.C.R., 145 and 401.

KENATH PUTHEN VITTIL TAVAZHI v. NARAYANAN.

three-fourths of the members of the family decided otherwise, cease to have anything to do with the management not only during the life-time of the karnavan, but even after his death, though he was the person next entitled to succeed as such. The compromise of the litigation and, in particular, the arrangement for the payment of the debts that had been contracted by the plaintiff as well as the specific provision made for his maintenance constituted of course ample consideration for the plaintiff's promise, assuming consideration was required to, and could, give it validity. Nor is the objection that the provision in question is incapable of being proved for the reason that exhibit I was not registered, sustainable, since the right to the status of a karnavan cannot be treated as an interest in immoveable property, within the meaning of section 17 of the Indian Registration Act.

The real question for determination is whether the plaintiff's renunciation of his right to succeed as karnavan is valid in law. The arrangement evidenced by exhibit I was no doubt a family karar, having been entered into by all the members of the family. It was also one calculated, as a whole, to benefit the family as it put an end to litigation which must necessarily have entailed loss and injury otherwise. But the fact that the agreement by the plaintiff was a part and parcel of the arrangement so entered into could not make the agreement valid if it was incompetent to the plaintiff to renounce the right to the karnavanship.

In *Cherukomen* v. *Ismala*(1) this question of renunciation was carefully considered. Holloway, J., admitting that the general rule is power of renunciation, points out certain exceptions. "One marked class regarded rights coupled with relative duties prescribed by an absolute law. This phrase "absolute law" refers to rules which in the language of Savigny "govern with an immutable necessity without leaving any play-room to the individual will" (see Holloway's Translation, p. 46). They contrast with rules which "at first leave free power to the individual will and only take its place in order to give the necessary definiteness to the jural relation where that will has failed to exercise its power" (see *ibid.*). A more modern writer puts the same matter thus :—"The greatest part of the law leaves to the individual full freedom to make his legal dispositions and to direct his legal relations according to his

(1) 6 M.H.C.R., 145 and 401.

KENATH PUTHEN VITTIL TAVAZHI v. NARAYANAN.

own judgment and therefore only comes into application when those concerned have arranged nothing otherwise, by its supplementing their imperfectly declared will." This is called 'Dispositive law.' But there are besides other institutions which plainly limit individual will and exclude every private disposition of a contrary tendency—absolute legal rules, 'Peremptory law' (see Salkowski's 'Roman Private Law,' translated by Whitefield, pp. 16 and 17). The foundation of 'absolute', 'peremptory' or as it has also been called 'imperative' law is of course general interest or utility (see Savigny Translation by Holloway, p. 46). In *Hunt* v. *Hunt*(1) cited by Holloway, J., with reference to the class of rights prescribed by absolute law, Westbury, Lord Chancellor adverting to the maxim '*quilibet potest renunciare juri pro se introducto*' observed:—"I beg attention to the words *pro se* because they have been introduced into the maxim to show that no man can renounce a right which his duty to the public, which the claims of society, forbid the renunciation of."

The second class of rights forming an exception to the rule of renunciation according to Holloway, J., consists of those resulting from a natural condition and of which a type is the instance impressively put in the text of the 'Digest' quoted by him, viz: "It is the opinion of Julian that the law of relationship (through males) cannot be disclaimed by agreement no more than one may say that he does not wish to be himself."

Adverting to the views stated by him in this case of *Cherukomen* v. *Ismala*(2), Holloway, J., three months later said in *Valia Kaimal* v. *Velluthadatha Shamu*(3): "We have recently expressed a strong inclination of opinion that the doctrines as to the power of renunciation do not apply to a person in the position of a Malabar karnavan." It would thus seem that the rights and obligations attaching to the status of a karnavan were understood by Holloway, J., to be those prescribed by 'absolute law' and also as arising from a natural condition, and consequently that his settled view was that they were utterly incapable of renunciation. In *Valia Kaimal* v. *Velluthadatha Shamu*(3) Scotland, C.J., contented himself with an expression of doubt whether a karnavan can irrevocably renounce his rights and duties.

(1) 31 L.J.Ch., 161 at p. 175. (2) 6 M.H.C.R., 145.
(3) 6 M.H.C.R., 401.

KENATH PUTHEN VITTIL TAVAZHI v. NARAYANAN.

Innes, J., however, who took part in *Cherukomen* v. *Ismala*(1), apparently entertained a somewhat different view. His judgment in the case concludes thus :—" A man cannot assign obligations (*i.e.*, cannot substitute some one else as the performer of his duties) without the consent or authority of those to whom the duties are owing, and whereas, in the present case, rights are co-existent with and inseparable from obligations, so that the assignment of the one cannot be effected without the assignment of the other, there can be no valid transfer of rights without the consent and authority of those interested in the performance of the obligations." If these passages were to be understood as implying that an assignment by a karnavan of his powers and duties to another member of the tarwad with the consent of all the rest of the tarwad would be valid, a renunciation with similar assent would be equally so. Now, if the assent of all the members could give validity to an assignment by a karnavan of his powers and duties to one of their own number it would be difficult logically to contend that such assent would not avail to support a transfer of those powers and duties to a stranger. But in *Chappan Nayar* v. *Assen Kutti*(2) the delegation of the powers and duties of a karnavan to his son who of course did not belong to the tarwad was held void. The description of the right by Collins, C.J., and Muttusami Ayyar, J., in this case, viz.: " Karnavanship is a birth-right inherent in one's status as the senior male member of a family " seems to accord with the view of Holloway, J., that it is a right arising from a natural condition.

It has been urged that where a karnavan does not wish to continue as such he ought to be at liberty to renounce, as otherwise a family would not be able to get rid of an unwilling manager and its interest must consequently suffer. It would seem, however, that a tarwad would not in such a case really experience any practical difficulty, since a karnavan may without actually abdicating his position lawfully utilize the services of an anandravan in the management of the affairs of the family subject to his own supervision. And if having regard to considerations like that suggested in the argument a power of renunciation on a karnavan's part were to be recognised, it is not unlikely that such a course would be attended with consequences not capable of being

(1) 6 M.H.C.R., 145. (2) I.L.R., 12 Mad., 219.

KENATH PUTHEN VITTIL TAVAZHI v. NARAYANAN.

adequately dealt with otherwise than by legislation. Take the present case itself. The renunciation is but conditional. The assent of the prescribed majority might, as the words of the instrument apparently imply, at any moment endow with active vitality the plaintiff's capacity for karnavanship which according to the arrangement is but dormant. Here is opportunity for canvassing, and suppose some of the votes are purchased by the plaintiff, are the Judges to invent the rules and principles with reference to which such questions of voting, election, etc., are to be decided? It is scarcely necessary to say that Courts will not be able satisfactorily to deal with these and like matters which the interest and ingenuity of individual members of tarwads are sure to bring about.

The better conclusion would seem therefore to be that adopted by Holloway, J. Having regard, however, to the difference in the views held by him on the one hand, and Innes, J., on the other, and to the intrinsic importance of the question, the point appears to us to call for a decision by a Full Bench.

It is perhaps necessary to add a few words with reference to one special feature of the present case, viz., that the renunciation was made before the right to succeed as karnavan had actually accrued. The mischiefs against which section 6 of the Transfer of Property Act, clause (*a*), was aimed at, whereby the transfer of the chance of an heir apparent succeeding to an estate, the chance of a relation getting a legacy on the death of a kinsman or other mere possibility of a like nature is prohibited, can hardly be predicated of a simple unilateral act of renunciation in respect of the karnavanship. And whether the view of Holloway, J., or that of Innes, J., should prevail, the fact that renunciation was in respect of the plaintiff's future right to succeed as karnavan would, in the circumstances of the present case, not be material, for if a karnavan's right is one governed by an absolute law or arising from a natural condition, a renunciation of it, whether present or future, must be invalid, and if it is one capable of being renounced with the consent of the members of the tarwad such consent was here given. And though instances of rights capable of renunciation after accrual, but not before, are not wholly unknown to the law, yet they seem to be extremely few and special in their character and there is no warrant for supposing that if a karnavan actually such can renounce his right, renunciation by a would-be-karnavan would be invalid

KENATH PUTHEN VITTIL TAVAZHI v. NARAYANAN.

on the mere ground of the futurity of the rights renounced. The rule of the Roman law was that in the case of a right not yet acquired a unilateral declaration of volition having a renunciation for its object bound its author and was irrevocable (Gondsmit on 'Pandects', translated by Tracey Gould, p. 141. See also observations of Holloway, J., in *Subbiem Pillay* v. *Arnachala Irungol Pillay*(1), citing Wachter II, 648).

We therefore refer, for the opinion of the Full Bench, the question whether the renunciation by the plaintiff of his right to karnavanship is or is not valid?

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

J. L. Rosario for appellant.

T. R. Ramachendra Ayyar for fifth respondent.

OPINION.—By a razi in Original Suit No. 22 of 1888 the plaintiff was appointed the manager of his tarwad in the place of the then karnavan, one Theyunni Menon. His management proving unsatisfactory, a suit to which all the members of the tarwad were parties was brought to remove him. Pending the suit, the disputes between the parties were referred to arbitration. By the karar or arrangement then arrived at, the plaintiff retired from the management and it was provided that even after the death of the then karnavan, Theyunni Menon, when this plaintiff next in age would be entitled to the karnavanship and management of tarwad property he was not to take up the management of tarwad affairs unless a majority of the members of the tarwad agreed to it. His debts were paid and he was given a comparatively handsome allowance.

The karnavan having since died, the plaintiff claims against the terms of the karar to succeed to the karnavanship of the tarwad and to the possession and management of its properties. He contends that his renunciation by that karar of his right so to succeed is invalid in law and the question that is referred to the decision of the Full Bench is "whether the renunciation by the plaintiff to succeed to the karnavanship is valid in law."

A karnavan in Malabar is the senior male member of a group of persons, all of them tracing their descent in the female line from

(1) 5 M.H.C.R., 444 at p. 450.

KENATH PUTHEN VITTIL TAVAZHI v. NARAYANAN.

a common female ancestor owning joint property under the absolute control and management of the karnavan. This group form a Marumakkatayam tarwad. In this tarwad a mother and her descendants in the female line, by themselves, constitute a tavazhi, *i.e.*, the line of a single mother. But this term is usually applied to any branch of a tarwad in separate possession of a portion of the joint family property holding it thus for convenience of enjoyment. The term is also occasionally applied to such a branch even when there is a severance of interest and the main tarwad loses or is deprived of all interest in the property in the possession of this branch or tavazhi and the latter has really developed into a tarwad by itself. See *Valia Kaimal* v. *Velluthadatha Shamu*(1). While the senior male member in a tarwad is the karnavan of all the members in the tarwad and hence is called the karnavan of the tarwad, every member is the karnavan of his junior in age and anandravan of those senior to him in the tarwad, the terms karnavan and anandravan being correlative. Every member is thus a karnavan or anandravan of every other member in the tarwad. A tarwad may be split into various branches, each branch holding its own property without community in the property held by another branch. When such division has taken place each branch or tavazhi, forms so far as Courts are concerned a separate tarwad by itself—the senior male of each branch is treated in law as the karnavan of that tarwad. As pointed out by Mr. Justice Holloway in *Erambapalli Korapen Nayar* v. *Erambapalli Chenen Nayar*(2), in popular language all the members of the separated branches still belong to the same tarwad, but "in the only sense with which Courts of Justice are concerned, they do not." The result is that the members of the original or larger tarwad continue to treat one another as karnavans and anandravans, though there may be no community of property between them and they do not strictly at any rate, as Mr. Justice Holloway correctly points out, in a Court of law belong to one tarwad. To put it briefly, even though the members of a tarwad may divide all the property, they still continue karnavan and anandravan. For purposes of pollution, for the performance of funeral ceremonies, for purposes of succession, the relationship is recognized to subsist.

(1) 6 M.H.C.R., 401. (2) 6 M.H.C.R., 411 at p. 414.

KENATH PUTHEN VITTIL TAVAZHI v. NARAYANAN.

It is this relationship of one person to the other members of the tarwad or group of tarwads which Mr. Justice Holloway had in view in the case in *Cherukomen* v. *Ismala*(1); at any rate his remarks have reference to such relation. Such relationship may be the source of obligations, social and religious, and may subsist as already pointed out between persons without any community of property. As a general rule substituting females for males, the quotation in *Cherukomen* v. *Ismala*(1) from Julian "that the law of relationship (through males) cannot be disclaimed by agreement no more than one may say that he does not wish to be himself" is applicable. But the question before us is not whether this karnavanship, the relationship due to their natural condition, may be renounced or not. The question is whether the plaintiff may renounce the rights or obligations including the right of management which devolved on him as karnavan or the senior male member in the tarwad. This renunciation of the bundle of rights and duties is also called the renunciation of karnavanship.

Karnavans are frequently removed by Courts from the management of tarwad property Such suits are loosely-termed suits to remove karnavans, though a karnavan cannot be deprived as above stated of his relationship of karnavan to the other members of his tarwad, but can only be removed from the management of tarwad properties When the Courts remove a karnavan, the decree does not determine the natural relationship that exists between the karnavan and the other members: they still continue karnavan and anandravan for the performance of funeral ceremonies and the like.

The only question therefore is whether a karnavan may himself renounce that power of management of which for adequate reasons he may be deprived by a Court of law.

In the order of reference it is stated and in our opinion correctly that if it is not open to a karnavan to renounce the rights or obligations attached to his position, he could not do so by a razi or contract. If he could renounce by contract, there is nothing to prevent him from doing it voluntarily as a unilateral act of renunciation.

The general rule is in favour of renunciation so far as his right to manage the property of the tarwad is concerned, and the decisions clearly recognize such right.

(1) 6 M.H.C.R., 145.

KENATH PUTHEN VITTIL TAVAZHI v. NARAYANAN.

In Appeal Suit No. 336 of 1854 the claim was to set aside a mortgage which would have been otherwise valid on the ground that the karnavan had no right to grant it according to an agreement to which all the members of the tarwad were parties. In declaring the mortgage invalid Mr. Holloway, then Sub-Judge, observed: "I am clearly of opinion that the whole of the members of a family have a right, by common consent, to regulate the karnavan's agency". . . . . "I am of opinion that, with the consent of all the members, it was possible for the tarwad to narrow his authority" (Zillah decisions, Sep. 1855, p. 18).

In Second Appeal Nos. 87 and 88 of 1857 (Sudder decisions, 1857, p. 158) the Sudder Court upheld an agreement under which the karnavan had renounced his right of exclusive management and the tarwad properties were agreed to be managed by himself jointly with another.

The karnavan could thus renounce the right of exclusive managements vested in him.

In Second Appeal No. 368 of 1862 the High Court confirmed a decision of Mr. Holloway in which he held that the plaintiff, the karnavan, was estopped by an agreement entered into between himself and the second defendant, a junior member, by which the second defendant was to be in management of the tarwad properties in one taluk and himself, the karnavan, of such properties in another taluk, and a suit brought by the karnavan was dismissed.

This is an instance of an absolute renunciation of the right to manage a substantial portion of the properties of the tarwad.

The High Court in Second Appeal No. 8 of 1880 in upholding a karar against the karnavan held:—"The contention of the appellant is the karar (agreement) of 1858 was illegal . . . . It is not necessary for us to consider whether the karar, if objected to by the family, is one which could be allowed to stand against them. There is no such objection by any of the family, though it was executed in 1868 and has been acted upon with full consent of the family down to the present time. There is ample reason to suppose that the karar was executed for the benefit of the family. It is the outcome of disputes and litigation in the family, and by it those disputes and that litigation were happily ended. There is apparently no reason for setting aside this karar and certainly none at the instance of the plaintiff (the karnavan)."

KENATH PUTHEN VITTIL TAVAZHI v. NARAYANAN.

The karar there sought to be set aside was entered into between the karnavan and one of the anandravans by which the income of the tarwad was to be collected and expenses defrayed by the anandravan, and all the documents on behalf of the family were to be in his handwriting. Properties were not to be demised without his consent. It also provided for the custody of the tarwad documents. The anandravan is to file suits in the karnavan's name on his vakalat for rents, etc.

There was thus practically a renunciation of the rights of the karnavan to manage the tarwad property. There was only the title and the shadow of his old power left to him. The tarwad management was practically handed over to a junior member and such renunciation was held valid.

Again in Second Appeal No. 357 of 1881 the High Court held :—"The rights of the parties were adjusted by the compromise and the decree passed thereon, and in our judgment it has been properly held that the respondent was to hold possession at least till some other arrangement was made or possibly until the death of the karnavan. *The right of the karnavan to recover possession applies to cases in which he has voluntarily conceded a temporary possession to an anandravan for management.* Here he has no greater right to put an end to the contract than any member of the family."

By the agreement there sought to be set aside certain lands were left in the possession of the defendant, an anandravan, who was to maintain himself and his tavazhi, *i.e.*, some other members of the family, with the income thereof. The karnavan sought to set aside the agreement and to recover the lands. The words in italics indicate the right principle to be followed.

Similarly in Second Appeal No. 363 of 1883 a family agreement was held to be binding upon the succeeding karnavan—the High Court holding "Both the Courts have found that the lands in suit are included in the paddy tract called Kallamulli which was set apart for the defendants' branch of the tarwad in the family agreement. The plaintiff, however, as the common karnavan asserts a right to resume the lands and re-allot them at pleasure. He has no such right since the allotment was not one made by the former karnavan of his own authority but as part of a family arrangement which binds him in common with the whole family."

KENATH PUTHEN VITTIL TAVAZHI v. NARAYANAN.

Appeal No. 120 of 1889 was a remarkable case. As an exception to the ordinary rule the karnavanship of the tarwad in question was vested in the senior female called Valia Rani, and on account of disputes among the members a karar was entered into by which the Valia Rani surrendered the entire right of management to the senior male and after her death that right to manage was vested *de jure* in the then senior female, but the *de facto* management was vested in the senior male according to the old usage in the family subject to certain specific powers preserved to the senior female who held the karnavastanom. It will be noticed that the then Valia Rani was excluded from all management even to the extent to which future Valia Ranis were permitted to interfere.

This renunciation was enforced against the Rani when she sought to resume management. It is true the case in *Cherukomen* v. *Ismala*(1) is not quoted nor the question discussed. Nevertheless the case is important as showing that such renunciations have been always recognized.

In *Kanna Pisharodi* v. *Kombi Achen*(2) it was held that "ordinarily, it is of course true that the karnavan of a Malabar tarwad is entitled to grant a renewal of a kanom, but it is in the power of the family, with the assent of the karnavan, to place a restriction on his ordinary powers."

To the same effect is the decision in *Komu* v. *Krishna*(3). "As to the contention that he did not consider the objection taken by the petitioner, viz., that, as the present karnavan of the tarwad, he was entitled to set aside the karar sued upon, we are of opinion that the karnavan is not entitled of his own authority to set aside a family arrangement made on behalf of all the members of the tarwad."

The practice is widely prevalent whereby tavazhis are constituted (see S.A. No. 363 of 1883 above referred to), *i.e.*, properties are set apart for the support of some members of a tarwad who form a tavazhi under the control and management of the senior male of that branch who so far as the management of these properties is concerned takes the place of the karnavan of the tarwad. In all such cases there is a renunciation by the tarwad

(1) 6 M.H.C.R., 145. (2) I.L.R., 8 Mad., 381.
(3) I.L.R., 11 Mad., 134.

KENATH PUTHEN VITTIL TAVAZHI v. NARAYANAN.

karnavan of all his rights of management though he still continues to be styled the karnavan.

The Courts have gone further and have held after some hesitation that the members of a tarwad may withdraw themselves entirely from his control and form themselves into a separate tarwad and thereby put an end to all the karnavan's rights over them. In a series of cases beginning with *Kunhacha Umma* v. *Kutti Mammi Hajee*(1) which overruled certain previous decisions it has been held that a mother and children may form themselves into a distinct tarwad with their own senior male as karnavan treating themselves *inter se* as sole members of a tarwad without interference by the karnavan of their main tarwad from which they have separated. This shows that for the purposes of guardianship, survivorship, the succeeding members have renounced their anandravanship and determined the karnavan's rights over them. All these cases are repugnant to the contention that a karnavan cannot renounce by contract or otherwise his rights or powers of management. His powers may be curtailed; may be exercised only under conditions imposed by the tarwad; may be reduced to a vanishing point; may be entirely renounced or taken away with reference to the tarwad members or the tarwad property.

These decisions are in accordance with usage and were not cited apparently before the learned Judges who made the reference.

The case of *Cherukomen* v. *Ismala*(2) was a case in which what was put forward as a deed of renunciation was held to be a power of attorney, and the question therefore according to Mr. Justice Holloway did not arise for decision. The passage cited from Julian shows further that Mr. Justice Holloway was then considering the question whether "the law of relationship through males cannot be disclaimed by agreement" which is very different from the question before us whether one may not renounce the rights acquired by him on account of his relationship, though of course he cannot get rid of his relationship. Holloway and Innes, JJ., were further considering a case where it was argued that "there was an irrevocable waiver of the karnavan's rights and an irrevocable transfer of them to another."

(1) I.L.R., 16 Mad., 201. (2) 6 M.H.C.R., 145.

KENATH PUTHEN VITTIL TAVAZHI v. NARAYANAN.

This also is very different from a simple renunciation where the law vests the management in the next senior male. To appoint another person in his place as karnavan would be a direct interference with the right of his successor and that question stands obviously on a very different footing from a power of renunciation and can only be upheld, if at all, as a contract. In *Velia Kaimal* v. *Velluthadatha Shamu*(1) the question was as to the effect of an arrangement made by a former karnavan. There was no renunciation of his rights by the person who then claimed as karnavan. In the course of his judgment Mr. Justice Holloway no doubt observes referring to the previous case: "We have recently expressed a strong inclination of opinion that the doctrine as to the power of renunciation does not apply to a person in the position of the Malabar karnavan." Mr. Justice Holloway could scarcely have intended to decide by these two cases that a karnavan cannot renounce his right of management by contract seeing that he had already decided in favour of that view, and the true explanation therefore appears to be that he made these observations with reference to the facts of the cases before him or that he was referring only to the renunciation of the natural relationship.

If, on the other hand, he meant to say that it is not open to a karnavan to renounce his rights and obligations and in particular the right of managing the tarwad properties which he has by virtue of his position as karnavan, then his view is opposed to his own opinion as expressed in his previous decisions, to the course of subsequent decisions and to the practice amongst the community who follow that law.

Nor is there anything in principle in the position of the karnavan opposed to such renunciation. A karnavan is not a trustee, yet a trustee may renounce his trust with the consent of the beneficiaries or with the sanction of the Court. These restrictions are necessary in the case of a trustee for the protection of the beneficiaries; but the karnavan is not bound to render any account or to pay to the tarwad any surplus he may have in his hands. These reasons therefore do not apply to the case of a tarwad where the next male in order of seniority takes the place vacated by the senior.

(1) 6 M.H.C.R., 401 at p. 406.

KENATH PUTHEN VITTIL TAVAZHI v. NARAYANAN.

It is decidedly for the benefit of the tarwad that such power of renunciation should be recognized. An unwilling karnavan usually makes a bad manager. Delegation to a junior member, passing over his seniors, will produce discord and in the interest of the tarwad it is clearly desirable that the power of management should be accompanied with responsibility.

If, on the other hand, his renunciation is not irrevocable, the karnavan's own interest and the interests of his wife and children being in conflict with his duty, the tarwad will generally be in danger from his attempts to win back his authority and the inevitable result of refusing to recognize the power of renunciation will be litigation and great loss to the tarwad.

The case before us illustrates the necessity of recognizing the power of renunciation. The tarwad acknowledged the validity of debts contracted by the plaintiff to avoid litigation and gave him an allowance to which as stated by the arbitrator in his award he was not entitled. The renunciation in this case was for full consideration received. That, of course, will not make the renunciation valid if as a unilateral act of renunciation it cannot be valid.

We are therefore of opinion that it is open to the karnavan of a tarwad to renounce his karnavanship including his right to manage the tarwad affairs.

The question referred must, therefore, be answered in the affirmative.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Boddam.

1904. October 3, 4, 5.

PYDIGANTAM JAGANNADHA ROW AND OTHERS (DEFENDANTS), APPELLANTS,

v.

RAMA DOSS PATNAIK AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Limitation Act XV of 1877, sched. II, arts. 124, 141—Claim for the recovery of an hereditary office—Succession by Hindu widow to trusteeship of temple—Alienation by widow of temple property—Suit to declare alienation invalid and not binding on those entitled to succeed the widow as trustees after her death—Bar by limitation.

A temple was built and dedicated to the public by one Jagayya, who acted as trustee of it during his lifetime. He died childless and his widow succeeded him as trustee. She continued to manage the affairs of the temple until October 1885, when she transferred the right of trusteeship together with certain temple properties to the first defendant. In 1897 the widow died. The plaintiffs as the persons entitled to be trustees in succession to her brought this suit in December 1900, to establish their rights as trustees and to have the transfer in favour of the first defendant declared invalid:

Held, that the suit was barred under article 124 of the Limitation Act. The property transferred with the trusteeship was only recoverable by the plaintiffs in their right as trustees, which right had ceased to exist through the operation of The Law of Limitation.

Gnanasambanda Pandara Sannadhi v. *Velu Pandaram*, (I.L.R., 23 Mad., 271), referred to.

The possession by the defendants during the lifetime of the widow was adverse to the plaintiffs, who derived their title "from and through" the widow notwithstanding the fact that they were not her heirs in the strict sense of the word.

SUIT for a declaration that an alienation by a trustee of the right of the trusteeship of a temple, the properties of the temple and its endowments, was invalid. One Jagayya Patnaik founded the mutt of Sri Ramachendra Swami in Parlakimedi, which he dedicated to the public, meeting the cost of daily offerings, etc., from the income of certain of his lands with which he endowed the mutt. During his lifetime he acted as trustee of the mutt. He died childless in 1866 and his widow succeeded him, and continued in the management of the mutt affairs. In

* Appeal No. 229 of 1901, presented against the decree of E. B. Elwin, Esq., District Judge of Ganjam, in Original Suit No. 37 of 1900.

PYDIGANTAM JAGANNADHA ROW v. RAMA DOSS PATNAIK.

1885, she executed a registered deed, purporting to transfer to the first defendant the properties to which she had succeeded, including the mutt. The widow died in June 1897. The plaintiffs brought this suit in December 1900. The plaint alleged that there was no legal necessity for the transfer; that as a widow she was incompetent to make the alienation beyond her lifetime; that the same was not therefore binding on the plaintiffs, who, as reversioners of her husband, were entitled to succeed to the properties including the mutt; and that the deed was otherwise invalid. The second and third defendants were impleaded in the suit, as the plaintiffs alleged that the first defendant had collusively executed a usufructuary mortgage in their favour.

The first defendant in his written statement contended that the mutt was a public institution founded by Jagayya Patnaik and his wife partly with their own funds and partly with the aid of donations made by the public; that, after the mutt was founded and consecrated, various persons endowed the mutt with landed property from time to time; that the suit properties were all the endowments of the mutt; that Jagayya Patnaik and his wife reserved to themselves the right to nominate a dharma-kartha; that the widow having incurred debts by purchasing lands for the mutt and by defending suits, etc., requested him to liquidate the debts and take up the management; and that she executed to him a deed of trust conveying the mutt and its properties to him and conferring the exclusive rights of management on him; that he accordingly assumed the management and discharged the said debts by borrowing money from defendants Nos. 2 and 3 on a mortgage of a portion of the properties. He further contended that the mutt and its appurtenances not being private properties could not be inherited by the plaintiffs; and finally, that the suit was barred by limitation.

On these facts, the District Judge passed a decree in favour of the plaintiffs. The defendants appealed to the High Court.

The Advocate-General (Hon. Mr. *J. P. Wallis*), *K. Subrahmani Sastri*, and *A. S. Balasubrahmania Ayyar* for appellants.

V. Krishnaswami Ayyar and *T. Rangachariar* for respondents Nos. 1, 3 and 4.

JUDGMENT.—Notwithstanding some doubtful language used in the plaint and also in the judgment, there can be no doubt as

PYDIGANTAM JAGANNADHA ROW v. RAMA DOSS PATNAIK.

to the real nature of the plaintiffs' claim. The temple referred to in the plaint was founded by Jagayya and dedicated to the public, endowments to it having been made by him as well as by others. The founder left no writing evidencing the dedication or laying down rules as to the devolution of the office of trustee. During his lifetime he himself acted as the trustee and the evidence proves he contemplated that the office of trustee after him should devolve upon his heirs according to the ordinary rules of inheritance under the Hindu Law. He died childless and his widow succeeded him and continued to manage the affairs of the institution In 1885 she executed exhibit V purporting to transfer to the first defendant the right of trusteeship, the possession of the temple and the properties belonging to it including the landed endowments. The first defendant entered into possession and has ever since held it. The transfer was altogether invalid and the defendant's possession was from its inception adverse to the transferor.

In 1897 she died and the present plaintiffs, as the persons entitled to be trustees in succession to her, brought this action in December 1900 to have the transfer made by exhibit V in favour of the first defendant declared invalid and not binding upon them to establish their right as trustees and to recover possession of the temple and its endowments. The point for determination is whether the suit is barred by limitation.

In proceeding to consider this question, it is perhaps right to refer to an observation made on behalf of the plaintiffs that the founder in granting the endowments made by him reserved a right of maintenance. Whether there was any reservation of the kind, and if so, in whose favour, whether only of himself and his widow, or of all succeeding trustees, is a matter which was not made the subject of an issue and has not been properly determined. Assuming there was some such arrangement that would not affect the determination of the question now to be decided amounting as it would only to a charge on the income of the endowment in favour of the parties to be maintained.

It has been earnestly pressed on behalf of the plaintiffs that the suit is governed by article 141 of the Limitation Act; but we cannot agree with this contention. The claim being one for the recovery of an hereditary office, it is obvious that the article applicable is No. 124. No doubt the bulk of the property sought

PYDIGANTAM JAGANNADHA ROW v. RAMA DOSS PATNAIK.

to be recovered is immoveable property but this as well as the other properties are recoverable by the plaintiffs only in their right as trustees, and if their right to the office has ceased to exist by operation of the Law of Limitation, they could have no right to possession of the properties which pass with the office. In the view that the article applicable in the circumstances is article 124, the question is whether the possession of the first defendant has been as contended for him adverse to the plaintiffs for more than twelve years, and this would be so, if the plaintiffs can be rightly held to be persons deriving their right to sue "from or through" the widow. No doubt with reference to the ruling of the Privy Council in *Gnanasumbanda Pandara Sannadhi* v. *Velu Pandaram*(1), the widow on succeeding to the trusteeship must be taken to have become trustee without the right of transmitting the office to her own heirs, the person to take the office on her death being the party who would be her husband's heir on the footing that succession to him opens then. No doubt also as in the case of her succeeding to property as her husband's heir beneficially, her right as trustee in succession to her husband would be liable to be divestedly an adoption duly made by her after her succession. Again the Privy Council have extended the principle on which article 141 rests to moveable property vesting in a widow beneficially and liable to pass to the reversionary heir on her death holding that the six years' period under article 120 applicable to the case runs only from the date of the widow's death. These considerations may at first seem to suggest the propriety of holding that in cases like the present the plaintiffs should not be held to claim "from or through" the widow so as to make the possession during her lifetime adverse to them also the propriety in short of treating the case as within the spirit of the rule on which article 141 rests.

On the other hand her position as trustee possesses a distinction from that occupied by her with reference to her husband's estate vesting in her by inheritance beneficially which makes it apparent that the case is not really one within the scope of the said rule. As regards property inherited by a widow beneficially, the reversioner cannot claim relief by way of possession so long as she is alive, and a transfer by her would at all events be valid till her death. It is different in both respects here. Her powers

(1) I.L.R., 23 Mad., 271.

PYDIGANTAM JAGANNADHA ROW v. RAMA DOSS PATNAIK.

of transfer are precisely those of a male trustee. Neither can alienate the office and the validity of other transfers has reference in her case as in that of male trustees, simply to the requirements of the trust. For misconduct she is removeable from the office and complete relief is obtainable without reference to her death.

In other words notwithstanding that the office would not after the death of the female trustee descend to her heir, the trust estate during her incumbency for all other purposes resides in her as fully and effectually as it does in a male trustee. The reason for the rule on which article 141 is founded being thus inapplicable, the adoption of the principle of that rule here would not be warranted. The mere fact that the devolution after her death is not to one who is her heir in the strict sense of the term could not by itself be held to be an adequate reason for treating her successor as not claiming from or through her in connection with limitation. Take, for instance, the case of trustees succeeding by virtue of an appointment made by persons other than the predecessor of the appointee. To hold that the appointee in such a case does not claim through his predecessor as regards a question of limitation arising under article 144 the phraseology of which in column 3 is similar to that in 124, would virtually be holding that there is no limitation in such cases.

The better view, in our opinion, therefore, is that the plaintiffs here are persons deriving their right, through the widow and consequently the possession of the defendants as against her was adverse possession against the plaintiffs also.

As regards the observations of the Judicial Committee in *Runchordas* v. *Parvatibai*(1) they must not be detached from the contest and must be understood as made only with reference to a case governed by article 141. As to *Harinath Chatterjee* v. *Mothurmohun Goswami*(2) the only question decided there was one of *res judicata*. The language in *Kalianasundram Ayyar* v. *Umamba Bayi Saheb*(3) on which also much stress was laid by Mr. Krishnaswami Ayyar, merely amounts to saying that under the terms of the grant then the devolution of the trusteeship after the death of the Ranee was not to her heir but to those of the

(1) I.L.R., 23 Bom., 725. (2) I.L.R., 21 Calc., 8.
(3) I.L.R., 20 Mad., 421 at p. 432.

PYDIGANTAM JAGANNADHA ROW v. RAMA DOSS PATNAIK.

Rajah of Tanjore in whom the right of management had vested up to his death.

Differing from the District Judge, we hold that the suit was barred by limitation and accordingly reverse his decree and dismiss the suit with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Sankaran Nair.

1904. September 27.

BHAVADASAN AND OTHERS (DEFENDANTS Nos. 2, 3, 42, 46 AND 58), APPELLANTS,

v.

NARAYANA SOMAYAJIPAD AND OTHERS (PLAINTIFF AND DEFENDANTS Nos. 1, 4, 6 TO 8, 10 TO 29, 31 TO 38, 40, 41, 45, 47 TO 55, 57 AND 59), RESPONDENTS.*

Provincial Small Cause Court Act IX of 1887, sched. II, art. 13—Dues to which a person is entitled by reason of his interest in a religious institution—Suit for a share of presents made to a religious institution—Maintainability.

A suit by a member of a religious association to recover his share of the "voluntary payments" made to the association is a suit within the meaning of schedule II, article 13 of the Provincial Small Cause Court Act for "dues" to which a person is entitled "by reason of his interest in a religious institution," and as such it is excepted from the cognisance of a Court of Small Causes. *Mahadeo* v. *Budhai Ram*, (I.L.R., 26 All., 360), commented on.

THIS was a suit for the recovery of money from certain of the members of an ancient religious association in Malabar. The association or sabha possessed considerable properties, including mutts, situated in various places. Admission to the association, which consisted entirely of Nambudri Brahmins of Sukapuram gramum, depended upon certain religious qualifications. When a person became a member of the association he was entitled to a share in its income. The plaintiff alleged that he was a member,

* Second Appeal No. 1093 of 1902, presented against the decree of M.R.Ry. T. Venkataramaiya, Subordinate Judge of South Malabar at Palghat, in Appeal Suit No. 283 of 1901, presented against the decree of M.R.Ry. T. Ramakrishna Ayyar, District Munsif of Nedunganad, in Original Suit No. 99 of 1900.

BHAVADASAN v. NARAYANA SOMAYAJIPAD.

and that the amount sued for was due to him, as his share out of certain presents made to the association, and that the amount had been improperly withheld from him by certain of the defendants who were members of the association and who denied that he had any status in it. The suit was filed in the Court of the District Munsif of Nedunganad other than as a small cause suit and the plaintiff obtained a decree, which was affirmed on appeal by the District Judge of Palghat. This second appeal was filed against that appellate decree.

T. R. Ramachandra Ayyar for appellants.

The Hon. Mr. *P. S. Sivaswami Ayyar* and *K. P. Govinda Menon* for first respondent.

JUDGMENT.—The plaintiff's suit is for the recovery of Rs. 8 and odd from certain of the members of an ancient religious association called the "Sukapuram Sabhayogam" in Malabar. The association possesses landed endowments yielding considerable income and the members of the association when assembled in meeting also receive presents from the Rajahs of Travancore and Cochin and others. Brahmins known as Nambudris belonging to certain definite groups and complying with specific conditions become members of the association and share in its income. The plaintiff alleges that he is such a member and that the amount sued for is due to him as his share out of the present made to the associations with reference to its meetings held in January and March 1899 and that the amount has been improperly withheld from him by certain of the defendants who are members of the association and who deny that he has any status in it.

The suit was instituted in the Court of the District Munsif of Nedunganad other than a small cause suit and the plaintiff got a decree which was affirmed on appeal by the Subordinate Judge of Palghat. This second appeal is against that appellate decree and the sustainability thereof depends upon the question whether the suit is one excepted from the jurisdiction of a Small Cause Court by article 13 of the second schedule to the Provincial Small Cause Courts Act. We are clearly of opinion that it is such a suit.

So far as participation in the income from the landed endowments of the sabha is concerned, there can be no doubt that a suit by the plaintiff for his share of such incomes, supposing his allegation as to his membership is true, and supposing also what

BHAVADASAN v. NARAYANA SOMAYAJIPAD.

should have been paid to him out of those incomes is withheld, would be a suit within the meaning of the article for "dues to which a person is entitled by reason of his interest in a religious institution." Considering that portions of the emoluments of persons employed in many temples including famous ones consist of offerings made at the shrines, it is to be presumed that a right to share in voluntary payments made to religious institutions was not intended to be put on a different footing from that on which the incomes of permanent endowments thereof stand, with reference to the matter under consideration. As between persons who are entitled to participate in such voluntary payments the share to which each of such persons is entitled is properly a "due" to him by reason of his interest in the institution.

The observation of Blair and Banerji, JJ., in *Mahadeo* v. *Budhai Ram*(1) that the cesses and dues referred to in the article are cesses or dues which are claimed from the person who is liable to pay them has apparently no warrant in the language of the article, and such a construction involves an importation into the article of material words which the legislature would not have omitted to insert had it been its intention to make the provision one of that restrictive character. Now even prior to the enactment of the present Provincial Small Cause Courts Act, suits relating to participation in voluntary offerings made at shrines had been held to be not coginzable by Courts of Small Causes (*Bishen Singh* v. *Harbhagat Singh*(2)). This coupled with the introduction into the schedule of excepted cases of such a provision as article 13 argues strongly against the supposition that any change in the law was intended especially as the word "dues" in the article is capable grammatically of being applied as has been already shown to shares in even what has been paid voluntarily. Turning to the merits of the case, it is clear even upon the evidence called for the plaintiff that the mere fact of the performance by a Nambudri of the prescribed religious rites or "*Yagams*" would not entitle him to claim membership in the association. There are admittedly various classes of Nambudris. Some of them are prohibited from performing the said rites and they cannot in any event become members of the Sabhayogam. There are others spoken of as Karmies as to whom performance of "Yagam" in each

(1) I.L.R., 26 All., 358 at p. 360. (2) Punjab Rev. No. 71 of 1876.

BHAVADASAN v. NARAYANA SOMAYAJIPAD.

"Purushantaram" is enjoined,—non-performance in their case involving "Pathithathwam" or degradation rendering "Prayschithittam" or expiation necessary. Nambudris of this class may undoubtedly become members of the association on the performance of the yagam and complying with other rules, if any, of the institution. Nambudris known as Adhyans and Bhattatiris may, if they like, perform the said sacrifices though they do not generally perform them and are supposed to have risen above the need of performing the same. These Nambudris will not be entitled to become members of the Sabhayogam and to a share in the income of the endowment, having regard to the object of the association which is to promote vedic sacrifices by those Nambudris who ought to perform such sacrifices; and we have not been referred to any evidence to show that they are entitled. The point whether the plaintiff belongs to the class of Nambudris who ought to and are bound to perform yagams does not appear to have been kept in view by the lower Courts in deciding the case and there is no finding on the point. We must, therefore, call upon the Subordinate Judge to submit one taking fresh evidence, if necessary. The finding will be submitted within six weeks from this date. Seven days are allowed for filing objections.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Sankaran Nair.

1904. September 14.

RAMANUJA AYYANGAR (RESPONDENT), APPELLANT,

v.

SADAGOPA AYYANGAR (PETITIONER), RESPONDENT.*

Negotiable Instruments Act—XXVI of 1881, *ss.* 8, 32, 78—*Promissory note taken in name of adoptive mother—Suit by minor adopted son—Benami transaction—Maintainability—Limitation—Act XV of* 1877.

A minor sued by his next friend in August 1903 to recover the amount due on a promissory note, executed in September 1897 in favour of his mother and alleged to have been made and delivered on account of his estate:

* Appeal No. 23 of 1904 presented under article 15 of the Letters Patent against the judgment of Mr. Justice Davies in Civil Revision Petition No. 12 of 1904.

RAMANUJA AYYANGAR v. SADAGOPA AYYANGAR.

Held, that the suit was barred by limitation. A benamidar or trustee who takes a note in his own name is the person entitled in his own name to the possession thereof and not the *cestui que trust* or person for whom he holds the note. He is therefore the proper person to sue upon it.

Held also, that the infant son was not the holder or payee or a person entitled at any time to sue upon the note.

SUIT on a promissory note. The facts sufficiently appear from the judgment. The District Munsif decreed in plaintiff's favour. Defendant filed a revision petition in the High Court. The case came before Davies, J., who held as follows:—

"The minor is not the holder and payee of the promissory note and he cannot be put forward as such in order to save the bar of limitation which has run against the payee. The suit is dismissed with costs in both Courts."

Plaintiff preferred this appeal under article 15 of the Letters Patent.

S. Kasturiranga Ayyangar for appellant.

T. Rangachari for respondent.

JUDGMENT.—In this case a promissory note was executed by the defendant to one Seshammal in September 1897.

On the 6th August 1903 the present suit was brought by the plaintiff, a minor, and the adopted son of Seshammal by his next friend, Seshammal, his adoptive mother, for the amount of it.

The Munsif held that as the note was obtained for the minor and with his money the suit was not barred and the minor might sue and gave a decree for the plaintiff. On a revision petition to this Court the decree was set aside as the minor was not the holder or payee of the promissory note, and he could not be put forward as such to save the bar of limitation which had already run against the payee. This is an appeal from that decision.

In an unreported case in this Court (*Ganapathy Naiker* v. *Saminatha Pillai*(1)) it was held that the payee of a note being only a benamidar cannot sue in his own name. In February 1897 it was held (*Gurumurti* v. *Sivayya*(2)) that an infant could sue by a next friend on a note not endorsed to him by the payee, his mother and guardian, where it was alleged to have been made and delivered on account of his estate. In April 1897 it was held (*Bojjamma* v. *Venkataramayya*(3)) that the holder and payee

(1) C.R.P., No. 578 of 1895 (unreported). (2) I.L.R., 21 Mad. 391.
(3) I.L.R., 21 Mad., 31.

RAMANUJA AYYANGAR v. SADAGOPA AYYANGAR.

of a note even though a benamidar could sue on the note and in that case the learned Judges say in their judgment:—"In the case of negotiable instruments especially, it would be most mischievous in our opinion to hold that the holder and payee of an instrument may be put to proof whether the money advanced was his own. We can find no authority in favour of this plea now suggested. We entirely disagree with an unreported decision in *Ganapathy Naiker* v. *Saminatha Pillai*(1)."

We think it is clear that under the Negotiable Instruments Act (Act 26 of 1881) the only person entitled to sue is the payee or holder.

By section 32 the maker of a promissory note is required to pay "according to the apparent tenor of the note to the holder" and by section 78 to discharge the maker he must pay the holder of the note. The holder by section 8 means the person entitled in his own name to the possession thereof and to receive and recover the amount due thereon from the parties thereto.

A benamidar or trustee who takes a note in his own name is the person entitled in his own name to the possession thereof and not the *cestui que trust* or person for whom he holds the note, He therefore is in our opinion the proper person to sue upon it.

In this case the note was taken by the mother in her own name and she undoubtedly could at any time have sued upon it during the currency of the statute of limitations and we are of opinion that the infant son was not the holder or payee or a person entitled at any time to sue upon it.

We therefore hold that the suit was rightly dismissed and dismiss this Letters Patent appeal with costs.

(1) C.R.P. No. 578 of 1895 (unreported).

APPELLATE CIVIL.

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

1904. September 15, 22.

AIYAPPA REDDI (DEFENDANT), APPELLANT,

v.

KUPPUSAMI REDDI (PLAINTIFF), RESPONDENT.*

Mortgage—Mortgage of interest in tenancy in common by one of two co-tenants—Deterioration of mortgagor's interest by act of other co-tenant—Suit for damages by mortgagee against wrong doer—Maintainability—Limitation Act XV of 1877, art. 49—Wrongfully removing specific property.

K, who was a tenant in common with the defendant, mortgaged her interest to the plaintiff. The plaintiff instituted a suit against K for the recovery of the mortgage amount by sale of the mortgaged property. Pending the appeal in that suit, the defendant cut down all the trees on the land and appropriated the same to himself. On the sale of K's interest in t e land which took place after the removal of the trees, the plaintiff realised only a portion of the decree amount. The mortgagee now instituted the present suit against the defendant for the damage suffered by him by reason of the defendant having appropriated K's share of the wood. The suit was filed within three years of the act complained of:

Held, that the suit was maintainable. From the time of lending his money, the mortgagee, whether in or out of possession, acquires the right to have the mortgaged property secured from deterioration in the hands of the mortgagor or of any other person to whose rights those of the mortgagee are superior.

Held also, that the suit was not barred by limitation. It was not the act of cutting down the timber, but the subsequent appropriation of the wood by the defendant which ought to have been left for the share of the mortgagor, that operated to the injury of the plaintiff. Limitation began to run from the date when the defendant appropriated the wood to himself.

SUIT by a mortgagee of the interest of one of two tenants in common, in certain property, against the other tenant for damages. Plaintiff held a mortgage over the interest of Kanakammal in certain lands. Defendant was a co-tenant with Kanakammal in the said lands, and his interest was not mortgaged to the plaintiff. Plaintiff sued Kanakammal for the amount of his mortgage debt and obtained a decree. Pending an appeal from that decree defendant cut down all the trees which stood on the land, and

* Civil Miscellaneous Appeal No. 93 of 1904 presented against the decree of D. Broadfoot, Esq., District Judge of Chingleput, in Appeal Suit No. 205 of 1903, presented the decree of M.R.Ry. V. Swaminatha Ayyar, District Munsif of Poonamallee, in Original Suit No. 478 of 1902.

appropriated the wood. Plaintiff was only able to realize a portion of his decree, as against Kanakammal's interest in the land. He, now, within three years of the defendant's appropriation of the cut wood, sued the defendant for the damage suffered by reason of defendant's act in appropriating the wood. Further facts appear in the judgment. The District Munsif held that article 36 applied and that the suit was barred by limitation. The District Judge on appeal held that article 48 applied, and reversed the decree and remanded the suit for disposal.

Against that order defendant preferred this appeal.

T. V. Seshagiri Ayyar for appellant.

C. V. Anantakrishna Ayyar for respondent.

JUDGMENT—SUBRAHMANIA AYYAR, J.—The plaintiff held a simple mortgage from one Kanakammal upon her one-fourth share of certain lands which contained trees, she being a tenant in common with the defendant who was entitled to the remaining three-fourths. Pending the appeal in the suit instituted by the plaintiff for the recovery of the mortgage amount by the sale of the mortgaged interest, the defendant, who had also been impleaded in the suit, under section 85 of the Transfer of Property Act, as a person holding undivided possession with the mortgagor of the land which was the subject of the tenancy in common, cut down all the trees on the land and appropriated the same to himself. On the sale of the mortgagor's interest in the land, which took place after the removal of the trees, the plaintiff realized but a portion of the amount due to him under the decree passed in the said suit. The present action is for damages alleged to have been caused to the plaintiff by the defendant having appropriated to himself the mortgagor's share of the wood cut.

On behalf of the defendant it was contended before us that the plaintiff had no right of action against the defendant in respect of the wood in question.

Now undoubtedly from the time of lending his money, the mortgagee, whether he be in or out of possession, acquires the right to have the mortgaged property secured from deterioration in the hands of the mortgagor or of any other person to whose rights those of the mortgagee are superior (see Fisher on 'Mortgage,' Fourth Edition, page 293). Hence it has been held that the mortgagee is entitled to maintain an action for any act done by the mortgagor or by his authority, essentially impairing

AIYAPPA REDDI v. KUPPUSAMI REDDI.

the inheritance, such as cutting timber, tearing down houses, fixtures and the like although such fixtures may have been placed on the premises by the mortgagor after the making of the mortgage, and likewise against strangers whose wrongful act affects injuriously the mortgage security (see Washburn on 'Real Property,' Fifth Edition, Volume II, pages 139 and 140, and *Frothingham* v. *McKusick*(1), *Searle* v. *Sawyer*(2), *Wilhen* v. *Moulton*(3), and *Goading* v. *Shea*(4), cited in 'American Digest,' Century Edition, Volume 35, columns 1045, 1046 and 1047). The contention referred to is, therefore, untenable. I also hold that the suit was in time, as it was instituted within three years from the date when the defendant appropriated the wood to himself. It was conceded on both sides that the mere act of cutting down all the timber which stood on the common property did not, having regard to the rights *inter se* of the defendant on the one hand and his tenant in common, the mortgagor, and those claiming through her, on the other, constitute a wrong. It was the defendant's subsequent appropriation of the wood which ought to have been left for the share of the mortgagor that operated to the injury of the plaintiff. No doubt the case cannot be held to fall within article 48 of the second schedule to the Limitation Act as the District Judge decided, the plaintiff never having had a right to the possession of the wood. But he having been entitled to have the wood sold as part of his security, the taking of the wood by the defendant which interfered with such right of the plaintiff was one to which the next article 49 applies.

I would therefore dismiss the appeal with costs.

DAVIES, J.—I concur.

(1) 24 Me. (11 Shep.), 403. (2) 127 Mass, 491.
(3) 127 Mass, 509. (4) 103 Mass, 360.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Boddam.

1904, October 7.

ETYATI POOPARAMBIL BAVA AND ANOTHER (COUNTER-PETITIONERS NOS. 1 AND 2), APPELLANTS,

v.

MATALAKAT KRISHNA MENON AND OTHERS (PETITIONER AND COUNTER-PETITIONERS NOS. 3 TO 10, 13 TO 20, 23 AND 24), RESPONDENTS.*

Limitation Act XV of 1877, sch. II, art. 179—Mortgage—Decree for redemption—Extension of time for payment of the mortgage amount—Execution.

In a suit for redemption of the motgage property the decree directed that upon payment of the mortgage amount within six months from its date the decree-holder should take possession of the mortgage property. The decree was affirmed on appeal on the 6th November 1896. The decree-holder failed to pay the amount within the time fixed in the decree. The present application was made on the 15th October 1902 to the Court to have the time extended for three months. The decree-holder's last application to execute the decree was made on the 21st April 1897:

Held, that the application was barred by limitation. Notwithstanding that time is granted to a mortgagor for payment, a decree for redemption such as that in the present case should be taken to be executable from the passing of the decree and is therefore governed by article 179, schedule II, of the Limitation Act.

Rungiah Gounden v. *Nanjappa Row*, (I.L.R., 26 Mad., 780), approved.

EXECUTION PETITION. The facts material to the judgment are set forth in the order of the District Munsif as follows:—

"The decree-holder obtained the kanom redemption decree, Original Suit No. 521 of 1895, on 3rd July 1896. In the decree, he has been given six months' time from its date to pay up the kanom and value of the improvements and take possession of the property. The decree-holder appealed against this Court's decree as regards the costs which this Court disallowed. The Appellate Judge rejected the appeal. This was on 6th November 1896. The appeal decree did not enlarge the time for redemption fixed in this Court's decree. The decree-holder failed to pay or deposit into the treasury the kanom and value of improvements

* Civil Miscellaneous Second Appeal No. 89 of 1903, presented against the order of M.R.Ry. K. Krishna Rao, Subordinate Judge of South Malabar at Calicut, in Appeal Suit No. 10 of 1903, presented against the order of M.R.Ry. A. Annaswami Ayyar, District Munsif of Tirur, in Civil Miscellaneous Petition No. 2921 of 1902 (Original Suit No. 521 of 1895).

ETYATI POOPARAMBIL BAVA v. MATALAKAT KRISHNA MENON.

within the time fixed in the decree and take possession of the property. He now applies to this Court to extend the time for redemption."

The counter-petitioners raised, *inter alia*, the objection that the petition was barred by limitation. The District Munsif in dismissing the petition said :—

"In December 1896, the decree-holder applied to, and obtained an order from this Court, extending the time for redemption by three weeks. But there is no provision of law which prohibits the decree-holder from applying to the Court to enlarge the time for redemption a second time. No authority is shown to me that a second application to enlarge the time cannot be entertained. The last paragraph in section 93 of the Transfer of Property Act says, upon good cause shown, the Court may, if it thinks fit, from time to time, postpone the day fixed for redemption."

"I think the last objection, should prevail. The application to extend the time for redemption is an application to execute the decree and the application should be made within the time allowed by the Limitation Act. Article 179 of the second schedule of the Limitation Act applies to such applications. It allows to the decree-holder only three years' time from the date of the decree or order, or from the date of the last application made to execute the decree, etc., to apply to execute the decree. The appeal decree was passed on 6th November 1896. The decree-holder's last application to execute the decree was on 21st April 1897. The present application was made only on 15th October 1902. It is time barred (see *Chunni Lal* v. *Harnam Das*(1) and *Mallikarjunadu Setti* v. *Lingamurti Pantulu*(2))."

On appeal by the counter-petitioners the Sub-Judge reversed the order of the lower Court and extended the period of redemption till 30th January 1904. On appeal from this order, the High Court delivered the following judgment :—

J. L. Rozario for appellant.

K. Sreenivasa Ayyangar for respondent.

JUDGMENT.—When the case was before us on the last occasion we overlooked the question whether the execution of the decree at the instance of the plaintiff (the mortgagor) was or was not barred by limitation.

(1) I.L.R., 20 All., 302. (2) I.L.R., 25 Mad., 244 at p. 288.

ETYATI POOPARAMBIL BAVA v. MATALAKAT KRISHNA MENON.

We agree with the opinion of Bhashyam Aiyangar, J., that notwithstanding that time is granted to a mortgagor for payment, a decree for redemption such as that in the present case should be taken to be executable from the passing of the decree and is therefore governed by article 179 of the Limitation Act. The decision in *Chhedi* v. *Lalu*(1) seems open to question and it is inconsistent with *Maruti* v. *Krishna*(2) which is referred to and relied on in *Rungiah Gounden* v. *Nanjappa Row*(3).

In this view at the time when the application for extension of the time for payment was made in 1902 the plaintiff's right to execute the decree had long become barred and it was then not open to the Court to entertain an application for extension of time. We accordingly set aside our order of 12th April 1904, allow the appeal, reverse the order of the Subordinate Judge, and restore that of the District Munsif with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Sankaran Nair.

MOTHI RUNGAYA CHETTY (PLAINTIFF), PETITIONER,

v.

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

1904. September 28, 29.

Indian Post Office Act VI of 1898, s. 34—Value-payable article—Liability of Government to sender when value not collected from addressee—Duty of Post Office to collect value payable—Liability for neglect to do so—Provincial Small Causes Act IX of 1887—Jurisdiction.

The plaintiff delivered a parcel containing silver jewellery to the Postal authorities for transmission to Colombo as a value-payable article. He also registered and insured it for Rs. 115. The fees were duly paid, receipts obtained, and the Post Office took charge of the parcel. By the mistake of a clerk the parcel was delivered to and accepted by the addressee without its value being collected from him. This suit was brought to recover the value of the parcel

(1) I.L.R., 24 All., 300. (2) I.L.R., 23 Bom., 592.
(3) I.L.R., 26 Mad., 780.

* Civil Revision Petition No. 43 of 1904 presented under section 25 of Act IX of 1887, praying the High Court to revise the decree of M.R.Ry. S. Doraiswami Ayyar, District Munsif of Trichinopoly, in Small Cause Suit No. 878 of 1902.

MOTHI RUNGAYA CHETTY v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

from the defendant, as the Post Office would neither pay the money to plaintiff nor return the article. The defendant relied *inter alia* upon section 34 of the Indian Post Office Act, 1898. The proviso to section 34 runs as follows:—Provided that the Secretary of State for India in Council shall not incur any liability in respect of the sum specified for recovery unless and until that sum has been received from the addressee:

Held, that the defendant was liable. The effect of the proviso is that the Post Office does not guarantee the collection of the money, but the proviso does not absolve the Post Office from the common law liability to pay damages for delivering a parcel without collecting the money in pursuance of its undertaking to do so.

By its contract the Post Office is bound to collect the money when it delivers the article. If, for any reason, it neglects to do so, it commits a breach of contract for which it is liable in damages. The measure of the damages being the value of the article lost.

A Small Cause Court has jurisdiction to entertain such a suit, it being a suit on contract and not on tort.

SUIT to recover damages from the Post Office for the amount undertaken to be collected from the addressee of a value-payable article. The facts are fully set out in the judgment. The District Munsif at Trichinopoly dismissed the plaintiff's suit. The plaintiff preferred this Civil Revision Petition to the High Court.

T. Narasimha Ayyangar for petitioner.

The Government Pleader for respondent.

JUDGMENT.—The plaintiff, a trader, delivered a parcel containing silver jewellery of the value of Rs. 115 to the Postmaster of the Kotwalchavadi Post Office, Trichinopoly, for transmission to one Kristna Chetty at Colombo, Ceylon, as a value-payable article. He also registered and insured the parcel for Rs. 115. He duly paid the fees and obtained receipts, and the Post Office took charge of the parcel.

This action was brought to recover from the Secretary of State for India in Council the value of the jewellery, as the Post Office would neither pay the money nor return the article to the plaintiff. The defence is that, by some mistake of a clerk in the Post Office, the parcel was delivered to and accepted by the addressee without its value being collected from him, and liability is disclaimed as regards the insurance because the article was duly delivered and as regards the non-collection of its value under the proviso to section 34 of the Indian Post Office Act, 1898. That proviso runs as follows: "Provided that the Secretary of State for

MOTHI RUNGAYA CHETTY v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

India in Council shall not incur any liability in respect of the sum specified for recovery unless and until that sum has been received from the addressee." Admitting the disclaimer to be good so far as the insurance is concerned, we cannot hold the Secretary of State is saved from liability by the proviso quoted. The effect of the proviso is that the Post Office does not guarantee the collection of the money, but it does not absolve it from the common law liability to pay damages for delivering the parcel without collecting the money. The Post Office, in order to meet the requirements of traders and others who wish to recover the value of articles supplied by them, undertakes, on the payment of certain fees, to act as their agents for the collection of the money (see rule 130, Indian Postal Guide). So that the Post Office is bound by contract to collect the money when it delivers the article. If the Post Office for any reason neglects to collect the money as agreed to by it for consideration, it has committed a breach of contract for which it is liable to pay damages. The measure of the damages in this case is the value of the silver jewellery which the plaintiff has lost and which he has proved to be Rs. 115. It was contended before us that the suit was not cognizable by a Small Cause Court, and also that the Secretary of State was not liable for the neglect of his servant. The answer to both these objections is that the case is one of contract and not of tort. The decree of the District Munsif is set aside and the plaintiff will get a decree for Rs. 115 with his costs in both Courts.

APPELLATE CIVIL.

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

1904. October 21, 24.

ABDUL KARIM SAHIB AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

BADRUDEEN SAHIB AND OTHERS (DEFENDANTS), RESPONDENTS.*

Letters Patent, art. 12—Jurisdiction of High Court—Immoveable property situated outside—Moveable property situated within the jurisdiction—Partial partition.

The members of a Mahomadan family sued their deceased father's brothers to recover from them their share in the family property, which consisted of the capital and profits in a certain business in the town of Madras and two houses and land situated outside the original civil jurisdiction of the Madras High Court. There was no immoveable property situated within the jurisdiction and no leave to institute the suit had been obtained under article 12 of the Letters Patent. Plaintiffs asked that the first defendant might be ordered to account for the estate which had come to his hands as an executor *de son tort*; for an administration order, for the appointment of a Receiver, and that they may be put in possession of their shares. On objection being raised as to the jurisdiction of the Court to entertain the suit:

Held, that the suit was one for land or other immoveable property within the meaning of article 12 of the Letters Patent in so far as it claims a share of the houses and lands outside the jurisdiction.

Held also, that the Court had jurisdiction to entertain the suit in so far as it related to the moveable property situated within the jurisdiction.

The Court may decree a partition of the moveable property within its jurisdiction while declining jurisdiction as to immoveable property situate outside the jurisdiction.

SUIT for partition amongst the members of a Mahomadan family. The plaintiffs alleged that the first defendant had made himself executor *de son tort* of their father's estate, which consisted of the capital and profits of a certain business in Madras and houses and lands situated at Vaniyambadi outside Madras. They prayed, that accounts may be taken of the estates of their father and grandfather, and for the administration of these estates by the Court and to be put in possession of their respective shares in these estates. No leave to sue had been obtained. At the settlement of issues, objection was taken that the Court had no

* Original Side Appeal No. 8 of 1904, presented against the judgment of Mr. Justice Moore, dated the 19th day of January 1904, and from the order of 22nd December 1903 therein embodied and made in Civil Suit No. 121 of 1903.

jurisdiction to entertain the suit, on the ground, that a portion of the claim related to immoveable property, and the whole of that immoveable property was situated outside the jurisdiction. On this objection, Mr. Justice Moore passed the following order:

"It is clear to me that as the plaint stands I have no jurisdiction to try this suit. There is immoveable property for a share of which the plaintiffs sue, and as the whole of that immoveable property is beyond the jurisdiction of the Court, the Court has no jurisdiction with respect to it (*Jairam Narayan Raje* v. *Atmaram Narayan Raje*(1) and *Seshagiri Rau* v. *Rama Rau*(2)). Mr. Chamier, however, for the plaintiffs proposes to abandon his claim in so far as the immoveable property is concerned and proceed with the remainder of the suit. I am very doubtful if this can be done, although the wording of the judgment of West, J., and Shephard, J., in the cases that I have quoted appear to contemplate the Court deciding in a suit by Hindus for partition that it has no jurisdiction to divide the immoveable property and proceeding to divide the moveable property of the family. If the plaintiffs wish to proceed further with the suit they should put in a formal application to the Court for leave to abandon the claim in respect to the immoveable property and proceed with the remainder of their claim. The question as to whether this can be done will be considered and decided if such an application is made."

Subsequent to this order, plaintiffs filed a Judge's summons, calling upon the parties to show cause why the plaint should not be amended by omitting therefrom so much as related to immoveable property situate outside the jurisdiction of the Court. On this Judge's summons, Mr. Justice Moore passed the following order:—

"Mr. Chamier, on behalf of the plaintiffs, has not found it advisable to adopt the suggestion made in the above order that he should put in a formal application for leave to abandon the claim in respect to the immoveable property and proceed with the remainder of the claim. What he now applies for is leave to amend the plaint by omitting therefrom so much as relates to immoveable property outside the jurisdiction of the Court leaving it to his clients to file hereafter a suit elsewhere for partition of

(1) I.L.R., 4 Bom., 482. (2) I.L.R., 19 Mad., 448.

ABDUL KARIM SAHIB v. BADRUDEEN SAHIB.

the family immoveable property. It is left to the option of the Court to give or refuse leave to amend a plaint under section 53, Civil Procedure Code. I am decidedly of opinion that this is not a case in which the leave asked for should be given. This is a suit for the partition of family property. The whole of the immoveable property possessed by the family lies outside the jurisdiction of this Court. The plaintiffs proposed, in the first instance, to bring a suit in this Court for the division of the moveable family property, leaving it open to them subsequently to bring a second partition suit for the division of the immoveable property in the District Court having jurisdiction. I am not prepared to offer facilities towards the adoption of this course. If the plaintiffs had already filed their suit for the partition of the immoveable property in the District Court, I could, under clause 13 of the Letters Patent, transfer that case here and try the whole matter in one suit. This, however, they have not thought it advisable to do. As has already been pointed out the Court has no jurisdiction to try the suit as brought. Such being the case as it does not appear to me to be advisable to permit the plaint to be amended as prayed for, the only course open to me is to dismiss this suit. I should have preferred to have returned the plaint for presentation to the proper Court under section 57 of the Civil Procedure Code, but this I have no power to do (*vide* section 638). I may add that having gone through the decisions again I am very doubtful if either West, J., in *Jairam Narayan Raje* v. *Atmaram Narayan Raje*(1) or Shephard, J., in *Seshagiri Rau* v. *Rama Rau*(2) can be considered to have decided that it would be open to this Court to allow the suit in so far as the immoveable property is concerned to be abandoned and to proceed to divide the moveable property. West, J., indeed points out that Chief Justice Sausse seemed "to have thought that the Supreme Court could decree a partition of the moveable property within its own jurisdiction while declining jurisdiction as to the immoveable estate which lay beyond it" and goes on to give his reasons for doubting if under the Letters Patent the High Court could adopt such a procedure."

"This suit is dismissed with costs."

Plaintiffs filed this appeal.

(1) I.L.R., 4 Bom., 482. (2) I.L.R., 19 Mad., 448.

ABDUL KARIM SAHIB v. BADRUDEEN SAHIB.

Mr. Chamier for appellant.—The appeal is supported on two grounds: first, that the suit is maintainable as the plaint stands and is not a "suit for land" within the meaning of article 12 of the Letters Patent. All the relief asked for may be obtained by an order *in personam* against the first defendant. He may be ordered to account, and, if necessary, to sell the only house that forms part of the estate. Of the two houses mentioned in the plaint the family house has been disposed of in the settlement with second defendant, and that which still forms portion of the estate is alleged to have been purchased in the course of the administration of the family property. Possibly it was wrongly purchased. The plaintiffs do not want it or a share in it. It may be kept by the first defendant, who may account for its value. The second ground is that at any rate plaintiffs should be allowed to amend their plaint by omitting any mention of the house in it. Then, it cannot be a suit for land, because the whole of the property which remains is moveable property and it is all situated within the jurisdiction. The suit will then be one for partition of all the family property excepting that which is outside the jurisdiction. Such a suit is maintainable (see *Subba Rau* v. *Rama Rau*(1)). [Subrahmania Ayyar, J., referred to *Pattaravy Mudali* v. *Audimula Mudali*(2).] In *Balaram* v. *Ramchandra*(3) Candy, J., allowed the suit to proceed in so far as it related to immoveable property within the jurisdiction. That was a stronger case because there a portion of the immoveable property was within the jurisdiction, and consequently the plaintiff might have obtained leave, in which case the Court would have had jurisdiction to decree partition over the whole of the family property. In the present case, no leave could have been given as the only immoveable property is situated beyond the jurisdiction, so that there is greater reason why the plaintiff should be allowed to proceed with the suit in so far as it relates to property within the jurisdiction. In *Seshagiri Rau* v. *Rama Rau*(4), Shephard, J., dismissed the suit only so far as immoveable property beyond the jurisdiction was concerned. In *Jairam Narayan Raje* v. *Atmaram Narayan Raje*(5), West, J., did the same.

(1) 3 M.H.C.R., 376. (2) 5 M.H.C.R., 419.
(3) I.L.R., 22 Bom., 922. (4) I.L.R., 19 Mad., 448.
(5) I.L.R., 4 Bom., 482.

ABDUL KARIM SAHIB v. BADRUDEEN SAHIB.

Mr. Richmond and Mr. Tirunarainachariar for respondent.—The suit is one for land within the meaning of article 12.

[He was heard only as to whether the amendment should be allowed.]

If the suit is for land it should be dismissed (see *Hara Lall Banerjee* v. *Nitambini Debi*(1)). The Letters Patent contemplate suits "for land" and "other cases", and the proviso as to leave relates to suits for land as well as to "other cases" (see *Seshagiri Rau* v. *Rama Rau*(2) and *Jairam Narayan Raje* v. *Atmaram Narayan Raje*(3)). A suit which is in part for land outside the jurisdiction and for moveable within the jurisdiction is not provided for, and the Court has no jurisdiction to entertain such a suit. The plaintiff should sue for partition in the District Court in whose jurisdiction the land is situated. There he can obtain a decree for partition of the entire family property. The defendant should not have to defend two suits. When the two cases in the High Court Reports were decided, the old Code of Civil Procedure was in force.

JUDGMENT.—This is an appeal from the judgment of Moore, J., dismissing the suit for want of jurisdiction on the ground that it was a suit for land outside the limits of the jurisdiction of the High Court and refusing to give the plaintiffs leave to amend their plaint by omitting therefrom so much as related to land outside the jurisdiction.

The first defendant is the son of one T. Meerudeen Sahib and uncle of the plaintiffs. The plaintiffs allege that the first defendant has made himself executor *de son tort* of their father's estate. They ask that accounts may be taken of the estates of their father and of their grandfather T. Meerudeen Sahib and for the administration of these estates by the Court. They also ask that they may be put in possession of their shares in these estates. The plaint alleges that the property, of which they claim a share, consists of the capital and profits in certain businesses in Madras and of a house and land which have been described as the family house situated at Vaniyambadi and another house and land also situated at Vaniyambadi bought out of monies realized by the sale of T. Meerudeen Sahib's estate. As regards the family house

(1) I.L.R., 29 Calc., 315. (2) I.L.R., 19 Mad., 448. (3) I.L.R., 4 Bom., 482.

ABDUL KARIM SAHIB v. BADRUDEEN SAHIB.

the plaint alleges an agreement between the first defendant and his brother the second defendant that the latter should receive a lump sum in cash and the house and land in satisfaction of his claims against the estate of T. Meerudeen Sahib. If the plaintiffs are entitled, as they allege, to a share of T. Meerudeen Sahib's estate, it is clear that this arrangement is not binding on them.

We are of opinion that the present suit is a suit "for land or other immoveable property within the meaning of article 12 of the Letters Patent in so far as it claims a share of the houses and lands outside the jurisdiction. The plaintiffs claim to be put in possession of certain properties and the plaint alleges that these properties consist in part of land. The fact that the estates of which they claim a share consist in part of moveable property does not make the suit any the less a suit for land in so far as it is a suit in which a share of houses and lands outside the jurisdiction is claimed. The present case is clearly distinguishable from the case in *Shamanna* v. *Krishna Ayyangar*(1) to which our attention has been called. In that case the claim with regard to the land outside the jurisdiction was merely auxillary and incidental to the main relief claimed and full relief could be given in the suit without having recourse to the land out of the jurisdiction. The present case is also distinguishable from the case in *Nistarini Dassi* v. *Nundo Lall Bose*(2). In that case an administration action was brought against the executors of a will charging them with mal-administration and asking that certain leases of land outside the jurisdiction which had been granted by the executors to themselves might be set aside In that case there was no question as to the title to the property. The suit then, as Stanley, T., puts it (page 921), was merely "to have (the) property administered under the direction of the Court and for this purpose if it be found that the trustees or executors have been guilty of mis-appropriation of assets or mal-administration of the estate to compel them personally to make amends." This does not turn the suit into one for the recovery of immoveable property. Conversely, it may be said that the prayer in the plaint in the suit before us that the estates may be administered by the Court in order that the amount of the plaintiff's shares in the property may be ascertained, with a view to

(1) O.S.A. No. 27 of 1901 (unreported). (2) I.L.R., 26 Calc., 891.

ABDUL KARIM SAHIB v. BADRUDEEN SAHIB.

their shares being handed over to them by the first defendant does not turn this suit into an administration suit. In a case of *Hara Lall Banerjee* v. *Nitambini Debi*(1), a suit for a declaration that the plaintiff was entitled to possession of properties moveable and immoveable, the latter being wholly situated outside the jurisdiction, for the construction of a will, and for an account and for administration of the testator's estate, was held to be a suit for land.

The further question remains—ought leave to amend the plaint to have been given? If the Court has jurisdiction to try the suit except in so far as it is a suit for land outside the jurisdiction, we think that the suit ought only to be dismissed in so far as it relates to land outside the jurisdiction, or that leave to amend the plaint by omitting therefrom so much as related to land outside the jurisdiction ought to be given. The learned Judge was disposed to hold—though he did not refuse the application for leave to amend upon this ground—that it was not open to the Court to decree a partition of the moveable property within the jurisdiction while declining jurisdiction as to the immoveable property outside the jurisdiction. We do not take this view.

In the case in *Seshagiri Rau* v. *Rama Rau*(2) where the suit was for a partition of moveable property within the jurisdiction and land outside the jurisdiction leave under article 12 having been obtained, the objection that the Court had no jurisdiction to try the suit was upheld only as regards the land outside the jurisdiction. In the case of *Jairam Narayan Raje* v. *Atmaram Narayan Raje*(3) the suit was of a similar character and it was dismissed as regards the land outside the jurisdiction only. In the latter case the observations of West, J., to which Moore, J., refers in his judgment were made with reference to the question whether leave to sue could properly be given, not with reference to the question whether the Court had jurisdiction as regards the property within the local limits of the jurisdiction. This is clear from the fact that the Court allowed the case to proceed with reference to the moveable property within the limits of the jurisdiction. Seeing that in both these cases, although the point does not appear to have been argued, the suit was only dismissed as

(1) I.L.R., 29 Calc., 315. (2) I.L.R., 19 Mad., 448. (3) I.L.R., 4 Bom., 482.

ABDUL KARIM SAHIB v. BADRUDEEN SAHIB.

regards the land outside the jurisdiction, it must be taken that the learned Judges were of opinion that the Court had jurisdiction as regards the moveable property within the jurisdiction. The fact that in these cases leave was obtained is immaterial. The leave, of course, was applied for and granted upon the assumption which was not well founded, that leave could properly be given when the land lay wholly outside the jurisdiction. If in the present suit the amendment asked for is made, the suit becomes one for which leave is not necessary and under the decisions, which are uniform on this point, leave cannot be given.

In *Balaram* v. *Ramchandra*(1) the same view was taken as that adopted in the two cases above referred to and the case was allowed to proceed as regards the property within the jurisdiction. In the last-named case the property within the jurisdiction was land and the suit was dismissed as regards the land out of the jurisdiction on the ground that leave to sue had not been obtained.

But the point was taken in argument that as the suit was a suit for partition, it must include all the property alleged to be liable to partition and as it could not be so framed without the leave of the Court having been first obtained, the suit was in its inception bad and should be dismissed. The Court, however, after reviewing the authorities upon the question, held that the suit could proceed as regards the property within the jurisdiction. The fact that in this case the property within the jurisdiction was land, whilst in the case before us the property within the jurisdiction is moveable property makes no difference so far as the construction of article 12 of the Letters Patent is concerned.

The cases in *Subba Rau* v. *Rama Rau*(2) and *Pattaravy Mudali* v. *Audimula Mudali*(3) are authorities in support of the view that in a suit for partition the fact that a portion of the common property lies outside the jurisdiction of the Court in which the suit was brought does not in itself bar the maintenance of the suit. If for the purpose of doing complete justice between the parties it is necessary that a suit should be stayed pending the institution of a suit in the Court within whose jurisdiction the immoveble property is situate, that course might be adopted. Whether this course should be adopted would depend upon the facts of the particular case. On

(1) I.L.R., 22 Bom., 922. (2) 3 M.H.C.R., 376. (3) 5 M.H.C.R., 419.

ABDUL KARIM SAHIB v. BADRUDEEN SAHIB.

the materials before us it does not appear that any such course is necessary for the purpose of doing complete justice between the parties in the present case.

We must therefore set aside the decree of the learned Judge in so far as it relates to the claim of the plaintiffs in respect of property other than the land outside the jurisdiction and direct that the suit be restored in so far as it relates to the moveable property within the limits of the jurisdiction. In this view it is unnecessary to make any order on the application for leave to amend the plaint. Costs before Moore, J., and in this Court will be costs in the cause.

Messrs. *Branson & Branson*, attorney for appellants.

Mr. *James Short*, attorney for respondents.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Sankaran Nair.

1904. October 20, 26.

ABDULLA SAHIB AND OTHERS (COUNTER-PETITIONERS Nos. 1 TO 3 AND JUDGMENT-DEBTORS), APPELLANTS,

v.

DOCTOR OOSMAN SAHIB (PETITIONER AND ATTACHING DECREE-HOLDER), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, ss. 230, 295—Mortgage decree—Decree for money—Application for execution—Limitation.

Where a decree directs a defendant to pay money to the plaintiff and in default the property mortgaged is to be sold and the balance, if any, is to be realized from the other properties of the defendants:

Held, that this was a 'decree for money' within the meaning of section 230 of the Code of Civil Procedure.

Kommachi Kather v. *Pakker*, (I.L.R., 20 Mad., 107), followed.

Katrick Nath Pandey v. *Juggernath Ram Marwari*, (I.L.R., 27 Calc., 285), differed from.

An application for attachment of certain property cannot be treated as an application to execute a decree which directs the sale of that property.

Jogemaya Dassi v. *Thackomoni Dassi*, (I.L.R., 24 Calc., 473), approved.

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* Civil Miscellaneous Appeal No. 4 of 1904, presented against the order of L. G. Moore, Esq., Acting District Judge of Trichinopoly, in Civil Miscellaneous Petition No. 330 of 1903 (Execution Petition No. 290 of 1901), in Original Suit No. 23 of 1887.

ABDULLA SAHIB v. DOCTOR OOSMAN SAHIB.

APPEAL against the order of the District Court, Trichinopoly.

The facts of this case were stated by the Acting District Judge in his order as follows:

"This is an application under sections 284 and 287 of the Code of Civil Procedure to settle a proclamation of sale. The petitioner is the attaching decree-holder in Original Suit No. 23 of 1887 in the Trichinopoly District Court. Petitioner was the assignee decree-holder in Original Suit No. 27 of 1890, and in execution of the decree which he obtained in that suit, attached the decree in Original Suit No. 23 of 1887. The date of the decree in Original Suit No. 23 of 1887 is 29th July 1889. The application for the attachment of certain immoveable properties belonging to respondents Nos. 1 to 4 was presented to this Court on 27th July 1901. Attachment was ordered in due course and on 24th March 1903 petitioner applied for sale of the attached properties. It is contended on behalf of respondents Nos. 1 to 3 that the sale application is out of time and barred under section 230 of the Code of Civil Procedure, as the application to execute the decree was not made within 12 years of the date of the decree."

The petitioner contended that the decree in Original Suit No. 23 of 1887, execution of which was sought, was a mortgage decree to which section 230 of the Code of Civil Procedure did not apply.

The Acting District Judge accepted the view contended for by the petitioner and held that the application was not barred under section 230 of the Code of Civil Procedure.

The appellants (counter-petitioners) preferred this appeal.

T. Natesa Ayyar for appellant.

T. V. Seshagiri Ayyar for respondent.

JUDGMENT.—This is an application to execute the decree in Original Suit No. 23 of 1887 on the file of the District Court of Trichinopoly. The application is opposed on the ground that it is barred under section 230, Civil Procedure Code. The District Judge has held that the application is not so barred, as it is not a decree for money under section 230, Civil Procedure Code, following the case reported in *Katrick Nath Pandey* v. *Juggernath Ram Marwari*(1). He also expresses his opinion that the case in *Kommachi Kather* v. *Pakker*(2) is not opposed to the ruling in *Katrick Nath Pandey* v. *Juggernath Ram Marwari*(1).

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(1) I.L.R., 27 Calc., 285. (2) I.L.R., 20 Mad., 107.

ABDULLA SAHIB v. DOCTOR OOSMAN SAHIB.

The contention before us is that this case is governed by the ruling in *Kommachi Kather* v. *Pakker*(1), which is inconsistent with the decision of the Calcutta High Court, and that the Judge ought to have followed the decision of this Court.

The decree in this case runs as follows:—"The Court doth order and decree that plaintiff do recover the amount sued for, viz., Rs. 4,151-14-0 from defendants Nos. 1 to 4 with costs and subsequent interest on the principal sum, viz., Rs. 3,500 at 6 per cent. per annum from date of plaint, that is, 10th August 1887, to date of realization that, if the amount be not made good within six months from this date, the hypothecated property specified here below shall be sold in satisfaction thereof that for any balance that may be due after sale of the hypothecated property, the other properties of defendants Nos. 1 to 4 shall be sold and that the person of the fourth defendant shall be held liable and that the other defendants shall bear their own costs."

We are of opinion that this case is on all fours with the decision in *Kommachi Kather* v. *Pakker*(1). The decree, as in that case, directs the defendants to pay the money to the plaintiff and in default the property mortgaged is to be sold and the balance is to be realized from the other properties of the defendants.

That the section then under consideration was 295, Civil Procedure Code, makes no difference. The distinction, if any, is in favour of the judgment-debtor. The words in section 230 being "a decree for payment of money". We must, therefore, follow this decision in preference to *Katrick Nath Pandey* v. *Juggernath Raw Marwari*(2), which expressly dissents from it.

The application dated the 24th March 1903 for the sale of the mortgaged property is thus clearly barred by section 230, Civil Procedure Code, if it is to be treated as an application to execute the decree which is dated the 29th July 1889.

But it is contended that there was an application for attachment which was made within 12 years and that the attachment then made is still subsisting and that this application for sale is merely a continuance of that proceeding as a sale has to be carried out by a Court after the attachment of the property without even any application for the same. This contention cannot be supported. An application for attachment of certain property cannot be

(1) I.L.R., 20 Mad., 107. (2) I.L.R., 27 Calc., 285.

ABDULLA SAHIB v. DOCTOR OOSMAN SAHIB.

treated as an application to execute a decree which directs the sale of that property. As pointed out in *Jogemaya Dassi* v. *Thackomoni Dassi*(1), the properties attached being mortgaged properties could not be brought to sale under the attachment and the attachment must therefore be treated as ineffective and infructuous. It is only the present application for sale that can be treated as an application to execute the decree and it is made after 12 years.

The appeal must therefore be allowed, the order of the lower Court reversed and the application for sale dismissed with costs.

APPELLATE CIVIL.

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

MATURI SUBBAYYA (PLAINTIFF), APPELLANT,

v.

KOTA KRISHNAYYA (DEFENDANT), RESPONDENT.*

1904. September 22. October 31.

Civil Procedure Code—Act XIV of 1882—Suit for the determination of any right to or interest in immoveable property—Suit for the recovery of purchase money under contract for the sale of land—Jurisdiction.

A suit for the recovery of unpaid purchase money under a contract for the sale of land is a suit "for the determination of any right to or interest in immoveable property" within the meaning of section 16, clause (*d*) of the Code of Civil Procedure.

John Young v. *Mangalapilly Ramaiya*, (3 M.H.C.R., 125), and *His Highness Shrimant Maharaj Yashvant Ray Holkar* v. *Dadabhai Cursetji Ashburner*, (I.L.R., 14 Bom., 353), referred to and distinguished.

THIS was an appeal against the order of the District Court of Kistna, against the decree of the District Munsif of Masulipatam.

The facts material to the case are fully set out in the judgment.

Dr. *S. Swaminadhan* and *T. Ramachandra Rau* for appellant.

E. Venkataramasarma for respondent.

(1) I.L.R., 24 Calc., 473 at p. 480.

* Civil Miscellaneous Appeal No. 71 of 1904, presented against the order of V. Venugopal Chetty, Esq., Acting District Judge of Kistna, in Appeal Suit No. 222 of 1903, presented against the decree of M.R.Ry. S. Ramaswami Ayyar, District Munsif of Masulipatam, in Original Suit No. 111 of 1902.

MATURI SUBBAYYA v. KOTA KRISHNAYYA.

JUDGMENT.—In this case the plaintiff brought a suit in the Court of the District Munsif of Masulipatam for the purchase money alleged to be due to him by the defendant under a contract for the sale of land. The contract was entered into, and the defendant resides, within the jurisdiction of the District Munsif of Masulipatam. The land is situate within the jurisdiction of the District Munsif of Gudivada. In his plaint the plaintiff alleges he is ready and willing to execute a conveyance in accordance with the contract of sale. The defence is, in effect, a false representation on the part of the plaintiff as to the extent of the land sold. The District Munsif of Masulipatam held that he had jurisdiction to try the suit. The District Judge held that he had no jurisdiction and ordered that the plaint should be returned for presentation to the proper Court. The question for determination is whether a suit for the recovery of unpaid purchase money under a contract for the sale of land is a suit "for the determination of any other right to, or interest in immoveable property" within the meaning of section 16 (*d*) of the Code of Civil Procedure. In the case of *John Young* v. *Mangalapilly Ramaiya*(1), it was no doubt held by this Court that an action could be brought for the purchase money under a contract for the sale of land in the Court within the jurisdiction of which the contract was entered into, notwithstanding that the land was situate outside the jurisdiction. The enactment in force at the time this case was decided was section 5 of Act VIII of 1859. The language of that enactment was not "suits for the determination of any other right to or interest in immoveable property" as in the present Code but "suits for land or other immoveable property". Section 16 of the present Code after referring in (*a*), (*b*) and (*c*) to certain classes of suits relating to land, refers in (*d*) in general terms, to suits for the determination of any other right to, or interest in land. We do not think the case referred to can be regarded as an authority on the construction of section 16 (*d*) of the Code now in force. The cases of *His Highness Shrimant Maharaj Yashvantray Holkar* v. *Dadabhai Cursetji Ashburner*(2) and *Land Mortgage Bank* v. *Sudurudeen Ahmed*(3) where it was held that the High Court had jurisdiction to try a suit for specific

(1) 3 M.H.C.R., 125. (2) I.L.R., 14 Bom., 353.
(3) I.L.R., 19 Calc., 358.

MATURI SUBBAYYA v. KOTA KRISHNAYYA.

performance of a contract entered into within the local limits of the original jurisdiction, the land being outside the jurisdiction, were decisions under article 12 of the Letters Patent, the language of the article being the same as that of section 5 of the Act of 1859, viz., "suits for land or other immoveable property". The present case does not fall within the proviso to section 16, since it is clear that the land sold is not held by the defendant and it cannot be said that it is held by the plaintiff on his behalf. We are of opinion that the suit is one which comes within section 16 (*d*) of the Code. The appeal is dismissed with costs.

APPELLATE CIVIL.

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

KULAIKADA PILLAI AND ANOTHER (DEFENDANTS NOS. 1 AND 2), APPELLANTS,

1904. November 3, 8, 28.

v.

VISWANATHA PILLAI AND ANOTHER (THIRD DEFENDANT AND PLAINTIFF), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, ss. 544, 561—Practice—Appeal—Appeal by one defendant making co-defendants and plaintiffs party respondents—No appeal or memorandum of objections filed by plaintiff—Relief granted to plaintiff-respondent in decree of Appellate Court—Appellate Court—Procedure—Jurisdiction.

Where a respondent to an appeal fails to give the notice required by section 561 of the Code of Civil Procedure, it is not open to the Appellate Court to grant any relief to that respondent, in a case, where the granting of such relief is not necessarily incidental to the relief granted to a party who has appealed.

Soiru Padmanabh Rangappa v. *Narayan Rao Bin Vithal Rao*, (I.L.R., 18 Bom., 520), distinguished.

Hudson v. *Basdeo Bajpye*, (I.L.R., 26 Calc., 109), referred to.

Rup Jaun Bibee v. *Abdul Kadir Bhuyan*, (I.L.R., 31 Calc., 643), referred to and commented on.

* Second Appeal No. 1376 of 1902, presented against the decree of M.R.Ry. S. Doraisamy Ayyangar, Subordinate Judge of Tinnevelly, in Appeal Suit No. 309 of 1901, presented against the decree of M.R.Ry. P. S. Seshia Ayyar, District Munsif of Srivaikuntam, in Original Suit No. 491 of 1900.

KULAIKADA PILLAI v. VISWANATHA PILLAI.

SUIT to recover possession of certain property from the defendants under an alleged contract of sale, or for the return by the third defendant of the purchase money in the event of the sale by him being found invalid. The District Munsif held that the claim in so far as it related to the recovery of the property was barred by limitation. He gave judgment for the plaintiff against the third defendant for the return of the purchase money. Against this decree the plaintiff did not appeal. The third defendant appealed, making the first and second defendants and the plaintiff, respondents. The plaintiff-respondent did not file a memorandum of objections as required by section 561 of the Code of Civil Procedure. The Subordinate Judge, in reversing the decree of the District Munsif, said: "The District Munsif, holding that the plaintiff is not entitled to possession of the one-third share sold to him on the ground of limitation, has given a decree for the amount of the purchase money against the third defendant and as in this appeal preferred by the third defendant it is found that the plaintiff is entitled to possession though the plaintiff does not press in appeal the claim for possession, I have, while reversing the District Munsif's decree, to grant to the plaintiff the other relief to which he is entitled. The District Munsif's decree is reversed and in its place there will be a decree directing the delivery of one-third of plaint property to him and the payment of the plaintiff's costs of suit and the third defendant's costs of this appeal by the defendants Nos. 1 and 2."

Against this decree the first and second defendants preferred this second appeal.

M. R. Ramakrishna Ayyar for appellant.

V. Krishnaswamy Ayyar for first respondent.

P. R. Sundara Ayyar for second respondent.

JUDGMENT—Sir ARNOLD WHITE, C.J.—This is a suit in which the plaintiff claims to recover certain property from the defendants on the ground of an alleged sale to him by the third defendant, or, in the event of the sale being found invalid, for the return by the third defendant of the purchase money paid to him by the plaintiff. The District Munsif held on the ground of limitation that the plaintiff was not entitled to recover the property, dismissed the claim for possession, and gave judgment for the plaintiff against the third defendant for the recovery of the purchase money. The third defendant appealed. The plaintiff did not appeal against the

KULAIKADA PILLAI v. VISWANATHA PILLAI.

dismissal of his suit for possession against defendants Nos. 1 and 2. The Subordinate Judge set aside the Munsif's decree for the recovery of the purchase money, and gave a decree for the plaintiff on his claim for possession against defendants Nos. 1 and 2. The third defendant made the plaintiff a respondent to the appeal to the lower Appellate Court. The plaintiff appealed and was represented at the hearing of the appeal, but it does not appear whether he took any part in the argument. The Subordinate Judge observes that he did not press, in appeal, his claim for possession.

One thing however is quite clear, and that is that he did not file any notice of objection to the decree under section 561 of the Code of Civil Procedure. It would seem that before the lower Appellate Court he was content with the decree given him by the Court of First Instance against the third defendant for the recovery of his purchase money. The first and second defendants have appealed to this Court against the decree of the lower Appellate Court and have made the third defendant and the plaintiff respondents to the appeal. Before this Court the plaintiff supports the decree for possession given him by the lower Appellate Court. I am of opinion that the decree of the lower Appellate Court cannot be upheld.

For the purposes of my judgment I assume that the suit is not bad for misjoinder. This point was raised before us on behalf of the appellants, but the point was not taken before the lower Appellate Court, and I do not think the appellants ought to be allowed to raise it here.

A good deal of argument was directed to the question whether the plaintiff, having regard to the form in which he made his claim, had any right of appeal against the decree of the District Munsif. The argument on behalf of the plaintiff was that as his claim was in the alternative, and he had obtained a decree on one branch of his claim he had no right of appeal, and that as much as he had no right of appeal, it was not open to him to give the notice required by section 561, and this being so, the lower Appellate Court had power to give a decree in his favour, notwithstanding the fact that the notice required by the section had not been given. I should be disposed to hold that section 561 only applies where a party, has a right of appeal but who until forced, or "invited" into Court does not think fit to exercise it. But it is not necessary to decide this question.

KULAIKADA PILLAI v. VISWANATHA PILLAI.

It seems to me that where a respondent to an appeal fails to give the notice required by section 561, it is not open to the Appellate Court to grant any relief to that respondent in a case where the granting of such relief is not necessarily incidental to the relief granted to a party who has appealed. This is obviously not the case here, for the lower Appellate Court could have given full relief to the appellant before that Court by simply setting aside the decree which had been obtained against him. This may seem to be a somewhat narrow ground on which to determine a question of jurisdiction but the powers of an appellate tribunal are the creature of statute and unless power to give such a decree as was given by the lower Appellate Court in this case is to be found in the provisions of the Code, the decree cannot be supported. We are asked to say that the case comes within section 544 of the Code since before the lower Appellate Court, the plaintiff and the third defendant were equally interested in maintaining the title of the third defendant to convey to the plaintiff; that before the lower Appellate Court the third defendant was really in the position of a plaintiff, seeking to make out as against defendants Nos. 1 and 2 his right to convey to the plaintiff, and that the decree appealed against proceeded on a "ground common to all the plaintiffs." I do not think the section can be so construed. Even if it could, it is quite clear that the decree appealed against, did not proceed on a ground common to the plaintiff and the third defendant since it was a decree in favour of the plaintiff against the third defendant. Neither can it be said that the decree appealed against proceeded on a ground common to all the defendants since it was not the case of the third defendant that the plaintiff's claim for possession as against defendants Nos. 1 and 2 was barred by limitation. The powers of the Court of Appeal in England are regulated by Order LVIII of the Rules of the Supreme Court.

Rule 4 of this order is no doubt wide enough to cover a case like the present. But the powers of this Court are those given by the Code, and, under the provisions of the Code, in the absence of the notice of objection required by section 561, it seems to me there was no power in the lower Appellate Court to give the decree which is now before us. As regards the authorities in the case of *Timmayya* v. *Lakshmana*(1) the notice required by

(1) I.L.R., 7 Mad., 215.

KULAIKADA PILLAI v. VISWANATHA PILLAI.

section 561 had been given by the party who had been made a respondent. The case of *Soiru Padmanabh Rangappa* v. *Narayan Rao* bin *Vithal Rao*(1) may be distinguished on the ground that the relief granted by the Appellate Court to the plaintiff who had not appealed was necessarily incidental to the relief granted to the first defendant, who had appealed, as against the second defendant. The case of *Hudson* v. *Basdeo Bajpye*(2) where a party was added as a respondent to an appeal when no appeal had been made against him, was a decision under section 559 of the Code and the party was added on the ground that he was "interested in the result of the appeal." In the case of *Bishunchurn Roy Choudhry* v. *Jogandra Nath Roy*(3) where the plaintiff was not allowed to urge his cross objections against the non-appealing defendants, the notice required by section 561 had in fact been given by him.

In a recent case decided by a Full Bench of the Calcutta High Court (*Rup Jaun Bibee* v. *Abdul Kadir Bhuyan*(4)), the suit was one for contribution in which the plaintiff asked for relief against several defendants separately. The Court of First Instance gave a decree against defendant No. 1 and dismissed the suit against defendant No. 2. The plaintiff did not appeal. Defendant No. 1 appealed and made defendant No. 2 a respondent. The lower Appellate Court allowed the appeal of defendant No. 1 and gave the plaintiff a decree against defendant No. 2 instead of against defendant No. 1. On a reference to a Full Bench the decree of the lower Appellate Court was upheld, but the judgment was expressly limited to the case of a suit for contribution. The Full Bench declined to answer the general question referred to them. The question whether an Appellate Court can give relief to a respondent who has not given the notice required by section 561 of the Code was not considered. I think the decree of the lower Appellate Court for possession by the plaintiff as against defendants Nos. 1 and 2 must be set aside. The appellants must pay the costs of the third defendant before this Court. We make no further order as to the costs of this appeal.

SUBRAHMANIA AYYAR, J.—The appellant before us brought the suit out of which the appeal arises, in the District Munsif's Court for the partition and delivery of certain lands setting

(1) I.L.R., 18 Bom., 520.
(2) I.L.R., 26 Calc., 109.
(3) I.L.R., 26 Calc., 114.
(4) I.L.R., 31 Calc., 643.

KULAIKADA PILLAI v. VISWANATHA PILLAI.

up title thereto under a purchase from the third defendant who was himself vendee of the same from the widow of a deceased brother of the first and second defendants. The plaintiff also prayed that in the event of its being found that his vendor had no right to convey the lands the latter may be directed to refund Rs. 300, the price paid by the plaintiff. The District Munsif being of opinion that defendants Nos. 1 and 2 had for the statutory period held adverse possession of the share of their deceased brother as against the widow, dismissed the suit for partition and delivery of the lands, and gave a decree to the plaintiff for Rs. 300 against the third defendant. This defendant preferred an appeal against the decree so given against him, impleading, as respondents not only the plaintiff but defendants Nos. 1 and 2 also. The plaintiff preferred no appeal against so much of the decree of the District Munsif as related to the dismissal of the suit for the lands nor preferred a memorandum of objections in the matter under section 561 of the Civil Procedure Code. The Subordinate Judge who heard the appeal having differed from the Munsif with reference to the question of adverse possession by defendants Nos. 1 and 2, reversed practically the whole decree, dismissed the suit for money as against the third defendant and decreed the claim for land as against the first and second defendants. The question in the present appeal of the first and second defendants is whether it was competent to the Subordinate Judge to reverse so much of the decree of the Munsif as was in their favour.

There can be no doubt that when in an appeal the conclusion of the Appellate Court with reference to matters properly arising before it is such as to render any portion of the decree of the lower Court not made the subject of appeal inconsistent with such conclusion, it would be not only anomalous to leave such portion of the decree in force while setting aside only so much of it as was comprised in the appeal, but it might also involve a breach of the rules as to *res judicata*. Take for instance a suit brought on a bond for a sum of money and a decree given for the whole amount claimed, but an appeal is preferred only in respect of part of the amount decreed. If the Appellate Court should find that the whole claim is barred by limitation, it could not for that reason properly reverse the decree in so far only as it was appealed against, for the decree so far as it has not been appealed against

KULAIKADA PILLAI v. VISWANATHA PILLAI.

carries with it the assumption that there is no bar by limitation, and a decree resting on such assumption being final, would preclude a finding by any other Court to the contrary with reference to any claim based on the same right and between the same parties. It would seem therefore that in cases such as that supposed the only consistent course is to dismiss the appeal or to reverse the whole decree.

How then does the matter stand with reference to the provisions of our Civil Procedure Code? In instances falling within section 544 of the Code the provisions thereof fully enable an Appellate Court to avoid anomalies. In other cases also the desirable result could be brought about if the Court in which the appeal is pending takes the precaution of requiring a memorandum of objections being presented to it. This course will meet all cases so far as this Presidency is concerned inasmuch as according to the decisions of this Court such a memorandum may legally be filed even when the question arises as between co-respondents only. Nor would there be any obstacle on the score of its late presentation since it would be a legitimate ground to excuse the delay that the admission of the memorandum is required to do complete justice as between all the parties to the litigation. The difficulty can only arise when, as in the present case, the Appellate Court has failed to have this necessary precaution adopted. The absence of a provision corresponding to Rule 4 of Order LVIII of the English Supreme Court Rules would, where the section 544 has no application, seem to preclude the modification by the Appellate Court of the decree of the lower Court in favour of a party who has filed neither an appeal nor a memorandum of objections except as part and parcel of relief necessary to be granted to an appellant. The language of section 574 of the Civil Procedure Code is wide enough to cover such an exception and *Soiru Padmanabh Rangappa* v. *Narayan Rao Bin Vithal Rao*(1) is a case that goes to support this view. It may be added that even with reference to the English Practice it was held by Jessel, M.R., and Cotton and Brett, L.JJ., in *In re Cavander's Trusts*(2) that a respondent who wishes to have the decree appealed against varied with reference to a matter in which the appellant has no interest must himself file a notice of appeal. As to *Rup Jaum*

(1) I.L.R., 18 Bom., 520. (2) L.R., 16 Ch.D., 271.

KULAIKADA PILLAI v. VISWANATHA PILLAI.

Bibee v. *Abdul Kadir Bhujan*(1) and the cases approved of therein, they are apparently in conflict with the above view of the effect of the provisions of the Code of Civil Procedure bearing on the point and if it is correct, it would follow that the Subordinate Judge had no power to reverse the decree as against the first and second defendants inasmuch as such reversal was not necessary to give relief to the appellant before him, viz., the third defendant who was disentitled to ask for anything more than the reversal of the decree directing him to refund the price, since, having sold the land, the right to claim present possession thereof had passed away from him so as to disentitle him to claim delivery.

I concur in the order proposed.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Sankaran Nair.

1904. September 15.

AIYAVU MOOPPAN (PLAINTIFF), APPELLANT,

v.

SAWMINATHA KAVUNDAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

Riparian owners—Water rights for irrigation where stream flows through separate estates—Relative rights of upper and lower proprietors on the banks to the use of the water—Action to enforce rights—Absence of proof of damage.

A riparian owner, where a stream flows in a channel down from a property higher up, is entitled to the flow of water without interruption and without substantial diminution caused by the upper proprietor, who may, for legitimate purposes withdraw so much of the water as will not materially lessen the downward flow on to his neighbour's land.

In order to support an action by one riparian owner to restrain another from diverting the water beyond his riparian tenement, it is not necessary that the plaintiff should prove that he has suffered any damage.

SUIT for an injunction. The District Munsif, who passed a decree in favour of the plaintiff, stated the facts as follows:—

The plaint sets forth that the plaintiff owns $2\frac{1}{4}$ kanis of nunja in the village of Muruvathore, Musiri Taluk, irrigated

(1) I.L.R., 31 Calc., 613.

* Second Appeal No. 565 of 1902, presented against the decree of H. G. Joseph, Esq., District Judge of Trichinopoly, in Appeal Suit No. 81 of 1901, presented against the decree of M.R.Ry. S. Ramasami Ayyangar, District Munsif of Kulitalai, in Original Suit No. 145 of 1900.

AIYAVU MOOPPAN v. SAWMINATHA KAVUNDAN.

by the waters of Perumal Karattar, that he has all along been raising nunja crop thereon, that, besides the plaintiff's lands, about 20 acres of others' nunja are being irrigated by the same, that the defendants have no right to the waters of the said river, that they own only punja lands, that east of the said river, there is another channel, that, for irrigating their punja lands with its water occasionally, the defendants' punja lands have been assessed with water-cess, that on account of defendants' diversion of the waters of the Perumal Karattar into a canal newly dug by them on 21st December 1898 and in consequence of the necessary diminution of the water-supply to the plaintiff's lands, the plaintiff has incurred damages to the extent of 50 kalams, and that the defendants are diverting the waters of the Perumal Karattar by putting up a dam across it.

On appeal the District Judge reversed the decree of the District Munsif and dismissed the plaintiff's suit, on the ground that the plaintiff had not sustained any damage.

Plaintiff filed this second appeal.

T. Rangachariar for appellant.

T. Natesa Ayyar for first and second respondents.

JUDGMENT.—We must allow this appeal. The District Judge has reversed the decree of the District Munsif solely on the ground that the plaintiff has not proved that he has sustained any damage. This is not sufficient for disposal of the case. A riparian owner, where a stream flows in a channel down from a property higher up, is entitled to the flow of water without interruption and without substantial diminution caused by the upper proprietor who may for legitimate purposes withdraw so much only of the water as will not materially lessen the downward flow on his neighbour's land (*Debi Pershad Singh* v. *Joynath Singh*(1)). If, therefore, the defendants are riparian proprietors at the place where the bund is erected and along the course where the water is carried and distributed, they are entitled to take it and use it so, unless they thereby cause a diminution of the flow of water to the plaintiff's riparian tenement. The owner of a tenement adjoining a natural stream has however no right to divert water to a place outside the tenement and there consume it even though he does not thereby diminish the flow of water to the lower

(1) I.L.R., 24 Calc., 865.

AIYAVU MOOPPAN v. SAWMINATHA KAVUNDAN.

riparian tenement (*McCartney* v. *Londonderry and Lough Swilly Railway*(1).

If, therefore, the diversion made by the defendants conducts the water of the river beyond their riparian tenement or if the diversion is made at a spot other than where the defendants' riparian tenement is, it is not necessary for the plaintiff to prove any damage or diminution in the water flowing to his riparian tenement in order to sustain his right of action.

In this case it is not found whether the defendants are riparian owners at the place where the diversion is made or whether the diversion is throughout within their riparian tenement or if it is carried beyond their riparian tenement at any point—all of which are necessary findings for the purpose of arriving at a proper determination of the rights of the parties. We therefore reverse the decree of the District Judge and remand the case to the lower Appellate Court for disposal according to law with due regard to the above observations. The costs will abide and follow the event.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Sankaran Nair.

1904. October 25.

JAGANNATHA CHARRY (RESPONDENT), APPELLANT,

v.

RAMA RAYER (PETITIONER), RESPONDENT.*

Specific Relief Act I of 1877, s. 9—Immoveable property—Actual and constructive possession—Landlord and tenant—Dispossession by third party—Suit by landlord—Maintainability.

A landlord holding possession through a tenant can bring a suit under section 9, Act I of 1877, to recover possession of property of which he has been dispossessed by the act of a third party.

Innasi Pillai v. *Sivagnana Desikar*, (C.R.P. No. 643 of 1893 *unreported*) followed.

LETTERS Patent appeal against the order passed by Davies, J., in the following terms :—

"There is no doubt to my mind that the only persons entitled to sue under section 9 of the Specific Relief Act are those in

(1) L.R., (1904) A.C., 301.

* Appeal No. 18 of 1904 under section 15 of the Letters Patent against the judgment of Mr. Justice Davies in Civil Revision Petition No. 424 of 1903.

JAGANNATHA CHARRY v. RAMA RAYER.

actual physical possession of the land at the time of dispossession and not persons in merely constructive possession. No cases are cited to the contrary." The plaintiff had therefore no cause of action under section 9 of the Specific Relief Act, and his suit is dismissed with costs in both Courts.

T. V. Seshagiri Ayyar for appellant.

T. V. Vaidyanatha Ayyar for respondent.

On the appeal the Court delivered the following

JUDGMENT.—We think this appeal must be allowed. The case is practically concluded by the decision in *Innasi Pillai* v. *Sivagnana Desikar*(1) which was affirmed on appeal in Letters Patent Appeal No. 44 of 1894. In that case it was held that the right to collect rent was immoveable property and that an action could be brought under section 9 of the Specific Relief Act for dispossession of that right. Here the tenant in possession was dispossessed immediately before his tenancy terminated and at the time of the action his tenancy had ceased. At the time of the dispossession the plaintiff, the landlord, was in possession by his tenant, and the physical possession of the latter as well as the constructive possession of the former were both terminated by the defendant. The only person whose possession was affected was really the landlord, for the tenant's interest terminated with his lease. At the time of suit the tenancy had ended and the landlord alone was the person deprived of possession by the defendant's wrongful act. To hold that the landlord in those circumstances was not entitled to bring the action would be to take away the right given by section 9 of the Specific Relief Act, in every case where the interest or the inclination of the tenant led him to decline to bring the action.

We agree with the case above cited which does not appear to have been cited before the learned Judge, and we reverse his decree and restore that of the District Munsif with costs.

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(1) C.R.P. No. 643 of 1893 (unreported).

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Sankaran Nair.

1904. October 20, 21, 26.

REFERENCE UNDER PRESIDENCY SMALL CAUSE COURT'S ACT, s. 69, AND RULE 428 OF THE RULES OF PROCEDURE OF THE COURT OF SMALL CAUSES.*

Indian Companies Act VI of 1882, ss. 136, 177—Voluntary liquidation—Loan made by Company prior to liquidation upon the security of deposit standing to credit of borrower—Action by liquidators to recover amount of loan—Plea—Set off—Validity—Presidency Small Cause Court Act XV of 1882, s. 69—Rules of Procedure of the Small Cause Court Rule 428.

The plaintiffs were liquidators of a company which went into voluntary liquidation in June 1901. The defendant, after he had ceased to be a shareholder in the company, deposited with the company a sum of money for a period of twelve months. Before the expiry of this period, the defendant applied to withdraw this amount. Being unable to get it, he applied to and obtained from the company a loan on the security of his deposit with interest at 12 per cent. on 14th December 1900. The company went into liquidation in June 1901. On 20th September 1901 an interim injunction was obtained restraining all creditors from suing the company. On 9th October 1901 this injunction was made absolute. On 9th November 1903 the liquidators brought this action to recover the loan and interest. The defendant pleaded a set-off of the amount due to him from the company under his deposit made on 16th July 1900:

Held, that the defendant was entitled to set off the amount of his deposit against the sum claimed.

Anderson's case (L.R., 3 Eq., 337) and *Sovereign Life Assurance Company* v. *Dodd* (L.R. (1892), 2 Q.B.D., 573), followed.

THIS was a case referred for the opinion of the High Court by the Chief Judge of the Court of Small Causes at Madras.

The following was the case as stated:—

1. The plaintiffs are the liquidators of the Chennai Purasai Hindu Jananukula Saswatha Nidhi, 1st Branch, Limited, appointed by resolutions of the shareholders passed at general meetings held on 16th June and 10th August 1901. They sued the defendant, M. Subramania Moodelly, for the sum of Rs. 1,053-4-10, being the amount of principal and interest due on the footing of exhibit A, an instrument, dated 14th December 1900, whereby a

* Referred Case No. 5 of 1904 stated under section 69 of Act XV of 1882 and rule 428 of the Rules of Procedure of the Court of Small Causes by J. G. Smith, Esq., Chief Judge of the Court of Small Causes, Madras.

sum of Rs. 750 was lent to defendant on the security of the defendant's deposit of Rs. 1,750 in the fund.

2. The defendant pleaded *inter alia* that the debt must be adjusted out of the deposit and that exhibit A was discharged or paid off on 2nd January 1901, the date of exhibit IV, by which the defendant requested the said fund to deduct the amount due to them from his deposit of Rs. 1,750 and to pay him the balance. The defendant at a later stage in the hearing of the suit requested permission to file a set off under rule 104 (corresponding to section 111 of the Civil Procedure Code) which was granted.

3. The defendant was a shareholder in the plaintiff fund, but withdrew his shares under rule 12 on 11th July 1900 and became entitled to a sum of Rs. 4,201-10-11. After adjusting a previous loan with interest the amount remaining due and payable by the fund was Rs. 1,750 which was transferred to a deposit account in his name on 16th July 1900. On the security of this sum Rs. 750 was on 14th December 1900 lent to defendant and exhibit A was executed.

4. The plaintiff company went into voluntary liquidation on 16th June 1901.

5. The deposit made on the 16th July 1900 by the defendant was for a year certain (exhibit D) and was therefore not repayable until 16th July 1901. It also appears that on the 14th October 1900 the affairs of the society were found to be in an unsatisfactory condition and a meeting of depositors was held and by virtue of a resolution passed there at the time for repayment of deposits was extended to three years. The defendant was present at the meeting and was elected a Director which office he accepted, but which he afterwards resigned. This circumstance is, however, immaterial in the present case.

6. Upon the above facts I found that the amount of the defendant's deposit was not repayable on the 16th June 1901, the date on which the fund went into liquidation for the reasons stated in my judgment herewith. I therefore gave judgment for plaintiff for the sum sued for, costs, attorney's and counsel's fees and dismissed the set off with costs, attorney's and counsel's fees. At the request of the defendant my judgment was made contingent on the opinion of the High Court on the following question:—

"Whether on the facts stated and under the circumstance of the case the defendant was entitled to set off the sum of Rs. 1,750

REFERENCE UNDER PRESIDENCY SMALL CAUSE COURT'S ACT, S. 69.

(the amount of his deposit) against the sum claimed by the liquidators of the Fund under exhibit A."

Mr. *M. A. Tirunarayanachariar* for plaintiff.

V. Krishnaswami Ayyar for defendant.

The High Court delivered the following

JUDGMENT.—This is a reference under section 69 of Act XV of 1882 and Rule 428 of the Rules of Procedure of the Small Cause Court on a case stated by the learned Chief Judge of that Court.

The suit is brought by the liquidators of a nidhi under voluntary liquidation to recover Rs. 1,053-4-10 the principal and interest on a loan made by the nidhi to the defendant on the 14th December 1900 under exhibit A.

The defendant had at one time been a shareholder in the nidhi. After he had ceased to be a member on the 16th July 1900, he placed on deposit with the nidhi the sum of Rs. 1,750 for twelve months. Before the termination of the twelve months he wanted his money back as he learnt that the affairs of the nidhi were in an unsound condition, but not being able to get it back he took a loan of Rs. 790 on the security of his deposit repayable on demand with interest at 12 per cent. under exhibit A, dated 14th December 1900, which contained the following words: "If, per chance, I fail to pay the principal and interest due in respect of the amount borrowed by me, I shall according to the rules of the fund receive out of the total amount of any deposit in your fund the balance, if any, left after you had taken the principal and interest due to the fund."

In June 1901 the nidhi went into voluntary liquidation and the plaintiffs were appointed the liquidators.

On the 20th September 1901 a temporary injunction was issued by the High Court restraining all creditors from suing the nidhi (exhibit E), and this was made perpetual on the 9th October 1901 (exhibit F).

On the 9th November 1903 the liquidators brought this action against the defendant to recover the amount of the loan with interest advanced to the defendant under exhibit A on the 14th December 1900. The defendant pleaded a set-off of the amount due to him from the nidhi under his deposit for twelve months made on the 16th July 1900.

On the hearing the learned Chief Judge of the Small Cause Court held that he was not entitled to set off that sum as it was

REFERENCE UNDER PRESIDENCY SMALL CAUSE COURT'S ACT, S. 69.

not repayable at the date of the nidhi going into liquidation and gave judgment for the plaintiffs with costs subject to the opinion of this Court upon the question "whether on the facts stated and under the circumstances of the case the defendant was entitled to set off the sum of Rs. 1,750 (the amount of his deposit) against the sum claimed by the liquidators of the fund under exhibit A."

We are of opinion that the answer to this question must be in the affirmative, that the defendant was entitled to set off the amount of his deposit against the sum claimed. By section 177 of the Indian Companies Act (Act VI of 1882) "the assets of the company shall be applied in satisfaction of its liabilities *pari passu* as they exist at the commencement of the winding up, etc." At the commencement of the winding up one of the liabilities of the company was to repay the defendant the amount of his deposit at the termination of the twelve months for which it had been deposited, viz., on the 16th July 1901. Owing to the orders of this Court of September and October 1901 and section 136 of the Act (VI of 1882) the defendant was precluded from suing the nidhi for that money. The money was none the less due and payable to him as from the 16th July 1901, and there is nothing either in the orders or in the Act which precludes him from setting it off against any debt due by him. It was an ascertained sum legally recoverable at the time the action was brought and the parties filled the same character as in the suit. It was, therefore, a matter which could be set off in the plaintiff's suit inasmuch as that suit was not commenced until the 9th November 1903.

The law is practically the same here as in England so far as it affects this case, and the case is concluded by the decisions in *Anderson's Case*(1) and *Sovereign Life Assurance Company* v. *Dodd*(2).

In this case exhibit A itself provides that the loan, if not repaid, shall be deducted from the amount of the deposit. We must, therefore, hold that the defendant was entitled to set off the amount of his deposit against the sum claimed.

(1) L.R., 3 Eq., 337. (2) L.R. (1892), 2 Q.B.D., 573.

APPELLATE CIVIL.

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

1904. September 14. October 25.

SUBBA NARAYANA VATHIYAR (PLAINTIFF), PETITIONER,

v.

RAMASWAMI AYYAR (DEFENDANT), RESPONDENT *

Negotiable Instruments Act XXVI of 1881—Promissory note—Suit by payee—Defence by maker—Payee not true owner of note—Parol evidence to support plea—Admissibility.

In a suit to recover the amount due on a promissory note by the payee named in the note the defendant pleaded that the consideration for the note was not advanced by the plaintiff, but by a third party on whose account the note was taken; and that as the amount had already been repaid to the party entitled the suit was fraudulent and unsustainable:

Held, per SUBRAHMANIA AYYAR, J., that the plea was sustainable. Parol evidence is admissible in a suit on a promissory note to show that the plaintiff is not the true owner of the note, if such proof would enable the defendant to establish a defence, valid as against the true owner.

Per DAVIES, J., diss. that the defendant was precluded from pleading the "jus tertii" of a person who is not even a party to the record.

SUIT on a promissory note made payable to the plaintiff or his order by the defendant. The note was not negotiated and the defendant's plea was that the consideration for the note was advanced not by the plaintiff, but by a third party on whose account the note was taken in the name of the plaintiff as payee, and that the amount having been duly repaid to the party entitled to it, the present suit was fraudulent and unsustainable. The District Judge dismissed the suit. The plaintiff filed this Civil Revision Petition.

T. Subrahmania Ayyar for petitioner.

C. Venkatasubarama Ayyar for respondent.

SUBRAHMANIA AYYAR, J.—The plaintiff in this case sued the defendant for Rs. 299-1-3 being the amount of the promissory note made payable to the plaintiff or his order by the defendant. The note was not negotiated and the defendant's plea was that the consideration for the note was advanced not by the plaintiff, but by one Krishna Vathiyar on whose account the note was taken

* Civil Revision Petition No. 401 of 1903, presented under section 25 of Act IX of 1887, praying the High Court to revise the decree of L. C. Miller, Esq., District Judge of Salem, in Small Cause Suit No. 10 of 1902.

with the name of the plaintiff as payee, and that the amount having been duly repaid to the party entitled to it, the present suit was fraudulent and unsustainable. The District Judge who tried the suit received oral evidence in support of this plea and being of opinion that the evidence was trustworthy, dismissed the suit.

Of course the rule that oral evidence is inadmissible to vary a written contract is applicable to negotiable instruments as well, but it is equally settled that even as to such instruments the rule mentioned is subject to certain exceptions; as for instance—parol evidence is admissible to show fraud, illegality, want or failure of consideration, the delivery of the paper on condition and non-fulfilment thereof, the true relation of the parties as between themselves when it is necessary to a correct determination of the right or liability of either of them thereon and so forth. The real question in the present case is whether parol evidence was admissible to prove that the plaintiff was not the true owner of the note in order to enable the defendant to substantiate a good defence as against such owner.

In the argument before us our attention was not drawn to any authority clearly bearing on it. On principle it would seem to be obvious that the evidence was, in the circumstances of the case, perfectly admissible. Now it is indisputable that "if one person is the agent of another the latter, as to all matters falling within the scope of the agency, is entitled to the benefits and subject to the burdens of acts done and contracts made by his agent. The fact of the existence of an agency may not be disclosed to the other contracting party. The contract may be in writing and may appear to be executed by him in favour of the agent without disclosing his agency and may upon its face be a contract apparently enforceable by or against him only. His principal though undisclosed is nevertheless entitled to its benefit, and the general principle that a contract in writing may not be varied by parol is subject to the exception that if it be made by one of the parties as the agent of another person, the latter may treat it as his own contract and may maintain an action in his own name thereon and prove by parol evidence that he is entitled to do so though there is nothing in the face of the writing indicating that he has any right thereon." These propositions, it has sometimes been assumed both in England and in the United States, do

SUBBA NARAYANA VATHIYAR v. RAMASWAMI AYYAR.

not extend to negotiable instruments and that in their case only the person named therein as the payee can maintain an action thereon. In stating the rule to be to that effect in Dicey on 'Parties to Actions', the learned author refers at p. 135 to Leake on 'Contracts' and in the part of the latter work referred to *Beckham* v. *Drake*(1), *Emly* v. *Lye*(2) and *Miles Claim*(3) are cited as the authorities in support of that proposition. But Sir Frederick Pollock in his work on 'Contracts', while referring to the technical rule that those persons only can sue or be sued upon an instrument under seal who are named or described therein as parties, points out that though a similar rule has been "supposed" to exist as to negotiable instruments, "modern decisions seem to show that when an agent is in a position to accept bills so as to bind his principal, the principal is liable though the agent signs not in the principal's name but in his own, or, it would appear, in any other name. It is the same as if the principal had signed a wrong name with his own hand" (at page 100, Pollock on 'Contracts', 7th edition), and the cases of *Lindus* v. *Bradwell*(4) and *Edmunds* v. *Bushell*(5) cited by the author clearly sustain this statement. If the view of the law adopted by Sir F. Pollock and the authorities cited by him with reference to the *liability* of a principal in respect of a negotiable instrument is correct, it is impossible to doubt that such a principal is entitled to *enforce his rights* under such instruments in his own name in spite of the supposed rule.

Turning to the decisions in the United States, it will be seen from Story on 'Promissory Notes', 7th edition, note to section 67, that there also a diversity of opinion on the point exists. As the different views are well presented in certain of them, I take the liberty of referring to them as helpful to a clear understanding of the matter. The most pronounced statement in favour of the view that a principal for whose benefit an agent obtains a negotiable instrument cannot sue, will be found in the judgment of Justice Prentiss of the United States Circuit Court for Vermont in *Bank of United States* v. *Lyman*(6) and the gist of his conclusion was thus expressed by the learned Judge:—

"Upon the whole it appears to me that the true rule of law, as deducible from the adjudged cases American as well as English,

(1) 9 M. & W., 79 at p. 96.
(2) 15 East, 7.
(3) L.R., 9 Ch., ap. 635.
(4) (1848) 5 C.B., 583.
(5) (1865) L.R., 1 Q.B., 97.
(6) 20 Vt. (U.S.C.C), 666.

SUBBA NARAYANA VATHIYAR v. RAMASWAMI AYYAR.

is that no person, although in fact a principal or partner, can sue or be sued upon a bill or negotiable note, unless he appear upon its face to be a party to it. A promissory note, according to the expression of very great Judges, partakes in some measure of the nature of a specialty, importing a consideration and creating a debt or duty by its own proper force. Being assignable, and passing by mere endorsement, it is necessary that the parties to it should appear and be known by bare inspection of the writing; for it is on the credit of the names appearing upon it that it obtains circulation. It is for these qualities, and on these considerations, that it is distinguished from written simple contracts in general and made subject to a different rule" (cited 12 Amer. Dec. 711). Positive as this expression of opinion is, it has not been generally accepted in that country as a correct statement of the law on the point, and according to Mr. Daniell, the author of a work of repute on negotiable instruments, the preponderance of authority is greatly the other way (sections 1187 and 1188); the author's own opinion is expressed thus (section 1187):—

"Upon the theory that the party entitled to sue is the one in whom the instrument shows the legal title to exist, it has been held that when the bill or note is payable to a certain person by name but describing him as agent of another person also named, as for instance, A. B. agent for C. D., the suit must be brought in the name of the agent and cannot be brought in the name of the principal, and that *a fortiori* must the suit be so brought when the instrument is simply payable to 'A B agent', no principal being named. But in either case, the better doctrine, as it seems to us, is that either the agent or the principal might sue. If suit were brought by the agent, the possession conforming to the express indication of the paper would clearly sustain the action. If suit were brought by the principal whose name is expressed in the instrument, possession by him would be evidence that he had received from his agent the instrument of which he was entitled to the beneficial interest; and there could be no good reason why it should be necessary for the principal to continue to use his agent's name when it is clear from the face of the paper that if so used, it would be as the representative of his own. And where the principal is undisclosed on the face of the paper he might also sue in his own name; but in such case mere possession of the paper

SUBBA NARAYANA VATHIYAR v. RAMASWAMI AYYAR.

would not be sufficient evidence that he was the principal intended and it would be necessary for him to supply that element in his title to recover by parol proof" (cited 2 Amer. Dec., p. 713).

Of the decisions adopting this view of the law, it is sufficient to cite *Baldwin* v. *Bank of Newbury*(1), the judgment in which delivered by Justice Clifford on behalf of the Supreme Court of the United States contains a lucid exposition of the reasons for such view. He said :—

"The promise as appears by the terms of the note was to 'O. C. Hale, Cashier,' and the question is whether parol evidence is admissible to show that he was the cashier of the plaintiff Bank, and that in taking the note he acted as the cashier and agent of the corporation. The contract of the parties shows that he was cashier, and that the promise was to him in that character. Banking corporations necessarily act by some agent, and it is a matter of common knowledge that such institutions usually have an officer known as their cashier. In general he is the officer who superintends the books and transactions of the Bank under the orders of the Directors. His acts within the sphere of his duty are in behalf of the Bank, and to that extent he is the agent of the corporation. Viewed in the light of these well-known facts, it is clear that evidence may be received to show that a note given to the cashier of a Bank was intended as a promise to the corporation, and that such evidence has no tendency whatever to contradict the terms of the instrument. Where a cheque was drawn by a person who was a cashier of an incorporated Bank and it appeared doubtful upon the face of the instrument whether it was an official or a private act, this Court held in the case of *Mechanics' Bank* v. *Bank of Columbia*(2), that parol evidence was admissible to show that it was an official act. The signature of the promisor in that case had nothing appended to it to show that he had acted in an official character, and yet it was unhesitatingly held that parol evidence was admissible to show the real character of the transaction. The opinion in that case was given by Mr. Justice Johnson and in disposing of the case he said that it is by no means true, as was contended in argument, that the acts of agents derive their validity from professing on the face of them to have been done in the exercise of their agency.

(1) 1 Wallace, 234.

(2) 5 Wheat, 326.

SUBBA NARAYANA VATHIYAR v. RAMASWAMI AYYAR.

Rules of form, in certain cases, have been prescribed by law, and where that is so, those rules must in general be followed, but in the diversified duties of a general agent the liability of the principal depends upon the fact that the act was done in the exercise and within the limits of the powers delegated, and those powers, says the learned Judge, are necessarily enquirable into by the Court and jury. The maker of the note in that case had signed his name without any addition to indicate his agency, which makes the case a stronger one than the one under consideration.

"The same rule as applied to ordinary simple contracts has since that time been fully adopted by this Court. Examples of this kind are to be found in the case of the *New Jersey Steam Navigation Co.* v. *Merchant's Bank*(1), and in the more recent case of *Ford* v. *Williams*(2), where the opinion was given by Mr. Justice Grier. In the latter case it is said that the contract of the agent is the contract of the principal and he may sue or be sued thereon, though not named therein. Parol proof may be admitted to show the real nature of the transaction; and it is there held that the admission of such proof does not contradict the instrument but only explains the transaction. Such evidence, says *Baron Parke in Higgins* v. *Senior*(3), does not deny that the contract binds those whom on its face it purports to bind; but shows that it also binds another, by reason that the act of the agent is the act of the principal. The argument for the defendant is, that the doctrine of those cases can have no application to the present case because the suit is founded upon a promissory note, but the distinctions taken we think cannot be sustained under the state of facts disclosed in the agreed statement. Mr. Parsons says if a bill or note is made payable to AB without any other designation there is authority for saying that an action may be maintained upon it, either by the person therein named as payee or by the Bank of which he is cashier, if the paper was actually made and received on account of the Bank, and the authorities cited by the author fully sustain the position (*Fairfield* v. *Adams*(4), *Shaw* v. *Stone*(5), *Barnaby* v. *Newcombe*(6) and *Wright* v. *Boyd*(7)). Among the cases cited by that author to show that the suit may be maintained

(1) 6 Howard, 381.
(2) 21 Howard, 289
(3) 8 M. and W., 844.
(4) 16 Pick., 381.
(5) 1 Cush., 254.
(6) 9 Cush., 46.
(7) 3 Barb., 523.

SUBBA NARAYANA VATHIYAR v. RAMASWAMI AYYAR.

by the Bank is that of the *Bank* v. *White*(1), which deserves to be specially considered. The note in that case was indorsed to 'R. Olcott, Esquire, cashier or order' and the suit was brought in the name of the plaintiff Bank of which the indorsee was cashier. Objection was made that the suit could not be maintained in the name of the Bank, but it appearing that the indorsement was really made for the benefit of the corporation, the Court overruled the objection and gave judgment for the plaintiff (*Bailey* v. *Onandaga Ins. Co.*(2)). Suggestion was made at the argument that the rule was different in Massachussetts, but we think not. On the contrary, the same rule is established there by repeated decisions which have been followed in other States (*Eastern R. R. Co.* v. *Benedict*(3), *Folger* v. *Chase*(4), *Hartford Bank* v. *Barry*(5), *Long* v. *Colburn*(6), *Swan* v. *Park*(7) and *Rutland, etc., R. R. Co.* v. *Cole*(8)). Doubt cannot arise in this case that the person named in the note was in fact the Cashier of the plaintiff Bank, because the fact is admitted, and it is also admitted that the plaintiff can prove that in taking the note he acted as the cashier and agent of the corporation, provided the evidence is legally admissible. Our conclusion is that the evidence is admissible and that the suit was properly brought in the name of the Bank."

From the *ratio decidendi* of the above and similar cases, it follows that it is equally competent to a defendant to adduce oral evidence that the plaintiff in the action is not the true owner if such proof would enable the defendant to establish consistently with other rules governing the case of negotiable instruments, a defence valid against the true owner. This was accordingly held in *Newton* v. *Turner*(9). There the plaintiffs were indorsees of a promissory note given by the defendants to the plaintiff's indorser Campbell. In answer to their claim for the amount of the note, the defendant denied that the plaintiffs were the owners of the note and averred that the property therein was still in Campbell and set up certain defences available as against him. In holding that the defendants were entitled to adduce evidence in support of

(1) 1 Denio, 608.
(2) 6 Hill, 476.
(3) 5 Gray, 561.
(4) 18 Pick., 63.
(5) 17 Mass., 94.
(6) 11 Mass., 97; 6 Amer. Dec., 160.
(7) 1 Fairf., 441.
(8) 24 Vt., 33.
(9) 25 Amer. Dec., 173.

SUBBA NAYARANA VATHIYAR v. RAMASWAMI AYYAR.

their averment that the true owner was Campbell and not the indorsees, the Supreme Court of Louisiana laid down the law as follows:—

"The doctrine contended for by the plaintiffs, which has been sanctioned by several decisions of this Court, we believe correct. The maker of the note when sued has not the right to inquire whether the plaintiff, in whom the legal title to the instrument is vested, be the agent or the owner of it. Because, whether he be the one or the other is immaterial to the defendant for a judgment in favour of the party who *ex facie* has the title to the note will protect him against a demand against any other person. But this rule has its exceptions as we stated in the case of *Banks* v. *Eastin*(1) and one of these is where the defendant has substantial grounds of defence against the payee, of which he apprehends an attempt is made to deprive him by a fictitious assignment. In this case the answer sets up what would be a good defence against the payee and it charges the assignment to be false and fraudulent. It, therefore, comes clearly within the exception just stated, unless a distinction taken by the counsel for the plaintiffs should be found correct.

"It is contended that as the debts now pleaded in compensation were not acquired until after the indorsement of the note, the assignment could not have been made to deprive the defendants of any just defence to the instrument sued on; and consequently they have no right to put the interrogatories. The position assumes that the authority of the defendants to go into the enquiry as to the real ownership of the note depends on their having a defence against the payee, at the time of the transfer, and that this transfer was made to deprive them of the defence. We are not aware of any authority or sound reason on which the right can be so limited. As strong an inducement for such fictitious transfers may exist in the apprehension the debtor will acquire obligations of the plaintiffs as he will set off those already acquired. The fictitious assignment cannot deprive the defendants of rights which they would have had, had that assignment not been made; if the plaintiffs are but the agents of the payee, the case must be open to every defence against them as it would be against him."

(1) 3 N.S., 291, 392.

SUBBA NARAYANA VATHIYAR v. RAMASWAMI AYYAR.

Passing now to the consideration of the question with reference to the law of this country, both from the passage quoted from the judgment of Justice Prentiss and from the statement in Pollock on 'Contracts' adverted to above, it will be seen that the supposed rule that none but a person *eo nomine* a party to a negotiable instrument can sue or be sued thereon, rests on the supposition that negotiable instruments present greater analogy to deeds and indentures than to simple written contracts. This analogy can hardly lend any weight in countries to whose common law deeds and indentures are unknown. Whether the decision in *Lindus* v. *Bradwell* (1) which Sir F. Pollock apparently treats still as good law, is consistent with sections 17 and 23 of the English Bills of Exchange Act, is a point on which Mr. Chalmers seems to entertain some doubt (Chalmer's 'Bills of Exchange,' 6th edition, pp. 42 and 43). Be this as it may, it is to be observed that the Indian Negotiable Instruments Act does not contain any section similar to the two just referred to of the English statute. And commenting on section 28 of the Indian Negotiable Instruments Act Mr. Chalmers observes:—"It seems uncertain whether the English rule as to the non-liability of an undisclosed principal on a bill applies to India. Neither sections 233, 234 of the Indian Contract Act nor this Act excepts parties to negotiable instruments from the general rule that where an agent is personally liable, a person dealing with him may hold either him or his principal or both of them liable." (Chalmers' 'Negotiable Instruments Act.')

But even supposing it were otherwise as to the *liability* of an undisclosed principal according to the law of this country that cannot affect the question as to the *right* of such a principal to sue in respect of the benefit accruing to him under a negotiable instrument taken by the agent in his own name. For in the absence of any express provision to the contrary in the Negotiable Instruments Act the general rules as to principal and agent will be applicable and according to them the right of the principal to sue cannot be denied. To avoid misconceptions on points like the present, it is necessary to keep steadily in view the bearing, on transactions effected by negotiable instruments, of rules and principles other than those embodied in the Negotiable Instruments Act, and of which the following may serve as instances. The case

(1) (1848) 5 C.B., 583.

SUBBA NARAYANA VATHIYAR v. RAMASWAMI AYYAR.

in *Muhammad Khumarali* v. *Ranga Rao*(1) is an instance where the ordinary rule as to the assignability of a chose in action was held applicable to negotiable instruments, title thereto otherwise than by endorsement being recognized. The case of the right to negotiable instruments devolving by operation of law on the assignees of a bankrupt is another example of title to such instruments accruing otherwise than in accordance with the special provisions of the law merchant to be found in the Negotiable Instruments Act. In *Krishna Ayyar* v. *Krishnasami Ayyar* (2) a person not a party to a promissory note was made liable in respect of the debt created thereby on the ground that under the personal law to which he was subject the obligation was one he was bound to discharge. The present is an instance where the question has to be decided not with reference to any rule of the Mercantile Law peculiar to negotiable instruments but with reference to the general rules of the law of evidence as to admissibility or otherwise of parol proof to vary a written instrument, negotiable or not negotiable which are unaffected by the provisions relating to rules of evidence in Chapter XIII of the Indian Negotiable Instruments Act.

The judgment of Kernan, J., in *Bommee Chetti Ramiah Chetty* v. *Visvanatha Pillay*(3) goes far to support my view.

As to the case in *Ramanuja Ayyangar* v. *Sadagopa Ayyangar*(4) it seems to lay down that one who takes a promissory note in his own name *benami* for another is the only party entitled to sue thereon and that the true owner is precluded from maintaining an action in his own name for the amount thereof. This decision is directly in conflict with the unquestionable rule that a principal disclosed or undisclosed is entitled to enforce his rights under a contract entered into on his behalf by his agent, recognised alike by the common law and by section 230 of the Indian Contract Act which is not in any way qualified or restricted by anything contained in the Negotiable Instruments Act. The true rule in such cases is, as stated in the passage from Daniell on 'Negotiable Instruments' quoted above, that either the principal or the agent may sue, the former, when suing, being subject to all equities properly arising in the case. Whilst following this rule it is now unnecessary to decide whether a suit by an

(1) I.L.R., 24 Mad., 654.
(2) I.L.R., 23 Mad., 597.
(3) 6 Mad. Jurist, 305.
(4) I.L.R, 28 Mad., 205.

SUBBA NARAYANA VATHIYAR v. RAMASWAMI AYYAR.

undisclosed principal, say on a negotiable promissory note made payable to his agent, may not on the analogy of the principle on which the decision of the Court of appeal in *Beck* v. *Pierce*(1) followed by the Full Bench in *Periasami Mudaliar* v. *Seetharama Chettiar*(2) be correctly held to be subject in the matter of limitation to the same rules as those which would govern the suit had it been brought by the agent himself. I will therefore dismiss the petition with costs.

DAVIES, J.—The simple case before us is whether the defendant, the maker of a promissory note which was negotiable, can set up the plea that the payee thereof (the plaintiff) is not the person entitled to recover the money on the ground that the plaintiff is only the ostensible payee and that the real payee is some third person. It seems to me that the decision of the case is governed entirely by the provisions of the Negotiable Instruments Act XXVI of 1881 and that under the provisions of that Act, the defendant is estopped from setting up that plea.

The "payee" of a promissory note is defined in section 7 of the Act to be "the person named in the instrument to whom or to whose order the money is by the instrument directed to be paid." In the promissory note now in suit, the plaintiff is undoubtedly that person. As he has not negotiated the note he is the "holder" thereof according to section 8 of the Act as he is the "person entitled in his own name to the possession thereof and to receive or recover the amount due thereon." Section 78 lays down that payment of the amount due on a promissory note must "in order to discharge the maker" be made to the holder of the instrument.

Further, the special rules of evidence in regard to negotiable instruments provide that the holder of a negotiable instrument shall be presumed to be a holder in due course [section 118, clause (*g*)] and that no maker of a promissory note "shall in a suit thereon by a holder in due course be permitted to deny the validity of the instrument as originally made." (Section 120.)

In the face of these plain provisions of the law, I am clearly of opinion that the defendant in this case is precluded from pleading the *jus tertii* of a person who is not even a party on the record. Under section 120, the defendant cannot deny that the plaintiff, the holder of the promissory note, is entitled to

(1) L.R., 23 Q.B.D., 316. (2) I.L.R., 27 Mad., 243 at pp. 246 and 253.

SUBBA NARAYANA VATHIYAR v. RAMASWAMI AYYAR.

recover the money and under section 78 he can only be discharged from his liability to pay it by payment to the holder.

Whether a person not named as the payee or indorsee of a promissory note can sue upon it as being the beneficial owner is, in my opinion, a question that does not arise in this case and I therefore refrain from discussing it here. I should however state that I have lately decided the question in the negative in *Sadagopa Ayyangar* v. *Ramanuja Ayyangar*(1) which decision has been confirmed by a Bench of two Judges in *Ramanuja Ayyangar* v. *Sadagopa Ayyangar*(2). The matter therefore seems to be finally settled so far as this Court is concerned.

Holding that the defendant had no good defence to the action, I would reverse the decree of the District Judge, and give the plaintiff a decree for the amount sued for with costs throughout.

In the result, the petition is dismissed with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Davies and Mr. Justice Sankaran Nair.

MAHOMED ABDUL MENNAN (ACCUSED), PETITIONER,

v.

PANDURANGA ROW (COMPLAINANT), RESPONDENT. *

1904. October 12, 13.

Criminal Procedure Code—Act V of 1898, ss. 203, 435, 439—Complaint—Complaint dismissal of—Revival of Proceedings—Illegality.

When an original complaint is dismissed under section 203 of the Code of Criminal Procedure no fresh complaint on the same facts can be entertained so long as the order of dismissal is not set aside by a competent authority.

Mir Ahwad Hossein v. *Mahomed Askari*, (I.L.R., 29 Calc., 726), differed from.

over ruled by I L R Mad XXIX page 126

THIS was a petition to revise the order of the Stationary Sub-Magistrate of Tenali passed in the following circumstances:—

The petitioner was charged with receiving and retaining property in respect of which criminal breach of trust had been committed. After the case for the prosecution had been closed, the petitioner filed a petition stating that a charge, based upon

(1) C.R.P. No. 12 of 1904 (unreported). (2) I.L.R., 28 Mad., 205.

* Criminal Revision Case No. 232 of 1904, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of M.R.Ry. T. Sitaramiah, Stationary Sub-Magistrate of Tenali, in Calendar Case No. 126 of 1904.

MAHOMED ABDUL MENNAN v. PANDARUNGA ROW.

the same set of facts, had been preferred against him by an undivided brother of the complainant and dismissed under section 203 of the Criminal Procedure Code by the Stationary Sub-Magistrate, Bezwada. He objected that the Court had no power to entertain the second complaint until the order of dismissal passed by the Stationary Sub-Magistrate, Bezwada, had been set aside. The Stationary Sub-Magistrate in disposing of the case was of opinion that the two complaints did not relate to the same set of facts, but in discussing the case upon the assumption that the two complaints were identical, held that the Court had power to rehear the case and directed the case to be proceeded with.

Dr. *S. Swaminadhan* for petitioner.

Acting Public Prosecutor and the Hon. Mr. *P. S. Sivaswami Ayyar* for respondent.

The following order was passed :—

ORDER.—As against the petitioner, the first accused, the present complaint is exactly on the same facts as the previous complaints which were dismissed under section 203 of the Code of Criminal Procedure on the ground that *primâ facie* no criminal offence was disclosed. On revision the District Magistrate refused to interfere with the Magistrate's order and in our opinion that order was right. On the merits therefore we think that this complaint against the petitioner should not have been entertained, and we are further of opinion that, in law, the Magistrate was not competent to entertain it. We are unable to agree with the decision of the majority of the learned Judges of the Calcutta High Court in the case of *Mir Ahwad Hussein* v. *Mahomed Askari*(1) and we concur in the previous decisions of the same Court in *Nilratan Sen* v. *Jogesh Chundra Bhuttacharjee*(2) and *Komal Chandra Pal* v. *Gour Chand Audhikari*(3).

The Allahabad High Court and this Court have taken the same view (see *Queen-Empress* v. *Adam Khan*(4) and the rulings of the Court referred to in Weir's 'Criminal Rulings', pp. 874 and 875).

The order of the Magistrate dated the 31st of May last directing that the trial be proceeded with on the new complaint is accordingly set aside so far as the petitioner, the first accused, therein is concerned, and the complaint as against him is dismissed.

(1) I.L.R., 29 Calc., 726.
(2) I.L.R., 23 Calc., 988.
(3) I.L.R., 24 Calc., 286.
(4) I.L.R., 22 All., 106.

APPELLATE CIVIL.

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

1904. April 7, 8, 11, 15, 18 to 22, 25 to 28. December 9, 12, 15. 1905. March 17.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, BY THE DISTRICT FOREST OFFICER, SOUTH CANARA (DEFENDANT), APPELLANT (IN SECOND APPEALS NOS. 1276 AND 1277 OF 1900),

v.

MANJESHWAR KRISHNAYYA (CLAIMANT), RESPONDENT (IN SECOND APPEAL NO. 1276 OF 1900).

KINHANNA SHETTY, KARIASTA TO THE RAJAH OF VITTAL (CLAIMANT), RESPONDENT (IN SECOND APPEAL NO. 1277 OF 1900),

PANDURANGA PAI AND OTHERS (CLAIMANTS), APPELLANTS (IN APPEAL NO. 27 OF 1902),

KUCHUR SUBBA ROW (CLAIMANT), APPELLANT (IN SECOND APPEAL NO. 28 OF 1902),

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, BY THE DISTRICT FOREST OFFICER, SOUTH CANARA (RESPONDENT) IN BOTH.*

South Canara—Forest and waste lands—Rebuttable presumption of Government ownership—Conclusive presumption under Hindu and Muhammadan Law—Warg land—Rights of wargdar over waste lands adjacent to his cultivated land—Kumaki and Netticut rights—Acts of user and occupation consistent with proprietary right of Government.

There is a general presumption that forest and immemorial waste land in South Canara, not exclusively occupied by any person or body of persons, is the property of the Government.

* Second Appeals Nos. 1276 and 1277 of 1900, presented against the decrees of J. W. F. Dumergue, Esq., District Judge of South Canara, in Appeal Suit Nos. 263 and 240 of 1899, respectively, presented against the orders of H. S. Mullins, Esq. Forest Settlement-officer of the Malabar and South Canara Districts Nos. 4 and 1 of 1897 under Act V of 1882 (The Madras Forest Act).

Appeals Nos. 27 and 28 of 1902, presented against the orders of H. S. Mullins, Esq., Forest Settlement-officer of the Malabar and South Canara Districts, made on claim No. 3 of 1897 and Nos. 3 and 14 of Hale Someshwar and Nos. 1 and 4 of New Someshwar (Appeal Suits Nos. 234 of 1899 and 263 of 1898) on the file of the District Court of South Canara, transferred to this Court under the order passed on Civil Miscellaneous Petitions Nos. 110 and 112 of 1901.

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

In the case of the large tracts of immemorial forest on the ghats and elsewhere in South Canara, there is a presumption of fact that they are Government forests, though such a presumption is rebuttable, by proof of private ownership in regard to any particular part of the forest.

In the case of forests of secondary growth, the presumption will usually be that they belong to some private owner, but this may be rebutted by showing that any portion forms part of a warg that was abandoned or forfeited or escheated to Government, or by showing that it was not part of a warg but was cultivated as kumri.

In order to rebut the presumption of Government ownership in forest and immemorial waste land it is necessary that there should be proof of the exercise both, in the past, and in the present, of acts of undoubted ownership, such for instance as, the granting of leases to tenants for cultivation, and the cutting of valuable timber trees for sale, and not such acts as the Government permits in forest and waste land for the benefit of the adjacent cultivation.

"Kumaki" and "Netticut" privileges, which are conceded to all wargdars for the better enjoyment of their warg lands adjacent to Government forest do not by any means prove exclusive proprietary right as against Government.

"Netticut" privileges are enjoyed by such wargdars as have their wargs situated in valleys lying between the slopes or ridges of hills. Each ridge or Netticut forms a natural boundary within which the cultivator grazes his cattle.

Kumaki lands are lands which are allowed to be used in assisting cultivation and they are intended to afford to the ryots the means of procuring leaves for manure and to furnish fodder for their cattle.

History of the Revenue System obtaining in the District of South Canara reviewed.

Subbaraya v. *Krishnappa*, (I.L.R., 12 Mad., 422), approved.

Bhaskarappa v. *The Collector of North Kanara*, (I.L.R., 3 Bom., 452), approved and followed.

GOVERNMENT proposed to reserve as Government Reserved Forest under the Forest Act of 1882, certain tracts of forest land in South Canara. Claims were made by certain wargdars to these tracts of forest land. These appeals and second appeals arose out of the decisions of the Forest Settlement-officer rejecting these claims. Against the order of the Forest Settlement-officer on claim No. 1 of 1897 an appeal was preferred to the District Court of South Canara. In this appeal (No. 240 of 1899) the District Judge in reversing the order of the Forest Settlement-officer passed the following judgment :—

"As explained in *Vyakunta Bapuji* v. *The Government of Bombay*(1) and *Bhaskarappa* v. *The Collector of North Kanara*(2) the primary meaning of the word 'Warg' is 'account,' and it came by an extension of its orignal meaning to denote the property

(1) 12 B.H.C.R., App. 1. (2) I.L.R., 3 Bom., 452.

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

to the assessment on which such account relates, while jamabandi chittas are nothing but continuous accounts between the Government and the wargdar of the amounts chargeable on various heads and with increases or deductions from time to time, and of the sums actually collected. It by no means follows that a muli warg consists solely of those lands on which assessment is paid. On the contrary it is stated at page 118 of the 'District Manual,' volume I, that a warg is an estate and although 'the theoretical basis of the assessment was a share of the produce of each field, the assessment was never fixed on particular fields or portions of a warg, but is a lump assessment for the whole, even although the estate or warg is composed of unconnected parts, which may be even in different villages.' The position is still more clearly defined in the following passage from the 'Imperial Gazetteer of India,' volume VII, page 381.

"Almost all land (in South Canara) is private property, some unclaimed waste and lands escheated to Government being the only exception.

"The whole is divided into estates (wargs), which include cultivated, cultivable, and waste land; but only the cultivated portion is assessed. Any new cultivation is assessed at certain fixed rates according to the description of the soil. As long as the proprietor pays the assessment, the Government does not interfere and no cultivation accounts are kept, the assessment being fixed on the whole estate and not on each field.

"The assessment of warg lands which have been waste and are newly cultivated is referred to in *Vyakunta Bapuji's* case(1) and the system explains why the appellant in this case obtained a pattah for warg land newly cultivated some years ago. Then, if anything more were wanted to show that a warg may include land on which assessment is not separately charged, I would point out the fact that in 1823 the then Collector of Canara directed that to estates 'which had no forest land attached to them,' 100 yards should be assigned as 'Kumaki' from the Government forests adjoining them and this direction was maintained in the Forest rules of 1884 ('District Manual,' volume I, pages 129 and 130). The exclusion from this privilege of estates which had forest land attached to them necessarily implies that there are wargs

(1) 12 B.H.C.R., App., 1 at p. 220.

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

which include forest land, on which, as shown above, no assessment is levied.

"Nevertheless it has now been contended on behalf of the respondent that, according to the decision in *Bhaskarappa's* case(1) the principle to start from is that waste lands belong to the State and my attention has been drawn to the case of *Subbaraya* v. *Krishnappa*(2) in which this principle was adopted. But in the Madras case, the land which was the subject of litigation was waste land adjacent to, not included in a warg and in the Bombay case it was found that the plaintiff had failed to establish any exclusive possession of or proprietary right in any part of the forest claimed, while the evidence showed a continuous and consistent exercise on behalf of the Government of its proprietary right over the timber and even the firewood in the forest in dispute. On this ground, and because mere entries of 'Kumri' assessment in the accounts did not involve general ownership in the plaintiff, of the soil, the plaintiff's suit was dismissed, but the existence of private proprietary rights in forests was recognized, and a perusal of the whole judgment shows that the term 'waste lands' means 'unoccupied waste lands,' of which the general ownership is with the Government.

"These two decisions are perfectly in consonance with the passage I have quoted from the 'Imperial Gazetteer', but I have been referred to pages 125 to 128 of the 'District Manual', volume I, from which it appears that in 1848 Mr. Blane, Collector of Canara, conceded to the holder of an estate nothing more than an easement over lands which, like the land in this case, had never been cultivated, and that this view has been more or less consistently acted upon by succeeding Collectors. In other words, used at page 16 of the same volume, the Government has attempted to 'gradually extinguish proprietary rights.' This is a candid avowal of policy, but the policy is opposed to the opinions, the intentions and the express directions of the highest authorities.

"Writing to the Madras Board of Revenue on the 9th November 1800, Sir Thomas (then Major) Munro, described Canara as a province 'where almost all land is private property derived from gift or purchase or descent from an antiquity too remote to be traced,' and in a report, dated the 4th August 1807,

(1) I.L.R., 3 Bom., 452 at p. 584. (2) I.L.R., 12 Mad., 422.

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

Mr. Thackeray, subsequently a member of the Madras Government, said 'No person who has seen Canara, or considered the subject can doubt the antiquity and validity of the title of the Canara landlords; and any Government that should attempt to overturn it would act like the French Government when it confiscated the private estates of the nobility and the Church' (quoted in *Vyakunta Bapuji's* case(1) at pages 156 and 157). Then in their despatch of the 17th December 1813 to the Government of Madras, the Court of Directors declared that in Canara, 'we have not property in the land to confer, with the exception of some forfeited estates' while in the 41st paragraph of their minute, dated the 5th January 1818, the Madras Board of Revenue stated that 'the exclusive right to the hereditary possession and usufruct of the soil is, in Canara, termed warga, meaning separate independent property in the land, and seems originally, as in Malabar, to have been vested in the military tribe of the Nairs, the first and at one time the exclusive mulees, or landlords, of that province; for, except to unclaimed waste, or to estates escheated from want of heirs, it does not appear that the Government in Canara at any time possessed or even pretended to the smallest right to property in the land.' The Sadr Adaulut in Case No. 9 of 1831 (decrees of the Sadr Adaulut 34) held that this was conclusive evidence and that in contravention of this general disclaimer of a property in land, not being unclaimed waste or escheat, the bare averment, unsupported by any sort of evidence that a certain land 'has always remained in the possession of the Sirkar' did not appear entitled to any consideration. This decision was certainly not dissented from by the High Court of Madras in Second Appeal No. 154 of 1885, because there the plaintiff's claim to certain lands was disallowed simply because he had not proved either title to, or possession of, them. Thus it seems to me beyond dispute that the Government has, in South Canara, no proprietary right in land other than unclaimed waste, forfeitures or escheats, and I need only refer briefly to the fact that in *The Collector of Trichinopoly* v. *Lekkamani*(2) the Privy Council ruled that Regulation XXXI of 1802 was not intended to confer upon Government any title which did not then exist. After an exhaustive discussion of the subject, the Bombay High

(1) 12 B.H.C.R. 1 at p. 220. (2) L.R., 1 I.A., 282.

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

Court arrived at the conclusion in *Vyakunta Bapuji's* case(1) that the Muli, the Mirasi, the Kaniyatchi, the Svasthyam, and the Janma Kari tenures are merely so many various names for the ancient proprietary right of the ryot in the soil, subject to the sovereign's share of the produce. That right existed long before the British Government assumed the province of Canara after May 1799 and in *Bhaskarappa's* case(2) it is laid down that the introduction of British rule did not extinguish private rights already fully acquired.

"Applying these principles to the present case in which it is tacitly conceded that the appellant's ancestors were Muli Wargdars before the introduction of British rule, I think it is clear that the ownership of all the Warg lands, cultivated, cultivable and waste, vests in the appellant, and the next question for decision is whether the Ukkada Forest is included in the Warg lands. If it is, then it is not unoccupied waste, and is therefore not at the disposal of Government.

"The appellant's family records were destroyed by fire in 1842 or 1843, and no title deed showing the boundaries of his Warg has been produced. But exhibits C and D1 show that for at least 46 years the appellant and his ancestors employed watchers to guard the forest and these documents which have not been impugned, are corroborated by the oral evidence. Even the respondent's first witness, who has been Potail since 1881, says 'I have known of the Raja's enjoyment of the forest since I knew anything,' while the appellant's witnesses prove that no one has ever been allowed to cut timber or gather firewood in the forest without the Raja's permission and that trespassers have been prosecuted. It has been contended on behalf of the respondent that these acts are merely compatible with the appellant's 'Kumki' rights, but they are as much in excess of 'Kumki' rights as the extent of the forest, about a square mile, is in excess of the 'Kumki' limit of 100 yards; they could not have been done, as they were, for a great number of years unless the forest had been included in the appellant's warg, and under the circumstances it must be held that the forest is an integral part of the Warg."

The Advocate-General (Hon'ble Mr. *J. P. Wallis*) and *K. Narayana Row* for the appellants, contended that the claimants did not

(1) 12 B.H.C.R., 1 at p. 220. (2) I.L.R., 3 Bom., 452 at p. 584.

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

claim these lands at the time of the survey under the Boundaries Act, Madras Act XXVIII of 1860, and it is now too late (*Kamaraju* v. *The Secretary of State for India*(1)). In claims under the Madras Forest Act, 1882, the burden is on the claimants (*The Secretary of State for India* v. *Bavotti Haji*(2)). Claimants have not proved possession of the tracts in dispute as against Government. Such enjoyment as they had was permissive and did not amount to an exclusion of Government. Such exclusion must be known and acquiesced in *Leigh* v. *Jack*(3), *Jacobs* v. *Seward*(4), Pollock and Wright on 'Possession,' pp. 32 and 34, 85 and 86. The claimants never had possession (see *Watson & Co.* v. *The Government*(5), *Ishan Chunder Behara* v. *Ram Lochun Behara*(6), *Raja Satyasaran Ghosal* v. *Mahesh Chandra Mitter*(7), *The Secretary of State for India* v. *Vira Rayan*(8), *The Secretary of State for India* v. *Nella Kutti Siva Subrahmania Tevar*(9), *Joytara Dassee* v. *Mahomed Mobaruck*(10), *Framji Cursetji* v. *Goculdas Madhowji*(11), *Chokkalinga Naicken* v. *Muthusami Naicken*(12), *Hanmantrav* v. *The Secretary of State for India*(13), *Lord Advocate* v. *Lord Blantyre*(14), *Lord Advocate* v. *Young*(15)). The question of land tenure in Canara has been exhaustively dealt with in *Haridas Purshotam* v. *Henry Gamble*(16) and *Bhaskarappa* v. *The Collector of North Kanara*(17). These cases relate to North Canara, but the same principles apply to South Canara (see *Subbaraya* v. *Krishnappa*(18) and *Fernandez* v. *Madappu*(19)).

The word Warg originally meant an account and was an account of the assessment the landholder had to pay; then it came to mean the land or estate in respect of which he was assessed. Except where mulpattas have been granted including all the land with specified boundaries, wargs do not include land which has never been assessed. The statements of Sir Thomas Munro and Mr. Thackeray that all land in Canara is private property only meant, as explained in *Haridas Purshotam* v. *Henry Gamble*(16)

(1) I.L.R., 11 Mad., 309.
(2) I.L.R., 15 Mad., 315.
(3) L.R., 5 Ex. D., 264.
(4) L.R., 4 H.L., 464.
(5) 3 W.R., 73 at p. 80.
(6) 9 W.R., 79.
(7) 2 B.L.R., 23 at p. 30.
(8) I.L.R., 9 Mad., 184.
(9) I.L.R., 15 Mad., 101 at p. 109.
(10) I.L.R., 8 Calc., 975.
(11) I.L.R., 16 Bom., 338.
(12) I.L.R., 21 Mad., 53.
(13) I.L.R., 25 Bom., 287.
(14) L.R., 4 A.C., 770.
(15) L.R., 12 A.C., 544.
(16) 12 B.H.C.R., 23.
(17) I.L.R., 3 Bom., 452.
(18) I.L.R., 12 Mad., 422.
(19) S.A. No. 36 of 1886 (unreported).

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

that assessments in Canara were low as compared with other parts of Southern India and left the ryot a saleable interest in his holding. Sir Thomas Munro himself says that sovereign power in India has always claimed to dispose of waste lands, and Canara is no exception. Land tenure in Canara was the same as in other parts of Southern India, except that assessments were low, and that owing to the nature of the country, cultivation was different. Under Muhammadan law, the waste lands of a conquered country belong to the State, and this principle took effect on the Mysore conquest of Canara. After the introduction of British rule, Government by proclamation assumed the sovereignty of all the forests in Canara, and as appears from the records printed in the case, for some years even claimed trees growing on warg lands, although this was subsequently released. Government has repeatedly asserted its title to waste lands in Canara whilst allowing some of the waste in the neighbourhood of the wargs to be used as *Kumaki* or in aid of cultivation, and further allowing the wargdars to gather leaves for manure up to the Netticut or crest of the hills adjoining their wargs. The fact that a warg very often consists of small patches of cultivation in different villages, and that patches belonging to several different wargs are found mixed up together of itself negatives the wargdar's claim to separate ownership of the surrounding kumki or netticut lands. Government ownership on the other hand is shown by the established practice of granting hosagame or new wargs out of the kumaki or netticut lands. The following records were referred to:—

South Canara Collector's letter to the Board, dated 18th August 1815, marked A.

South Canara Collector's letter to the Board, dated 8th September 1821, marked B.

Acting Principal Collector's letter to the Board, dated 22nd July 1839, marked C. No. 58.

Extract from Canares Shaba Book of Proclamations issued in Fasli 1253 of 1843 A D. by H. Blair, Esquire, Principal Collector of South Canara district, marked D.

South Canara Collector's letter to the Board, No. 70, dated 31st August 1847, marked E.

Extract from the Minutes of Consultation to the Governor in Council in the Marine department No. 501, dated 3rd December 1847, marked F.

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

Extract from the Canares Shaba Book of Huzur Revenue Circular order for Fasli 1261, No. 17, dated 10th August 1264—1854 A.D., marked G.

Extract from Canares Shaba Book of Proclamation issued in Fasli 1264 (A.D. 1854) by Mr. Maltby, Collector of Canara district, marked H.

Canara Collector's letter to the Board, No. 91, dated 30th August 1858, marked I.

Extract from the Proceedings of the Board of Revenue, No. 1350, dated 16th April 1859, marked J.

Proceedings of Government, Revenue department, No. 32, for the month of May 1860, marked K and G.O., No. 830, Revenue department, dated 23rd May 1860.

Board's Proceedings, No. 986, dated 15th February 1864, marked L.

Canares Circular Order, No. 33, dated 2nd August 1864, issued to the Tahsildar by the Collector, marked M.

Canares Circular Order issued by Mr. W. H. G. Comyn, Collector of Canara, marked N.

Proceedings of Government, Revenue department, No. 359, dated 20th May 1865, marked O.

Board's Proceedings, No. 2985, dated 5th June 1865, marked P.

Rules for the Conservancy of the Forest of the South Canara district as revised by Government, 1865, marked Q.

Extract from the 'District Gazette' for 1866, page 670, dated 23rd October 1866, marked R.

Extract from the 'District Gazette' for 1868, page 57, dated 22nd January 1868, marked S.

Circular, dated 6th November 1879, issued by Mr. W. H. Comyn, marked T.

Proceedings of the Board of Revenue, dated 2nd September 1884, No. 3084—Forest 273, marked U.

Proceedings of the Board of Revenue, dated 26th March 1885, No. 1016—Forest 188, marked V.

High Court judgment in Second Appeal No. 36 of 1886, marked W.

C. Sankaran Nair and *K. P. Madhava Rao* for respondent.

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

The cases in *Haridas Purshotam* v. *Henry Gamble*(1) and *Bhaskarappa* v. *The Collector of North Kanara*(2) do not relate to all Canara, but only to that part of North Canara known as Soonda. Soonda was under the Bijapure Kings, the Maharattas, the Moguls and Mysore. Except for a short time under Hyder and Tippu South Canara was never under Mahomedan domination. Under Hindu Law there is no presumption that waste land belongs to the Crown, the Crown is only entitled to a share of the produce. The same principles apply to South Canara as to Malabar where private property in waste lands is established (see *The Secretary of State for India* v. *Vira Ryan*(3)). (Fifth report, appendix 30, p. 842.) In 1813 the Court of Directors in their despatch cited in *Vyakunta Bapuji* v. *Government of Bombay*(4) only claimed forfeited lands in Canara (*The Secretary of State for India* v. *Ashtamurthi*(5), and *Sakkaji Rau* v. *Lutchmana Goundan* (6)). A warg may include waste; the assessment is levied on the whole warg. Sir Thomas Munro's letter printed in Arbuthnot's edition, volume I, p. 62, shows that waste lands in Canara are private property. In Canara Government was only able to grant inams of revenue. Until 1844 Government was in the habit of granting mulpattas in which the warg boundaries included waste. Sturrock's 'District Manual of South Canara district.' The proclamation of 1807 could not affect private rights of property (*Forrester* v. *The Secretary of State for India in Council*(7)). The claimant has been in possession for fifty years of the land in question as part of his warg; it lies on Government to prove their superior title. The Forest Act does not make any difference, section 10, Evidence Act.

The Secretary of State for India v. *Bavotti Haji*(8), *The Secretary of State for India* v. *Kota Bapanamma Garu*(9), *The Secretary of State for India* v. *Vira Rayan*(10), *Sivasubramaniya*, v. *The Secretary of State for India*(11), *Muthayya Chetti* v. *The Secretary of State for India*(12), *Mustapha Saheb* v. *Santha Pillai*(13), *Dadoba* v. *Krishna*(14), *Anangamanjari Chowdhrani* v. *Tripura Soondari Chowdhrani*(15) and *Narayana Row* v. *Dharmachar*(16).

(1) 12 B.H.C.R., 23.
(2) I.L.R., 3 Bom., 452.
(3) I.L.R., 9 Mad., 179.
(4) 12 B.H.C.R., App., 159.
(5) I.L.R., 13 Mad., 89.
(6) I.L.R., 2 Mad., 149.
(7) I.A. Sup., 10.
(8) I.L.R., 15 Mad., 315.
(9) I.L.R., 19 Mad., 165.
(10) I.L.R., 9 Mad., 184.
(11) I.L.R., 9 Mad., 285.
(12) I.L.R., 22 Mad., 100 at p. 107.
(13) I.L.R., 23 Mad., 179 at p. 182.
(14) I.L.R., 7 Bom., 34.
(15) 14 I.A., 101.
(16) I.L.R., 26 Mad., 514.

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

The Advocate-General in reply.

K. P. Madhava Rao and *A. Srinivasa Poi* for appellants in Appeal No. 27 of 1902.

C. Ramachandra Rao Saheb and *K. P. Madhava Rao* for appellants in Appeal Suit No. 28 of 1902.

The Advocate-General and *K. Narayana Rao* for respondent in Appeal Suits Nos. 27 and 28 of 1902.

JUDGMENT.—These appeals and second appeals arise out of decisions of the Forest Settlement Officer rejecting the claims made by certain wargdars in South Canara to tracts of forest land which Government proposed to reserve as Government reserved forest under the Forest Act of 1882.

The important question of principle that is raised is with regard to the right of Government in the forest and other waste lands of the district. Is it similar to that which is now well established in the other districts of the Presidency, omitting Malabar; that is to say, is there a general presumption that forest and waste land not exclusively occupied by any person or body of persons, is the property of Government? Or, is the presumption similar to that which is now established in Malabar, viz., that such lands, like all other lands, are presumed to belong to some private person or family? Or, is the true position that there is no presumption at all either one way or the other, and that the onus of establishing the claim lies in each case on the Government or the person who makes the claim?

The British Government took over the administration of the country in 1799 after the defeat and death of Tippu Sultan at Seringapatam, and Munro was sent to report on its condition and to administer it in 1800. In the course of that year he made three most valuable reports which are the chief source of the information, and often of the opinions, of succeeding administrators. It is certain that Munro and some of the early British administrators who took their opinions from him refer to "all land" in Canara as being "private land" held on ancient and indefeasible titles. But it is equally certain that they were not thinking of the great tracts of immemorial forest on the western ghats and elsewhere in the district and there is not a single expression in their reports which specially refers to these tracts which form so large a portion and so important a feature of the

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

district as a whole. Writing in 1894 Mr. Sturrock says: "South Canara is essentially a Forest district. The slopes of the western ghats from north to south are clothed with dense forests of magnificent timber and the forest growth stimulated by the heavy rainfall, approaches to within a few miles of the coast" in two specified places, but "generally the heavy forest begins from 20 to 30 miles from the coast . . . . Even on the plains, however, a large portion of the Uppinangadi taluk is covered with heavy forest, and jungle varying from moderate forest to mere scrub is to be found everywhere throughout an exceptionally large area of waste land" ('Manual of the South Canara District,' p. 15).

Munro and the early administrators were specially concerned with the land revenue assessment of the district, and their reports in regard to it must be read as referring to the occupied land which yielded revenue, not to the great tracts of immemorial forests which yielded none. We know that "Tippu introduced rules of draconic severity for the conservancy of sandalwood for his revenue and teak for his navy" (Sturrock's 'Manual of South Canara District,' p. 16). The Madras Government almost immediately after the conquest of the country was complete, that is to say, on the 25th April 1807, issued a proclamation announcing that the Court of Directors had resolved to assume the sovereignty of the forests in Canara and that an officer (Captain Johnston) had been appointed to see that no injury was done to them and that all persons were "prohibited from cutting or destroying trees in the teak forests . . . . or from taking away the young plants."

As regards this proclamation the Bombay High Court justly observes: "The resolution of the Court of Directors could not, of course, give it a sovereignty which it did not possess already; it was in virtue of a sovereignty already existing that the proclamation was made. What it obviously meant was that the Court being sovereign by delegation and thus vested with the eminent domain, intended in future to exercise it for the preservation of forests over which public rights subsisted. It has been urged for the plaintiff that the prohibition extends only to the cutting of teak; but though this was held chiefly in view, the prohibition must be taken as general, since 'injury' might

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

be done by destroying timber of other kinds" (*Bhaskarappa* v. *The Collector of North Kanara*(1)).

In his minute of the 26th November 1822 Munro refers at length to this proclamation and the action of the Madras and Bombay Governments subsequent thereto. He protests vehemently against the interference of the Conservator of Forests with the rights of the landholders to the trees growing on their private lands, but throughout the minute he also refers to other forests as "undoubtedly public property" and explains that "the line between public and private forests had not been ascertained" and urges that a survey should be made "in order to protect the property of the public and of individuals in the forests." The extent of the forests which he referred to as public was, evidently, very great, for he protests against its conservancy as checking the extension of cultivation to a dangerous extent. He says: "the complete preservations of the public forests, would of itself be a serious injury to the country. If no part of a hill where teak or poon is now growing, is to be cultivated, it would stop the progress of cultivation over all hills belonging to Government" (Arbuthnot's 'Life and Minutes of Munro,' p. 187, volume I). It is clear that Munro was very far from thinking that all forests in Canara were private property. His protest evidently was effectual, for in 1823 Mr. Harris issued a proclamation in pursuance of the orders of Government that the prohibition extended only to the Government jungles not to timber trees on private lands (*Bhaskarappa* v. *The Collector of North Kanara*(1)) and he drew up lists of the Government forests as they then stood. This was followed by Blair's proclamation in 1843 (exhibit D in Appeal Suit No. 26), and by the proclamation of the Government of Madras of the 8th November 1847 (exhibit F, *ibid.*), in which the Collector is instructed "to assert the rights of Government to all forest lands to which a title cannot be clearly established by private individuals" and by Maltby's proclamation in 1854 (exhibit H, *ibid.*), and by others subsequently, all maintaining the rights of Government in the forests. On the 15th February 1864, the Board of Revenue wrote that the right of Government in the forests "was asserted by the Bednore Government as far back as 1660 when the shist or original Government demand on the land is said to have been settled and

(1) I.L.R., 3 Bom., 452 at pp. 727, 728.

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

forest lands were excluded from the area liable to land tax as the property of the State. The Board are satisfied that no claim to forest land as a portion of warg needs to be admitted unless unquestionable evidence is forthcoming of a State grant of the land or locality" and this view was fully accepted by the Madras Government in G.O., dated 20th May 1865, No. 359 (exhibit O). In 1884 when Mr. Sturrock made an exhaustive enquiry into the actual state of the Government forests at that time, he found that of the forests found to be Government forest by Mr. Harris in 1823 only 67 could then be identified as the original lists had been burned by the Coorgs in 1837, but these 67 forests contained an area of no less than 250 square miles. He also found that there were no less than 394 Government forests which were "remote from cultivation" and to which "no private claims of any kind had been made good." Looking to these considerations we may safely say that in the case of the large tracts of immemorial forest on the ghats and elsewhere in the district there is a presumption of fact that they are Government forests, though, of course, such presumption may be rebutted by proof of private ownership in regard to any particular part of the forest.

On the other hand, many of the early reports indicate that patches of woodland and waste were not infrequently regarded as included with the cultivated land in the holdings of the wargdars or landholders. It cannot, therefore, be held that such patches of woodland or waste when interspersed with, or adjacent to, the cultivation of a warg, may not be a part of the warg. In a warm, moist climate like that of Canara land which has once been forest and has been cleared for cultivation very rapidly reverts to forest if it is left uncultivated. Such forest is for many years easily distinguishable from primeval forest and is known as secondary growth. In the case of secondary growth the presumption will usually be that it belongs to some private owner, but this again may be rebutted, as for instance, by showing that it is part of a warg that was abandoned or forfeited or escheated to Government or by showing that it was not part of a warg but was cultivated as "kumri." "Kumri" is cultivation of land outside a warg by felling and burning a patch of the forest, the ashes acting as manure. After one or two crops are raised the plot is abandoned and a fresh patch treated in the same way. The wasteful and injurious character of this kind of cultivation was recognized before

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

the middle of the last century and by the Government proclamation of 1847 already referred to, the Collector was authorized to prohibit it wherever it was found desirable to do so. In 1860 after an exhaustive enquiry it was decided by Government (G.O., dated 23rd May 1860, Revenue department) that the entry of "kumri shist" (*i.e.*, assessment for kumari cultivation) in the patta (or account) of an estate or warg gave no validity to a claim to proprietary right over the forest in which the "*kumri*" was carried on, or even over the spots which had been actually cultivated. "*Wargdar kumri*" was, therefore, abolished in 1860 and the assessment on account of it was remitted throughout the district, except in a few places where special permission was given (Sturrock's 'Manual,' p. 123). The whole question as to whether kumri cultivation could give a proprietary title to land was examined exhaustively in the case of *Bhaskarappa* v. *The Collector of North Kanara*(1) and was decided in the negative. We are not aware that the correctness of that decision has ever been judicially doubted, and though it was given in reference to a case which arose in the northen part of North Canara where the land tenures are in some respects different from those of the rest of Canara, yet the grounds on which it is based are of general validity and, in our opinion, the decision is applicable to South Canara also.

The learned Advocate-General contends that the wargs contain no land except what is now or was formerly cultivated. Mr. Sankaran Nair, on the other hand, contends that Munro's expression that "all land" is "private land" is to be taken literally, except in regard to some lands which have escheated to Government and to which their title can thus be referred to former private owners. We do not think that either of these extreme views is correct, or is in accordance with Munro's own views if rightly understood. With his report of the 31st May 1800 (printed in full at page 71 of Selections from the Records of the Collector of South Canara, 1879, and extracted with a statement at page 447 of volume 2 of the Fifth Report) Munro gives a statement of the land rent of Canara and Soonda showing the changes it had undergone from 1660 down to 1799–1800, and he explains the statement at great length. He states that the settlement of

(1) I.L.R., 3 Bom., 452 at pp. 727, 728.

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

Hurryhur Roy, the Rajah of Bijanaggar, made in 1334–47 was the foundation of all subsequent assessments and that it was made on *an estimate of the yield of the land*, the produce being divided in certain fixed proportions between the labourer, the landlord and the Sirkar (Government). This assessment was increased by 50 per cent. by the Rajah of Biddenore (Bednore), 1618–60; and this enhanced assessment, Munro says, "has been more than a century considered as the rekah, or standard rent of *all the lands in the country* cultivated and waste." This manifestly means all the occupied lands, or at least the cultivable lands in the inhabited parts of the district, as it would be absurd to assess great areas of immemorial waste in the mountains which were uninhabited and unoccupied and not likely to be occupied within any period that could be foreseen. This rekah or standard rent of all such lands, cultivated and waste, is given as Rs. 5,80,000. Then follow four large sums which have to be deducted from this gross standard rent. Munro explains: "The deductions in the four following columns are made in order to show the amount of the standard rent of the *Sarkar lands actually occupied and paying rent* at the end of the Biddenore Government." The expression "*Sarkar lands*" is important as showing that Munro regarded the Government as the ultimate owner of all the lands in Canara, subject of course, to the private, or saleable, interest which had grown up in them owing to the lightness and fixity of the assessment. The expression "actually occupied and paying rent" is also important since it shows that Munro was giving an account of such land as opposed to other land which was not actually occupied and which was not paying rent. The deductions are "(3) for 'Enaums' Rs. 1,44,000," "(4) deficiencies of rekah or standard rent Rs. 1,23,000," "(5) Waste lands Rs. 58,000," "(6) Tunkahs to peons Rs. 8,000." The total of these four deductions is Rs. 2,34,000, and this being deducted from the gross Bednore assessment of Rs. 5,80,000 leaves Rs. 2,46,000 as the shist or balance of standard rent, as Munro says, "of the Sarkar lands actually occupied and paying rent at the end of the Bednore Government." Munro explains these four deductions. It is unnecessary to refer to the "enaums" or the "tunkahs for peons." But his explanation of the other two deductions is of much importance. He says: "The waste lands in column 5 are all supposed to be fit for cultivation, because *the whole or the greater part of them had been cultivated at different periods* under

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

the Bednore Government"; and again: "The deficiencies of rekah or standard rent in column 4 are composed of uncultivated lands and reduction of rent. The first of these heads comprehends all lands overflowed by the sea, or torn up or washed away by rivers and nullahs, and ancient waste lands which had been in that state ever since the Bijanaggar Government, and which from their situation among the hills and jungles being deemed *unlikely to be ever again cultivated* were withdrawn from the sum of the general assessment of the country."

Thus the ancient waste lands which had never been cultivated for a century or more and which were never likely to be again cultivated were treated in the same way as "lands overflowed by the sea," and were withdrawn from the category of assessed lands from the year 1660.

Again he writes (paragraph 15): "The sums entered in columns 8, 44 and 72 exhibit the standard rent of the *lands in cultivation under* the Rani of Biddenore, Hyder and Tippoo; and had all these lands been actually cultivated, they would likewise show exactly the comparative rates of assessment of those three periods. But this was not the case, for a *small portion of the land in occupancy even under the Rani was waste*; more of it was waste under Hyder, particularly in the latter year of his Government and a far greater share under Tippoo. It never was the practice under any one of those Governments to keep an account of waste lands, unless of such as, from the failure of heirs or other accidents, had reverted to the Sirkar. The accounts contained a register of the number of landholders and the fixed assessment of their respective estates, the total of which formed the jumma, but they took no notice of waste lands when there was a proprietor in existence. As long as he was present he was responsible for the full rent whether he cultivated or not. This was little felt under the Biddenore Government *when there were very few proprietors who had* not *the means of cultivating the whole of their estates*, but it became a serious evil under Hyder and Tippoo when the increase of rent diminished cultivation, and by being thrown upon a narrower space pressed harder upon the landholders. Both their assessments must therefore be reckoned higher than they appear to be from the statement. There is no method of ascertaining with accuracy what, in either of them, was the quantity of waste in those estates which composed the jumma, and which, of course, was subjected

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

to the full rent in the same manner as if it had been cultivated."

These explanations by Munro show that the lands with which he was dealing were lands which were cultivable and which, with only small exceptions, were actually under cultivation in the Rani's time. He certainly was not dealing with great tracts of immemorial forest on the ghats, miles away from any cultivation or with rocky and uncultivable areas such as often exist on the slopes of the lower hills above the cultivated villages. Further on, we find that Rs. 3,330 was added to the rent roll on account of the "cultivation of ancient waste" in Hyder Ali's time and a smaller sum on a like account in Tippu's time. In column 82 we find an entry "deductions from Tippu's assessment on account of waste lands, &c., Rs. 1,50,940." As regards this Munro explains that this large deduction was made by him in the year then current (1799–1800) and was "*principally composed of waste lands of which the proprietors are extinct* and which though they have been in that state for a long time past had been permitted to swell the jumma at the beginning, and outstanding balances at the close, of the year." As Rs. 2,46,000 represented "the balance of standard rent of the Sirkar lands actually occupied and paying rent at the end of the Biddenore Government," and as Rs. 1,50,940 represented lands of which the proprietors were extinct, it will be seen that some two-fifths of the land which had once been occupied by private persons had reverted to Government, and was in their hands as waste land which they were as free to deal with as land which had never been in private occupation at all. As Munro himself says: "From these and other causes there were in many parts of the country tracts of waste land which paid no rent, and which could not be sold" (paragraph 17).

It is necessary to bear in mind these facts and statements made by Munro himself in order to correctly understand statements made by him later on in the same letter and in his letter of the 9th November 1800, when dealing with the proposals of Government to introduce the Bengal (or Cornwallis) Zamindari system into Canara. So when in paragraph 27 he says "the only land in Canara that can in any way come under the description of Sirkar land is unclaimed waste," it is evident that he means not "unclaimed" but unoccupied waste, for it is obvious that a mere claim to land could not give, or even evidence, a title to it.

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

Again in paragraph 28 he says "all public documents convincingly testify that Sirkar land was altogether unknown," and gives as a proof of this the fact that inams were given in the form of grants of land revenue, not in the form of grants of land. That, no doubt, was the usual, but not the universal form, for Mr. Sturrock shows that waste and forest were sometimes granted (exhibit U of printed documents in Appeal Suit No. 26). But even if it were the universal form, it is clear that the conclusion does not follow from the premises. Whether an inam be given in the one form or the other is a matter of convenience or custom. If the cultivable land is already completely, or almost completely, occupied, as it was from early times in Canara, and nothing remained but forests or unprofitable waste land, it is clear that the grant of the latter would be useless, and the only convenient way was to make a grant of the revenue payable by existing occupants. But, indeed, it is manifest from what Munro says later on that he is not denying the existence in Canara of waste lands at the disposal of Government, for he expressly says (paragraph 22 of the letter of 9th November 1800) that the Zamindars, if created, "ought to be vested with the proprietary right of all waste lands to which there are no owners" and again in the same paragraph: "If we restrict the division of lands to the original estate and determine that all subsequent acquisitions whether from the reversion of inferior estates or *the cultivation of Sirkar waste lands*, etc." When, therefore, he says "Government in reforming the revenue system of this Province have no new rights to private property in land to create" he is referring to Government rights in occupied land, not in waste land, for he goes on to say that Government "may augment the value of the property by diminishing the assessment, but the right itself is already as strong as purchase or prescription can make it and is as well understood as it is in Great Britain." So in paragraph 17 of the same letter Munro describes Canara as a province "where almost all land is private property derived from gift, purchase or descent from an antiquity too remote to be traced." In this passage Munro is discussing and opposing the introduction of a Permanent Settlement of the type just established in Bengal by Lord Cornwallis which was understood to imply the creation of a class of great landed gentry or Zamindars, a recognition of them as *proprietors of the soil*, and the fixing with them in perpetuity

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

of the revenue payable to Government; an arrangement, which, if carried into effect on the Bengal model, would have been irreconcilable with a recognition of the existing ryots, or wargdars, as owners of the soil occupied by them and paying revenue direct to Government. As he himself points out at the end of the sentence "great proprietors cannot be established without annihilating all the rights of the present landlords."

It will be remembered that the very thing that Munro feared did come to pass. In section 2 of the Regulation for establishing the Zamindari system in Madras (Regulation XXV of 1802) it was declared that "an assessment shall be fixed on all lands liable to pay revenue to the Government, and in consequence of such assessment, the proprietary right of the soil shall become vested in the Zamindars," etc. The regulation was misunderstood as giving Zamindars a proprietary right even in the lands of the old occupants, and it became necessary to correct this false idea by passing Regulation IV of 1822 which declared that the earlier Regulation was not intended to define, limit, infringe, or destroy the actual rights of any description of landholders or tenants.

By "all land" in the passages quoted above Munro meant all "occupied land" and by "private property" Munro meant land assessed so low as to command a ready sale (*Haridas Purshotam* v. *Henry Gamble*(1) and *Bhaskarappa* v. *The Collector of North Kanara*(2)). In paragraph 31 of his letter of 31st May 1800, speaking of the high assessment in Soonda, he says "there seems to be nothing else wanting but a reduction of the present assessment in order to constitute the rice lands private property as well as the gardens"; and the Board of Revenue on the 5th August 1813 writes: "In the provinces where the land tax is happily so moderate that private property in the soil is still preserved" (*Vyakunta Bapuji* v. *Government of Bombay*(3)). So he states in his minute of 1807 that "nothing can be plainer than that private landed property has never existed in India except on the Malabar Coast" (*Bhaskarappa* v. *The Collector of North Kanara*(2) and the references there quoted). His argument was, "You cannot ignore the ancient titles and the valuable proprietary rights which the

(1) 12 B.H.C.R., 23 at pp. 41 and 46. (2) I.L.R., 3 Bom., 524.
(3) 12 B.H.C.R. App., 194.

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

ryots here possess by giving their land to Zamindars, as you might in other parts of India, where, owing to heavy assessments the ryots have no saleable interest, or in other words, no property in the soil." He certainly did not mean that the immemorial forests, and immemorial waste lands generally, did not belong to Government. It is in a similar sense that the language of the Court of Directors in their despatch of the 17th December 1813, and of the Board of Revenue in their minute of the 5th January 1813, and of Mr. Thackeray in his report of the 4th August 1807 quoted by the District Judge, must be understood. They are referring to the lands which were then occupied or which had been occupied and were then abandoned, and they were not referring to the immemorial forests and uncultivable waste lands. There is no question before us of interference with the admitted holding of any occupant. Government admits the fullest private ownership of such lands, subject only to liability for the land tax assessed by Government. The question before us is with regard to certain waste lands which the ryots allege form part and parcel of their holdings and over which they claim the same rights as over the lands actually cultivated by them; while the Government alleges that these lands are not included in the holdings, but are Government waste lands in which the cultivators of the adjacent lands have been allowed such privileges as the taking of leaves and twigs for manure, the cutting of fuel for domestic use, and the cutting of the less valuable trees for the building of their own houses and for furniture. The difficulty arises from the fact that the holdings of the ryots have, in most cases, never been defined by boundaries or exact areas, and the Government officials have from time to time admitted claims to forest and waste lands as included in some of the holdings, and this has made it possible for the ryots generally to advance claims to all the waste adjacent to their cultivation, and now to allege a presumption that such waste land belongs to them and not to the Government. In Canara owing to its heavy rainfall, and the consequent breaking up of the country into hills and level valleys between them, the cultivation is mainly in the level valleys between the hills, while the hill sides are naturally used for the grazing of the cultivators' cattle and for the collection of leaves and fuel. Each ridge or "*netticut*" forms a kind of natural boundary, or limit, within which the cultivator of the valley below

grazes his cattle, etc., and this user up to the ridge gradually led to a claim to the full proprietary right up to the ridge. The convenience of the ridges, or crests of hills, as boundaries led to their being often adopted in the *mulputta* title-deeds which were in many cases issued prior to 1844, and this strengthened the idea that the warg lands always or usually ran up to the crest of the ridge, and gave colour to the cultivators' claims. In some parts of the district and especially near the coast, owing to the absence of hills the claims could not be defined by reference to the ridges, but there were generally some jungles or pasture lands over which similar privileges were exercised and to which similar claims were made" ('District Manual', p. 129).

In this connection we may point out that much misconception has arisen from the use of the word "estate" as the English equivalent of the "warg," or holding, of a ryot. *Warg* is derived from the Sanscrit *varga*—a leaf—and was applied to the palm leaves on which the revenue official kept an account of the ryot's holding. A man's *warg* was simply the *account* of the assessments payable by him for his lands, which were not necessarily all adjacent, but might be situated at a distance from each other and even in different villages. The word "estate" conveys the idea of a compact property, which is wholly alien to the idea of a warg. The use of this word "estate" for the ryot's holding has thus led to the idea that warg is a more or less compact entity, comprised of cultivated land and of all the uncultivated land and forest lying between the cultivated portions. When once it is understood that the lands of one warg may be intermixed with those of another warg, and may even be in different villages it will be apparent how erroneous this idea is, and how liable the use of the word "estate" is to lead to an erroneous conception of the rights of the wargdar to waste land adjacent to his cultivated land. So long ago as 1839 Mr. Maltby, the Collector, drew attention to the fact, that extensive tracts of Government jungle and waste had been appropriated in this way by persons who had no title whatever or whose right was at least extremely doubtful, and in 1848 Mr. Blane went very fully into the subject in his report to the Board of Revenue, dated 20th September and quoted in Sturrock's 'District Manual,' p. 125. He wrote "(37) The theory at present asserted by the landholders of Canara and which has been practically acted upon at least since the *tharao* settlement (1819) is

this, that their estates include not only the land which was in cultivation at the time the former settlements were made, but also tracts of waste of two descriptions:—First, the waste lands which had fallen out of cultivation in former times, and, second, immemorial waste lands which never were in cultivation, both of which kinds of waste they allege that they have a right to bring under cultivation without any additional assessment. They assert that the beriz was fixed upon the entire estate, including lands of every description. Of these waste lands, as I have before stated, but cannot too often repeat, there is no account or record whatever."

"(40) Upon the whole I am inclined to the belief that it was the intention, in fixing the tharao beriz, that no account should be taken of increased cultivation within the limits of the estates, and to give the ryots the full benefit of all the lands they might so bring under cultivation."

"(41) With respect to the other class of waste lands claimed as being attached to estates to which I have referred, viz., the immemorial waste, they may be considered to form a distinct question from that of the waste lands just referred to. It is to the claim to these lands which has been incautiously admitted or at least not opposed, that I attribute the absorption of nearly all the rekahnust or Government waste land. The claim appears to have recently attracted the notice of Government, for it is apparently respecting these that it called for some information in its Minutes of Consultation, dated 5th August 1845. There are considerable tracts of such kinds of waste land attached to a great part of the estates, some of which is cultivable and some consisting of hilly or stony ground incapable of improvement. They are often termed "Kumaki" lands or land allowed to assist in the cultivation, and they were intended to afford to the ryots the means of procuring leaves from the brushwood or jungles growing on them as manure for their fields and to furnish grass as fodder for their cattle; but they do not appear originally to have differed materially from the waste lands used for similar purposes in other parts of the country, except that in place of being common to the whole village, they were divided and enjoyed in separate portions by the individual landholders. The original terms upon which they were held then I conceive to have been essentially as an adjunct to, and in connection with, the cultivated lands and the

right to them to have been a modified right, and only to be enjoyed for the purposes for which they were held as above stated. The usufruct of them for such purposes was a necessary concession, but I do not conceive them to have been on that account the less Government lands, but only lands which they were permitted to occupy for particular purposes."

"(42) If such were in general terms the nature of the tenure under which they were held it has become entirely altered under our administration. The ryots now claim the absolute proprietary right in them the same as to their cultivated lands, and as a necessary consequence of such a right, the liberty to bring them under cultivation without the payment of additional assessment and even of selling or letting them, and thus separating them, if they choose, from the cultivation and alienating them from the original purposes for which they were intended. Another effect of such a tenure is, they can prevent others from taking them up on a patta and upon a fixed assessment payable to Government, and the person occupying them pays the rent to the landlord, not to the Government, and is in every respect his tenant. It is necessary to observe, however, that a right to cultivate such lands is not admitted in theory, but it is, as a general rule, actually enjoyed in practice, from the simple cause to which I have so often alluded that we do not know the extent of the original estates, and cannot tell, therefore, what is new cultivation and what is old, and the ready answer to all questions on the subject is that it is part of the original cultivation."

It will thus be seen that Mr. Blane in 1848 admitted the full proprietary right of the wargdar to the waste lands (adjacent to his cultivation) which had formerly been cultivated, but which had fallen out of cultivation (warg banjar); but as regards land which had never been cultivated he did not admit any proprietary right, though he allowed what he called a modified right, what Mr. Sturrock calls an easement, but what is really only a license or privilege, viz., to make use of the leaves and other produce of the land as an aid to the cultivation of the warg lands and for domestic purposes, subject to the full proprietary right of Government. Mr. Sturrock says that this is the view which has been held and acted upon ever since by Government and its Revenue officers.

Land within "netticut" limits has not since 1848 been regarded as attached to any of the adjacent warg lands, while

exclusive "kumaki" privileges have been conceded in the forests adjacent to the warg lands only to the extent of 100 yards all round each part of warg land. Beyond this limit of 100 yards the cultivators, *i.e.*, all the wargdars of each valley have been allowed "the common usufruct of the open hill sides up to the water-shed dividing each valley but must not cut down trees growing in this common land." (Proceedings of the Board of Revenue, dated 30th January 1865, No. 490.) The limitation of exclusive "kumaki" privileges to 100 yards appears to have originated as far back as 1823, when Mr. Harris allowed kumaki to that extent in Government jungles to such wargs as had not then any kumaki lands attached to them, but the general application of the limitation to the old wargs appears to have been made in 1845.

Such being the established revenue system and practice in the district for the past half century, it would, we think, require much stronger evidence than has been adduced before us in these cases, to justify us in laying down any rule that the practice is not justified by the revenue history of the district and that on the contrary there is a presumption that immemorial waste land adjacent to what is admittedly warg land must belong to some private owner as contended by the learned vakil for the appellant.

There is no ground whatever for saying that the land tenures of Canara, and the respective rights of the landholders and of Government in Canara are on the same footing as in Malabar. We have seen how by repeated proclamations and executive action, the Government asserted its right in the forests of Canara from the earliest times after the acquisition of the Province. As regards immemorial waste lands, we know that Manu founded the right of the cultivator on the fact that he "had cut away the wood and cleared and tilled the land" (chap. IX, pl. 44 of Sir W. Jones' translation), a basis that would give him no proprietary rights in waste land which he had never cleared or cultivated. Canara, we know, was under the sway of the Vijayanagar and Bednore dynasties for some 400 years and then was ruled by Hyder and Tippu for some 40 years before it was conquered by the British. It is now well established that under the Hindu Common Law the immemorial waste lands of the country generally belonged to the ruling power, and it would be strange, indeed, if the essential features of the Hindu system were not established during the centuries of Hindu rule which preceded the Muhammadan conquest.

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

The facts that we know with any certainty indicate that that system was, in truth, established. We know that the land assessment was based on an estimate of the grain produce of the land, which was divided in certain proportions between Government and the cultivator just as in the East Coast Districts. Mr. Ellis compared the land tenures in Canara to those in the Arudi Karai villages to the south of the Coleroon on the East Coast, where the right of Government to the waste lands has now, after protracted contest, been established as against the Mirasidars. We also know that the Native Government sometimes made endowments by grants of the waste land itself, including forests, though, no doubt, the usual form of grant was of the Government share of the produce of occupied land. (Mr. Sturrock's report of the 3rd April 1884, printed in exhibit U, paragraphs 18 and 19.)

When the Muhammadan Government succeeded the Hindu Government there can be no doubt that it exercised proprietary rights over waste lands, in accordance with Muhammadan Law. In Munro's account to which we have already referred in detail we find considerable additions to the revenue in both Hyder's and Tippu's time from the "cultivation of ancient waste." The rule as to waste land is laid down in the Hedaya, Vol. IV, p. 129. "Whoever cultivates waste lands with the permission of the chief, obtains a property in them; whereas if a person cultivates them without such permission, he does not in that case become proprietor, according to Hanifa . . . . Besides all waste lands are plunder, seeing that the Mussalmans acquired possession of them by conquest and hence no person can assume a property in them without the consent of the Imam as holds in all cases of plunder." At page 91 of his work on the law and constitution of India, published in 1825, General Galloway writes "By the Muhammadan Law the land revenue of the Crown was fixed on the arable land only. That alone was given away to the husbandman who became the owner. All other lands remained the property of the State, and were ready to be given away, on application to any one who would undertake to cultivate them. If he did cultivate well; if not within a reasonable time, which was limited to three years, the land was taken from him, and might be given to another. By law, therefore, it is evident that no right can exist in any individual, or body of individuals, to any other description of land than that which is cultivated." Nothing in fact can be more

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

certain than that under the Mahammadan Law waste land was the property of the State, as shown in great detail in *Vyakunta Bapuji* v. *Government of Bombay*(1).

The British Government when it took Canara from Tippu Sultan in 1799 succeeded to the rights which he then actually exercised as sovereign, and the rights thus acquired continued in the British Government until given up by it. This was the view of the Madras Government in its letter of the 20th September 1800 (*Vyakunta Bapuji* v. *Government of Bombay*(1)). Speaking of inams the letter says: "The inams having been entirely resumed by the house of Hyder Ali, the original grounds on which they were granted have been subverted, and the *Company having succeeded to the right actually exercised by Tippu Sultan*, it cannot be incumbent on them to revert to the original institution of those grants."

We have already shown that it cannot be held that Munro even in 1800 considered that Government had no proprietary right in immemorial waste lands in Canara. But whatever argument may be founded on some passages in his early reports, his minute of the 31st December 1824, in the earlier part of which he more than once referred to Canara, shows that in his later years he had no doubt as to the rights of Government in the immemorial waste lands. As pointed out (*Vyakunta Bapuji* v. *Government of Bombay*(1)) "Both Sir Thomas Munro and Mr. Mountstuart Elphinstone maintained that the waste land now belongs, and has always belonged to Government." The former, in a minute of the 31st December 1824, penned by him as Governor of Madras, when his experience had reached its ripest maturity, after referring to the opinion of Mr. Ellis that the waste land in miras villages in Arcot belonged to the Mirasdars jointly, denied that they had "the right of ownership." He added, "The Circar (Sarcar) from ancient times has *everywhere*, even in Arcot *as well as in other provinces*, granted waste in inam, free of every rent or claim, public or private, and appears in all such grants to have considered the waste as being exclusively its own property. It may be objected that if this were the case, it might give away the whole waste lands of a village, and injure the inhabitants by depriving them of their pastures. It certainly might give away the whole, but whether the exercise of this right would be injurious to the

(1) 12 B.H.C.R., App. 1 at pp. 53 *et seq.*, 58, 125.

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

inhabitants would depend on circumstances." And again he says: "In all villages, whether miras or not, the inhabitants reserve to themselves the exclusive use of the waste. But this right is good only against strangers, not against the Circar (Sarkar) which possess I think, by the usage of the country, the absolute right of disposing of the waste as it pleases, in villages which are miras as well as in those which are not. In the Dekkan, in miras villages, the corporation has not the right of disposing of unoccupied land, but the Circar has." And Mr. Elphinstone says: "The unoccupied waste, as in all other cases where society has assumed a regular form, must, no doubt, have belonged to the State; but the King, instead of transferring this property to the intended cultivators for a price paid once for all, or for a fixed annual rent or quit-rent (as is usual in other countries) reserved a certain portion of the produce, which increased or diminished according to the extent and nature of the cultivation. The rest of the produce belonged to the community of settlers."

"The State, he subsequently, at some length, shows, might grant those waste lands on such terms as it deemed fit and found practicable."

With reference to these considerations West, J., in *Bhaskarappa* v. *The Collector of North Kanara*(1) lays it down that "under British rule though its introduction would not extinguish private rights already fully acquired, the principle from which we must start is that waste lands belong to the State."

The British Government having thus succeeded to the full ownership of all forest and immemorial waste lands, has it in Canara ever abandoned those rights generally to any person or sets of persons? We do not find any evidence that it has.

We have already seen how explicitly and repeatedly the right of the State in the forests was asserted in proclamations issued by, or under the direct orders of Government and the proclamations were followed by executive action. We also know that the British Government has from the earliest times formed *new wargs* by grants made from immemorial waste. Such new wargs are locally distinguished by a special name and are known as *Hosagame* wargs (District Manual, p. 120). They are distinct from re-grants of

(1) I.L.R., 3 Bom., 452 at pp. 583, 584, 586, 739.

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

escheated or abandoned wargs. Several Hosagame wargs are referred to in the evidence in the cases before us and in some instances (see judgment in Appeal 28) these new wargs have been formed out of waste land actually contiguous to cultivated warg lands, and the new wargs have sometimes been assigned to strangers having no adjacent warg lands. At pages 122 and 123 of the District Manual Mr. Sturrock gives the rules for the classification and grant of these lands and says: "There are but few assessed waste lands in this district, except in localities where they are not now much sought after, and consequently the majority of durkhasts are for unassessed waste, and are dealt with as far as possible under the same rules as are in force for applications for assessed waste in other districts."

The formation of these new wargs as part of the regular revenue system of the district conclusively negatives the contention that all waste lands in the district belonged to the ancient wargdars. These new wargs are formed out of lands in which previously the old wargdars had enjoyed kumaki privileges, and this fact goes far to show that the kumaki privileges were privileges and nothing more, and were similar to the privileges enjoyed by mirasidars in other districts in the Government waste lands of their villages.

No evidence has been adduced before us to show that the wargdars do now, in fact, exercise or have generally in the past, exercised, acts of undoubted ownership in the waste lands adjacent to their cultivation and running up to the Netticut or ridge, such as the granting of leases to tenants for cultivation, the cutting of the more valuable timber trees for sale, and the like. All that they have generally done are such acts as the Government allows to be done in what are admittedly Government forest and waste lands for the benefit of the adjacent cultivation, such as the taking of fuel and of leaves for manure (see judgment in Appeal Suit No. 28 *infra*). As pointed out by West, J., in *Bhaskarappa* v. *The Collector of North Kanara*(1). "In the case of a private owner even, the allowance of acts which do not necessarily involve any denial of his ownership, or a grant from him, does not suffice to create an ownership against him; and the mere non-interference of the State, to which neglect is not to be imputed, is not

(1) I.L.R., 3 Bom., 583, 584, 586, 739.

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

to be accounted for, if it can be otherwise accounted for, on a presumption of a surrender of its ownership. Such a transaction must be evidenced by an undisguised and effective appropriation assented to or submitted to by some one having due authority, or else fortified by an equivalent law of prescription." It may be added that "even though there had been no interference on the part of the revenue officers with the free use of the forest, yet that free use, without an exclusive appropriation, would not in itself constitute an exclusive right as against the public. The right arising from the State's eminent domain in not extinguished by its mere non-exercise; and its exercise was not called for until some public injury or inconvenience arose" (*Bhaskarappa* v. *The Collector of North Kanara*(1)) and "there can be no grant, no acquiescence in possession, unless the essential elements of possession, a fixed, a definable, an exclusive occupation exist, and are present to the perception of the parties." *Bhaskarappa* v. *The Collector of North Kanara*(1).

All these considerations point to the conclusion that the general presumption is in favour of Government ownership of any immemorial waste lands to which no private person can show a title by grant, or by such user and occupation as is inconsistent with the proprietary right of Government. What acts prove such user and occupation must be determined according to the circumstances of each case separately. On the other hand, land which has been at any former time cultivated may generally be presumed to be warg land, unless it is shown that it was kumri or otherwise not included in any warg. As to grants we know that 893 mulpattas, or title-deeds in which the boundaries of the lands were specified, were issued prior to 1844. These grants often include forest and waste lands, and, though at one time, it was thought by some that is was not intended to grant or acknowledge proprietary right in such lands, Government since 1881 has acknowledged the full proprietary right of the grantees to every thing within the boundaries in those grants (G.O., dated 7th December 1881, No. 889, Revenue Department) and no difficulty can now be felt in dealing with these cases except in identifying the boundaries. The fact that forest and waste was included in these title-deeds, even if the omission to secure the proprietary

(1) I.L.R., 3 Bom., 583, 584, 586, 739.

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

right of Government therein was not unintentioned, is only evidence at most that the Revenue officers who issued those title-deeds thought that the particular patches of forest and waste included in the deeds belonged to the particular wargdars they were dealing with. It cannot be regarded as proof that any other patch of forest or waste belongs to some other wargdar, especially in view of the fact that when the effect of the terms of these title-deeds began to be realized their further issue was, in fact, discontinued in 1844, and finally forbidden in 1859.

The conclusions at which we have arrived are in accordance with the decisions of this Court in all the cases in which these questions have hitherto been considered. In the case of *Subbaraya* v. *Krishnappa*(1) the Collector granted to another certain land which was included in the kumaki waste land attached to the warg of the plaintiff. The plaintiff sued to recover possession of the land but the Court (Collins, C.J., and Parker, J.), referring to the two Bombay cases quoted above, held that "the principle to start from is that waste lands belong to the State" and that as this was waste land not included in the plaintiff's warg, or holding, but only attached to it as kumaki, that is as an aid to the cultivation of warg land by supplying leaves and manure, etc., it was open to the Collector to grant it for cultivation to any other person at his discretion. It may be that in that case the general rule was taken for granted and there can be no doubt there was not the elaborate examination into the question from the historical point of view which there has been in the present case. In the present case we have had the advantage of hearing a very full argument, and of considering all the available documentary evidence which can throw any light upon the question. After giving full consideration to the arguments and the documents the conclusion at which we have arrived is that the law as laid down in *Subbaraya* v. *Krishnappa*(1) is good law. The same view had been taken in an earlier case (*Fernandez* v. *Madappu*(2)) in which the Court (Kernan and Parker, JJ.) held "the plaintiff is not entitled to have 100 yards next his warg kept waste, so that he may use the same. The Government are the proprietors of the waste lands and they had the power at any time to give them on darkhast. They have given them to the first defendant on darkhast, and before they did so the appellant

(1) I.L.R., 12 Mad., p. 422. (2) S.A. No. 36 of 1886 (unreported).

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

applied for them on darkhast, and this was refused. According to the custom of kumaki a wargdar is only entitled to an 100 ards waste next to his warg so long as they remain waste." In Second Appeal No. 436 of 1899 the claim was allowed solely upon the ground that a grant had been proved which comprised the whole of the area within the boundaries without any reservation in reference to forest land. In Criminal Revision Case No. 326 of 1901 two members of the present Bench upheld a conviction of a wargdar for cutting timber in the kumaki attached to the warg.

We are not aware of any decisions of this Court in which doubts as to the correctness of those decisions have been expressed.

The decision in the Attapadi Valley case (*Secretary of State* v. *Vira Rayan*(1)) is irrelevant since it relates to Malabar, the revenue history and tenures of which are very different from those of Canara. In that case the Judges considered it of vital importance to determine at the outset whether the land in question appertained to the District of Malabar and they are careful to limit the statement that there is no presumption that forest lands are the property of the Crown to the District of Malabar. That case was, moreover, one in which Government as plaintiff sued for a declaration of the right of Government to the land, and the suit was dismissed expressly on the ground that the respondents (defendants) "were in possession of and recognised as proprietors of the lands they claim by Government officials for a long period," and on the ground that there was "no proof of possession on the part of the Crown and no proof that any cause of action has arisen against any of the defendants within 60 years before suit."

In Case No. 9 of 1831 in the decrees of the Sadr Adaulat, page 34 to which the District Judge refers, the Collector of Canara claimed to have the right to eject a person from a garden. As the judgment puts it "the point maintained is that Government being the landlord and proprietor of the garden in dispute, the principal Collector, as the servant of Government had a right to oust the plaintiff, she being a tenant at will," and as "the garden now in dispute always remained in the possession of the Sarkar." The garden had, in fact, been in possession of the defendant before the British Government took possession of the country, and as the Court pointed out, she had "continued to occupy the premises on

(1) I.L.R., 9 Mad., 187.

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

'Beriz Puttahs' from the Collector, the tenor of which appears to involve an acknowledgment of proprietary right in the occupant rather than the contrary as contended for by the appellant." Such being the facts of the case before it, the Sadar Adaulat naturally enough held that the 41st paragraph of the minute of the Board of Revenue's, dated the 5th January 1818, was conclusive evidence that Government had no right to the garden in dispute. There is absolutely no decision in the judgment, nor even any *obiter dictum*, to the effect that Government, in Canara, has no title to the forest and immemorial waste to which a private title is not made out.

Such being our conclusions on the general questions of principle, we must now consider the particulars of each of the appeals before us.

In Second Appeal No. 1277 *of* 1900.—The learned Advocate-General contends that at the time when the claimant's warg land were surveyed about the year 1890, the claimant made no claim to the forest now claimed and that consequently the present claim is barred by section 25 of the Boundary Marks Act (Act 28 of 1860, Madras) and relies on the Full Bench decision reported in *Kamaraju* v. *The Secretary of State for India*(1).

It may, perhaps, be that the claim is so barred, but the Government has not adduced any proof that the procedure prescribed by the Act was followed, so as to make the survey binding on the claimant. No issue was taken, and the matter was not investigated by the Courts below. We cannot, therefore, in second appeal disallow the claim on this ground.

On the other hand, the claimant's vakil contends that the District Judge has found that the forest claimed forms part of the claimant's warg, and urges that this is a finding of fact which it is not open to us to review in second appeal.

We, however, think that it is clear from a perusal of the District Judge's judgment that he misunderstood the common law of the district and had not present to his mind a correct view of the presumptions in regard to forest land in Canara which we have seen arise from a consideration of its Revenue history and peculiar tenures. For instance, he accepts a brief statement from the Imperial Gazetteer that "almost all land in South Canara is private property, some unclaimed waste and lands escheated to Government

(1) I.L.R., 11 Mad., 309 at p. 314.

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

being the only exception. The whole is divided into estates (wargs), etc." We have seen how inaccurate and inadequate this whole passage is as a definition of the tenures of the district and the respective position of the Government and of the wargdars *quoad* the forest and immemorial waste lands, and the misconceptions on these fundamental questions of the common law have misled the District Judge in his appreciation of the evidence that has been adduced.

It is also clear that the District Judge has attributed to the claimant's witnesses evidence which is not to be found on the record and he has not dealt with the important evidence given by the Village officers on behalf of Government or the inferences to be drawn against the claimant from his own petitions and from the revenue receipts filed by him. For instance, in paragraph 2 of his judgment he says: "Three witnesses were examined on behalf of the appellant (claimant), one being his kariastan and the other two his tenants. Their evidence is to the effect that the forest has from time immemorial been included in warg No. 32 and that the appellant and his ancestors have exclusively exercised proprietary rights over it." Now not one of these witnesses says that the forest is included in warg No. 32, nor do they say that the claimant has exercised exclusive proprietary rights over it. The kariastan merely produces exhibits A to D and says that he "sends coolies to the forest to bring firewood, leaves, twigs, etc., from the forest" and "I have prevented many persons from trespassing and collecting produce in the forest. The watchers bring them to me." These acts, as we have seen, do not by any means prove exclusive proprietary right as against Government. They are precisely the acts done by all wargdars in regard to Government land in which they are allowed "kumaki" or netticut privileges for the benefit and better enjoyment of their warg lands. The two tenants no doubt say that the claimant has been "in enjoyment of the forest from time immemorial" one of them says that the forest "belongs to the claimant" and they give as a reason for this view that no one is allowed to take things from the forest without the claimant's leave, but the effect of this general evidence is rendered comparatively unimportant by the fact that both say that other wargdars similarly enjoy and take produce from the slopes of the hills above their wargs. Thus if the evidence of these witnesses is to be accepted as proof of the claimant's exclusive proprietary right in

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

the forest, it would equally justify the finding of similar rights in all wargdars in the forests stretching from their warg lands to the crest of the hills above them; but we have seen that these netticut privileges are something very different from proprietary rights and do not negative the proprietary right of Government.

The witnesses also refer to the claimant paying watchers to keep away trespassers and in exhibit C we find entries of such payments, from time to time, for many years past, but the District Judge has not noticed that the keeping of such watchmen is not necessarily proof of a possession adverse to Government. They are necessary to prevent trespassers from other villages taking the produce of lands. As long ago as 1858, the custom of keeping such guards was recognized, and its practice even enjoined by the authorities as a means of preventing violence and theft and the destruction of the forests. Mr. Maltby in his proclamation of August 1854 (printed as exhibit H in the documents in Appeal Suit No. 26) after reiterating the rights of Government to the "forest and hills, etc., excepting the lands under cultivation" and informing the people how they were to proceed if they required timber, etc., from Government jungles or from kumaki lands, proceeded as follows:—

"There is no objection to the ryots guarding and growing the forest situated near their lands or according to custom of the country, as far as the Nettikattu or niradhare, for the aid of the cultivation of their lands, and to their using the grass, dry leaves, and fuel therefrom. Yet on this pretext the forest should not be cut from the bottom (roots), and sold. If for any good reason it is necessary to cut the forest from the bottom, a petition should be made with regard to it and such orders as the merits of the case deserve, shall be given."

"It has been noticed in many proceedings that on account of the ill-will which the ryots bear towards each other, strangers cut leaves, fuel, etc., by force from the forest situated near the lands of another and grown by him by keeping guard over it and it is made the subject of a suit. If such things take place, there is reason to fear violence and theft being committed and to the growth of forests being destroyed. *Therefore in future each should guard the forest in the neighbourhood of his lands as ordered above, only* the leaves, grass, dry leaves and fuel necessary for the aid of cultivation of his lands should be *used and other people should not*

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

enter that forest. There are lands which have no forest in the neighbourhood. Those that cultivate such lands should remain separate, and make use of leaves and fuel for the aid of their cultivation from the forest enjoyed by the ten people (Hattu Mandi)." (*Note.*—That is, by the villagers generally.)

"If any one cuts trees and forests contrary to the order given above, the same shall be attached and those that cut the same shall be punished according to law."

The acts then, to which these witnesses speak are consistent with the forest being the property of Government in which the claimant enjoyed so called netticut privileges. It is remarkable that none of the witnesses speak of the claimant ever felling timber, or giving permits for such felling or for cultivation in the forest. These are the especial acts indicative of ownership which might be looked for if the claimant, in truth, exercised anything more than "Netticut" privileges.

The claimant's petitions show that her original claim on the 16th May 1894 was not to proprietary right, but rather to the continuance of the existing kumaki or netticut privileges. She there speaks of the forest as "*adjoining*" *not* as forming part of her warg No. 31 and as being necessary as an aid to its cultivation by supplying manure and leaves, etc., and for fuel. In her next petition, dated 18th September 1894, her kariastan says he will adduce documentary evidence to prove her title to the forest. This, it may be noticed, he has not done. In the third petition, dated the 18th October 1894, the kariastan speaks of the forest as "abutting" both on wargs Nos. 31 and 32 and adds that "the chittas of warg No. 32 bring to light another circumstance of the utmost importance," viz., that a considerable portion of the forest has been held by the house as an integral part of the warg No. 32 itself for which an assessment of Rs. 44 on a distinct heading has been levied for that warg."

Here the forest is no longer only "adjoining" warg No. 31, but it "abuts" warg No. 32 also, which is a much larger warg, and *a portion* (not the whole) is an integral part of the warg, charged with a separate assessment. In the next and latest petition, though the forest is still spoken of as "adjoining wargs Nos. 31 and 32" yet the whole is claimed as a portion of the assessed land. It seems unlikely that the claim would have been made in these uncertain terms of progressive comprehensiveness

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

if the lands were really part and parcel of the warg and had been held as such in proprietary right for many years.

That such was not the true character of the land appears to be almost demonstrated by one fact to which the District Judge has hardly referred. It is this. Exhibits A and B are the jamabandhi chittas, or Revenue accounts, for the years 1819 to 1893 inclusive. The Rs. 44 referred to in the claimant's petition of 18th October 1894 is the 11 (huns) which appear in line 3, page 2 of exhibit A as the assessment imposed in 1803 as "Sarkar demand on darkhasted land." There is nothing to suggest that this was a new assessment on forest land already included in the warg. The description of the land as "darkhasted," *i.e.*, obtained from Government on application to the Revenue authorities, negatives the supposition that the forest or waste land adjacent to the cultivation was then part of the warg, for, if it was, no extra charge would have been made on its cultivation, for the assessment on a warg is a lump sum payable on all the lands in the warg whether they be cultivated or left waste. Moreover, in the same accounts (page 12) in the fasli 1265 (1855) we find an entry "Hosagame Rs. 45–3–2" and again (page 9) in 1889 we find an entry "excess on Hosagame for this year Rs. 3–2–5." We have seen that Hosagame is a technical term applied to land newly granted for cultivation out of the Government immemorial waste or forest. If the claimant held the lands as part of his warg, they would not have been granted as Hosagame and they would not have been charged with assessment. The District Judge evidently did not understand this, for he says that the system under which warg lands left waste and again cultivated are assessed, *Vyakunta Bapuji* v. *Government of Bombay*(1) is referred to and "explains why the appellant in this case obtained a patta for warg land newly cultivated some years ago." We can find no such explanation in the passage referred to. We think the District Judge has altogether misunderstood these *Hosagame* entries and the inferences to be drawn from them.

Then turning to the evidence of the three village officers examined as witnesses by Government we find that the District Judge sums it all up in one sentence of three and-a-half lines and then makes no further reference to it in the judgment.

(1) 12 B.H.C.R. App. at p. 220.

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

Yet that evidence is very important and deserves consideration. The shanbogue (karnam) proves that the warg No. 32 consists of 72 acres—particulars of which are given in the (survey) A Register (produced)—all being cultivated as one, two or three crop land (betta, majal, bail) with the exception of three acres of waste. He distinctly states that this is the full area on which assessment is paid and that there is no other land belonging to or attached to the warg No. 32. There was practically no cross-examination as to this evidence. If it is true, there is an end of the claimant's case, yet the District Judge makes no reference to it. It is not necessary in this second appeal to discuss the other evidence of the village officers. It is enough to say that much of it appears to be highly pertinent to the question before the District Judge, viz., whether the forest claimed was part and parcel of the warg or was not included in it, and the District Judge has apparently not considered it. Lastly, the District Judge refers to exhibit D (II) at a genichit executed by a tenant of the claimant. This document has not been proved, nor is it shown to have been acted upon. It is not admissible as evidence.

In these circumstances we set aside the decree of the District Judge and remand the appeal for disposal with reference to all the evidence in the case, and with reference to the general principles and presumptions which we have found to be established on a review of the revenue history and tenures of the district. The District Judge may, at the hearing of the appeal, if he sees fit, admit further evidence properly admissible in appeal, on behalf of either side, including the petition, dated 26th November 1888, by the grandmother of the claimant applying to Government for land adjoining warg No. 32, and the order thereon (printed at pp. 53 and 45 of the documents in Second Appeal No. 1276). Costs in this Court will abide and follow the result.

In Second Appeal No. 1276 *of* 1900.—In this case the District Judge has found that the claimant's ancestor had obtained confirmatory grants of the tracts in dispute from the Vital Rajah (exhibits B, D, E) prior to the conquest of the country by the British, and that his family had been in continuous possession ever since, such possession being evidenced by such acts of ownership as the making of tanks in the forest, the construction of a

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

boundary wall, the felling of trees and generally by using the forest as they pleased to the exclusion of all others. This is a finding of fact with which we are not at liberty to interfere in second appeal. There are not in this case those special facts which exist in Second Appeal No. 1277 and which prevent us from accepting the Judge's finding in that case as binding on us. In the present case the title being found to be in the claimant, the acts of possession are naturally referrible to such title. Some of them are, moreover, of a character to indicate proprietary right in the claimant rather than such permissive use as is re ferrible to kumaki and netticut privileges, and such use as is not inconsistent with the proprietary right of Government.

We therefore dismiss this second appeal with costs.

In Appeal No. 28 *of* 1902.—The appellant claims a large area of forest in the proposed reserved forests known as Halesomeshwar and New Someshwar blocks on the ground that the forest claimed forms part of his Geni warg No. 5 and of his Muli warg No. 16. of Nadupal village. We think that the Forest Settlement-officer rightly rejected his claim on the evidence before him. That evidence was, however, very meagre. After the appeal was filed, a plan of the locality was prepared by a Commissioner appointed by the Court and further evidence on both sides was admitted.

The whole of the evidence now before us makes it clear that the appellant has no proprietary right to the land. He rests his claim mainly on exhibits H and A, and on oral evidence of enjoyment. Exhibit H is a statement prepared in 1822 for the purpose of showing the boundaries between Mysore and the Company's territories. It shows the crest of the ghats as the boundary and states the distance of this boundary line to be three leagues from the Mursevadur lands of the warg of Nadupal village and from the Arsinamane lands of Halesomeshwar village. It describes the whole of the interval as forest in which teak and jack trees grow and adds that the wargdar of Halesomeshwar (who appears to be the ancestor of the appellant) "takes deer, boars, etc., and cuts for kumri." (*Note.*—It is agreed before us that the vernacular words which are translated in the printed records "fells in the forest" ought to be translated "cuts for kumri.") It is not clear who prepared this statement, or what

authority attaches to it. But assuming that the statement is entitled to any weight, it certainly does not support the appellant's claim to proprietary right. If the forest was then regarded as part of his warg it would have been so stated. The fact that he captured deer and boar and had kumri (shifting) cultivation in the forest is in no way inconsistent with the forest being the property of Government, while the fact that these alone are recited as his rights or privileges in connection with his great tract of forest, extending for many miles to the top of the ghats, negatives the idea of his proprietary right.

On the other hand it is shown by exhibit I, read with exhibits VII to XI, that in this very year, 1822, in which exhibit H was prepared, these forest tracts were entered in the list of Government forests prepared by the Collector, Mr. Harris, Mr. Webster, the Collector in 1876, in dealing with the appellant's claim to these forests says (exhibit X that Mr. Harris' list was "signed" by the appellant's grandfather as well as by the village officers. It is not clear from the records before us that the appellant's grandfather actually signed the list, but exhibit I, column 5, shows that the list was "*prepared from information supplied*" by the village officers, and the appellant's grandfather as well as the actual cultivator of the Melarsina mane lands belonging to the latter (exhibits VIII and X). Reading exhibits H and I together it is clear that in 1822, the appellant's ancestor, the Collector and the village officers all regarded these ghat forests as the property of Government.

Then the appellant relies on exhibit A. It is a chitta or statement prepared in 1829 by the Monigar (or Revenue Inspector) in obedience to an order from the Collector, showing the profits, boundaries, etc., of warg No. 5 of Nadupal village. Its heading shows that it was prepared "in the presence of the village officers and ryots of Halesomeshwar for the purpose of issuing a Mulpatta." The Mulpatta was apparently claimed by the tenants of the appellant's grandfather (exhibit IV, paragraph 3). The statement describes the lands said to be in the possession of each of the tenants of the warg and in many cases forests are entered as part of the tenants' holdings. Some of these forests are small patches of which the measurements are given, but in other cases they are said to be so dense and extensive that they cannot be measured. There is nothing to show that this list was ever

accepted by the Collector. It is certain that no Mulpatta was ever issued. The mere entry of these forests in an account prepared by a subordinate official from the statements of the parties interested (the appellant's ancestor being the karnam or accountant of the village), but never accepted or acted upon by the Collector, cannot be regarded as establishing the appellant's title as against Government, especially when the inferences to be drawn from exhibits H and I, prepared only seven years previously, are borne in mind.

Then we find from exhibits XII, XIII and XIV read with the evidence of the Forest Ranger who prepared the plan exhibit XV, that in 1865 Government made grants of various portions of this forest for cultivation to persons other than the appellant. They, in fact, created three Hosagame (or new) wargs in this forest within the boundaries given in exhibits H and A, and no objection has even been taken by the appellant to this exercise by Government of the fullest proprietary right.

The absence of any proprietary right in the appellant to these forests is also clear from the proceedings in exhibits II to VI. These show that the lands comprised in the appellant's warg in Nadupal village were from very early times in the possession of tenants under the wargdar. In 1829 the tenants claimed to have permanent occupancy rights and asked for Mulpattas to be issued to them. Exhibit A was apparently prepared in connection with this claim. The Collector, however, appears to have rejected their claim and advised the appellant's father the wargdar, to sue them for possession. He accordingly filed Original Suit No. 30 of 1867 on the file of the Karkal District Munsif, obtained a decree and got possession of all the property. Neither in the schedule attached to the plaint (exhibit II) nor in the list of property delivered by the Court Amin (exhibit III) is there any mention of forest. It is all described as bail (three crop), majal (two crop), bett (one crop), garden land or houses or house sites. In exhibit IV, dated 26th March 1872, the appellant prayed the Collector on the strength of this decree to "enter the warg and Kudtala (revenue registry) of the whole of the property" in his name and added: "If perchance any land over which the Government has rights is included within the boundaries stated in the decree, it is enough if the warg and kudtala of the cultivated land only are entered in my name." The tenants, however,

objected to the transfer and in his petition exhibit V of the 28th May 1872 the appellant recited the history of the property and in his statement made to the Deputy Tahsildar on the next day said: "It appears that about 25 acres of Government land are included in the boundaries of the decree. I shall not make any improvement on that land without permission. I shall use it for leaves and fuel for the aid of cultivation only. It is enough if the warg and kudtala are entered in my name only for the cultivated land." These proceedings are important as they show, firstly, that though the whole of the warg lands were in possession of the tenants, no forest lands were included; and, secondly, that when some 25 acres of forest was included in the decree, the appellant admitted that the inclusion was incorrect, that the forest was Government land and that he made no claim to it as part of the warg. It cannot be suggested that the forest now claimed by the appellant remained in possession of the appellant while the cultivated land alone was in possession of the tenants. The appellant makes no claim to such separate possession. There is no evidence in support of it. The only evidence of possession of the forest land now claimed by the appellant refers to the tenants taking fuel and manure from it for the benefit of their cultivation, but the very language of the appellant in regard to this 25 acres included in the decree shows that the appellant regarded the use of the Government forest land for the taking of fuel and of leaves for manure as an aid to cultivation as a privilege enjoyed by leave of Government and not such as to indicate any proprietary right in the person so using the land. This brings us to the oral evidence of enjoymen relied on by the appellant. It entirely fails to establish his right. The appellant himself, though 52 years of age, gives no evidence of any acts of enjoyment of the forest land by himself or his tenants and he admits that his tenants have not cut and sold timber from it. He called three of the villagers but they merely state in the most general way that the appellant's family "enjoy the forests" by taking firewood, leaves and twigs and small trees and they admit that precisely the same acts are done in the Government forests (or revenue jungles as one of the witnesses calls them). All the witnesses say that there has been no cultivation or felling of timber at any time in the forests claimed. As already stated the so-called acts of enjoyment are such as Government permits, or

until recently permitted, in its forests, and do not operate to create any proprietary right in the licensees.

The whole of the evidence, oral and documentary, shows that the appellant has no such right as he claims, and his appeal must be dismissed with costs, except the costs provided for by the order of this Court, dated 4th December 1901.

In Appeal No. 27 *of* 1902.—In this case the claimants own wargs 15, 16 and 17 of Anantadi. They claim the slopes of the Sulaimalai and Ballamalai hills between their warg lands in the valley and the watershed of the hills on the strength of an alleged Mullpatta, exhibit A, and by virtue of the prescriptive title acquired by long occupation. The Forest Settlement-officer disallowed the claim and the claimants' appeal. If exhibit A was, in fact, a Mulpatta granted by the Collector, and if the lands claimed were within the boundaries given in it, we would certainly be unable to accept the Forest Settlement-officer's view that it conferred no title to the forest land within its limits. As already stated the Government has now far many years past accepted the view of the Bombay High Court that the Mulpattas granted by Collectors do convey a title to all lands within their boundaries, subject of course, to the right of Government to assess them.

But exhibit A is not a *Mulpatta* nor is it admissible as evidence that the claimant ever had such a *Mulpatta*. It purports to be a copy, not of an original *Mulpatta*, but of a copy of a Mulpatta. As such it is not admissible even as secondary evidence of the contents of the original (section 63, Indian Evidence Act).

The claimants' vakil when producing the copy said that the original would be produced at the adjourned hearing, but it was not produced. Even if exhibit A could be looked at as evidence of the alleged grant, the boundaries are so vague that it would be impossible, so far as the evidence before us goes, to say that the forest claimed is within its limits. Indeed the contrary would seem to be the case, as the northern boundary is said to be the rice land ("bail") of a certain warg, and three cocoanut trees, neither of which would be found on the top of a hill. Moreover there is nothing to show that the present claimants are the descendants, or heirs, or transferees of the persons named in exhibit A. Exhibit A is in fact, quite worthless as evidence of the claimants' alleged title to the forest.

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

Nor is there any evidence from which a proprietary title by prescription can be found. All that the claimants' witnesses say is that for many years past the claimants have taken from the forest in dispute leaves and manure for the benefit of their cultivated lands and that they have paid watchmen to prevent others from taking the leaves and manure. But, as we have already seen in dealing with Second Appeal No. 1277, such use of the leaves and manure of the Government forests is permitted by Government in favour of wargs situated close to the forests, and Government not only permitted, but enjoined the wargdars, so long ago as 1854, to employ watchers in order to prevent strangers taking the leaves and manure away from the forest to the injury of the wargs for whose benefit Government allowed it to be used. The evidence adduced by the claimants does not prove or even indicate any proprietary right as against Government. The fact that they adduce no evidence to show that they have ever cultivated the forest, or cut timber trees in it, or sold its produce, or planted up the slopes, suggests that their occupation is not proprietary, but only permissive in accordance with the *kumaki* or netticut privileges allowed by Government, and that such is the real character of their occupation appears from other statements of their own witnesses as well as from the evidence of the village officers. The claimants' first witness says that there are seven wargdars besides the claimants in Anantadi and that each enjoyed the slopes of the hill adjoining his warg just as the claimants did. Claimants' third witness says "I enjoy the slopes of the Sulamalai adjoining my land as claimant enjoys those adjoining his." Claimants' fourth witness says "other wargdars enjoy the Sulamalai slopes adjoining their lands. They enjoy the slopes up to the *netticut*. Claimant owns in the same way." The Shanbogue of the village gives the exact area of the claimants' three wargs and says plainly that "the wargs have kumaki jungle, but no other forest" and explains that the kumaki land extends only for 100 yards round the cultivated areas. This is evidently the view also of the Potail of Mudanur who says that the claimants collect manure only from the slopes between the cultivated land and Sirthaguli, a distance of a half a furlong (120 yards). The evidence of the Potail of Anantadi is also distinct. He says that the claimants' wargs consist of "fields, cocoanut and jack trees, etc. The trees are on the bunds of the paddyfields. There is no warg

THE SECRETARY OF STATE FOR INDIA v. M. KRISHNAYYA.

jungle that I know of. There is no assessed jungle. The wargdar collects leaves from Sulaimalai and Ballamalai slopes. Before reservation they collected leaves from the whole slopes. The wargs have a right to 100 yards only margin. Other wargdars before reservation removed leaves, etc., from the hill slopes above their wargs for greater distances than 100 yards."

All this evidence shows that the claimants, though using the leaves and manure of the forest for the benefit of their warg lands, did so not by reason of any proprietary right in the forest, but in accordance with the well-known *kumaki* and *netticut* privileges sanctioned by Governmeet in favour of wargs adjacent to the Government forests. The appellants' claim must therefore be disallowed and their appeal be dismissed with costs, except those provided for in the order of this Court, dated 4th December 1901.

APPELLATE CIVIL.

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

RAJARATHNA NAIDU (PLAINTIFF), APPELLANT,

v.

NARASIMHA CHARIAR (DEFENDANT), RESPONDENT.*

1904. December 2, 7.

Rent Recovery Act (Madras) VIII of 1865, s. 9—Power-of-attorney granted by shrotriemdar to exercise rights under the Act—Power coupled with interest irrevocable—Acceptance of patta by tenants with knowledge of grantee's interest —Suit by grantee to enforce acceptance of puttahs—Maintainability.

A, a shrotriemdar gave the plaintiff a power-of-attorney authorising him to exercise the rights of a shrotriemdar under Act VIII of 1865. A, subsequently, purported to revoke the power-of-attorney. He then tendered pattas to the defendants which they accepted. The plaintiff tendered pattas for the same fasli which the defendants refused on the ground that they had already accepted pattas from A. The defendants were aware at the time they accepted A's pattas, that his right to tender them was disputed by plaintiff. On a suit being filed by plaintiff to enforce acceptance of the pattas:

Held, that the power-of-attorney being coupled with an interest was in law irrevocable and the defendants were not discharged from their liability.

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* Second Appeal No. 275 of 1903, presented against the decree of A. C. Tate, Esq., District Judge of Chingleput, in Appeal Suit No. 571 of 1902, presented against the decision of S. M. V. Woosman Sahib, Head-quarters Deputy Collector of Saidapet Division, in Summary Suit No. 57 of 1902 (*vide* Second Appeal Nos. 276 to 313 of 1903).

RAJARATHNA NAIDU v. NARASIMHA CHARIAR.

SUIT to enforce the acceptance of pattas. The facts material to the case appear in their Lordships' judgment. The Deputy Collector dismissed the plaintiff's suit, which dismissal was confirmed on appeal by the District Judge.

Plaintiff preferred this second appeal.

T. V. Seshagiri Ayyar for appellant.

V. C. Seshachariar for respondent.

JUDGMENT.—These are appeals from decrees of the District Court of Chingleput dismissing suits under section 9 of Act VIII of 1865 for the acceptance of pattas.

For the purposes of the point of law (which was argued) before us the following facts may be taken to have been found or admitted :

In 1898 the shrotriemdar gave to the plaintiff a power-of-attorney authorising the plaintiff to exercise the rights of the shrotriemdar under the Act of 1865.

This power, being coupeld with an interest, was in law irrevocable. The shrotriemdar purported to revoke this power-of-attorney, and gave notice to the defendants that he had done so. He then tendered pattas to the defendants which the defendants accepted. At the time the defendants accepted the pattas they were aware that the shrotriemdar's right to tender the pattas was disputed by the plaintiff. The plaintiff subsequently presented pattas for the same fasli and the defendants refused to accept them on the ground that they had already accepted pattas from the shrotriemdar.

The question is whether the defendants are discharged from their liability to the plaintiff by reason of their having already accepted pattas from the shrotriemdar. The District Judge decided the point in favour of the defendants upon the ground that as the relation of principal and agent existed between the shrotriemdar and the plaintiff, and the pattas tendered by the shrotriemdar had been accepted, the plaintiff was not entitled to tender second pattas by reason of the fact that the shrotriemdar had acted in contravention of the contract with the plaintiff in himself tendering the pattas. On behalf of the defendants it was contended before us that the plaintiff's only remedy was to sue the shrotriemdar for damages for having derogated from his own grant. We do not think that this contention is well founded. It is not necessary for us to consider whether the defendants

RAJARATHNA NAIDU v. NARASIMHA CHARIAR.

would have had a good defence if at the time they accepted the shrotriemdar's pattas, they had been unaware that the plaintiff disputed the shrotriemdar's right to tender the pattas. There is no express finding on the point but it seems clear to us (and the learned vakil for the defendants did not contend otherwise) that when the defendants accepted the shrotriemdar's pattas they were aware that the right to tender the pattas was claimed by the plaintiff by virtue of the authority which had been given to him by the shrotriemdar. This authority was in law irrevocable; and this distinguishes the present case from the class of cases where payment to the agent has been held to be a good discharge (see, for instance, *Venning* v. *Bray*(1)).

The principle which governs the present case is thus stated in Story on 'Agency.' In dealing with the exceptions to the general rule that the principal may sue upon a contract made by the agent in the same manner as if he had personally made it, the learned author says: "Another exception is where the agent has a lien or claim upon the property bought or sold, or upon its proceeds which is equal to or exceeds the amount or value thereof; for in such a case (as we have seen), the rights of the agent are paramount to those of the principal; and the principal has no right to sue thereon unless with the consent of the agent; and if he does sue, and the other party has received notice of the lien, the suit will be ineffectual or at the peril of the party sued. If any other doctrine were to prevail, the right of lien of the agent might be defeated at the mere will of the principal." No doubt the case of *Engleton* v. *The East India Railway Company*(2) to which our attention was called on behalf of the appellant may be distinguished on the ground that there was an assignment of property, whereas here there was only an assignment of a right, but the basis of the decision appears to be that the defendants who had received notice from the party who had given the original authority to the plaintiff to take delivery of the goods to give delivery to a person other than the plaintiff were not discharged from liability to the plaintiff for the reason that the authority which had been given to the plaintiff was an authority coupled with an interest and was therefore irrevocable. See the passage in the judgment of Sir R. Couch on page 601.

(1) 2 B. & S., 502. (2) 8 B.L.R., 581.

RAJARATHNA NAIDU v. NARASIMHA CHARIAR.

As we think the learned Judge was wrong in dismissing the suits on the ground taken by him, we must set aside his decrees and remand the cases to him for disposal on the other points in the cases.

Costs will abide the event.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Moore.

1904. November 24, 28.

ALGARASAWMI TEVAN AND OTHERS (ACCUSED NOS. 1 AND 3 TO 13), PETITIONERS,

v.

EMPEROR, RESPONDENT.*

Indian Penal Code—Act XLV of 1860, *s.* 379—*Theft—Dishonest taking*—Bonâ fide *claim of ownership by accused over property in possession of third party—Disputed ownership of land—Possession summarily taken by Revenue authorities—Province of Civil Courts to decide questions of ownership between Government and private persons.*

The petitioner was convicted of theft of certain bamboos which he said he cut on his own puttah land, but which the prosecution alleged he cut on Government poramboke land adjacent to his own. Prior to his conviction, disputes had arisen between the Revenue authorities and the petitioner regarding the ownership of the land. The petitioner contended that he *bonâ fide* believed the bamboos to be his property at the time he cut and removed them. The Magistrate, finding that the Revenue authorities had taken possession of the land at the time the bamboos were removed convicted the petitioner:

Held, that the conviction was wrong. The questions to be considered were, (1) whether the bamboos did in fact belong to the petitioner or to Government; (2) whether if they did not belong to the petitioner he *bonâ fide* believed they did.

It is the province of the Civil Courts to decide questions of ownership of land between Government and private parties, and if the Revenue authorities take summary possession of land as in the present case, they become mere trespassers and there is nothing dishonest in the owner taking possession of his own property.

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* Criminal Revision Case No. 350 of 1904, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of G. H. B. Jackson, Esq., Head Assistant Magistrate of Sattur Division, in Criminal Appeal No. 25 of 1904, presented against the judgment of Mr. S. S. William, Second-class Magistrate of Watrap, in Calendar Case No. 103 of 1904.

ALGARASAWMI TEVAN v. EMPEROR.

CHARGE of theft. The petitioner with several others was convicted by the Stationary Second-class Magistrate of theft under the following circumstances:—A petition was sent to the Revenue authorities stating that the petitioner was utilising bamboos growing on Government poramboke land. The karnam was accordingly directed to inspect the land, and he reported that certain clumps of bamboos bordering on the petitioner's land were in Government poramboke. The petitioner refused to be present at the karnam's inspection but was informed of its results. The Deputy Tahsildar, on receipt of the karnam's report, ordered the bamboo clumps to be watched on behalf of Government. The petitioner shortly afterwards presented a petition to the Collector, stating that the bamboos had been planted by his ancestors for a hedge and setting out the action taken by the authorities thereto. Upon this petition the Revenue Inspector made an inspection and informed the petitioner's servant that certain of the clumps were in Government poramboke. The prosecution alleged, that the petitioner, subsequent to the inspection by the Revenue Inspector, cut these bamboos, and the Revenue Inspector deposed that those clumps were cut which he had pointed out to the petitioner's servants as lying within Government poramboke. The petitioner contended that he was the lawful owner of the bamboos in question. On appeal, the Head Assistant Magistrate in disposing of the petitioner's contention said:—

"The appellants have devoted eight paragraphs of the appeal petition to urging that the first and second appellants are the lawful owners of the bamboos in question. They seem to forget that ownership has little to do with cases of theft, where possession only is the point at issue. Mr. Mayne in paragraph 506 of his 1901 edition has put the matter thus, "it must not however be supposed that even a *bonâ fide* claim of right to property in the possession of another will always be sufficient answer to a charge of theft, if the right claimed cannot be fairly supposed to justify the mode in which it was exercised. If the property was in the possession of the prosecutor in such a way that he had a right to hold it against the prisoner, that is, that the petitioner could not get it without the consent of the prosecutor, then it would be theft if the prisoner dishonestly possessed himself of it with the intention of appropriating it."

ALGARASAWMI TEVAN v. EMPEROR.

The point can be proved by a *reductio ad absurdum*. If every one who believes that he has the right of ownership may take property from the possessor, there would be an end to all legal procedure and every one who could would help himself.

Therefore the facts that the appellant's grandfather planted the bamboos, that they are a hedge, that he has long enjoyment, or that the English maxim '*quicquid inaedificatur solo solo cedit*' finds no place in Indian Law (Madras, XXVII, 211) are all in my opinion beside the point. We want to know not that appellant can establish a right to the bamboos, but that he was in possession of them or thought that he was, when he removed them.

When the accredited officials of Government measure land according to the records and drive in pegs and announce that certain land is Government land and order that it shall be guarded as such and that the forest produce will be sold for Government. I hold that Government has taken possession of that land. Exhibit L show that first appellant shares my opinion. He details the steps taken by the authorities and begs the Collector that the bamboos, etc., may be in his possession as heretofore.

Were the bamboos, being moveable property in the possession of Government, taken dishonestly? Obviously the loss to Government and gain to the appellant is wrongful till a definite right is established by appellant. The fact that he may in the future establish such right does not effect the dishonesty of a removal without the right."

The petitioner filed this criminal revision petition.

R. Subrahmania Ayyar for petitioners.

Public Prosecutor in support of the conviction.

ORDER.—The first petitioner has been convicted of theft of certain bamboos which he says he cut on his own patta land, but which the prosecution alleges he cut on Government poramboke land adjacent to his own patta land.

The first petitioner has claimed a right to these bamboos for a long time past. He says that his grandfather planted them as a hedge and that he has long been enjoying them. The Revenue authorities, however, do not admit the claim. Revenue officers recently measured the lands, and being of opinion that the bamboos claimed by the first petitioner were within the limits of the Government poramboke took possession of the land and informed

ALGARASAWMI TEVAN v. EMPEROR.

the first petitioner that they had done so. The first petitioner, however, after this cut and removed some of the bamboos alleging that they belonged to him. Such being the facts, it is obvious that the first petitioner could not be guilty of theft if the bamboos were really his own property for he would be entitled to take them and his act would not be dishonest; nor would his act be dishonest if he *bonâ fide* believed them to be his even though, in fact, they were not so. The Head Assistant Magistrate in paragraphs 10 to 15 of his judgment shows that he entirely misunderstands the law applicable to cases of this kind. He says that "ownership has little to do with cases of theft, where possession only is the point at issue" and "We want to know not that appellant can establish a right to the bamboos but that he was in possession of them, or thought that he was, when he removed them." The Head Assistant Magistrate found that the Revenue authorities had taken possession of the land, and, therefore confirmed the conviction without trying the question whether the bamboos belonged to the first petitioner or whether he *bonâ fide* believed that they did.

The Head Assistant Magistrate evidently does not understand that the Revenue authorities have no right, as between themselves and the petitioner, to decide the question as to who is the owner of the land and the bamboos, nor have they any right to oust the first petitioner from possession. Their position in regard to these matters is the same as that of any private person. It is the province of the civil courts to decide questions of ownership of land between Government and private persons just as much as between two private claimants. If Government officers take summary possession of a man's land otherwise than under the Land Acquisition Act or other legal authority his rights are no more affected by such illegal action than they would be by the illegal seizure of his land by a private person. In such a case the Revenue officers are mere trespassers, and there is nothing dishonest in the owner retaking possession of his property.

The case quoted by the Head Assistant Magistrate from Mayne has no application to such a case as the present, for it presupposes that the offender has no present right to the possession of the property, (for example a man may be guilty of theft if he dishonestly and without the banker's consent takes his own valuable securities out of the possession of a banker who has a lien on them), but in the case before us if the bamboos

ALGARASAWMI TEVAN v. EMPEROR.

belong to the first petitioner he has a present right to their immediate possession.

The chief questions then, are (1) whether the bamboos do, in fact, belong to the first petitioner or to Government; (2) whether, if they do not belong to the first petitioner he *bonâ fide* believed that they did. In regard to this the fact that his grandfather planted the trees, (if it be a fact) and that he long enjoyed the produce (if he did do so) would be matters of great importance from which to draw an inference as to his honesty. On the other hand, if these are not proved, and if the land is shown not to belong to him, then the fact that he knew that the Revenue authorities had decided against his claim after enquiry and examination of records and had warned him not to interfere with the bamboos would be important in judging of the *bona fides* of his alleged belief.

We set aside the order of the Head Assistant Magistrate confirming the conviction and we direct that the Head Assistant Magistrate to restore the appeal to his file and dispose of it a fresh in accordance with law. He will also reconsider in the light of our observations the petitioner's application for the admission of further evidence. The accused will remain on the same bail pending the disposal of the case by the Head Assistant Magistrate.

APPELLATE CRIMINAL.

Before Mr. Justice Boddam.

1904. December 1.

KAMATCHINATHAN CHETTY (ACCUSED), PETITIONER,

v.

EMPEROR (RESPONDENT).*

Indian Penal Code—Act XLV of 1860, *s.* 193—*Giving false evidence—Deposition of witness upon which assignment of perjury based not taken in manner required by law—Conviction—Unsustainability of.*

A was convicted of giving false evidence in a judicial proceeding. It was proved that after his evidence had been recorded, his deposition upon which the

* Criminal Revision Case No. 368 of 1904, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of W. W. Phillips, Esq., Sessions Judge of Tinnevelly, in Criminal Appeal No. 51 of 1904, presented against the conviction and sentence of E. W. Legh, Esq., Sub-Divisional First-class Magistrate, Tuticorin, in Calendar Case No. 55 of 1904.

KAMATCHINATHAN CHETTY v. EMPEROR.

assignments of perjury were based was read over to him by the Court clerk, in a place where neither the Judge nor vakils were present:

Held, that the conviction could not be sustained. The deposition upon which the prosecution was based not being properly taken in accordance with law, should not have been admitted in evidence.

CHARGE of giving false evidence. The accused, who was the first defendant in Original Suit No. 230 of 1902 in the Munsif's Court, was convicted by the Sub-Divisional Magistrate of Tuticorin, of giving false evidence in that suit. The conviction was confirmed by the District Judge.

Against his conviction the accused preferred a criminal revision petition to the High Court on the following *inter alia* grounds:—

(1) The conviction of the accused is illegal.

(2) The prosecution of the accused for statements alleged to be made in a deposition not taken in accordance with law is unsustainable.

(3) Exhibit A not having been taken down by the Munsif in his own hand as the law directs nor having been interpreted to the accused and certified to be correct in accordance with the provisions of the Code, the lower Courts erred in admitting it in evidence and acting on it.

V. Krishnaswami Ayyar and *S. Srinivasa Ayyar* for the petitioner.

Public Prosecutor in support of the conviction.

ORDER.—I am of opinion that this conviction cannot be sustained. The proper proof of the statement on oath of a witness is his deposition taken in the manner required by the Civil Procedure Code.

In this case that which purports to be the deposition of the accused given in the civil suit and upon which this prosecution is based was not properly taken in accordance with the requirements of the Civil Procedure Code. By the Code it is provided that the evidence given by a witness after being taken down in writing "shall be read over in the presence of the Judge and of the witness and also in the presence of the parties or their pleaders and the Judge shall, if necessary, correct the same and sign it." In this case it is proved that the witness was taken aside by the clerk and his evidence read over to him in a place where neither the Judge nor the vakils were present and one of the most important safeguards as to the correctness or otherwise of the deposition was omitted. The Judge is required to be present in

KAMATCHI-NATHAN CHETTY v. EMPEROR.

order that he may correct any inaccuracy or mistake in the deposition and may not depend upon the carelessness, forgetfulness or wilful misrepresentation of another as to whether any and what corrections should be made. The vakils are required to be present that they may call the attention of the witness to any statement appearing in the deposition which may or may not require correction. The document purporting to be a deposition read over and signed without these requirements being complied with is not a deposition and should not have been admitted as such. Without it there is no evidence of the statement on *oath* of the accused upon which the assignments of perjury are based for no oral or secondary evidence was admissible (inasmuch as the actual words purport to have been recorded) as long as the document containing them exists.

In these circumstances the perjury alleged was not proved and the accused should have been acquitted.

I allow this petition and set aside the conviction and sentence passed upon the petitioner and acquit him. The bail must be discharged.

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice.

1904. December 15.

CHINNATHAMBI MUDALI (COMPLAINANT), PETITIONER,

v.

SALLA GURUSAMY CHETTY (ACCUSED), COUNTER-PETITIONER.*

Criminal Procedure Code—Act V of 1898, s. 259—Complaint—Absence of complainant at hearing—Discharge of accused—Revival of proceedings on fresh complaint—Jurisdiction.

Where an order of discharge under section 259 of the Code of Criminal Procedure has been passed by a Magistrate, such order will not preclude him from proceeding with the case on a fresh complaint.

An order of discharge under section 259 of the Code of Criminal Procedure is not an acquittal nor has it the effect of an acquittal under section 403.

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* Criminal Revision Case No. 477 of 1904, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of Mr. M. Azizudin, Presidency Magistrate, Black Town, in Application No. 9745 of 1904.

CHINNA-THAMBI MUDALI v. SALLA GURUSAMY CHETTY.

PETITIONER preferred a complaint under section 500 of the Indian Penal Code, against the counter-petitioner, in the Court of the Presidency Magistrate of Madras on the 10th June 1904, which complaint was dismissed on 31st August 1904 owing to the absence of the complainant. The complainant applied to the High Court to revise the order of dismissal, passed by the Magistrate, but the High Court declined to interfere. The complainant thereupon filed a fresh complaint on the 1st October 1904. The Magistrate held that his previous order precluded him from entertaining the fresh complaint.

Against this order petitioner preferred this criminal revision petition.

Mr. *W. Barton* for petitioner.

Mr. *T. Richmond* for counter-petitioner.

ORDER.—In this case, the complainant was absent on the day fixed for the hearing and the Magistrate discharged the accused by an order made under section 259 of the Code of Criminal Procedure. An application was made to me to revise this order, but I declined to interfere since the matter was one for the discretion of the Magistrate and I was not prepared to say he had exercised his discretion on wrong principles. The present application is, by way of petition, against an order made by the Magistrate refusing to proceed with the case on the filing of a fresh complaint by the complainant. The Magistrate dismissed the application of the complainant upon the ground that his order under section 259 could not be revised by him. Assuming this to be so, this does not, as it seems to me, preclude the Magistrate from proceeding with the case on a fresh complaint. It would be otherwise, according to the decisions of this Court, if the case had been disposed of on the merits and the order of discharge had been made under section 203 or section 253. No doubt section 258 applies only to compoundable offences but I do not think this affects the question of the jurisdiction of the Magistrate. I should of course be bound by the decisions of this Court to which my attention has been called, if they covered the present case. But so far as I am aware there is no decision of this Court that a Magistrate, who has made an order of discharge under section 259, has no jurisdiction to rehear the case on a fresh complaint. The order of discharge under section 259 is not an acquittal under section 403 and has not the effect of an acquittal.

CHINNA-THAMBI MUDALI v. SALLA GURUSAMY CHETTY.

In the case of *Mahomed Abdul Mennam* v. *Panduranga Row*(1), this Court expressed their approval of the decisions in *Nibratan Sen* v. *Jogesh Chundra Bhutta Charjee*(2), and *Komal Chandra Lal* v. *Gour Chand Adikari*(3), and disagreed with the decision in *Mir Ahmad Hossein* v. *Mahomed Askari*(4). But in all these cases the complaint had been dismissed on the merits, the order having been made under section 203. In the Full Bench decision of the Calcutta High Court in *Dwarka Nath Mundul* v. *Beni Madhal Banerjee*(5), the Court held that the Magistrate had jurisdiction to rehear a warrant case in which he had discharged the accused person by an order made under section 259. I do not find that this Court has ever declined to accept this view. I agree with this Calcutta decision and with the reasoning upon which it is based.

The case must go back to the Magistrate to be dealt with according to law.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Moore.

1905. February 13.

PAMULAPATI ANKINUDU (PLAINTIFF), APPELLANT,

v.

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

Revenue Recovery Act—(Madras) Act II of 1864—Land revenue—Tax levied on person in unauthorized occupation of Government waste land—"Penal assessment"—Illegality of.

Plaintiff and second defendant, who were brothers, built a choultry on their patta land and obtained from Government a piece of the adjoining poramboke

(1) I.L.R., 28 Mad., 255. (2) I.L.R., 23 Calc., 983.
(3) I.L.R., 24 Calc., 286. (4) I.L.R., 29 Calc., 726.
(5) I.L.R., 28 Calc., 652.

* Second Appeal No. 166 of 1903, presented against the decree of M.R.Ry. I. L. Narayana Row, Subordinate Judge of Kistna, in Appeal Suit No. 276 of 1902, presented against the decree of M.R.Ry. V. L. Narasimham, District Munsif of Tenali, in Original Suit No. 722 of 1900.

(1) See now Madras Act III of 1905. A search undertaken in consequence of certain observations made while this measure was before the Legislative Council as to the course of decisions in this Court shows that besides the cases reported

PAMULAPATI ANKINUDU v. THE SECRETARY OF STATE FOR INDIA.

land measuring 4 cents upon the condition that it should be used for the purposes of the choultry. The plaintiff subsequently constructed paddy godowns contiguous to the choultry, and in doing so encroached upon a portion of the land granted by Government. The Government thereupon resumed possession of the land, cancelled the grant, and directed the plaintiff and the second defendant to vacate the same. The plaintiff refused to vacate on the ground that he had not encroached upon the land granted by Government. The revenue authorities, thereupon, imposed a penal assessment on him of Rs. 44. In a suit by the plaintiff, *inter alia*, to recover the amount of the tax which he had paid:

Held, that the levy of penal assessment was illegal, and the plaintiff was entitled to recover the amount thereunder.

Madathapu Ramaya v. *The Secretary of State for India*, (I.L.R., 27 Mad., 386), followed.

SUIT to establish plaintiff's right to certain land and to recover, a sum of Rs. 44 collected from the plaintiff by the Government, by way of penal assessment for encroaching upon poramboke land. The facts of the case as stated by the Acting Sub-Judge are as follows:—The plaintiff and second defendant are brothers. They erected a choultry and a travellers' shed about 6 or 7 years ago on their patta land D. No. 725-A. Subsequently, the Government granted a kabela for 4 cents of land from the adjoining poramboke on condition that it should be used for the purposes of the choultry. Three or four years ago, the plaintiff and second defendant divided this plot and erected paddy godowns thereon and stored their paddy therein. They have stored earth on another one cent of the unassigned portion of the poramboke D. No. 724. The Government thereupon

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in *Muthayya Chetti* v. *The Secretary of State for India* (I.L.R., 22 Mad., 100) and in *Madathapu Ramaya* v. *The Secretary of State for India* (I.L.R., 27 Mad., 386), the only other cases in which the question of penal assessment has come before the Court are (i) *Kattai Muhammad Meera Mohideen* v. *The Secretary of State for India* (S.A. No. 912 of 1901) (unreported) decided shortly before *Madathapu Ramaya* v. *The Secretary of State for India* (I.L.R., 27 Mad., 386), in which the question of the legality of imposing penal assessment was raised but left undecided, the suit being dismissed as barred by limitation and on the ground that the penal assessment had been paid without compulsion of law; (ii) in the case of *Pamulapati Ankinudu* v. *The Secretary of State for India* (S.A. No. 166 of 1903) reported above which follows *Madathapu Ramaya* v. *The Secretary of State for India* (I.L.R., 27 Mad., 386); and (iii) *Pedda Maldanna* v. *The Secretary of State for India* (S.A. No. 1199 of 1902), not reported, in which it was again held that penal assessment paid voluntarily could not be recovered back. Two other cases, viz., *The Collector of Chingleput District* v. *Kosalram Naidu* (S.A. No. 1352 of 1897) (unreported) and *Boddupalli Jagannadham* v. *The Secretary of State for India* (I.L.R., 27 Mad., 16), related to the liability of land to ordinary as distinct from penal assessment and did not raise any question of the legality of penal assessment.

PAMULAPATI ANKINUDU, v. THE SECRETARY OF STATE FOR INDIA.

resumed the 4 cents, cancelling the grant and directed the plaintiff and second defendant to vacate the same. The second defendant promised to give up his personal rights in the southern portion of the godowns and agreed to utilize them for the benefit of the choultry, but the plaintiff stubbornly maintained as he still maintains, that no portion of his godowns stood on the kabela land granted by the Government, and refused to vacate it. The Revenue authorities have, thereupon, charged the land with a 'prohibitory assessment' at Rs. 20 per cent."

The District Munsif passed a decree in favour of the plaintiff for Rs. 34-13-3 on the ground that only a portion of Government land measuring ½ cent had been encroached upon. On appeal by the first defendant, the Subordinate Judge modified the decree of the lower Court in respect of the amount payable by the first defendant. Plaintiff preferred this second appeal.

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

The Government Pleader for first respondent.

JUDGMENT.—Following the decision in *Madathapu Ramaya* v. *The Secretary of State for India in Council*(1) we must hold that the levy of penal assessment on this land was illegal. We modify the decree of the Subordinate Judge and direct that the plaintiff do recover from the first defendant a sum of Rs. 38-4-4 in addition to the sum already allowed with *interest* at 6 per cent. from this date to date of payment. We make no order as to costs in this appeal.

(1) I.L.R., 27 Mad., 386.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Benson.

NARAYANASAMI NAICK (PLAINTIFF), APPELLANT,

v.

MANGAMMAL AND OTHERS (DEFENDANTS Nos. 2, 3 AND 5), RESPONDENTS.*

1905. January 16, 17.

Hindu law—Adoption by senior widow without consulting junior widow—Validity of.

An adoption made after the death of a Hindu by his senior widow, after having obtained the consent of his sapindas but without consulting the junior widow is valid and cannot be impeached on the ground that such adoption has the effect of divesting the estate of the junior widow or her infant daughter.

Rakhmabai v. *Radhabai*, (5 B.H.C.R. (A.C.J.), 181 at p. 192), *Bhimawa* v. *Sangawa*, (I.L.R., 22 Bom., 206), *Amava* v. *Mahadgauda*, (I.L.R., 22 Bom., 416), referred to and followed.

Subrahmanyam v. *Venkamma*, (I.L.R., 26 Mad., 627), distinguished.

The consent of kinsman is required on account of the incapacity of women to act rather than to procure the consent of all whose interests will be defeated by the adoption.

The Collector of Madura v. *Moottoo Ramalinga Sathupathy*, (12 M.I.A., 397 at p. 442).

THE plaintiff-appellant a minor, brought this suit by his next friend for a declaration of his right as the adopted son of the deceased Ramásawmy Naik who died in March 1897, and for recovering the properties of his adoptive father in the hands of defendants Nos. 1 and 2, widows of the deceased Ramasawmy Naik. The case set up in the plaint was that the deceased authorised defendants Nos. 1 and 2 to adopt the plaintiff and that the adoption was made in pursuance of such authority. The District Judge on the evidence found that no authority was given by the deceased, but that the first defendant adopted the plaintiff with the consent of the sapindas but without consulting her co-widow, the second defendant. Holding that the adoption was invalid as it was made without obtaining the consent of the second defendant, he

* Appeal No. 107 of 1902, presented against the decree of Vernor A. Brodie, Esq., District Judge of Coimbatore, in Original Suit No. 20 of 1900.

NARAYANA-SAMI NAICK v. MANGAMMAL.

dismissed the plaintiff's suit. At paragraph 16 of his judgment, the District Judge observes as follows :—

"The question therefore resolves itself into the simple question of whether one of the two widows without authority from the husband to adopt at all can, with the assent of the sapindas of her husband, make a valid adoption without the knowledge and against the will of the other widow, such consent being not only against the interest of the non-consenting widow but against the interest of her minor daughter. Assuming the *bona fides* of the sapindas in giving their consent and of the widow actually making the adoption, as we have nothing to impeach it but the fact that they were careful not to take the other widow (who they probably had no doubt would never consent) into their confidence, I am however of opinion that the adoption is invalid for want of this consent on the analogy of the Travancore case quoted by Mr. Mayne ('Hindu Law,' page 155) and on the general principle that persons cannot be divested by others without their consent of property already vested in them by law even where that interest is not a complete, but a limited interest such as that of a Hindu widow in her husband's estate."

Plaintiff preferred this appeal.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for appellant.

The Hon. Mr. *P. S. Sivaswami Ayyar* and *S. Kasturiranga Ayyangar* for first respondent.

JUDGMENT.—The plaintiff's case was that his alleged adoptive father, on his death-bed in February 1897, authorised the first and second defendants, his widows to adopt the plaintiff and also by oral will bequeathed to him all his property. The case found proved by the District Judge is that in the following December in 1897 the first defendant the senior widow adopted the plaintiff with the consent of all her late husband's divided brothers, but that that adoption was invalid because the junior widow (the second defendant) did not consent to it and took no part in it. The District Judge did not believe that portion of the plaintiff's evidence which related to the death-bed disposition of his property by the deceased or to his having authorized his widows to adopt the plaintiff. In that conclusion we agree. It was not seriously contested in the appeal by the plaintiff, which was confined more to the legal question whether on the Judge's finding of the *factum*

NARAYANA-SAMI NAICK v. MANGAMMAL.

of adoption in December 1897 by the senior widow it had not been erroneously held by the District Judge to be an invalid adoption. It was urged for the respondent, second defendant, the junior widow, that the District Judge's finding of fact that there had been an adoption by the senior widow in December 1897 was wrong; and it will be more convenient to deal with this question first, leaving the question of law for considerations afterwards. We have on a review of all the evidence come to a decided opinion that the adoption by the senior widow in December 1897 never took place. The whole story depends upon the words of a dozen interested witnesses unsupported by any circumstantial evidence, while it is contradicted by as many witnesses for the defence, no doubt interested too. But it is for the plaintiff to prove his case. His witnesses have been discredited in regard to the greater part of their story. The District Judge disbelieved them not only with reference to the death-bed events, but also with reference to the presence of the second defendant at the alleged adoption and there is nothing tangible to corroborate that fact of their story which the District Judge has believed and which is not free from several improbabilities. If the senior widow had received her husband's authority to adopt, there was no necessity to get the consent of his sapindas and there was also no occasion for the extreme hurry and privacy with which it was made. No astrologer, no purohit, no official of the village, in short no independent person was present, and many relatives who ought to have been invited to the ceremony were not asked to attend it. It is true that some two months afterwards, in February 1898, the first defendant the senior widow announced to the Tahsildar that the adoption had been made but no details, not even the approximate date of it, were stated in her petition. The alleged adoption was promptly denied by the second defendant and when the first defendant was put to *prove it*, she did not press it and eventually allowed the claim to be withdrawn giving as her reason for failing to urge it, ill-health. She had her own brother holding a general power of attorney from her and a Vakil had also been engaged by her, either or both of whom could have proceeded with the case on her behalf. Her personal conduct of the matter was in no way required, so that her sickness was only a subterfuge for delaying to adduce her proofs. She ultimately left it for the natural father of the boy to institute this suit.

NARAYANA-SAMI NAICK v. MANGAMMAL.

Meantime she had executed several documents in which she made no reference to the adopted son, but alleged that the property which should have been his, was her own and dealt with it as such. Lastly in the school registers of the boy, made two years after the alleged adoption the name of his natural father is entered as his "father or guardian" which could hardly have occurred if he had had an adoptive father. For all these reasons we must hold that the alleged adoption of the plaintiff did not in fact take place. In view of our finding that no adoption was, in fact, made it is unnecessary to decide the question whether the adoption found by the District Judge was a valid adoption or not. As however the question has been fully argued we may say that, if it were necessary to decide the question, we should be unable to support the conclusion of the District Judge. He found that the deceased husband gave no authority to his widows to adopt but that, after his death, the elder widow with the consent of all the sapindas made the adoption, without the knowledge of the junior widow and without consulting her. The District Judge observed that the adoption was against the interest of the junior widow and her infant daughter, who were thereby deprived of the property which had come to them from the deceased, and he held that the adoption was invalid "for want of the co-widow's consent, on the analogy of the Travancore case quoted by Mr. Mayne ('Hindu Law,' page 155) and on the general principle that persons cannot be divested by others without their consent of property already vested in them by law even where the interest is not a complete, but a limited interest, such as that of a Hindu widow in her husband's estate." We do not think that the case referred to by the District Judge has any application to the present case. On the other hand it has been laid down by the Bombay High Court that though "it would seem to be unjust to allow the elder widow to defeat the interest of the younger by an adoption against her wish yet if the adoption is regarded as the performance of a religious duty and a meritorious act, to which the assent of the husband is to be implied wherever he has not forbidden it, it would seem that the younger widow is bound to give her consent being entitled to a due provision for her maintenance and if she refuses the elder widow may adopt without it" (*Rakhmabai* v. *Radhabai*(1)).

(1) 5 B.H.C.R. (A.C.J.), 192.

NARAYANA-SAMI NAICK v. MANGAMMAL.

This decision was followed in *Bhimawa* v. *Sangawa*(1) and *Amava* v. *Mahadgauda*(2).

The Vakil for the respondent argues that the absence of consultation with the younger widow renders the adoption invalid and relies on the analogy of *Subrahmanyam* v. *Venkamma*(3) and the remarks at page 636, but we do not think that the case is in point. The junior widow is bound, as a matter of duty, to consent, and if, as their Lordships of the Privy Council say (*The Collector of Madura* v. *Moottoo Ramalinga Sathupathy*(4)), the consent of kinsmen is required by reason of the presumed incapacity of women for independence rather than the necessity of procuring the consent of all those whose interest in the estate would be defeated by the adoption, it would seem that the omission to consult the co-widow though no doubt improper, would not be a sufficient reason for holding the adoption to be invalid.

We must, however, dismiss the appeal with costs on the ground that no adoption took place.

APPELLATE CIVIL.

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

1905. January 5, 6, 9, 11. February 10.

PRAYAG DOSS JI VARU, MAHANT (DEFENDANT), APPELLANT IN APPEAL No. 236 OF 1901 AND RESPONDENT IN APPEAL SUIT No. 38 OF 1902,

v.

TIRUMALA SRIRANGACHARLAVARU AND ANOTHER (PLAINTIFFS), RESPONDENTS IN APPEAL SUIT No. 236 OF 1901 AND APPELLANTS IN APPEAL No. 38 OF 1902.*

Civil Procedure Code—Act XIV of 1882, s. 539—'Under the trust' meaning of—Power of appointing additional trustees or controlling body.

Under section 539 of the Code of Civil Procedure, the Court in sanctioning a scheme, may provide for the appointment of additional or new trustees, though such appointment may not be in conformity with the original constitution of the trust or with the rules in force in respect to it. The words 'under the trust'

(1) I.L.R., 22 Bom., 206. (2) I.L.R., 22 Bom., 416.
(3) I.L.R., 26 Mad., 627. (4) 12 M.I.A., 397 at p. 442.

* Appeals Nos. 236 of 1901 and 38 of 1902, presented against the decree of K. C. Manavedan Raja, Esq., the District Judge of North Arcot, in Original Suit No. 31 of 1898.

PRAYAG DOSS JI VARU, MAHANT v. TIRUMALA SRIRANGA-CHARLAVARU.

in section 539 of the Code of Civil Procedure have no reference to such original constitution or the rules. The Court of Chancery in England has always exercised such powers and in the absence of express words restricting the powers of Courts in this country, the Legislature must be presumed to have conferred similar powers upon them by section 539 of the Code of Civil Procedure.

Chintaman Bajaji Dev v. *Dhondo Ganesh Dev*, (I.L.R., 15 Bom., 612), and *Annaji* v. *Narayan*, (I.L.R., 21 Bom., 556), followed.

A scheme framed by the Court may be liable to variation for good cause shown.

Re Browne's Hospital v. *Stamford*, (60 Law Times, 288), referred to.

The directions in a scheme framed under section 539 of the Code of Civil Procedure may be enforced in execution on application by persons interested.

Damodarbhat v. *Bhogilal*, (I.L.R., 24 Bom., 45), followed.

THE plaintiffs, as persons interested in the Tirupati Temple, brought this suit under section 539 of the Code of Civil Procedure in the District Court of North Arcot for framing a scheme for carrying out the trusts of the temple at Tirupati. The facts are fully set out in the judgment.

The District Judge sanctioned a scheme by which amongst other things, a committee of management was formed and provision was made for the appointment of additional trustees.

Both parties appealed.

Sir *V. Bhashyam Ayyangar*, *R. Sadagopachariar*, *V. Krishnaswami Ayyar*, *S. Gopalaswami Ayyangar* and *T. T. Tiruvenkatachariar* for appellant.

P. R. Sundaram Ayyar and the Hon. Mr. *L. A. Govindaraghava Ayyar* for respondents.

JUDGMENT.—The temple of Sri Venkateswara in Tirumalai or Tirupati in the North Arcot district is a very ancient Hindu temple to which worshippers resort from all parts of India, and is in receipt of an annual income of between 2 and 3 lakhs of rupees. Prior to the establishment of the British Government, the management of the institution was directly under the ruler of the country for the time being. After the advent of the British, the management passed into the hands of the East India Company, and subsequent to the enactment of Regulation VII of 1817 of the Madras Code, it was carried on under the control of the Board of Revenue through the Collector of the district. With reference to a despatch of the year 1841 from the Court of Directors ordering the immediate withdrawal from all interference on the part of the officers of Government with native temples and places of religious resort, the management of the temple was in 1843 made over to

PRAYAG DOSS JI VARU, MAHAN v. TIRUMALA SRIRANGA-CHARLAVARU.

Seva Doss, the head of a Mutt called Hathiramji Mutt, situated in the town of Tirupati at the base of the hill on which the important shrine stands. In the 'sanad' by which this transfer of management, was effected, it was provided that Seva Doss' successors in the Mutt should be his successors as vicharanakartha or manager of the temple. Seva Doss having died in 1864, Darma Doss succeeded him, and, on Darma Doss' death in 1880, Bagavan Doss became manager and continued so still 1890. From 1890 to 1894 Mahabir Doss was manager. And from 1895 to 1900 Ramakisore Doss, the defendant in the two suits Nos. 31 of 1898 and 10 of 1899 on the file of the North Arcot District Court, held the management; and on his death, pending the litigation, the present Mahant as the head of the Mutt is styled, succeeded to the office of manager and was brought on the record as the legal representative of Ramakisore.

Now, when in 1843, the management was transferred to Seva Doss, it was, no doubt, expected that the management by the Mahant would prove satisfactory, but the history of what took place subsequent to Seva Doss' death is, to put it shortly, a record of waste and embezzlement.

Persons interested in the institution were not slow to bring the misconduct of the managers to the notice of the authorities. A suit was brought against Darma Doss, the second manager, charging him with misconduct and malversation. The charges were established and the District Court gave a decree against him. On appeal the decree was confirmed, and this Court taking a less lenient view than the District Judge, came to the conclusion that Darma Doss' misconduct was fraudulent and such as to justify his dismissal, but the dismissal was not ordered for the reason that it was apprehended that his successor might not prove a better manager. In spite of this, the third manager, Bagavan Doss' acts of mismanagement, which were many, were also made the subject of judicial proceedings. A charge of criminal misappropriation with reference to a quantity of gold coins belonging to the temple of the value of over 2 lakhs of rupees was instituted against him, and, after a prolonged trial, he was convicted by the Sessions Court of North Arcot and sentenced to 18 months' imprisonment. It was pending his incarceration under that sentence, that Mahabir, with Bagavan Doss' permission, took charge of the management of the temple. The record shows that allegations

PRAYAG DOSS JI VARU, MAHANT v. TIRUMALA SRIRANGA-CHARLAVARU.

of malversation were made against him as well and proceedings taken, but owing to his death they were not prosecuted further.

The present suits Nos. 31 of 1898 and 10 of 1899 were brought against the last holder of the office, Ramakisore, and upon the evidence adduced which is practically uncontradicted, the District Judge has found, in our opinion, rightly, that Ramakisore received bribes to the extent of fifty thousand rupees for granting leases of the landed properties of the temple or showing favour to the contractors. During the pendency of the suits he was murdered, so that the suit for his removal from the trusteeship (10 of 1899) became infructuous, but the other suit (31 of 1898) for the settlement of a scheme was heard and decided and the decree passed by the Judge in the matter is the subject of appeals Nos. 236 of 1901 and 38 of 1902, which have now to be disposed of.

It may here be pointed out that the Mahant as well as the byragees who form the fraternity of the Hathiramji Mutt are not natives of this Presidency, but come from the northern parts of India. The Mahants, so far as appears in the evidence in the case, have not been men of any education and are celibates supposed to have little or no concern with worldly affairs.

The present Mahant was brought down from Northern India only after the death of his predecessor in 1900, and was then a minor under 18 years of age, unacquainted with even the vernacular of the country. With reference to the actual administration of the affairs of the temple, the Mahants are more or less dependent upon the byragees of the Mutt, and it is not surprising that they have proved altogether inefficient as managers, as also, in most instances, dishonest. Another point to be remembered is that they possess no private property from which the temple can be recouped in respect of the embezzlements committed by them. Properties to which a Mahant succeeds as the head of the Mutt are not at his disposal except for the purposes of that institution, and even the incomes received by a Mahant during his incumbency are subject to a first charge in respect of disbursements appropriate to the Mutt. The result has been that, notwithstanding that decrees have been obtained for large sums against the Mahants concerned, the temple has not been able to recover any portion of the amounts decreed save in one instance where the decree debt was paid up, but was immediately followed by another act of embezzlement of temple funds.

PRAYAG DOSS JI VARU, MAHANT v. TIRUMALA SRIRANGA-CHARLAVARU.

It is thus clear that the arrangement made in 1843 for the administration of the institution has not answered the expectations then entertained, that the Mahants have shown themselves to be utterly incompetent to discharge the duties of the office properly, and that the surplus income has been misappropriated by them partly for their own personal use and partly for the aggrandisement of the Mutt. Unless, therefore, steps are taken to impart real efficiency to the management, to provide checks against peculation and to arrange for the due application of surplus funds not required for the usual and ordinary purposes of the institution, it is impossible to safeguard the interests of the institution. We agree, therefore, with the District Judge that this is a fit case for the Court sanctioning a scheme. And it may be added that Sir V. Bhashyam Ayyangar, who appeared for the Mahant both in the lower Court and here, did not take any objection to a scheme being sanctioned. The controversy has been as to the machinery which the District Judge considered necessary to bring into existence in the form of a committee consisting of five members who were to exercise minute and complete control over the Mahant. And it was contended both before him and before us that it was beyond the jurisdiction of the Courts to establish such a controlling authority. And it was also strongly urged that it was not competent, in cases like the present, for the Courts to appoint new or additional trustees. After a careful consideration of the authorities referred to on both sides, we are unable to accept either of the contentions urged on behalf of the Mahant. No doubt section 539 of the Civil Procedure Code with reference to which the present suit has been brought, speaks of the appointment of new trustees "under the trust." This, however, does not, in our opinion, mean only in conformity with the original constitution of the trust or with the rules now in force in respect to it. The passages in Tudor on 'Charities' and particularly the observation of Jessel, Master of the Rolls, in *In re Burnham National Schools*(1), to which our attention was drawn on behalf of the plaintiffs, show beyond a doubt that the Court of Chancery always possessed the power to appoint additional trustees, even though such appointment involved a departure from the arrangement contemplated in the constitution of the trust. The case in *In the matter of the*

(1) L.R., 17 Eq., 246.

PRAYAG DOSS JI VARU, MAHANT v. TIRUMALA SRIRANGA-CHARLAVARU.

charity called Storey's Almshouses in the town of Cambridge(1) was a case under Lord Romilly's Act and the language used by the Lord Chancellor there was with reference to the question whether the Court had jurisdiction to appoint additional trustees in a case brought before it on petition under that Act. That language could not be taken as intended to negative the existence of the power in the Court of Chancery to appoint additional trustees in proceedings otherwise duly taken before it. The same observation applies to *Ludlow (corporation of)* v. *Greenhouse*(2). The decision in *ex parte Bolton School*(3), as we understand it, proceeds on the view that, according to the fair construction of the Act of Parliament then in question, it was not open to the Court to alter the constitution laid down by that Act of Parliament in respect of the appointment of a trustee. The enactment of section 539 of the Code, as it now stands, was long after the passing of the English Trustees Act of 1850. Presumably, therefore, that section may be taken as intended to confer upon the Courts in this country the same power that the Courts in England possessed at the time of its enactment. There is no reason for thinking that the Indian Legislature meant to control the power of the Courts in this country only in this one respect as to the appointment of new and additional trustees, whilst conceding them powers as large as those possessed by the English Courts in other respects. Had that been the case the Legislature would have used language expressive of this limitation. That the High Court and the District Courts in this country to which the jurisdiction is confined possess the same practically unlimited jurisdiction as the Court of Chancery in matters relating to the administration of public charities, religious or otherwise, was taken for granted in the cases in *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev*(4) and *Annaji* v. *Narayan*(5), cited for the plaintiffs.

It is not, however, necessary to pursue this matter further as, upon the facts of this case, the Mahant is not a trustee deriving his power of management under the constitution originally laid down centuries ago. As already pointed out, the institution was completely under the control of the public authorities up to 1843, and when the management was transferred to the Mahant in that year, it was an arrangement made by the Board of Revenue in

(1) 9 L.J. Eq., 93.
(2) 4 E.R., 803.
(3) 2 Brown, 662.
(4) I.L.R., 15 Bom., 612.
(5) I.L.R., 21 Bom., 556.

PRAYAG DOSS JI VARU, MAHANT v. TIRUMALA SRIRANGA-CHARLAVARU.

whom the control of such institutions was then vested under the Regulation of 1817. In other words, the arrangement was analogous to a scheme settled by a lawful authority and, therefore, quite liable to be varied by that or other authority, legally competent so to alter or modify it. Sir V. Bhashyam Ayyangar did not contend that a scheme containing, among others, provisions relating to the appointment of additional trustees sanctioned by a Court was not liable to variation on good cause being shown. And if authority on the point were necessary, reference may be made to *Re Browne's Hospital* v. *Stamford*(1). There is, therefore, nothing to prevent a scheme being framed providing *inter alia*, for the appointment of an additional trustee or the creation of a controlling body such as that sanctioned by the Bombay Courts in the cases already cited.

The matter for determination therefore is, as to the actual terms of the scheme, to be sanctioned. We are clearly of opinion that the formation of a committee such as that directed by the District Judge is not calculated to secure efficient management. We think considerable difficulty will be experienced in the selection now, and from time to time hereafter, of competent men to act as honorary members of the committee. Occasional visits by persons not resident in the immediate neighbourhood of the institution would hardly afford sufficient check. A body consisting of so many as five members without any emoluments expected to exercise a detailed control over the discharge of his duties by the Mahant by a unanimous vote in some instances and a fixed majority in others—not to refer to other restrictions prescribed by the Judge—is too cumbrous a machinery to work smoothly and effectively. It seems to us, therefore, that the best course is to appoint one additional trustee to take part in the management with the Mahant. And in order that such trustee may bring to the discharge of his duties, capacity, education and training calculated to make him a responsible co-adjutor with the Mahant, it is essential that he should receive from the funds of the institution a fitting remuneration for his onerous duties, the amount thereof to be fixed by the District Court, at a sum not lower than Rs. 400 and not exceeding Rs. 500 per mensem. The appointment of this trustee should vest in the District Court of

(1) 60 L.T., 288.

PRAYAG DOSS JI VARU, MAHANT v. TIRUMALA SRIRANGA-CHARLAVARU.

North Arcot and the person so to be appointed should be a caste Hindu and his term of office should extend for five years, but he should be eligible for re-appointment. In the case of a difference of opinion arising between the two trustees the matter must be referred to the Pedda Jiyangar whose opinion should be followed. Either of the trustees should be liable to summary removal by the District Court on good cause shown subject to appeal to the High Court. In addition to the matter of the appointment of such new trustee the scheme should first and foremost provide for the utilization of the surplus funds coming into the hands of the trustees from time to time. The necessity for making such a provision is imperative to guard against the wasting or embezzlement of such accumulations in future which have been not only possible in the past but encouraged owing to the want of any provision for their utilization. There is no complaint that the services in the temple have not been duly performed but after all that has been done, the Mahant has found a large surplus in his hands which the accounts show he has expended upon objects more or less objectionable. The surplus income may be estimated at about a lakh or so per annum. Proceeding on the *cy-pres* principle the following are the objects on which both sides are agreed that the surplus funds may be appropriately spent:—

1. The establishment of a college in Lower Tirupati for the promotion among Hindus of a knowledge of the Hindu religion and shastras, such college to be styled "The Sri Venkateswara Vidyasala" with a library attached and with suitable buildings inclusive of residential quarters for the teaching staff as well as hostel accommodation for students who may be permitted to remain in the premises of the college, the annual expenditure in the upkeep of the college not exceeding, until further orders, the sum of twenty-four thousand rupees.

2. The distribution of prizes annually to persons possessing proficiency in the one or other of the various Hindu shastras, to an extent, until further orders, not exceeding rupees twelve thousand. Rules for the management of the college and the award of prizes shall be made by the trustees from time to time subject to the approval of the District Court.

3. The foundation and maintenance of a hospital on the hill for the relief of the numerous pilgrims and worshippers visiting the place.

PRAYAG DOSS JI VARU, MAHANT v. TIRUMALA SRIRANGA-CHARLAVARU.

4. The construction and maintenance of a choultry or rest-house in the same place for the use and accommodation of all classes of pilgrims visiting the shrine.

5. The introduction of good water-supply on the hill.

6. The improvement of the road communications to the shrine.

The scheme should also authorize the trustees to sell unnecessary accumulations of jewels and properties and invest the sale-proceeds in Government paper until the money is required for the objects referred to above or for other purposes connected with the institution. It should be further provided that all other funds not required for immediate expenditure should be invested in the same way, provided that, with the sanction of the District Court, such funds may be invested in purchases or first mortgages of immovable properties. Leases for over five years of immovable properties vested in the temple as well as sales and mortgages thereof are not to be made without the sanction of the District Court. The trustees should provide for efficient checks against misappropriation of the offerings daily received in the shrine between the time of such receipt and that of their deposit in the usual place of custody. They should also provide for proper sets of accounts being maintained and for their inspection by persons interested in the institution, for budgets of receipts and expenditure being prepared annually, for estimates and plans of important works being made before the execution of the works is undertaken, and for an annual audit by a competent auditor. A brief report by the trustees of their administration for the past year should be published early in the next year.

The scheme should prohibit any transaction of a pecuniary or mercantile character between the Mutt on the one hand and the temple on the other, or the employment of any persons as common servants of the two institutions.

Power should be reserved for application by the trustees or by persons interested being made to the District Court with reference to the carrying out of the directions of the scheme.

The directions in the scheme may be enforced by the District Court in execution upon application by persons interested (*Damodarbhat* v. *Bhogilal*(1)).

(1) I.L.R., 24 Bom., 45.

PRAYAG DOSS JI VARU, MAHANT v. TIRUMALA SRIRANGA-CHARLAVARU.

Power should also be reserved for application being made to the High Court by the trustees or by persons interested for any modification of the scheme that may be found necessary.

It should come into force on the 1st January 1906.

Costs in these two appeals of both parties will be paid out of the funds of the temple.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

1904. November 2, 3, 4, 8, 11.

GOPALASAMI CHETTIAR (DEFENDANT), APPELLANT,

v.

FISCHER (PLAINTIFF), RESPONDENT.*

Rent Recovery Act (Madras) VIII of 1865, *s.* 11—*Rules for deciding disputes as to rates of rent—Improvement of land by tenant before and after passing of the Act—Right of landlord to levy enhanced rate of rent.*

A landlord is not entitled to levy a tax on improvements effected by a tenant at his own expense, whether such improvements were made before or after the passing of the Rent Recovery Act, 1865, but a contract express or implied by a tenant to pay such a tax would be enforced, whether made before or after 1865, for the law does not declare such a contract to be illegal.

Where a tenant has been paying an enhanced rent in consequence of improvements made by him before the passing of the Act, there will be an inference from such payments, in the absence of anything to rebut it, that there was a contract to pay an enhanced rent, and such contract would be binding under the Act. Each tenant's contract, if any, is to be inferred from his own acts and payments rather than from those of other tenants.

SUIT to enforce acceptance of pattahs. The facts material to the case appear from the judgment of the High Court. The Deputy Collector decreed in plaintiff's favour, which decree was affirmed on appeal.

Defendant preferred this second appeal.

T. Subrahmania Ayyar for *R. Sadagopachariar* for appellant.

T. Rangachariar for respondent.

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* Second Appeal No. 762 of 1902, presented against the decree of L. C. Miller, Esq., District Judge of Salem, in Appeal Suit No. 30 of 1901, presented against the decision of M.R.Ry. T. Vijiaragava Chariar, Personal Assistant Deputy Collector of Salem, in Summary Suit No. 63 of 1900.

GOPALASAMI CHETTIAR v. FISCHER.

JUDGMENT.—This is one of a large batch of suits in which the mittahdar of Salem sued his tenants to enforce acceptance of pattahs in which he has entered a charge on account of fruit trees grown on their pattah lands, in addition to the acreage rent fixed on the lands at the time of the permanent settlement.

The mittahdar claims that, by the custom of the mittah he is entitled to make a charge for every fruit tree coming into bearing as well as for every palmyra tree whose leaves are useful for thatching, growing on the pattah land of a tenant, as soon as the tree comes into bearing, or yields useful leaves as the case may be. This charge by the same custom takes the form of a tax on each tree in addition to the rent on the field where the trees are scattered, and where the trees form a clump or tope, of an addition to the land assessment of the field of an amount equal to itself. The charge is made in all circumstances, whether the ryot raises the trees by irrigation from sources constructed by himself, or from the mittahdar's sources, whether the trees are grown upon nanjai land or upon punjai land, and whether they were planted by the ryot or by the mittahdar.

The Deputy Collector upheld the custom and found the charges proper, except in those cases where the trees were grown with the aid of water from wells sunk at the ryot's expense after 1865. In these latter cases he amended the pattahs by omitting the tree tax on the ground that the charges on account of the fruit trees were enhancements of rent and were prohibited by the proviso to section 11 of the Rent Recovery Act (VIII of 1865, Madras). On both points the District Judge concurred with the Deputy Collector and dismissed the appeals made to him. The tenants whose wells were sunk prior to 1865 have for the most part acquiesced in the decision of the Courts below. But the present appellant and a few others appeal on the ground that, even where the improvements were made prior to 1865, the mittahdar has no right to levy the so-called tree tax; and in a number of suits the mittahdar appeals on the ground that the Courts below are wrong in finding that the right was taken away by the Act of 1865 in regard to trees grown with the aid of water from wells sunk after that date at the tenant's own expense. In some of the suits a further important question was raised as to whether the mittahdar's original right, if it existed, was now lost in consequence of a contract implied from a long course of conduct between the

GOPALASAMI CHETTIAR v. FISCHER.

mittahdar and the tenants concerned that the tax should not be levied on them.

The suits, then, are all "suits involving disputes regarding rates of rent" and section 11 of the Rent Recovery Act (VIII of 1865, Madras) lays down the rules that are to be observed by the Courts in deciding the disputes. The Full Bench of this Court in the case of *Venkatagopal* v. *Rangappa*(1) has given a lucid exposition of the law as it stood prior to 1865 and of the circumstances which led to the legislation of that year, and has clearly explained the manner in which the provisions of section 11 are to be understood and applied. That section lays down four rules as to the rates to be charged, and these rules are to be applied consecutively. The first rule is that "all contracts for rent, express or implied, shall be enforced." The second is that if no contract, express or implied, exists, then "in districts or villages which have been surveyed by the British Government previously to 1st January 1859, and in which a money assessment has been fixed on the fields, such assessment is to be considered the proper rent." The third rule is that if neither of the two previous rules are applicable then "local usage" is to be applied. There has been a good deal of confusion in the arguments before us, and there are traces of a similar confusion in the judgments of the Courts below from not keeping these three rules, and their consecutive applicability, clearly in view. Let us see, then, what are the facts found with regard to the charge of tree tax in the mittah generally; then let us consider any special facts proved in each suit, and thereafter apply the three rules in their order and thus determine whether the pattahs tendered are correct or not.

The Salem district came into the possession of the British Government in 1792. The land was surveyed and a money assessment was fixed on each field in the years 1793–96 and this money rent is all that the mittahdar can *primâ facie* charge his tenants under section 11, clause II, in the absence of any contract express or implied, as to the rent. For the mittahdar it is argued that this fixed acreage rent was not the only money rent on the fields, but that in addition a rent or tax was imposed on all fruit trees grown on the ryots' land even when grown with the aid of wells dug at their own expense and that the real money rent of

(1) I.L.R., 7 Mad., 365.

GOPALASAMI CHETTIAR v. FISCHER.

any field within the meaning of section 11, clause II, was to be found by adding the fixed field rent and the tree tax together; and it was argued that if that view was not correct, then the mittah could not be regarded as one in which a money assessment had been fixed at all, so as to make clause II applicable, and that "local usage," the third rule, must be applied.

We do not think that this argument is sound. It is true that in addition to the fixed field rent, Captain Macleod, who was in charge of the Salem taluk, appears to have held the cultivators liable to pay certain rates of tax on fruit trees grown in their own pattah lands and with the aid of water from their own wells, though Captain Read who was the Principal Collector had previously abolished this tax on the tenant's improvements. ('Salem District Manual,' page 281.) But Captain Macleod had left the district before the Salem mittah was formed and a permanent settlement made. It was formed when Mr. Cockburn was in charge (1801–03) and from the passages quoted from Mr. Orr's report at page 376 of the 'District Manual,' it would seem that, in Mr. Cockburn's settlement, fruit trees grown with the aid of ryot's water were not taxed, but that the mittahdars afterwards "arbitrarily introduced" certain rates on such trees. There is no finding by the District Judge and there is no clear evidence that fruit trees grown with water from the ryots' own wells were taxed by Government in the Salem taluk immediately before the mittah was formed, and that such a tax formed part of the assets on which the peishcush (rent) payable by the mittah to Government was fixed. No doubt the *swarnadayam* (ready money income) account (exhibit DDDDD) of 1801 includes a tax on fruit trees among the assets of the mittah, but for all that appears that may have been a tax on fruit trees on waste land, or on fruit trees watered from Government sources of irrigation. There is no dispute as to the right of the mittahdar to levy a tax on such trees. The dispute is as to his right to do so when the trees are grown with the aid of the ryots' own water and on their assessed fields. There is nothing to show that such a right was given to the mittahdar at the time of the permanent settlement, and therefore the argument that clause II of section 11 is inapplicable to this mittah fails. Even if such a right existed as an incident of the tenure when the mittah was formed, we do not think that it could be exercised after the passing of the Act of 1865 in such a way as to render the provisions of

GOPALASAMI CHETTIAR v. FISCHER.

that Act nugatory. The meaning of clause II is plain and it would be contrary to the policy of the Act and to accepted canons of interpretation of statutes to allow its plain meaning to be negatived by evidence of customs and incidents enhancing or diminishing the fixed rent, thereby perpetuating the very uncertainty which it was the object of the section to terminate.

But the District Judge has found that ever since 1836 a considerable number of the mittah ryots have been charged with and have paid a tree-tax at various rates and in different ways on trees in their holdings. He rightly says that a custom going so far back is presumptive proof of its existence before that date if there is nothing to rebut the presumption, and he, therefore, finds it "proved that a custom of levying a tree-tax on pattah lands over and above the land rent has existed in the Salem mittah from the earliest times of which we have any evidence."

He has also found that "the custom attaches to each contract for rent a contract to pay tree-tax," but that such custom cannot since the passing of Act VIII of 1865 be enforced so as to deprive a tenant of the benefit of his own improvements, and that, therefore, where the improvement was made after 1865 the tenant is not bound to pay a tree-tax on trees raised in his own pattah land by means of such improvement; but that where the improvement was made prior to 1865 the tenant is liable to pay the tree-tax. The view that the tenants could not be compelled to pay an enhanced rent on improvements effected at their own expense after 1865 is undoubtedly correct, and is in accordance with the decisions of this Court in the cases of *Venkatagiri Raja* v. *Pitchana*(1) and *Fischer* v. *Kamakshi Pillai*(2). But we do not think that the District Judge was right in the distinction he makes between improvements effected before 1865 and those made after that date. No doubt if there was a contract, express or implied, by the tenant to pay such a tax, it would be enforced whether made before or after 1865 for the law does not declare such a contract to be illegal. It only by implication prevents a landlord from levying such a tax from a tenant who has not agreed to pay it. Neither of the cases quoted above proceeds on the ground that a landlord is entitled to levy a tax on a tenant's improvement, because it was made prior to 1865, though there are expressions in both judgments

(1) I.L.R., 9 Mad., 27. (2) I.L.R., 21 Mad., 136.

GOPALASAMI CHETTIAR v. FISCHER.

which seem to have led the Courts below erroneously to suppose that this was intended. In the earlier case Muttusawmy Ayyar, J., said "Nor is the tenant entitled to claim a reduction of assessment in the case of lands watered by wells constructed at his own expense prior to the date of Act VIII of 1865." As we understand it this merely means that where a tenant had been paying an enhanced rent in consequence of improvements made by him he was not entitled on the passing of the Act or in consequence of the passing of the Act to ignore the inference to be drawn from those payments and to claim a reduction in the rate of rent on account of the improvements. The inference from the payments in the absence of anything to rebut it would be that there was a contract to pay such rent and such contract would be binding under the Act.

The remark in *Fischer* v. *Kamakshi Pillai*(1) relied on by the Vakil for the mittahdar is an *obiter dictum* which was not necessary for the decision of that case, but was made with reference to an unreported case that had been cited in the argument in order to show that that case could not, in any view, affect the case then being tried.

But in both *Venkatagiri Raja* v. *Pitchana*(2) and *Fischer* v. *Kamakshi Pillai*(1) the broad rule is, as it seems to us, correctly laid down. In the former Hutchins, J., said "The proper rate of rent for the land has to be determined with reference to the several provisions of section 11 quite irrespective of the improvements" and Muttusawmy Ayyar, J., held that "The proviso to clause 4, section 11, implies that when the tenant improves the land at his own expense the landlord is not entitled to enhance the assessment on that ground." In the latter case the Court laid it down that "according to the law (section 11, Madras Act VIII of 1865) the landlord is precluded from enhancing the rent on account of improvements made by the tenant" and with reference to the alleged custom relied on by the Zamindar, whereby a varying assessment was charged according to the kind of crop raised, the Court held that "the custom could only be upheld in so far as it might not conflict with the statute law. In other words the landlord would be entitled to vary the rates according to the cultivation only in cases where the variation in the crop was not the result of improvements made by the tenant." These statements of the law

(1) I.L.R., 21 Mad., 136. (2) I.L.R., 9 Mad., 27.

GOPALASAMI CHETTIAR v. FISCHER.

negative the idea that the landlord is at liberty to tax improvements made before the passing of the Act, and we think that they are correct.

But if there was a contract, whether express or implied, to pay an enhanced rent on making improvements such a contract would, like any other contract as to the rates of rent, be enforced in accordance with clause I of section 11. The District Judge finds proof of an implied contract by all the tenants to pay such an enhanced rent because the evidence shows that a tree-tax of one kind or another has been very generally paid by a great many of the tenants at various rates and in different ways for a great many years past. He says that "the custom attaches to each contract for rent a contract to pay tree tax." We are unable to accept this view. It may be that a contract may in certain circumstances be inferred on proof of a general custom affecting the holdings of an estate. For instance if a man purchases the holding of a tenant, or takes up waste land in an estate without making any express contract with the landlord as to the rent to be paid and it is proved that certain rates are customarily paid by tenants in those circumstances, the Courts might fairly imply a contract by the new tenant to pay the customary rates. But we do not think that such a custom as has been proved in this case can be taken as proof of a contract that every tenant in the estate should pay tree-tax at the various rates claimed by the landlord in the present cases. All that has been proved is that in a very large number of cases the tenants have paid a tree-tax of some sort at varying rates and in different ways. The extent to which the rates varied is well stated by the Deputy Collector in these words. "As to the rates, there is plenty of evidence to show that the rates till recently varied considerably. A tamarind tree used to be charged 1 rupee, 8 annas, 4 annas, or 2 annas. A cocoanut tree used to be charged 4 annas, 2 annas, or 1 anna; a palmyra at 6 pies, 3 pies, 2 pies or 1 pie. A mango tree used to be charged 8 or 2 annas (6th D.W. in suit No. 18 whose evidence has to be used also in the general suit). A tamarind tree used to be charged 8, 10 or 12 annas (P.W. 8). Plaintiff however says that the rates in paimash—the original survey and settlement—too varied considerably. This is true as appears from pages 429 and 430 of the 'District Manual.' The paimash rates are thus summed up by Mr. LeFanu 'excepting cotton and indigo, all other scattered trees paid a tree-tax at certain rates which

GOPALASAMI CHETTIAR v. FISCHER.

were not uniform, and palmyras and *illuppai* topes paid tree-tax only on the number of trees, while the areca and cocoanut topes paid double, and mango, tamarind, orange and lime topes, the highest land assessment.' It will be observed that the charge on areca and cocoanut topes is the same as the present *rettippu*. Rettippu does not seem to have been charged on mango topes in these early days (*vide* also the deposition of 16th P.W. who says that in his mittahs of Annadhanapatti and Pallapatti *rettippu* is not charged on mango trees) though it seems to have been extended by analogy later on. In any case *rettippu* is generally a lighter charge than individual tree-tax. Besides adverting to the fluctuations of rates in paimash, plaintiff dwells on the fact that since the elder Mr. Fischer took charge of the mittah in 1860, there has been a tendency towards fixity and uniformity in the rates, the present rates being given in his memorandum."

It is impossible to see how payments made at these varying and uncertain rates by some of the tenants could be regarded as proof of a contract by other tenants who had never paid at those rates or at any rate at all, that they would pay at the rates paid by the tenants who had paid or by a majority of those tenants. If a particular tenant had made any payment on account of tree tax or a series of such payments that might well be evidence of a contract by him to continue to pay such amount; and if it were also proved that the tenants generally paid a similar tax, it would, no doubt, strengthen the inference as to the contract; but it is impossible to see how an obligation to pay tree-tax could be inferred as regards a particular tenant from the mere fact that other tenants, after he had entered on his tenancy, made such payments to the landlord.

Each tenant's contract, if any, is to be inferred from his own acts and payments rather than from those of other tenants. If each tenant is to be bound by such a custom as the Judge finds in this case, we should virtually establish "local usage" under clause III as the standard of rent to be looked to in preference to "contract, express or implied" and "survey" rates, which clauses I and II of section 11 expressly provide shall be the standards, where they exist, in preference to "local usage."

In the case of *Venkatagopal* v. *Rangappa*(1) already cited the Full Bench has explained the meaning of "implied" contracts

(1) I.L.R., 7 Mad., 365.

GOPALASAMI CHETTIAR v. FISCHER.

as used in the first clause of section 11 of the Act. They there pointed out that the term "implied" was "probably intended to signify a contract that could be inferred from the conduct of the parties in preceding years." They also pointed out that "payment of rent in a particular form or at a certain rate for a number of years is not only presumptive evidence of the existence of a contract to pay rent in that form or at that rate for those years, but it is also presumptive evidence that the parties have agreed that it is obligatory on the one party to pay and the other to receive rent in that form and at that rate, so long as the relation of landlord and tenant may continue. Either party is of course at liberty to rebut this presumption. It may be shown that the rate paid has been paid under a mistake; that it was intended rent should have been paid at the pre-settlement rate and that a higher or lower rate had been paid in error. It may be shown that rent at a certain rate or in a certain form was fixed for a certain term, on the expiry of which, the parties were at liberty to revert to their original rights, and that the term has expired; or it might be shown that there has been an increase or diminution in the extent of the holding or an addition to its value by the creation of improvements at the expense of the landlord; or that its value has diminished by reason of the deterioration of irrigation or other works which the landlord was bound to maintain. Changes of circumstances such as these would entitle the parties to the agreement to an alteration in its terms without necessarily putting an end to the relationship of landlord and tenant. But where there is no proof of any such special cause entitling the parties to an alteration in the terms heretofore subsisting between them, it must be held that so long as the tenant elects to retain the holding, he is liable to the obligations in respect of rent which it is to be inferred from his past conduct that he has accepted."

In Second Appeal No. 762 of 1902, the tenant pleads that, for the past twenty years, he has had many fruit trees which were liable to tax according to the mittahdar's contention but which, in fact, were not taxed, and he asks the Court to infer from this a contract that the trees should not be liable to tax. The Courts below have held that to prove such a contract "it must be shown that the mittahdar had personal knowledge of the state of the trees" and they have held that this has not been shown in the present case. We do not think that it is necessary to bring home such

GOPALASAMI CHETTIAR v. FISCHER.

knowledge to the mittahdar by direct evidence. We think that it is enough if such knowledge can fairly be inferred from all the facts of the case. In Second Appeal No. 762 of 1902, the facts proved are that the defendant has paid the same amount of rent for no less than fifty-six years. The amount of the rent is Rs. 46-11-4, and it is made up of Rs. 45-5-4 the fysal rate on the land, and Rs. 1-6-0 the extra sum charged in respect of fruit trees. It is also proved that for some twenty years prior to the suit the defendant had many fruit trees on his land in addition to those charged in his pattah. We know that during this long period the mittahdar was generally active in pressing his alleged rights in regard to tree-tax. He was constantly engaged in litigation on the subject. We also know that the system of annual settlements is such as to make it almost certain that the state of each holding and its liability to further taxation would come under notice each year. There is nothing to suggest that a temporary exemption or remission of the rent on account of relationship, personal friendship or other special circumstances, was granted by the mittahdar. In these circumstances we think that a contract to pay Rs. 1-6-0 for tree tax, and no more, may fairly be inferred, even though there is no evidence to show when such contract was made or the consideration for it. We think that the District Judge is wrong in supposing that the contract which it is necessary for him to find is a contract made at the beginning of the tenancy. Such a contract, no doubt, could hardly be inferred from the facts proved, but it is sufficient if the facts lead to the inference that the parties made the contract at any time.

In *Krishna* v. *Venkatasami*(1) Turner, Chief Justice, and Muttusawmy Ayyar, J., after referring to the decision of the Full Bench in *Venkatagopal* v. *Rangappa*(2) already quoted to the effect that payment of rent at a certain rate for a series of years is evidence of what the Act calls an "implied contract" and that on this ground a landlord had been held entitled to claim rates higher than the fysal rates, added that the same construction must be adopted in favour of a tenant so as to entitle him to claim the right to pay something different from the fysal rate.

We think, then, that in the present Second Appeal (No. 762) the facts lead to the reasonable inference of an implied

(1) I.L.R., 8 Mad., 164. (2) I.L.R., 7 Mad., 365.

GOPALASAMI CHETTIAR v. FISCHER.

contract that the appellant shall pay Rs. 1-6-0 as tree-tax and no more.

The pattah will be amended accordingly and the old rent maintained.

Defendant will have his costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Sankaran Nair.

1904, October 4, 5, 6, 7, 13, 14, 20.

NARAYANAN CHETTY (FIRST DEFENDANT), APPELLANT,

v.

KANNAMMAI ACHI AND OTHERS (SECOND PLAINTIFF—DEFENDANTS Nos. 2, 3 AND 4 AND ANOTHER), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *s.* 13—Res judicata—*Findings necessary to support decree—Limitation Act XV of* 1877, *s.* 14—*'Unable to entertain suit'—'Other causes of a like nature'—Dismissal of previous suit for non-joinder—Schedule II, arts.* 142 *and* 144 *of Act XV of* 1887—*Possession under decree subsequently reversed—Adverse possession of equity of redemption—Act XV of* 1887, *sch. II, art.* 93.

An appellate judgment operates by way of estoppal as regards all findings of the lower Court, which though not referred to in it, are necessary to make the appellate decree possible only on such findings.

A plaintiff is not entitled under section 14 of the Limitation Act to exclude the time spent in prosecuting a previous suit when such suit was dismissed for non-joinder on findings arrived at after trial and not without trial because the Court was unable to entertain the suit.

Under article 142, schedule II of the Limitation Act, limitation runs from the date of dispossession, and no fresh starting point is given because the party dispossessed subsequently obtains possession under a decree and is ousted from possession when the decree is reversed.

Sayad Nasrudin v. *Venkatesh Prabhu*, (I.L.R., 5 Bom., 382), followed.

Degumbery Dossee v. *Rajah Annundnath Poy*, (W.R. (1864), 43), *Firingee Sahoo* v. *Sham Manjhee*, (8 W.R. Civil Rule, 373), and *Daydu* v. *Kalu*, (I.L.R., 22 Bom., 733), referred to.

Quære.—Whether a bare equity of redemption is capable of adverse possession under article 144, schedule II of the Limitation Act.

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* Second Appeals Nos. 1278 and 1279 of 1902, presented against the decrees of M.R.Ry. T. M. Rungachariar, Subordinate Judge of Madura (West), in Appeal Suits Nos. 74 and 62 of 1902, presented against the decrees of M.R.Ry. V. R. Kuppuswami Ayyar, District Munsif of Sivaganga, in Original Suits Nos. 355 and 354 of 1900, respectively.

NARAYANAN CHETTY v. KANNAMMAI ACHI.

Schedule II, article 93, does not apply when the suit is substantially for possession of property, though the plaintiff avers that an instrument relied on by the defendant is a forgery.

Sundaram v. *Sithammal*, (I.L.R., 16 Mad., 311), and *Abdul Rahim* v. *Kirparam Daji*, (I.L.R., 16 Bom., 186), followed.

THESE second appeals were filed against the decrees of the Subordinate Court of Madura (West). The facts are fully set out in their Lordships' judgment.

The Hon. the Officiating Advocate-General and *T. Rangachariar* for appellant.

V. Krishnswami Ayyar and T. *Rangaramanujachariar* for first respondent.

JUDGMENT.—The villages of Puduvayal and Pudukuruchi in the Sivaganga zamindari were granted by Rani Katama Nachiyar on a permanent lease to one Sivagami.

She sold three-fourths of the two villages to Authappa Chetti, the plaintiff, on the 1st July 1885 and on the same day the remaining one-fourth to Kolandasami Tevar.

The plaintiff now sues in Original Suit No. 355 of 1900 to recover Puduvayal and in Original Suit No. 354 of 1900 to recover Pudukuruchi.

The contending defendant in both the suits is one Palaniappa Chetti who claims under a sale-deed from the same vendor Sivagami, dated the 21st May 1885, but which is denounced by the plaintiff to be antedated,—the document itself having only come into existence on or shortly before the 12th September 1885, the date it was presented for registration.

The questions before us are, whether Palaniappa is estopped by certain decisions which will be presently referred to from relying upon his sale-deed of 1885, and whether the plaintiff's suits are barred by limitation?

Second Appeal No. 1278.—As to Puduvayal these are the facts. That village was already mortgaged in October 1882 to one Sivasubramaniem Servai, and Authappa, the plaintiff, having paid the entire mortgage amount due to him brought this suit to recover from Kolandasami, the sum of Rs. 67-8-0, for his share of the mortgage amount which he was bound to pay on account of his one-fourth share of the property by the sale of such share, or to recover possession of that share on the ground that Sivasubramaniem was entitled to possession. That suit was resisted

NARAYANAN CHETTY v. KANNAMMAI ACHI.

by Palaniappa, the appellant before us, on the same grounds, substantially as those now put forward, *i.e.*, that the plaintiff's sale-deed was without consideration that his own sale-deed was supported by consideration and executed in May 1885, and therefore prior in date to that of the plaintiff. Both the lower Courts held that the sale to Palaniappa was antedated and therefore a forgery and that the sale to the plaintiff was true and supported by consideration, and accordingly passed a decree in favour of the plaintiff for possession of one-fourth of the village. The High Court, however, set aside the decrees of both the Courts and passed a decision, the effect of which is in question before us. The decision runs thus :—

"We cannot say the appellant ought not to have been joined in the suit. The decree must however be varied by substituting a decree against the first defendant (Kolandasami) for the money and in default after six months with direction for sale of his quarter share of the property. Both decrees are set aside. Appellant (Palaniappa) must have his costs throughout from the plaintiff. The first defendant must pay the plaintiff's costs in the Court of First Instance."

It is contended before us that this judgment exonerates the appellant, entirely from the suit as his costs throughout have been ordered to be paid by the plaintiff, the respondent, and the decrees of the lower Courts have been set aside. It is further urged that the decision that the appellant was not an unnecessary party to the suit has reference to the suit as originally framed, which contained a prayer for possession, and as the High Court dismissed the claim for possession, the suit must be taken to have been entirely dismissed against him as he was an unnecessary party to the suit, with reference to the relief which alone was finally granted. We are unable to accede to this contention. Palaniappa was admittedly in possession as owner of the village, a part of which was directed by the High Court decree to be sold. He was therefore a necessary party. It was necessary to find that the plaintiff's sale was valid, that Kolandasami was the owner of the one-fourth share and that the appellant's sale-deed was a forgery conveying to him no interest in law in that one-fourth share, for the High Court to order that share to be sold as Kolandasami's property to satisfy the plaintiff's claim, and these facts were found by the lower Courts. It was unnecessary to re-state those

NARAYANAN CHETTY v. KANNAMMAI ACHI.

findings in the High Court judgment, when the High Court only substituted the proper relief which, in their own opinion, ought to have been granted on those findings which were not interfered with. We have no doubt, therefore, that the High Court adopted those findings to grant the relief which was possible only on such findings.

Those questions are therefore clearly *res judicata*, and the lower Courts are right in holding that it is not open to the appellant now to plead that his sale-deed is not antedated and not a forgery.

The appellant then contends that this suit, instituted in August 1900, is barred by limitation, as it is found that he has been in possession of this village from October 1885. The lower Courts have held that the suit is not barred, as the time during which the respondent (plaintiff) has been prosecuting Original Suit No. 460 of 1895 and the appeals arising therefrom must be excluded under section 14 of the Limitation Act.

That suit was brought by the same plaintiff to recover the same property, *i.e.*, three-fourths share of the village on the same title against the same defendant Palaniappa alone. Kolandasami, the purchaser of the one-fourth share, was not a party, the plaintiff alleging in his plaint that Kolandasawmi had attested the sale-deed to the defendant Palaniappa. This suit was tried along with Original Suit No. 461 of 1895 already refererd to, Palaniappa's sale-deed was found to be a forgery and the plaintiff was found to have a valid title. The lower Courts gave a decree for possession in favour of the plaintiff. But the High Court reversed that decree on the ground that Kolandasami, as the owner of the one-quarter share ought to have been made a party in order that the plaintiff should have his three-quarters share delivered to him. It is contended for the respondent that this was a dismissal of the suit for non-joinder and non-joinder is a cause of like nature under section 14 of the Limitation Act. For the exclusion of time under this section the Court must have been unable to entertain the suit from defect of jurisdiction or other cause of a like nature.

In this case it is unnecessary for us to decide the question whether the dismissal of a suit for non-joinder will entitle a plaintiff to claim the exclusion of time under section 14, when the suit is dismissed without any trial, and simply on the case set up in the plaint. But in this case there is no doubt that the dismissal of the suit was based on the findings arrived at by the lower Courts.

NARAYANAN CHETTY v. KANNAMMAI ACHI.

Those findings, it is rightly contended for the respondent, preclude the plaintiff from setting up the same pleas. In these circumstances, it appears to be clear to us that the Courts which tried Original Suit No. 460 were not unable to entertain the suit for any reason. In fact the Courts were able to and did entertain the suit.

We agree, therefore, with the appellant's contention that the respondent is not entitled to any deduction of time under section 14 of the Limitation Act.

It is next contended that, as the plaintiff was in possession as the owner of Puduvayal between July 1896 and December 1898, limitation runs against him only from 1898 and the suit is therefore not barred.

The plaintiff was placed in possession in execution of the decree in Original Suit No. 460 of 1895 and when the decrees of the Courts below in his favour were reversed by the High Court, he was deprived of such possession and Palaniappa was restored to possession and he obtained mesne profits.

It is contended for the first respondent that the plaintiff cannot be treated as having been in possession during such period and reliance is placed on the decisions reported in *Degumbery Dossee* v. *Rajah Annundnath Poy*(1), *Firingee Sahoo* v. *Sham Monjhee*(2) and *Dagdu* v. *Kalu*(3).

The case before us, however, is governed by article 142 of the Limitation Act, and the plaintiff was admittedly originally dispossessed in October 1885, and he cannot treat the dispossession in 1898 under the order of the Court restoring possession to Palaniappa as giving him a fresh cause of action (*Sayad Nasrudin* v. *Venkatesh Prabhu*(4) is clearly in point.

We must hold the suit No. 355 of 1900 to recover Puduvayal is barred by limitation. The Second Appeal No. 1278 of 1902 is allowed and the suit is dismissed with costs throughout.

Second Appeal No. 1279, *Pudukuruchi.*—We have already held that Palaniappa is precluded from relying upon his sale-deed on account of the prior decision holding that it is antedated and a forgery and the plaintiff is entitled to the decree he has got unless the defendant's plea that he has been in adverse possession of the

(1) W.R., (1864), 43.
(2) 8 W.R. (C.R.), 733.
(3) I.L.R., 22 Bom., 733.
(4) I.L.R., 5 Bom., 382.

NARAYANAN CHETTY v. KANNAMMAI ACHI.

equity of redemption is to prevail, a mortgagee having been in actual possession of the village.

The lower Appellate Court has found on the evidence that he has not proved such adverse possession.

The defendant-appellant argues that the orders of the Courts to which the plaintiff was a party, directing that possession should be delivered to him under section 264 of the Civil Procedure Code conclusively proves that he has obtained such adverse possession.

Even assuming this to be the case, the defendant obtained such symbolical possession only in April 1894, under an order of Court and the effect of that order cannot be referred back in the most favourable view to the defendant, to any time before November 1890 when the lessees obtained actual possession and when according to the defendant, he was deprived of his alleged possession of the equity of redemption. As to any possession before that date, we must accept the finding of the lower Court that the defendant has not proved any possession.

He has not been therefore in possession for more than twelve years and the plaintiff's suit is not barred.

It is unnecessary, therefore, in this case to decide whether a bare equity of redemption is capable of adverse possession within the meaning of article 144 of the Limitation Act.

We are of opinion that the plaintiff's suit is not barred under article 93 of the Limitation Act. See *Sundaram* v. *Sithammal*(1) and *Abdul Rahim* v. *Kirparam Daji*(2).

We accordingly confirm the decrees of the Courts below and dismiss the second appeal with costs.

(1) I.L.R., 16 Mad., 311.
(2) I.L.R., 16 Bom., 186.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Boddam.

1904. December 12, 13, 21.

SOKKANADHA VANNIMUNDAR (PLAINTIFF), APPELLANT,

v.

SOKKANADHA VANNIMUNDAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Law—Partnership with manager of joint family—Death of manager, effect of—Joint family and joint family business, nature of—Partner, right of, to sue for particular assets after suit for general account barred—Limitation Act XV of 1877, sched. II, art. 106.

Where K, the manager of a joint Hindu family, enters into a partnership for the family benefit with S, a stranger to the family, the partnership is dissolved of the death of K, in the absence of any agreement with the survivors. How far a joint Hindu family resembles a corporation sole and how far a joint family business resembles a partnership considered.

Samalbhai Nathubhai v. *Someshvar, Mangal, and Harkisan*, (I.L.R., 5 Bom., 38), referred to.

Although a suit for general account of a partnership will be barred under schedule II, article 106 of the Limitation Act, if brought more than three years after the dissolution of the partnership, a suit will lie for recovering a share of any particular assets received by a partner after such dissolution, if such suit is brought within time and if such claim, having regard to previous dealings, is not inequitable.

Merwanji Hormusji v. *Rustomji Burjorji*, (I.L.R., 6 Bom., 628), and *Knox* v. *Gye*, (L.R., 5 H.L., 656), followed.

SUIT to have an account taken of partnership dealings. The facts are fully set out in the judgment.

The Hon. Mr. *P. S. Sivaswami Ayyar* for appellant.

K. Srinivasa Ayyangar for P. R. Sundara Ayyar for first and second respondents.

JUDGMENT.—On the 5th August 1893, one Kandasami obtained from one Natesa Pillay a sub-lease of a fishery right and on the 18th August 1893 agreed with the plaintiff to hold the right in partnership with him. Kandasami and defendants were members of a joint Hindu family, of which defendants Nos. 1 and 2 and Kandasami were at the time the only major members, the

* Second Appeal No. 1416 of 1902, presented against the decree of G. F. T. Power, Esq., District Judge of Tanjore, in Appeal Suit No. 196 of 1901, presented against the decree of M.R.Ry. N. Sarvothama Row, Subordinate Judge of Tanjore, in Original Suit No. 49 of 1899.

rest being minors. The sub-lease was not obtained for the benefit of Kandasami alone, it having been intended that all the members of the family should have the benefit thereof. A very short time after the sub-lessees began to exercise their right disputes arose between them and Natesa Pillay and Ayyakutti Muthiryan who also claimed to be a sub-lessee under Natesa Pillay. Litigation ensued and Original Suit No. 466 of 1893 was instituted by Kandasami against Natesa Pillay and Ayyakutti Muttiryan. Pending the suit Kandasami died on the 31st January 1895. The suit having been continued by the first defendant as next friend of Kandasami's son, the present sixth defendant an infant, a compromise was, on the 25th August 1896, entered into whereby Natesa Pillay undertook to pay Rs. 1,800 in discharge of all liability. The plaintiff alleges that at the same time the first defendant entered into an arrangement with Ayyakutti Muthiriyan, whereby the former was to receive Rs. 2,300 in settlement of all disputes and that the two sums aggregating to Rs. 4,100 were, as assets of the partnership, received by the defendants subsequent to the date of the compromise aforesaid. He claims a moiety of this amount as the share to which he is entitled according to the arrangement made when he was admitted as a partner, and prays that the partnership be dissolved and accounts be taken.

The Subordinate Judge granted the prayer. On appeal the District Judge reversed the decree and dismissed the suit on the ground that it was barred by limitation, the suit having been instituted on the 24th August 1899 or more than three years from the death of Kandasami.

It was urged on behalf of the plaintiff-appellant that Kandasami's death did not dissolve the partnership, but this cannot be upheld. It is scarcely necessary to say that a joint Hindu family though at times spoken of by Judges as a corporation cannot, as contended for the plaintiff, be taken as a legal person in the strict sense of the term so as to constitute a partnership such as the present one subsisting between the plaintiff on the one hand, and a real corporation on the other. No doubt when business is carried on by the members of a joint family for the benefit of the family without a contract among the members constituting themselves actual partners, the legal relation subsisting between them may have some sort of resemblance to that of partners, but it is not identical with it. The death of a member of a family thus

SOKKANADHA VANNI-MUNDAR v. SOKKANADHA VANNI-MUNDAR.

engaged in business has in truth no other effect upon the rights of the surviving members in the business than to enlarge their interest to the extent of the share to which the deceased was entitled in his lifetime if he left no male issue, and if he left such issue, then to enlarge the shares of such issue similarly. It is to such result that the observations of Mr. Justice Melvill in *Samalbhai Nathubhai* v. *Someshvar, Mangal* and *Harkisan*(1) on which reliance was placed on behalf of the plaintiff should be taken to refer. Therefore whether the contract of partnership entered into between the plaintiff and Kandasami be taken as creating that relation only between the two or between the plaintiff on the one hand and the adult members of the family on the other or again between the plaintiff and all the members of the family including the minors, the death of Kandasami necessarily caused a dissolution of the relation which was the creature of a contract as between the plaintiff on the one hand and the rest on the other. Consequently the suit viewed as one for a general account and a share of the profits was under article 106 of the second schedule to the Limitation Act out of time unless a fresh contract to continue the business could be inferred from the conduct of the parties. Owing to the dispute and litigation already referred to, nothing was done in pursuance of the sub-lease which was the subject of partnership, after Kandasami's death beyond the continuance of the litigation, and as the Subordinate Judge in effect found that the plaintiff and the defendants together conducted the litigation, it is a question whether a contract to continue the partnership was not made out. This view of the case has not been considered by the District Judge and, if it should prevail the suit for a general account, would be sustainable going back to the 18th August 1893, as it was brought within three years from the date of the compromise and the alleged receipt by the defendants of the partnership assets as in the absence of anything to the contrary, the partnership should at least till the date of the compromise be taken to have gone on.

Apart from this it was contended on behalf of the plaintiff that, even on the footing that a suit for a general account was out of time, the plaintiff is entitled to his share of the assets of the partnership received by the defendants subsequent to the

(1) I.L.R., 5 Bom., 38.

SOKKANADHA VANNI-MUNDAR v. SOKKANADHA VANNI-MUNDAR.

compromise subject to due allowances, as the claim for such relief is within time. Whether in point of fact the defendants have received any and what assets subsequent to the compromise has not been tried and the question is, assuming they did so receive, is the plaintiff entitled to maintain a suit for his share notwithstanding that a suit for a general account and a share of the profits is time barred? *Merwanji Hormusji* v. *Rustomji Burjorji*(1) is a clear and direct authority in favour of answering the question in the affirmative. There Latham, J., relied upon the observations of the Lord Chancellor, Lord Colonsay and Lord Chelmsford in *Knox* v. *Gye*(2) and the view taken of the effect of those observations by Green, J., in *Dayal Jairaj* v. *Khatav Ladha*(3). No doubt in *Rivett Carnac* v. *Goculdas*(4) Candy, J., intimated that were the question *res integra* he would not have been prepared to take the view adopted by Latham, J., and in the appeal against the decree made by Candy, J., the Appellate Court refrained from expressing any opinion on the point. There is, however, absolutely nothing in the judgment of the Judicial Committee in the same case (*Bhugwan Das Mitharam* v. *Rivett Carnac*(5)) when it went before that tribunal to indicate that this point was in any way considered by their Lordships: their decision resting altogether upon the ground that the suit there for a general account was within time. Our attention was not drawn to any authority other than that of the dictum of Candy, J., already referred to against the view of the law expressed by Latham, J., and as that view appears to us to be amply supported by the observations of the majority of the lawlords quoted and commented on at length in his judgment by Latham, J., we think we ought to follow that view. Even on principle it would seem that this conclusion is the better one, for why should the fact that a suit for a general account is no longer maintainable be used to secure to some of the partners exclusively the benefit of realization of assets made under circumstances which raise no question of limitation with reference to a claim strictly confined to a share of what was thus realized. Of course, to allow such a claim to be maintained without the defendant being at liberty to go into the whole accounts and if possible

(1) I.L.R., 6 Bom., 628.
(2) L.R., 5 H.L., 656.
(3) 12 B. H.C.R., 97.
(4) I.L.R., 20 Bom., p. 15.
(5) L.R., 26 I.A., 32.

SOKKANADHA VANNI-MUNDAR v. SOKKANADHA VANNI-MUNDAR.

defeat the plaintiff's claim by showing that the net balance is against the plaintiff would be quite unjust. The view we follow avoids such undesirable results while it secures to all the partners their fair and proper shares in assets with reference to which no question of lapse of time is capable of being raised under the law.

We must therefore set aside the decree of the District Judge and remand the case. In doing so it is necessary to point out that the plaintiff should have an opportunity of showing that notwithstanding the dissolution of the partnership on the death of Kandasami he was treated by the defendants as still interested in the business so far as it was carried on. In the plaint no doubt the plaintiff did not set up any contract to the above effect, but with reference to a contention set up by the defendants that the plaintiff had relinquished his interest, an issue was raised and tried as to whether the plaintiff did not continue a partner down to the time of the compromise, and the finding of the Subordinate Judge on the point was in favour of the plaintiff. And in this connection the Subordinate Judge states that the evidence showed that the plaintiff was participating even after Kandasmi's death in the conduct of the litigation which resulted in the compromise. This circumstance, if true, would be a piece of evidence as to an implied agreement between the parties to continue the business, with the plaintiff as a partner. If the conclusion with reference to this question should be in favour of the plaintiff then a decree for a general account will have to be given. If the finding should be against the plaintiff the case must be proceeded with, nevertheless with a view to the determination of the plaintiff's right to a share in the assets said to have been received subsequent to the compromise on the principles laid down in the judgment of Latham, J., referred to above.

Costs will abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Benson.

SINGARAPPA AND TWO OTHERS (DEFENDANTS), APPELLANTS,

v.

TALARI SANJIVAPPA (PLAINTIFF), RESPONDENT.*

1904. December 15, 16.

Limitation Act XV of 1877, art. 91—Suit to set aside an instrument—Collusive sale deed not intended to be acted upon—Specific Relief Act I of 1877, s. 39.

A suit to cancel or set aside an instrument must, under article 91 of the Limitation Act, be brought within three years from the date when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him.

The plaintiff on 1st June 1895 executed a sham sale deed in favour of the defendants, neither party intending that it should be acted upon. The defendants in February 1899 began to set up a claim to ownership on the strength of the deed. On 3rd August 1900, plaintiff brought this suit. On its being contended that the suit barred by limitation :

Held, that the suit was not barred having been brought within three years from the date when the plaintiff apprehended that the defendants had set up title under the instrument.

The facts which would entitle a person to bring such a suit are stated in section 39 of the Specific Relief Act I of 1877.

SUIT to set aside an instrument. The material facts are fully set out in their Lordships' judgment. The District Munsif passed a decree in favour of the plaintiff which was affirmed on appeal by the Acting District Judge.

Defendants preferred this second appeal.

The Hon. Mr. *P. S. Sivaswami Ayyar* and *P. S. Parthasarathy Ayyangar* for appellants.

T. V. Seshagiri Ayyar for respondent.

JUDGMENT.—The plaintiff, on the 1st June 1895, executed a sham sale deed in favour of his illegitimate sons, the defendants, neither party intending that it should be acted upon. Possession of the property sold remained with the plaintiff.

The defendants some time about February 1899 began to set up a claim to ownership on the strength of the deed. On the 3rd

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* Second Appeal No. 1535 of 1902, presented against the decree of J. W. Hughes, Esq., District Judge of Kurnool, in Appeal Suit No. 36 of 1902, presented against the decree of M.R.Ry. D. K. Viraswamy Ayyar, District Munsif of Gooty, in Original Suit No. 583 of 1900.

SINGARAPPA v. TALARI SANJIVAPPA.

August 1900 the plaintiff brought this suit for the cancellation of the deed of sale.

The question for decision is whether the suit is barred by article 91 of the second schedule to the Limitation Act of 1877. That article provides that such a suit must be brought within 3 (three) years from the time "when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him." The facts which would entitle a person to bring such a suit are stated in section 39 of the Specific Relief Act I of 1877 which provides that "any person against whom a written instrument is void or voidable who has reasonable apprehension that such instrument if left out standing may cause him serious injury, may sue to have it adjudged void or voidable, and the Court may in its discretion so adjudge it or order it to be delivered up and cancelled" In the present case the plaintiff did not entertain any apprehension that the instrument would injure him until the defendants began to set up a title under it as if it evidenced a real sale to them. The plaintiff's cause of action therefore arose within 3 (three) years prior to the suit and the District Judge rightly held that it was not barred.

This view is in accordance not only with the case quoted by him (*Tawangar Ali* v. *Kura Mal*(1)) but also with the decision of this Court in *Sundaram* v. *Sithammal*(2) approved in *Vithai* v. *Hari*(3). See also *Meda Bibi* v. *Imaman Bibi*(4) and *Janki Kunwar* v. *Ajit Singh*(5).

We dismiss the second appeal with the costs.

(1) I.L.R., 3 All., 394 at p. 396.
(2) I.L.R., 16 Mad., 311.
(3) I.L.R., 25 Bom., 78.
(4) I.L.R., 6 All., 207 (Full Bench).
(5) I.L.R., 15 Calc., 58.

APPELLATE CIVIL.

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

1905. January 6, 10.

NARAYANASAMI PILLAI (FOURTH DEFENDANT IN BOTH), APPELLANT IN BOTH,

v.

ESA ABBAYI SAIT (PLAINTIFF), RESPONDENT IN SECOND APPEAL No. 1389 OF 1902

AND

SALI MAHOMED ABBAYI SAIT AND OTHERS (PLAINTIFFS AND SECOND DEFENDANT), RESPONDENTS IN SECOND APPEAL No. 1390 OF 1902.*

Executor de son tort *liability of, under Hindu Law, when there is a legal representative—Power of, to pay own debt out of assets—Consent of heir to such payment, how far a defence to creditor's action—Creditor, form of suit by.*

Where A on the death of B pays off a debt due to C by B which he had guaranteed, and later on in the same day, removes goods belonging to B's estate, A becomes liable as *executor de son tort*. The rule of English Law that no liability as *executor de son tort* can arise when there is another personal representative does not apply in India. *Magaluri Garudiah* v. *Narayana Rungiah*, (I.L.R., 3 Mad., 359), referred to.

An *executor de son tort* cannot plead *plene administravit* if he retains the assets for his own use or pays his own debt. In this case A became a creditor of the estate when he paid off the debt, and when he removed the goods he paid a debt due to himself and not to C.

Quære.—Whether he can plead *plene administravit* if he pays the debts of the deceased out of the assets. *Mounéford* v. *Gibson*, (4 East, 441), referred to.

Where there is an *executor de son tort* a creditor may sue for his debt and is not confined to an administration action.

Quære.—Whether the consent by the heir to the appropriation by the *executor de son tort* will be a defence to a creditor's action.

SUIT to recover money. The plaintiffs were creditors of one Ambalavana Pillay (deceased). The first defendant was the widow of the deceased; the second and third were alleged to have been partners of the deceased and the fourth defendant Narainsawmy Pillay was charged with liability on the ground that he

* Second Appeal Nos. 1389 and 1390 of 1902, presented against the decrees of M.R.Ry. N. Sarvothama Row, Subordinate Judge of Tanjore, in Appeal Suits Nos. 1034 and 1012 of 1900, presented against the decrees of Syed Tajuddin Sahib, District Munsif of Negapatam, in Original Suits Nos. 121 and 120 of 1899 respectively.

NARAYANA-SAMI PILLAI v. ESA ABBAYI SAIT, ETC.

had misappropriated goods of the value of Rs. 15,000 belonging to the deceased subsequent to his death. The plaintiffs sued to recover debts due by the deceased arising out of dealings with him. The first defendant allowed the suit to proceed *ex parte*. The second and third defendants denied that they were partners in the business carried on by the said Ambalavana Pillay. The fourth defendant pleaded that the deceased Ambalavana Pillay had borrowed Rs. 5,000 on the 30th January 1899 from the Bank of Madras at Negapatam on his becoming surety for him; that Ambalavana Pillay having directed him to pay the said debt to the Bank, sold articles to the defendant to the extent of his debt on the 22nd March 1899; that he had liquidated the said debt due to the Bank and that no property belonging to the deceased remained in his possession.

The District Munsif dismissed the suit as against the second and third defendants on the ground that the plaintiff had not established their partnership with the deceased, and against the fourth defendant on the ground that he had come into possession of the goods in question with the permission of Ambalavana Pillay and for valid consideration.

On appeal the District Judge held that the fourth defendant had taken possession of the deceased's goods, that such possession was wrongful and decreed the plaintiff's suit as against him.

On second appeal to the High Court by the fourth defendant, their Lordships passed the following judgment.

V. Krishnaswami Ayyar and *A. K. Sundaram Ayyar* for appellant.

C. Sankaran Nair, *T. Rangachariar* and *A. S. Balasubrahmania Ayyar* for respondents.

JUDGMENT.—In these cases the plaintiffs are creditors of one Ambalavana deceased. The first defendant is his widow and legal representative. As regards the fourth defendant the case alleged against him in the plaint is that he carried away property worth about Rs. 15,000 from the shop of the deceased after his death. The Munsif held that the first defendant alone was liable in the plaintiff's suits. The District Judge held the fourth defendant was also liable and gave a decree against the first and fourth defendants. The fourth defendant appeals. On the findings of fact by the lower Appellate Court, we are of opinion that the fourth defendant by intermeddling with the estate of the deceased made

NARAYANA-SAMI PILLAI v. ESA ABBAYI SAIT, ETC.

himself liable to the plaintiffs as *executor de son tort*. The taking of the goods by the fourth defendant was not denied. His case was that he was a surety of the deceased in respect of a debt of Rs. 5,000 due by the deceased to the Bank of Madras and that, prior to the death of the deceased, he had purchased the goods in consideration of his undertaking to pay off this debt and that he paid it off accordingly. The lower Appellate Court found that he had not purchased the goods and that the document by which he sought to support his case of purchase was a forgery. There was no dispute as to the facts that immediately after the death of the deceased, the fourth defendant paid off the debt due to the Bank by the deceased, and, later on the same day, removed the goods from the shop of the deceased.

The first contention put forward on behalf of the fourth defendant was that inasmuch as the estate was represented by the widow as legal representative, the fourth defendant could not by any act of his constitute himself an *executor de son tort*. The appellant relied upon the English rule of law that when a will is proved or administration granted, and another person intermeddles this does not make him *executor de son tort*, because there is another personal representative of right against whom the creditors can bring their actions. (William's 'Law of Executors,' ninth edition, page 212.)

In our opinion this rule of English law does not apply to a case where, as here, the estate is represented under the Hindu law by the heir. It is to be observed that in the case of *Magaluri Garudiah* v. *Narayana Rungiah*(1) where a party who had taken the property of the deceased was held liable for a debt due by the deceased, it was not suggested that the fact that there was a personal representative exempted him from the same liability as that which arises under the English law, in the case of a party who intermeddles. In fact as under the Hindu law there must always be some legal representative of the estate of a deceased person, if the appellant's contention were sound, a case could never arise in which a party had constituted himself *executor de son tort* and had become liable as such.

It was next urged that assuming the defendant had made himself liable as *executor de son tort* what he had in fact done was

(1) I.L.R., 3 Mad., 359.

NARAYANA-SAMI PILLAI v. ESA ABBAYI SAIT, ETC.

to pay not a debt due by the estate to himself but a debt due to the Bank by the estate, and that being under no obligation to pay the creditors of the estate *pari passu*, he was entitled to do this. On the findings of fact we cannot take this view. By paying off the Bank the fourth defendant became a creditor of the estate. He then paid himself out of the estate. Having paid his own debt he cannot plead *plene administravit* if sued as *executor de son tort*. "An *executor de son tort* cannot give in evidence, or specially plead a retainer for his own debt for otherwise the creditors of the deceased would be running a race to take possession of his goods, without taking administration to him." (William's 'Law of Executors,' page 220.) It is not necessary to decide whether in the view that the fourth defendant had paid a debt due to the Bank out of the assets of the deceased he would be entitled to plead *plene administravit* if sued as *executor de son tort* or whether the passage in William's 'Law of Executors' in page 223 in support of which the authority of *Mountford* v. *Gibson*(1) is cited applies to a case like the present where the suit is by a creditor.

On the findings we do not think it can be said that the widow assented to the fourth defendant paying his own debt but even if she did, this would not be a good defence to the action. (Wiliiam's 'Law of Executors,' page 220.)

The third contention was that the creditors can only ask for administration and cannot sue for the debt. There is no reason why the plaintiff's rights should be limited to an administration suit. If as we hold the fourth defendant has made himself liable as executor the plaintiffs are entitled to sue him as representing the estate for the debts due by the estate.

We do not think the case of *Magaluri Garudiah* v. *Narayana Rungiah*(2) can be distinguished in principle, although in that case there was a finding of collusion between the legal representative and the parties who got possession of the estate, from the case before us.

The second appeals are dismissed with costs.

(1) 4 East, 441. (2) I.L.R., 3 Mad., 359 at p. 360.

APPELLATE CIVIL.

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

1904. December 20.

NARAYANA PATTAR (SECOND DECREE-HOLDER—SECOND DEFENDANT), APPELLANT,

v.

GOPALAKRISHNA PATTAR AND ANOTHER (JUDGMENT-DEBTORS NOS. 9 AND 2—PLAINTIFFS NOS. 9 AND 2), RESPONDENTS.*

Execution proceedings—Res judicata *in—Effect of non-appearance when notice silent as to relief claimed—Final decision.*

A applied in execution for restitution of money with interest thereon paid to B under a decree which was subsequently reversed. The notice to B did not specify the nature of the claim and an *exparte* order allowing the claim was made. The application, however, was dismissed for default in payment of process fees and A subsequently put in a similar application. B appeared and objected to the interest claimed which was 12 per cent. The Subordinate Judge allowed the interest, which, however on appeal to the District Court, was reduced to 6 per cent. On appeal to the High Court:

Held, that the order of the Subordinate Judge allowing interest was a final order, as it dealt with the only question at issue and did not contemplate a further order, and that the appeal to the District Judge was not premature.

Venkatagiri Ayyar v. *Sadagopachariar*, (Appeal No. 69 of 1900 and Civil Miscellaneous Appeal Nos. 105 and 109 of 1902 unreported), distinguished.

Held, also, that as the notice to B was silent as to the nature of the claim, the first order granting A's application *ex parte* had not the force of *res judicata* so as to estop B from disputing the claim in subsequent proceedings. Knowledge of the nature of the claim can be presumed only when the application is for execution of a decree or order directing a thing to be done. *Sheik Budan* v. *Ramchandra Bhunjgaya*, (I.L.R., 11 Bom., 537), and *Vappakandu Maracayan* v. *Hamid Beevi Ammal*, (Civil Miscellaneous Appeal No. 25 of 1903 unreported), referred to.

EXECUTION PETITION. The facts are fully set out in the judgment.

T. R. Ramachandra Ayyar for appellant.

M. R. Sankara Ayyar for *P. R. Sundara Ayyar* for respondents.

* Civil Miscellaneous Second Appeal No. 31 of 1904, presented against the decree of L. C. Miller, Esq., District Judge of South Malabar, in Appeal Suits Nos. 196 and 228 of 1903, presented against the order of M.R.Ry. S. Raghunathaiya, Subordinate Judge of Palghat, in Execution Petition No. 61 of 1902 (Original Suit No. 12 of 1897 on the file of the Calicut Sub-Court).

NARAYANA PATTAR v. GOPALA-KRISHNA PATTAR.

JUDGMENT.—A decree which had been obtained against the appellant by the respondents was reversed and the former became entitled to restitution of the money which had been collected from him under the decree so reversed. He applied to the Subordinate Court for restitution of the amount, claiming interest thereon at 12 per cent. per annum. Notice of the application was given to the respondents, but it did not specify that the application was for restitution or contain any intimation of the claim for interest. The respondents not having appeared on the day they were required to attend, the Subordinate Judge ordered execution by way of arrest, but process fee not having been paid, no further action was taken. The appellant however moved the Court again in the matter and the respondents then appeared and objected to the grant of interest at 12 per cent. The Subordinate Judge, however, decided the matter in favour of the appellant holding that the rate claimed was proper. On appeal the District Judge reduced the interest at 6 per cent.

We are unable to accept the contention on behalf of the appellant that the appeal to the District Judge was premature. Unlike as was apparently taken to be the case with the finding in *Venkatagiri Ayyar* v. *Sadagopachariar*(1) to which our attention was drawn, the decision of the Subordinate Judge as to interest was not a conclusion as to part of a matter arising between the parties before him intended to be embodied in an order dealing with the whole matter and to be passed later on. It was a final determination so far as the Judge was concerned of the only dispute between the parties that had to be decided and was therefore appealable.

Nor can we agree with the contention that the respondents were precluded from raising the question as to interest at the time they did. Though the appellant had made a claim at 12 per cent. in the original application for execution and an order was passed thereon after a notice to the respondent, the notice was not such as to warrant the view that the order for arrest operated as *res judicata* in the matter. The appellant's application was not for the execution of some thing which had been directed to be done by any decree or order, so as *ipso facto* to convey information to the respondents as to what the claim made and

(1) A. No. 69 of 1900 and C.M.A. Nos. 105 and 109 of 1902 (unreported).

NARAYANA PATTAR v. GOPALA-KRISHNA PATTAR.

the relief prayed for were, but in regard to a matter of which, so far as the question of interest at least was concerned they could not without being expressly apprised have become aware of. Consequently the notice issued to them, such as it was, was insufficient to fix them with the knowledge of the claim for interest and thereby bar them from raising any controversy in the matter on their failing to appear on the date fixed. See *Sheik Budan* v. *Ramchandra Bhunjgaya*(1) and *Vappakandu Maracayan* v. *Hamid Beevi Ammal*(2).

On the merits we agree with the District Judge as to the rate allowed by him and dismiss the appeal with costs.

APPELLATE CIVIL.

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

1905. January 30.

VAKULABHARANA AND OTHERS (LEGAL REPRESENTATIVE OF FIRST PETITIONER AND SECOND PETITIONER), APPELLANTS,

v.

RANGAIAYAN CHETTY AND OTHERS (COUNTER-PETITIONERS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, ss. 232, 244—Power of Court, discretionary.

Where the right of a party applying for execution as transferee is *sub judice*, it is not obligatory on the Court, under the last clause of section 244 of the Code of Civil Procedure, to stay execution until the question has been determined by separate suit. The Court may in its discretion either stay execution or dismiss the application.

THE first counter-petitioner obtained a decree against the other counter-petitioners in Original Suit No. 93 of 1900 in the Court of the District Munsif of Tirutturaipundi. The present petitioners claiming that they were entitled, under an award made between them and the plaintiff, to the decree in Original Suit No. 93 of

(1) I.L.R., 11 Bom., 537. (2) C.M.A. No. 25 of 1903 (unreported).

* Civil Miscellaneous Second Appeal No. 57 of 1904, presented against the order of G. F. T. Power, District Judge of Tanjore, in Civil Miscellaneous Appeal No. 50 of 1904, presented against the order of M.R.Ry. J. Sundaranana Row, District Munsif of Tiruturaipundy, in Execution Petition No. 325 of 1903 (Original Suit No. 93 of 1900).

VAKULABHA-RANA v. RANGAIAYAN CHETTY.

1900 as transferees, applied to the Munsif's Court of Tirutturaipundi under section 232 of the Code of Civil Procedure to be allowed to execute the decree as transferee decreeholders. The District Munsif dismissed the application as the award was in dispute in another suit. An appeal to the District Court was dismissed.

Petitioners preferred this appeal.

K. Ramachandra Ayyar for the Hon. Mr. *P. S. Sivaswami Ayyar* for appellants.

Mr. *M. A. Tirunarayana Chariar* for respondents.

JUDGMENT.—The question, whether the decree which the appellants seek to enforce has been transferred by operation of law to the appellants, is now *sub judice* in Original Suit No. 400 of 1902 on the file of the District Munsif of Mannargudi.

This being so, we think the Munsif was right in dismissing the appellants' application for execution. On behalf of the appellants it is contended that, under the last clause of section 244, he is entitled to a general order staying execution of the decree. We are asked to construe the last clause of section 244 of the Civil Procedure Code as making it obligatory on the Court either to stay execution until the question has been determined by a separate suit or itself to determine the question. We do not think the section should be so construed. We think the Court has a discretion both under sections 232 and 244 of the Civil Procedure Code, and in this case we think the discretion was rightly exercised.

This appeal is dismissed with costs.

APPELLATE CIVIL.

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

1904. November 1, 2.

PARU AND ANOTHER—MINORS BY THEIR GUARDIAN I. K. RAMUNNI NAIR (THIRD AND FOURTH APPELLANTS IN APPEAL SUIT NO. 200 OF 1894 ON THE FILE OF THE HIGH COURT), PETITIONERS,

v.

VARIANGATTIL RAMAN MENON (SECOND RESPONDENT), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *s.* 368—*Appeal by guardian, abatement of—Laches of guardian, effect of—Application on behalf of minors to restore appeal—Right to apply joint and not several—Limitation Act XV of* 1877, *s.* 7.

Where two majors and the guardian of two minors jointly preferred an appeal in which they were jointly interested, and on the death of the sole respondent the appeal was allowed to abate under section 368 of the Code of Civil Procedure, the minor appellants cannot on the application of another guardian have the appeal restored and proceeded with.

Per DAVIES, J.—The order of abatement under section 368 of the Code of Civil Procedure is absolute. The minors being bound by the acts of their guardian, there was no appeal pending and the application could not be treated as an application under section 368 of the Code of Civil Procedure to which the provisions of section 7 of the Limitation Act might be applied, as section 368 of the Code of Civil Procedure contemplates an appeal pending. Even if it could be so considered, the application would be barred as the minors were interested jointly with others who laboured under no disability. *Periasami* v. *Krishna Ayyan*, (I.L.R., 25 Mad., 431), followed.

Per SUBRAHMANIA AYYAR, *J.*—On the death of the respondent, the right to have his representatives added as parties vested *jointly* and not *severally* in the appellants, whatever may be the nature of their interests in the subject matter of the appeal. *Periasami* v. *Krishna Ayyan*, (I.L.R., 25 Mad., 431), followed.

THE facts are fully set out in the judgment.

V. Kishnaswami Ayyar for petitioners.

Sir *V. Bhashyam Ayyangar* for respondent.

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* Civil Miscellaneous Petition No. 487 of 1904, praying that, in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to declare as null and void or set aside, the order of abatement passed in Appeal Suit No. 200 of 1894 on its file and to allow the appeal to be proceeded with in due course of law. (Original Suit No. 39 of 1892 on the file of Sub-Court of Calicut.)

PARU v. VARIAN-GATTIL RAMAN MENON.

ORDER—DAVIES, J.—Appeal No. 200 of 1894 was preferred jointly by two majors and by the guardian of two minors, all of whose interests were joint. The sole respondent died after the appeal was filed, no application was made by the appellants or any one of them to bring in the legal representative of the deceased respondent, and the appeal was declared to have abated under the penultimate clause of section 368 of the Code of Civil Procedure by our order dated the 11th August 1896.

The minors through another guardian now ask that that order may be set aside and the appeal be proceeded with. It seems to me that the abatement provided for in the penultimate clause of section 368 is absolute, and it is far too late now that the parties have been in appeal to the Privy Council to allow a review, and I would dismiss the application on this ground alone.

But I am further of opinion that the minors are bound by the act of their original guardian. It was he who filed the appeal on their behalf, and it was he who neglected to bring in the legal representatives of the deceased respondent. The result was that there was no appeal, and it is clear that the minors cannot, because they are minors, either revive the appeal that has abated or make a fresh appeal as it would be time-barred. The minors claim the benefit of section 7 of the Limitation Act treating this as an application under section 368 of the Civil Procedure Code, but I do not think that section is at all applicable, as there is no appeal pending in which an application under section 368 can possibly be made. If, however, any question under section 7 of the Limitation Act arises, then the minors would be out of Court under the ruling of the Full Bench in *Periasami* v. *Krishna Ayyan*(1), as there were others joined with them who were not under disability at the time.

I therefore dismiss the petition with costs.

SUBRAHMANIA AYYAR, J.—I am of opinion that on the death of the respondent the right to have his representative made respondent in his stead did not, as contended by Mr. Krishnaswami Aiyar, vest severally in each of the appellants, but jointly in all of them, without reference to the question whether the right of the appellants in the subject of the appeal itself was several or joint. Consequently the minor appellants were not entitled to the benefit

(1) I.L.R., 25 Mad., 431.

PARU v. VARIAN-GATTIL RAMAN MENON.

of the provisions of section 7 of the Limitation Act (*Periasami* v. *Krishna Ayyan*(1)). I agree therefore in dismissing their petition with costs.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

1904. October 28.

SAMBASIVA CHETTI AND ANOTHER—MINORS BY THEIR GUARDIAN RUKMANI AMMAL (PETITIONERS—LEGAL REPRESENTATIVE OF FOURTH DEFENDANT), PETITIONERS,

v.

VEERA PERUMAL MUDALI AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code, ss. 108, 234, 368—*Death of defendant after* ex parte *decree —Application by representatives of the defendant to be brought on record.*

Section 368 of the Code of Civil Procedure only applies to the case of a defendant who dies before a decree is passed.

Where, therefore, a defendant dies after a decree *ex parte* has been passed against him, his representatives cannot apply to set aside the *ex parte* decree unless the plaintiff has brought them on the record as representatives under section 234 of the Code of Civil Procedure.

Section 108 of the Code of Civil Procedure applies only to the defendant against whom the *ex parte* decree is passed.

THE facts necessary for this report are set out in the judgment.

K. Jagannadha Ayyar for petitioners.

K. R. Subrahmania Sastri for respondents.

JUDGMENT.—On the 24th April 1903, a decree was passed by the District Munsif *ex parte* against the fourth defendant in the suit.

The fourth defendant died in May-June 1903, and on the 9th September 1903, the petitioners put in a petition before the District Munsif under section 108, Civil Procedure Code, as the

(1) I.L.R., 25 Mad., 431.

* Civil Revision Petition No. 138 of 1904, presented under section 622 of the Code of Civil Procedure, praying the High Court to revise the decree of A. C. Tate, Esq., District Judge of South Arcot, in Civil Miscellaneous Appeal No. 10 of 1903, presented against the order of the Court of the District Munsif of Tirukkoyilur in Miscellaneous Petition No. 469 of 1903 in Original Suit No. 102 of 1903.

SAMBASIVA CHETTI v. VEERA PERUMAL MUDALI.

representatives of the deceased fourth defendant praying to set aside the decree against the deceased fourth defendant and to add the petitioners as his legal representatives.

The petition was dismissed by the District Munsif and on appeal to the District Judge his order was confirmed.

This civil revision petition is put in to set aside those orders under section 622, Civil Procedure Code.

We are of opinion that the orders are right.

By the Civil Procedure Code, the representatives of a deceased defendant can only apply to be brought on the record under section 368, Civil Procedure Code, which only applies to a case where the defendant dies before decree. Here the decree has been passed and the section applicable after decree is section 234, Civil Procedure Code, which does not authorise any application to be made by the representatives of the deceased judgment-debtor to bring them on to the record, but only authorises the plaintiffs to make such an application.

The article of the Limitation Act applicable to an application to bring on to the record the representatives of a deceased judgment-debtor is article 164 which provides that limitation shall begin to run from the first notice of proceedings in execution.

Section 108, Civil Procedure Code, under which the application is made only authorises applications by the defendant against whom an *ex parte* decree has been made.

We are of opinion that, until the representatives have been brought on to the record under section 234, Civil Procedure Code, no application can be made to set aside the *ex parte* decree and we dismiss this petition with costs.

APPELLATE CIVIL.

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

YETHIRAJULU NAIDU (PLAINTIFF), APPELLANT,

v.

MUKUNTHU NAIDU AND OTHERS (DEFENDANTS NOS. 1 TO 4), RESPONDENTS.*

1905. March 16.

Hindu Law—Will, construction of—Effect of gift without words of severance to persons forming an undivided Hindu family—Gift 'in equal shares'—Tenant in common—Share of, will pass to his representatives—'Grandsons being sons' sons' include a grandson by adoption—Analogy between an adopted son and an appointee under a power.

C died in 1881, leaving him surviving three sons, Y the plaintiff, M the first defendant and P. P died in 1896 leaving a son B who died in the same year. The second defendant was the son of the first defendant M, the third defendant was the adopted son of the plaintiff Y, and the fourth defendant was the widow of B. The second and third defendants and B were alive at the time of C's death in 1881. The third defendant was adopted by the plaintiff in 1897.

C, by his last will and testament, dated 12th May 1881, disposed of three houses (referred to as Nos. I, II and III). The disposition in regard to No. I was in these terms, " . . . . therefore my three sons shall use and enjoy this house from son to grandson and so on in succession without power to give as gift or sell the same "—subject to a payment of a small rent in respect thereof for charity. As regards Nos. II and III the will provided 'that out of a total income of Rs. 530 (being the total amount of the income of rent per month) deducting the aforesaid expenses of Rs. 181 the remaining amount whatever it may be shall be divided and paid by my executors to my three sons in equal shares' . . . . 'my executors shall divide and give away these properties to my own grandsons being my sons' sons after my sons according to their respective shares. My sons shall have no right whatever to give as gift or to sell these properties.'

The plaintiff brought this suit to have the will construed:

Held per Sir ARNOLD WHITE, C.J., that under the will of C house No. I vested absolutely in his three sons as members of a joint Hindu family and that the law of inheritance in undivided Hindu families applied. B having died without male issue his interest passed by survivorship to Y and M to the exclusion of his widow, the fourth defendant.

Held further, that the sons took a limited estate as tenants in common in the income of Nos. II and III in the nature of an estate for lives which subsists till

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* Original Side Appeal No. 29 of 1904, presented against the judgment of Mr. Justice Moore in Original Suit No. 26 of 1903—*vide* Original Side Appeal Nos. 30 and 33 of 1904.

YETHIRAJULU NAIDU v. MUKUNTHU NAIDU.

the death of the last survivor, when this limited estate comes to an end and the provision for the division of the corpus will be carried out.

On a proper construction of the will such limited estate of each son passed on his death to his representatives and not to the survivors. The interest of P went to his son B and on B's death his widow, the fourth defendant, took a widow's estate in her husband's interest.

Bryan v. *Twigg*, (L.R., 3 Eq., 433), *Pearce* v. *Edmeades*, (51 R.R., 369), and *M'Dermott* v. *Wallace*, (59 R.R., 441), referred to and distinguished.

Held also, that the third defendant, the adopted son of the plaintiff, took an interest under the will as grandson of C.

Per SUBRAHMANIA AYYAR, J.—As regards item No. I the words from 'son to grandson' were words of purchase importing a grant of absolute property under the Hindu Law and the sons took an absolute estate. Having regard to the statement in the will that the testator formed an undivided family with his sons, and also to the fact that in disposing of the income and corpus of items Nos. II and III he had used the expressions, 'in equal shares' and 'according to their respective shares' to indicate a tenancy in common, the devise of item No. I without such qualifying words was clear evidence of an intention, that the sons should take as a Hindu co-parcenary with rights of survivorship. The fourth defendant therefore could claim no share in item No. I. *Jogeswar Narain Deo* v. *Ram Chund Dutt*, (L.R., 23 I.A., 37), referred to and distinguished.

Held further, that as regards items Nos. II and III the sons took an interest in the income only as tenants in common. The gift of the income being in equal shares and not limited to each son for his life, the share of each on his death went to his representatives. The fourth defendant therefore took the share of her husband as his heir.

The division of the income among those entitled will not cease until the time for the division of the corpus arrives which will not be so long as any of the sons of the testator is alive.

Held also, that as regards the corpus of items Nos. II and III the words in the will 'my own grandsons being my sons' sons' include a grandson by adoption and that therefore the third defendant took an equal share with the other two grandsons.

The right of the adopted son is analogous to that of an appointee under a power given by the donor, as regards the effectuation of the gift; and the gift to an appointee will be good if he be a person in existence at the testator's death. *Bai Motivahoo* v. *Bai Mamoobai*, (L.R., 24 I.A., 93), referred to.

SUIT praying for a construction of the will of Arcot Cotah Cothanda Ramasamy Naidu, the deceased father of the plaintiff, and for a declaration of the respective rights of the plaintiff and the defendants in the property of the deceased under the terms of the said will, the material clauses of which were as follows:—

"On the 12th day of the month of May of the year 1881, I, Arcot Cotah Cothanda Ramasamy Naidu, the son of Arcot Cota Varadappa Naidu, while I am in the enjoyment of sound memory and clear understanding write and leave the Will and Testament,

YETHIRAJULU NAIDU v. MUKUNTHU NAIDU.

that is to say, now all the properties I have got with me were acquired by me by my industry, and so they are my self-acquired properties."

"*Particulars of the properties.*—

(1) The house I live in, Number 101 in Acharappan street.
(2) The upstair house now occupied by Gordon Woodroffe and Co., Number 1st 21, 1st Line Beach.
(3) The bungalow and garden now occupied by the Poodocotta Maharajah's son No. 36 on the Poonamallee road."

"As I have fixed the above mentioned house I live in, Number 101 in Acharappan street for the Teerva or assessment of the land attached to the charity choultry which I have built at Sevapett therefore my three sons shall use and enjoy this house from son to grandson and so on in succession without possessing power to give as gift or sell the same and continue to pay rent month by month at the rate of rupees six Rs. 6 per month for the Teerva of the aforesaid charity land. Therefore the above-mentioned my executors shall out of the entire amount of my income of rents which they shall divide and pay monthly to my three sons according to the particulars I have mentioned here-below withhold Rs. 6 expressly for house rent in common and pay the same month by month for the Teerva of the land attached to the charity choultry."

"Out of the total income of Rupees five-hundred and thirty Rs. 530 deducting the aforesaid expenses Rs. 181, the remaining amount whatever it may be shall be divided and paid by my Executors to my three sons in equal shares."

" . . . . . Therefore I and my three sons are members of undivided family."

"My Executors shall divide and give away these properties to my own grandsons being my sons' sons after my sons according to their respective shares. My sons shall have no right whatever to give as gift or sell these properties."

Such further facts as are necessary for the purpose of this report are fully set out in the judgments.

The material questions raised in the suit were,—what rights the fourth defendant had under the will, and whether the third defendant who was adopted after the testator's death had any

YETHIRAJULU NAIDU v. MUKUNTHU NAIDU.

claim as a grandson under the will? The case was heard before his Lordship Mr. Justice Moore on the Original Side who delivered the following judgment:—

"Arcot Cotah Cothanda Ramasamy Naidu, on the 12th May 1881, executed a will and died on the 17th of the same month. His eldest son, Cotah Yethirajulu Naidu, is the plaintiff. He has no natural born son, but has adopted the third defendant, the son of the testator's daughter. It is admitted that the third defendant was born in the testator's lifetime, but was not adopted till after his decease. The testator's second son Cotah Purushotham Naidu died on the 9th May 1896, leaving a son Cotah Baubu Rao Naidu, who died on the 20th December 1896, leaving a widow, the fourth defendant. Baubu Rao was a major at the time of his death. The third son of the testator is the first defendant and he has a son the second defendant, who was born during the lifetime of the testator. The testator under his will nominated four executors of whom two, the plaintiff and the first defendant, took out probate and have administered the estate. As disputes have arisen between the plaintiff and the defendants as to their respective rights under the will of the testator, this declaratory suit has been instituted under section 42 of the Specific Relief Act. The following is the only issue that has been framed. "What are the respective rights of the parties to the suit under the will in question?"

The will under consideration has not been very skilfully drawn up and some of its provisions are not as clear as could be desired. There can, however, in my opinion be no reasonable doubt that under its terms the corpus of the estate was not to be divided till after the death of all the testator's sons when by the last clause in the will, the executors were directed to divide it among such of his sons' sons as had attained majority. This clause is as follows: "After my sons, my executors shall after my own grandsons, namely my sons' sons may attain age, divide and give away these properties to them according to their respective shares." Difficult questions might have arisen as to when this distribution should take place, *i.e.*, as to whether the executors should carry out this division as each son's son attained the age of 18 years, or whether they should wait till they had all reached that age. It is however, as matters have turned out, unnecessary to consider this question as the only three persons who could possibly take anything under

YETHIRAJULU NAIDU v. MUKUNTHU NAIDU.

this clause, *i.e.*, the third defendant, the husband (since deceased) of the fourth defendant, and the second defendant have all attained the age of 18, while both the plaintiff and the first defendant are still alive. I shall first deal with the case of the third defendant. It is clear that at the time of the testator's death, the third defendant was not a son of the testator's son and such being the case, I must hold that, under the decision of the Privy Council in what is known as the *Tagore case*(1), he can receive no benefit under the will. I may add that, if the question was *res integra*, I myself should be very much inclined to take the view taken by Mr. Justice Wilson in the decision in *Alangamonjori Dabee* v. *Sonamoni Dabee*(2) to the effect that the rule of construction laid down in the *Tagore case*(1), to the effect that a gift to an unborn person by a Hindu by will is invalid, cannot be held to apply to wills of Hindus executed since the passing of Act XXI of 1881. As is pointed out by Mr. Whitby Stokes, if it was the intention of the Legislature that this rule should continue to apply some words such as "or to bequeath property to any person to whom he could not have bequeathed it before the same day" should have been added to section 3 of the Hindu Wills Act (*vide* note at page 314 of the Anglo-Indian Codes, volume 1). Sitting as a single Judge however, I think it better to follow the decision of a Bench of the Calcutta High Court in *Alangamonjori Dabee* v. *Sonamoni Dabee*(2) reversing the judgment of Mr. Justice Wilson that I have mentioned. The same view as that arrived at by the Calcutta Bench has, I find, been also taken by Mr. Justice Bayley of the Bombay High Court in the case of *Jairam Narronji* v. *Kuverbai*(3) and by Mr. Justice Pontifex in the decision of *Cally Nath Naugh Chowdhry* v. *Chunder Nath Naugh Chowdhry*(4). The Privy Council has clearly laid down the principle that, although a son when adopted, enters at once into the full rights of a natural born son, his rights cannot relate back to any earlier period. His fictitious birth into his new family cannot be antedated (*Bamundoss Mookerjea* v. *Mussamut Tarinee*(5)). When the testator died the third defendant had not been adopted. He had therefore in his capacity of son of the testator's son not been born and his

(1) I.A. Sup., Vol. 47; 9 B.L.R., 377 at p. 397.
(2) I.L.R., 8 Calc., 157, 637.
(3) I.L.R., 9 Bom., 491 at p. 506.
(4) I.L.R., 8 Calc., 378.
(5) 7 M.I.A., 169.

YETHIRAJULU NAIDU v. MUKUNTHU NAIDU.

subsequent adoption cannot antedate his fictitious birth. It follows that he gets no share of the corpus of the testator's estate when it is divided under the last clause of the will.

The next question to be considered is as to the rights of the fourth defendant under the will in so far as the corpus of the estate of the testator is concerned. Her case appears to me to come under the exception appended to section 98 of the Indian Succession Act extended to Hindu wills by section 2 of the Hindu Wills Act. The corpus of the estate of the testator was by the last clause of the will bequeathed to a class of persons as standing in a particular degree of kindred to a specified individual, *i.e.*, to the sons' sons of the testator, but their possession of it was deferred to a time later than the death of the testator by reason of the direction contained in the will that the sons of the testator are to have a life-interest in the corpus of the estate, and that it is not to be divided among the sons' sons till after the death of all the sons. The corpus of the estate, according to the provisions of the exception to section 98, goes on the death of the last surviving son of the testator in equal shares to his son's son the second defendant, and to the fourth defendant as the widow and representative of his deceased son's son Baubu Rao, who was alive at the time of the death of the testator but has since died. I accordingly pass a declaratory decree to that effect, and further direct that the costs of all the parties be paid out of the estate of the testator. It does not appear to me to be advisable to pass a declaratory decree with respect to several minor and unimportant questions that have been raised with respect to the administration of the estate pending the death of the plaintiff and the first defendant and the consequent partition of the corpus."

The plaintiff and the first and third defendants preferred separate appeals.

Messrs. *Sundaram Sastri* & *Kumaraswami*, and *C. P. Ramaswami Ayyar* for appellants.

Mr. *M. A. Tirunarayana Chariar* for fourth respondent.

The Hon. Mr. *P. S. Sivaswami Ayyar* for second respondent.

Sir ARNOLD WHITE, C.J.—In these appeals four questions arise for determination. The first question is, under the will of the testator, what estate do the three sons of the testator take in the property described in the will as No. 101, Acharappen Street?

YETHIRAJULU NAIDU v. MUKUNTHU NAIDU.

The argument on the one side was that this particular property, which may be conveniently referred to as house No. 1, devolved with the rest of the property (which may be referred to as house No. 2 and house No. 3) devised by the will. On the other side it was contended that the three sons took an "absolute" estate in house No. 1. I feel no doubt that the testator intended that house No. 1 should not devolve in the same way as house No. 2 and house No. 3. No doubt house No. 1 is included with house No. 2 and house No. 3 under the heading "Particulars of properties," but when the testator deals with the income of the houses pending the final division of his estate, he only provides for the income of house No. 2 and house No. 3. With regard to the income of these two houses he directs that his executors after making certain monthly payments (including a sum of Rs. 6 a month as the rent of house No. 1 which he sets apart as the teerva of a certain charity), shall divide it and pay it to the three sons in equal shares. I think it is quite clear that the words "these properties" when they occur in the last paragraph of the will refer to the properties with which the testator had just been dealing, viz., house No. 2 and house No. 3. The same words occur at the beginning of the will in the passage where the executors are appointed. No doubt the more natural meaning to give to these words where they thus occur would be to read them as referring to the properties which have just been enumerated which would include house No. 1. They may, however, be read as referring to the properties dealt within the two following paragraphs, viz., house No. 2 and house No. 3. This construction gives the meaning to the words which I think the testator clearly intended them to have when he uses them at the end of the will, and makes them consistent with the express provision of the will with regard to the dispositions of house No. 1 and houses Nos. 2 and 3, respectively.

The effect of the will as regards house No. 1 is to create an estate in English phraseology, in fee simple, or to use the words which have been adopted by the Courts of this country, an absolute estate in the three sons. The three sons took as members of a joint family and their respective interests pass to their representatives not under the will but under the Hindu Law of Inheritance. That is to say, the plaintiff and his branch and the first defendant and his branch take the property to the exclusion of the fourth defendant whose husband died without male issue.

YETHIRAJULU NAIDU v. MUKUNTHU NAIDU.

The next question is what interest do the three sons take in the income of house No. 2 and house No. 3.

I am of opinion that the sons take a limited estate in the income in the nature of an estate for lives which subsists until the death of the last survivor, when this limited estate comes to an end and the property must be divided under the provision of the will which will be dealt with later.

I do not propose to discuss in detail the English authorities which were cited in the course of the argument of this case. It has often been observed that except in so far as the authorities lay down broad canons of construction, they are of little assistance in interpreting a will. If this be so with reference to wills drawn by experts using well-known terms of art, the observation applies with much greater force to the case of a will like that with which we have to deal in the present case. So far as the English authorities are concerned I will content myself by saying that, in my opinion, the present case falls within the class of cases in which it has been held that under a gift to A and B as tenants in common during their joint lives and the life of the survivor, if A dies, his share vests in his legal personal representative during B's life (see for instance *Bryan* v. *Twigg*(1), and not within the class of cases in which it has been held that the survivor takes the whole for life (see for instance *Pearce* v. *Edmeades*(2), and *M'Dermott* v. *Wallace*(3). There is nothing in the will to show that the testator intended that the share of the income to which a son was entitled should, on his death, pass to his surviving brothers and not to his representative. On the other hand the provisions of the will with regard to the ultimate distribution of the corpus may be said to point to an intention on the part of the testator that the grandsons between whom the corpus was to be divided on the death of the last survivor of three sons should not be altogether shut out from any participation in the income so long as any one of the three sons remained alive. The result is that the three sons take, and the survivor of them takes a limited estate which subsists till the death of the last survivor and that the interest of a deceased son passes to his representatives. In the present state of the family the plaintiff and the first defendant

(1) L.R., 3 Eq., 433. (2) 51 R.R., 369. (3) 59 R.R., 441.

YETHIRAJULU NAIDU v. MUKUNTHU NAIDU.

take one-third each, and the fourth defendant as the widow of the son of the deceased son, takes a widow's estate in her husband's one-third.

The next question is, as regards houses Nos. 2 and 3, when is the corpus to be divided amongst the grandsons? I think it is clear that the testator intended that these properties should not be divided amongst the grandsons until after the death of the last survivor of the three sons.

The last question is, does the third defendant, the adopted son of the plaintiff, take any interest under the will as the grandson of the testator? He was born in the testator's life-time, but was not adopted till after his decease. The learned Judge held, though with some doubt, that the third defendant took no interest under the will. I was at first disposed to take the view adopted by the learned Judge in the Court below, but on furthur consideration I have come to the conclusion, for the reasons stated in the judgment of my learned brother which I have had the advantage of reading, that the adopted son takes as one of the grandsons. I agree that the decree of the learned Judge should be modified in the manner stated in the judgment which my learned brother is about to read.

SUBRAHMANIA AYYAR, J.—The question in the present appeals is as to the construction of certain important provisions of the will of Cotah Kothanda Ramasamy Naidu who died on the 17th May 1881 and as to the rights of the parties before us with reference to the dispositions made therein. The testator died leaving three sons, of whom the plaintiff is one and the first defendant another. The plaintiff, some years after the death of the testator, adopted the third defendant who had been born in the testator's life-time. The second defendant is the son of the first defendant and he also was in existence at the testator's death. The third son of the testator also had a son born to him in the testator's life-time, but both died subsequently, the son first and the grandson afterwards, the latter leaving the fourth defendant, his widow, as his heir.

The provisions of the will requiring consideration are those bearing upon the immovable properties of the testator, viz., three houses or bungalows yielding or capable of yielding considerable monthly rent. After referring to the properties in general terms and appointing executors to administer his estate, the testator first deals with house No. 101, Acharappen Street (which I

YETHIRAJULU NAIDU v. MUKUNTHU NAIDU.

of houses Nos. 2 and 3, while with reference to the house under consideration he directs common enjoyment without any possibility of division, the reason for such disposition being that the house had been used as the residence of the family and it was the testator's wish to perpetuate such use. As, however, the condition against alienation is void as repugnant to the absolute estate given to the sons, it follows that the fourth defendant's contention referred to above is unsustainable and that the property was taken by the three sons with rights of survivorship incident to a Hindu co-parcenary, that on the death of the fourth defendant's husband without male issue and without having become divided from his uncles, the house became vested in the plaintiff and the first defendant and their male issue, and therefore that the fourth defendant can claim no share in this property.

Passing now to the case of houses Nos. 2 and 3, it is unquestionable that the testator gave to his sons an interest in their incomes only subject to the deductions specified in the will. That the donees took their interests as tenants in common is likewise certain, as the phrase "in equal shares" used in reference to this gift obviously implies. I consider it quite unnecessary to examine the numerous English decisions cited with reference to this question in the argument by Mr. Sivaswami Ayyar. It is sufficient to say that they turn more or less on the words of the instrument in question in the particular case and do not furnish any general rule which can be relied on as helpful in construing the present will. Moreover, in such of them as were held to be cases of joint tenancy, it was joint tenancy of a description unknown to the Hindu Law. I would only add that *Bryan* v. *Twigg*(1) relied on by Mr. Tirunarayanachariar on behalf of the fourth defendant lays down a principle which may properly be applied in the circumstances here, for the gift of the income in the present instance being to the sons in equal shares and not to them each for his life only, the language is virtually similar to that in the above case. According to the principle of that decision the division of the income among those entitled will not cease until the time for the division of the corpus arrives, which will not be so long as any of the sons of the testator is alive. And as already observed inasmuch as the testator intended that the sons should

(1) L.R., 3 Eq., 433.

YETHIRAJULU NAIDU v. MUKUNTHU NAIDU.

take as tenants in common, the share of each must be taken to vest in him and his representative while the title to payment subsists. The fourth defendant therefore is entitled to receive her husband's share of the income as his heir.

Now lastly as to the corpus of these two houses, that is in the most express terms left to the testator's grandsons by his sons, and only to them. That the second defendant and the deceased husband of the fourth defendant as the grandsons in existence at the death of the testator became entitled to their respective shares whatever they might turn out to be has of course never been controverted. The dispute is as to whether the third defendant has any right to a share in the houses under consideration. Though at first I was inclined to take a different view, further consideration has led me to the conclusion that the contention of Mr. Ramachandra Rau Sahib on behalf of the third defendant, that he became entitled on his adoption to an equal share with the other two grandsons, is well founded. No doubt in this view the adopted son who is only a substitute for an *aurasa* son is placed in a better position than an *aurasa* son conceived and born after the testator's death; for such an *aurasa* son could not take any interest in the houses in question according to the decision in the *Tagore case*(1), and notwithstanding the Hindu Wills Act, having regard to *Alangamonjori Dabee* v. *Sonamoni Dabee*(2), wherein it was held on appeal that the Hindu Law on the point had not been modified by the provisions of the said Act. This view may seem anomalous but it is not really so. For the effectuation of a gift with reference to such an adopted son as the third defendant is on the analogy of a gift to an appointee under a power given by the donor. In *Bai Motivahoo* v. *Bai Mamoobai and another*(3), the Privy Council upheld a power given by a testator to another to appoint by will the person who was to take the property of the testator, relying for the recognition of such a power on the analogy of the power to adopt that may be given by a husband to his widow and declared that gifts made under a power to appoint will be valid so far as they may be made to persons in existence at the death of the testator. Just as in that case the gift takes effect on the appointment being made so in the present case in the gift takes

(1) I.A. Sup., Vol. 47; 9 B.L.R., 377 at p. 397. (2) I.L.R., 8 Calc., 637.
(3) L.R., 24 I.A., 93.

YETHIRAJULU NAIDU v. MUKUNTHU NAIDU.

effect on the adoption being made. The conditions necessary are that the donee must, as required in that case have been in existence at the death of the testator and must, in the circumstances of the present case, have also acquired the status of a grandson prior to the time when the division of the corpus could take place. I should, however, not be supposed as suggesting that the condition that the donee should have been in existence at the death of the testator could be insisted on even in the case of a son adopted to the testator himself. For according to the observations of the Privy Council in the *Tagore case*(1) such an adopted son would be taken in point of law as in existence at the testator's death or his case would be treated as an exception to the rule of Hindu Law about the existence of the donee at the donor's death. It only remains to observe that I do not understand the words "my own grandsons being my sons' sons" in the will to indicate an intention to exclude grandsons by adoption. The suggestion uniformly made in the argument, and in which I entirely agree, is that these words were meant to prevent illegitimate sons of the sons putting forward pretensions to a share under the terms of the will in question.

For all the foregoing reasons I would substitute for the declarations made by the learned Judge the following: (1) declare that the plaintiff and his adopted son the third defendant on the one hand and the first defendant and his son the second defendant on the other are entitled to house No. 1 in Acharappen Street as members of a co-parcenary with the right of survivorship incident to such holding under the Hindu Law subject to the payment of Rs. 6 per mensem on account of the teerva payable in respect of the land attached to the charity choultry at Sevvapet founded by the testator, (2) declare that out of the income of the houses No. 1/21, 1st line Beach and No. 36, Poonamallee Road (subject to the deductions mentioned in the will) for the life of the longest liver of the testator's sons, the plaintiff and his representatives are entitled to a third share the first defendant and his representatives are likewise entitled to a third share and the fourth defendant is entitled to the remaining third share as her husband's heir, (3) declare that the second and third defendants are respectively entitled to a third share in the aforesaid two houses

(1) I.A. Sup., Vol. 47; 9 B.L.R., 377 at p. 397.

YETHIRAJULU NAIDU v. MUKUNTHU NAIDU.

Nos. 1/21 and 36 and that the fourth defendant is entitled to a widow's estate in her husband's remaining third share therein, but that these three defendants are not entitled to call for division and delivery of their respective shares until the demise of the last surviving son of the testator.

The cost of all the parties will be paid out of the estate.

Messrs. *Short & Bewes*—attorney for first respondent.

Mr. *C. Vijiaragavalu Naidu*—attorney for fourth respondent.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Benson.

1905. January 23.

CHETTIKULAM VENKITACHALA REDDIAR (PLAINTIFF), APPELLANT,

v.

CHETTIKULAM KUMARA VENKITACHALA REDDIAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Law—Liability of undivided son for surety debt contracted by father.

Where a Hindu father having undivided sons incurs an obligation as surety for the payment of a debt and not for keeping the peace or for good behaviour, the whole ancestral property including the shares of the sons is liable for the discharge of such obligation.

Sitaramayya v. *Venkatramanna*, (I.L.R., 11 Mad., 373), and *Tukarambhat* v. *Gangaram*, (I.L.R., 23 Bom., 454), followed.

THE plaintiff was the Zamindar of Turayur and the deceased father of the minor first defendant was his brother. The grandmother of the first defendant (his *guardian ad litem* in this suit) sued the plaintiff in this suit, in Original Suit No. 36 of 1890, for maintenance and obtained a decree for Rs. 200 a month. On her applying for execution of the decree before the time for appeal had expired, the plaintiff herein was directed to pay Rs. 12,000 into Court with liberty to the grandmother of the first defendant to draw out the money on furnishing security. The father of the first defendant executed a security bond and the money was paid to the

* Appeal No. 172 of 1901, presented against the decree of M.R.Ry. O. Sivaramakrishnamma, Subordinate Judge of Trichinopoly, in Original Suit No. 16 of 1901.

CHETTIKULAM VENKITA-CHALA REDDIAR v. CHETTIKULAM KUMARA VENKITA-CHALA REDDIAR.

grandmother of the first defendant. On appeal to the High Court the rate of maintenance was reduced to Rs. 100 a month. The plaintiff on applying for restitution of the difference between the amount due under the decree of the High Court and the amount actually recovered from him in execution by enforcing the security bond against the first defendant, his father having died, the plaintiff was referred to a regular suit. The plaintiff thereupon brought this suit to recover from the properties hypothecated by the security bond and from first defendant the sum of Rs. 14,405 odd. The Subordinate Judge passed a decree in favour of the plaintiff for Rs. 6,972 and costs against the share of the first defendant's father in the hypothecated properties and for a further sum of Rs. 5,685 against the assets of the deceased in the hands of the first defendant.

The plaintiff preferred this appeal.

A. S. Balasubrahmania Ayyar for appellant.

T. V. Seshagiri Ayyar for respondents.

JUDGMENT.—We think there can be no doubt that the construction of the security bond (exhibit D) by the Subordinate Judge is right for the reasons stated by him. But he is not right in limiting the liability of the family property to the share of the father in it. The liability of ancestral property in the hands of a son for a surety debt due by his father (the security having been given for payment of a debt not for keeping the peace or for good behaviour) has been affirmed by this Court in the case of *Sitaramayya* v. *Venkatramanna*(1) and by the Bombay High Court in the case of *Tukarambhat* v. *Gangaram*(2).

We must therefore amend the decree by omitting the words the "first defendant's father's share in" before the words "the hypothecated property now in defendant's possession" and also by substituting the words "family property" for the word "assets" before the words "in his hands" in two places. Both parties will pay their own costs in this Court.

(1) I.L.R., 11 Mad., 373. (2) I.L.R., 23 Bom., 454.

APPELLATE CIVIL.

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

1905. January 5.

ARUNACHELLAM CHETTI AND THREE OTHERS (PLAINTIFFS), APPELLANTS,

v.

GANAPATHI AYYAR (DEFENDANT), RESPONDENT.*

Rent Recovery Act (Madras) VIII of 1865, ss. 9, 51—Limitation.

The period of limitation of two months prescribed by sections 6 and 51 of the Rent Recovery Act for suits to enforce acceptance of puttahs runs from the date of tender of the second puttah where such puttah is substantially different from the puttah first tendered.

Krishna Doss Balamukunda Doss v. *Guruva Reddi*, (S.A. No. 831 of 1898, unreported), referred to and followed.

THE plaint village together with others which form part of the zamindari of Gandara Kotta had been mortgaged to the father of the plaintiffs Nos. 1 to 4 by the Zamindar. The defendant was a ryot of the village. The plaintiffs were the landlords entitled to the melvaram of the village and the defendant was a tenant entitled to the kudivaram of the lands held by him. In December 1900 puttah for fasli 1310 was tendered to the defendant by the agent of the plaintiffs, one of whom, *i.e.*, the fourth plaintiff, was then a minor. The puttah recited that the agent was authorised by the guardian of the fourth plaintiff to sign and tender the puttah. The defendant did not accept the puttah tendered and did not execute a muchilika. Subsequently, on 27th March 1901, a fresh puttah was tendered to the defendant by the plaintiffs, the fourth plaintiff having attained his majority in the interval. The plaintiffs brought this suit under section 9 of Act VIII of 1865 to enforce acceptance of the puttah and for the execution of a muchilika by the defendant. The suit was brought on the 25th May 1901, within two months of the tender of the second puttah but more than two months after the tender of the first puttah. The defendant pleaded *inter alia* that the suit was barred as more than two months had elapsed from the date of the first tender.

* Second Appeal No. 556 of 1903, presented against the decree of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Appeal Suit No. 286 of 1902, presented against the decision of M.R.Ry. A Ramacha Nedungadi, Deputy Collector of Tanjore Division, in Summary Suit No. 425 of 1901.

ARUNA-CHELLAM CHETTI v. GANAPATHI AYYAR.

The Deputy Collector passed a decree in favour of the plaintiffs but the District Judge on appeal reversed his decision and dismissed the suit on the ground that it was barred, there being no difference between the puttahs, except in the persons tendering them.

The plaintiffs preferred this second appeal.

S. Srinivasa Ayyangar for appellants.

The respondent was not represented.

JUDGMENT.—We think the learned Judge was wrong in his view that the suit was barred by limitation. The second puttah tendered in this case was substantially different from the first puttah, and that being so the two months period of limitation prescribed by sections 9 and 51 of the Rent Recovery Act runs from the tender of the second puttah. See the decision of this Court in *Krishna Doss Balamukunda Doss* v. *Guruva Reddi*(1). On the merits the findings of the lower Appellate Court are in the plaintiffs' favour.

We must set aside the decree of the lower Appellate Court and restore that of the Deputy Collector with costs in this Court and in the lower Appellate Court.

APPELLATE CIVIL.

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

1905. February 1, 2, 8.

VIBUDHAPRIYA TIRTHASWAMI (PLAINTIFF), APPELLANT IN BOTH,

v.

YUSUF SAHIB (DEFENDANT), RESPONDENT IN SECOND APPEAL No. 117 of 1903, AND

BANUBIBI (DEFENDANT), RESPONDENT IN SECOND APPEAL No. 118 of 1903.*

Civil Procedure Code—Act XIV of 1882, ss. 276, 295—"Assets realised by sale or otherwise in execution of a decree," what are.

The words "assets realised by sale or otherwise in execution of a decree" in section 295 of the Code of Civil Procedure mean that the assets must be realised by some process of Court in execution and can apply only to a sale by the Court and not to a private sale by the judgment-debtor of properties attached.

(1) S.A. No. 831 of 1898 (unreported).

* Second Appeals Nos. 117 and 118 of 1903, presented against the decree of J. W. F. Dumergue, Esq., District Judge of South Canara, in Appeal Suits Nos. 181 and 182 of 1901, presented against the decrees of M.R.Ry. M. Deva Row, District Munsif of Udipi, in Original Suits Nos. 797 and 798 of 1900.

VIBUDHA-PRIYA TIRTHASWAMI v. YUSUF SAHIB.

The assets are not realised by the attachment but by the sale. The realisation must be by sale by the Court in execution or by one of the other remedies prescribed by the Code of Civil Procedure. The fact that the money is paid into Court in satisfaction of the attaching creditor's debt does not make such money assets realised under section 295 of the Code of Civil Procedure.

Gopal Dai v. *Chunni Lal*, (I.L.R., 8 All., 67), and *Purshotamdass Tribhovandass* v. *Mahanant Surajbharthi Haribharthi*, (I.L.R., 6 Bom., 588), referred to and approved.

Lakshmi v. *Kuttunni*, (I.L.R., 10 Mad., 57), and *Sorabji Edulji Warden* v. *Govind Ramji F. N. Wadia*, (I.L.R., 16 Bom., 91), referred to.

Manilal Umedram v. *Nanabhai Maneklal*, (I.L.R., 28 Bom., 264), distinguished.

Sew Bux Bogla v. *Shib Chunder Sen*, (I.L.R., 13 Calc., 225), and *Prosonnomoyi Dassi* v. *Sreenauth Roy*, (I.L.R., 21 Calc., 809), approved.

An attachment ceases to be operative from the moment money is paid into Court or at the latest from the time satisfaction is entered.

Kunhi Moossa v. *Makki* (I.L.R., 23 Mad., 482).

THE facts are fully stated in the judgment.

C. Ramachandra Rao Saheb for appellant in both.

K. P. Madhava Rau and *A. Srinivasa Poi* for respondent in Second Appeal No. 117.

K. Narayana Rao for respondent in Second Appeal No. 118.

Sir ARNOLD WHITE, C.J.—For the purposes of the question to be decided in these appeals the material facts and dates are as follows:—

One Kalinga Hebbara obtained a decree against one Krishnaraya. On 5th July 1900 he attached certain property belonging to Krishnaraya and the sale was fixed for 22nd August. Yusuf and Banubibi (the defendants in these suits) had also obtained decrees against Krishnaraya. On 19th July Yusuf applied for an order for rateable distribution under section 295 of the Code of Civil Procedure and on 27th July an order for rateable distribution was made. On 23rd July Banubibi applied for a similar order and on 1st August the order was made. Meantime, on 18th July the plaintiff bought from Krishnaraya, the judgment-debtor, the property which had been attached by Hebbara. The consideration for the sale was a sum of Rs. 1,500. The property had been mortgaged to the plaintiff by Krishnaraya. The sale-deed recites that the amount due to the plaintiff on his mortgage, and certain other moneys were set off against this sum of Rs. 1,500. Apparently there was good consideration for the sale and the transaction was *bonâ fide*. The sale-deed also recites the attachment by Hebbara and makes provision for payment by the plaintiff to Hebbara of

VIBUDHA-PRIYA TIRTHASWAMI v. YUSUF SAHIB.

the amount of his judgment debt in order that the property might be freed from the attachment. On 28th July the amount of the judgment debt was paid into Court by the plaintiff to be paid to Hebbara in satisfaction of his decree against Krishnaraya. On 1st August and 3rd August the defendants obtained orders of attachment. On 23rd August satisfaction of Hebbara's decree was entered up. Hebbara brought the claims of the other judgment-creditors to the notice of the Court and the order entering up satisfaction was made without prejudice to their rights to question the sale to the plaintiff. The attachment made by Hebbara was not formally withdrawn. The plaintiff claimed the property. Yusuf and Banubibi resisted the claim on the ground that they were entitled to execution against the property and rateable distribution. The plaintiff's claim was rejected. The suits now under appeal were then brought by him. The Munsif decided in favour of the plaintiff, but the District Judge held that the sale to the plaintiff was void and dismissed his suits.

On these facts the question for determination is whether the sale to the plaintiff was void as against the defendants under section 276 of the Code?

This depends upon whether in the events which happened assets were realised by sale or otherwise in execution of a decree within the meaning of section 295 of the Code so as to entitle the defendants to the benefit of that section. Their rights depend upon that section and if they have no rights under that section they can have no claim "enforceable under the attachment" within the meaning of section 276. In my opinion on the facts of this case, there was no realisation of assets by sale or otherwise in execution of a decree. The sale was not made under any process of Court. It was made under a private arrangement between the judgment-debtor and the plaintiff. No doubt at the time of sale the property had been attached, but where moneys are realized by a private sale of attached property by the judgment-debtor to a third party there is not as it seems to me, a realization of assets in execution within the meaning of section 295. There is no doubt a realization of assets, but the realization is not in execution. In execution means by execution, *i.e.*, by same process of the Court. I do not think the words "wherever assets are realized by sale or otherwise in execution of a decree" can be read as if they simply meant where assets are realized for the purposes of satisfying a

VIBUDHA-PRIYA TIRTHASWAMI v. YUSUF SAHIB.

decree. The fact that the amount of the judgment debt was paid into Court does not make the money so paid "assets realized in execution."

The money was paid into Court by the plaintiff on behalf of the judgment-debtor, but neither the plaintiff nor the judgment-debtor was under any obligation to pay the money into Court. Satisfaction could have been entered up under section 258 without the money having been paid into Court. But even if it were otherwise I fail to see how the fact of payment into Court in itself would make the money so paid "assets realized in execution" I see no reason why section 295 should not be construed strictly as against judgment-creditors who claim rateable distribution. The effect of such a claim, if allowed necessarily diminishes *pro tanto* the amount available for the judgment-creditor through whose diligence the assets have been realized.

The fact that the order of August 23rd entering up satisfaction was without prejudice to the right of the other judgment-creditors to question the alienation does not affect the legal rights of the parties. This order, of course, gave them no legal rights which they would not otherwise have had.

I do not think that any of the authorities are really in conflict with the view I have indicated. On the other hand there is a strong body of authority in support of it.

In *Gopal Dai* v. *Chunni Lal*(1) the judgment-debtor's property was attached, but there was no sale. He paid into Court a sum on account of the judgment debt. It was held that the money paid into Court could not be regarded as "assets realized in execution." The fact that the money was there paid in by the judgment-debtor himself and in the case before us it was paid in by a third party does not, as it seems to me, make any difference. Neither does the fact that only a portion of the judgment debt, and not as in the case before us, the whole amount was paid into Court. In the case of *Purshotamdass Tribhovandass* v. *Mahanant Surajbharthi Haribharthi*(2), it was held that monies paid by a judgment-debtor under arrest, in satisfaction of a decree against him, are not assets realized by sale or otherwise, the ground of the decision being that "realized in execution" meant realized by the sale by the Court of the property of the judgment-debtor.

(1) I.L.R., 8 All., 67. (2) I.L.R., 6 Bom., 588.

VIBUDHA-PRIYA TIRTHASWAMI v. YUSUF SAHIB.

In the present case there was no doubt a sale of the debtor's property but the sale was not by order of the Court but was the outcome of a private arrangement between the debtor and a third party. It is quite clear that an order for attachment under section 274 is not "realization." There is no realization till the property is sold. If the sale is a sale by the Court, there is a realization in execution. If the sale is not by the Court there is realization but not realization in execution. It seems to me the test to apply is whether the assets were realized by sale or otherwise by a process in execution provided for by the Code. The case of *Sorabji Edulji Warden* v. *Govind Ramji F. N. Wadia and another*(1) satisfies this test for there the debt due to the judgment-debtor was realized by means of an order made under section 268, a process in execution provided for by the Code. A further ground of distinction is that in that case there was no payment off of the attaching creditor by the party to whom the debt due by the Railway Company to the judgment-debtor had been assigned. In the case of *Manilal Umedram and others* v. *Nanabhai Maneklal and others*(2), the money was realized by a process in execution provided for by the Code, viz., an order under section 272. This is quite clear from a passage in the judgment of Jenkins, C.J., in page 274. The learned Judge observes "The Subordinate Judge acting (as he appears to us to have acted) under section 272, whether rightly or wrongly, ordered the letter to be written to the Collector which resulted in the payment into Court of this sum of Rs. 15,623-11-0. How can it, with fairness, be said by the present petitioners that that money was not brought in in execution?"

In the case before us the realization of the assets resulted not from the attachment of the property but from the sale of the property by the judgment-debtor to the plaintiff. In the cases of *Sew Bux Bogla* v. *Shib Chunder Sen*(3) and *Prosonnomoyi Dassi* v. *Sreenauth Roy*(4) respectively the Court adopted the test which, I think, is the true one, viz., that to constitute a "realization" within the meaning of section 295 there must be either a realization by a sale in execution under the process of the Court or a realization in one of the other modes expressly

(1) I.L.R., 16 Bom., 91. (2) I.L.R., 28 Bom., 264.
(3) I.L.R., 13 Calc., 225. (4) I.L.R., 21 Calc., 809.

VIBUDHA-PRIYA TIRTHASWAMI v. YUSUF SAHIB.

prescribed by the Code. There is nothing in Kernan J.'s judgment in the case of *Lakshmi* v. *Kuttunni*(1) where it was held that where one decree-holder had attached land and another decree-holder against the same debtor had entitled himself to rateable distribution, the latter was entitled to apply under section 311 of the Code to set aside a sale, which is in conflict with the view taken in the two Calcutta cases to which I have referred. The fact that the defendants themselves obtained orders of attachment on August 1st and August 3rd does not affect the question whether there was a realization of assets within the meaning of section 295.

On the facts of the present case, I am of opinion that there was no realization of assets in execution within the meaning of section 295. This being so it is not necessary to consider whether the words "claims enforceable under the attachment" which were added to section 276 by Act X of 1877 would include claims of judgment-creditors other than the judgment-creditor at whose instance the property was attached or whether, as held in *Manohar Das* v. *Ram Autar Pande*(2), they only applied to the claims of the attaching creditor. It is also unnecessary to consider whether having regard to the fact that the judgment debt was paid on July 28th, although satisfaction was not certified till August 23rd, the attachment ceased to subsist on July 28th or whether it subsisted till August 23rd. The case of *Kunhi Moossa* v. *Makki*(3) would seem to be a clear authority for holding that, at any rate, as from August 23rd, if not from July 28th, the attachment of the property by Hebbara ceased to be operative. It is also unnecessary to consider whether an application for rateable distribution, whilst the attachment subsisted, followed by an order for rateable distribution made after the attachment ceased to be operative constituted a claim "enforceable under the attachment."

These questions, of course, only arise in the view that the case is one to which section 295 applies.

For the reasons which I have stated I think the plaintiff is entitled to a decree. I would set aside the decree of the District Judge and restore the decree of the Munsif with costs in this Court and the lower Appellate Court.

DAVIES, J.—I concur.

(1) I.L.R., 10 Mad., 57. (2) I.L.R., 25 All., 431.
(3) I.L.R., 23 Mad., 478 at p. 482.

APPELLATE CIVIL.

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

1904. October 14, 19. November 3. December 19, 23.

SOMASUNDARA MUDALIAR AND TWO OTHERS (DEFENDANTS Nos. 2 TO 4), APPELLANTS,

v.

GANGA BISSEN SONI AND TWO OTHERS (PLAINTIFFS AND FIRST DEFENDANT), RESPONDENTS.*

Hindu Law—Self-acquisition, power of acquirer over—Will construction of—Words conferring absolute estate by subsequent terms held to confer only life estate—Devise, effect of, when devisees not in existence at testator's death.

Properties acquired by a Hindu who had inherited no ancestral property, out of income derived by him in Government service are his self-acquisition and he has complete power of disposition over them by will or otherwise to the prejudice of his male issue.

Where some terms of a will apparently give an absolute interest but subsequent provisions show that only a life interest was intended to be given, effect will be given to the intention of the testator by cutting down the effect of the former words and construing them as conferring a life estate only.

When in making a provision for his sons, the testator uses words which if strictly construed would give them only a right to be maintained out of the income of certain moveable and immoveable properties, but subsequent portions of the will referred to them as 'donees' and directed such properties to be handed to them on coming of age:

Held, that the sons were given a life interest in such properties.

Where a testator after giving a life interest in certain properties to his sons devised the residue 'in favour of the male issue of the sons, such issue failing, in favour of female issue and that again failing, in favour of the grand-daughters by his daughter' and where at the testator's death, there were no grand children by his sons, but one of his daughters had two daughters alive:

Held, that the sons did not take the residue as on an intestacy but that it was taken by the two daughters of the daughter, who were then alive.

ONE Velayuda Mudaliar died in or about the year 1887, having made his last will and testament on 29th June 1887, by which the defendants Nos. 2 and 3 were appointed executors. He left a widow Vedammal the fourth defendant, three sons of whom the first defendant is one, daughters, and two grand-daughters,

* City Civil Court Appeal No. 5 of 1904, presented against the decree of M.R.Ry. C. Jambulingam Mudaliar, Madras City Civil Court Judge, in Original Suit No. 300 of 1902.

the children of a daughter. The will, among other things, provided that from the income of three houses and a garden, therein specified and from the monthly interest derived by investing the sale-proceeds of certain moveables, his three sons, including the first defendant should be supported for their lives but that they were to have no power of alienation over the said properties, which were after their death to go to their male issue, or failing male issue, to their female issue, and in the absence of all issue of the sons to the female issue of his daughters. On the 24th July 1902, the first defendant executed a mortgage for Rs. 1,800 of two of the houses mentioned in the will in favour of the plaintiffs Nos. 1 and 2.

This suit was brought by the plaintiffs to recover the amount due on their mortgage bond.

The defendants Nos. 2 to 4 denied that the first defendant had any interest in the properties mortgaged, he being only entitled under the will of Velayuda Mudaliar to be maintained out of the income.

The second issue was—Whether the first defendant had any and what right to mortgage the said property.

On this issue the Judge of the City Civil Court held that there was no evidence that the properties were self-acquired properties of Velayuda Mudaliar and that the property must be presumed to be the joint family property of Velayuda Mudaliar and his sons. He accordingly held that the will of Velayuda Mudaliar was invalid, and passed a decree in favour of the plaintiffs against the one-third share of the first defendant in the plaint properties.

Defendants Nos. 2 to 4 appealed to the High Court.

Further evidence was taken on appeal on the ground that defendants Nos. 2 to 4 were not given an opportunity to adduce their evidence.

The Hon. Mr. *P. S. Sivaswami Ayyar* and *G. Krishnaswami Ayyar* for appellants.

T. V. Seshagiri Ayyar for first respondent.

Messrs. *Branson & Branson* for first and second respondents.

JUDGMENT.—The question in this case is as to what interest, if any, the first defendant, the mortgagor, one of the sons of the late Velayuda Mudaliar, had in the properties of which Velayuda died possessed and specially in the two houses which formed part of the estate and were mortgaged by the first defendant to the plaintiffs.

SOMASUNDARA MUDALIAR v. GANGA BISSEN SONI.

As it appeared to us that the appellants, the executors of the will of Velayuda, were not able to produce in the lower Court material evidence bearing on the matters in dispute without any real default on their part, evidence was allowed to be produced by both the parties in the appeal. The witnesses called and the exhibits filed on behalf of the appellants abundantly prove that Velayuda derived no property from his father Danokoti, who was in very poor circumstances all through life, and that the properties which Velayuda became possessed of were his self-acquisition, he having been able to acquire them with savings of his own during the many years he was employed in the Department of Public Works, first as an overseer, and subsequently as supervisor in which latter appointment he drew a monthly salary of Rs. 200. It follows, therefore, that Velayuda's property was entirely at his disposal and the question is as to the effect of the dispositions made by him in his will, dated the 29th June 1887, and of which probate was duly taken on the 7th May 1888.

Putting aside from consideration as not material to the present case dispositions other than those in favour of his sons, the first defendant included, and his junior widow, we are of opinion that the interest created in both the cases is merely one for the life of the respective devisees and that the remainder became vested in the two grand-daughters of Velayuda by his daughter Thayammal. So far as the gift to the junior widow is concerned the terms of the will are comparatively clear. No doubt some of the terms of the will in regard to this gift may even seem to favour the view that the gift was of an absolute estate. But other words which occur subsequently in relation thereto plainly show that what was given was no more than an estate for life. As regards the devise in favour of the sons, part of the language used would tend to make it doubtful whether they were to have anything but a right to maintenance out of the income of specific portions of Velayuda's moveable and immoveable properties. In paragraph 12 of the will, however, the sons are spoken of as donees of the property equally with the two wives. This coupled with the direction that when the sons come of age their guardians should hand over to them the properties necessarily leads to the conclusion that an estate, though for life only, was created in their favour also.

It was, however, contended on behalf of the plaintiffs that the remaining interest in the properties given to them for life also

SOMASUNDARA MUDALIAR v. GANGA BISSEN SONI.

became vested in the sons as a case of intestacy, because the gift in favour of the male issue of the sons such issue failing in favour of the female issue and that again failing, in favour of the grand-daughters by his daughter was invalid. No doubt the gift to Velayuda's grand children by his sons failed as none such were in existence at the testator's death, but as Thayammal, one of his daughters had then two daughters alive they became entitled in remainder to all the property left by Velayuda to his three sons and to his junior widow, it not having been shown how the disposition in their favour was in any way invalid.

With reference to the conclusions thus arrived at, the mortgage to the plaintiffs must be held to be inoperative so far as house No. 94, Annapillai street, is concerned, no interest therein having been created in favour of the sons; and the parties thereto entitled under the will being the junior widow and the grand-daughters. With reference to the other house the life interest of the first defendant is liable to be proceeded against in respect of the plaintiffs' debt.

The decree of the City Civil Judge will be modified as aforesaid. Each party will bear his costs in the lower Court. In the appeal the plaintiffs will bear their own and pay half the costs of the appellants.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Offg. Chief Justice, and Mr. Justice Bhashyam Ayyangar.

NARAINA NAIKA (SIXTH DEFENDANT), APPELLANT,

v.

VASUDEVA BHATTA (PLAINTIFF), RESPONDENT.*

1903. October 21

Land-lord and tenant—Lease, forfeiture of, for non-payment of rent when period of grace allowed for payment—Transfer of Property Act IV of 1882, s. 114.

A Mulageni chit or permanent lease of 1866 for building purposes provided that the lessee should pay to the lessor a rent of Rs. 5 per annum by the 24th

* Second Appeal No. 247 of 1902, presented against the decree of J. W. F. Dumergue, Esq., District Judge of South Canara, in Appeal Suit No. 298 of 1900, presented against the decree of M.R.Ry. V. Ranga Row, District Munsif of Mangalore, in Original Suit No. 191 of 1899.

NARAINA NAIKA v. VASUDEVA BHATTA.

May of each year; and if any arrears remained due, they should be paid within a further period of three months or by the 24th August, and if not so paid, the Mulageni chit to stand cancelled.

In a suit brought for cancelling the lease and recovering the demised premises on the ground amongst others that the rent due on the 24th May 1898 was not paid by the 24th August 1898:

Held, affirming the decree of the lower Appellate Court, that the condition of forfeiture for non-payment was not penal as a period of grace was allowed and consequently no relief against forfeiture could be given.

Narayana Kamti v. *Nandu Shetty*, (S.A. No. 89 of 1900, unreported), referred to and followed.

The provisions of the Transfer of Property Act do not apply to the lease. Even under section 114 of the Transfer of Property Act, relief against forfeiture is discretionary and may depend on whether the lease allows a reasonable period of grace.

ONE Narasa Naika, deceased father of defendants Nos. 1 to 5 and brother of the sixth defendant, obtained from the plaintiff under a permanent lease-deed of the 24th May 1866 a piece of land for building purposes. One of the conditions of the deed was that an annual rent of Rs. 5 was to be paid by the 24th May of each year; and if any portion remained unpaid within that time, it should be paid within a further period of three months, *i.e.*, by the 24th August. If not paid within such further period, the lease to stand cancelled. The defendants failed to pay the rent due on the 24th May 1898 by the 24th August 1898. The plaintiff brought this suit for the recovery of the lands leased and for other reliefs. The first issue was whether the lease was penal and in what particular. The District Munsif held that the Court had a discretion to grant time for payment of rent preparatory to forfeiture and that no forfeiture was created by mere non-payment of rent. He gave a decree for rent due and directed the removal of certain encroachments but dismissed the prayer for possession. The District Court on appeal held that the lease was forfeited and decreed possession to the plaintiff.

The sixth defendant preferred this second appeal.

K. Narayana Rau for appellent.

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

JUDGMENT.—This case is not governed by the Transfer of Property Act. Under the lease in question the lessee had as against the lessor a permanent right to occupy, but he was at liberty to quit whenever he might choose to do so. The time fixed for payment of rent is the 24th May of every year with a

NARAIN. NAIKA v. VASUDEV. BHATTA

proviso that if rent is not paid within a further period of three months allowed as a period of grace, the lease shall stand cancelled. In a similar case of *Narayana Kamti* v. *Nandu Shetty*(1) where also there was a grace period allowed, it was held by this Court that the case was distinguishable from the reported cases in which relief against forfeiture had been given by the Court for non-payment of rent on the ground that, in those cases, the lease provided no period of grace.

Following that decision we hold that the decree of the District Judge is right.

We may add that, even under section 114 of the Transfer of Property Act, the exercise of the discretion to relieve against forfeiture may depend upon the circumstance whether the lease allows a period of grace or not, and in the former case, whether the period of grace is a reasonable period having regard to the nature and terms of the lease.

This second appeal fails and is dismissed with costs.

APPELLATE CIVIL.

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

NARASIMHA CHARI (PLAINTIFF), APPELLANT,

v.

GOPALA AYYANGAR (DEFENDANT), RESPONDENT.*

1905. January 5.

Hindu Law—Religious Endowment—Trustee, creation of tenure by—Cancellation by succeeding Trustee—Notice to tenure-holder—Tender of patta at end of fasli not reasonable notice.

A trustee of a religious endowment cannot, except on special grounds, create a perpetual tenure binding on his successors in office.

Mayandi Chettiar v. *Chokkalingam Pillay*, (I.L.R., 27 Mad., 295) and *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami*, (I.L.R., 27 Mad., 435), followed.

Where however a long succession of trustees had acquiesced, a succeeding trustee cannot sue to eject the tenure holder without giving him reasonable notice of the determination of the tenure; and the tender of a patta at the end of a fasli for which it is tendered is not a reasonable notice.

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(1) S.A. No. 89 of 1900 (unreported).

* Second Appeal No. 716 of 1903, presented against the decree of D. Broadfoot, Esq., District Judge of South Arcot, in Appeal Suit No. 313 of 1902 presented against the decision of M.R.Ry. K. Krishna Ayyar, Deputy Collector of Chidambaram Division, in Summary Suit No. 1 of 1902.

NARASIMHA CHARI v. GOPALA AYYANGAR.

THE suit out of which this appeal arose was instituted by the Receiver of the Aghobilam Mutt, under section 9 of Act VIII of 1865, to compel the defendant as tenant of the plaint mutt to accept a patta in respect of certain land in the village of Kavanoor, for fasli 1311. The land in question formed part of an inam belonging to the mutt. The defendant pleaded that he and his forefathers had been enjoying the land paying no rent, but spending a sum of money for an annual festival in connection with the mutt. The Deputy Collector decided in favour of the plaintiff. On appeal the District Judge found that the defendant was a tenant under a service tenure, the service being the performance of a festival at a cost of Rs. 21, and that he could only be ejected for non-performance of such service. It was admitted on behalf of the appellant that the land belonged to the mutt and that the tenure was created by a former Jir. The District Judge dismissed the plaintiff's suit.

Plaintiff preferred this second appeal.

S. Kasturiranga Ayyangar for appellant.

V. Krishnaswami Ayyar and *N. Rajagopalachariar* for respondent.

JUDGMENT.—The finding of the lower Appellate Court is that the condition of the defendant's tenure was that he should perform an annual festival at a cost of Rs. 21. This was in accordance with an arrangement entered into in 1835 by the Jir then in office and which has been continued down to the present time without objection. We are of opinion that, as a matter of law, the Jir, who entered into this arrangement being a trustee, had no power to bind his successors in perpetuity, except on very special grounds which are not alleged in this case, and that it was open to a succeeding Jir to alter this arrangement. See the judgment of the Privy Council in the case reported in *Mayandi Chettiar* v. *Chokkalingam Pillay*(1) and the decision of this Court in *Vidyapurna Tirtha Swami* v. *Vidyanidhi Thirtha Swami*(2). The defendant, however, was in possession of the land on certain terms which had been acquiesced in by successive Jirs for a long period, and the plaintiff was bound to give him notice of the determination of his existing tenancy. The tender of the patta cannot be treated as notice since it was only tendered on June 26th, 1902, whereas the

(1) I.L.R., 27 Mad., 291 at p. 295. (2) I.L.R., 27 Mad., 435.

NARASIMHA CHARI. v. GOPALA AYYANGAR.

fasli for which the patta was tendered expired on June 30th of that year. We think the suit ought to have been dismissed upon the ground that no notice was given to the defendant of the change in the conditions of his tenure, and not on the ground taken by the learned Judge.

We dismiss the appeal on the ground that no notice was given. As the plaintiff was in default in not giving notice and the defendant was in default in setting up that he was the absolute owner of the land as to which the findings are against him, we direct that each party do bear his own costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

FISHER (PLAINTIFF), APPELLANT,

v.

RAMASWAMY UDAYAN AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1904. November 2, 3, 4, 8, 11.

Rent Recovery Act (Madras) VIII of 1865, s. 9—Tender of patta to one of several joint pattadars—One of several joint pattadars not agent for the others.

A tender of patta to one of several joint pattadars is not a sufficient tender for the purposes of section 9 of the Rent Recovery Act of 1865. Each pattadar cannot be regarded as the agent of his co-pattadars for the purpose of receiving tender of patta.

THE plaintiff as mortgagee with possession of the Salem zamindari brought this suit to enforce acceptance of patta by defendants for fasli 1308 in respect of lands in their possession in the said zamindari. It was alleged in the plaint that patta was tendered to the defendants in May 1899.

The second issue in the case was, "whether plaintiff tendered a patta and defendants refused to accept it in the fasli."

* Second Appeal No. 764 of 1902, presented against the decree of L. C. Miller, Esq., District Judge of Salem, in Appeal Suit No. 341 of 1900, presented against the decision of M.R.Ry. Vijiaragava Chariar, Personal Assistant Deputy Collector of Salem, in Summary Suit No. 26 of 1900.

FISHER v. RAMASWAMY UDAYAN.

The Deputy Collector found that the patta was tendered to the first defendant alone and dismissed the suit. His decision was confirmed by the District Judge on appeal.

Plaintiff preferred this second appeal.

T. Rungachariar for appellant.

T. Subrahmania Ayyar for respondents.

JUDGMENT.—The Act makes no provision for the tender of patta to one only out of several joint pattadars, and no authority has been quoted to show that such tender is sufficient. It is not clear how each pattadar could properly be regarded as the agent of his co-pattadars for the purpose of receiving tender of patta.

It is obvious that to hold that a tender to one is sufficient to bind all the co-pattadars might open a wide door to fraud and irregularities.

We therefore agree with the Courts below and dismiss the second appeal.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Sankaran Nair.

1904. October 25.

KONDURU RUNGA REDDI (PLAINTIFF), APPELLANT IN BOTH THE CASES,

v.

SUBBIAH SETTY (DEFENDANT), RESPONDENT IN LETTERS PATENT APPEAL No. 16 OF 1904.

KUMBAHALA SUBBAMMA (DEFENDANT), RESPONDENT IN LETTERS PATENT APPEAL No. 17 OF 1904.*

Provincial Small Cause Courts Act IX of 1887, art. 31 – Suits for account, what are.

A suit for an account within article 31 of the Provincial Small Cause Courts Act does not mean every case in which accounts have to be looked into to ascertain the amount due to the plaintiff. A suit for an account is a special form of suit in which a special process is required to take an account.

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* Appeals Nos. 16 and 17 of 1904, presented under article 15 of the Letters Patent against the orders of Mr. Justice Russell in Civil Revision Petitions Nos. 406 and 407 of 1903 (Small Cause Suits Nos. 498 and 499 of 1903 on the file of the District Munsif's Court of Nellore).

KONDURU RUNGA REDDI v. SUBBIAH SETTY AND KUMBAHALA SUBBAMMA.

THESE suits were brought by the plaintiff against the defendants, in the District Munsif's Court of Nellore on the small cause side, to recover sums alleged to be due from defendants on a settlement of accounts made with them. The District Munsif found that there was no settlement but gave the plaintiff decrees for amounts found due to him on examining the accounts. On revision under section 25 of the Provincial Small Cause Courts Act, Mr Justice Russell, holding that the suits were suits for account within article 31 of the Act and as such not cognisable by a Court of Small Causes, set aside the decrees and directed the plaints to be returned for presentation to the proper Court.

The plaintiff filed this appeal under clause 15 of the Letters Patent.

Mr. *M. A. Tirunarayanachariar* for appellant.

S. Subrahmania Ayyar for respondent.

JUDGMENT.—The suit was brought in the Small Cause Court for a specified sum alleged to be due by the defendant on a settlement of account between the parties. Amongst the points stated by the Munsif for determination was, what amount is due to the plaintiff? At the hearing before the Munsif he found that the settlement relied on was not proved; but he found that a certain sum was due on examination of the accounts of the parties to the plaintiff, and gave a decree accordingly.

On revision the learned Judge held that the suit was practically a suit for an account within article 31 of the Provincial Small Cause Courts Act and was not cognisable by a Small Cause Court. He therefore set aside the decree of the Munsif directing that the plaint should be returned to the plaintiff to be presented to the proper Court. From that order this appeal is brought. The only question for determination by us is whether the suit is a suit for an account within article 31 and therefore not cognisable by a Small Cause Court.

We are clearly of opinion that the suit is not a suit for an account within the meaning of article 31.

A suit for an account is a special form of suit. It does not mean every case in which accounts have to be looked into in order to ascertain the correctness or otherwise of the amount claimed by the plaintiff. A special process is required to take an account and Small Cause Courts have no means of dealing with such an action, and therefore it is excluded from the jurisdiction of Small Cause

KONDURU RUNGA REDDI v. SUBBIAH SETTY AND KUMBAHALA SUBBAMMA.

Courts; but nearly every case brought in a Small Cause Court involves a certain amount of investigation of the accounts of the parties in order to arrive at the sum to be awarded. Such cases, and this is one of them, are not suits for an account within article 31 of the Provincial Small Cause Courts Act. No question of limitation arises. We are of opinion that the suit was cognisable by the Small Cause Court. We must therefore reverse the order of the learned Judge and restore the decree of the Munsif with costs.

APPELLATE CIVIL.

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

1905. February 7.

SARAMMA (DEFENDANT—COUNTER-PETITIONER), APPELLANT,

v.

SESHAYYA (PLAINTIFF—PETITIONER), RESPONDENT.*

Limitation Act XV of 1877, sch. II, art. 179—'Application in accordance with law'—Application by guardian on behalf of one found to be a major at the time—Jurisdiction of Court to review its own order when an appeal lay.

An application for execution made by A as guardian on behalf of B who was a major at the time the application was made is not an 'application in accordance with law' within the meaning of article 179, schedule II of the Limitation Act and will not operate as a bar to limitation, though it may perhaps be a good application for other purposes.

Taqui Jan v. *Obaidulla*, (I.L.R., 21 Calc., 866, distinguished).

Neither can such an application be considered an application by B under section 235 of the Code of Civil Procedure.

A Court can review its own order in execution although an appeal might have been but was not preferred.

THE decree in connection with the execution of which, this appeal arose, was passed in favour of the plaintiff by the District Court of Godavari in Appeal No. 287 of 1896, reversing the decree of the District Munsif of Tanuku in Original Suit No. 285 of 1895.

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* Civil Miscellaneous Second Appeal No. 76 of 1904 presented against the order of F. H. Hamnett, Esq., District Judge of Godavari, in Appeal Suit No. 549 of 1903, presented against the order of M.R.Ry. P. V. Ramachendra Ayyar, District Munsif of Ellore, in E.P. No. 490 of 1903 (Original Suit No. 285 of 1895 on the file of the District Munsif's Court at Tanuku).

SARAMMA v. SESHAYYA.

The present respondent was the plaintiff and the father of the appellant was the defendant in Original Suit No. 285 of 1895. The plaintiff was a minor at the time and applications for execution of the decree were put in on various occasions by his mother. The application in question in this appeal was presented on 23rd March 1903 by the plaintiff, the preceding application having been presented on the 23rd June 1902 by the mother of the plaintiff acting as his guardian. On the application of the 23rd March 1903, the defendant objected on the ground that such application was barred as the plaintiff had attained majority more than four years before. Execution was ordered to proceed on the 17th April 1903. Subsequently a review petition was put in by the defendant on the 23rd June 1903, and the Munsif on this petition dismissed the application for execution on the ground that, as the plaintiff became a major at the latest on the 3rd January 1900, the application by his mother of the 23rd June 1902 was null and void, and consequently the present application was barred.

On appeal by the plaintiff, the District Judge held that the application by the mother though irregular, was not altogether null and void, and that it could be considered a step in aid of execution within article 179, schedule II, of the Limitation Act. He accordingly reversed the order of the Munsif.

The defendant preferred this appeal.

K. Subrahmania Sastri for appellant.

T. V. Seshagiri Ayyar for respondent.

JUDGMENT.—The question for consideration in this appeal is whether the application of 23rd June 1902 was effective for the purpose of keeping alive the decree and preventing the execution thereof being barred by limitation. The application was made by the mother as guardian of the respondent who was described as a minor. It has been found that when the application was made he was a major. The District Judge was of opinion that the application by the mother was nothing more than an irregularity and that the proceedings were only technically defective. There is some evidence that the respondent was aware of his mother's proceedings, but there is nothing to show that he constituted her his agent for the purpose of making the application. The question is not whether the proceedings by the mother were void for all purposes, but whether they amounted to an application according

SARAMMA v. SESHAYYA.

to law for a step in aid of execution within the meaning of article 179 in the second schedule to the Limitation Act. In our opinion the application was not according to law for the purposes of article 179. In *Taqui Jan* v. *Obaidulla*(1), the Calcutta case on which the learned Judge relied, no question of the law of limitation arose. No doubt the Judges observe "If we were to uphold this decision the result would be, the suit being now barred by limitation, that the plaintiff, because of this error, whether intentional or not, would lose the whole of his cause of action." It does not follow that because certain proceedings are effective (assuming them to be effective) for the purpose of keeping alive a cause of action, that similar proceedings must be held to be "in accordance with law," and therefore effective for the purpose of keeping alive the right to execute a decree. On behalf of the respondent, it was contended, that the application should be treated as the application of the respondent; that it fulfilled the requirements of section 235 of the Code of Civil Procedure, and was therefore in accordance with law since it was verified by the mother and the section did not require that it should be signed by the applicant. On the face of the application it is clear that it was the application of the mother and not that of the respondent. It was also argued that the Munsif had no jurisdiction to review his own order and that, as he, in the first instance, directed execution to issue, and there was no appeal from this order, no appeal now lies from the order of the District Judge reversing the order of the Munsif made on review. We are of opinion that the Munsif had jurisdiction to review his own order and that, seeing that an application to review had been made to him, an appeal against the original order was unnecessary.

As regards the question of fact involved in this case, the Munsif finds by implication, that the respondent was eighteen years old on 3rd January 1900. The Judge finds that he must have been eighteen on 23rd June 1902. The present application was made on 23rd March 1903. If, therefore, the respondent became a major on some date subsequent to 23rd March 1900 the present application would be within three years of his attaining his majority and therefore in time irrespective of the application made by the mother.

(1) I.L.R., 21 Calc., 866.

SARAMMA v. SESHAYYA.

The case must go back to the District Judge for an express finding as to the date on which the respondent attained the age of eighteen. Further evidence may be taken. The finding should be submitted within six weeks; and seven days will be allowed for filing objections.

APPELLATE CIVIL.

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

VIJIARAGHAVALU NAIDU AND OTHERS (DEFENDANTS), APPELLANTS,

v.

SRINIVASALU NAIDU (PLAINTIFF), RESPONDENT.*

1905. January 27. February 28.

Limitation Act XV of 1877, sch. II, art. 179—"Step in aid of execution"—A "batta memorandum" praying for issue of sale proclamation.

A so-called "batta memorandum" which applies for the issue of a sale proclamation and on which a sale proclamation is issued accordingly, is a "step in aid of execution" within the meaning of article 179, schedule II of the Limitation Act, although an order for the issue of such proclamation might have been made previously.

Maluk Chand v. *Bechar Natha*, (I.L.R., 25 Bom., 639), distinguished.

Ambica Pershad Singh v. *Surdhari Lal*, (I.L.R., 10 Calc., 851), followed.

THE facts necessary for this report are stated in the judgment.

The Hon. Mr. *P. S. Sivaswami Ayyar* for appellant.

T. V. Seshagiri Ayyar for *V. Krishnaswami Ayyar* for respondent.

JUDGMENT.—The "batta memorandum" dated July 10th, 1900, asks that process may issue and for this purpose the necessary "batta" was deposited. The so-called "batta memorandum" is something more than a mere memorandum of the deposit of the batta. It is an application for the issue of the sale proclamation, though it also refers to the deposit of the batta. The sale proclamation was issued the following day.

We are of opinion that the "batta memorandum" was an application to take a step in aid of execution. It is none the

* Civil Miscellaneous Second Appeal No. 35 of 1904, presented against the order of R. D. Broadfoot, Esq., District Judge of Chingleput, in Appeal Suit No. 217 of 1903, presented against the order of M.R.Ry. V. Saminatha Ayyar, District Munsif of Poonamallee, in Execution Petition No. 540 of 1903 (Original Suit No. 433 of 1895).

VIJIARAGHAVALU NAIDU v. SRINIVASALU NAIDU.

less an application for a step in aid of execution, because the issue of the proclamation had been previously ordered. The proclamation would not have been issued if the batta memorandum had not been put in.

The present case is clearly distinguishable from the case of *Maluk Chand* v. *Bechar Natha*(1). In that case there was nothing more than a payment of batta. There was no written application and no evidence of any oral application. Here there was a written application. The Full Bench decision of the Calcutta High Court in *Ambica Pershad Singh* v. *Surdhari Lal*(2) is an authority for the view that the application of July 10th, 1900, was an application for a step in aid of execution.

It cannot be said the application was not in accordance with law since it was made in the form prescribed by the rules.

The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Moore.

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REFERENCE UNDER PRESIDENCY SMALL CAUSE COURT'S ACT, SECTION 69. *

Carriers by sea, liability of, under Common Law—Foreign carrier contracting in Calcutta, Law applicable to—Negligence and misfeasance.

Carriers by sea, for hire, are common carriers by the Common Law of England; and, where the contract is made in Calcutta, whatever be the nationality of the carriers they will be governed by the *lex loci contractus* which is the Common Law of England.

Mackillican v. *The Compagnie Des Messageries Maritimes De France*, (I.L.R., 6 Calc., 227), not followed.

Under the English Common Law, a common carrier may protect himself from liability for deliberate acts of misfeasance on the part of himself or his servants, but he must do so by clear, definite and unambiguous words.

Landing goods in rainy weather instead of delaying delivery is negligence and not misfeasance.

CASE stated, under section 69 of Act XV of 1882, by the Registrar of the Court of Small Causes, Madras, in Suit No. 12836 of 1903.

(1) I.L.R., 25 Bom., 639. (2) I.L.R., 10 Calc., 851.

* Referred Case No. 8 of 1904 stated under section 69 of Act XV of 1882 by the Registrar of the Court of Small Causes, Madras, in Suit No. 12836 of 1903.

REFERENCE UNDER PRESY. SMALL CAUSE COURT'S ACT, S. 69.

The facts of the case, as stated by the Chief Judge of the Court of Small Causes, were as follows:—

"The plaintiff sues the defendant company for the sum of Rs. 1,356-6-0 being the amount of loss or damage caused to plaintiff by reason of negligence. The plaint states that Messrs. Hajee Esack Saib & Co. at Calcutta, plaintiff's agents, shipped to the plaintiff, Hajee Ismail Sait, at Madras, as consignee, a cargo of 500 bags of Bengal oats per S.S. *Dupleix*, a steamship belonging to the defendant company; that the steamer arrived in the Madras Harbour on 27th October 1902; that the plaintiff took delivery of 200 bags which were landed in good order and condition and that the remaining 300 bags were landed in a wet and damaged condition. The plaint then states that the plaintiff, after giving due notice to the defendants, held an official survey and sold the goods by public auction, the defendants having been previously given notice of such sale, and realised thereby a net sum of Rs. 1,031-1-0. The plaint further states that the market value of the said 300 bags at Rs. 6-12-0 a bag amounted to Rs. 2,025 and that Rs. 362-6-0 was paid by plaintiff by way of survey fees, storage, demurrage, etc. The plaintiff averred in the plaint that the damage to the goods was owing to the negligence and misfeasance of the defendant company in landing the said goods which they did in pursuance of the provisions of the bill of lading issued by the defendants, and prays judgment for Rs. 1,356-6-0, being the difference between Rs. 2,387—the market value of the 300 bags, together with Rs. 362-6-0, costs of storage, survey fees, etc., paid by plaintiff—and Rs. 1,031-1-0, the net sale-proceeds of the goods.

The defendants by their counsel pleaded that (1) there was no negligence, (2) that they were protected by the bill of lading, (3) puts plaintiff to proof of damages, (4) and not indebted.

It appears that, on the 27th October 1902, the date on which the 500 bags were landed in the Madras Harbour, the rain wa very heavy amounting to 1·30 inches between 6 A.M. on 27th October and 6 A.M. on 28th October. It appears also that it is the practice of merchants to abstain from making shipments during the monsoon except when the weather is fine and except in cases where the Captain is bound by time and then only in tin-lined cases of imperishable goods. It is also in evidence that the cargo was stowed in the holds of the vessel, not on deck, and was raised n slings by means of derricks and then lowered into the boats.

REFERENCE UNDER PRESY. SMALL CAUSE COURT'S ACT, s. 69.

Exhibit X, the coasting abstract kept by the Harbour Trust authorities, shows the condition of the bags at the time they were received by them at the pier, as wet by rain.

With regard to the pleas raised I found for the reasons given in my judgment (copy herewith) (1) that the Captain did not use ordinary and reasonable care, and was guilty of negligence in landing these bags as he did on the 27th October 1902 taking into consideration the state of the weather on that day; but I further found that no negligence was proved with regard to those bags between the time they left the ship's side and the time they reached the pier where the ship's liability ceases on delivery to the Harbour Trust. (2) I found that the defendant company is not liable as they are protected by article 2 of the bill of lading. (3) There is no dispute as to the damages if the defendant company is liable. (4) I found the defendant's company not liable. I therefore dismissed the suit with costs and counsel's fee Rs. 100 and Attorney's fee Rs. 60. At the request of the plaintiff I made my judgment contingent on the opinion of the High Court on the following question:—

"Whether under the bill of lading the defendants are liable to the plaintiff."

Mr. *E. Norton*
Mr. *James Short* } for plaintiffs.

Mr. *A. Read*
Messrs. *King & Josselyn* } for defendants.

JUDGMENT.—Goods were carried on the defendant's ship, the *Dupleix*, from Calcutta to Madras under a bill of lading which contains a clause that "the company is not answerable for any fault or negligence whatsoever of its Captain; nor for that of pilots, seamen, or other persons on board its vessel in whatever capacity."

On arrival at Madras the goods were delivered by the defendants in rain and part of them were damaged by wet. The plaintiff claims damages from the defendants for negligence and misfeasance in delivering these goods so damaged. At the hearing, the learned Chief Judge of the Small Cause Court dismissed the suit holding that the defendants were protected by the above clause, but has stated a case for the opinion of this Court on the question "whether under the Bill of Lading the defendants are liable to the plaintiff." On behalf of the plaintiff it was

REFERENCE UNDER PRESY. SMALL CAUSE COURT'S ACT, s. 69.

contended that the defendants were not common carriers (as was held in *Mackillican* v. *The Compagnie Des Messageries Maritimes De France*(1)), but were bound by the Contract Act and could not contract themselves out of their liability as bailees and that, even if they were common carriers, they were not protected by the clause in question as their act in delivering the goods in monsoon rain was misfeasance and not mere negligence.

As regards the first question, we are of opinion that the defendants are common carriers. The only reason given in *Mackillican* v. *The Compagnie Des Messageries Maritimes De France*(1) for holding that they were not common carriers is that the defendant's ship is a foreign ship. The defendants are a company who carry goods for any person for hire between certain termini on a certain route. The contract was made at Calcutta and, whatever the nationality of the defendants or their ship, the law applicable to them is the *lex loci contractus*. The *lex loci* is the law of England; the defendants are therefore in our opinion common carriers and the English law as to common carriers applies to them.

By the English law applicable to common carriers, the common carrier may enter into any contract so as to protect himself, but he can only do so by clear, definite, and unambiguous, words. If therefore the words used in the exemption clause of the bill of lading are clear, definite and unambiguous, they may suffice to protect the shipowner even from deliberate acts of misfeasance on the part of himself or his servants. On arrival at Madras the defendants delivered the plaintiff's goods, which were oats, in heavy rain and allowed them to get wet in the process. They might, if they had chosen to do so, have taken the goods on and not delivered them until later when it was fine; and the plaintiff contends that their act in delivering the goods in rain instead of delaying the delivery until it was fine, was an act of deliberate misfeasance and not mere negligence as the learned Chief Judge has found in the case stated. We think the acts of the defendant's servants amounted only to negligence and that the learned Chief Judge is right in so holding. We further think that the words of the clause above quoted are sufficiently clear and definite to protect the defendants and we answer the question referred to us in the negative.

(1) I.L.R., 6 Calc., 227.

APPELLATE CIVIL.

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

1905. February 10.

YANDAMURI JAGANNADHAM (PLAINTIFF), PETITIONER,

v.

YANDAMURI SESHACHELAM AND OTHERS (DEFENDANTS), RESPONDENTS. *

Scheduled Districts Act XIV of 1874, s. 6, rules under—"Hearing the appeal" meaning of—Rule 8, power of the High Court under.

Rule 6 of the rules framed under section 6 of the Scheduled Districts Act provides that, in appeals from Munsif's or Assistant's decisions, it shall not be necessary to summon the respondents in the first instance, but the original records shall be called for 'and if' after perusing the records, etc., the officer "hearing the appeal" shall see no reason to alter the decision appealed from, he may dismiss the same. Where the Government Agent to whom the appeal was preferred sent for and perused the appeal petition and dismissed the same endorsing the order of dismissal on the petition, without fixing a day and hearing the appellant:

Held, by the High Court on revision under rule 8, that the words "hearing the appeal" necessarily imply that the appellant must be given an opportunity of being heard in support of his appeal and that he has a right to be so heard if he appears, and that the Agent's order of dismissal must be set aside.

THE facts necessary for this report are set out in the judgment.

P. Nagabhushanam for petitioner.

R. Kuppuswami Ayyar for respondents.

JUDGMENT.—Rule 4 of the rules made under section 6 of the Scheduled Districts Act XIV of 1874 provides, "In all original suits an appeal shall lie from the decree of an Assistant to the Court of an Agent."

Rule 6 provides "When an appeal shall be preferred from any Munsif's or Assistant's decision, it shall not be necessary to summon the respondent in the first instance, but forthwith the original record of the proceedings in the case shall be called for; and if, after the perusal of the record of the original suit and

* Civil Miscellaneous Petition No. 1072 of 1904, praying that, in the circumstances stated therein, the High Court will be pleased to revise the decree of E. B. Elwin, Esq., Government Agent of Godavari at Cocanada, in Appeal Suit No. 3 of 1904, presented against the decree of A. C. Woodhouse, Esq., Agency Deputy Collector of Godavari, in Original Suit No. 12 of 1903.

petition of appeal, the officer hearing the appeal shall see no reason to alter the decision appealed from, it shall be competent to him to dismiss the same with an endorsement on the petition of appeal that it has been so dismissed." Rule 8 provides "All decrees passed by the Government Agent on appeals from decrees of his subordinates shall be final, the High Court having the power on special grounds to require him to review his judgment as may be directed by them."

In the case before us the Deputy Collector, Agency Division, dismissed an original suit. The plaintiff in exercise of the right of appeal given him by rule 4 appealed to the Agent. The appeal was dismissed by the Agent by his indorsing on the appeal petition a note that the appeal had been dismissed. A formal decree was drawn up which recited that the appeal came on for hearing on a certain day. It is not suggested however that the Agent either gave the appellant any opportunity of being heard in support of his appeal or that the Agent heard the appeal in the ordinary meaning of the word. Rule 6 does not provide that any notice of the day fixed for the disposal of the appeal should be given to the appellant and it does not expressly provide that the appeal should be heard by the agent, but it speaks of the "officer hearing the appeal" and we do not think these words can be construed as meaning nothing more than the officer to whom the appeal is presented. They imply that the appellant is entitled to be given an opportunity of being heard in support of his appeal, and that he has a right to be heard if he appears. Under rule 8 upon the special ground that the Agent did not hear the appeal, we must direct him to restore the appeal to his file and dispose of it after giving the appellant an opportunity of being heard.

Costs of this application will abide the result.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

1905. March 2, 27.

PARAMBATH MANAKKAL (PLAINTIFF), APPELLANT,

v.

PUTHENGATTIL MOOSAMU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *ss.* 13, 43—*Former suit to redeem kanam, no bar to subsequent suit based on the kanam and title, so far as the latter is based on title.*

A previous suit to redeem four out of six items of land mortgaged under a kanam deed on the ground that the kanam was split up by a subsequent demise, and which suit was dismissed on the ground that such demise was not valid, will be a bar to a subsequent suit to redeem under the same kanam, so far as such suit is based on the kanam. Section 13 of the Code of Civil Procedure will be a direct bar to any claim on the demise and sections 13 and 43 of the Code of Civil Procedure will bar a claim on the original kanam as an alternative claim on it might have been made in the prior suit. But where in the subsequent suit the plaintiff relies as well on his title, such title is a distinct cause of action, and neither section 13 nor section 43 of the Code of Civil Procedure will bar his claim on such title.

A claim on a kanam is a claim arising *ex contractu* while a claim on title against a trespasser is founded on tort.

Ramaswami Ayyar v. *Vythinatha Ayyar*, (I.L.R., 26 Mad., 760), followed.

Rangasami Pillai v. *Krishna Pillai*, (I.L.R., 22 Mad., 259), dissented from.

Per BODDAM, J.—Estoppel by judgment cannot be avoided by suing on a new form of claim or on a ground of relief which might have been, but was not raised in the former suit, if such claim or ground arises out of and depends on the same right or title as that which was directly in question in the former suit.

Chinniya Mudali v. *Venkatachella Pillai* (3 M.H.C.R., 320).

Muthumadeva Naik v. *Sevattamuthumadeva Naik*, (7 M.H.C.R., 160), referred to and approved.

Suit brought to redeem certain items of land and also on title. The case set up in the plaint was that A and B of the plaint schedule were the jenm properties of the plaintiff; that they were demised by his ancestor P on kanam for Rs. 112-8-0 to one Veeran deceased, elder brother of defendants Nos. 1 and 2, on the 7th June 1876; that on the death of Veeran, S, the elder brother of

* Second Appeal No. 204 of 1903, presented against the decree of M.R.Ry. K. Krishna Rau, Subordinate Judge of South Malabar at Calicut, in Appeal Suit No. 479 of 1902, presented against the decree of M.R.Ry. V. Raman Menon, District Munsif of Chowghat, in Original Suit No. 260 of 1901.

the plaintiff, demised the property in A to defendants Nos. 1 and 2 on kanam for Rs. 90, on the 5th June 1884. In 1896, the plaintiff brought a suit No. 471 of 1896 against defendants Nos. 1 and 2 and the children of the deceased Veeran to redeem A under the demise of 1884. The children of Veeran contended that the demise of 1884 was not valid and that the suit ought to have been brought on the kanam demise of 1876. That suit was dismissed on the ground that the demise of 1884 was invalid, as the children of Veeran were not parties to it and that it was not open to the plaintiff to redeem a portion of the properties mortgaged on payment of a portion of the mortgage amount. Another suit (Original Suit No. 470 of 1896) regarding the items in B was brought against the sons of Veeran and was also dismissed.

The plaintiff then brought this suit to redeem the properties in A on payment of whatever may be found due, on the strength of his title and on the demises of 1876 and 1884. Paragraph 4 of the plaint recited that Veeran's children having disclaimed all right to the properties A, were not made parties and paragraph 6 of the plaint recited that the plaintiff was the heir and legal representative of P and S, and the defendants Nos. 1 and 2 were the representatives and heirs of Veeran.

The defendants contended *inter alia* that the suit was barred by sections 13 and 43 of the Code of Civil Procedure. The District Munsif held that neither section 13 nor section 43 of the Code of Civil Procedure barred the plaintiff's claim, and further that the plaintiff was entitled to succeed on the strength of his title. He therefore passed a decree for redemption in favour of the plaintiff. On appeal the Subordinate Judge reversed the decree holding that the suit was barred by both sections 43 and 13 of the Code of Civil Procedure and dismissed the suit.

The plaintiff preferred this second appeal.

T. R. Ramachandra Ayyar for *P. R. Sundara Ayyar* for appellant.

K. P. Govinda Menon for second respondent.

JUDGMENTS—BENSON, J.—The present suit, so far as it is based on the kanam of 1876, is clearly barred by section 43 of the Code of Civil Procedure, for the simple reason that the plaintiff's suit No. 470 of 1896 was also based on the kanam of 1876, and in it he could have claimed redemption of all the six items of land demised by that kanam, but he claimed only two of them. He omitted to

PARAMBATH MANAKKAL v. PUTHEN-GATTIL MOOSAMU.

sue in respect of the other four items, and section 43 forbids a suit for a portion of a claim so omitted.

The present suit, so far as it is based on the kanam of 1884, is also barred by section 13, Civil Procedure Code, because so far as the present defendants are concerned, it is merely a repetition of the plaintiff's suit No. 471 of 1896. But the present suit is also based on the plaintiff's title. His title was not denied in the suits of 1896. On the contrary it was admitted by the present defendants and by the other defendants in that litigation. The defendants had and have no defence on the merits. They merely claim some compensation for improvements.

The former suits by the plaintiff were not based on his title but on the kanams only. That being so, the plaintiff's present suit, based on title, is not, in my opinion, barred by section 13 or section 43, Civil Procedure Code.

As pointed out by this Court in *Ramaswami Ayyar* v. *Vythinatha Ayyar*(1), "section 13 cannot be relied on to support the proposition that a plaintiff who seeks to redeem a specific mortgage or to eject on a specific lease and fails in such suit, because the mortgage or the lease is not proved, is thereby precluded from seeking to redeem the same property or a portion thereof from another specific mortgage, or to eject on the strength of his title the person in possession. Every transaction of lease imposes on the lessee the obligation of delivering to the landlord possession of the property at the expiration of the lease, and every transaction of mortgage imposes upon the mortgagee the obligation of re-transferring, after the expiration of the term of mortgage, the property free from all incumbrances created by him (or those claiming under him or under whom he claims) and, if necessary, delivering possession of the same to the mortgagor on discharge of the mortgage debt by payment or otherwise; and such obligation on the part of the lessee or mortgagee (as the case may be) arises from the transaction of lease or mortgage which in respect of such obligation operates as an executory contract. The cause of action, therefore, in a suit based on a lease or mortgage arises *ex contractu* and is based upon a contract. Such a suit, therefore, can be no bar to a subsequent suit, based upon plaintiff's title, against the same defendant as a trespasser."

(1) I.L.R., 26 Mad., 760.

PARAMBATH MANAKKAL v. PUTHEN-GATTIL MOOSAMU.

The decision in *Rangasami Pillai* v. *Krishna Pillai*(1) is relied on to show that section 43, Civil Procedure Code, is a bar to the suit, but it may be pointed out that this Court regarded the latter case as directly opposed to the decision of the Privy Council in *Amanat Bibi* v. *Imdad Husain*(2) and as opposed to several specified later decisions of this Court (*Ramaswami Ayyar* v. *Vythinatha Ayyar*(3)).

I think, then, that the decision of the Subordinate Judge, that the suit is barred by sections 13 and 43 is erroneous. There was no appeal to the lower Appellate Court on the ground of non-joinder of parties, or in respect of the amount of compensation due for improvements.

I would therefore set aside the decree of the Subordinate Judge and restore that of the District Munsif with costs in this and in the lower Appellate Court.

BODDAM, J.—This suit is brought to redeem certain items of land and also on title.

In the year 1876 the plaintiff's ancestor demised six items of land under a kanam deed of that date to one Veeran for Rs. 112-8-0. Veeran died; and in 1883-84, four of these same six items of land were granted to Veeran's brothers (defendants Nos. 1 and 2 in this suit) for Rs. 90 out of the Rs. 112-8-0, the remaining amount of the original kanam of 1876, viz., Rs. 22-8-0 being left as applicable to the remaining two items granted under that kanam.

In 1896 the plaintiff brought two suits Nos. 470 and 471 of 1896. The first of these No. 470 of 1896 was brought against Veeran's sons to redeem the two items left redeemable under the kanam of 1876 on payment of Rs. 22-8-0 and the second No. 471 of 1893 was brought against defendants Nos. 1 and 2 (in this suit) and Veeran's sons to redeem the four items on payment of Rs. 90. Both suits were dismissed.

In the judgment in No. 471 of 1896 which is put in in this suit, it is clear why they were dismissed; for the District Munsif says "What is plain from this evidence is, that even according to the plaintiff the demise of 1876 granted to Veeran was split up and four of the properties in it were re-demised to defendants Nos. 1 and 2 on a kanam of Rs. 90, and suit No. 470 of 1896 was

(1) I.L.R., 22 Mad., 259. (2) I.L.R., 15 Calc., 800.
(3) I.L.R., 26 Mad., 760 at p. 778.

PARAMBATH MANAKKAL v. PUTHEN-GATTIL MOOSAMU.

"brought to redeem the other items on payment of the balance "of kanam amount, namely, Rs. 22-8-0. It is plain that plaintiff "cannot redeem a part of the properties demised by paying only "a part of the kanam. The original demise of 1876 is admittedly "to the father of defendants Nos. 4 and 5 and they are admitted "to be his heirs. The demise of 1884 on which the present suit "is leased is only for a portion of the properties comprised in that "of 1876 and the kanam amount has also been split up without "the consent of the demisee. The demisee has every right to "insist upon the whole property being redeemed and his whole "money being paid to him."

The present suit is brought against the brothers of Veeran without joining his heirs, to redeem the same four items of property only as were sought to be redeemed in suit No. 471 of 1896 on the strength of the plaintiff's title, and under the demise of 1876 or 1884, on payment of so much as may be found by the Court to be due.

The suit is not based specifically on the kanam of 1876 or on the kanam of 1884, and the heirs of the demisee under the kanam of 1876 are not made parties; but the facts with regard to the two kanams and the bringing and dismissal of the suit No. 471 of 1896 are stated, and the claim is to redeem merely on payment of whatever may be found to be due after setting off arrears of purapad.

It is clear that both the former suits were for redemption, 470 of one part, and 471 of the rest of the lands demised under the original kanam of 1876.

It is clear that in both the former suits, the kanam of 1876 was admitted by all parties or proved. The first suit No. 470 of 1896 based on the original kanam of 1876 was brought to redeem part of the land demised under it, and was against the heirs of the original demisee, and though in that suit the claim was to redeem only a part of the properties demised, it might, and ought to have claimed to redeem the whole of the properties demised on payment of the whole of the kanam amount; and if the plaintiff did not do so he must be presumed to have abandoned his claim to anything which he omitted to make a ground of attack. It is also clear that in the second suit No. 471 of 1876 the original kanam of 1876 was put forward and proved. The claim was for part of the land demised under it and the parties were the heirs of the original

PARAMBATH MANAKKAL v. PUTHEN-GATTIL MOOSAMU.

demisee in addition to the present defendants Nos. 1 and 2. In that suit the plaintiff might, if he had chosen to do so, have claimed alternatively to redeem the whole of the land demised under it, though in fact he claimed to redeem only a part of the land originally demised under it, alleging a subsequent kanam (or an arrangement whereby the original kanam was split up).

The former suit and the present suit were for redemption. The same items of property were sought to be redeemed in both. In both suits both the kanams were relied on, and in the former suit all the parties interested in both the kanams were parties—the defendants in the present suit being among the defendants in that suit.

The present suit has been dismissed on the ground that the matter is *res judicata* and the plaintiff is barred under explanation II of section 13 and section 43 of the Civil Procedure Code, and the appeal before us is against that decree.

Now the law is clearly laid down by Scotland, C.J., in *Chinniya Mudali* v. *Venkatachella Pillai*(1). He says "I take it to be "clearly established that there must be not only the same property "or subject of demand in dispute either wholly or in part between "the same parties or their privies: but it must also appear that "the identical question of right or title had before been *in judicio*. "I take it to be also clear as a general rule both on principle and "authority, that when a question of right or title has been adjudi-"cated on in a suit, the bar of the judgment cannot be avoided "by suing on a new form of claim, or on a ground of relief "which might have been, but was not, raised or determined in "the former suit, if such claim or ground arises out of and "depends upon the same right or title as that which was directly "in question in the former suit"; and Holloway, J., says at page 332 "The whole case of the parties as to the matter of litiga-"tion must be brought forward. Taking the words 'matter of "litigation' to mean 'question of right' which is the only proper "sense in questions of *res judicata* . . . the meaning of the "rule is not that a decree will bar a man as to matters never raised "if they are matters relating to the external object of the litiga-"tion, but as to all matters which were relevant and examinable "upon the question of right at issue between the parties" see also

(1) 3 M.H.C.R., 320.

PARAMBATH MANAKKAL v. PUTHEN-GATTIL MOOSAMU.

Muthumadeva Naik v. *Sevattamuthumadeva Naik*(1). Here (apart from the plaintiff's claim based on his title) the same property is in dispute, the parties are the same, and the identical question of right or title, viz., the right of the plaintiff to redeem had been *in judicio* in the previous suits. In those circumstances the bar of the judgment cannot be avoided by suing on a new form of claim or on a ground of relief which might have been but was not raised in the former suit, if such claim or ground arises out of and depends upon the same right or title as that which was directly in question in the former suit.

It is however argued that the question of right or title is not the same in this suit as in suit No. 471 of 1896, because there the plaintiff claimed to redeem the same lands under the kanam of 1884, and in this suit he claims to redeem under the original kanam of 1876. That is not accurate however; for in the present suit he claims under both the kanams alternatively. This suit is therefore merely repeating the former suit in a new form and the alternative claim now made could and should have been made in the former suit and is barred so far as any right to redeem under the kanams can be set up. If it were not so, the whole aim and object of section 13 explanation II, and section 43, Civil Procedure Code, would be done away with, for there have already been two suits by the same plaintiff in which the original kanam has been set up and in which the present claim might have been (if it was not) made. Moreover in redemption suits all mortgages should be redeemed in one and the same suit, and if the plaintiff knowing of the existence of a prior mortgage to those who are defendants to his action for redemption under a subsequent mortgage, chooses to make no claim for redemption under the prior mortgage, he must be taken to have abandoned his claim under it and cannot be allowed to bring a fresh action for redemption of the same lands by simply altering the form of his claim to redeem to an alternative claim either under the second or under the first mortgage.

In this suit, however, the plaintiff also bases his claim on his title as to which there is no question, for it was admitted by the defendants in the previous suit. That is a ground of claim which is entirely separate and distinct from the claims upon which the

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

PARAMBATH MANAKKAL v. PUTHEN-GATTIL MOOSAMU.

previous suits were based, and is not in my opinion barred. It is a fresh ground of claim which the plaintiff was not bound to join with his previous suits and which hitherto he has not based any claim upon. The defendants have no defence on the merits to this claim. The Munsif found that the plaintiff offered to pay the whole amount of the original kanam and that the defendants were entitled to a certain sum for improvements less purapad, and there was no appeal against his decree as to those findings.

I would, therefore, reverse the decree of the Subordinate Judge and restore that of the District Munsif with costs in this and in the lower Appellate Court.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Benson.

1905. March 23, 24, 30.

THASI MUTHUKANNU AND OTHERS (DEFENDANT AND HER LEGAL REPRESENTATIVES), APPELLANTS,

v.

SHUNMUGAVELU PILLAI (PLAINTIFF), RESPONDENT.*

Contract Act IX of 1872, s. 23—Immoral consideration, assignment of mortgage for—Right of one in pari delicto to set aside executed contracts—Completed gift cannot, but transfer for consideration may be set aside—Raising new points in second appeal.

In 1898 the plaintiff, who was then young and inexperienced, assigned to the defendant, a dancing girl, a mortgage for Rs. 1,500, the consideration stated in the deed being payments in cash and jewels to the plaintiff and the discharge by the defendant of debts due by the plaintiff. The plaintiff sued in 1901 to set aside the assignment on the ground that no consideration passed as recited therein but that the real consideration was the future continuance of immoral relations between himself and the sister of the defendant. The defendant contended that the consideration stated in the deed actually passed, and further that the plaintiff

* Second Appeal No. 514 of 1903, presented against the decree of F. D. P. Oldfield, Esq., Acting District Judge of Tanjore, in Appeal Suit No. 98 of 1902, presented against the decree of M.R.Ry. P. Adinarayaniah, District Munsif of Shiyali, in Original Suit No. 23 of 1901.

THASI MUTHU-KANNU v. SHUNMUGA-VELU PILLAI.

who admitted that the assignment was for an immoral consideration, could not sue to set it aside.

Both the lower Courts found that there was no consideration for the deed and set it aside.

On second appeal to the High Court it was contended that the transaction being for an immoral consideration and completely executed, the plaintiff as a person *in pari delicto* could not sue to set it aside:

Held that, where the transaction amounted to a voluntary gift, it cannot be set aside; but, where the transaction, though completed, was intended to be for consideration, it can be impeached if the consideration is immoral, and it makes no difference whether the transaction is executed or executory.

Ayerst v. *Jenkins*, (L.R., 16 Eq., 275), distinguished.

Whether what has been transferred has been transferred by way of gift or not will depend on the intention of the parties and the facts of the particular case; and the form of the transaction will be material in determining the question.

Phillips v. *Probyn* ((1899) 1 Ch.D., 811 at pp. 816 and 817).

Held also, that on the facts, the transaction was between the plaintiff on the one hand and the defendant, as the managing member of a joint family of dancing girls consisting of the defendant and her sister, on the other.

Kamakshi v. *Nagarathnam*, (5 M.H.C.R., 161), referred to.

Held further, that considering the age and inexperience of the plaintiff and that he had no independent advice, he was not *in pari delicto*.

A point not taken in the lower Courts, on which no issue was raised, and on which the parties had no opportunity of adducing evidence cannot be urged in second appeal.

SUIT to set aside an assignment of a mortgage for Rs. 1,500 in favour of the defendant by registered deed, dated 24th June 1898. The deed recited that the consideration for the assignment was a payment to the plaintiff in cash of Rs. 250, and in jewels of Rs. 940, the discharge by the defendant of certain debts due on promissory notes by the plaintiff, and Rs. 44 paid to the defendant as a reward for taking the transfer. The plaintiff's case was that he, being young and inexperienced, was introduced by some of her friends to the defendant and her sister, Ammakannu, who were dancing girls living by prostitution; that the assignment was made in consideration of future illicit intercourse with the defendant's sister, and under the influence of the defendant and her friends; that he had had no independent advice; that shortly after the transfer was executed Ammakannu ceased, at the instance of the defendant and her friends to have further intercourse with him. The plaintiff denied that the consideration mentioned in the deed passed to him. The defendant denied any fraud or deceit, and pleaded that the consideration mentioned in the deed was actually paid to the plaintiff.

THASI MUTHU-KANNU v. SHUNMUGA-VELU PILLAI.

The District Munsif found that the consideration recited in the deed never passed to the plaintiff and set aside the deed of assignment.

The defendant appealed, and the District Judge dismissed her appeal.

The defendant preferred this second appeal.

T. Rangachariar and *T. Natesa Ayyar* for second and third appellants.

V. Krishnaswami Ayyar for respondent.

JUDGMENT.—The plaintiff sued to set aside an assignment made by him to the defendant on the 24th June 1898 of his right under a simple mortgage deed executed to him on the 24th February 1898 by one Veerappa Padayachi for the sum of Rs. 1,500 due to the plaintiff by Veerappa. The District Munsif and the District Judge decreed the claim, the ground for the decree being that the consideration for the assignment recited in the instrument of transfer and relied on by the defendant in her defence, viz., payment of Rs. 250 to the plaintiff by the defendant, discharge by the latter of debts due by the former to the extent of Rs. 265, and the delivery of jewels of the value of Rs. 940 never passed from the defendant to the plaintiff.

On behalf of the defendant, it was for the first time contended in this Court that according to the plaintiff's own case the transaction was entered into for an immoral purpose and the plaintiff as a person *in pari delicto* was not entitled to ask for the relief prayed for having regard especially to the fact that the transaction was one completely executed. The substance of the plaintiff's case, with reference to the point thus raised on behalf of the defendant, was this: The plaintiff who was at the time young and inexperienced was introduced to the defendant and her sister Ammakannu, dancing women living by prostitution, by certain individuals referred to in the plaint who had immoral relations with them; that the transfer in question was made expressly in consideration of future illicit intercourse between the plaintiff and Ammakannu; that the transfer was executed while the plaintiff was under the influence of the said persons acting in the interests of the women without the plaintiff having had opportunity of being properly advised in the matter; and that shortly after the execution of the instrument the defendant and her partisans caused the connection between the plaintiff and Ammakannu to be

THASI MUTHU-KANNU v. SHUNMUGA-VELU PILLAI.

broken off. This case was supported by the evidence given by the plaintiff himself and is uncontradicted except it be by the defendant's case that the consideration recited in the instrument of transfer did actually pass, which, however, as already stated, has been negatived by the concurrent findings of the lower Courts.

The question then for determination is, whether upon the facts spoken to by the plaintiff, the decrees of the lower Courts are sustainable. In dealing with this question we proceed on the footing, that though the instrument of assignment purported to be between the plaintiff on the one hand and the defendant on the other, yet the transaction was intended for the benefit of both the sisters who, according to the law governing them, were members of a joint family, the defendant being the elder member and manager (*Kamakshi* v. *Nagarathnam*(1)). Mr. Rangachariar on behalf of the defendant, did not question (as he could not) that the promise or expectation of future illicit cohabitation is an unlawful consideration, and that an agreement founded on it, is void. He contended, however, that the rule on the subject is confined only to executory contracts, and, as in the present instance, the transaction was one which had been carried out, whereby the mortgage interest possessed by the plaintiff became fully vested in the defendant, the lower Courts should have refused the relief prayed for. He strongly relied on *Ayerst* v. *Jenkins*(2) in support of his contention. Now, that the doctrine laid down by Lord Selborne there is confined to cases where according to the intention of the parties the transaction is a gift absolutely completed, is made clear throughout the judgment and particularly by the following passages. At page 283 of the report his Lordship observes:—"In the present case relief is sought by the representative, not merely of a *particeps criminis*, but of a voluntary and sole donor, on the naked ground of the illegality of his own intention and purpose; and that, not against a bond or covenant or other obligation resting *in fieri*, but against a completed transfer of specific chattels, by which the legal estate in those chattels was absolutely vested in trustees, ten years before the bill was filed, for the sole benefit of the defendant. I know no doctrine of public policy which requires, or authorises, a Court of Equity to give assistance to such a plaintiff under such circumstances." Again in the same page he says:—"A

(1) 5 M.H.C.R., 161.

(2) L.R., 16 Eq., 275.

THASI MUTHU-KANNU v. SHUNMUGA-VELU PILLAI.

voluntary gift of part of his own property by one *particeps criminis* to another, is in itself neither fraudulent nor prohibited by law." And at page 284 he adds:—"I think it consistent with all sound principle, and with all authority, to recognise the importance of the distinction between a completed voluntary gift, valid and irrevocable in law (as I hold the transfer of the shares to the defendant's trustees to be), and a bond or a covenant for an illegal consideration, which has no effect whatever in law." In short the precise point established by the case is, borrowing the words of Sir Frederick Pollock, that "an actual transfer of property which is on the face of it 'a completed voluntary gift valid and irrevocable in law' and confers an absolute beneficial interest, cannot be afterwards impeached by the settlor or his representatives, though in fact made on an unlawful consideration." (Pollock on 'Contracts,' 7th edition, at p. 304.) Where therefore the transaction, though completed, was not intended to be a gift but a transfer for consideration, in such a case, if the consideration is shown to be unlawful on the ground of its immoral character that must necessarily make the transaction void, and the question whether reliefs should be given or refused to a *particeps criminis* will have to be decided on principles different from that on which *Ayerst* v. *Jenkins*(1) proceeds. This is in a way implied in the observation of Lord Selborne that "where the immediate or direct effect of an estoppel in equity against relief to a particular plaintiff might be to effectuate an unlawful object, or to defeat a legal prohibition, or to protect a fraud, such an estoppel may well be regarded as against public policy." The effect of the authorities would seem to be that save the case of gifts of the kind upheld in that case, transactions having for their consideration future illicit cohabitation, whether the transaction be executory or executed, are, on grounds of public policy, liable to be impeached even at the instance of a *particeps criminis* as will be seen from the statement of the law on the point in Pollock on 'Contracts,' 7th edition, page 386, and where the learned author expresses himself thus:—"A wider exception is made, as we have seen above, in the case of agreements of which the consideration is future illicit cohabitation between the parties." Apart from this particular class of cases, it is submitted, that the rule and its

(1) L.R., 16 Eq., 275.

THASI MUTHU-KANNU v. SHANMUGA-VELU PILLAI.

qualifications may be stated to this effect:—"Money paid or property delivered under an unlawful agreement cannot be recovered by, nor the agreement set aside at the suit of either party, unless nothing has been done in the execution of the unlawful purpose beyond the payment or delivery itself, and the agreement is not positively criminal or immoral; or unless the agreement was made under such circumstances as between the parties that, if otherwise lawful, it would be voidable at the option of the party seeking relief; or in the case of an action to set aside the agreement, unless, in the judgment of the Court, the interests of third persons require that it should be set aside." And *Wootton* v. *Wootton* referred to and distinguished by Lord Selborne in *Ayerst* v. *Jenkins*(1) is a decisive instance against the Courts laying down broadly that relief will never be given to a plaintiff *in pari delicto* in cases of completed transactions having for their consideration future illicit cohabitation.

Turning now to the present case, the transfer was undoubtedly not a voluntary gift as in *Ayerst* v. *Jenkins*(1). That neither of the parties to it intended it as such is obvious from the fact that it was considered necessary to introduce recitals as to consideration, which if true, would have made the transaction in effect a sale. And as already shown, according to the plaintiff who is uncontradicted, the assignment by him was a transfer for a specific return, viz., the future association of Ammakannu with him as his concubine. No doubt recitals as to consideration such as those in the present case are not conclusive as to the real character of the transaction intended. On the other hand, the form in which the transaction is embodied cannot be treated as immaterial; for, suppose in order to secure future illicit cohabitation, a man transfers to the woman his property by way of lease on a very favourable rent, it would be impossible to contend in such a case that the relation intended to be created by the instrument was not that of lessor and lessee in spite of the fact that, the lease on those terms, was for the purpose of securing to the woman the difference between the income of the property and the rent reserved. Again, suppose the transaction is made to take the form of a pure usufructuary mortgage. It would be equally impossible to speak of such an arrangement as a donation though the real effect of it would be to

(1) L.R., 16 Eq., 275 at p. 284.

THASI MUTHU-KANNU v. SHUNMUGA-VELU PILLAI.

secure to the woman the payment of the sum of money mentioned in the instrument as the mortgage amount. The question whether what is transferred has in truth been transferred by way of gift or not must depend on the actual intention of the parties and the facts of the particular case. Compare *Phillips* v. *Probyn*(1) a case of settlement by a man on his deceased wife's sister where North, J., distinguishes that case from *Ayerst* v. *Jenkins*(2) on the ground that in the former "the deed was not expressed to be a voluntary "one, but as made for a consideration (viz., marriage) which under "the circumstances could not legally take effect and which must "continue to be illegal so long as the parties lived" (*Phillips* v. *Probyn*(1)). In this view it would follow that the present case is not governed by *Ayerst* v. *Jenkins*(2) and that the plaintiff is not precluded from getting the relief sought for, on the simple ground of his participation in the illegal compact.

Even if this conclusion were not right it must be held that the case of the plaintiff is hardly one in which he can be said to be *in pari delicto*. At the date of the transaction he was a youth of about 20 years of age. The assignment was brought about at the instance of persons referred to by the plaintiff in his evidence, acting in complicity with the defendant and her sister, and who led the plaintiff into evilways. That during this time the plaintiff was not in a position to obtain proper advice from those interested in him, and capable of protecting him from being imposed upon, is also spoken to by him. And the circumstance that he was induced to execute the document when at a distance from the station, which was the place of residence of both the parties, tends strongly to corroborate the view distinctly put forward by him that, when he was led to transfer a mortgage worth Rs. 1,500 advantage was taken of his youth and inexperience to induce him to accept a consideration which could at any time be rendered valueless for the future and which, as the event showed, did fail after a short time.

It was lastly urged that the lapse of time between the date of the transfer in June 1898, and the institution of the suit which was on the 5th March 1901, was fatal to the successful maintenance of the suit. No doubt, the District Munsif observes that the plaintiff had satisfactorily accounted for the delay, but this observation of

(1) (1899) 1 Ch.D., 811 at pp. 816, 817. (2) L.R., 16 Eq., at p. 275.

THASI MUTHU-KANNU v. SHUNMUGA-VELU PILLAI.

the Munsif was not made with reference to the argument now suggested. As the defendant contented herself with relying on an untrue case as to the consideration for the transfer, no issue was raised as to whether the inaction of the plaintiff in the interval relied on, amounted to such an acquiescence as would estop him from obtaining the relief sought. And no evidence was adduced on either side, and the plaintiff had not any opportunity of offering such explanation in the matter as he could. In these circumstances the defendant cannot be allowed to rely on the present ground of objection.

The second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

1905. March 17.

IBRAHIM KHAN SAHIB (SEVENTH DEFENDANT), APPELLANT,

v.

RANGASAMI NAICKEN AND OTHERS (PLAINTIFF AND DEFENDANTS Nos. 1 to 6), RESPONDENTS.*

Abkári Act I of 1886 (*Madras*), *s.* 28, *Sale for arrears under—Effect on prior encumbrances—' As if they were arrears of land revenue,' meaning of—Limitation.*

A sale for arrears of abkári revenue of immoveable properties belonging to the defaulter under section 28 of Act I of 1886 has not the effect of discharging encumbrances created prior to the sale.

Ramachandra v. *Pitchaikanni*, (I.L.R., 7 Mad., 434), followed.

The words ' as if they were arrears of land revenue ' in the new Act have the same meaning as the words ' in like manner as for the recovery of arrears of land revenue ' in the old Act.

Chinnasami Mudali v. *Tirumalai Pillai and the Right Honourable the Secretary of State for India*, (I.L.R., 25 Mad., 572), followed.

Kadir Mohideen Marakkayar v. *Muthukrishna Ayyar*, (I.L.R., 26 Mad., 230), followed.

Where lands subject to mortgage are sold under section 28 of Act I of 1886, the mortgagee's suit to enforce his mortgage right against the purchaser does not fall within article 12 of schedule II of the Limitation Act, when the plaint contains no prayer for setting aside the sale.

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* Second Appeal No. 477 of 1903, presented against the decree of F. D. P. Oldfield, Esq., Acting District Judge of Tanjore, in Appeal Suit No. 1003 of 1901, presented against the decree of M.R.Ry. P. Narayanachariar, District Munsif of Kumbakonam, in Original Suit No. 36 of 1901.

IBRAHIM KHAN SAHIB v. RANGASAMI NAICKEN.

THIS suit was brought by the plaintiff to recover the amount due on a mortgage bond executed in his favour by defendants Nos. 1 and 2 on the 6th May 1899. Of the two items mortgaged, item No. 1 belonged to the first defendant and item No. II to defendants Nos. 2 to 5, who formed an undivided family of which the second defendant was the managing member. Item No. I was sold on the 28th August 1899 for arrears of abkári rent due by the first defendant to Government, and was purchased by the seventh defendant. The plaintiff prayed, in default of payment of his mortgage amount, that item No. I might be sold. The seventh defendant contended, *inter alia*, that the claim of Government for arrears had priority over plaintiff's claim, and that item No. I should not be sold. The second issue raised was, whether the plaint mortgage was binding on the seventh defendant, and whether item No. I could be sold. An additional issue was raised at a late stage, as to whether the plaintiff's claim against the seventh defendant was barred by limitation, in not having been brought within a year of the abkári sale.

The District Munsif found the second issue against the seventh defendant and, on the additional issue, held that article 12 of schedule II of the Limitation Act did not apply. He passed a decree in favour of the plaintiff. On appeal by the seventh defendant, the District Court confirmed the decision of the District Munsif.

The seventh defendant preferred this second appeal.

K. Narayana Rao for *C. Sankaran Nair* for appellant.

T. R. Ramachandra Ayyar for *P. Ananda Charlu* for first respondent.

K. Ramachandra Ayyar for seventh respondent.

JUDGMENT.—The revenue authorities sold certain lands in accordance with the powers given by section 28, Act I of 1886 (Madras), for arrears of abkári revenue due by its owner. It was purchased by the seventh defendant in this suit, and the question is whether the seventh defendant took it free of all incumbrance, or, whether he took it subject to a mortgage which had been created on it prior to the sale. We are clearly of opinion that the seventh defendant took the land subject to the mortgage. In *Ramachandra* v. *Pitchaikanni*(1) it was decided that, when land

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(1) I.L.R., 7 Mad., 434.

IBRAHIM KHAN SAHIB v. RANGASAMI NAICKEN.

is sold under section 10 of the Madras Abkári Act III of 1864 for arrears due by an abkári renter, the purchaser at the sale does not take the land free of all incumbrances as in the case of a sale for arrears of land revenue under the provisions of the Revenue Recovery Act II of 1864 (Madras), and excellent reasons are given for that decision.

The only question is whether the change in the wording of section 28 of the present Act which corresponds with section 10 of the old Act, effects a change in the law.

Section 10 of the old Act enables the abkári arrears to be recovered "in like manner as for the recovery of arrears of land revenue." Section 28 of the present Act says that the abkári arrears may be recovered "as if they were arrears of land revenue."

We do not think that there is any real difference in the meaning of the two provisions. The same question lately arose in regard to the provisions of section 7, clause 1 (*a*), of the Land Improvement Loans Act XIX of 1883 and in regard to section 30 of the Income Tax Act II of 1886, in which the powers given for the recovery of the Government dues are, in the same words, as in the present Abkári Act. In both cases this Court decided that those words did not render the sale free of prior incumbrances (*Chinnasami Mudali* v. *Tirumalai Pillai and the Right Honourable the Secretary of State for India*(1) and *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar*(2)).

In addition to the reasons that are stated in those cases, we may add that to hold that a sale of the land for an arrear of abkári rent would have the effect of discharging all prior incumbrances, would open a wide door to fraud on *bonâ fide* mortgagees.

We agree with the Judge that the plaintiff did not apply to set aside the sale and there is therefore no limitation.

We dismiss the second appeal with costs two sets.

(1) I.L.R., 25 Mad., 572. (2) I.L.R., 26 Mad., 230.

APPELLATE CIVIL.

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

RANGA REDDI (FIRST DEFENDANT), APPELLANT,

v.

NARAYANA REDDI AND OTHERS (PLAINTIFF AND DEFENDANTS Nos. 2 AND 3), RESPONDENTS.*

1905. March 10.

Limitation Act XV of 1877, sched. II, arts. 44, 144—Suit for cancellation of deed of sale and for possession.

A suit for cancelling a deed of sale executed by the plaintiff's guardian on the ground of fraud and misrepresentation and for recovery of possession of the properties comprised therein, falls within article 44 and not within article 144 of schedule II of the Limitation Act.

Unni v. *Kunchi Amma*, (I.L.R., 14 Mad., 26), distinguished.

Kamakshi Nayakan v. *Ramasami Nayakan*, (Second Appeal No. 929 of 1895, unreported), distinguished.

SUIT instituted by plaintiff on 23rd September 1901 to cancel a deed of sale executed by his mother, acting as his guardian, in favour of the defendants, on 29th August 1892, on the ground of fraud and want of consideration and to recover the properties in possession of the defendants under such sale. The defendants pleaded, *inter alia*, that the suit was barred by limitation.

The District Munsif held that, under article 144, schedule II, of the Limitation Act, the suit was within time; but dismissed the plaintiff's suit on the ground that the sale deed was valid and binding on him. On appeal the District Judge upheld the decision of the District Munsif on the question of limitation but reversed his decree on the ground that the sale was not binding on the plaintiff.

The first defendant preferred this second appeal.

C. Venkatasubbaramiah for appellant.

P. Nagabhushanam for first respondent.

JUDGMENT.—We cannot accept the view taken by the District Munsif and accepted by the District Judge that the prayer for the cancellation of the sale deed was merely auxiliary to the prayer for

* Second Appeal No. 350 of 1903, presented against the decree of R. D. Broadfoot, Esq., District Judge of South Arcot, in Appeal Suit No. 191 of 1902, presented against the decree of M.R.Ry. T. S. Thiagaraja Ayyar, District Munsif of Tirukkoyilur, in Original Suit No. 880 of 1901.

RANGA REDDI v. NARAYANA REDDI.

possession. In our opinion, on the case which the plaintiff set up in the plaint, and which he sought to make out by evidence at the trial, he could not establish his right to possession without first obtaining an order for the cancellation of the sale deed. His case was not that the mother went beyond her powers as guardian in executing the sale deed, but that the sale deed was brought about by fraud and misrepresentation on the part of the defendant. On this ground the present case may be distinguished from the case of *Unni* v. *Kunchi Amma*(1) and the case of *Kamakshi Nayakan* v. *Ramasami Nayakan*(2). Further, in neither of these cases does there appear to have been any prayer for the cancellation of the document. In the present case there was such a prayer, and such a prayer was essential. The lower Courts were of opinion that the article of the second schedule to the Limitation Act which was applicable in the present case was article 144, on the ground that the case fell within the decision in *Unni* v. *Kunchi Amma*(1). For the reasons we have stated, we do not think this decision applies, and in our opinion the article of the schedule to the Limitation Act which is applicable is article 44.

There is what was apparently intended to be a finding by the District Munsif as to the age of the plaintiff at the date of the institution of the suit. But there is no finding by the lower Appellate Court as to this. The case must go back to the lower Appellate Court for a finding on the question as to the age of the plaintiff at the date of the suit. Fresh evidence may be taken. The finding is to be submitted within four weeks. Seven days will be allowed for filing objections.

(1) I.L.R., 14 Mad., 26. (2) S.A. No. 929 of 1895 (unreported).

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

1905. March 2.

LAKSHMANA SASAMALLO AND NINE OTHERS (PLAINTIFFS Nos. 1 TO 3 AND 5 TO 11), APPELLANTS,

v.

SIVA SASAMALLAYANI AND SEVEN OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Widows' Re-marriage Act XV of 1856, s. 2—Hindu widow, re-marriage of—Effect of re-marriage on rights of inheritance accruing after such re-marriage.

The right of a Hindu widow who re-marries during the lifetime of her son, to succeed by inheritance to the ancestral property of such son on his death, is not within any of the exceptions referred to in section 2 of Act XV of 1856, and she is entitled to succeed notwithstanding her re-marriage.

Chamar Haru v. *Kashi*, (I.L.R., 26 Bom., 388), referred to and followed.

THE plaintiffs, as the heirs of one Magata Saso Malu, brought this suit to recover the $\frac{10}{16}$th share in the plaint properties which admittedly belonged to the deceased Magata Saso Malu, having been inherited by him from his father. The first defendant was the mother of Magata Saso Malu, and she had married the second defendant after she had become a widow, while Magata Saso Malu was living. She claimed that as the mother of Magata Saso Malu she was entitled to succeed in preference to the plaintiffs. The plaintiffs' case was that she had lost such right by her re-marriage.

The District Munsif held that such right was not lost by her re-marriage and dismissed the plaintiffs' claim. The District Judge confirmed his decree.

The plaintiffs preferred this second appeal.

K. Subrahmania Sastri for appellants.

The Hon. Mr. *P. S. Sivaswami Ayyar* for respondents Nos. 1 and 2.

JUDGMENT.—The first defendant, a Hindu widow, re-married whilst her son was in possession of ancestral property. Subsequently her son died and this action was brought by the heirs of her

* Second Appeal No. 210 of 1903, presented against the decree of V. Venugopaul Chetty, Esq., Acting District Judge of Ganjam at Berhampore, in Appeal Suit No. 82 of 1902, presented against the decree of M.R.Ry. N. R. Narasimmiah, District Munsif of Berhampore, in Original Suit No. 110 of 1901.

LAKSHMANA SASAMALLO v. SIVA SASAMULLA-YANI.

deceased husband, claiming the property of which the son died possessed, on the ground that the widow was precluded from succeeding to his property as his heir. The suit was dismissed by both Courts following the decision of *Akora Suth* v. *Boreani*(1) and this second appeal is now brought by the appellant contending that the first defendant the widow, is incapable of inheriting as her son's heir, having been re-married.

It was decided in 1868 in *Akora Suth* v. *Boreani*(1) that section 2 of Act XV of 1856 (Hindu Widows' Re-marriage Act) does not preclude a Hindu widow, who has re-married during her son's lifetime, from inheriting his property after his death. Sir B. Peacock in his judgments at page 205 says: "The object of the Act was to remove all legal obstacles to the marriage of Hindu widows. Looking to the words of section 2, I am of opinion that it was not the intention of the Legislature to deprive a Hindu widow, upon her re-marriage, of any right or interest which she had not at the time of her re-marriage. The words of the section are:—"All rights and interests which any widow may have in her deceased husband's property, by way of maintenance, or by inheritance to her husband, or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to re-marry, only a limited interest in such property, with no power of alienating the same, shall, upon her re-marriage, cease and determine as if she had then died; and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same."

In the present case, at the time of her re-marriage, the property belonged to her son, and she had no right or interest in that property. It came to her by inheritance from her son, who died after her re-marriage. If the son had pleased, he might have given the property to his mother, notwithstanding her re-marriage. At the time of her re-marriage, she had no interest in her deceased husband's property, by inheritance to her husband, or to his lineal successors. It could not, therefore, cease or determine upon her re-marriage; and if she had died at the time when she re-married, the property would never have descended to her. Section 5 to which Mr. Justice Kemp alludes, says that, "except as in the three preceding sections provided, a widow shall not, by reason of her

(1) 2 B.L.R., 199.

LAKSHMANA SASAMALLO v. SIVA SASAMULLA-YANI.

re-marriage, forfeit any property, or any right to which she would otherwise be entitled; and every widow who has re-married, shall have the same rights of inheritance as she would have had, had such marriage been first marriage."

"The right of inheritance from her son, after her re-marriage, did not, as it appears to me, fall within any of the exceptions referred to in section 5."

This has been followed in *Chamar Haru* v. *Kashi*(1), and has not been dissented from by any of the High Courts of India from that time to the present, so far as we are aware.

We agree with the decision, and it is now established as the law.

This second appeal is therefore dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Boddam.

THE RECEIVER OF NIDADAVOLE ESTATE (PLAINTIFF), APPELLANT,

v.

VEGASENA SUBBARAJU AND OTHERS (DEFENDANTS), RESPONDENTS.*

1904. December 14, 15, 21.

Rent Recovery Act (Madras) VIII of 1865, s. 11—Enhancement of rent, sanction of Collector for, not binding on Courts, as regards existence of conditions justifying or the amount of the enhancement—Sanction not a judicial proceeding, and may be general—Civil Procedure Code, Act XIV of 1882, s. 561—Power of Appellate Court to uphold decree of lower Court on grounds not relied on or disallowed by lower Court.

The sanction of the Collector, under section 11 of the Madras Rent Recovery Act, authorising an enhancement of rent by the landlord, has not the binding force of a decision between the parties, and Courts dealing with the matter, are not precluded from questioning the existence of the conditions required by the proviso to section 11, or the amount of the enhancement, although they cannot award more than the amount sanctioned. Such sanctions, as containing the

(1) I.L.R., 26 Bom., 388.

* Second Appeal No. 1091 of 1903, presented against the decree of L. G. Moore, Esq., Acting District Judge of Godavari, in Appeal Suit No. 7 of 1902, presented against the decisions of M.R.Ry. K. Narasimha Row, Deputy Collector, General Duty, Narasapur, in Summary Suit No. 13 of 1900.

THE RECEIVER OF NIDADAVOLE ESTATE v. VEGASENA SUBBARAJU.

opinion of unbiassed experts, ought to be respected by Courts, and ought not to be disregarded except on the strongest grounds.

Siriparapu Ramanna v. *Mallikarjuna Prasada Nayudu*, (I.L.R., 17 Mad., 43 at p. 46), commented on.

Kottasawmy v. *Sandama Naik*, (5 M.H.C.R., 294), approved.

Sanctions under section 11 of the Madras Rent Recovery Act are not judicial proceedings. Omission to hear the tenant before granting sanction will not necessarily invalidate it, although it may detract from the weight to be attached to it by the Courts. The observations in *Bhupathi* v. *Rajah Rangayya Appa Rau*, (I.L.R., 17 Mad., 54 at p. 57), commented on.

It is incumbent on the landlord to show that the lands, in respect of which enhancement is claimed on the ground that additional water rate is imposed by Government, are actually liable to pay water rate to Government.

The sanction of the Collector under section 11 of the Madras Rent Recovery Act may be general.

Under section 561 of the Code of Civil Procedure, an Appellate Court may uphold the decree of the lower Court on any grounds warranted by law, though such grounds may not have been referred to, or even disallowed, by the lower Court.

THE batch of suits, out of which these appeals arose, were brought by the appellant, the Receiver of the Nidadavole estate, against the respondents, tenants of the estate, to enforce acceptance of pattas for fasli 1309. The defendants contended, *inter alia*, that the rates of tax charged in the pattas for wet lands, were higher than the mamool rates, and that the plaintiff had no right to charge such higher rates, and that the sanction granted to the plaintiff by the Deputy Collector under section 11 of the Rent Recovery Act, to levy enhanced rates for faslis 1306 and 1307, was not binding for fasli 1309. The sanction in question was granted by the Deputy Collector in August 1898, and authorised the recovery of the additional water rate of Re. 1 per acre imposed by Government, by rateably apportioning it on the excess area irrigated, over and above the mamool wet land.

The facts are very fully set out in their Lordships' judgment. The Deputy Collector held that the sanction was valid and binding and allowed the enhancement, reducing the amount however, to As. 2–9 per acre, for reasons referred to in the judgment of the High Court. Appeals were preferred to the District Court by the Receiver, in all the cases, on the ground that the reduction of the amount was not legal and proper, and in some of the cases the tenants appealed on the ground that no enhancement whatever should have been allowed.

The District Judge held that the Deputy Collector's sanction was *ultra vires*; that under section 11 of the Rent Recovery Act,

THE RECEIVER OF NIDADAVOLE ESTATE v. VEGASENA SUBBARAJU.

it must first be ascertained which lands were mamool wet, and which were the lands for which the Receiver collected water rate by virtue of an agreement with Government.

In regard to the cross appeals by the tenants, the District Judge held that the order of the Deputy Collector was also open to the objection, that no individual notices were given to the tenants before the order was passed. The District Judge dismissed the appeals by the Receiver (plaintiff), and allowed, with costs, the cross appeals of the tenants.

The plaintiff preferred these second appeals to the High Court.

P. R. Sundara Ayyar and *C. R. Tiruvenkatachariar* for appellant.

V. Krishnaswami Ayyar for respondent.

JUDGMENT.—This is a batch of cases out of some hundreds of suits instituted by the Receiver, in charge of the permanently-settled estate of Nidadavole, to compel the acceptance of pattas for fasli 1309 against certain ryots holding lands in the Baharzalli paragana of the estate. The lands to which the dispute relates are wet lands subject to payment of rent in money. In the pattas tendered by the Receiver the amount of rent that was payable and continued to be paid prior to the fasli in question is entered, and a note is added, that an enhancement of rent at the rate of As. 3–7 per acre is due. The Deputy Collector, who tried the cases in the first instance, sustained the claim for enhancement to the extent of As. 2–9 per acre, deducting 10 pies for reasons which will be referred to by and by. In all the cases, the Receiver appealed to the District Court against the reduction of the 10 pies, and in fourteen of them, the ryots also appealed objecting to the enhancement even to the extent permitted by the Deputy Collector. The District Judge dismissed the Receiver's appeals and allowed those of the ryots. The present second appeals are by the Receiver against the decrees thus passed by the District Court.

The question for determination is, whether the claim for the enhancement, so far as it comes before us, is maintainable?

The facts bearing on the matter are these: In or about the year 1859, the Government introduced canal irrigation in the paragana referred to. In doing so, by agreement with the proprietor of the estate, the existing irrigation works there, were taken charge of by the Government, added to, and improved, and

made part of the irrigation system in the locality. Later on, it was ascertained and settled that 25,000 and odd acres of wet land in the paragana, being those supplied by the old works, were entitled to receive canal water free of charge, and that water rate was to be imposed by the Government only upon lands supplied with water over and above the 25,000 and odd acres. In thus allowing canal irrigation to these lands, the ryots are permitted to take advantage of the concession in so far as they may wish, each year. Consequently, the extent of irrigated land for which water rate is levied by the Government is not uniform, but varies from fasli to fasli. For the purpose of ascertaining and fixing the actual extent thus liable to pay water rate from time to time, the Government employs a Special officer, who, about April in each year, settles the acreage of land irrigated in the year.

Water rate was originally levied by the Government at the rate of Rs. 3 an acre and subsequently at Rs. 4 an acre for many years. In fasli 1305, the water rate was increased to Rs. 5 an acre.

It is with reference to the additional rupee levied by the Government from the proprietor upon lands other than the 25,000 acres referred to, that the receiver professes to claim the enhancements in question. In compliance with the concluding part of the first proviso to section 11 of the Rent Recovery Act (VIII of 1865), application for sanction therein prescribed, as one of the conditions to a landholder being allowed to enhance the rent, was made to the Collector and the proceedings of the Deputy Collector, dated the 29th August 1898, is relied on as the sanction supporting the present claim for enhancement.

What the Deputy Collector therein laid down was this:—When the Special officer employed by the Government, referred to above, has fixed for the year, the extent of land irrigated in the year and liable to pay water rate, the amount payable to the Government at the rate of Re. 1 an acre in respect of the extent so fixed, should be divided by the number of those acres *plus* 25,000 acres entitled to irrigation free of charge, and the proprietor may claim enhancement in respect of every tenant holding wet land in the paragana at the rate of the quotient arrived at as above, irrespective of the question whether the holding of the particular tenant consists of land forming part of 25,000 and odd acres irrigable without payment of water rate or not.

The absolutely unwarranted character of this action is manifest, in that it sanctions enhancement in respect of lands, for the irrigation, of which, the Government is not entitled to, and does not, collect any water rate, while the proviso under which the sanction is accorded, permits the grant of a sanction only in respect of lands as to which water rate is actually levied by Government. The consequence of this is, not only partly to relieve those on whom the whole liability should fall, but also to increase the burden unjustly cast upon lands, not liable to payment of water rate, in proportion to the extent to which canal irrigation is availed of in respect of other lands. Be this as it may, this sanction cannot, for the reason stated later on, prove of any service to the plaintiff in these cases, unless, as contended for the Receiver, the Courts dealing with the matter were inevitably precluded from going into the question, whether the conditions prescribed by the proviso (other than the condition as to sanction) exist in the particular case, and were bound to accept the sanction as conclusive upon the question of the existence of such conditions, as well as the amount of enhancement. We have no hesitation in holding this contention to be totally unsound. There is nothing in the language of the proviso to warrant the view that the Legislature intended to invest the Collector's sanction granted under it with such a startling efficacy. Had the Legislature meant to do so, apt words to that effect would have been introduced, which is not the case. As already stated, the sanction is but one of the conditions precedent to be satisfied before a landholder can claim an enhancement of rent.

Relating as the other conditions do to pure questions of fact, viz., has the land concerned been benefited by an improvement effected by the landholder or Government? Has the proprietor to make any payment to Government with reference to any improvement effected by Government? It is impossible to see why the Courts should be prohibited from trying these questions in the usual course. And in the absence of express provision to the contrary, the jurisdiction of the Courts to deal with such matters according to the ordinary law must be admitted. The right view of the proviso in our opinion therefore, is what Mr. Krishnasawmi Iyer in his able and succinct argument contended for, viz., that having regard to the peculiar nature of the questions connected with improvements and enhancement dealt with by the proviso,

THE RECEIVER OF NIDADAVOLE ESTATE v. VEGASENA SUBBARAJU.

the Legislature in prescribing the sanction as a condition precedent intended, on the one hand, to provide a check upon landholders harassing their tenants by putting forward claims for enhancement without tangible and adequate grounds, and on the other, to furnish the authorities on whom it is incumbent to deal with those questions judicially, the help of expert opinion of accredited public servants, well conversant with the matter, an opinion therefore, not only free from bias but specially valuable. In this view it is clear that the sanction of the Collector does not bind the Court either as to the question of the truth of the improvement alleged, or its effect upon the land concerned, or the amount to be allowed by way of enhancement of rent, save, that the amount to be allowed by the Court can in no case exceed that stated in the sanction, the reason for the exception being that, inasmuch as a sanction is an essential preliminary to the landholder's claim for every enhancement, allowance of any amount over and above that approved of by the Collector, would be virtually an allowance of a claim without any sanction. The argument that this view would tend to deprive such sanctions of all real effect is entitled to no weight, for though it is competent to the Courts to decline to be bound absolutely by such sanctions, yet Judges must not and will not refuse to act upon them unless the strongest grounds for any departure therefrom are proved by clear and convincing evidence. In *Siriparapu Ramanna* v. *Mallikarjuna Prasada Nayudu*(1) referred to on behalf of the Receiver, no doubt the Collector's sanction granted under the proviso, was spoken of as conclusive evidence. This was, however, a mere passing observation unnecessary for the determination of any point which arose in the case. On the other side attention may be drawn to the passage cited by Mr. Krishnaswami Aiyar from the judgment of Scotland, C.J., and Collet, J., in *Kottasawmy* v. *Sandama Naik*(2), and which runs as follows:—"It seems to us that the very important and by no means easy task of arbitrating between the landholder and his ryots on such occasions has been imposed by the Legislature on the Collector *in the first instance at least.*" These concluding words clearly imply that the learned Judges were not prepared to go the length of attaching a conclusive effect to these sanctions. It is noteworthy that that was their inclination even with reference

(1) I.L.R., 17 Mad., 43 at p. 46. (2) 5 M.H.C.R., 294.

THE RECEIVER OF NIDADAVOLE ESTATE v. VEGASENA SUBBARAJU.

to the language of the proviso as it stood when the opinion was expressed, as that language was different from and more capable of being relied on in support of ascribing conclusiveness to the sanction, than the language of the proviso as it stands now after amendment by Act II of 1871, made presumably, in deference to the criticism to which the doubtful language of the proviso was subjected in the said decision of the learned Judges, given in the previous year.

The view we have above taken as to the true nature and effect of the sanction, involves also, the rejection of the suggestion made by the learned Vakil for the Receiver, that such sanctions partake of the nature of judicial proceedings. To accede to this cannot but lead to undesirable consequences, for, then, parties to such litigation as the present, would be entitled to attack such sanctions on the ground that the forms of law as to hearing both sides, receiving evidence in their presence subject to cross-examination and so forth, have not been duly complied with. To subject those officers in connection with the granting of these sanctions to such set procedure would be to impose on them, restrictions that would go far to defeat the obvious intention of the Legislature, that the opinion is to be arrived at after an examination of all the circumstances of the case, conducted unfettered by any technical rules.

The fact that the provisions of the enactment as to the grant of the sanction make no reference to the necessity of a notice to the tenant in the matter or to any enquiry by the Collector with reference to his arriving at an opinion on the point or the manner in which it is to be made, shows that the framers of the enactment could not possibly have thought that the grant of the sanction was to be a judicial Act. The observations in *Bhupathi* v. *Rajah Rangayya Appa Rau*(1), are not warranted by anything to be found in the provisions of the enactment, but rest upon an assumption as to the character of the sanction, viz., that it has the price of a binding contract, which, it will be seen from what has already been stated, is altogether destitute of any real foundation. It is scarcely necessary to add that we are not to be understood as in the slightest degree suggesting that the tenant need not be heard before a sanction is given, but only as pointing

(1) I.L.R., 17 Mad., 54 at p. 57.

out that an omission in the matter would not render the sanction invalid, whatever, under the circumstances of the particular case, the effect of such an omission might be on the weight to be attached to the sanction by the Court which has to act thereon.

Turning now to the appeals themselves, it is plain that the claim for enhancement cannot be sustained inasmuch as the plaintiff at present is not in a position to allege and prove that the lands, in respect of which enhancement of rent is claimed, or any of them, are lands not forming part of the 25,000 acres entitled to irrigation free of charge, and therefore liable to pay any water rate.

It was strongly urged that the disallowance of the claim for the enhancement in question will entail serious loss on the landholder. Whether this will be really so is by no means clear having regard to the circumstances brought to light in the course of this litigation, and which form the ground for the Deputy Collector's reduction of the 10 pies alluded to above. The Deputy Collector refers in his judgment to instances in which ryots holding lands liable to pay water rate, have by express contract agreed to pay to the landholder the whole of the additional rupee collected in pursuance of the orders passed in fasli 1305 but which lands nevertheless, had been taken into account by the plaintiff in arriving at the figure As. 3–7 entered in the pattas. To what extent lands, in respect of which the proprietor gets the whole water rate under contracts with the ryots concerned, have nevertheless been included in the calculations made by the plaintiff, as the result of which, the above figure was arrived at, thus enabling him so far to recover more than he is entitled to, it is impossible to say. It may, therefore, well be doubted whether the complaint under notice on behalf of the proprietor has any foundation in truth. But assuming it were otherwise, the proprietor alone is to blame for, had he been willing to have the 25,000 acres located and demarcated as is said to have been done elsewhere, no difficulty could possibly have arisen. But he did not want that to be done. This was so perhaps, because he would by the location lose the profit which if we are not mistaken, the present arrangement as between him and the Government is calculated to secure to him. Say for instance, that in a particular year a thousand out of the 25,000 and odd acres exempted from water rate are left waste, and are not irrigated, but that an equal extent of land liable to the

payment of water rate is cultivated and irrigated. The effect of the said present arrangement exonerates him from having to pay to Government any water rate on the 1,000 acres not entitled to irrigation free of charge, without preventing him from recovering the same from the occupant's thereof. Whatever be the proprietor's objection to the location, obstacles in the way of the Courts allowing him to enhance the rent with reference to the additional rupee in question, will probably continue to arise so long as that remains uneffected. Once that is carried out, the proprietor would simply have to apply to the Collector for a sanction in general terms to enhance, permanently or temporarily, according as the irrigation is permanent or temporary, the rent payable in respect of lands, wet or dry, in the whole paragana or in other definite tract irrigated by canal water, and not entitled so to be irrigated free of charge. Such general sanction will in our opinion satisfy the requirements of the law on the point and enable the proprietor to assert and maintain successfully his right to enhance in each individual case. All that he would have to do to make good that sanction in such cases would be to specify in the pattas, the parcels, which according to him, come under the category mentioned in the sanction of the Collector, and if his allegation as to it be challenged, to establish it by evidence. It ought to be added that, having regard to the practice now prevailing with reference to canal irrigation in the locality, more than a general sanction would be impracticable since, as will appear from what has already been said, it would not at any time be stated for certain, what lands would be irrigated, and for what period.

It only remains to say that the argument that it was not competent to the District Judge under section 561 of the Civil Procedure Code to uphold, in the cases in which the ryots had not appealed, the disallowance of the 10 pies by the Deputy Collector, is untenable, as that section in no way prevents an Appellate Court from upholding the decree of the lower Court on any ground which in law warrants such upholding, even though that ground may not have been referred to, or disallowed, in the lower Court.

The second appeals fail and are dismissed with the costs of the respondents who have appeared.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

1905. March 17.

SARAVANAI PERUMAL PILLAI (PLAINTIFF), APPELLANT,

v.

POOVAYI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Limitation Act XV of 1877, sched. II, art. 35—Applicability to Hindus—Suits for restitution of conjugal rights—Starting point of limitation for.

A suit brought by a Hindu or Muhammadan husband against his wife for restitution of conjugal rights is barred under article 35, schedule II, of the Limitation Act if brought more than two years after the time when he demanded restitution and was refused.

Dhanjibhoy Bomanji v. *Hirabai*, (I.L.R., 25 Bom., 644 at p. 646), followed.

Binda v. *Kaunsilia*, (I.L.R., 13 All., 126), dissented from.

SUIT for restitution of conjugal rights. The plaintiff alleged that his wife, the first defendant, went to the house of her father, the second defendant, about three years prior to the suit, and that she did not return though often requested to do so, and that a registered notice was sent to her on the 10th May 1901 by him asking her to return, but that she did not comply with the said notice. The first defendant stated that she had left her husband's house more than seven or eight years prior to the suit, and pleaded limitation.

The first issue was whether the suit was barred by limitation. The District Munsif held that, on the facts, there was no evidence of a demand and refusal more than two years prior to suit, and that the suit was not barred. He passed a decree in plaintiff's favour.

On appeal the District Judge found, on the evidence, that a demand and refusal more than two years prior to suit was proved and reversed the decree and dismissed the suit. Plaintiff preferred this second appeal.

S. Gopalaswami Ayyangar for appellant.

The Hon. Mr. *P. S. Sivaswami Ayyar* for respondents.

* Second Appeal No. 355 of 1903, presented against the decree of M.R.Ry. T. M. Rengachariar, Subordinate Judge of Madura (West), in Appeal Suit No. 67 of 1902, presented against the decree of M.R.Ry. V. Swaminatha Ayyar, District Munsif of Tirumangalam, in Original Suit No. 279 of 1901.

JUDGMENT.—The suit was for restitution of conjugal rights. The District Judge has found that the plaintiff's claim was barred under article 35 of the Limitation Act. We agree with the decision of the Full Bench in *Dhanjibhoy Bomanji* v. *Hirabai*(1), that article 35 of the Limitation Act is applicable, and, with great deference, are unable to agree with the decision of the Allahabad Court in *Binda* v. *Kaunsilia*(2).

The suit was therefore rightly dismissed.

The second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Moore.

1905. February 18. March 9.

THE MANAGER OF THE COURT OF WARDS, KALAHASTI ESTATE (PLAINTIFF), APPELLANT,

v.

RAMASAMI REDDI (DEFENDANT), RESPONDENT.*

Civil Procedure Code, Act XIV of 1882, s. 564—Whether consent of parties can validate an illegal remand under section 564 of the Civil Procedure Code—Waiver, effect of—Effect of illegal remand by lower Appellate Court on points properly decided.

Where the Court of First Instance had framed all the necessary issues and decided all those issues, and the lower Appellate Court, reversing the decision of the Court of First Instance on one of the issues, remanded the case for retrial under section 564 of the Code of Civil Procedure, held, on second appeal:—

Per SUBRAHMANIA AYYAR, J.—An order of remand, contrary to the provisions of section 564, is not merely irregular but illegal; but it is not on that account absolutely void so as to render any consent of the parties of no avail. It can be objected to by a party if he has not given his consent to such a course, and even a party who has not consented may be equitably estopped by subsequent conduct from treating such an order as null and void. Such an order of remand does not necessarily vitiate the decision of the lower Appellate Court on questions properly decided by it, which can be attacked only on grounds legally open to the parties on second appeal. It cannot be treated as void for want of jurisdiction so as to be incapable of being validated by consent or waiver.

(1) I.L.R., 25 Bom., 644 at p. 646. (2) I.L.R., 13 All., 126.

* Civil Miscellaneous Appeal No. 9 of 1904, presented against the order of D. Broadfoot, Esq., District Judge of Chingleput, in Appeal Suit No. 145 of 1903, presented against the decision of M.R.Ry. P. Sivarama Ayyar, Deputy Collector of Trivellore, in Summer Suit No. 12 of 1903.

THE MANAGER OF THE COURT OF WARDS, KALAHASTI ESTATE v. RAMASAMI REDDI.

Mohesh Chandra Dass v. *Jamiruddin Mollah*, (I.L.R., 28 Calc., 324), referred to.
Mallikarjuna v. *Pathaneni*, (I.L.R., 19 Mad., 479), referred to.
Subrahmania Ayyar v. *King-Emperor*, (I.L.R., 25 Mad., 61 at p. 97), followed.
Per MOORE, J.—The order of remand was illegal and no consent of parties could make it valid.

THE suits, out of which these appeals arose, were brought by the manager of the Court of Wards of the Kalahasti estate, to enforce acceptance by the defendants, the tenants, of waram puttahs for fasli 1312. The substantial contention of the defendants was, that from fasli 1304 it was agreed that the waram rate should be converted into a money rent, and the plaintiff had no right to enforce waram puttahs. The Deputy Collector framed six issues, of which the second related to the existence of the alleged contract. He decided all the issues in favour of the plaintiff and passed a decree directing the defendants to accept the puttahs tendered.

On appeal, the District Judge reversed the finding on the second issue, and being of opinion that the evidence on record was not sufficient to enable him to draw up the correct puttahs, remanded the case with directions that additional evidence should be taken, and that correct puttahs should be drawn up.

Against the order of remand the plaintiff preferred this appeal.

Mr. *Joseph Satya Nadar* and *V. Krishnaswami Ayyar* for appellant.

The Hon. Mr. *P. S. Sivaswami Ayyar* and *V. Krishnaswami Ayyangar* for respondent.

JUDGMENTS—SUBRAHMANIA AYYAR, J.—The suits, out of which these civil miscellaneous appeals arise, were instituted before the Deputy Collector of Trivellore by the Regulation Collector in charge of the Kalahasti estate for compelling the acceptance by the respective defendants of puttahs for fasli 1312. The main contest before the Deputy Collector was whether with reference to the lands constituting the holdings, rent was payable in kind as contended on behalf of the plaintiff, or, as contended for the defendants in money, under express contracts alleged to have been entered into in fasli 1305. This and certain minor questions were tried by the Deputy Collector who held that the contracts alleged were not made out, and he directed that waram puttahs should be accepted. The defendants appealed and the District

THE MANAGER OF THE COURT OF WARDS, KALAHASTI ESTATE v. RAMASAMI REDDI.

Judge on appeal disagreed with the Deputy Collector on the main question, and after discussing the evidence on the point, found that the contracts set up were proved. This conclusion rendered a revision of practically all the other terms of the puttahs necessary; and the District Judge reversed the decision of the Deputy Collector and remanded the suits for disposal on the basis that rent was payable in money in accordance with the contracts found. Against the orders of such remand, these appeals have been preferred.

Mr. *Krishnaswami Ayyar*, on behalf of the plaintiff, argued the cases on the merits, stating that the plaintiff was desirous of obtaining the decision of this Court on the question as to whether the finding of the District Judge that the contracts alleged by the defendants were established, was correct, and that if the decision should be against him, it was not intended to object to the order of remand. At the conclusion of the argument I expressed my opinion that the District Judge was right in his finding on the question of the contract and that we ought to dismiss the appeals. But my learned colleague, if I am not mistaken, was inclined to hold that the orders of remand having been passed contrary to section 564 of the Civil Procedure Code, the proper course was to set aside the whole proceedings of the District Judge, inclusive of his decision on the question of the contracts, and to direct him to restore the appeals to his file, rehear the case, and pass decrees settling the terms of the puttahs, taking fresh evidence or calling for findings as he may deem fit. Thereupon the vakils for the defendants, one of whom had appeared before the District Judge when the cases were disposed of by him, urged that the remand of the suits was, at the express request of both the parties made to the District Judge; that subsequent to the remand the matter had been tried by the Deputy Collector and fresh decrees given, and that consequently the plaintiff was precluded from taking exception to the order of remand; and that at all events the decision of the District Judge as to the contracts being true and valid could not be set aside in the absence of any reason warranting such a course on second appeal. Judgment was reserved for further consideration of the contentions thus raised on behalf of the defendants.

Now as to the first of these contentions there can be no doubt that when a suit is remanded contrary to the provisions of section

THE MANAGER OF THE COURT OF WARDS, KALAHASTI ESTATE v. RAMASAMI REDDI.

564, proceedings taken in pursuance of such remand cannot be said to be absolutely null and void so as to render any consent given by the parties of no avail whatever. Nor, on the other hand, is such remand a mere *irregularity*, which in spite of objection duly taken by a party might, in the discretion of the Court, be treated as not necessarily affecting the validity of the proceeding. The true view is that a remand in contravention of section 564 is a violation of a mandatory provision of the law which makes the order of remand illegal, and one that ought to be set aside at the instance of a party entitled to object to such a procedure, but which nevertheless is of such a character that the defect can be cured by consent. That no question of want of jurisdiction in any real sense of the term is involved in the case of a remand such as that under consideration is to my mind obvious, inasmuch as the lower Court to which the proceeding is so erroneously remanded, could not only properly try the matter if instead of such remand issues had been referred in connection therewith, but could also have dealt with it in the first instance save for the error set right in the Appellate Court. And *Mohesh Chandra Dass* v. *Jamiruddin Mollah*(1) clearly and directly supports this view. No doubt that case as well as *Mallikarjuna* v. *Pathaneni*(2), speaks of an improper remand as an 'irregularity,' but such a description of the deviation in procedure in question is inconsistent with the subsequent ruling of the Judicial Committee in *Subrahmania Ayyar* v. *King-Emperor*(3), where it is observed that their Lordships are unable "to regard the disobedience to an express provision as to a mode of trial as a mere irregularity." Such disobedience must therefore, I think, be held to be null and void as against the party entitled to object thereto, provided, he has not waived his right so to object. *Perumbra Nayar* v. *Subrahmanian Pattar*(4) is not in conflict with what I have just stated, for, the remand there was one which, while being outside the scope of section 564, was warranted by an earlier provision of the Code in the manner explained by Strachey, C.J., in *Habib Bakhsh* v. *Baldeo Prasad*(5). The doctrine that consent does not give jurisdiction of course applies where the Court has "no inherent jurisdiction over the subject

(1) I.L.R., 28 Calc., 324.
(2) I.L.R., 19 Mad., 479.
(3) I.L.R., 25 Mad., 61 at p. 97.
(4) I.L.R., 23 Mad., 445.
(5) I.L.R., 23 All., 167.

THE MANAGER OF THE COURT OF WARDS, KALAHASTI ESTATE v. RAMASAMI REDDI.

matter" (*Ledgard* v. *Bull*(1)). It would not, however, apply to violations of rules of procedure though they are more than irregularities. For the doctrine of waiver has been applied even where there have been what may be correctly described as jurisdictional defects in a general sense. *Moore* v. *Gamgee*(2) may be referred to as an instance in point. There, Cave, C.J., in accordance with a previous similar decision of Erle, J., in *In re Jones* v. *James*(3) held, notwithstanding that leave of the Court had not been obtained for the institution of the suit as it should have been, the objection to the jurisdiction of the Court had been waived by the defendant appearing and contesting the action. Another instance in point is *Revell* v. *Blake*(4) followed in *Gomatham Alamelu* v. *Komandur Krishnamacharlu*(5) and in *Sardarmal* v. *Aranvayal Sabhapathy*(6). In that case it was held by the Court of Common Pleas that when a tribunal, competent to adjudicate a person a bankrupt if he resided within its territorial limits, had proceeded to make the adjudication when that was not the case, but without objection having been made to its so acting, the adjudication was held to be not void. On substantially the same ground Kay, L.J., in *Warwick and Birmingham Canal Navigation Company* v. *Burman*(7) held the objection to the jurisdiction of a Court to proceed by way of injunction supposing the only remedy was by way of *mandamus* was waived by the conduct of the defendant in the course of the litigation. These are instances of waiver where the jurisdiction was, in the language of Erle, J., in *In re Jones* v. *James*(3). *Kandoth Mammi* v. *Neelancherayil Abdu Kalandan*(8), *Nallatambi Mudaliar* v. *Ponnusami Pillai*(9), and *Fazal Shau Khan* v. *Gafer Khan*(10) are authorities where, though the jurisdiction was not *contingent*, yet parties voluntarily submitting to it and taking the chance of a decision in their favour, were held to be equitably estopped from falling back on the objection of want of jurisdiction. Further it seems to me that the reason which I conceive underlies the prohibition against remand contained in section 564, favours the application of the doctrine of waiver here. That reason I take to be that once a lower Court has decided a

(1) L.R., 13 I.A., 134 at p. 145.
(2) L.R., 25 Q.B.D., 244.
(3) 19 L.J. (Q.B)., 257.
(4) L.R., 8 C.P., 533.
(5) I.L.R., 27 Mad., 118.
(6) I.L.R., 21 Bom., 205.
(7) 63 L.T. (N.S)., 670.
(8) 8 M.H.C.R., 14.
(9) I.L.R., 2 Mad., 400.
(10) I.L.R., 15 Mad., 82.

THE MANAGER OF THE COURT OF WARDS, KALAHASTI ESTATE v. RAMASAMI REDDI.

case on the merits and the cause is removed on appeal to a higher Court, the latter should dispose of the cause finally, adopting whatever intermediate steps that may be necessary, and not by a remand of the whole cause to the lower Court, drive the party affected to incur the delay, trouble, and expense of a fresh appeal to the same tribunal in respect of the eventual decision of the case. If this is right, the provision is one introduced for the benefit of litigants who may consequently waive it if they find that the more advantageous course to make.

Passing to the other contention on behalf of the defendants referred to above, it is to be observed that, in the circumstances of the cases, the question whether the express contracts set up are true and valid was the crucial question between the parties, and it was essential that the Judge should come to a decision on it before any further order could be passed or step taken by him in the litigation, be that further step, the sending down of issues to the lower Court on the trial thereof by himself. Consequently the finding of the Judge in the matter was an adjudication rightly made at the stage in which it was made, and binding on the Court unless duly set aside on appeal or otherwise. The fact that an illegal remand followed, cannot of course affect what had already been properly done. It is clear, therefore, that if the finding is to be interfered with by us that must be only for reasons warranting such interference on second appeal. But no such reasons having been shown and the decision of the Judge being in accordance with the effect of the undisputed documents with reference to which it was sought to be impeached, it seems to me that the same must be upheld.

I should also add, supposing the order of remand was illegal, and that could possibly have affected the validity of the District Judge's decision as to the contracts relied on by the defendants, or that there was no consent in the lower Appellate Court for the remand, nevertheless having regard to the course adopted on behalf of the plaintiff in the conduct of the case before us as already stated, we must, on the principle of equitable estoppel laid down in the cases cited above, hold that the plaintiff can no longer rely on the impropriety of the remand and its supposed effect on the finding under consideration, and that we should proceed to determine the question on the merits, deliberately submitted for our decision, and dispose of the cases with reference to the

THE MANAGER OF THE COURT OF WARDS, KALAHASTI ESTATE v. RAMASAMI REDDI.

determination so arrived at (compare *Ex parte Butters, In re Harrison*(1)).

I would therefore dismiss the appeals with costs in Civil Miscellaneous Appeal No. 9 of 1904, and without costs in the other cases.

MOORE, J.—In Appeal Against Order No. 9 of 1904. The order of remand by the District Judge is, in my opinion, clearly illegal. The Deputy Collector had not disposed of the suit on a preliminary point. On the contrary he had framed six issues and had decided them all. It is alleged that the order was passed by consent. There is nothing on the record to show that such is the case, and even if it were proved that both the appellants and respondents consented to the suit being remanded, that would be immaterial. The order of remand being illegal (*vide* section 564, Civil Procedure Code) consent of parties would not make it legal. This appeal should, in my opinion, be allowed, the order of remand should be set aside, and the District Judge directed to retake the appeal on his file and dispose of it according to law. I, of course, at the present stage, give no opinion as to the matters treated of by the District Judge in his judgment.

The costs of this appeal against order should be provided for in the District Judge's final appellate decree. The other cases would follow.

Under the provisions of section 575, Civil Procedure Code, it is directed that these appeals be dismissed with costs in Civil Miscellaneous Appeal No. 9 of 1904, and without costs in the other cases.

(1) L.R., 14 Ch. D., 265.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Moore.

1905. February 13. March 9.

ARUMUGAM CHETTI (PLAINTIFF), APPELLANT,

v.

RAJA JAGAVEERA RAMA VENKATESWARA ETTAPPA (DEFENDANT), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *s.* 562—*Limit to remand—Custom opposed to Statute, validity of—Rent Recovery Act VIII of* 1865, *s.* 11—*Cultivation by wells constructed at tenant's cost, liability to enhanced rent for—Payment of enhanced rent for a number of years, whether an implied contract to pay—Agreement and contract, difference between—Tenant with right of occupancy, right of, to construct wells without permission of landholder.*

Ryots with permanent rights of occupancy in a zamindari constructed wells at their own cost without obtaining the permission of the Zamindar, and cultivated dry lands with garden crops for periods ranging from 1 to 18 years. Suits were brought by the ryots before the Sub-Collector under section 8 of the Rent Recovery Act to compel the defendant, the Zamindar, to grant them proper pattas for fasli 1312, alleging that the pattas tendered were illegal as they charged the higher garden rate for dry lands cultivated by them with the aid of wells constructed at their own cost. The defendant pleaded that he was entitled to the enhanced rate (1) by custom, (2) by virtue of a contract to be implied from previous payments. No consideration for such a contract was however alleged.

The Sub-Collector framed two issues—one as to the existence of the custom set up by the defendant, and the other, as to whether the previous payments by the plaintiffs operated as an estoppel, or evidenced an implied contract to continue to pay the enhanced rates. The Sub-Collector did not record evidence as to custom, holding that such custom even if proved could not deprive the plaintiffs of the benefits expressly given by the Act. He also held that any such implied contract as that set up by the defendant would be illegal as opposed to the provisions of the Act. He passed a decree that the defendant should grant pattas as claimed by the plaintiffs.

On appeal the District Judge held that the payment of rent at the enhanced rate raised a presumption that there was a contract to pay such rent; and that if there was no contract express or implied, the rent must be fixed in accordance with the other provisions of section 11 of the Rent Recovery Act. He reversed the decrees of the Sub-Collector and remanded the cases for retrial under section 562 of the Code of Civil Procedure.

* Civil Miscellaneous Appeal No. 160 of 1904, presented against the order of H. Moberly, Esq., District Judge of Madura, in Appeal Suit No. 542 of 1903, presented against the decree of E. H. Wallace, Esq., Acting Sub-Collector of Dindigul Division, in Summary Suit No. 14 of 1903.

On appeal to the High Court:

Held, per SUBRAHMANIA AYYAR, J., that the order remanding the case was not legal as all the questions raised between the parties and on which they went to trial, had been decided, and the questions so raised were purely questions of law.

A custom can be upheld only so far as it is not in conflict with statute law; and a custom to pay enhanced rent for improvements effected by a tenant at his cost is illegal as opposed to the provisions of the Rent Recovery Act.

Fischer v. *Kamakshi Pillai*, (I.L.R., 21 Mad., 136), followed.

Gopalasami Chettiar v. *Fischer*, (I.L.R., 28 Mad., 328), referred to.

It makes no difference whether a tenant constructed wells at his cost prior to or after the passing of Act VIII of 1865. In either case no additional rent can be claimed.

Nagasami Kamia Naick v. *Iyodi Rama Goundan*, (6 Mad., R.R., 5).

Payment for a number of years of enhanced rent may be evidence of an *agreement* to pay at that rate, but it will not be binding as a contract unless supported by consideration.

Quære, whether when the enhanced rate had been paid for a large number of years, and when the lapse of time is such as to make it unfair to call on the landlord to prove consideration, a lawful origin may not be presumed.

Gann v. *Free Fisheries of Whitstable*, (11 H.L.C., 192 at p. 193), referred to.

No such presumption can be made when the payments have been only for a period extending from one to eighteen years:

Tenants with permanent rights of occupancy are entitled to construct wells without the permission of the landholder; and a custom requiring such permission may be bad, as unreasonable, and is certainly illegal as opposed to the policy of section 11 of the Rent Recovery Act.

Venkatanarasimha Naidu v. *Dandamudi Kotayya*, (I.L.R., 20 Mad., 299), referred to.

Held, per MOORE, J., that the Sub-Collector having disposed of the case on two preliminary issues, the District Judge was right in remanding the cases under section 562 of the Code of Civil Procedure.

THE suits out of which these appeals arose were brought by the ryots of certain villages in the zamindari of Gantamanaickanur against the Zamindar to compel him to grant proper pattas for fasli 1312. The main question in dispute between the parties was whether the Zamindar was entitled to enhanced rent for garden cultivation carried on by the ryots with the aid of wells constructed by them at their own cost, and whether payment of such enhanced rent for a number of years by the ryots amounted to an implied contract by them to pay such rent.

The Sub-Collector decreed in favour of the plaintiffs holding that the Zamindar had no right to enhanced rent. On appeal, the District Judge reversed the decrees of the Sub-Collector and remanded the suits for disposal under section 562 of the Code of Civil Procedure on the ground that the Sub-Collector had come to

ARUMUGAM CHETTI v. RAJA JAGAVEERA RAMA VENKATESWARA ETTAPPA.

a wrong conclusion on the preliminary issues on which he had disposed of the cases and that a trial on the merits was necessary.

The plaintiffs appealed to the High Court.

V. Krishnaswami Ayyar and *V. V. Srinivasa Ayyangar* for appellants.

Sir *V. Bhashyam Ayyangar* and the Hon. Mr. *P. S. Sivaswami Ayyar* for respondents.

JUDGMENTS—SUBRAHMANIA AYYAR, J.—The appellants in these 27 civil miscellaneous appeals are ryots holding lands in certain villages in the zamindari of Gantamanaickanur. They brought these suits before the Sub-Collector under section 8 of the Rent Recovery Act to compel the respondent who is the Zamindar to grant them proper pattas for fasli 1312. In the plaints they stated that though they themselves had sunk wells at their own cost in certain dry lands forming part of the holdings and with the aid thereof they had been raising garden crops, the respondent insisted upon charging the garden rate of 8 fanams per guli instead of the dry rate of 4 fanams per guli, which alone he was entitled to charge in respect of such cultivation. They therefore prayed for a decree that pattas may be granted to them in which the said dry rate alone is charged.

The respondent in his written statement did not allege that the wells were sunk by himself or his predecessors in title, but in effect asserted that, even assuming that the wells were sunk by the ryots themselves, he had a right to charge the higher rate of 8 fanams on the ground first, of a local custom, and secondly, of a contract to pay at that rate to be implied from the fact of its payment by the ryots for a number of years. He did not, however, either then or subsequently, aver or suggest that any consideration passed from him or his predecessors in title which would support the alleged promise on the part of the ryots to pay at the higher rate. In a tabular statement filed by him under the orders of the Sub-Collector he simply set forth in respect of the land in each case in regard to which the question was raised, the period during which payment at the higher rate had been made. The Sub-Collector proceeded to deal with the cases on the footing that the facts were (1) the lands to which the dispute relates were dry lands chargeable with 4 fanams per guli, (2) that the wells were sunk at the cost, not of the respondent or his predecessors in title, but of the ryots themselves, and (3) that the payment at the higher rate had been

ARUMUGAM CHETTI v. RAJA JAGAVEERA RAMA VENKATESWARA ETTAPPA.

made by the ryots for the respective periods specified in the statement referred to above. Accordingly he raised the following issues:—

"(1) Is there a general custom to charge enchanced rates for garden crops when raised by plaintiff irrespective of any improvement or alteration in the land made at plaintiff's expense and is such custom, if proved, valid in law?"

"(2) If plaintiff has paid at such enhanced rates for previous several years, is he estopped from objecting now to the enhanced rates, and is there an implied contract binding him to continue to pay such rates?"

As to the existence of the custom, the Sub-Collector recorded no evidence for he held that the provisions of the Rent Recovery Act secured to the appellants the benefit of the improvement effected by them free from any liability to enhanced rent, and consequently, that the custom, even if it exists, could not in point of law disentitle the appellants to claim such benefit. As regards the question of implied contract, he was of opinion that the alleged contract was illegal as opposed to the said provisions of the statute. In the result he directed that the respondent do tender pattas charging 4 fanams per guli with reference to the lands, to the garden cultivation whereon, the dispute related. On appeal the District Judge reversed the decrees and remanded the cases for disposal on the merits, though he does not say what the merits contemplated were.

That in the lower Courts the parties throughout proceeded in all these cases on the footing that there were no facts to try except as to the existence of the alleged custom, must be clear from what has already been stated, and this is expressly pointed out by the Sub-Collector himself. After summarising the pleadings, he observes in paragraph 2 of his judgment, "Defendant in his written statement makes no plea that he sank or improved the wells, and in his pleadings admitted, that he could not assert that he had sunk or improved the wells. He practically allowed plaintiffs' contentions on this point and on that understanding certain preliminary issues were framed on objections put forward by the defendant." Statements to the same effect will also be found in paragraph 7 of the judgment and the last paragraph, but one unmistakeably shows, that in certain other suits between the ryots and the Zamindar in which, unlike here, a question of fact

ARUMUGAM CHETTI v. RAJA JAGAVEERA RAMA VENKATESWARA ETTAPPA.

had to be gone into, viz., whether the wells in question there had not been sunk prior to the Rent Recovery Act coming into force, the Sub-Collector reserved the trial. Thus, when the cases came before the District Court there were but two questions raised for determination, both questions of law only, viz., the effect of the custom, assuming there was one, upon the right of the appellants to raise garden crops with the aid of their own wells, and secondly, whether the naked fact of payment for a series of years at the rate of 8 fanams in respect of such cultivation warranted a finding that the appellants were bound to continue the payment as a matter of implied contract. To the first question the District Judge makes no allusion whatever in his judgment. Whether in the argument before him the point was raised and urged does not appear. Considering that the Sub-Collector's decision on it was against the respondent, and considering that if that decision were wrong it would be necessary to try whether in point of fact the custom prevailed, it should have been made clear, in reversing and remanding the cases, what was the course to be pursued by the Sub-Collector with reference to the first part of the first issue when the cases went back to him. The matter, however, to say the least is left in doubt, and it seems to me we are called upon in these appeals to remove that doubt. Now as to the point itself it is covered by authority. In *Fischer* v. *Kamakshi Pillai*(1) referred to by the Sub-Collector the very question arose and the decision was against the landholder and it was held that a custom such as that alleged could be upheld only in so far as it might not conflict with the statute law. This decision has been followed very recently in *Gopalasami Chettiar* v. *Fischer*(2). There the landholder relied on the custom of his mitta as entitling him to make a charge even in respect of trees grown by the tenant with the irrigation from wells constructed at the cost of the tenant. Though such a custom was found to prevail yet it was held by the lower Courts that the custom cannot, since the passing of Act VIII of 1865, be enforced so as to deprive a tenant of the benefit of his own improvements, and that, therefore, when the improvement was made after 1865 the tenant is not bound to pay a tax on trees grown in his own patta land by means of such improvement. In this Court not only was this view confirmed, but it was laid down that there

(1) I.L.R., 21 Mad., 186. (2) I.L.R., 28 Mad., 328.

ARUMUGAM CHETTI v. RAJA JAGAVEERA RAMA VENKATESWARA ETTAPPA.

was no distinction in the matter between improvements by the tenant effected since the passing of the said Act and those effected prior to it. See also *Nagasami Kamia Naick* v. *Iyodi Rama Goundan*(1). It follows therefore that the first ground on which the respondent based his demand of 8 fanams per guli is unsustainable.

As regards the other ground relied on by him it will be seen from what I have already said when stating the effect of the pleadings, that both the Sub-Collector and the District Judge failed to grasp the real point involved in the contention, viz., that though payment for a number of years at the rate of 8 fanams may imply an *agreement* to pay in future at that rate, yet that will not imply a *contract* between the parties, for the obvious reason that there was no consideration to support such an agreement so as to make it a binding one. To put it otherwise, the improvement having been effected by the tenant himself, there was no obligation to make an extra payment in respect of cultivation resulting from such improvement, unless a promise so to pay was made, or could be inferred to have been made, on account of some detriment to the landholder or advantage to the tenant which, in point of law, would have constituted consideration for the promise. As however none such was alleged in these cases, the agreement to be implied from the naked fact of payment at the rate of 8 fanams per guli for a longer or shorter period is *nudum pactum* and does not compel the appellants to continue to pay at the same rate any longer. It was however argued on behalf of the respondent that according to another custom in the locality the appellants were not entitled to sink the wells referred to without the permission of the landholder, and as receipt of rent at the rate of 8 fanams involved a permission on his part to the wells being sunk, such permission was consideration sufficient to support the promise on the part of the tenants to pay at that rate. No doubt, in the last paragraph of the respondent's written statement it is asserted that the tenants had no right to sink the wells without the permission of the Zamindar, but on what ground that right was denied he did not venture then to add. If custom had really been taken to be the ground for the denial as suggested for the first time here on his behalf, a reference to it would certainly not have been omitted in the paragraph. On the contrary, not only is there no specific

(1) 6 Mad., R.R., 5.

ARUMUGAM CHETTI v. RAJA JAGAVEERA RAMA VENKATESWARA ETTAPPA.

allusion to it in the paragraph, but the general tenour of the paragraph taken as a whole, negatives the intention to rely on custom. Paragraph 3 of the same written statement goes far to confirm this for there he expressly relies on custom in support of his claim for increased *theerva* with reference to nature of the crop raised. Now the tenure under which the appellants hold the lands in respect of which the grant of pattas is claimed, being of the permanent character described in *Venkatanarasimha Naidu* v. *Dandamudi Kotayya*(1) and the cases following it, it is impossible to understand why the landholder's permission for the sinking of the well was necessary. And even supposing that a custom supporting the averment can be shown, such a custom must be held to be bad if not for its unreasonableness, at least on account of its utter inconsistency with the policy of the proviso to section 11 of the Rent Recovery Act which expressly admits the tenants' unqualified right to make improvements free from any liability to make any payment to the landholder in respect of the benefit accruing therefrom. If in cases like the present, payments at the higher rate had continued to be made for a great many years so as to make it unfair to the landholder, on account of such lapse of time, to be compelled to prove the existence of some consideration when the payment commenced, it may be a question whether the Courts should not presume a lawful origin for the payment, on the analogy of the lost grant principle availed of to support long possession and enjoyment. That even in the case of immemorial usage the doctrine of *quid pro quo* is not altogether to be ignored, will be seen from the observations of Lord Chelmsford in *Gann* v. *Free Fisheries of Whitstable*(2). Be this as it may, in the present cases, the presumption of lawful origin is quite inadmissible considering that the payments have been made, as will be seen from the note in the margin, during periods ranging between 1 and 18 years only. Moreover if in truth there was any consideration moving from the landholder in any of these cases, it would not in the circumstances have been difficult for him

No. of years for which higher theerva was paid.	No. or Nos. of the original suit or suits.
1 year	15.
2 years	14, 33.
4 ,,	29.
5 ,,	25, 31,
6 ,,	20, 24, 26, 30, 35.
7 ,,	40.
8 ,,	21, 37, 38, 39.
9 ,,	33.

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

(2) 11 H.L.C., 192 at p. 193.

ARUMUGAM CHETTI v. RAJA JAGAVEERA RAMA VENKATESWARA ETTAPPA.

No. of years for which higher theerva was paid.	No. or Nos. of the original suit or suits.
10 years	50.
11 ,,	17, 34, 36.
12 ,,	18, 48.
13 ,,	21, 33.
14 ,,	15, 17, 48.
16 ,,	47, 49, 50, 53.
18 ,,	21, 22, 23, 34.

to state what it was, and adduce evidence to prove it, as from the very commencement the payments were in pursuance of muchilikas obtained from the tenants. Upon the only facts therefore which are before the Court,—payment at the dry rate of 4 fanams per guli prior to the sinking of the wells by the tenants, and payment at the garden rate of 8 fanams subsequent to the improvement which gave the facility for a change of cultivation—the reasonable inference to be drawn is only that the payment originated in the mistaken notion on the part of the tenant that he was bound to pay, and on the part of the landholder that he was entitled to receive the higher rate, due to the prevalence in some zamindaris of the practice of varying the assessment according to the crop raised, the restrictive operation on such practice of section 11 of the Rent Recovery Act and particularly of the proviso as regards tenants' improvements, being wholly overlooked.

It is scarcely necessary to add that the tenants' right to relinquish the whole or any part of his holding recognised by section 12 of the Act, to which also some reference was made on behalf of the respondent, in no way detracts from the tenant's right to make such an improvement as the sinking of a well during the subsistence of the tenancy.

I would therefore set aside the order of the District Judge and restore the decree of the Sub-Collector with costs here and in the lower Appellate Court.

MOORE, J.—The Sub-Collector framed two preliminary issues and when he had disposed of them, proceeded to decide the suit without framing the additional issues that arose and without taking any evidence either oral or documentary. The District Judge on appeal reversed his decree upon the preliminary point. Such being the case the District Judge was, in my opinion, right in acting under section 562, Civil Procedure Code, and remanding the suit for disposal on the merits. These appeals should, in my opinion, be dismissed with costs. I give no opinion as to the correctness or otherwise of the decision of the District Judge on the preliminary point. The proper time to consider that question will, in my opinion, be when the case comes up before us in

ARUMUGAM CHETTI v. RAJA JAGAVEERA RAMA VENKATESWARA ETTAPPA.

the usual manner in second appeal, in case such an appeal is eventually preferred.

Under section 575 of the Civil Procedure Code these appeals are dismissed with costs.

APPELLATE CIVIL.

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

1905. January 30.

VENKATA ROW AND OTHERS (JUDGMENT-DEBTORS), APPELLANTS,

v.

VENKATACHELLA CHETTY (DECREE-HOLDER), RESPONDENT.*

Limitation Act XV of 1877, *s.* 12—*Time requisite for obtaining a copy of the decree.*

In computing the period of limitation for an appeal, a party, applying to the lower Court for a copy of the decree on the day it re-opened after the holidays, is not entitled to deduct, as time requisite for obtaining a copy of the decree, the period during which the lower Court was closed, when he could have made such application before the Court closed and when on the day he actually applied the period limited for appeal had expired.

Tukaram Gopal v. *Pandurang Sadaram*, (I.L.R., 25 Bom., 584), referred to and distinguished.

Pandharinath v. *Shankar*, (I.L.R., 25 Bom., 586) referred to and distinguished.

THE facts material for this report are set out in the judgment.

T. Pattabhiramayyar for appellant.

C. Venkatasubbaramiah for *T. Ethiraja Mudaliar* for respondent.

JUDGMENT.—In this case the date of the judgment of the District Court was January 28th, 1904. The Court closed for the vacation on April 18th and re-opened on June 20th. The appellant made no application for a copy of the judgment between January 28th and April 18th, and has given no explanation why he failed to do so.

* Civil Miscellaneous Second Appeal No. 68 of 1904, presented against the order of R. D. Broadfoot, Esq., District Judge of Chingleput, in Civil Miscellaneous Appeal No. 198 of 1903, or presented against the order of M.R.Ry. C. Krishnasami Row, District Munsif of Conjeeveram, in Execution Petition No. 619 of 1902 (Original Suit No. 314 of 1889).

VENKATA ROW v. VEKATACHELLA CHETTY.

On the day of the re-opening of the Court (June 20th), he applied for a copy of the judgment; he obtained his copy on the 22nd, and he filed his appeal to this Court on July 11th, the first day after the re-opening of this Court. The question is whether in the computation of the ninety days, his time for appeal to this Court, the period during which the District Court was closed is to be excluded as time requisite for obtaining a copy of the judgment within the meaning of section 12 of the Limitation Act? Having regard to the fact that the appellant had from January 28th to April 18th to apply for his copy, we do not think that he is entitled to exclude the period during which the Court was closed as time requisite for obtaining a copy of the judgment within the meaning of the section. This time was not requisite inasmuch as the appellant had a period of some days before the Court closed in which to apply for a copy.

The two Bombay cases to which our attention has been called (*Tukaram Gopal* v. *Pandurang Sadaram*(1) and *Pandaharinath* v. *Shanker*(2)), are distinguishable on the ground that in both these cases the right of appeal was subsisting at the time the application for the copy was made. In the present case the appeal was out of time at the time the application for the copy was made.

We are of opinion that this appeal is out of time. It is accordingly dismissed with costs.

(1) I.L.R., 25 Bom., 584. (2) I.L.R., 25 Bom., 586.

APPELLATE CRIMINAL.

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

1905. January 11.

ALINGAL KUNHINAYAN AND ANOTHER (ACCUSED), APPELLANTS,

v.

EMPEROR, RESPONDENT.*

Penal Code, Act XLV of 1860—Right of private defence of body—Extent of right.

The view that a person should not exercise his right of self-defence if by running away he can avoid injury from his assailant, places a greater restriction on the right of private defence of the body than the law requires. The extent to which the exercise of the right will be justified will depend not on the actual danger but on whether there was reasonable apprehension of such danger.

CHARGE of murder. The appellants (with two others who were acquitted) were convicted by the Sessions Judge of South Malabar of the murder of one Raman and of causing grievous hurt to the first witness for the prosecution. It appeared from the evidence for the prosecution that while the first accused was the aggressor inasmuch as he beat the deceased, yet the latter was the first to use a knife with which he inflicted a serious wound upon the first accused; and it was apparently, with the knife which the first accused wrested from the deceased that he stabbed and killed him.

In the Sessions Court, it was contended for the defence that the deceased attacked the accused with a knife and that he had been killed by the accused in exercise of their right of self-defence.

The learned Sessions Judge in dealing with the plea of the accused observed as follows:—"It is urged on behalf of the first accused that he was justified in the exercise of his right of private defence of his person in stabbing deceased when he attacked him with a knife. First accused had undoubtedly a right to defend himself but I think it is clear that he exceeded the right of private defence which he possessed. First accused was certainly not justified in wresting the knife from deceased and inflicting a dangerous wound in the chest. There is no reason, I think, to suppose that first accused could not have escaped further injury

* Criminal Appeal No. 678 of 1904, presented against the sentence of L. G. Moore, Esq., Sessions Judge of South Malabar Division, in case No. 81 of 1904.

by resorting to less violence or by running away. It was not necessary for first accused's own preservation that he should have inflicted such grievous bodily harm."

The first and second accused preferred this appeal.

Mr. *T. Richmond* and *M. Govindan Nair* for appellants.

The Public Prosecutor in support of conviction.

JUDGMENT.—In this case, although as the Sessions Judge points out, the prosecution witnesses Nos. 1–4 were all anxious to make it appear that the accused were the aggressors and that the deceased and his brother Chathu (the first prosecution witness) acted on the defensive, the evidence of these witnesses makes it clear that although the first and second accused began the fray by striking the deceased Raman with their hands, Raman was the first to use the knife, and that he inflicted a very serious wound, which might well have proved fatal, on the first accused, and also wounded the second accused, before he received from the first accused the wound which caused his death. It is also clear that the first prosecution witness Chathu, the brother of the deceased, although he denies it in his evidence, used his knife and stabbed the second accused.

It would seem from the evidence of the prosecution witnesses that both Raman and Chathu used their knives before either the first or second accused used theirs. At any rate, there can be no doubt, from the evidence of the sixth prosecution witness, that Chathu stabbed the second accused before the second accused stabbed Chathu in return.

Further, it seems clear that the fight took place at the house of the fourth accused and not as Chathu stated in exhibit A, at Raman's house. It seems not unlikely that the quarrel, in the first instance, was provoked by the deceased and his brother Chathu going to the house of the fourth accused.

On the facts of the case, we cannot agree with the view of the law taken by the learned Judge. We do not think it can be said that the first accused exceeded the right of private defence. The learned Judge suggests that the first accused could have escaped further injury by resorting to less violence or running away. But, this is placing a greater restriction on the right of private defence of the body than the law requires. The principle applicable to a case like this is that laid down by Mayne "But a man who is assaulted is not bound to modulate his defence step by step,

ALINGAL KUNHINAYAN v. EMPEROR.

according to the attack, before there is reason to believe the attack is over. He is entitled to secure his victory, as long as the contest is continued. He is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and if, in a conflict between them, he happens to kill, such killing is justifiable. And, of course, where the assault has once assumed a dangerous form every allowance should be made for one, who, with the instinct of self-preservation strong upon him, pursues his defence a little further than to a perfectly cool by-stander would seem absolutely necessary. The question in such cases will be, not whether there was an actually continuing danger, but whether there was a reasonable apprehension of such danger."

The all important facts in connection with the question whether the first accused exceeded the rights of private defence of his body when he gave the stab with his knife which proved fatal to the deceased, are that the deceased was the first to use the knife and had inflicted a wound on the first accused which might well have proved fatal.

On the facts we are of opinion that the first accused did not exceed the right of private defence and that his conviction under sections 304 and 326 of the Indian Penal Code cannot be upheld.

As regards the second accused the evidence shows that although he no doubt used his knife to Chathu, before he did so, he had been stabbed by Chathu.

We are of opinion that the second accused did not exceed his right of private defence and that his conviction under section 326, Indian Penal Code, cannot be upheld.

In the case of both the accused the appeals are allowed and the convictions set aside.

APPELLATE CIVIL—FULL BENCH.

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

SOMASUNDARA MUDALI (FIRST DEFENDANT), APPELLANT,

v.

KULANDAIVELU PILLAI (PLAINTIFF), RESPONDENT.*

1904. September 5, 6, 14, 21. October 13.

Civil Procedure Code—Act XIV of 1882, *s.* 13, *expl. V, s.* 26—Res judicata—*'Right to relief' under s.* 26 *in previous suit essential to bar under expl. V of s.* 13.

Where some co-sharers sue to recover the whole property joining as a defendant a sharer who refused to join as plaintiff and who remained *ex parte* and a decree was passed in favour of the plaintiffs awarding to them their shares alone, such suit must be considered to have been brought by the plaintiffs for their shares alone and the defendant-sharer or his representative cannot as a plaintiff in a subsequent suit against a co-defendant in the prior suit rely on the judgment as a bar under section 13, explanation V of the Code of Civil Procedure on the ground that the plaintiffs in the previous suit claimed a relief common to them and the defendant co-sharer.

Chandu v. *Kunhamed*, (I.L.R., 14 Mad., 324), overruled.

Latchanna v. *Saravayya*, (I.L.R., 18 Mad., 164), not followed.

A right to relief can be said to be 'claimed in common' under explanation V to section 13 of the Code of Civil Procedure, only as between parties who would be benefited by such relief if granted and who have such an interest in the relief claimed that they could join as co-plaintiffs under section 26 of the Code of Civil Procedure.

A suit cannot be maintained by one person on behalf of others standing in the same relation with him in the subject of the action, unless the relief sought by him is beneficial to those whom he seeks to represent and such others are necessarily interested in the relief sought.

Gopalayyan v. *Raghupati Ayyan* alias *Aiyavayyan*, (3 M.H.C.R., 217), *Nabin Chandra Mazumdar* v. *Muktasundari Debi*, (7 B.L.R., App. 38), *Surender Nath Pal Chowdhry* v. *Brojo Nath Pal Chowdhry*, (I.L.R., 13 Calc., 352), referred to and followed.

Madhavan v. *Keshavan*, (I.L.R., 11 Mad., 191), distinguished.

SUIT by mortgagee and auction-purchaser to recover possession of property. The defendants Nos. 2, 3, 4 and 5 were brothers and the sons of one Soku Mudali. In Original Suit No. 321 of 1893 on the file of the District Munsif of Kulitalai, the present

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* Second Appeal No. 895 of 1903, presented against the decree of H. G. Joseph, Esq., District Judge of Trichinopoly, in Appeal Suit No. 112 of 1902, presented against the decree of M.R.Ry. S. Ramaswami Aiyangar, District Munsif of Kulitalai, in Original Suit No. 396 of 1901.

SOMA-SUNDARA MUDALI v. KOLANDAI-VELU PILLAI.

defendants Nos. 2, 3 and 4 sued to recover property in the possession of the first defendant in this suit who claimed as the adopted son of one Muthia Mudali, deceased, the divided brother of Soku Mudali. The fifth defendant in this suit was made a co-defendant in the previous suit as he refused to join as plaintiff. The first defendant failed to prove his adoption and the defendants Nos. 2, 3 and 4 obtained, ultimately, a decree for a three-fourths share of the property. In the meanwhile the fifth defendant in Original Suit No. 321 of 1893 hypothecated his share in the estate of Muthia Mudali to the present plaintiff who filed a suit thereon and obtained a decree in execution of which he purchased the property. He brought the present suit to recover the share of the fifth defendant. The first defendant again set up his title as the adopted son of Muthia Mudali; and the substantial question before the Court on appeal was whether he was estopped by the judgment in the previous suit in which he and the predecessor in title of the present plaintiff were co-defendants, from setting up such adoption by section 13, explanation V of the Code of Civil Procedure.

The case came in the first instance before Boddam and Sankaran Nair, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH:—The question in this case is whether the matter is *res judicata* under section 13, explanation V, Civil Procedure Code.

The previous suit was brought by the second, third and fourth defendants as plaintiffs to recover the property in suit from the first defendant who claimed to retain possession of it as the adopted son of the previous admitted owner. The fifth defendant, a brother of the second, third and fourth defendants (the plaintiffs) was made a defendant in the suit on the ground that he refused to join them in the suit.

The District Court in that suit held that the first defendant had failed to prove his adoption and gave a decree for possession to the plaintiffs for the whole, including the share of the fifth defendant. The High Court on appeal modified the decree by excluding the share of the fifth defendant on the ground that the plaintiffs were not entitled in the suit to recover that share.

The present plaintiff sues as a mortgagee and auction-purchaser of the fifth defendant and the first defendant again sets up his adoption which he failed to prove in the previous suit.

SOMA-SUNDARA MUDALI v. KULANDAI-VELU PILLAI.

Having regard to the document A which is the mortgage by the fifth defendant to the plaintiff and being of opinion that the parties were at the time of the previous suit undivided with respect to the property in suit though otherwise divided and that the plaintiffs therefore represented in that suit the fifth defendant, if we are to follow *Chandu* v. *Kunhamed*(1) and *Latchanna* v. *Saravayya*(2) the matter is *res judicata*. If, on the other hand, we are to follow *Mahabala Bhatta* v. *Kunhanna Bhatta*(3), the fifth defendant was not represented by the plaintiffs in that suit (defendants Nos. 2 to 4) and the matter is not *res judicata*.

In this conflict of authorities we refer to the Full Bench the question whether the first defendant's contention that he has been adopted is *res judicata* in this suit or not.

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

T. V. Seshagiri Ayyar for appellant. The question was not *res judicata*. The plaintiff's vendor, the fifth defendant, was *ex parte* in the previous suit. Its conduct was not in his hands, and if the suit was dismissed, he could not have appealed. The High Court in second appeal treated the previous suit as one brought to recover the share of the other brothers only who were plaintiffs in that Court, and modified the decrees of the lower Courts by decreeing to the then plaintiffs their share of the properties sued for and excluded the other brother's (fifth defendant's) share. Explanation V to section 13 applies only when the relief claimed is 'common' to a class of persons; here the relief was not claimed in common; in fact, the plaintiffs in the previous suit, according to the final decision in that case, did not claim any *relief* on behalf of themselves and the fifth defendant. The fifth defendant was not interested in the result of the suit. Explanation V to section 13 should be confined only to cases where, under section 30 of the Code of Civil Procedure, leave to sue or be sued has been obtained. The cases of *Chandu* v. *Kunhamed*(1) and *Latchanna* v. *Saravayya* (2) should not be followed. The case in *Mahabala Bhatta* v. *Kunhanna Bhatta*(3) should be followed. The cases of *Gopalayyan* v. *Raghupati Ayyan* alias *Aiyavayyan*(4) and *Nabin Chandra*

(1) I.L.R., 14 Mad., 324.
(2) I.L.R., 18 Mad., 164.
(3) I.L.R, 21 Mad., 373 at p. 383.
(4) 3 M.H.C.R., 217.

SOMA-SUNDARA MUDALI v. KULANDAI-VELU PILLAI.

Mazumdar v. *Muktasundari Debi*(1) and also the decision of the Full Bench of the Calcutta High Court in *Surender Nath Pal Chowdhry* v. *Brojo Nath Pal Chowdhry*(2) are in my favour. If the fifth defendant is not bound by the decision in the previous suit, neither is the first defendant, and both the first and the fifth defendants are entitled to have a fresh adjudication of the question when it arises as between themselves.

T. R. Ramachandra Ayyar and *C. V. Anantakrishna Ayyar* for the respondent.—In the former suit, the plaintiffs litigated in respect of a *right* claimed in common for themselves and the fifth defendant therein. As the fifth defendant refused to join as plaintiff in that suit, he was made a defendant. The right claimed in common was brought before the Court for adjudication, and the adjudication made in that suit is binding on all the persons who own the right. The *relief* claimed in the plaint or the relief granted by the Court by its decree has nothing to do with the explanation V to section 13, which speaks only of the '*right*.' The present case comes within the express words of the explanation and the previous decision is consequently *res judicata*. The case in *Chandu* v. *Kunhamed*(3) and *Latchanna* v. *Saravayya*(4) should be followed. The point was not decided in *Mahabala Bhatta* v. *Kunhanna Bhatta*(5). The fifth defendant in the previous suit could have appealed. There was a decree in that suit to which he was party adjudicating on a right which was claimed in common adversely to him. Whether he should have first had his name transferred from the list of defendants to that of plaintiffs or not is only a matter of form. He would have been entitled to appeal if the suit had been dismissed otherwise the doctrine now so well established that there can be *res judicata* even between co-defendants would have no legal basis at all. The cases decided under the earlier Code of 1859 are not authority on the construction of the present section, as there was no provision in the Code of 1859 corresponding to explanation V to section 13. It has been the policy of the legislature to enlarge the scope of *res judicata*.

The then plaintiffs and the fifth defendant represented one body of reversioners and they are all bound by the adjudication

(1) 7 B.L.R., Appx. 38.
(2) I.L.R., 13 Calc., 352.
(3) I.L.R., 14 Mad., 324.
(4) I.L.R., 18 Mad., 164.
(5) I.L.R., 21 Mad., 373.

SOMA-SUNDARA MUDALI. v. KULANDAI-VELU PILLAI.

therein made. Lastly, the adjudication on the question of the adoption was necessary for disposing of the previous suit, and to give the then plaintiff the reliefs claimed by them, and such an adjudication is binding on the co-defendants *inter se*. In the case of *Madhavan* v. *Keshavan*(1) the decision in a suit brought by one trustee was held to be binding on the other trustees. It is not the defendant's plea that there was any fraud or negligence on the part of the plaintiffs in the former case in the conduct of that suit; that suit was conducted *bonâ fide* by persons who were themselves interested in the matter,—the right being a common right. The case in *Chandu* v. *Kunhamed*(2) was followed by this Court in the cases in *Madhavi* v. *Kelu*(3) and *Latchanna* v. *Saravayya*(4) in preference to the decisions of the Calcutta High Court. The case in *Surender Nath Pal Chowdhry* v. *Brojo Nath Pal Chowdhry*(5) was not a case of partition and the Court did not consider explanation V to section 13 of the Code. The decisions of this Court which give effect to the express words of the explanation V to section 13 should be followed. Reference was also made to *Jogendro Deb Roy Kut* v. *Funindro Deb Roy Kut*(6).

T. V. Seshagiri Ayyar in reply—The decision in *Surender Nath Pal Chowdhry* v. *Brojo Nath Pal Chowdhry*(5) went much further than the present case, and though Mitter, J., differed on the question of the admissibility of the previous judgment in evidence, all the Judges were agreed that it would not constitute the matter *res judicata*.

The Court expressed the following

OPINION:—The defendants Nos. 2 to 5, sons of one Soku Mudali, are divided brothers and alleged by the plaintiff to be reversioners to the estate of their uncle Muthia Mudali.

The plaintiff claiming as the mortgagee and purchaser of the one-fourth share of the fifth defendant, sues for partition and to recover possession of that share from the first defendant who denies that the fifth defendant is a reversioner and sets up his own title as the adopted son of the deceased Muthia Mudali. The plaintiff contends that the first defendant is estopped from raising this plea by the decisions in Original Suit No. 321 of

(1) I.L.R., 11 Mad., 191.
(2) I.L.R., 14 Mad., 324.
(3) I.L.R., 15 Mad., 264.
(4) I.L.R., 18 Mad., 164.
(5) I.L.R., 13 Calc., 352.
(6) 14 M.I.A., 367.

SOMA-SUNDARA MUDALI v. KULANDAI-VELU PILLAI.

1893, Appeal Suit No. 246 of 1895 and Second Appeal No. 1289 of 1897.

That suit was brought by defendants Nos. 2 to 4 as reversioners to the deceased Muthia Mudali to recover the entire property including the fifth defendant's share from the first defendant who set up the same plea of adoption now put forward by him. The fifth defendant was made a third defendant on account of his refusal to join as plaintiff and allowed the suit to proceed *ex parte*.

The first defendant's alleged adoption was declared invalid and a decree was given by the Appellate Court in favour of the plaintiffs overruling the contention that they were only entitled to their share and not to the share of the present fifth defendant: that Court holding that the fifth defendant could afterwards obtain his share on partition from his brothers.

The High Court, however, reversed the decree so far as the fifth defendant's share was concerned; the suit to recover that share was dismissed and the defendants Nos. 2 to 4 in this suit, the plaintiffs therein, were held entitled only to their three-fourths share.

Conceding that after the decision in the second appeal that suit must now be treated as one brought by the present defendants Nos. 2 to 4 for their share only of the property, it is contended by the plaintiff that the first defendant is estopped by the decision in that suit that his adoption is invalid, from again relying upon it: that the plaintiffs in that suit, represented their brother, the fifth defendant, who was jointly interested with them in the property and they were therefore then litigating in respect of a right claimed by them in common with the fifth defendant—see explanation V to section 13 of the Civil Procedure Code—and reliance is placed upon the decisions in *Chandu* v. *Kunhamed*(1), approved in *Latchanna* v. *Saravayya*(2).

It is contended on behalf of the first defendant that the fifth defendant was not in any way interested in that suit, as it must be now treated as having been brought by the then plaintiffs for the recovery of their share only; that they did not sue for such share for themselves and on his behalf; that the right put forward was not a common and indivisible right; that the explanation V

(1) I.L.R., 14 Mad., 324. (2) I.L.R., 18 Mad., 164.

SOMA-SUNDARA MUDALI v. KULANDAI-VELU PILLAI.

to section 13 must be confined to cases where leave to sue has been obtained under section 30 of the Civil Procedure Code; and that the case in *Chandu* v. *Kunhamed*(1) has been disapproved in *Mahabala Bhatta* v. *Kunhanna Bhatta*(2), and if the fifth defendant is not estopped, then the first defendant cannot be estopped.

The question that is referred to us for decision is whether the first defendant's claim is *res judicata*.

If *Chandu* v. *Kunhamed*(1) correctly declares the law, then the plaintiff's contention must be upheld.

But we are of opinion that that decision ought not to be followed and proceeds on a wrong view of the scope of explanation V to section 13 of the Civil Procedure Code.

The rule of English Law is thus stated in Vol. I of Daniell's 'Chancery Practice,' 7th Edn., page 197, "In order to enable a person to sue on behalf of himself and others who stand in the same relation with him to the subject of the action, it is generally necessary that it should appear that the relief sought by him is beneficial to those whom he undertakes to represent; where it does not appear that all the persons intended to be represented are necessarily interested in obtaining the relief sought, such a suit cannot be maintained."

The authorities in support of this statement of the law are cited.

Judged by this test, it is clear there is no estoppel. The fifth defendant under whom the plaintiff claims was not interested in the then plaintiffs, his brothers, obtaining their share of the property: he was certainly not necessarily interested and he would not benefit by a decree in their favour for the relief granted to them.

The only reported cases in India to which our attention has been drawn are to the same effect.

In *Gopalayyan* v. *Raghupati Ayyan* alias *Aiyavayyan*(3), a member of a Hindu family, brought a suit for his share of the family properties, all the other members being defendants and to ascertain what his share was it became necessary to decide whether the first defendant was adopted into that family. The decision that

(1) I.L.R., 14 Mad., 324. (2) I.L.R., 21 Mad., 373.
(3) 3 M.H.C.R., 217.

SOMA-SUNDARA MUDALI v. KULANDAI-VELU PILLAI.

he was adopted was held in a subsequent suit not to be binding on the plaintiff therein, another member of the family claiming his share of the property. Similarly in *Nabin Chandra Mazumdar* v. *Muktasundari Debi*(1), the plaintiff in the first suit claimed to recover his share of his father's estate held by the defendant, who alleged title under a will left by the father, making his brother co-defendant. The decision that the will was genuine was held not to be binding on his brother, the co-defendant in the first suit, in a suit that was subsequently brought by him to recover his share of the property.

It is contended before us that whatever was the law before, explanation V to section 13, Civil Procedure Code now makes it clear that a co-owner in the circumstances above stated would be barred and the decision in the first suit brought by the other co-owners would be binding on him.

We are unable to accede to this contention. Under section 26 of the Civil Procedure Code, the persons who are to be joined as plaintiffs are those "in whom *the right to any relief* claimed is alleged to exist" as stated therein. The plaintiffs in the first suit can be held to represent the plaintiff in the second suit under explanation V to section 13 only if the latter has any "right to any relief" claimed in the first suit. Then alone, using the words in the explanation V, are the plaintiffs in the first suit litigating in respect of a right claimed in common with the plaintiff in the second suit. This is strictly in accordance with the rule of English Law as cited above and is supported by the Full Bench decision in *Surender Nath Pal Chowdhry* v. *Brojo Nath Pal Chowdhry*(2).

In that case the plaintiffs sued to recover their share of the rent from defendants. Another co-sharer in the same estate had previously sued for his share making the plaintiffs in the second suit co-defendants. These co-defendants allowed the suit to proceed *ex parte*. With reference to the question of *res judicata* the High Court held "If the former suit had been dismissed, could it have been said that the now plaintiffs were barred? Might they not have said, we had and have to do with our own shares, we neither knew nor cared about other people's shares: why should we have meddled in their suit?" *i.e.*, the plaintiffs in the

(1) 7 B.L.R., Appx. 38. (2) I.L.R., 13 Calc., 352.

SOMA-SUNDARA MUDALI v. KULANDAI-VELU PILLAI.

second suit were not interested in the relief prayed for in the first suit and the relief that they claimed in the second suit was not claimed in the first suit.

We agree with this judgment. The fifth defendant in the present suit is not interested in the relief that may be granted to the plaintiffs in the first suit. The conduct of the suit was not in his hands and with reference to the share of the plaintiffs in that suit he could not have been made a co-plaintiff. He gets no advantage therefore from that suit. He cannot enforce any rights of his own under that decree. He cannot get his share and he could not have appealed.

The case in *Chandu* v. *Kunhamed*(1) is undoubtedly in favour of the respondent. But no reasons are given in that judgment. For the reasons given above, we are unable to hold that that case was rightly decided.

The case in *Madhavan* v. *Keshavan*(2) has no application. There, a decision dismissing a suit brought on behalf of a devasam by one trustee to recover lands alleged to have been illegally alienated was held to be binding on another trustee who brought a suit for the *same relief*.

We are therefore of opinion that the fifth defendant and the plaintiff are not barred by any decision in that suit and the first defendant therefore is not barred.

(1) I.L.R., 14 Mad., 324. (2) I.L.R., 11 Mad., 191.

APPELLATE CIVIL—FULL BENCH.

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

1905. January 20. February 2, 27, 28. March 15.

SWAMINATHA AYYAR AND ANOTHER (FIRST AND SECOND COUNTER-PETITIONERS), APPELLANTS,

v.

VAIDYANATHA SASTRI (PETITIONER), RESPONDENT.*

Civil Procedure Code, Act XIV of 1882, *ss.* 234, 244, 248, 578—*Application to execute decree against representative to be made to Court which passed decree—Application to Court executing decree not an irregularity which can be cured under s.* 578—*Construction of statute.*

On a reference as to whether an application under section 234 of the Code of Civil Procedure to bring the legal representatives of a deceased judgment-debtor on record can be made to the Court to which the decree had been transferred for execution:

Held by the Full Bench, that, where a decree of one Court had been transferred to another Court for execution, an application by the decree-holder under section 234 to execute the decree against the legal representatives of the deceased judgment-debtor must be made to the Court which passed the decree and not to the Court executing the same.

Hirachand Harjivandas v. *Kasturchand Kasidas*, (I.L.R., 18 Bom., 224), approved.

Seth Shapurji Nana Bhai v. *Shankar Dat Dube*, (I.L.R., 17 All., 431), approved.

Sham Lal Pal v. *Modhu Sudan Sircar*, (I.L.R., 22 Calc., 558), not followed.

Per Sir ARNOLD WHITE, C.J.—The provisions of sections 234 and 244 (*c*) are not irreconcilable. The last paragraph of section 244 only applies when a question arises as to who is a 'representative' of a party for the purpose of that section, and ought not to be construed as cutting down the power given to the Court which passed the decree by the express words of section 234.

There is no difficulty in reconciling sections 234 and 248: they can be construed together and due effect given to the provisions of each.

The word 'representative' in section 244 has a much wider meaning than the words 'legal representative' in section 234.

An order under section 234 is not made in exercise of the powers 'in executing a decree,' but as a preliminary step towards those powers being exercised by the Court to which the decree has been transferred.

Section 234 contemplates the making of an order. The legislature in enacting section 244 (*c*) were not distinguishing cases, where a decree had been transferred for execution, between the powers to be exercised by the Court

* Civil Miscellaneous Appeal No. 149 of 1904, presented against the order of M.R.Ry. T. T. Rungachariar, Acting Subordinate Judge of Kumbakonam, in Execution Petition No. 88 of 1904 (Original Suit No. 74 of 1899 on the file of Subordinate Court of Tanjore).

which passed the decree and the powers to be exercised by the Court to which the decree has been transferred respectively, and effect must be given to the express provisions of section 234.

A statute ought to be construed so that, if it can be prevented, no clause, section or word shall be superfluous, void or insignificant.

The Queen v. *Bishop of Oxford* (L.R., 4 Q.B.D., 245).

Per DAVIES, J.—There is a direct and irreconcilable conflict between the provision in the first paragraph of section 234 and that in clause (*c*), section 244, read with the last paragraph of that section.

By the Divisional Bench.—An application under section 234 made to the Court to which the decree is transferred for execution cannot, when objection is taken by the other party to its being entertained, be treated as a mere irregularity under section 578 of the Code of Civil Procedure.

THE facts necessary for this report are fully set out in the following

ORDER OF REFERENCE TO A FULL BENCH:—One Srinivasa Aiyar, plaintiff in Original Suit No. 74 of 1899, on the file of the Subordinate Court of Tanjore, got a decree in execution of which some of the lands of Vaidyanatha Sastri, the fourteenth defendant in the suit, were attached and sold. Srinivasa Aiyar having himself become the purchaser was put in possession of the lands purchased by him. The sale was subsequently set aside and possession of the lands was transferred to Vaidyanatha Sastri who thereupon applied for recovery from Srinivasa Aiyar of the value of the crops received by him during the period he was in possession prior to the sale being set aside. The amount of profits so due was ascertained by an order of the Court, dated the 16th January 1904, and after that order the case was transferred to the Subordinate Court of Kumbakonam for execution of the order as against Srinivasa Aiyar who resided within the limits of that jurisdiction. Subsequent to such transfer but before any application for execution was presented to that Court by Vaidyanatha Sastri, Srinivasa Aiyar died. Thereupon Vaidyanatha Sastri applied on the 28th March 1904 for the recovery of the mesne profits awarded, from the estate of the deceased in the hands of his legal representatives, the present appellants. On the issue of notice to them they contended that the application to proceed against them should have been presented to the Tanjore Subordinate Court. The Subordinate Judge held that the contention was unsustainable.

The point is by no means free from difficulty having regard to the language of the several sections of the Code of Civil Procedure bearing on it. Section 234 read by itself seems to warrant the view

SWAMINATHA AYYAR v. VAIDYANATHA SASTRI.

that the application to proceed against the legal representatives in the first instance should be made to the Court which passed the decree. Section 248 however provides for the issue of notice to the legal representative by the executing Court which may not necessarily be the Court which passed the decree. In *Hirachand Harjivandas and another* v. *Kasturchand Kasidas*(1) these two sections were read together as laying down that the application itself should be made to the Court which passed the decree though when that has been done the notice may issue from the Court which executes the decree. In *Seth Shapurji Nana Bhai* v. *Shankar Dat Dube*(2) Aikman, J., held that it is for the Court which passed the decree to decide whether the person against whom execution is sought is or is not the legal representative, but it is for the Court executing the decree to decide to what extent such person is liable as such representative. In his judgment, however, no reference is made to the concluding paragraph of section 244 of Code which does not seem to be altogether reconcilable with the first of the propositions, referred to above, laid down by the learned Judge. In *Sham Lal Pal and others* v. *Modhu Sudan Sircar and others*(3) it was held that such an application as the one in question here could be made to the executing Court. But in *Amar Chundra Banerjee* v. *Guru Prosunno Mukerjee*(4) Stevens, J., reserved his opinion as to the construction of section 234 and apparently did not wish to be understood as assenting to the view adopted in regard to that section in *Sham Lal Pal and others* v. *Modhu Sudan Sircar and others*(3). In *Venkatappiah* v. *Jagannatha Rao*(5) Bhashyam Ayyangar, J., seems to have considered the point sufficiently doubtful to render it necessary for him to refrain from expressing concurrence with the decision in *Sham Lal Pal and others* v. *Modhu Sudan Sircar and others*(3) taken with the judgment of Banerjee, J., in *Amar Chundra Banerjee* v. *Guru Prosunno Mukerjee*(4).

In this state of the authorities we refer to the opinion of the Full Bench the following question:—

Whether the application of Vaidyanatha Sastri of the 28th March 1904 was properly presented to, and entertainable by, the Subordinate Judge of Kumbakonam.

(1) I.L.R., 18 Bom., 224. (2) I.L.R., 17 All., 431.
(3) I.L.R., 22 Calc., 558. (4) I.L.R., 27 Calc., 488.
(5) C.M.S.A. No. 64 of 1900 (unreported).

SWAMINATHA AYYAR v. VAIDYANATHA SASTRI.

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

T. V. Seshagiri Ayyar for appellants.

K. S. Ramaswami Sastri for respondent.

OPINION—Sir ARNOLD WHITE, C.J.—The conclusion at which I have arrived in this case not, I confess, without doubt, is that our answer to the question which has been referred to us should be in the negative. So far as sections 234 and 248 are concerned no difficulty arises. In section 234, I think, the legislature intended to draw a distinction between the Court which passed the decree, which is the Court referred to in the first paragraph of the section, and the Court executing the decree, which is the Court referred to in the second paragraph of the section, which, if the decree has not been transferred for execution, would be the Court which passed the decree, and which if the decree had been transferred for execution, would be the Court to which the decree had been transferred. The first paragraph is the governing enactment which, in general terms, requires a decree-holder who desires to execute his decree against the representatives of a deceased judgment-debtor to apply to the Court which passed the decree. The second paragraph empowers the Court executing the decree, which may be the Court which passed the decree or may be another Court, to compel the representative to produce accounts for the purpose of ascertaining the extent of the liability.

As regards section 248 it is clear from the explanation to the section that, when a decree has been transferred for execution, and the enforcement of the decree is applied for against the legal representative of a deceased party, the notice to the legal representative must be issued by the Court to which the decree has been transferred for execution. There is no difficulty in reconciling sections 234 and 248. They can be construed together and due effect can be given to the provisions of each. It is impossible to give effect to the view taken by the Subordinate Judge without entirely ignoring the express provisions of section 234.

The real difficulty of construction arises in connection with section 244 (*c*). Now it is quite clear that in enacting section 244 (*c*) the legislature were distinguishing between questions which must be determined by the order of the Court executing the decree, and questions which might be determined by separate suit. They were not distinguishing cases where a decree had been

SWAMINATHA AYYAR v. VAIDYANATHA SASTRI.

transferred for execution between the powers to be exercised by the Court which passed the decree, and the powers to be exercised by the Court to which a decree has been transferred. Further, an order under section 234 is not an order on a question "arising between the parties to the suit in which the decree was passed, or their representatives," within the meaning of these words as used in section 244. All that the Court which passed the decree has to consider before making an order under section 234 is whether AB is the personal representative, and whether the decree should be executed against him. All questions arising between the judgment-creditor and the representative are decided by the executing Court after notice has been issued by the executing Court under section 248.

As regards the last paragraph of section 244 it only applies where a question arises as to who is a representative of a party for the purposes of that section. It ought not, in my opinion, to be construed as cutting down the powers given to the Court which passes a decree by the express words of section 234. The word in section 244 is 'representative' not 'legal representative' as in section 234, and a much wider construction has been placed on the word 'representative' for the purposes of section 244 than could possibly be adopted with reference to the words 'legal representative' in section 234. Section 228 is not inconsistent with the construction of sections 234 and 248 which I am prepared to adopt. An order under section 234 is not made in the exercise of powers 'in executing a decree' but as a preliminary step towards those powers being exercised by the Court to which the decree has been transferred.

I cannot accede to the contention that the first paragraph of section 234 is useless and superfluous since it merely provides for an application being made to the Court which passed the decree and makes no provision for any order being made thereon. I think section 234 does contemplate the making of an order—an order in general terms—Let the decree be executed against AB, the personal representative. Where a decree has been transferred for execution the question of the extent of the liability of the personal representative is determined by an order under section 249 by the Court to which the decree has been transferred after notice to show cause has been issued by that Court under section 248. On grounds of convenience, it certainly seems desirable that

SWAMINATHA AYYAR v. VAIDYANATHA SASTRI.

the application should in all cases be made in the first instance to the Court which passed the decree. Otherwise in cases of concurrent execution (see *Saroda Prosaud Mullick* v. *Luchmeeput Sing Doogur*(1) and *Krishtokishore Dutt* v. *Rooplall Dass*(2)) conflicting orders might be made by the different executing Courts. The executing Court, under the order of transfer, merely exercises a delegated jurisdiction, and it seems both reasonable and convenient, that the order allowing the proceedings to go on should be made by the Court in which the decree was obtained whilst the working out of the order should be by the Court to which the authority to execute the decree has been delegated. Notwithstanding the order of transfer, under section 239, the Court which passed the decree retains the power to order a stay of the execution of the decree. It has been held by the Calcutta High Court that it retains the power to determine a question of limitation raised in the execution proceedings. See the case of *Srihary Mundul* v. *Murari Chowdhry*(3).

I think the provisions of section 234 can be given effect to without doing violence to the language of the other sections to which I have referred. The canon of construction, of course, is that a statute ought to be construed so that, if it can be prevented, no clause, section or word shall be 'superfluous, void or insignificant' (*The Queen* v. *Bishop of Oxford*(4)). Where a decree which has been transferred for execution is assigned, the application for execution must, under section 232, be made to the Court which passed the decree. On this point the authorities are uniform. The reasons given by Markby, J., in the case of *Sheo Narayan Sing* v. *Tarbans Lal*(5) for holding that, when a decree has been assigned, the application must be made to the Court which passed the decree, appear to me to be also applicable when the decree has been transferred and the judgment-creditor seeks to execute it against the representative of a deceased judgment-debtor.

I think the cases *Hirachand Harjivandas* v. *Kasturchand Tasidas*(6) and *Seth Shapurji Nana Bhai* v. *Shankar Dat Dube*(7) were rightly decided and I am prepared to follow them. The case of *Sham Lal Pal* v. *Modhu Sudan Sircar*(8) is no doubt a decision the other way. It is to be observed, however, that in a later

(1) 14 M.I.A., 529 at p. 540.
(2) I.L.R., 8 Calc., 687.
(3) I.L.R., 13 Calc., 257.
(4) L.R., 4 Q.B.D., 245
(5) 5 B.L.R., 497.
(6) I.L.R. 18 Bom., 224.
(7) I.L.R., 17 All., 431.
(8) I.L.R., 22 Calc., 558.

SWAMINATHA AYYAR v. VAIDYANATHA SASTRI.

Calcutta case *Amar Chundra Banerjee* v. *Guru Prosunno Mukerjee*(1) it was held that, in the case of the assignment of a decree, the application must, under section 232, be made to the Court which passed the decree, whilst Banerjee, J., appears to have been of opinion that the case of *Sham Lal Pal* v. *Modhu Sudan Sircar*(2) was rightly decided, Stevens, J., declined to express any opinion on the point.

As I have stated I think our answer to the question referred should be in the negative.

SUBRAHMANIA AYYAR, J.—I concur in answering the question in the negative.

DAVIES, J.—In my view there is a direct conflict between the provision in the first paragraph of section 234 and that in clause (*c*), section 244, read with the last paragraph which was enacted later. I find myself quite unable to reconcile the two. But we must accept one or the other, and it really does not matter which, so long as the question which relates only to formal procedure is settled once for all in this Presidency. I therefore agree to the order proposed to be passed by my learned colleagues.

The case came on for final hearing before Sir Arnold White, Chief Justice, and Subrahmania Ayyar, J., when their Lordships delivered the following.

JUDGMENT:—In accordance with the decision of the Full Bench the appeal will be allowed and the order of the Subordinate Judge of Kumbakonam set aside. We direct that the Subordinate Judge of Kumbakonam do return the application for presentation to the proper Court.

We are unable to accept the suggestion put forward on behalf of the respondent that the entertainment of the petition by the Subordinate Judge's Court of Kumbakonam was an irregularity within section 578 of the Code of Civil Procedure, as objection was taken by the appellants to the application being entertained by that Court. In these circumstances it was the duty of the Subordinate Judge's Court of Kumbakonam to return the application for presentation to the proper Court.

We make no order as to the costs of this appeal.

(1) I.L.R., 27 Calc., 488 at p. 489. (2) I.L.R., 22 Calc., 558.

APPELLATE CIVIL—FULL BENCH.

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

VAIDHINADASAMY AYYAR (PETITIONER), APPELLANT,

v.

SOMASUNDRAM PILLAI (FIRST COUNTER-PETITIONER), RESPONDENT.*

1904. December 20. 1905. January 5. February 27. March 13, 15.

Civil Procedure Code—Act XIV of 1882, *ss.* 258, 230, 295—*Decree for sale with personal remedy for balance unsatisfied governed by s.* 258, *even before sale of mortgage property—S.* 258 *applicable even to decrees for sale alone but not to receipt by mortgagee in possession—Mortgage decrees under s.* 88 *of the Transfer of Property Act.*

A decree directing the sale of mortgaged properties in default of payment of money is a decree for money, whether there is a direction to pay personally or not and whether the remedy against the property is exhausted or not. Such decrees will be money decrees under sections 230, 258 and 295 of the Code of Civil Procedure, although they will not be so under sections 220 and 222 of the Code.

Kommachi Kather v. *Pakker*, (I.L.R., 20 Mad., 107), and *Hart* v. *Tara Prasanna Mukherji*, (I.L.R., 11 Calc., 718), referred to and approved.

The provisions of the Code of Civil Procedure relating to execution of decrees apply with a few exceptions to mortgage decrees under the Transfer of Property Act. There is no conflict between the provisions of section 258 of the Code of Civil Procedure and the provisions of the Transfer of Property Act.

Mallikarjunadu Setti v. *Lingamurti Pantulu*, (I.L.R., 25 Mad., 244), referred to and approved.

Receipts by a mortgagee in possession after decree, though payments to the mortgagee under section 22 of the Limitation Act will not be "moneys payable under the decree" within the meaning of section 258 of the Code of Civil Procedure and consequently the provisions of that section will not apply to such receipts.

Mallikarjuna Sastri v. *Narasimha Rao*, (I.L.R., 24 Mad., 412), overruled.

THE substantial question involved in this case was whether in execution of a mortgage decree, the judgment-debtor could set up

* Civil Miscellaneous Second Appeal No. 27 of 1904, presented against the order of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Civil Miscellaneous Appeal No. 1175 of 1903, presented against the order of M.R.Ry. G. Kothanda Ramanujulu Naidu, District Munsif of Kumbakonam, in Execution Petition No. 399 of 1903 (Original Suit No. 50 of 1898).

VAIDHINADA-SAMY AYYAR v. SOMA-SUNDRAM PILLAI.

as a bar to execution an adjustment of the decree between himself and the decree-holder, which had not been certified by the Court under section 258 of the Code of Civil Procedure. The facts and the question raised are fully set out (by the Chief Justice and Subrahmania Ayyar, J.) in the following

ORDER OF REFERENCE TO A FULL BENCH:—In Original Suit No. 50 of 1898 on the file of the District Munsif of Kumbakonam, one Srinivasa Ayyar obtained, on the 16th January 1899, a decree against the respondent, upon a mortgage. The decree directed a sale of the mortgaged property in default of payment of the money due within three months from that date, and further entitled the decree-holder to proceed for what might not be realized by the sale of the mortgaged property against the respondent personally as well as against his property other than that mortgaged. The appellant, on account of a decree-debt due to himself by the said Srinivasa Ayyar, attached the latter's right under the decree in Original Suit No. 50 of 1898 and on the 10th August 1903 applied, under section 273 of the Civil Procedure Code, for execution thereof. The respondent contended that the decree had been satisfied by an adjustment between himself and Srinivasa Ayyar, the adjustment being said to have taken place on the 17th May 1900. The District Munsif held that the respondent was disentitled to rely upon the alleged adjustment, the same not having been certified as required by section 258 of the Civil Procedure Code, but the District Judge took the contrary view.

The point for determination is how far the provisions of that section apply to a decree such as that required to be executed in the present case—that is to say, one under which money has to be realized by the sale of the property mortgaged and execution has to issue as in the case of a mere money decree in respect of what is not so realized. The correct view would seem to be that, so far as the proceedings in relation to the realization of the debt from the mortgaged property go, the section referred to is inapplicable, as the decree to that extent is not a command to the defendant to pay any money but a decree which, in the contingency of his not choosing to pay, allows process to issue against specific immoveable property; while the case would be different as to the proceedings for the execution of the decree after the remedy against the mortgaged property has been exhausted, since what remains to be executed would be purely a direction to pay money and nothing

VAIDHINADA-SAMY AYYAR v. SOMA-SUNDRAM PILLAI.

more. The case of *Mallikarjuna Sastri* v. *Narasimha Rao*(1) is not inconsistent with the above view inasmuch as there the enquiry into the adjustment had reference to the determination of the question whether the property should be declared free of the encumbrance recognized and enforced by the decree—in other words, to the decree as it directly bore on the mortgaged land. The decision in *Muhammad Ismail Ravuthan* v. *Sinnaveerana Kone*(2), when considered with reference to the facts thereof, will be found not to be in conflict with the above case, for in it, the remedy as against the mortgaged property had been exhausted and the sum of Rs. 300 dealt with by the adjustment there pleaded was the portion of the debt remaining due after the sale of such property. But the decision in *Abdulla Sahib* v. *Doctor Oosman Sahib*(3) is not reconcilable with that in *Mallikarjuna Sastri* v. *Narasimha Rao*(1). For, though the ruling in the one was with reference to section 258 and that in the other to section 230 of the Civil Procedure Code, yet the decision in the latter was that the application for the sale of the mortgaged land was barred, as it was made more than twelve years from, it is to be taken, the date on which the money was payable—in short, that a decree on a mortgage, even in so far as it is a mere mortgage decree only, is a money decree. If this be correct, a mortgage decree, even when the remedy otherwise does not exist or has become barred by limitation, would be a money decree within the meaning of section 230, and therefore of sections 258 and 295 also, of the Civil Procedure Code; and this would seem to involve an undue stretching of the words of those sections and to countenance a view which none of the previous decisions really go to support.

We therefore refer for the opinion of the Full Bench the question:—

Whether section 258 of the Civil Procedure Code has any application to a case such as the present, so long as the remedy against the mortgaged property remains unexhausted.

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

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for appellant.

(1) I.L.R., 24 Mad., 412. (2) C.M.S.A. No. 96 of 1903 (unreported). (3) I.L.R., 28 Mad., 224.

VAIDHINADA-SAMY AYYAR v. SOMA-SUNDRAM PILLAI.

The Hon. Mr. *P. S. Sivaswami Ayyar* for respondent.

The Court expressed the following

OPINION :—The decree in the case under reference contains an order for the sale of the mortgaged property and also an order for the recovery personally from the judgment-debtor and from his other property of what may remain undischarged by the sale-proceeds of the mortgaged property. In *Mallikarjuna Sastri* v. *Narasimha Rao*(1) it was held by a Division Bench of this Court that section 258 of the Civil Procedure Code was inapplicable to such a case. In a case, however, where a similar question was raised in regard to section 295, Civil Procedure Code, Collins, C.J., and Benson, J., had held that a person who had obtained a decree for the sale of mortgaged property and who had not proceeded against such property was entitled to claim rateable distribution under that section as if he was the holder of a decree for money (*Kommachi Kather* v. *Pakker and others*(2)). Following this decision Boddam and Sankaran Nair, JJ., in *Abdulla Sahib* v. *Doctor Oosman Sahib*(3) held that section 230 of the Civil Procedure Code was applicable to decrees containing an order for the sale of the mortgaged property. The words in section 295 of the Code of Civil Procedure and in section 230 so far as the point under discussion is concerned are "decree for money," and "decree for payment of money," respectively. There can be no doubt that in some parts of the Code, as for instance, in sections 220 and 222 the language implies that the framers of the sections intended a distinction between decrees merely directing payment of money and decrees ordering the sale of mortgaged property. If this distinction is to be maintained with reference to sections 230, 258 and 295 of the Code perhaps the course suggested in the order of reference, viz., that, until the remedy against the immoveable property is exhausted, the decree should be treated as not a money decree, would be the one which would enable the distinction to be kept up. But that course would obviously detract from the intention of the Legislature in cases where the decree contains an order for sale as well as an order for payment of money with reference to every one of the three sections mentioned. So far as section 230 is concerned the execution may be prolonged

(1) I.L.R., 24 Mad., 412. (2) I.L.R., 20 Mad., 107.
(3) I.L.R., 28 Mad., 224.

VAIDHINADA-SAMY AYYAR v. SOMA-SUNDRAM PILLAI.

beyond the twelve years prescribed. So far as section 258 is concerned payments or adjustments clearly within the purview of the section as respects the direction to pay the money would be rendered nugatory. And as regards section 295 the inconvenience pointed out in *Kommachi Kather* v. *Pakker and others*(1) will arise. Again the reason of the provision in section 258 is that in cases where the decree is not for the delivery of specific property, that is to say, in cases where the satisfaction of the decree involves nothing more than payment of money, disputes connected with such payments or adjustments out of Court should be heard and determined in execution within a very limited time; and the party failing to obtain such determination should in execution be precluded from relying on them. This reason would seem to be as much applicable to a payment or adjustment with reference to a decree in which there is nothing more than an order for the sale of mortgaged property. The better view seems to be in the language of Tottenham and Agnew, JJ., in *Hart* v. *Tara Prasanna Mukherji*(2) that every decree by virtue of which money is payable is to that extent a decree for money, and that section 258 must be held applicable to cases in which the decree is as here, and even to cases where there is no direction to pay personally at all but only an order for sale, for in either case payment of money would be a complete satisfaction of the real purpose of the decree.

It was, however, urged that such a construction would conflict with the sections of the Transfer of Property Act relating to the passing of decrees in mortgage suits. No doubt according to them an account must be taken of all payments to the mortgagee by the mortgagor in ascertaining the amount for which sale should be ordered. If, however, section 258 of the Code of Civil Procedure is to be treated as among the sections bearing upon the execution of mortgage decrees also, that section, as well as the sections of the Transfer of Property Act relating to the taking of accounts should be read together, and the construction which will give effect to both—those in the Transfer of Property Act as well as those in the Code of Civil Procedure—should be adopted. The basis of the decision of the majority of the Full Bench in *Mallikarjunadu Setti* v. *Lingamurti Pantulu, etc.*(3) is that with a few exceptions

(1) I.L.R., 20 Mad., 107. (2) I.L.R., 11 Calc., 718.
(3) I.L.R., 25 Mad., 244.

VAIDHINADA-SAMY AYYAR v. SOMA-SUNDRAM PILLAI.

the provisions of the Civil Procedure Code relating to execution of decrees are applicable to mortgage decrees contemplated by the Transfer of Property Act. There is nothing in the language of section 258 of the Code of Civil Procedure and of the provisions of the Transfer of Property Act which involves any real conflict between the respective provisions. Only such payments as can be taken notice of by the executing Court in accordance with section 258 of the Code of Civil Procedure will be treated as payments going into the account. Reference was next made to the case of a mortgagee in possession of the mortgaged property and in receipt of the usufruct even after the mortgage decree was passed. No doubt under section 22 of the Indian Limitation Act such receipts are treated as payments to the mortgagee. But this special provision for the purpose of limitation would not make the sums so received payments within the meaning of section 258. Such receipts cannot grammatically be held to come within the words "money payable under the decree" in section 258. They are receipts by the mortgagee from the property in his possession by virtue of the contract and are altogether outside the purview of the section which refers to transactions taking place out of Court between the decree-holder and the judgment-debtor after the decree.

Overruling the decision in *Mallikarjuna Sastri* v. *Narasimha Rao*(1) we answer the question submitted in the affirmative.

The appeal came on for final hearing in due course before Sir Arnold White, Chief Justice, and Subrahmania Ayyar, J., when the Court delivered the following

JUDGMENT :—In accordance with the decision of the Full Bench the order of the lower Appellate Court must be set aside and that of the Munsif restored.

We make no order as to costs in this Court or in the lower Appellate Court.

(1) I.L.R., 24 Mad., 412.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Benson.

1905. April 7, 17, 19.

JOHNSON AND ANOTHER (PLAINTIFFS), APPELLANTS, IN ORIGINAL SIDE APPEAL No. 48 OF 1904,
PORTO NOVO CUNDASAMY AND OTHERS (PLAINTIFFS), APPELLANTS, IN ORIGINAL SIDE APPEAL No. 51 OF 1904,

v.

THE MADRAS RAILWAY COMPANY (DEFENDANTS), RESPONDENTS IN BOTH.*

Fatal Accidents Act (Indian)—XIII of 1855—*'Representative of the deceased' who are—The right under the Act is distinct in each and is a several, not joint, right —Limitation Act XV of* 1877, *ss.* 7, 8, *art.* 21, *sched II—Representatives under Act XIII of* 1855 *not persons 'entitled to sue within the meaning of s.* 7 *nor 'joint creditors' or joint claimants within the meaning of s.* 8 *of the Limitation Act—Construction of statute.*

The word 'representative' in Act XIII of 1855 does not mean only executors or administrators, but includes all or any one of the persons for whose benefit a suit may be brought under the Act and it makes no difference whether the deceased was a European or Eurasian.

Under article 21, schedule II of the Limitation Act, the suit must be brought within one year from death unless the bar is saved by section 7 or 8 of that Act.

The right of the beneficiaries under Act XIII of 1855 is not a joint right, but a distinct and several right in respect of the same cause of action enforceable at the suit of all or one of them suing for himself and the rest.

Pym v. *The Great Northern Railway Co.* (4 B. & S., 396).

The beneficiaries are in the position of joint decree-holders and the right of suit conferred by Act XIII of 1855 is analogous to the right to apply for execution conferred on one or more of several joint decree-holders by section 231 of the Code of Civil Procedure. The beneficiaries therefore are not persons 'entitled to sue' within the meaning of section 7 of the Limitation Act and limitation will run against all when any one is competent to bring the suit.

The principle in *Periasami* v. *Krishna Ayyan*, (I.L.R., 25 Mad., 431), followed.

They are also not joint creditors nor joint claimants under section 8 of the Limitation Act. Joint claimants are persons whose substantive rights are identical and not those who are permitted to enforce distinct and different rights under one judicial process.

Ahinsa Bibi v. *Abdul Kader Saheb*, (I.L.R., 25 Mad., 26), distinguished.

* Original Side Appeal Nos. 48 and 51 of 1904, presented against the judgment of Mr. Justice Moore in Original Suit Nos. 76 and 159 of 1904, respectively.

JOHNSON v. THE MADRAS RAILWAY COMPANY.

Sections 7 and 8 of the Limitation Act must be held to apply to suits under article 21 if they are capable of being grammatically applicable to them. The previous state of the law and the absence of evidence to show that the Legislature meant to effect a change will not justify Courts in holding, in the absence of express words, that they do not so apply.

THESE suits were brought under Act XIII of 1855 for compensation for death caused by the negligence of the defendant, the Madras Railway Company, resulting in what is known as the Mangapatnam accident. The accident in question took place on the night of the 11th September 1902. Civil Suit No. 76 of 1904 was instituted on the 28th April 1904 and Civil Suit No. 159 of 1904 was instituted on the 7th October 1904.

The plaintiffs in Civil Suit No. 76 of 1904 are the minor son and daughter of one Mr. Johnson, an Eurasian, who was killed in the accident, represented by their mother and guardian as next friend. No letters of administration or probate had been obtained to the estate of the deceased. The plaintiffs in Civil Suit No. 159 of 1904 are the minor sons of Narayanasawmi Mudali, a Hindu, who was killed in the same accident. They were represented by their mother and guardian as next friend. There were no executors or administrators in this case also. The defendant pleaded *inter alia* in both the suits that the plaintiffs' claim was barred by limitation. In Civil Suit No. 76 of 1904 the defendant further pleaded that the plaintiffs were governed by the provisions of the Indian Succession Act and that they were not 'representatives' as that could only apply to executors or administrators. In Civil Suit No. 159 of 1904, the objection was again taken that the plaintiffs were not the representatives of the deceased. The contention that the plaintiffs were not 'representatives' was overruled in both cases by Mr. Justice Moore. The material portion of his Lordship's judgment is as follows:—

"The case has been posted for trial of two preliminary issues, namely, as to whether the plaintiffs are entitled to sue as representatives of their deceased father and as to limitation. Mr. Chamier for the plaintiffs contends that the plaintiffs are representatives of the deceased under section I of the Act, but that the widow should not be held to be a representative, while Mr. Napier for the defendant maintains that neither the minor children of the deceased nor his widow can be deemed to be his representatives. Mr. Napier argues that, according to legal phraseology in England, the

JOHNSON v. THE MADRAS RAILWAY COMPANY.

representative of a deceased person means his executor or administrator and no one else, that Mr. Johnson was a Eurasian governed by Act X of 1865 and that in considering what the word representative means in the Act of 1855 when applied to such a person, it must be held that it refers to his executor or administrator and cannot refer to any other person. Mr. Napier referred to several decisions which certainly support the contention that the words legal representative, personal representative and representative as used in statutes and judgments of Courts in England refer to executors and administrators only and can be applied to no one else. It does not, however, in my opinion follow that the word representative as used in the Act of 1855 when applied to a person governed by Act X of 1865 means an executor or administrator and no one else. The wording of the section to my mind shows clearly that this is not a correct view to take. It cannot have been the intention of the Legislature to declare by section I of the Act that a suit brought for the benefit of the wife or child of a deceased European shall be brought by his executor or administrator or representative, *i.e.*, executor or administrator. Mr. Napier attempts to remove this difficulty by the contention that in this section the words executor and administrator alone are applicable to persons governed by Act X of 1865 while those words and also the word representative are to be applied in the case of Hindus and Muhammadans. I cannot accept this interpretation. It must, I conceive, have been the intention of the framers of the Act that all the three words should be applicable to all persons with respect to whose estate a suit might be brought under the Act, whether Europeans, Eurasians, Hindus or Muhammadans. In other words, if a European or a Hindu has an executor or administrator such executor or administrator must bring the suit, but if there is no executor or administrator the suit can be brought by any person whom the Court holds to be a representative of the deceased. The next question to be considered is as to whether the Court should hold that, in the absence of an executor or administrator, the son of the deceased can, for the purposes of this suit, be deemed to be his representative. I am of opinion that it should be decided that not only the sons of the deceased but also his widow are entitled to bring a suit under the Act as his representatives. The Statute (9 & 10 Vict., Chap. 93.—1846) on which the Indian Act of 1855 is

JOHNSON v. THE MADRAS RAILWAY COMPANY.

based, provides that the suit should be brought by the executor or administrator of the deceased. There is no mention of representatives. As it was found that, owing to the difficulty and expense of taking out letters of administration, persons entitled to compensation were prevented from recovering the same it was enacted in 1864 (27 & 28 Vict., Chap. 95) that in case the executor or administrator did not sue within six months, all or any of the persons for whose benefit the right of action was given by the statute of 1846 might sue in their own names. It was not, however, found to be necessary to amend the Indian Act of 1855, because it was, as I believe, considered, that the word representatives in that Act included all the persons for whose benefit the right of action was given. It must be remembered that the right of action conferred by the Act is not for the benefit of the personal estate of the deceased, but for the benefit of his wife, parent and child and further that, as held by the Court of Queen's Bench in *Blake* v. *Midland Railway Company*(1), the Act does not transfer to representatives the right of action which the person killed would have had 'but gives to the representative a totally new right of action on different principles.' There are not many reported decisions of the Courts regarding the provisions of the Act of 1855, but the view that I take, namely, that where there is no executor or administrator, any one or more of the persons for whose benefit the right of action is given can sue to enforce that right seems to be that which has been acted on by the Courts although there is no direct decision to that effect. *Lyell* v. *Ganga Dai*(2) for example, was a case that was very fully argued and eventually came before a Full Bench of five Judges. That was a suit brought by a widow (Ganga Dai) to recover damages on account of the death of her husband, and, as far as can be seen from the report, it was never even suggested that she was not entitled to sue as her husband's representative. Reference may also be made to *Vinayak Raghunath* v. *The G.I.P. Railway Company*(3) where it was held by Westropp, C.J., that an adopted son was entitled to bring a suit under this Act as legal representative. I therefore hold on the first issue that the plaintiffs are entitled to sue as representatives of the deceased."

(1) 18 Q.B., 93 at p. 110 (2) I.L.R., 1 All., 60.
(3) 7 B.H.C.R., 113.

JOHNSON v. THE MADRAS RAILWAY COMPANY.

On the question of limitation the learned Judge held that both the suits were barred under article 21 of schedule II of the Limitation Act and that section 7 of the same Act did not save the bar as there were, in both cases, the widows who could have brought the suits as representatives of their deceased husbands.

The plaintiffs in both cases appealed.

Mr. *D. Chamier* for appellants in Original Side Appeals Nos. 48 and 51 of 1904.

The Advocate-General (Hon Mr. *J. P. Wallis*) and Mr. *Napier* for respondent in both.

JUDGMENT.—In one of these cases the plaintiffs are the minor children of one, Johnson, a railway passenger, who was killed in the Mangapatnam railway accident. The plaintiffs sue with their mother, the widow of the deceased, as their next friend. In the other suit the plaintiffs are the minor children of a Hindu named Narayanasami Mudali, another railway passenger, who lost his life in the same accident. They also sue with their mother, the widow of the deceased, as their next friend. In neither case is there any executor or administrator of the deceased. The suits are brought against the Madras Railway Company for compensation under Act XIII of 1855, and were instituted after the expiry of one year from the death of the persons referred to. The question is whether the suits are time barred. The answer to this question must be in the affirmative with reference to article 21 of schedule II of the Indian Limitation Act unless the bar is saved by the provisions of section 7 or 8 of the Act.

Before proceeding to consider the applicability of these provisions to the cases, it is necessary to see what is the precise nature of the right conferred by Act XIII of 1855 under which the claims are made. As stated in the preamble of the Act itself the relations of a person whose death was caused by the wrongful act of another were not, prior to its enactment, entitled to claim compensation on account of the death. The right to claim compensation in respect of such a death was created by the Act. It is provided that every suit shall be for the benefit of certain specified near relations of the deceased "and shall be brought by and in the name of the executor, administrator or representative of the person deceased."

The learned Advocate-General for the defendants contends that in the case of Europeans and Eurasians the only

JOHNSON v. THE MADRAS RAILWAY COMPANY.

"representative" of a deceased man is his executor or administrator, and that in this Act the word "representative" has no application to Europeans and Eurasians but is used only with reference to Hindus and Muhammadans. Mr. Chamier for the plaintiff contends that the word "representative" in the Act is equivalent to, and includes, all the "heirs" of the deceased. We do not think that either of these views is correct. That the word is not equivalent to "heirs" seems clear from the fact that in Act XII of 1855 which was passed on the same day as Act XIII, and which deals with a cognate subject, the right is given to bring a suit against "heirs or representatives" of the deceased wrong doer. Nor do we think that there is any reason for limiting the meaning of "representative" in the narrow way suggested by the Advocate-General. We think that the word means and includes all or any one of the persons for whose benefit a suit under the Act can be maintained. These persons are the representatives of the deceased, in the sense, that they are the persons taking the place of the deceased in obtaining reparation for the wrong done.

In cases where the deceased is represented by an executor or an administrator such an executor or administrator is given the power to sue for the compensation for the benefit of the specified relations. Where there is no executor or administrator or where there is one, and he fails, or is unwilling to sue, then in our opinion the suit may be instituted by, and in the name of, the representative of the person deceased. But one suit only is allowed to enforce the claims of all the persons beneficially entitled,—it being provided that the rights of each and every one of them shall be adjudged and adjusted by the Court in such suit. The right of *each* beneficiary is only to receive compensation in proportion to the loss occasioned to *him* by the death of his deceased relative. From this it follows, and it was in effect so decided in *Pym* v. *The Great Northern Railway Co.*(1) with reference to the provisions of Lord Campbell's Act, that the right of the beneficiaries to compensation is a right distinct in each. In short the beneficiaries entitled to compensation under Act XIII of 1855 are not persons entitled to claim compensation *jointly*, but are parties entitled to relief *severally*, in respect of the same cause of action

(1) 4 B. & S. 396.

JOHNSON v. THE MADRAS RAILWAY COMPANY.

which is enforceable at the suit of all or any one of them suing for himself and the rest. If this is the correct view of the statutory right given to persons in the position of the plaintiffs in these cases, it is clear that section 7 of the Limitation Act has no application to suits such as the present, since in each case there is a widow of the deceased who was under no disability, and who could have sued, and therefore all the persons entitled to the compensation and capable of instituting the suit were not minors or otherwise incapable of suing within the period of one year prescribed by article 21. With reference to the view that in cases like the present the suit might have been brought by any one of the beneficiaries for the benefit of all, the case is analogous to that of a joint decree-holder who can, with the permission of the Court under section 231, Civil Procedure Code, take out execution of the decree for the benefit of himself and the other decree-holders, but who was held not to be a person entitled to apply in his own right within the meaning of section 7 of the Limitation Act. See the Full Bench decision in *Periasami* v. *Krishna Ayyan*(1), where it was held that the time with reference to an application for the execution of a decree passed in favour of several persons jointly, ran against all the decree-holders notwithstanding the minority of some of the decree-holders, and notwithstanding that any one of them might, with the permission of the Court, have executed the whole decree on behalf of all.

Passing now to section 8 of the Limitation Act, that also must be held to be inapplicable. Of course persons having claims such as those sought to be enforced here are not joint creditors, and unless they can be held to be *joint claimants* of the kind mentioned in the section the benefit thereof cannot be claimed by them. From the language of the whole section it is obvious that the term "joint claimants" is used with reference to persons whose *substantive* right is joint, or to put it otherwise, with reference to more than one individual possessing the same identical substantive right. The latter part of the section relating to the discharge by one of the joint creditors or claimants, without the concurrence of the others, conclusively points to the correctness of this view. The expression therefore does not comprehend persons whose rights are distinct and *different* but who are permitted to enforce

(1) I.L.R., 25 Mad., 431.

JOHNSON v. THE MADRAS RAILWAY COMPANY.

such separate rights by one judicial process to which all are parties or by a process instituted by one on behalf of all, *Ahinsa Bibi* v. *Abdul Kader Saheb*(1) is distinguishable on the ground that the right to sue for an account and share of profits of the partnership sought to be enforced by the heirs of the deceased partner was joint and indivisible notwithstanding the several character of their interests *inter se* in the profits, if any.

Now with reference to suits brought for compensation under the Act as it stood before it was amended by Act IX of 1871, the question of the disability of any or all of the persons entitled to compensation was immaterial, and the suit had to be brought within a year from the date of death. Whether when the words "and that every such action shall be brought within twelve calendar months after the death of such deceased person" in section 2 of Act XIII of 1855 were repealed and article 21 of the second schedule to Indian Limitation Act was introduced there was an intention to make a real change in the law, it is not easy to say. Having regard to the object and purpose of Act XIII of 1855 and the inexpediency of postponing the trial of questions of fact involved in a claim to be made under the provisions of the Act, it is not probable that the running of time was meant to be suspended on account of any disability on the part of some of the persons beneficially entitled. It is not improbable that the repeal of the provision as to limitation contained in Act XIII of 1855 as it stood before the amendment and the enactment of article 21 in lieu of it, were merely for the sake of symmetry as urged by the learned Advocate-General. Still the mere absence of evidence that the Legislature intended to effect a real change in the law would not justify the Court in holding that the present suits are barred by limitation if the language of section 7 or 8 was grammatically capable of application to them. That, however, as already pointed out, is not the case.

The conclusion of the learned Judge is therefore right and the appeals fail and are dismissed with costs.

Messrs. *Short & Bewes*—attorneys for appellants.

Messrs. *Orr, David & Brightwell*—attorneys for respondents.

(1) I.L.R., 25 Mad., 26.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Benson.

1905. April 3.

RAMCHODE DOSS (PLAINTIFF), APPELLANT,

v.

RUKMANY BHOY (DEFENDANT), RESPONDENT.*

Legal Representatives' Suits Act—XII of 1855, *s.* 1, *cl.* 2—*Does not apply to suits against the original wrong doer.*

Clause 2 of section 1 of Act XII of 1855 does not apply to an action commenced against the wrong doer in his lifetime, but only to actions commenced against the executors, administrators or other representatives of a deceased wrong doer. Where therefore a suit is brought against the wrong doer in his lifetime, such suit abates on his death.

Haridas Ramdas v. *Ramdas Mathuradas*, (I.L.R., 13 Bom., 677), followed.

Krishna Behary Sen v. *The Corporation of Calcutta*, (I.L.R., 31 Calc., 406), referred to and approved.

Suit for damages. Plaintiff was the son of one Goverdhan Doss who died in February 1903. A few days after his death one Rukmany Bhoy, the original defendant in the suit, demanded from the plaintiff the return of a Government promissory note for Rs. 3,000 which she alleged she had deposited with his deceased father and also a sum of money which she said was due to her. The plaintiff told her that according to the accounts only Rs. 700 was due to her which he offered to pay in full discharge of all her claims. The defendant thereupon brought a complaint against the plaintiff before the Magistrate charging him with criminal breach of trust and other offences and obtained a search warrant, under which the plaintiff's papers and account books were seized and conveyed to the Police Court. The complaint was dismissed by the Presidency Magistrate without framing a charge.

The present suit was brought by the plaintiff against Rakmany Bhoy for damages for malicious prosecution. The defendant denied that the prosecution was false or malicious and issues were settled. Subsequent to the settlement of issues and

* Original Side Appeal No. 32 of 1904, presented against the judgment of Mr. Justice Moore in Original Suit No. 104 of 1903.

RAMCHODE DOSS v. RUKMANY BHOY.

before the final hearing, the defendant died and the plaintiff applied for leave to bring on the record, as her legal representative, the respondent Krishna Doss Vittal Doss, the sole executor, under her last will and testament.

MOORE, J., held that the suit abated on the death of the defendant and dismissed the application. In doing so he passed the following judgment:—"It appears to me that the suit abates. Reference has been made to Act XII of 1855, but following the decisions in *Haridas Ramdas* v. *Ramdas Mathuradas*(1) and *Krishna Behary Sen* v. *The Corporation of Calcutta*(2), I must hold that that Act does not apply to a suit such as this instituted by the plaintiff against the defendant (since deceased) in his lifetime."

The plaintiff preferred this appeal.

Mr. *A. Read* for appellant.

K. Narayana Rau and *C. P. Ramaswami Ayyar* for respondent.

JUDGMENT.—The only point raised in this case by Mr. A. Read is that the second clause of section 1 of Act XII of 1855 applies, and that he is entitled to proceed against the representative of the deceased defendant, the person who is alleged to have maliciously prosecuted the plaintiff.

A similar argument was urged in *Haridas Ramdas* v. *Ramdas Mathuradas*(1) followed by the learned Judge, and was overruled. We agree with the Bombay High Court that clause 2 of section 1 of the Act XII of 1855 does not apply to an action commenced against the defendant in his lifetime, but only to actions commenced against the executors, administrators or other representatives of a deceased wrong doer.

The Calcutta case (*Krishna Behary Sen* v. *The Corporation of Calcutta*(2)) referred to by the learned Judge takes a similar view with regard to the first clause of the section.

We dismiss the appeal with costs.

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

(1) I.L.R., 13 Bom., 677. (2) I.L.R., 31 Calc., 406.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Boddam.

1905. February 20, April 25.

THE REGULATION COLLECTOR OF KALAHASTI AND KARVETNAGAR ESTATES (DECIDING OFFICER), APPELLANT,

v.

RAMASAMI CHETTI (CLAIMANT), RESPONDENT.*

Madras Court of Wards Regulation V of 1804 *as amended by Madras Act IV of* 1899, *ss.* 35, 37—*Power of local Government to make rules—Such rules may provide for claims not passed into decrees—Rules* 6 *and* 7 *do not authorise a reference to the District Court when no dispute as to fact or extent of liability in regard to principal matter of claim—Civil Procedure Code—Act XIV of* 1882, *s.* 322 (*a*), (*b*) *and* (*d*).

Under sections 35 and 37 of Regulation V of 1804, the local Government has power to make rules in regard to claims which have not merged into decrees and to extend to such claims the procedure laid down in section 322 (*a*), (*b*) and (*d*) of the Code of Civil Procedure.

Rules 6 and 7 of the rules framed under section 35 of Regulation V of 1804 do not authorise the Decree Collector to make a reference to the District Court in respect of the interest to be allowed to a creditor unless there is a dispute as to the fact or extent of liability in regard to the principle matter of the claim, and the question of interest arises as accessory and incidental to the disposal of the main claim.

UNDER Madras Regulation V of 1804 as amended by the Madras Act IV of 1899, the Court of Wards assumed superintendence of the Kalahasti estate and the appellant was appointed to perform the functions of the Collector under the Act in respect of such estate. A notice under section 30 of Regulation V of 1804 was issued calling upon all persons having claims against the Kalahasti estate to notify their claims to the Regulation Collector. The respondent put in a claim for Rs. 15,313 being the principal and interest due on a mortgage bond for Rs. 14,000, dated 24th October 1898, carrying interest at 9 per cent.

Further proceedings will appear from the order of the District Judge under appeal, which was as follows:—

ORDER.—"One Pangalore Ramasami Chetty, son of Pangalore Munisamy Chetty, of Tirupati, preferred a claim to the Regulation

* Appeal No. 122 of 1904, presented against the order of Mr. K. C. Manavedan Rajah, District Judge of North Arcot, in Referred Case No. 1 of 1903.

THE REGULATION COLLECTOR OF KALAHASTI AND KARVETNAGAR ESTATES v. RAMASAMI CHETTI.

Collector against the Kalahasti estate under section 30 of the Madras Regulation V of 1804 as amended by Act IV of 1899 to the extent of Rs. 14,000 secured by a deed of mortgage, dated 24th October 1898, and the interest thereon at 9 per cent. per annum. The Regulation Collector admitted the claim for the principal, and made a note that the claimant agreed to reduce the rate of interest to 6 per cent. from the date of the deed; and forwarded a statement of the claim to the Decree Collector under rule 3 of the rules framed under section 35 of the Regulation. The Decree Collector resolved to reduce the rate of interest and communicated his resolution to the claimant. The latter objected that section 35 of the Regulation confers powers only so far as claims based on decrees already passed are concerned, and does not extend those powers to claims such as the one in question and that the reduction of interest on this claim purporting to have been made in exercise of such powers cannot bind him. The Decree Collector referred the case to this Court with a statement of the case.

There are two kinds of claims contemplated by the Act—claims based on decrees and claims which have not yet been decreed. The procedure laid down in sections 29, 30, 32 and 33 of the Act applies to both classes of claims, whereas the claims provided for in section 35 are decrees which are capable of execution by sale of any immoveable property, or which in pursuance of a contract specifically affecting any such immoveable property order the sale of the same, whether such decrees be passed prior to the notification referred to in the section, or subsequent thereto, and which are to be transferred to the Collector for execution after the issue of such notification. There is no doubt that in respect of these claims that fall under section 35, the Collector is authorised to make a reference to this Court under the rules made under that section. But, as regards the claims for which there are no decrees and which are also dealt with in sections 29, 30, 32 and 33 there is nothing in these sections themselves prescribing a reference to this Court in case of a dispute arising between him and the claimant. The question now to be considered is whether the Governor in Council has power under section 35 to prescribe rules for dealing with claims other than what I may call decree claims. In my view section 35 does not give the Governor in Council power to make any such rules. The rules intended to be prescribed thereunder are rules for the transmission of the

THE REGULATION COLLECTOR OF KALAHASTI AND KARVETNAGAR ESTATES v. RAMASAMI CHETTI.

decree from the Civil Court to the Collector and for regulating the procedure of the Collector in executing the same, and for re-transmitting the decree from the Collector to the Civil Court. I think therefore that the rules, so far as they relate to claims other than decree claims, are *ultra vires*, and that in respect of those claims it was not the intention of the Legislature that a reference should be made to Civil Courts. This view receives support from the terms of the proviso to section 32 which says that nothing herein contained shall be construed as precluding any claimant from continuing or instituting proceedings in any Court in respect of any claim whether such claim be allowed or disallowed by the Court of Wards in whole or in part. The ordinary remedy which the claimant has is not interfered with by the Act, and, as he may come to Court obviously, it seems not to have been the intention of the Legislature that a reference should be made by the Decree Collector.

I hold that the Decree Collector's reference is *ultra vires* and that this Court has no jurisdiction. The claimant will have his costs from the estate."

The Regulation Collector preferred this appeal.

Sir *V. Bhashyam Ayyangar* for appellant.

V. Krishnaswami Ayyar and *C. V. Krishnaswami Ayyar* for respondent.

JUDGMENT.—We are unable to agree with the District Judge that the rules framed under section 35 of Regulation V of 1804 are *ultra vires* with reference to claims which had not become merged in a decree. Section 37 of Regulation V of 1804 made applicable the sections of the Civil Procedure Code, therein enumerated, to the execution of decrees transferred under section 35 of Regulation V of 1804. Under section 322 (*a*) of the Civil Procedure Code, which is one of those sections, it is provided that any person having a claim on the property referred to in section 322 may be called upon to submit to the Collector a statement of such claim. Section 322 (*b*) provides that, if any dispute arises in such a case, the Collector shall make a reference to the Court and that the Court shall decide the matter, if the matter be within its jurisdiction or transmit the matter to a competent Court for disposal. Section 322 (*d*) provides that such decision between the parties thereto shall have the force of a decree and be appealable as a decree.

THE REGULATION COLLECTOR OF KALAHASTI AND KARVETNAGAR ESTATES v. RAMASAMI CHETTI.

It seems to us that the portion of the rules to which the District Judge takes exception, introduces, with reference to claims which have not passed into a decree the procedure which sections 322 (*a*), (*b*) and (*d*) lay down in regard to matters covered by those sections. Having regard to the express extension of section 322 (*a*), (*b*) and (*d*) amongst others, by section 37 of Regulation V of 1804 to execution of decrees to be transferred under section 35 of Regulation V of 1804, the rules in question are clearly "*intra vires*." It was, however, contended on behalf of the respondent that, having regard to the admitted facts of the case, it was not open to the Decree Collector to make any reference in the present matter to the District Court and we think this contention is well founded. There was no dispute whatever, before the Regulation Collector or before the Decree Collector, either as to the fact or the extent of the liability of the proprietor in respect of the respondent's claim, under the mortgage bond, dated the 24th October 1898. The right to the principal as well as to the interest as provided in the bond was admitted, though the Regulation Collector decided to allow interest at a reduced rate from a certain date mentioned in his order. When the matter came before the Decree Collector, the respondent did not make any claim or representation requiring a decision. He merely contended himself with intimating that, in the circumstances of the case, neither the Regulation Collector nor the Decree Collector had power to allow only the reduced interest. No doubt, the explanation to rule 6 of the rules, provides that in the case of all claims in respect of which no decree has been passed, it shall be competent to the Collector to fix the rate of interest payable in the same way as a Civil Court under section 209 of the Civil Procedure Code, and that any dispute as to the rate so fixed shall be referred to the Court under rule 7. This provision as an explanation to rule 6 should, we think, be taken as applicable only to a case to which the rule itself applies, viz., where there is a dispute as to the fact, or extent of liability in regard to what is the principal matter of the claim and the question of interest arises as accessory and incidental to the disposal of the main claim.

If, as contended for the appellant, it was intended to give to the Collector the power of reducing the interest in other cases also, the provision would, we think, have been introduced, not as an explanation to rule 6 but as an independent rule. Accordingly

THE REGULATION COLLECTOR OF KALAHASTI AND KARVETNAGAR ESTATES v. RAMASAMI CHETTI.

we uphold the order of the lower Court on the ground that it was not competent in the circumstances of this case for the Decree Collector to make the reference to the Court.

Each party will bear his own costs.

APPELLATE CIVIL.

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

1905. February 9.

ALAYAKAMMAL (PLAINTIFF), APPELLANT,

v.

SUBBARAMA GOUNDAN AND OTHERS (DEFENDANTS Nos. 1 TO 9 AND 11), RESPONDENTS.*

Limitation Act XV of 1877, sch. II, art. 132—Suit for contribution from co-sharer for money paid for Government revenue, limitation for—Plaint presented as a pauper petition within time and full stamp subsequently paid—Suit instituted when plaint presented and not when court-fee is paid.

A co-sharer paying Government revenue due on land has a charge on the land for the amount so paid to the extent to which he is entitled to contribution from the other share-holders and the period of limitation to enforce such charge is 12 years under article 132 of schedule II of the Limitation Act.

Rajah of Vizianagaram v. *Rajah Setrucherla Somasekhararaz*, (I.L.R., 26 Mad., 686 at p. 708), followed.

When a plaint is presented as a pauper petition and before disposal of the petition the full stamp duty is paid after the period of limitation, the suit, in the absence of fraud, will be considered as instituted on the day the plaint was presented and the subsequent payment of stamp duty will relate back to the date of presentation of the plaint.

Stuart Skinner alias *Nawab Mirza* v. *William Orde*, (I.L.R., 2 All., 241), followed.

THE plaintiff's deceased husband and defendants Nos. 1 to 7 were originally members of an undivided family. Plaintiff's husband sued for partition in Original Suit No. 17 of 1885. A compromise decree was made in July 1887 and a partition was effected in 1893. This suit was brought by the plaintiff to recover from the defendants a sum of Rs. 5,500 paid in March 1888 by the plaintiff to prevent certain family properties in the possession of the defendants

* Appeal No. 126 of 1902, presented against the decree of M.R.Ry. W. Gopala Chariar, Subordinate Judge of Bellary and Salem at Salem, in Original Suit No. 3 of 1901.

ALAYA-KAMMAL v. SUBBARAYA GOUNDAN.

from being sold for arrears of revenue, and a sum of Rs. 2,500 paid in February or March 1891 for a similar reason. The plaintiff claimed other amounts which were disallowed and no appeal was presented in regard to such items. The plaint contained a prayer that the amounts claimed should be declared to be a first charge on the properties, moveable and immoveable, belonging to the defendants Nos. 1 to 7. The plaint was first presented as a pauper petition on 5th March 1900 but, before the petition was disposed of, the plaintiff offered on the 28th September 1901 to pay the full stamp duty. This was allowed and the suit was registered on the 30th September 1901.

As regards the two amounts claimed in respect of arrears paid, the Subordinate Judge held that the relief claimed in the plaint was a personal remedy and was not for the enforcement of a charge and that the period of limitation was three years under either article 61 or article 99 of Limitation Act. He held that article 132 of the Act did not apply.

The plaintiff preferred this appeal on the ground that the relief claimed in the plaint was not a personal remedy, but that the suit as framed was one to enforce payment of money charged upon immoveable property and that the case fell within article 132, schedule II of the Limitation Act.

C. Sankaran Nair for appellant.

The Hon. Mr. *P. S. Sivaswami Ayyar* for respondents Nos. 1 to 6 and Nos. 8 and 9.

JUDGMENT.—We find that the Subordinate Judge was in error in holding that the suit was barred by limitation. The appeal relates only to sums paid by the plaintiff on account of Government revenue in March 1888 and in March 1891, viz., the first two items in the plaint. In accordance with the decision of the Full Bench in the case of *Rajah of Vizianagram* v. *Rajah Setrucherla Somasekhararaz*(1), the person paying Government revenue due on land has a charge on the land for the amount so paid to the extent to which he is entitled to contribution from the other share-holders; and the article applicable to a suit to recover such a charge is article 132. The suit is not barred until the expiry of 12 years from the time when the money was paid. It is urged that, in respect of the first of the sums to which this

(1) I.L.R., 26 Mad., 686 at p. 708.

ALAYA-KAMMAL v. SUBBARAYA GOUNDAN.

appeal relates, the claim should be held to be barred even under article 132, as the stamp duty on the plaint was not paid until after the expiry of 12 years from March 1888. The payment of stamp duty, however, relates back to the date of the presentation of the plaint, as a proper plaint, in the absence of any evidence to show that there was fraud in putting in the plaint without a stamp (*Stuart Skinner* alias *Nawab Mirza* v. *William Orde*(1)).

If the presentation was within 12 years from the date of the payment in March 1888, then the suit would be in time. The actual date of the payment in March 1888 does not appear, and the question whether the suit as regards this item is in time, must be dealt with by the lower Court, on taking evidence. We must also point out that the plaint is not sufficiently definite as to the property on which the charge is to be established. The plaintiff should be required to amend the plaint in this respect. We set aside the decree of the lower Court and remand this suit as against defendants Nos. 1 to 9, for disposal as regards items 1 and 2 in the plaint, in accordance with law.

APPELLATE CIVIL.

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

KRISHNAMARAZU (PLAINTIFF), APPELLANT,

v.

MARRAJU (DEFENDANT), RESPONDENT.*

1905. March 14.

Easements Act V of 1882, *s.* 13, *cls.* (*e*), (*f*)—*Easement of necessity—No easement on the ground of convenience when there is other means of access—Evidence Act I of* 1872, *s.* 92—*Oral contemporaneous agreement cannot be set up to add to a written contract.*

Held, that if A has a means of access to his property without going over B's land, A cannot claim a right of way over B's land on the ground that it is the most convenient means of access. The law under section 13, clause (*e*) of the Easements Act is the same as the law in England.

Wutzler v. *Sharpe*, (I.L.R., 15 All., 270 at p. 281), followed.

Esubai v. *Damodar Ishvardas*, (I.L.R., 16 Bom., 552 at p. 559), not followed.

(1) I.L.R., 2 All., 241.

* Second Appeal No. 351 of 1903, presented against the decree of E. L. R. Thornton, Esq., District Judge of Godavari, in Appeal Suit No. 196 of 1902, presented against the decree of M.R.Ry. P. N. Satagopa Naidu, District Munsif of Bhimavaram, in Original Suit No. 649 of 1900.

KRISHNAMA-RAZU v. MARRAJU

The Municipality of the City of Poona v. *Vaman Rajaram Gholap*, (I.L.R., 19 Bom., 797), not followed.

To sustain a claim under section 13, clause (*f*) of the Easements Act, the easement claimed must be apparent and continuous.

A contract in writing cannot be added to by a contemporaneous oral agreement.

SUIT by the plaintiff to restrain the defendant from interfering with his (plaintiff's) raising a wall and to restrain the defendant from walking over a certain portion of plaintiff's ground and for Rs. 25 damages.

The plaintiff, the defendant and another V, now deceased, were brothers. They effected a partition by deed, in May 1896, by which among other things they divided certain houses and open sites. A lane leading to the defendant's house was easily accessible by using a vacant site belonging to the plaintiff under the partition and by crossing a wall which divided the plaintiff's property from the defendants. The exclusive right of the plaintiff to the said wall was admitted by the defendant in a letter of the 17th October 1897. The plaintiff on attempting to raise the wall was obstructed by the defendant, who also continued to use the plaintiff's ground as a pathway to the lane. Plaintiff brought this suit. The defendant set up an oral agreement at the time of partition, by which he was to have a right of way over the plaintiff's ground, and he impugned the letter of the 17th October 1897 as having been obtained by coercion. He further alleged that the right of way was a necessary easement under section 13, clause (*e*) of the Easements Act.

The District Munsif found on the evidence and probabilities that there was an oral agreement at the time of partition as set up by the defendant, and further that the right of way was necessary to the enjoyment of the defendant's premises in the state it existed at the time of partition, although there were other means of access to it. He also found that the letter of the 17th October 1897 (exhibit G) was obtained by coercion. He dismissed the suit with costs.

On appeal, the District Judge considered that the oral agreement could not be set up under section 92 of the Evidence Act, as it added to the partition deed which was in writing. He, however, concurred with the Munsif in finding that exhibit C was obtained by coercion: he also held that though there was another way available for the defendant, still as the use of such would

cause great inconvenience to the defendant, he had an easement of necessity over plaintiff's ground. He dismissed the appeal.

The plaintiff preferred this second appeal.

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

Dr. *S. Swaminadhan* for respondent.

JUDGMENT.—In this case we are of opinion that clause (*e*) of section 13 of the Indian Easements Act, 1882, does not admit of the construction which has been placed upon it by the lower Courts. We think the word 'necessary' must be construed in its ordinary sense. If A has a means of access to his property without going over B's land A cannot claim a right of way over B's land on the ground that it is the most convenient means of access. Th law of England as to the cases in which a person can claim an easement of necessity so as to give him a right of way over another man's land is now well settled, and there is nothing to indicate that the Indian Legislature intended to adopt a different principle. In the Bombay cases of *Esubai* v. *Damodar Ishvardas*(1) and *The Municipality of the City of Poona* v. *Vaman Rajaram Gholap*(2), a suggestion was made that the question of convenience might legitimately be considered, but there is no decision by the Courts of this country that the criterion is convenience and not necessity. The case of *Wutzler and another* v. *Sharpe*(3) is an authority for holding that the test under the law of this country is the same as under the English Law. To adopt the view contended for by Dr. Swaminadhan would be to recognize a right by way of easement in the nature of an easement of convenience. It is admitted that the respondent has a means of access to his property without going over the appellant's land and we must accordingly hold that he has no easement of necessity. He is not entitled to an easement under clause (*f*) of the section since the easement which he claims is not apparent and continuous. The respondent failed to establish any right by agreement. The District Judge was right in holding that oral evidence of an alleged agreement was inadmissible and the partition deed whilst it makes special provision for giving means of access to various portions of the partitioned property is silent as to any

(1) I.L.R., 16 Bom., 552 at p. 559. (2) I.L.R., 19 Bom. 797.
(3) I.L.R., 15 All., 270 at p. 281.

KRISHNAMA-RAZU v. MARRAJU.

means of access over the appellant's share which is claimed by the respondent in this case. It is unnecessary to consider whether the respondent surrendered any rights which he may have had by the agreement which is embodied in exhibit C, but we may observe that the evidence to show that exhibit C was obtained by coercion especially having regard to the fact that the consent mentioned in exhibit C was given by the elder brother to the younger in the presence of three mediators is extremely slender.

We must set aside the decrees of the lower Courts and grant the injunction asked for in the plaint. We do not think it is a case for damages. The respondent must pay the appellant's costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Sankaran Nair.

1905. April 20.

VAKKALAGADDA NARASIMHAM (THIRD DEFENDANT), APPELLANT,

v.

VAHIZULLA SAHIB AND OTHERS (PLAINTIFF AND DEFENDANTS Nos. 1, 2, 4 AND 5), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *ss.* 368, 582, 587—*Limitation Act XV of* 1877, *sch. II, arts.* 175 (*e*), 178—*Article* 175 (*e*) *applies to applications made in second appeals as well as first appeals.*

Section 587 of the Code of Civil Procedure authorises an application to bring in a plaintiff-respondent in second appeals and extends to such appeals the provisions of sections 368 and 582 of the Code of Civil Procedure. Such applications, however, are really made under sections 368 and 582 and for the purposes of limitation fall under article 175 (*e*) of schedule II of the Limitation Act and not under article 178.

THE facts necessary for this report are set out in the judgment.

T. V. Seshagiri Ayyar and *K. Subrahmania Sastri* for appellant.

C. Ramachandra Rau Saheb and *V. Ramesam* for respondent.

JUDGMENT.—It is objected that this appeal has abated because the first respondent (plaintiff) died in June 1903 and his legal

* Second Appeal No. 1565 of 1902, presented against the decree of J. H. Robertson, Esq., Acting District Judge of Kistna, in Appeal Suit No. 88 of 1902, presented against the decree of M.R.Ry. T. Kristnaswami Naidu, District Munsif of Bezwada, in Original Suit No. 512 of 1900 (*vide* Civil Miscellaneous Petition No. 414 of 1905).

VAKKALA-GADDA NARASIMHAM v. VAHIZULLA SAHIB.

representatives were not brought on to the record until August 1904 the time limited by the Limitation Act for bringing on a respondent being six months under article 175 (*e*). On the part of the appellant it is contended that this article does not apply to the case of a respondent in second appeal, but only to a respondent in first appeal and that the article applicable to second appeals is article 178 of the Limitation Act. He contends that article 175 (*e*) confines the limitation to cases coming within section 368 or sections 368 and 582 and does not apply to cases coming within section 587, Civil Procedure Code, which section alone applies to second appeals. The other side contends that as this application is in fact made under sections 368 and 582 of the Code of Civil Procedure he is bound by the limitation contained in article 175 (*e*) of the Limitation Act.

Section 587 of the Civil Procedure Code merely makes the provisions contained in chapter XLI of the Civil Procedure Code (of which section 582 is a part) applicable to second appeals. It lays down no period of limitation as applicable to second appeals, but merely directs that the procedure applicable to first appeals (chapter XLI) shall, as far as may be, be applied in the case of second appeals.

Section 582 makes the word "defendant" in section 368 include a "plaintiff-respondent" and therefore makes the procedure to be adopted for bringing in a plaintiff-respondent in a first appeal also applicable in a second appeal. It was therefore necessary that the application to bring in the plaintiff-respondent should be made under sections 368 and 582 of the Code of Civil Procedure. It does not cease to be an application under those sections, because it is an application that is authorised to be made under them by section 587.

As to the cases cited they do not apply because they do not refer to the section as now amended.

We therefore allow the objection and hold this application, Civil Miscellaneous Petition No. 987 of 1904, to bring in the legal representative of the first respondent is barred under article 175 (*e*) of the Limitation Act, and the appeal abates.

No sufficient reasons are, in our opinion, shown to excuse the delay.

No costs are allowed.

APPELLATE CIVIL.

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

1904. November 22, 25, 28, 29, 30. December 5.

LAKSHMAKKA AND ANOTHER (DEFENDANTS NOS. 1 AND 3), APPELLANTS,

v.

NAGI REDDI AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *ss.* 26, 53—*Amendment of plaint—Amendment may be allowed when such amendment does not raise a case essentially different from that first set up—Mis-joinder of parties and causes of action.*

Where in a suit brought by four members of a Hindu family against the widow of a fifth to recover the property of the deceased by right of survivorship, the plaint contained the further allegation that one of the plaintiffs was the adopted son of the deceased, and the defendant pleaded division and also denied the adoption, it is open to the Court on finding the adoption proved, to pass a decree in favour of the adopted son alone, even in the absence of a prayer in favour of such adopted son, without trying the question of division between the plaintiffs and the husband of the defendant. Such a course in no way contravenes the provisions of section 53 (*c*) of the Code of Civil Procedure, as the object of the proviso to that section is only to prohibit amendments which involve the trial of issues substantially different from those raised by the original pleadings.

Where the finding on one of the issues negatives any right in the defendant to hold the properties on the case set up by such defendant, it is not open to such defendant to insist on the trial of other issues, which can only affect the rights of the plaintiffs *inter se* and probably other rights of the defendant and plaintiffs not in issue in the suit.

A plaint will not be bad as contravening section 26 of the Code of Civil Procedure because it prays for a decree in favour of all the plaintiffs on certain allegations, or in the alternative, in favour of one of them, if other allegations should be proved.

Subrahmanyam v. *Venkamma*, (I.L.R., 26 Mad., 627), referred to.

IN this suit the plaintiffs alleged that they and the deceased husband of the first defendant were members of an undivided Hindu family. They sued to recover property in the possession of the first defendant and her agent, the second defendant, on the ground that the property belonged to the joint family and had

* Appeal No. 59 of 1902, presented against the decree of W. M. Thorburn, Esq., District Judge of Kurnool, in Original Suit No. 3 of 1900 (*vide* Appeal Suit Nos. 60 and 61 of 1902).

devolved on the plaintiffs by right of survivorship. It was further alleged in the plaint, that subsequent to the death of her husband, the first defendant adopted the fourth plaintiff. The plaint prayed for a decree in favour of all the plaintiffs, but contained no alternative prayer for a decree in favour of the fourth plaintiff, if the alleged adoption was proved. The first defendant contended that the properties were the separate properties of her husband, who was divided from plaintiffs and that she did not adopt the fourth plaintiff.

The first issue was, whether the family was divided or undivided, while the second was, as to whether the fourth plaintiff had been adopted by the defendant. On the second issue the District Judge found in favour of the adoption and struck out the first issue as unnecessary. He passed a decree in favour of the fourth plaintiff alone.

First and third defendants appealed to the High Court.

Dr. *Swaminadhan* and *V. Krishnaswami Ayyar* for appellants.

P. R. Sundara Ayyar and *A. S. Balasubrahmania Ayyar* for respondents.

JUDGMENT.—According to the plaint the claim was for the recovery of the property in dispute in the joint right of four plaintiffs, the first plaintiff being the uncle of the other three. It was also alleged that the fourth plaintiff who is a minor had been adopted by the first defendant as son to her deceased husband Pedda Nagi Reddi, first cousin of the first plaintiff, with the assent of that plaintiff. The case of the plaintiffs was that they, and the deceased Nagi Reddi were members of an undivided family, while the first defendant contended that her husband had become divided from them. Among others, issues were raised as to whether Nagi Reddi and the plaintiffs were the members of an undivided family and as to the alleged adoption of the fourth plaintiff. At the trial, the District Judge refrained from deciding the question of division or non-division, and being satisfied that the adoption was true gave a decree in favour of the fourth plaintiff only. In effect he proceeded to deal with the case on the footing that the plaint was to be treated as amended, as one by the fourth plaintiff only. It was contended before us that this procedure was opposed to section 53 of the Code of Civil Procedure and illegal. No doubt the proviso to that section states that no amendment should be allowed "so as to convert a suit of one character into a suit of another and

LAKSHMAKKA v. NAGI REDDI.

inconsistent character." In our opinion this provision was intended to ensure due observance of the well-known rule "*judicis est judicare secundum allegata et probata.*" The words of the proviso relied on should be understood as intended to prevent a case being raised which would involve the trial of issues essentially different from those that would have risen for the determination of the real contest between the parties with reference to the substance of the pleadings as originally framed. In other words the proviso was meant to guard against parties being taken by surprise by the starting of new cases in the progress of litigation and prejudiced by the determination of issues, without their having had full and proper opportunity of adducing all the evidence in respect of them and of raising all available legitimate defences. Tested by these principles the course adopted by the Judge in this case does not appear to be open to objection; for the real question between the plaintiffs, on the one hand and the first defendant on the other, was the issue as to adoption. If the adoption is proved, the first defendant has no right to retain possession of the properties and the question whether she should be directed to surrender them to all the plaintiffs or only to the fourth plaintiff is one in which she is not in truth interested. Her own case was that her husband was divided and in that view, on the adoption being proved the decree to be made should properly be in favour of the fourth plaintiff only. The parties really interested in agitating the question of non-division are plaintiffs Nos. 1 to 3. They acquiesced in the course adopted by the Judge and have not preferred any appeal because a decree was not given in their favour also. Such being the case, it seems clear that the omission to try the issue as to non-division is one about which the first defendant has no real ground for complaint. No doubt the question of division or non-division may be relevant as between the first defendant on the one hand and the plaintiffs on the other in other circumstances; as for instance, if it should become necessary to determine whether the fourth plaintiff's interest, in the event of his demise, would pass to the other plaintiffs or some of them by survivorship or to the first defendant as heir. The question would also be more or less relevant if the first defendant should bring forward a claim for maintenance. But these are contingencies which we are not called upon to deal with now and of course it would be prejudicial to the interest of the infant fourth plaintiff to involve him in an enquiry relating to

LAKSHMAKKA v. NAGI REDDI.

matters arising between him and third parties who are content to leave those matters for adjudication in the future, if necessary. So with reference to any question about the guardianship of the fourth plaintiff the status of the plaintiffs *inter se* might have a bearing; but as the first defendant has repudiated the alleged adoption altogether she could hardly put forward any right to be recognised as his guardian.

Our attention was drawn on behalf of the appellants to a number of authorities with reference to this question of amendment. In nearly all of them, the point considered was, whether with reference to the facts of that particular case the amendment then for decision was appropriate. None of the authorities relied on will be found to be in conflict with the view which we take of the proviso to section 53 of the Code of Civil Procedure. Nor is it necessary for us to express any decided opinion with reference to another point also urged at length on behalf of the appellants, viz., had the plaint been framed in the alternative, that is to say, praying for a decree in favour of the plaintiffs Nos. 1 to 4 as undivided members and, if the Court should find that they were not undivided members, then a decree in favour of the fourth plaintiff only, whether such frame of the plaint would be unwarranted by section 26 of the Code for the effect of the amendment involved in the decision of the Judge is not to convert the plaint into such an alternative plaint. As at present advised, however, it seems to us such a plaint would have been admissible under that section according to the principle of the decision of the (Full Bench) in *Subramanyam* v. *Venkamma*(1).

Passing to the merits, we have no hesitation in holding that the adoption of the fourth plaintiff has been established. The evidence on the point is all one way. The gift and acceptance of the boy have been clearly proved and there is no reason whatever for thinking that in executing the document referring to the adoption and subsequently admitting the adoption before the public officials, the first defendant acted otherwise than as a free agent. It was not until some weeks after this adoption took place that she changed her mind, being probably prompted thereto by the question raised by the Sub-Registrar as regards the validity of the instrument of adoption executed by her on the ground of its having been engrossed on an unstamped paper as well as by the fact that the

(1) I.L.R., 26 Mad., 627.

LAKSHMAKKA v. NAGI REDDI.

Tahsildar ordered the registration of the lands in the names of all the plaintiffs instead of in the name of the fourth plaintiff only, as was desired by her. In short, her own evidence fully proves the fourth plaintiff's case.

As regards the claim by the first defendant in respect of some of the jewels stated to be her streedhanam we see no sufficient reason to differ from the District Judge in holding them to be family property.

So far as the third defendant, who is one of the appellants in appeal No. 59 of 1902, is concerned the decree as against him cannot be upheld as there is absolutely nothing against him. He must be exonerated from all liability to the fourth plaintiff, and the suit as against him dismissed but without costs.

As to the appeal No. 60 of 1902 also, we agree with the District Judge that the appellant has failed to prove that the money and property taken charge of from the first defendant's house in which he, her servant was lodging, was his own or his wife's. His admitted circumstances strongly argue against the probability of his being able to amass Rs. 2,000 and jewels worth over Rs. 300. The fact that the cash was buried in the wall of the house is not as contended by his counsel, a circumstance in his favour but against him, implying as it would *primâ facie* that the property was hidden there by the owner of the house who is proved to have similarly secured property in another house, the one occupied by herself.

In appeal No. 61 of 1902 also by the second defendant the appellant's claim must be disallowed. No doubt she had been living with her daughter, the first defendant. And it is not unlikely she had some property of her own with her; but the properties claimed are such as she should have been able to prove more satisfactorily than she has done were they in truth hers. If, as alleged by her a large sum of Rs. 4,000 had been secured under ground along with that of her son-in-law, the deceased Nagi Reddi it is likely that some voucher or proof would have been obtained by her. Her allegation that she had a thousand rupees worth of grain also mixed up with that of her daughter is highly improbable and is unsupported by any evidence worth the name. As regards the jewels claimed by her, with the exception of the one awarded by the District Judge, the weight as stated in the inventories prepared by the officer of Court deputed to take charge of them does not tally with the weight shown in the partition-deed entered into by her

LAKSHMAKKA v. NAGI REDDI.

with her husband's co-parceners. She made no attempt in the Court below to throw any doubt upon the correctness of the weight specified in the inventories referred to; and the difference in weight is strongly against the truth of her claim. She admits that about Rs. 3,000 are due to her by persons to whom they have been lent, and since the partition she has acquired a considerable extent of land. And these will account for the money, which she got in the partition, about Rs. 2,500.

Before the District Judge there was a distinct allegation that the first and second defendants and their partisans had removed property of considerable value from their house. It would have been more satisfactory had the District Judge recorded evidence as to the truth of this complaint. But his omission to do so did not prejudice the defendants, and they have not attempted to show that the Judge excluded any evidence which they were desirous of adducing in regard to their ownership of the jewels, etc., claimed to be their own property.

We, therefore, dismiss the appeals except so far as the third defendant is concerned as already stated. The first, second and fourth defendants will pay the costs of their respective appeals. We see no reason to make any order on the memorandum of objections.

APPELLATE CIVIL.

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

PULLANAPPALLY SANKARAN NAMBUDRI (DEFENDANT), APPELLANT,

1905. March 16, 17.

v.

VITTIL THALAKAT MUHAMOD AND OTHERS (PLAINTIFFS AND FIRST PLAINTIFF'S REPRESENTATIVES), RESPONDENTS.*

Ryotwary tenure—Grant of bed of tidal and navigable river on ryotwary tenure—Power of Government to determine such tenure—Limitation Act XV of 1877, sch. II, art. 149—Decree in the alternative, legality of.

Land forming the bed of a tidal and navigable river is the absolute property of Government. Where Government has for a long time been collecting revenue

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* Second Appeal Nos. 127 and 128 of 1903, presented against the decree of M.R.Ry. T. Krishna Rau, Subordinate Judge of South Malabar at Calicut, in Appeal Suit Nos. 96 and 97 of 1899, respectively, presented against the decree of M.R.Ry. T. V. Anantan Nair, District Munsif, Kutnad, in Original Suit No. 507 of 1897.

PULLANAPPALLY SANKARAN NAMBUDRI v. VITTIL THALAKAT MUHAMOD.

and special cesses from the occupant thereof, it will be presumed that such land was granted on ryotwary tenure and the occupier will be entitled to hold the land so long as he pays the revenue; and he can be ousted only under the provisions of Madras Act II of 1864.

Where the assignees from the Secretary of State join him as a co-plaintiff with themselves in a suit, the period of limitation will not be 60 years under article 149, schedule II of the Limitation Act; such article applying only to suits brought on behalf of the Secretary of State.

The only parties entitled to a decree in such a suit will be the assignees; and a decree in the alternative cannot be passed in favour of the Secretary of State *or* the assignees when the right of the assignees is admitted.

THE plaintiffs sued for the recovery of lands alleged to be the jenm property of the fifth plaintiff, the Secretary of State, by whom they were demised to the plaintiffs Nos. 1 to 4. The fifth plaintiff pleaded that the plaint lands belonged to Government and formed part of a tidal and navigable river and were by Government demised to plaintiffs Nos. 1 to 4. The defendant contended that the lands were his jenm property, that he had been enjoying them for a long time paying Government the revenue due thereon; he further pleaded that the suit was barred by limitation. The District Munsif dismissed the suit as barred on the ground that the defendant had been in possession for more than 30 years and held that the lands were the jenm property of the defendant.

On appeal the Subordinate Judge after calling for findings, held that the lands were the property of the fifth plaintiff, being the bed of a tidal and navigable river, that as the defendant had enjoyed the land for 30 years only, the suit was not barred under article 149, schedule II of the Limitation Act, but that the defendant was entitled to compensation, fixing the amount. He decreed that the plaintiffs Nos. 1 to 4 *or* fifth plaintiff do recover possession on paying compensation.

The defendant preferred this second appeal.

C. Sankaran Nair and *C. V. Anantakrishna Ayyar* for appellant.

The Government Pleader for fifth respondent.

Mr. *C. Krishnan* for respondents Nos. 2 to 4, 9, 10, 12 and 13.

JUDGMENT.—The decree of the Subordinate Judge as it stands giving possession to plaintiffs Nos. 1 to 4 on the one hand or the fifth plaintiff on the other hand is in any view erroneous. On the case set forth in the plaint it is only the plaintiffs Nos. 1 to 4 who could claim possession, the fifth plaintiff having upon his own admission parted with his right to possession to plaintiffs Nos. 1 to 4. In this view the period of limitation for the suit would

PULLANAPPALLY SANKARAN NAMBUDRI v. VITTIL THALAKAT MUHAMOD.

primâ facie be 12 years and not 60 years. (*The Municipal Commissioners* v. *Sarangapani Mudaliar*(1) and *Maharaja Jagadindra Nath Roy Bahadur* v. *Rani Hemanta Kumari Debi*(2).) It is however unnecessary to decide the point of limitation here, as in our opinion the suit fails on another ground. Both Courts find that the defendant has been in possession of the disputed land at least since 1868, that is, for 30 years before suit. Admittedly the first defendant has been paying to Government certain revenue for the land since 1885 and it appears from the receipts that special cesses were also paid with the revenue. It is thus clear that the defendant has been holding the land as a ryot under Government. Taking it as a fact that the land was at one time the bed of a tidal and navigable river and thus land at the absolute disposal of Government, there was nothing to prevent the Government from granting the land to the defendant on ordinary ryotwary tenure as in fact they did. Having done so, it was not competent to the Government to put an end to the defendant's tenure by the arrangement made by them with plaintiffs Nos. 1 to 4. The defendant was entitled to hold the land as long as he paid the revenue properly leviable from him, and in default he could be ousted only on legal process taken under Act II of 1864. (*Rajagopala Iyengar* v. *The Collector of Chingleput*(3).) On this ground we set aside the decree of the Subordinate Judge and restore that of the District Munsif, with costs in this and in the lower Appellate Court, payable by the plaintiffs Nos. 2 to 4 and first plaintiff's legal representatives to the defendant. The fifth plaintiff will pay his own costs.

(1) I.L.R., 19 Mad., 154 at p. 156. (2) L.R., 31 I.A., 203 at p. 207.
(3) 7 M.H.C.R., 98.

PRIVY COUNCIL.

P.C.*
1905.
May 12, 16, 17.
July 31.

KACHI KALIYANA RENGAPPA KALAKKA THOLA UDAYAR (PLAINTIFF),

v.

KACHI YUVA RENGAPPA KALAKKA THOLA UDAYAR AND ANOTHER (DEFENDANTS), AND TEN OTHER APPEALS CONSOLIDATED.

[On appeal from the High Court of Judicature at Madras.]

Hindu law—Mitakshara law—Descent of impartible property—Rule of primogeniture—Evidence—Palayam, nature of—Acceptance by palayagar of sanad under Madras Regulation XXV of 1802, *effect of succession to palayam—Zamindari of Udayarpalayam—Maintenance, amount of—Privy Council, practice of.*

When impartible property passes by survivorship from one line of descent to another it devolves not on the co-parcener nearest in blood, but on the nearest co-parcener of the senior line.

Naraganti Achammagaru v. *Venkatachalapati Nayanivaru*, (I.L.R., 4 Mad., 250), approved.

The question whether an estate is subject to the ordinary law of succession or descends according to the rule of primogeniture must be decided in each case according to the evidence given in it.

Srimantu Raja Yarlagadda Mallikarjuna v. *Srimantu Raja Yarlagadda Durga*, (L.R., 17 I.A., 134; I.L.R., 13 Mad., 406), followed.

The acceptance of a sanad in common form under Madras Regulation XXV of 1802 does not of itself, and apart from other circumstances avail to alter the succession to an hereditary estate :

Held, in the evidence and circumstances of the case, and in accordance with the above principles that the Zamindari of Udayarpalayam represented the ancient palayam of Udayar which was in its origin and up to the expulsion of the palayagar in 1765 an impartible estate held by one member of the family only and not subject to the ordinary rule of Hindu law; and that notwithstanding the acceptance by the palayagar in 1817 of such a sanad and the fact that it was circumscribed in extent the palayam retained its character of impartibility and descended to the first defendant a grand nephew in the senior line, in preference to the plaintiff a nephew in a junior line of descent, as it was granted and accepted as equivalent in value to the ancient palayam.

The Judicial Committee will not interfere in a question as to the amount of maintenance, which is a matter to be dealt with by the Courts in India.

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* *Present :* Lord MACNAGHTEN, Sir FORD NORTH, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.

ELEVEN appeals consolidated from a judgment and decree (22nd March 1901) which varied a decree (22nd February 1899) of the District Judge of Trichinopoly.

The suit out of which this appeal arose was brought on the 1st November 1897 by Kaliyana Rengappa against Yuva Rengappa, the first defendant, and Yuvanava Rengappa, the second defendant, and others, for partition and recovery of possession of the plaintiff's share in the Zamindari of Udayarpalayam, or in the alternative in case the zamindari should be found to be impartible, for recovery of possession of it on the ground that the plaintiff was entitled to the whole estate in preference to the first defendant, or if the two first claims failed, then for a decree for maintenance.

The main question for decision was whether the estate was held by the last poligar as an impartible estate descendible by the rules of primogeniture, or as a partible estate in the capacity of manager of a joint undivided Hindu family.

The suit was filed in the Court of the District Judge who held that the estate was partible and gave a decree to the plaintiff and the second defendant for their shares of the estate. On appeal the High Court (SHEPHARD and BENSON, JJ.) held that the zamindari was impartible property, and gave the plaintiff only a decree for maintenance.

The facts, pleadings, arguments and judgments are sufficiently set out in the report of the case in the High Court which will be found in *The Udayarpalayam case*(1).

On this appeal, *W. C. Bonnerjee* and *G. E. A. Ross*, for Kaliyana Rengappa, the plaintiff, and Yuvanava Rengappa, the second defendant, contended that the estate in suit was partible. If impartible it must be shown to be so, and there was nothing in the evidence on the record to show that the palayam as it existed before 1765 was impartible. Even if it was then impartible the confiscation of the estate which took place in 1765 was effective to destroy its impartibility which was never regained. The restoration, even if intended, in 1802 was never carried out; and as evidenced by the documents produced the transactions which led up to the sanad of 23rd December 1817, and the words of the sanad itself showed that what was then created was a new estate and not a restoration of that which had been confiscated in 1765.

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(1) I.L.R., 24 Mad., 562.

THE UDAYAR-PALAYAM CASE.

After 1817 the sanad then granted was the root of title; the grant was made as an ordinary zamindari grant and as such the property granted was partible. There was no evidence to justify the finding of the High Court that the estate conveyed by the sanad was an impartible estate. Reference was made to the fifth report of the Select Committee on the affairs of the East India Company, Volume II, of the Madras edition of 1883, pages 117, 609, 610, Madras Regulation XXV of 1802. (*Rajah Venkata Narasimha Appa Row* v. *The Court of Wards*(1), *Katchi Kaliyana Rungappa Kalakka Tola Oodiar* v. *Kachivijaya Rungappa Kalakka Tola Oodiar*(2), *Zamindar of Merangi* v. *Sri Rajah Satrucharla Ramabhadra Razu*(3), and *Sri Raja Viravara Thodhramal Rajya Lakshmi Devi Garu* v. *Sri Raja Viravara Thodhramal Surya Narayana Dhatrazu Bahadur Garu*(4).) The cases contrary to these were all distinguishable on the ground that in all of them the grantee was in possession, and the sanad granted did not affect the nature of the estate which continued with the incidents it formerly possessed. In the present case the sanad was given to one who was not in possession of an impartible estate at the time of the grant, and the sanad created an ordinary estate partible according to Hindu law. In that view the plaintiff would be the preferable heir. Even assuming the estate to be impartible the plaintiff was, on the death of the holder of the estate in 1885 when the first defendant took possession of it, entitled to succeed as being the elder of two nephews of the deceased holder in preference to the first defendant who was only a grand nephew. The plaintiff and the second defendant belonged to the nearest class of kindred in which the single heir was to be found; the first defendant belonged to a remoter class. It was also contended that property in suit other than the zemindari was partible and of that the plaintiff and second defendant were entitled to shares; and that in any case the plaintiff was entitled to maintenance out of the estate, and that, if so, a sufficient amount had not been allowed by the High Court.

Cohen, K.C., and *D. E. Gruyther* for Yuva Rengappa, the first defendant, and for other respondents, contended that the estate was previous to 1765, impartible. Reference was made to Aitchison's

(1) L.R., 7 I.A., 38; I.L.R., 2 Mad., 128.
(2) 12 M.I.A., 495; 2 B.L.R., P.C., 72.
(3) L.R., 18 I.A., 45 at p. 54; I.L.R., 14 Mad., 237 at p. 245.
(4) L.R., 24 I.A., 118 at p. 121; I.L.R., 20 Mad., 256 at p. 263.

THE UDAYAR-PALAYAM CASE.

Treaties, 8th Ed., pp. 23, 30, 38 and 40, and the documentary evidence was referred to to show that the estate was a palayam, that the expulsion of the holder in 1765 was not a confiscation, and that he was after that date in possession as a palayagar and was recognized as such by the East India Company. As to what kind of tenure a "palayam" was, *Naragunty Lutchmeedavamah* v. *Vengama Naidoo*(1) was referred to, and it was submitted that the palayam in suit was originally an impartible estate, and that if there was no confiscation it remained so. Even if there was confiscation, there was restoration in 1817, and on the restoration the estate retained its former character of impartibility, notwithstanding the grant might have been an act of grace on the part of the Government. Reference was made to *Rani Kattama Natchiar* v. *Dorasinga Tevar*(2), *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee*(3), *The Collector of Trichinopoly* v. *Lekkamani*(4), *Srimantu Raja Yarlagadda Mallikarjuna* v. *Srimantu Raja Yarlagadda Durga*(5), *Ram Nundun Singh* v. *Maharani Janki Koer*(6), *The Ramnad case*(7), *Narayana* v. *Chengalamma*(8), and *Zamindar of Merangi* v. *Sri Rajah Satrucharla Ramabhadra Razu*(9), and Madras Regulation XXV of 1802. In the present case there was no condition in the sanad expressly stating that the grant was of a different character; and even assuming that the sanad of 1817 was the root of title, the estate granted could be identified with the old palayam. The words of the grant were plain and unambiguous, and where that is so the fact that parties had interpreted them differently could not affect the true construction: see *North-Eastern Railway Company* v. *Lord Hastings*(10). Since 1817 the estate had been treated as impartible, and successions to it had taken place in accordance with the rule of primogeniture. As to the right to succeed the High Court had rightly held that the first defendant was the preferable heir. As to maintenance it was contended that the amount allowed by the High Court was excessive.

(1) 9 M.I.A., 66 at p. 85.
(2) L.R., 8 I.A., 99; I.L.R., 3 Mad., 290.
(3) 12 M.I.A., 1 at pp. 29, 34.
(4) L.R., 1 I.A., 282 at p. 283; 14 B.L.R., 115; (S.C.) 6 M.H.C.R., 208.
(5) L.R., 17 I.A., 134 at p. 144; I.L.R., 13 Mad., 406.
(6) L.R., 29 I.A., 178; I.L.R., 29 Calc., 828.
(7) I.L.R., 24 Mad., 613, note (631).
(8) I.L.R., 10 Mad., 1 at p. 7.
(9) L.R., 18 I.A., 45; I.L.R., 14 Mad., 237.
(10) L.R., (1900), A.C., 260.

THE UDAYAR-PALAYAM CASE.

Ross replied referring to *Sri Raja Rao Venkata Surya Makipati Rama Krishna Rao Bahadur* v. *The Court of Wards*(1).

The judgment—of their Lordships was delivered by

Lord MACNAGHTEN.—These consolidated appeals have been brought from a judgment and decree of the High Court of Judicature of Madras which varied a judgment and decree of the District Court of Trichinopoly. The litigation relates to the title to a zamindari known as the Zamindari of Udayarpalayam. The principal question is whether the zamindari is a partible estate, as was held by the Court of First Instance, or an impartible estate descendible according to the rules of primogeniture, as the High Court has determined. There were two other questions raised on the appeals which may be mentioned for the purpose of putting them aside. It was objected by the appellant in the first five appeals that, assuming the estate to be impartible, still he was entitled as the preferable heir. Further, it was asserted that if he was to be held entitled only to maintenance, the maintenance allowed was insufficient in amount. On the other hand, the principal respondent, the appellant in the eleventh appeal, alleged that the allowance was extravagant and appealed on that ground. The first of these two questions is concluded by authority. It is settled in accordance with a ruling of this Board that when impartible property passes by survivorship from one line to another, it devolves not on the co-parcener nearest in blood, but on the nearest co-parcener of the senior line—a position held by the principal respondent (*Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru*(2)). As regards the second of these two questions, it is sufficient to say that it is not the practice of this Board to interfere in a question as to the amount of maintenance. That is a matter with which the Courts in India are better qualified to deal.

The history of the palayams, or polliams, of Southern India is set out in the Fifth Report of the Select Committee on the affairs of the East India Company. It is there stated that the Carnatic Poligars "were originally no more than officers of police to whom was committed the protection of a given portion of country; headmen of villages, or public servants of other

(1) L.R., 26 I.A., 83 at p. 95; I.L.R., 22 Mad., 383 at p. 396.
(2) I.L.R., 4 Mad., 250.

THE UDAYAR-PALAYAM CASE.

descriptions, whose actual condition had become changed to that of military rulers during those revolutions of power in the Deccan which had everywhere contributed to the usurpation of authority and in no part more than in the southern division of the Peninsula." In this connection it may be convenient to refer to the judgment in the case of *Naragunty Lutchmeedavamah* v. *Vengama Naidoo*(1) where the following passage occurs:—

"A polliam is explained in Wilson's Glossary to be 'a tract of country subject to a petty chieftain.' In speaking of poligars he describes them as having been originally petty chieftains, occupying usually tracts of hill or forest, subject to pay tribute and service to the paramount State, but seldom paying either, and more or less independent, but as having at present, since the subjugation of the country by the East India Company, subsided into peaceable landholders. This corresponds with the account read at the Bar from the Report of the Select Committee on the Affairs of India in 1812. A polliam is in the nature of a Raj; it may belong to an undivided family, but it is not the subject of partition, it can be held by only one member of the family at a time, who is styled the poligar, the other members of the family being entitled to a maintenance or allowance out of the estate."

It is not disputed that the estate which is the subject of the present litigation was in its origin impartible. The High Court confirming the finding of the District Judge expressed the opinion that there could be "no doubt that the palayam was, up to 1765, held by one member of the family only not being subject to the ordinary rule of Hindu law."

Between the year 1765 and the establishment of British rule in 1801, the fortunes of the family were of a very varied character. Throughout these troublous times, in turmoil or warfare, sometimes successful rebels, sometimes outcasts or exiles, the poligars of Udayarpalayam maintained or asserted their claim to the possession of their ancestral estate.

The first act of the British Government after the cession of the Carnatic was to issue a proclamation addressed to the zamindars, jageerdars, poligars, and inhabitants of the Carnatic, inviting them "to a ready and cheerful obedience to the authority of the Company in a confident assurance of enjoying under the protection of public and defined laws every just and ascertained

(1) 9 M.I.A., 66 at p. 85.

THE UDAYAR-PALAYAM CASE.

civil right, with a free exercise of the religious institutions and domestic usages of their ancestors."

In a Government Order of the 17th of July 1802, after referring to a report of the Collector of Trichinopoly on the poligars of that Province, it is stated that, having regard to the acts of sovereign authority which had been exercised by the late Nabob in the frequent resumption of the lands of the poligars, no claim could be established by them, supported either by long possession or prescriptive right; and that, while admitting the injustice of the Nabob's acts, it resulted that the expectations that might have been formed by the poligars must have been raised on the foundation of the lenity and moderation of the British Government. At the same time they expressed their intention of adhering to the principles set forth in the Proclamation of December 1801.

Then followed a long period during which the Government were apparently collecting information and considering the best mode of settling the Province consistently with their declared intentions. During this period of suspense the poligars, including the poligar of Udayarpalayam, received an allowance of 10 per cent. on the net revenue of their respective palayams, calculated from the day the Carnatic was ceded to the Company. The poligars themselves were taken into counsel by the Government, or at any rate directions were given that their views on the proposed arrangements should be ascertained.

It appears from an extract from the proceedings of the Board of Revenue of the 12th of May 1814 that the poligars had been given to understand that it was intended to restore them to the management of their palayams under a new arrangement of the conditions by which they formerly held them. The Board, however, observed that on further reflection they were induced to consider that the restoration of the poligars to the management of their palayams would be impolitic for many reasons, the principal of which were the known incapacity of the poligars to manage such extensive tracts of country, and the confusion, ruin, and distress in which their failure would involve, not only the poligars themselves, but inhabitants and ryots of the palayams. With the view therefore of effecting a more judicious arrangement without departing from the intention communicated to them as above mentioned, in as far as immediate interests of the poligars were

THE UDAYAR-PALAYAM CASE.

connected with that intention, the Board intimated that they would be inclined to recommend the Government to grant to each poligar such a number of villages as on an average would be equivalent to the benefit expected to be derived under the zamindari tenure.

It was ultimately determined that the villages to be granted to the poligars should be made over on zamindari tenure, bearing a small jumma in preference to that of jagheer, as contemplated by the Government in 1814, in order that the character and rights of the poligars might be better defined by a sannud-i-milkeat istimrar.

Accordingly, on the 23rd December 1867, a sannud in common form was granted to Rengappa, the poligar of Udayarpalayam, conferring upon him the rights of a zamindar under Regulation XXV of 1802, in 65 villages named in the sannud. The sannud was expressed to be granted in lieu of all former privileges. It declared that the grantee continuing to perform the specified stipulations, and to perform the duties of allegiance to the British Government, its laws and regulations, was thereby authorised and empowered to hold in perpetuity to his heirs, successors, and assigns at the permanent assessment therein named the Zamindari of Udayarpalayam.

It only remains to notice that, from the date of the grant of the sannud to the present time, the zamindari has uniformly been enjoyed as an impartible estate.

In these circumstances the Court of Appeal has held, and their Lordships think rightly, that the estate is impartible, and descendible according to the rules of primogeniture.

There are two propositions which appear to their Lordships to be well established and to be decisive on the point.

In the first place it is clear, as observed by Sir Richard Couch, in the case of *Srimantu Raja Yarlagadda Mallikarjuna* v. *Srimantu Raja Yarlagadda Durga*(1) that "the question whether an estate is subject to the ordinary Hindu law of succession, or descends according to the rule of primogeniture must be decided in each case according to the evidence given in it." And, secondly, it must be taken to be settled that the acceptance of a sannud in common form under Regulation XXV of 1802 does not of itself and apart from other circumstances avail to alter the succession to an hereditary estate.

(1) L.R., 17 I.A., 134 at p. 144.

THE UDAYARPALAYAM CASE.

The Zamindari of Udayarpalayam represents the ancient palayam of Udayar, and although for political reasons the estate has been circumscribed in extent, it is clear that it was granted and accepted as equivalent in value to the ancient palayam. On the cession of the Carnatic the British Government assured the poligars, of whom the poligar of Udayar was one, that they would enjoy every just and ascertained civil right, with a free exercise of the religious institutions and domestic usages of their ancestors. To this assurance the Government over and over again expressed a determination to adhere, although they deliberated long, and reconsidered their views more than once, as to the precise arrangements to be made for the settlement of the country and the restoration of the poligars.

Their Lordships will humbly advise His Majesty that these appeals ought to be dismissed.

The appellants in the first ten appeals will pay the costs of those appeals. The costs of the last appeal will be borne by the appellant therein and those costs will be set off against the costs of the other appeals.

Appeals dismissed.

Solicitor for *Kachi Kaliyana Rengappa Kalakka Thola Udayar* and *Kachi Yuvanava Rengappa Kalakka Thola Udayar*: Mr. *R. T. Tasker.*

Solicitors for *Kachi Yuva Rengappa Kalakka Thola Udayar* and others: Messrs. *Lawford, Waterhouse & Lawford.*

APPELLATE CIVIL.

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

GOPU KOLANDAVELU CHETTY (FIRST DEFENDANT), APPELLANT,

v.

SAMI ROYAR (PLAINTIFF), RESPONDENT.*

1905. January 31. February 1, 2 March 13.

Hindu law—Charitable Trust—Trustee of, has no power to appoint a co-trustee in place of a deceased trustee—Civil Procedure Code, Act XIV of 1882, *s.* 13—*Decision on a question of law not* res judicata *when the object-matter of the subsequent suit is different.*

The provisions of the Indian Trust Act do not apply to charitable trusts. In the absence of a power under the instrument creating a trust or by virtue of some statutory provision, a trustee, as such, has no power to appoint any person as trustee either in his own place or to act jointly with him.

A decision on a question of law in a previous suit is not *resjudicata* in a subsequent suit between the same parties when the object-matter of the two suits are different.

Quære.—Whether such a decision can be *res judicata* against a party who could not have prosecuted an appeal against it.

Parthasaradi v. *Chinna Krishna*, (I.L.R., 5 Mad., 304), *Venku* v. *Mahalingu* (I.L.R., 11 Mad., 393), *Chamanlal* v. *Bapubhai*, (I.L.R.,22 Bom., 669), *Vishnu* v. *Ramling*, (I.L.R., 26 Bom., 25 at p. 30), referred to and followed.

THIS suit was brought by the plaintiff (respondent) to restrain his co-trustee, the first defendant (appellant), from dealing with the trust properties without his, *i.e.*, the plaintiff's concurrence. The first defendant who was sole trustee had appointed the plaintiff a co-trustee with himself by a deed dated 22nd October 1895. Subsequently the plaintiff brought a suit (No. 181 of 1898) against the first defendant and another to set aside certain fraudulent alienations of trust property. The question, whether the plaintiff was validly constituted a trustee under the deed of 22nd October 1895, was raised and decided in plaintiff's favour and the alienation was set aside.

The further facts necessary for this report are set out in the judgment.

The lower Court passed a decree in favour of the plaintiff.

The first defendant preferred this appeal.

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* Appeal No. 153 of 1902, presented against the decree of M.R.Ry. P. S. Gurumurti, Subordinate Judge of Kumbakonam, in Original Suit No. 71 of 1900.

GOPU KOLANDAVELU CHETTY v. SAMI ROYAR

V. Krishnaswami Ayyar and *T. V. Gopalasami Mudaliar* for appellant.

Sir *V. Bhashyam Ayyangar* and *C. V. Ananta Krishna Ayyar* for respondent.

JUDGMENT.—The suit out of which this appeal arises was instituted by the respondent Sami Royar, as a trustee entitled to act jointly with the appellant Kolandavelu Chetty, in respect of charities and trusts created by the will of G. Appakutty Iyer. The main question for decision is whether, under the appointment relied on by Sami Royar, he was validly appointed as a trustee.

With reference to this question it was urged on his behalf by Sir Bhashyam Ayyangar that his appointment was really made by the daughters and daughters' sons of Appakutty Iyer, who were the heirs of the latter at the time. This contention is one suggested for the first time in this Court and is altogether unsupported by the record. Neither in this case, nor in the connected cases tried at the same time and to which Sami Royar is a party, was any averment made that the appointment was made by these heirs. The compromise in Original Suit No. 1 of 1897 (District Court, Tanjore) does not amount to an appointment of Sami Royar by the other plaintiffs in that suit. The plaint, as well as the compromise, proceeds on the assumption of an anterior appointment by Kolandavelu Chetty, and the matter is put beyond all doubt by the frame of the sixth issue in Original Suit No. 12 of 1900. We cannot therefore accept the respondent's contention and allow him to set up this new case. It was next urged that the question of the validity of the appointment is *res judicata* by the decision in Original Suit No. 181 of 1898 (District Munsif's Court, Kumbakonam), brought by the respondent against one Kannu Pillai, and the present appellant.

That suit was for the purpose of obtaining a declaration that the decree in Small Cause Suit No. 242 of 1896 (Subordinate Judge's Court, Kumbakonam) by Kannu Pillai was not capable of being executed by attachment of any of the property of Appakutti Iyer's estate referred to in his will. Kolandavelu Chetty was made a defendant as the other trustee, Sami Royar, obtained the declaration asked for. Mr. Krishnasami Iyer, on behalf of Kolandavelu Chetty, argued that the decree in favour of Sami Royar was in favour of the estate which Kolandvelu Chetty represented, that the latter was therefore not entitled to appeal against

GOPU KOLANDAVELU CHETTY v. SAMI ROYAR.

such decree and as against him no plea of *res judicata* could be founded on the adjudication referred to.

It may be that this suggestion is not without force, but, in point of fact, Kolandavelu did prefer an appeal which was heard and disposed of on the merits. We prefer therefore not to dispose of the plea of *res judicata* with reference to this argument.

Mr. Krishnasami Ayyar's next objection was that though it was necessary for the determination of Sami Royar's suit to decide whether Sami Royar was validly appointed by Kolandavelu, yet that finding was on a question of law, and as the object-matter of the present suit is entirely different from that of Original Suit No. 181 of 1898, that finding is not conclusive in the present suit. That the object-matter is different there is no doubt, for the claim now is to restrain Kolandavelu from acting in the future management of the estate and the trusts otherwise than jointly with Sami Royar, while the object-matter in the previous suit was whether the debt due to Kannu Pillai under the Small Cause decree was liable to be realized out of the estate.

It is equally clear that the adjudication in Original Suit No. 181 was upon a question of law, viz., whether it was competent to Kolandavelu to appoint Sami Royar as his co-trustee. In our view it is quite decided that an adjudication upon a point of law, though binding upon the parties in any future suit *quoad* the same object-matter is not conclusive even between the same parties when the subject-matter of the second suit is different. This is the view taken in *Parthasaradi* v. *Chinna Krishna*(1), *Venku* v. *Mahalinga*(2), *Chamanlal* v. *Bapubhai*(3), *Vishnu* v. *Ramling*(4), and as we consider that view to be sound, we do not feel called upon to decide whether the view of the Calcutta High Court in *The Government of Bengal* v. *Senayat Ali*(5) is in reality different. We are therefore of opinion that the contention of the respondent as to *res judicata* is not sustainable.

The question for determination then, is whether the appointment of Sami Royar by Kolandavelu is valid. The facts are shortly as follows :—

Under the will of Appakutti Iyer two trustees were appointed, viz., G. Nataraja Chetty and another. The latter died many

(1) I.L.R., 5 Mad., 304.
(2) I.L.R., 11 Mad., 393.
(3) I.L.R., 22 Bom., 669.
(4) I.L.R., 26 Bom., 25 at p. 30.
(5) I.L.R., 27 Calc., 317 at p. 318.

GOPU KOLANDAVELU CHETTY v. SAMI ROYAR.

years ago. On the death of Nataraja Chetty there was litigation as to who was entitled to succeed him as trustee and it was held by this Court on appeal that his son and heir, Kolandavelu, was so entitled. No one claiming as the heir of the other predeceased trustee came forward, and for a considerable period Kolandavelu was the sole trustee. In the latter part of 1895, Kolandavelu appointed Sami Royar as his co-trustee in the place of the second trustee named in the will. The will itself conferred no power on either of the trustees, or on any one else, to fill up vacancies in the office of trustee. Section 73 of the Indian Trusts Act does not extend to trusts such as that created by Appakutti, and it is settled law that, in the absence of a power under the instrument creating the trusts or by virtue of some statutory provision, a trustee as such has no power to appoint any person as trustee either in his own place or to act jointly along with him. It follows, therefore, that the appointment relied on by Sami Royar under exhibit I conferred on him no right to act as trustee, and the present suit brought by him as trustee is unsustainable.

We accordingly reverse the decree of the Subordinate Court and dismiss the suit with costs throughout.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Davies.

1905. March 30, 31.

SOMU PILLAI (PLAINTIFF), APPELLANT,

v.

THE MUNICIPAL COUNCIL, MAYAVARAM (DEFENDANT), RESPONDENT.*

Contract Act IX of 1872, ss. 23, 65—An agreement tending to create a monopoly void as opposed to public policy—Madras District Municipalities Act IV of 1884, s. 191, cl. 2, and s. 262, cl. 2—Construction of statutes, observations on—Refund of money obtained under a void agreement.

Agreements having for their object the creation of monopolies are void as opposed to public policy under the English Common Law and under section 23 of the Indian Contract Act.

* Second Appeal No. 507 of 1903, presented against the decree of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Appeal Suit No. 821 of 1901, presented against the decree of M.R.Ry. A. Rajagopala Ayyar, District Munsif of Mayavaram, in Original Suit No. 263 of 1900.

SOMU PILLAI v. THE MUNICIPAL COUNCIL, MAYAVARAM.

The power conferred by section 191, clause 2 of Madras District Municipalities Act IV of 1884 on the Chairman of a Municipality to license places for selling meat, etc., only empowers him to consider the propriety of granting or withholding licenses in each case and not to enter into agreements which must preclude him from considering any such application except from a particular person or persons.

A power to interfere with the ordinary rights of citizens will not be inferred in the absence of express grant unless it be necessarily implied as incidental to other powers expressly granted or is indispensable to repress the mischief contemplated and advance the remedy given.

Rossi v. *Edinburgh Corporation*, (L.R. (1905), A.C., 21), referred to.

Logan v. *Pyne*, (43 Iowa, 524; 22 Am Rep., 261, 262), followed.

Doubts as to the existence of such powers must be resolved against the Corporation and in favour of the public.

Where a municipal body receives license fees under a void agreement, it must, when the agreement is set aside, refund the amount so received; and a suit to recover such amount will not be barred by section 262 (2) of Madras Act IV of 1884.

Discretionary power to grant licenses conferred by section 191, clause 2, District Municipalities Act, does not empower Municipalities to refuse licenses unless clear grounds exist for so refusing.

SUIT for damages. Plaintiff brought this suit against the Municipal Council of Mayavaram for damages alleged to have been sustained by him in consequence of a breach by the defendants of a contract entered into between the defendants on the one hand and the plaintiff and one Kanni Rowthan (who had released his rights under the contract in favour of the plaintiff) on the other. The contract alleged in the plaint was that the defendant undertook to grant and secure to the plaintiff the exclusive right of selling flesh within the municipal limits of Mayavaram for a period of one year in consideration of the payment to the defendant of Rs. 100 on account of fees and Rs. 50 as security. The defendant contended *inter alia* that there was no undertaking to give the plaintiff any such exclusive right as was alleged; that the claim was barred under section 261 (3) of the Municipalities Act, and that the damages claimed were excessive. The two issues considered on this appeal were—

(1) Whether the plaintiff could recover license fees levied from him, or any damages, having regard to section 262 (2) of the District Municipalities Act?

(2) Whether the monopoly set up by the plaintiff was invalid? The District Munsif found that the agreement was valid; that the suit was not barred by section 261 (3) of the District Municipalities

SOMU PILLAI v. THE MUNICIPAL COUNCIL, MAYAVARAM.

Act, and passed a decree in favour of the plaintiff for Rs. 684 and costs.

On appeal the District Judge held that the agreement relied on was void, and dismissed the plaintiff's suit with costs.

Plaintiff preferred this second appeal.

T. Rangachariar for the Hon. Mr. *P. S. Sivaswami Ayyar* for appellant.

V. Krishnaswami Ayyar and *T. V. Gopalasawmi Mudaliar* for respondent.

JUDGMENT.—The plaintiff brought this suit for Rs. 1,760 damages alleged to have been sustained by him by the breach of a contract stated to have been entered into with him by the Municipal Councillors of the town of Mayavaram. The lower Appellate Court without giving findings upon certain matters of fact arising in the case, dismissed the suit on the ground, among others, that the alleged agreement was, upon the plaintiff's own showing, void as one intended to create a monopoly.

This decision is clearly right. The first paragraph of the plaint states the effect of the agreement sued upon thus:—"The plaintiff and one Nagore Kanni Rowthan entered into a contract with the defendant on the 12th April 1899 whereby in consideration of Rs. 100 paid by the plaintiff to the defendant on account of fees and Rs. 50 paid as security, the defendant undertook to grant and secure to the plaintiff the monopoly or exclusive right of selling flesh within the municipal limits of Mayavaram for one year from the said date." Whether the agreement relied on was one which, with reference to section 44 of the District Municipalities Act (IV of 1884), it was competent for the Chairman to enter into without the previous sanction of the Councillors and if not whether it was actually sanctioned by the Councillors and embodied in writing as required by the provisions of the said Act are points in controversy. There is no doubt, however, that, owing to some disputes between the butchers who were in the habit of selling meat in Mayavaram about the time the agreement is stated to have been entered into and the Municipal Council, the then Chairman of the Municipality made an arrangement with the plaintiff and Kanni Rowthan to the effect stated in the passage quoted above from the plaint and received the sum of Rs. 150 from the plaintiff and Kanni Rowthan. Mr. Ranga Chariar on behalf of the plaintiff referred to sections 113 and 191, clause (2) of the

SOMU PILLAI v. THE MUNICIPAL COUNCIL, MAYAVARAM.

District Municipalities Act, and urged that it was competent to the Municipal authorities to enter into the arrangement in question and that it was valid. Section 27 of the Indian Contract Act (IX of 1872) to which some reference was made in the course of the argument has of course no application to a case such as the present. The question really is whether the agreement is not one opposed to public policy and therefore void under section 23 of the said enactment. No one denies that, under section 113 of the District Municipalities Act, the funds raised under the provisions of the enactment are to be applied in connection not only with the specific purposes enumerated in the section but also in connection with "other measures of public utility calculated to promote the safety, health, comfort or convenience of the people." But it is difficult to see what all this has to do with the present question.

The other provision of the Act relied on by Mr. Ranga Chariar, viz., section 191, clause 2, lays down that "no place in any municipality shall be used for selling or storing for sale any flesh or fish intended for food, unless a license for such use of the place has been previously obtained from the Chairman." The argument with reference to this provision was that a sale of meat in an unlicensed place was unpermitted, that it was absolutely in the discretion of the Commissioners to grant or withhold licenses under the above provision, that it was consequently open to them to restrict the grant of licenses to any individual chosen by them, and that it followed that an agreement such as that in question was authorized under the Act. This argument is obviously unsound. The manifest intention of the provision in regard to the grant of licenses in respect of places where meat is to be sold is mainly to empower the Municipal authorities to guard against the prevalence of insanitary conditions in the use of such places. *Primâ facie* it would be the duty of the Commissioners to grant licenses to applicants in the matter unless clear grounds for refusal existed with reference to the object in the view of the law in prescribing the necessity for the issue of such licenses. Be this as it may, unquestionably as pointed out by Mr. Krishnaswami Ayyar on behalf of the defendants, the decision as to the propriety of granting or withholding the license must be made in each case with reference to its particular circumstances and it would be a direct violation of their duty for the Commissioners to resolve beforehand that no application in the matter would be entertained or considered except

SOMU PILLAI v. THE MUNICIPAL COUNCIL, MAYAVARAM.

from a person or persons selected by them. Though no doubt full effect should be given to the purpose of provisions in enactments constituting local bodies such as the municipality here so as to repress the mischief contemplated and advance the remedy given, yet, that the language of these enactments is not to be stretched to cover attempts made, under the colour of such legislative provisions, to interfere in any way with the exercise of the ordinary rights of citizens, will be seen from the recent decision of the House of Lords in *Rossi* v. *Edinburgh Corporation*(1) cited by Mr. Krishnaswamy Aiyar. (See specially the observations of the Lord Chancellor at page 26 and of Lord Davey at page 28.) It is thus evident that neither of the provisions in the District Municipalities Act relied on on behalf of the plaintiff affords the slightest foundation for the contention that the agreement in question is warranted by that enactment. That under the English Common Law agreements having for their object the creation of monopolies are void as opposed to public policy is beyond dispute and the same is equally true under section 23 of the Indian Contract Act. The American cases to which we referred in the course of the argument are almost on all fours with the present case. In *Logan* v. *Pyne*(2) it was held by the Supreme Court of Iowa that where a city had been authorized by its charter to license, tax and regulate omnibuses, it had no power to grant an exclusive right to run omnibuses within its limits. In *In re Lowe*(3) the Supreme Court of Kansas ruled that an ordinance providing that the Mayor and Council may appoint two or more persons as scavengers who shall have the exclusive privilege of removing garbage not only from public premises but from private premises as well, was an attempt to create a monopoly and was therefore void; and in the *City of Bloomington* v. *Whal*(4) it was laid down by the Supreme Court of Illinois that an ordinance of a city confining the sale of meats to two lots in the city was invalid as tending to create a monopoly. The general principles to be followed in cases like the present were stated in *Logan* v. *Pyne*(2) cited above, thus:—"The power of Municipal Corporations is strictly confined within the limits prescribed by the statutes creating them and will not be extended by the Courts upon mere inference.

(1) L.R., (1905), A.C., 21. (2) 43 Iowa, 524; 22 Am. Rep., 261.
(3) 54 Kansas, 757; 27 Lawyer's Reports annotated, 546.
(4) 46 Illinois, 469, cited Century Digest, vol. 35, 241 Q. (4) C.

SOMU PILLAI v. THE MUNICIPAL COUNCIL, MAYAVARAM.

It always depends upon express grant or must be necessarily implied as incident to other powers expressly granted or indispensable to the object and purpose for which the corporations were created. Doubts as to the existence of such powers must be resolved against the corporations and in favour of the public. A Municipal Corporation can grant, if at all, exclusive privileges for the protection of business which, without prohibitory legislation, would be free to all men, only under express legislative grant of power. Monopolies being prejudicial to the public welfare, the Courts will not infer grants thereof, refusing to presume the existence of legislative intention in conflict with public policy." We need scarcely add that in this statement of the law we entirely concur. The District Municipalities Act containing nothing that warrants the creation of the monopoly in question, the plaintiff's claim for damages fails, and it is unnecessary to consider the other contentions as to limitation, &c., raised on behalf of the defendants.

We think, however, that the plaintiff is entitled to a refund of the Rs. 150 paid to the municipality. No doubt a portion of this sum was treated as fee for licenses to the plaintiff permitting him to sell flesh and fish in certain localities in the town. But we are unable to agree with the suggestion on behalf of the councillors that that amount should be viewed as collected under the provisions of the Act and therefore under section 262 (2) of the Act not recoverable by suit. In our opinion the payment of the sum in question was in truth made as a part and parcel of the void arrangement, and under circumstances which render it equitable that the same should be returned by the municipality.

The decree of the lower Appellate Court will be modified by awarding to the plaintiff Rs. 150, each party paying his costs.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Sankaran Nair.

1905. July 27, 28. August 3.

MUTHUNAIYAN (PLAINTIFF), APPELLANT,

v.

SINNA SAMAVAIYAN AND OTHERS (DEFENDANTS NOS. 2, 3 AND 4), RESPONDENTS.*

Revenue Recovery Act (Madras)—Act II of 1864, s. 38, cl. 5, and s. 39—Tenant, right of, to dispute title of Landlord—Benami, nature of, sale, proof of, not precluded by s. 38 (5) and s. 39 of the Revenue Recovery Act.

Benami transactions are very common in India and ought to be recognised unless declared illegal by the Legislature directly, or by necessary implication.

Mussumat Buhuns Kowur v. *Lalla Buhooree Lall*, (14 M.I.A., 496), followed.

Section 38, clause 5, and section 39 of the Revenue Recovery Act II of 1864 do not declare directly or by implication that *benami* transactions are illegal; and the real purchaser at a revenue sale, is not therefore precluded from showing that the certified purchaser was only a *benamidar*.

Per Sir SUBRAHMANIA AYYAR, Offg. C.J.—A tenant cannot deny the title of his landlord without first surrendering possession.

Tirumalayappa Pillai v. *Swami Naicker*, (I.L.R., 18 Mad., 469), referred to and followed.

Subbarayar v. *Asirvatha Upadesayyar*, (I.L.R., 20 Mad., 494), referred to and followed.

Narayana Chettiar v. *Chokkappa Mudaliar*, (I.L.R., 25 Mad., 655), dissented from.

Revenue sales are not affected by paragraph 2 of section 82 of the Indian Trusts Act.

Section 317 of the Code of Civil Procedure and similar provisions in other Acts referred to and considered.

SUIT to recover lands which plaintiff alleged belonged to him and which were leased to the second defendant. The plaintiff's case was that the lands were brought to sale for arrears of revenue in 1883 and were purchased with his money in the name of the first defendant; the plaintiff continued in possession till 1898 when he leased them to the second defendant who refused to surrender them alleging that the first defendant who was the real owner had sold them to him.

* Second Appeal No. 626 of 1903, presented against the decree of F. D. F. Oldfield, Esq., District Judge of Tanjore, in Appeal Suit No. 923 of 1902, presented against the decree of M.R.Ry. A. Ramalingam Pillai, District Munsif of Tiruvádi, in Original Suit No. 93 of 1901.

The fourth issue was whether the plaintiff was the real purchaser; and the fifth issue whether the second defendant was a lessee under the plaintiff.

The District Munsif found that the plaintiff was the real purchaser and that the second defendant was lessee under him and passed a decree in favour of the plaintiff. The District Judge on appeal upheld the findings of District Munsif on the facts but on the authority of the case in *Narayana Chettiar* v. *Chokkappa Mudaliar*(1), he held that the plaintiff was debarred by the provisions of the Revenue Recovery Act from setting up that the first defendant was a *benamidar* and dismissed the plaintiff's suit.

The plaintiff preferred this second appeal.

The Hon. Mr. *P. S. Sivaswami Ayyar* for appellant.

T. V. Seshagiri Ayyar for first respondent.

JUDGMENT—Sir S. SUBRAHMANIA AYYAR, Offg. C.J.—The plaintiff sues to recover from the second defendant possession of certain lands, alleging that the same belong to him, having been purchased by him at a revenue sale in which they were sold on account of arrears of land revenue due to Government in respect thereof; that they were subsequently let to and put into the possession of the second defendant by the plaintiff, but that the latter refuses to surrender them setting up a title in himself under a collusive purchase from the first defendant, a mere *benamidar*, in whose name the certificate at the revenue sale was taken.

The finding of both the lower Courts with reference to these allegations is in favour of the plaintiff. The suit was, however, dismissed by the District Judge, who reversed the decree of the District Munsif, on the ground that the plaintiff was disentitled to rely on his being the real purchaser, with reference to the provisions of sections 38, clause 5, and 39 of the Madras Revenue Recovery Act II of 1864.

Even if this view were correct, which it is not as will be shown hereafter, a decree should be given in favour of the plaintiff for the simple reason that the second defendant, having been let into possession by the plaintiff, was estopped from denying the latter's title without first surrendering possession. I do not, however, wish to dispose of the case in that way. The question of the construction of sections 38, clause 5, and 39 has been fully argued on both

(1) I.L.R., 25 Mad., 655.

MUTHU-NAIYAN v. SINNA SAMAVAIYAN.

sides; and having regard to the terms of the decision in *Narayana Chettiar* v. *Chokkappa Mudaliar*(1), cited and relied on by the District Judge, it is necessary to go into that question.

The said sections run as follows:—

Section 38, clause 5. "After the confirmation of any such sale, the Collector shall register the lands sold in the name of the person declared to be the purchaser and shall execute and grant a certificate of sale bearing his seal and signature to such purchaser."

"Such certificate shall state the property sold and the name of the purchaser, and it shall be conclusive evidence of the fact of the purchase in all Courts and tribunals, where it may be necessary to prove the same; and no proof of the Collector's seal or signature shall be necessary unless the authority before whom it is produced shall have reason to doubt its genuineness."

Section 39. "When lands may be purchased at a public sale, the Collector, or other officer empowered by the Collector in that behalf, shall publish in the villages in which the land sold may be situated, in the cutcherry of the taluk, in the head cutcherry of the District, and in the District Gazette, the name of the purchaser and the date of purchase, together with a declaration of the lawful succession of such purchaser to all the rights and property of the former landholder in the said lands."

It will be seen that there is nothing in these provisions that expressly prevents a person from claiming as a purchaser at a revenue sale on the ground that he is the real purchaser and that the certified purchaser is only a *benamidar*. The exhaustive judgment of the Judicial Committee in *Mussumat Buhuns Kowur* v. *Lalla Buhooree Lall*(2), in dealing with a similar contention raised with reference to analogous statutory provisions and the canons of construction laid down by their Lordships, to my mind, render it impossible for us to accept the view adopted by the District Judge. There, a purchaser of an equity of redemption sold in execution of a decree, who had obtained a certificate as purchaser under section 259 of the Code of Civil Procedure of 1859, brought a suit for redemption and possession against the mortgagee under a deed of *Zur-i-peshgee* (usufructuary mortgage). Their Lordships held (reversing the decree of the High Court) that the Act which was simply a code of procedure did not affect the existing law, and

(1) I.L.R., 25 Mad., 655. (2) 14 M.I.A., 496.

MUTHU-NAIYAN v. SINNA SAMAVAIYAN.

that the fact of the plaintiff's title being certified as purchaser did not, under section 260 of that Act, preclude the defendant who was in possession, from pleading that he was the real purchaser and that the purchase was made *benami* for him by the certified purchaser. The sections referred to ran thus:—"Section 259. After a sale of immoveable property shall have become absolute in manner aforesaid, the Court shall grant a certificate to the person who may have been declared the purchaser at such sale to the effect that he has purchased the right, title, and interest of the defendant in the property sold, and such certificate shall be taken and deemed to be a valid transfer of such right, title, and interest."

"Section 260. The certificate shall state the name of the person who at the time of sale is declared to be the actual purchaser, and any suit brought against the certified purchaser on the ground that the purchase was made on behalf of another person not the certified purchaser, though by agreement the name of the certified purchaser was used, shall be dismissed with costs."

The analogy in substance between these provisions and those of sections 38, clause 5, and 39 of the Revenue Recovery Act with one exception is obvious. That exception but made the case before the Privy Council decidedly stronger in that the latter part of section 260 expressly evinced some intention to derogate from the efficacy of *benami* purchases, while sections 38 (clause 5) and 39 of the Revenue Recovery Act are absolutely silent in the matter.

Let me now proceed to consider the reasoning of the Judicial Committee. Their Lordships preface the discussion thus:—"It is well known, that *benami* purchases are common in India, and that effect is given to them by the Courts according to the real intention of the parties. The Legislature has not, by any general measure, declared such transactions to be illegal; and, therefore, they must still be recognised, and effect given to them by the Courts, except so far as positive enactment stands in the way, and directs a contrary course." The argument that an intention to prohibit *benami* purchases was inferable from the general tenor of the two sections coupled with those relating to delivery of possession was met thus:—"Their Lordships consider it would not be safe to make such an inference, except it arose upon very clear implication, and that it would be especially unsafe so to construe the Act as by inference to import into it prohibitory enactments, which would exclude an inquiry into the truth in any suit between

MUTHU-NAIYAN v. SINNA SAMAVAIYAN.

the parties." And referring to the stress sought to be laid on the direction in section 259 as to the grant of a certificate to the purchaser, and in sections 261 to 266 as to giving possession to the purchaser they said :—" Section 259, requiring the Court to grant a certificate to the person declared to be the purchaser of land at the sale, and directing that such certificate shall be taken and deemed to be a valid transfer of the debtor's right and interest, does no more than create statutory evidence of the transfer, in place of the old mode of tansfer by Bill of sale. Their Lordships consider, that no inference fairly arises from this clause that it was intended to interfere with benami transactions; for the language is adapted to meet the case of ordinary purchasers, and the same language might well have been used if benami transactions had been wholly unknown."

" The same observations apply to sections 261 to 266, which prescribe modes of giving possesssion of the various kinds of property. These provisions would naturally find a place in the Act in order to govern ordinary purchases and no inference can therefore be drawn from them of an intention to prohibit benami transactions."

I have made these quotations as they appear to me, in effect, applicable to the present case in their entirety and as furnishing by themselves a complete answer to the contention before us. Nor must the rest of the judgment of the Judicial Committee, because it was devoted to the consideration of a provision not to be found in the statute I am dealing with, be understood as possessing no significance here. For in dealing with that provision, *i.e.*, so much of section 260 as did expressly affect *benami* purchases, it is pointed out that the same should not receive anything but a strict interpretation as will be seen from the following concluding portion of the judgment :—" For the reasons given, their Lordships do not feel justified in adopting a construction beyond what the language of the Code imports, when such a construction would, in effect, be to declare that to be unlawful which the Code itself has not declared to be so ; and they are consequently of opinion, that there is no bar to preclude the inquiry in this suit into the real title." If such are the true canons of interpretation to be adopted in the case of an enactment which in terms showed an intention to attach some infirmity to *benami* transactions, how much less ground is there for implying any prohibition in regard to such transactions

MUTHU-NAIYAN v. SINNA SAMAVAIYAN.

from provisions lacking altogether any such indications and which, giving every word its proper meaning, convey nothing more than that the certificate and the proclamation constitute evidence of a statutory transfer under the sale ?

Our attention was drawn to the second paragraph of section 82 of the Indian Trusts Act, which, however, does not appear to me to touch the present case. No doubt, that provision excludes to some extent the application of the doctrine of trust to *benami* purchases under judicial sales governed by section 317 of the Code of Civil Procedure or under revenue sales governed by Act XI of 1859, section 36, which proceeds on the same lines and lays down :—" Any suit brought to oust the certified purchaser as aforesaid on the ground that the purchase was made on behalf of another person not the certified purchaser or on behalf partly of himself and partly of another person, though by agreement the name of the certified purchaser was used, shall be dismissed with costs." If it were necessary to decide how far in these descriptions of cases the doctrine of trusts is excluded, the drift of the remarks of the Judical Committee in the decision above cited, with reference to the various classes of cases that could arise under provisions such as the concluding part of section 260 of the Civil Procedure Code of 1859, would have to be steadily kept in view. But sections 38, clause 5, and 39 of the Revenue Recovery Act find no place in the said second paragraph of section 82 of the Trusts Act. Why the reference there is confined to the two sections mentioned and provisions such as are contained in section 184 of the N.-W.P. Land Revenue Act (XIX of 1873) referred to in *The Delhi and London Bank, Ld.* v. *Chaudhri Partab Bhaskar*(1), were left out, it is useless to speculate upon. Suffice it to say that, be the cause for the said paragraph standing as it does what it may, it is not competent to us to extend the restriction therein laid down to sections 38, clause 5, and 39 of our Revenue Recovery Act, which, as more than once stated, make no reference to *benami* transactions, since, to borrow the language of the Judicial Committee at page 528 of the report of the case I have been quoting from, " where the legislature has stopped the Courts must stop."

Turning now to the cases decided in this Court and cited in the argument, it is clear that two out of these three decisions, viz.,

(1) I.L.R., 21 All., 29 at p. 40.

MUTHU-NAIYAN v. SINNA SAMAVAIYAN.

Tirumalayappa Pillai v. *Swami Naikar*(1) and *Subbarayar* v. *Asirvatha Upadesayyar*(2), are directly in favour of the view I am adopting. As to the third and latest case, *Narayana Chettiar* v. *Chokkappa Mudaliar*(3), it seems to me that the actual decision there is not consistent with the *ratio decidendi* of either of the earlier cases, though these are there stated to be distinguishable. Nor is the part of the judgment of the learned Judges disallowing the question of trust under section 82 of the Trusts Act being raised, if I am not altogether mistaken in grasping the meaning of the passage, reconcileable with their conclusion that it was not open to the second and third defendants to contend that the person through whom the plaintiff claimed was not the real purchaser, it being stated in the commencement of the judgment that the purchase was in fact *benami*. I do not know what more was required to found a case of an obligation in the nature of a trust, within the meaning of section 82 of the Trusts Act. If what the learned Judges had in mind was that the plaintiff in the case, who claimed through the *benami* purchaser, could have shown that he was a *bonâ fide* purchaser without notice and therefore as against him the second and third defendants could not at that stage be allowed to rely on their being the original real purchasers, that would be different. But such a view would be inconsistent with the conclusion expressed in the sentence that "it was not competent to the second and third defendants to prove the truth as to who was the real owner under the Revenue Sale." However this may be, the Privy Council decision already cited was not brought to the notice of the learned Judges and as the reasoning therein and the rules of interpretation laid down by their Lordships make it imperative on us to come to the conclusion that statutory provisions such as sections 38, clause 5, and 39 of the Revenue Recovery Act ought not to be construed as precluding the real purchasers from showing the truth, I feel compelled to say, with all deference to the learned Judges who decided *Narayana Chettiar* v. *Chokkappa Mudaliar*(3), that I am unable to follow them, if they really intended to lay down that *benami* purchases are in any way struck at by the said sections 38, clause 5, and 39, though I am by no means sure that they did so intend.

(1) I.L.R., 18 Mad., 469. (2) I.L.R., 20 Mad., 494.
(3) I.L.R., 25 Mad., 655.

MUTHU-NAIYAN v. SINNA SAMAVAIYAN.

As regards the other decisions relied on on either side, it is not necessary to notice them as they are decisions with reference to cases governed by section 317 of the Civil Procedure Code or provisions similar whereby (unlike as in sections 38, clause 5, and 39 of the Revenue Recovery Act) it is in terms provided that no suit shall be maintained against a certified purchaser on the ground that the purchase was made on behalf of any other person or on behalf of some one through whom such other person claims.

I would, 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.

SANKARAN NAIR, J.—The plaintiff sues in ejectment. He was the owner and pattadar of the lands in dispute. They were sold in 1883 for arrears of revenue and, according to the plaintiff, purchased by him, on account of disputes with his uncle, in the name of the first defendant. The plaintiff alleges that having obtained them, and continued in possession till 1898, he let the lands to the second defendant, who now sets up the title of the first defendant as the real purchaser of the lands at the revenue sale.

Both the lower Courts have found that the plaintiff was the real purchaser, having paid the sale amount as purchaser himself, and that though the revenue sale certificate was taken in the name of the first defendant, the latter was only a *benamidar* who had no interest in the property. The first Court has further found—whether that finding has been accepted by the Appellate Court is one of the points in dispute before us—that the plaintiff, having obtained possession of the property, let the second defendant into possession as his tenant. Although he was of opinion that the purchase was made by the plaintiff with his own money and for his own benefit, and that the first defendant was only a *benamidar*, the District Judge has, nevertheless, dismissed the plaintiff's suit on the ground that the sale certificate issued in the name of the first defendant as purchaser, and the publication of his name as such, by the Collector, under the provisions of the Revenue Recovery Act, confer upon the first defendant an absolute title and pass to him the entire estate which admittedly vested in the plaintiff before the sale, and that it is not open to the real purchaser, the plaintiff, to put forward his claim and contend that the first defendant is only a *benamidar*, even when the purchase

MUTHU-NAIYAN v. SINNA SAMAVAIYAN.

money was paid by the plaintiff and the purchase was made for his benefit. The main question for consideration which has been fully argued before us is whether this is the correct view of the law.

It is well known that *benami* transactions are very common. They have been recognised by all the High Courts in India and the Privy Council. When a transaction is proved to be *benami*, the Courts proceed to give effect to the real as against the nominal title except in a few instances not necessary now to be noticed. If the *benamidar* sues the beneficial owner, the latter is allowed to prove his title as against the plaintiff and, conversely, the beneficial owner is allowed to enforce his title as against the *benamidar*. On the question whether a *benamidar* could enforce his rights against strangers in the absence of the beneficial owner, the High Courts in India are not in agreement. But they are all agreed that, ordinarily, the title of the beneficial owner must prevail against that of the *benamidar*. A stranger in whose name property is purchased by a person with his own money for his own benefit has been always treated as a *benamidar* having no interest in the property that could be enforced against the beneficial owner. In English law it would be treated as a resulting trust in favour of the actual purchaser who advances the money and effect given to it accordingly. In India the definition of 'trust' in the Trusts Act excludes resulting and other constructive trusts; and these latter are dealt with in a separate chapter—chapter IX, sections 80 to 96. Section 82 substantially reproduces the rule of English law and enacts that the transferee must hold the property for the benefit of the person who is proved to have paid the purchase money.

Thus according to the authorities, the plaintiff, as the real purchaser, is entitled to recover the property now in suit from the first defendant, who is only his *benamidar*. Under the English law and the Indian Trusts Act, he would be treated as a beneficial owner, and his claim enforced against the first defendant, the trustee who has the legal estate or the ownership. It now remains to consider whether the Judge is right in holding that the provisions of Act II of 1864, are a bar to the recognition of the just claims of the plaintiff on the ground that it is not open to him to contend that the first defendant is not the absolute owner of the property.

MUTHU-NAIYAN v. SINNA SAMAVAIYAN.

In construing the provisions of that Act it is useful to bear in mind the observations of their Lordships of the Privy Council. In *Mussumat Buhuns Kowur* v. *Lalla Buhooree Lall*(1), they point out that *benami* purchases being very common in India they have to be recognised until declared illegal by legislation and, when there is no express prohibition of such transactions, a general intention should not be presumed unless it appears very clearly to be the object of the legislature to discountenance them; and when the matter is doubtful, it is safer that the legislature should declare its view clearly and unequivocally to prohibit transactions which are generally known to take place than for the Courts to do so from ambiguous or uncertain expressions in any Act, and thereby preclude an inquiry to discover the truth and connive at the perpetration of fraud. Having regard to these observations of their Lordships, it appears clear to me that the plaintiff is not estopped by any provision of law from pleading the *benami* nature of the first defendant's title.

Sections 38 and 39 of Act II of 1864 are relied upon in favour of the respondent's contention. The material portion of section 38 runs thus:—"The certificate shall state the property sold and the name of the purchaser and it shall be conclusive evidence of the fact of the purchase." There is nothing in this to bar the plea that the purchase was *benami*. Section 39 prescribes a proclamation giving among other things, "the name of the purchaser and the date of purchase, together with a declaration of the lawful succession of such purchaser to all the rights and property of the former landholder in the said lands." This declares in fact the effect of section 38 which confers title. Neither in this section nor in the last section is it declared that a purchase *benami* is illegal or void. For the purpose of this discussion these provisions seem similar to section 259 of Act VIII of 1859 which declares in equally clear terms that the sale certificate shall be taken and deemed to be a valid transfer to the person who is declared to be the purchaser. And the Privy Council decided, in the case above referred to, that this does nothing more than create statutory evidence of transfer in place of the ordinary deed of sale and that "no inference fairly arises from the clause, that it was intended to interfere with *benami* transactions; for the language is adapted to meet the case

(1) 14 M.I.A., 496 at p. 520.

MUTHU-NAIYAN v. SINNA SAMAVAIYAN.

of ordinary purchasers and the same language might have been used if *benami* transactions had been wholly unknown."

These observations appear to be directly in point; and I am inclined to hold accordingly that sections 38 and 39 do not preclude us from holding that the first defendant in this case was only a *benamidar* and, as such, no title vested in him and that it was in the plaintiff for whom the property was purchased. Nor do those sections in any way interfere with the operation of section 82 of the Trusts Act when the trust is imposed by law on a person who, by the hypothesis (see the definition of 'Trust') is the owner of the property by virtue of the sale certificate (section 38) and the proclamation (section 39). These provisions deal with the transfer of ownership or legal estate. They have nothing to do with the equitable obligations imposed on the certified purchaser by law and subject to which he takes.

Nor in the absence of an express prohibition can any intention to discourage such transfers be gathered with sufficient clearness from the provisions of the Acts which have been referred to in the argument before us. Mr. Seshagiri Ayyar contended that such provisions indicate that the policy of the Legislature is to confer absolute title on the purchaser and not to allow *benami* purchases in public sales. So far as sales under the Civil Procedure Code are concerned, it has been determined by the highest authority that there is no ground for such presumption, but that section 317 of that Code only interdicts the class of suits mentioned therein.

The Trusts Act lends no support to the contention. Section 82 by specially exempting the cases under section 317 of the Civil Procedure Code and the sales under section 36 of Act XI of 1859 makes it clear that *benami* purchasers in other sales take subject to the obligations imposed by that section.

Illustration (*c*) to section 90 shows that where a qualified owner makes default in payment of Government revenue with a view to the land being put up for sale and himself becoming the purchaser of it and he himself becomes the purchaser, he has to hold the land for the benefit of the other persons who were interested in the property before the date of his purchase. This illustration declares the intention of the Legislature not to exempt purchasers at revenue sales from the operation of the rules of law imposing equitable obligations. Similarly, illustration (*b*) to the same section shows a similar intention not to treat the entry

MUTHU-NAIYAN v. SINNA SAMAVAIYAN.

in the Government records of the name of a person as inamdar as conclusive of his beneficial ownership to the property. He has to hold it subject to the claims of the other persons interested. Nor is there anything in the legislation of this Presidency to show that the person whose name is entered in the patta must be the owner, legal and equitable, of that property; and the certified purchaser stands in no higher position. Though Regulation XXVI of 1802 directs the Collectors to keep public registers for transfers of land, yet such transfers are valid between the parties though unregistered. A patta granted by Government, even accompanied with possession, to one person for land belonging to another will not confer any right to possession against the true owner and a sale for arrears of revenue due by him will not pass any title to the certified purchaser. See *Secretary of State* v. *Ashtamurthi*(1). That the Government may issue the patta in the name of a person put forward by the real proprietor is clear to show that it is recognised even by Government that a certified purchaser or the pattadar need not necessarily be the real owner though, as a rule, the pattadar is the proprietor. See *Zamorin of Calicut* v. *Sitarama*(2).

I fail to find, therefore, any indication of any general policy to prohibit a *benami* purchase. On the other hand, if we are to adopt the strict construction suggested for the respondents, we have to hold that a purchase by the managing member of a Hindu family out of family funds at a revenue sale or by a qualified owner in the circumstances referred to in section 90 of the Trusts Act will confer on him on absolute title. Even fraud and mistake will apparently be no ground for avoiding the bar created by sections 38 and 39. In the absence, therefore, of any clear intention to declare *benami* purchases null and void or to confer absolute ownership on the certified purchaser, there is no reason for extending the scope of sections 38 and 39 beyond what they, in terms, warrant.

I now proceed to refer to the three cases which deal with the question before us. In *Tirumalayappa Pillai* v. *Swami Naikar*(3), land was sold for arrears of revenue due by the pattadars—trustees of a certain endowment, who purchased the property themselves in the name of a dependent of theirs who was the plaintiff in the

(1) I.L.R., 13 Mad., 89. (2) I.L.R., 7 Mad., 405 at p. 406.
(3) I.L.R., 18 Mad., 469 at p. 470.

MUTHU-NAIYAN v. SINNA SAMAVAIYAN.

case. It was there decided that no title vested in the plaintiff, a *benamidar*, whose suit must therefore be dismissed. Adverting to section 38, the Judges held that no greater effect can be given to it than to the provisions in the Civil Procedure Code, which do not prevent third parties from relying upon the *benami* nature of the plaintiff's purchase. Substantially the same view was taken in *Subbarayar* v. *Asirvatha Upadesayyar*(1), as to the scope of section 38, where it was held that a plaintiff who purchased the land for the benefit of himself and the other villagers cannot recover the land for himself. Both these cases are authorities for the proposition that a sale certificate issued by the Collector at a revenue sale is not conclusive as to the right to recover of the person named therein and that it is open to the contesting defendants to show that the purchase was really made for the benefit of other persons. The next case and the one relied upon by the respondents' pleader as decisive in his favour is in *Narayana Chettiar* v. *Chokkappa Mudaliar*(2) where the plea of the defendants Nos. 1 and 4 that one Palaniappa Chetti, the certified purchaser at a revenue sale, under whom the plaintiffs claimed, was merely a 'name lender' for the real purchaser Dandayuda Chettiar was found true and the transaction was held to be *benami*. But on the ground that sections 38 and 39 of Act II of 1864 vested the property in the purchaser therein named and that it was not open subsequently to any one to contend that such purchaser was only a *benamidar* for someone else, the Court passed a decree in favour of the plaintiff whose vendor was found to be only a *benamidar*. The two cases already referred to were noticed and declared not to be in conflict with this conclusion. I do not see how this case can be reconciled with the decision in *Tirumalayappa Pillai* v. *Swami Naikar*(3) or with the principle involved in the decision in *Subbarayar* v. *Asirvatha Upadesayyar*(1).

Those cases proceed on the view that when a transaction is proved to be *benami*, the *benamidar's* name must be treated as an *alias* for that of the person beneficially interested and that there is nothing in the Revenue Sale Law, Act II of 1864, to effect the operation of that rule. It appears to me to be clear that the decision in *Narayana Chettiar* v. *Chokkappa Mudaliar*(2), declares that

(1) I.L.R., 20 Mad., 494. (2) I.L.R., 25 Mad., 655 at p. 656.
(3) I.L.R., 18 Mad., 469 at p. 470.

MUTHU-NAIYAN v. SINNA SAMAVAIYAN.

no effect can be given to *benami* purchases in the cases o revenue sales under Act II of 1864. As to section 82, Trusts Act, the learned Judges refused to consider whether the case before them came within the scope of that section as the question was not raised in the Courts below and fresh issues would have to be tried. As that decision thus expressly excluded such cases from consideration, it does not apply to the facts before us. In this case the plea has been raised and the facts necessary for the determination of the question have been found. Both the lower Courts hold that the property was purchased in the name of the first defendant by the plaintiff with his own money. The law will, therefore, clearly imply a trust in favour of the plaintiff; and the plaintiff is therefore entitled to recover possession of the property from the defendants.

In this view it is unnecessary to consider the various other questions argued before us.

I would, therefore, reverse the decree of the District Judge and restore that of the District Munsif with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

AMBALAVANA PANDARA SANNATHI (PLAINTIFF), APPELLANT,

v.

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

1908. March 2, 3, 16.

Construction of grant—Grant of village 'with wells, tanks and waters,' effect of—Irrigation works, rights of Government in—Proprietary right not proved by contribution of customary labour.

A grant of a village 'with all wells, tanks and waters' within the boundaries will not pass to the grantee an artificial water-course then existing, which irrigated the village granted and other lands.

* Second Appeal No. 150 of 1903, presented against the decree of J. Hewetson, Esq., District Judge of Tinnevelly, in Appeal Suit No. 326 of 1901, presented against the decree of M.R.Ry. B. Cammaran Nair, Additional Subordinate Judge of Tinnevelly, in Original Suit No. 75 of 1899.

AMBALAVANA PANDARA SANNATHI v. SECRETARY OF STATE FOR INDIA.

Subsequent contribution of labour by the grantee for clearing the channel will not be evidence of proprietary right as such labour is customary and may be enforced under Madras Act I of 1858.

The ruling power in India had from the earliest times the conservation and control of works of irrigation and Government has accordingly the right to carry out repairs and improvements in the irrigation works belonging to it provided that in doing so, it does not diminish materially the supply of water to which others may be entitled.

THE plaintiff was the owner of three inam villages granted to him in 1614 which grant was confirmed by the Government in 1864. The original grant was in these terms :—

"We have given the village of Sevandipuram on the banks of the Tambraparni as absolutely rent free. Therefore according to the boundaries mentioned for the said village, namely, eastern boundary to the west of Iravapanikkan channel and Melappalam, and to the west of Pothapadyanpatti, and the water-spread of Nochikulam, Kodarangulam channel, Kalungadi banyan tree, the nunjah fields of Idamalaikulam and the Tambraparni corresponding to Kalai Chamban odai: southern boundary to the north of the Tambraparni from Kalai Chamban odai as far as Tambraparni Vikramasingapuram Vanambadi odai: western boundary. (Signed) Sri Muthuveerappa Naiken Aiyan: to the east of Alatteir Pothai from Tambraparni Vanambadi odai, *Kodaimelagiyan channel*, Vikramasingapuram punjah elevated ground, the Ambasamudram road and Vagaikulam Mannarkovil road: northern boundary to the south of Mannarkovil Brahmadesem road, Mettal Matam *and* (2) *Chetti Matam* (this is written in pencil in the original), western well, Mannarkovil punjah, Vagaikulam punjah palmyra tree, Kalmedu and Iravapanikkan channel, the nunjah, punjah, swarnadayam, village site, temple, palmyra and other trees, etc., groves, wells, immemorial waste, tanks and all appurtenances situate within these boundaries shall be enjoyed by him as absolutely rent free for food-giving charity, so long as the sun and moon last."

These villages and other Government villages were irrigated by a channel (found to have existed before the original grant) which conveyed water from the bed of the Tambraparni river at the Thalaianai (dam), a temporary structure erected from time to time. In 1896 the Government commenced to execute certain works in the dam and channel. The plaintiff claimed the channel within his inam limits as sole owner under the grant, and the dam as joint owner with Government, and brought this suit to restrain the defendant from carrying out the works without his concurrence.

AMBALAVANA PANDARA SANNATHI v. SECRETARY OF STATE FOR INDIA.

The defendant, the Secretary of State pleaded that the channel and dam belonged to Government and also that the contribution of labour by the plaintiff in clearing the channel and in repairing the dam did not evidence any proprietary right in the plaintiff.

The Subordinate Judge held that the channel not having been excluded passed under the grant, but that the dam belonged to the defendant and granted the plaintiff's prayer in a modified form, in conformity with the findings.

On appeal the District Judge found that the channel did not pass under the grant and that the defendant being sole owner of the channel and dam, the plaintiff's suit was unsustainable as he failed to show any damage. He dismissed the suit.

The plaintiff preferred this second appeal.

V. Krishnaswami Ayyar, *S. Srinivasa Ayyangar* and *S. Srinivasa Ayyar* for appellant.

The Government Pleader for respondent.

JUDGMENT.—The channel in dispute is an artificial channel and was in existence before the grant of the three inam villages to the plaintiff.

The first question for decision is whether on the proper construction of the plaintiff's title-deed, the grant of 1614 (exhibit J_1), the channel in regard to which the declaration and injuction sought, is included in the grant, and is therefore the absolute property of the plaintiff as contended by him.

The channel is one that conveys water from the bed of the Tambraparni river to certain Government villages on its banks, then to the three inam villages of the plaintiff, and then to other Government and other inam lands lower down on the channel. In the grant of 1614 the boundaries of the village are specified, and then the grant says that within these boundaries the wet lands, dry lands, swarnadayam, village site, temple, palmyra and other trees, groves, wells, immemorial waste, tanks, mines, treasure, waters, trees, stones, whatever is obtainable and what is desirable and eight rights of ownership (ashtabogam) are granted.

It is remarkable that there is no express reservation of the channel nor any mention of the grant of the channel, though the existence and importance of channels as separate entities was

AMBALAVANA PANDARA SANNATHI v. SECRETARY OF STATE FOR INDIA.

present to the mind of the grantor, since more than one channel is referred to in detailing the boundaries of the village.

The omission to grant the channel is significant, especially when it is observed that tanks, and wells, are separately mentioned and we think that the omission was intentional and that the word "waters" (jala) cannot be held to include the channel. The channel in question is a large and important feature running right through the villages and it would certainly have been mentioned if it were intended that its ownership should pass under the grant. The word "jala" would never be used to describe a particular channel. It is used in the present case along with other words to indicate the completeness of the grant of the things specified as granted, viz., the wet and dry and waste lands, village site, etc. And it is natural that the Government in granting the villages as inam should not have granted the channel, since the conservation and control of works of irrigation have from the earliest times been the especial function and duty of Government in India (*The Madras Railway Company* v. *The Zamindar of Carvatenagarum*(1), *Ponnusawmi Tevar* v. *The Collector of Madura*(2)), and in the present case the channel running through the three villages granted to the plaintiff is only a portion of a channel which supplies other lands both higher up and lower down than the lands granted to the plaintiff and the grant of the proprietary right in so much of the channel as passed through the plaintiff's villages would be obviously inconvenient and injurious to all concerned, as creating a divided ownership and control and a divided responsibility for the upkeep of the channel as a whole, and of the dam across the river on which the channel depends for its supply of water.

We find, then, that the channel is not included in the grant, and we agree with the District Judge that the plaintiff has not had any adverse possession of it as against Government so as to give him a proprietary title by prescription. The fact that the plaintiff clears the channel and contributes labour when the channel is breached and contributes labour to assist Government in erecting the dam in the river each year is no proof of any proprietary right. It is customary for land-owners to contribute such labour for ordinary repairs of irrigation works by which they benefit,

(1) L.R., 1 I.A., 364. (2) 5 M.H.C.R., 6.

AMBALAVANA PANDARA SANNATHI v. SECRETARY OF STATE FOR INDIA.

and such labour may even be enforced under the provisions of the Madras Compulsory Labour Act (I of 1858), but it by no means indicates that the persons liable are owners or co-owners of the irrigation works. It is significant that the only expensive materials for the dam, viz., the timber required, is supplied by Government. The channel not having been granted, remains the property of Government, and the proper officers of Government, have the right of entering on it and carrying out such repairs and improvements as are proper, but in doing so they must not interfere with the customary supply of water to the plaintiff's lands, or unnecessarily cause damage thereto. The rights and liabilities of Government in maintaining and in improving existing irrigation works has recently been considered by this Court in the case of *Sankaravadivelu Pillai* v. *Secretary of State for India*(1), but in the present case it is not necessary to do so, since there is not only no evidence that the plaintiff has been injured or must necessarily be injured by the work done, or proposed to be done by the defendant in regard to the channel, but it is clear, as the Judge observes, that particular orders have been issued to the Department of Public Works to revise the estimate (exhibit 38) so as to be quite certain that no damage is caused to the plaintiff.

There is therefore no case for the declaration sought for, or for an injunction (*Kristna Ayyan* v. *Vencatachella Mudali*(2)), and we dismiss the second appeal with costs.

(1) I.L.R., 28 Mad., 72. (2) 7 M.H.C.R., 60.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Boddam.

1905. August 1, 2, 16.

MUTHAR SAHIB MARAIKAR (PLAINTIFF), APPELLANT,

v.

KADIR SAHIB MARAIKAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Negotiable instruments—Assignee of a negotiable instrument otherwise than by endorsement may sue—Parol evidence to show nature of a negotiable instrument.

Endorsement is not the only mode by which negotiable instruments may be transferred. They may be otherwise assigned, and the assignee may sue in his own name. He will however have only the right title and interest of the assignor while the indorsee of a negotiable instrument will have all the rights of a holder in due course.

Pattat Ambadi Marar v. *Krishnan*, (I.L.R., 11 Mad., 290), not followed.

Abboy Chetty v. *Ramachandra Rau*, (I.L.R., 17 Mad., 461), not followed.

Negotiable instruments are choses in action, and the rules in regard to them prior to the passing of the Negotiable Instruments Act continue to apply to them, to the extent that they are not expressly or impliedly affected by any provisions of the Act.

The indorser of a promissory note paying off his immediate indorsee and obtaining possession of the note is entitled, without a re-indorsement to himself to sue and recover on the note.

Negotiable instruments are subject to much the same rules as other written contracts in regard to the reception of parol evidence. Evidence of usage and intention of parties is admissible to show that a promissory note executed by an individual was executed on behalf of a firm.

THE facts necessary for this report are fully set out in the judgment.

Mr. *N. Subrahmaniam* and *R. Kuppuswami Ayyar* for appellants.

V. Krishnaswami Ayyar for first, fifth and sixth respondents.

JUDGMENTS—Sir S. SUBRAHMANIA AYYAR, Offg. C.J.—The plaintiff's case in short is as follows. The defendants Nos. 1 to 6 traded in Ceylon under the name and style of S.M.P.M.K., and, while so trading, the firm obtained 25 negotiable promissory

* Second Appeal No. 728 of 1903 presented against the decree of W. W. Phillips, Esq., Acting District Judge of Tinnevelly in Appeal Suit No. 371 of 1902 presented against the decree of M.R.Ry. P. S. Sesha Ayyar, District Munsif of Srivaikuntam in Original Suit. No. 297 of 1901.

notes from different persons and indorsed the same to one Meyyappa Chetty, who again indorsed them to the Bank of Madras at Colombo. On the presentation of the notes on behalf of the bank to the makers the notes were dishonoured. The said Meyyappa Chetty paid the bank and obtained a return of them The defendants' firm gave to the said Meyyappa Chetty three other promissory notes payable to him or to his order which were indorsed by Meyyappa Chetty in favour of the bank and similarly returned to him on his payment to the bank after they also had been dishonoured. Subsequently, in consideration of Rs. 1,500 paid by the plaintiff to him, Meyyappa Chetty assigned in Ceylon his right to the notes by an instrument, dated the 9th April 1901. The defendants on demand failed to pay the amount due by them upon the notes. The present suit is for the recovery of the amount due in respect of five out of the promissory notes made payable to the firm and one out of those made by the firm itself.

Various defences were raised which it is not necessary now to state. The District Munsif gave a decree to the plaintiff. On appeal, the District Judge reversed the decree and dismissed the suit on the technical ground that the notes not having been indorsed over to the plaintiff he could not sue on them.

The *ratio decidendi* involved in the actual decision in *Pattat Ambadi Marar* v. *Krishnan*(1) and *Abboy Chetti* v. *Ramachandra Rau*(2), which the District Judge followed, has not been accepted as sound in subsequent cases. In *Ramachandra Rao* v. *Abeeb Rowthan*(3) Shephard and Moore, JJ., held that there was nothing in the Negotiable Instruments Act to restrict the transfer of negotiable instruments to transfer by indorsement only, that such choses in action may be otherwise assigned, and that an assignee under an assignment of the latter class may sue in his own name. This was followed in *Mahomed Khumar Ali* v. *Runga Rao*(4) and the authorities in support of this view of the law will be found referred to and considered in the judgment of Bhashyam Ayyangar, J., in that case, where it is pointed out that "the important difference between transfer by indorsement and transfer otherwise than by indorsement of a negotiable instrument is that

(1) I.L.R., 11 Mad., 290. (2) I.L.R., 17 Mad., 461.
(3) I.L.R., 24 Mad., 657, (note) Appeal No. 175 of 1897 (unreported).
(4) I.L.R., 24 Mad., 654.

MUTHAR SAHIB MARAIKAR v. KADIR SAHIB MARAIKAR.

in the latter case the assignee will acquire in the bill or note, as a chattel, nothing more than the right title and interest of his assignor, whereas in the former case the assignee by indorsement will have all the rights and advantages of a holder in due course of a negotiable instrument" (at page 656). Story also states the law on the point thus:—"If a promissory note is originally payable to a person or his order, then it is properly transferable by indorsement. We say 'properly transferable' because in no other way will the transfer convey the legal title to the holder so that he can at law hold the other parties liable to him *ex directo*, whatever may be his remedy in equity. If there be an assignment thereof without indorsement, the holder will thereby acquire the same rights only as he would acquire upon an assignment of a note not negotiable" (Story on 'Promissory Notes,' 7th edition, section 120, page 153).

Mr. Krishnasvami Ayyar on behalf of the respondents, in effect, contended not only that the provisions of the Negotiable Instruments Act do not permit of any kind of transfer other than by indorsement, but went the length of urging that in cases like the present we are precluded from travelling beyond the four corners of the Act. Before proceeding to examine the provisions of the Act, it is best to point out the fallacy underlying such an extreme contention—a contention possible only when the true nature of the instrument is overlooked. Now, a promissory note, whether negotiable or not, is nevertheless a chose in action and is subject to the incidents attaching to it in that aspect, so long as the rules of the law merchant are not departed from. Choses in action have been held assignable in this country, and it has been held that a non-negotiable promissory note may be assigned so as to enable the assignee to sue upon the note in his own name. See *Kanhaiya Lal* v. *Domingo*(1). The fact that the note is negotiable does not make any difference except that it carries with it certain peculiar incidents attached to it by the law merchant. The rules in regard to these choses in action prior to the Act do not cease to be any the less applicable to them by the passing of the Act unless its provisions expressly or impliedly affect those rules. If we now turn to the Act, so far as one can see, no provisions there constrain one to come to any other

(1) I.L.R., 1 All., 732.

MUTHAR SAHIB MARAIKAR v. KADIR SAHIB MARAIKAR.

conclusion. The only provision of the Act which could, with any plausibility, be relied on in support of the contention under consideration is the definition therein of the term 'holder': and Mr. Krishnasvami Aiyar did lay stress on it. But the real import of this definition is that, to come within it, the party should be the owner *at law* of the negotiable instrument, *i.e.*, according to the law merchant, whatever such party's position and liability in equity may be. But this in no way interferes with the due application of rules which are unaffected by that law and which are not to be ignored simply because the Negotiable Instruments Act does not refer to them. The observations of Mr. Chalmers with reference to the English Bills of Exchange Act, 1882, may very well be applied to the Negotiable Instruments Act. He says at page 128 of his book on 'Bills of Exchange' that "the Act deals only with transfer by negotiation, that is, transfer according to the law merchant. It leaves untouched the rules of general law which regulate the transmission of bills by act of law and their transfer as choses in action or chattels according to the general law" (6th edition, page 128). No doubt, section 97, clause 2, in the English Act expressly says that "the rules of common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques"; and section 31, clause 4, enacts that "where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor." These, of course, are provisions inserted by way of caution only and do not mean that, but for them, the rules of law referred to in those sections would have been unenforceable though there was nothing in the other provisions of the Act itself to forbid their application. And surely the absence of similar provisions in the Indian Act does not warrant that view that the Act abolished rules previously established, even though they are in no way inconsistent with any of its provisions. This was undoubtedly the reason for Shephard and Moore, JJ., upholding the assignment in question in the case already cited. It is thus clear that the absence of an endorsement to the plaintiff is no bar to the suit and the ground on which the decision of the District Judge rests is unsustainable.

MUTHAR SAHIB MARAIKAR v. KADIR SAHIB MARAIKAR.

It was next urged by Mr. Krishnaswami Ayyar, if his argument in this respect was correctly understood, that upon the plaint allegations themselves the property in the notes should be taken as still residing in the last indorsee, the Bank of Madras, and, therefore, that the instrument of the 9th April 1901, relied on by the plaintiff, conferred on him no right whatever to the notes. The fallacy of this argument is in the assumption that, notwithstanding the payment to the Bank of Madras of all that was due to it by Meyyappa Chetty as indorser, an indorsement back to Meyyappa Chetty from the Bank was, in point of law, necessary to revest the title in the notes in him. This contention is but a repetition in different words of the argument that transfer of a negotiable promissory note can be effected by indorsement only and in no other way, which has already been sufficiently refuted. It is true that there is no averment in the plaint of an express re-transfer by the Bank to Meyyappa Chetty. But it may be pointed out that, when a prior indorser, in the technical language of the law, 'takes up a note' (see *Ellsworth* v. *Brewer*(1)), on payment to his immediate indorsee and discharges his liability under the contract arising by the indorsement, there is no provision either in the Negotiable Instruments Act or elsewhere prescribing the mode in which such 'taking up' of the note is to be established. As laid down in section 452 of Story on 'Promissory Notes,' "the possession of a note by the maker or by the payee or by any subsequent indorser is *primâ facie* evidence that he is the true and lawful owner thereof and that he has acquired the full title thereto." The proposition thus laid down is, it scarcely needs to be added, supported by numerous authorities of which the leading one is the decision of the Supreme Court of the United States in *Dugan* v. *The United States*(2), where LIVINGSTONE, J., delivering the opinion of the Court, said that 'if any person who indorses a bill of exchange to another whether for value or for purposes of collection, shall come to the possession thereof again, he shall be regarded, unless the contrary appear in evidence, as the *bonâ fide* holder and proprietor of such bill and shall be entitled to recover, notwithstanding there may be on it one or more indorsements in full subsequent to the one to him, without producing any receipt or indorsement back from either of such indorsees whose names

(1) 11 Pickering, *per* Shaw, C.J., at p. 320. (2) 3 Wheaton, 172 at p. 183.

MUTHAR SAHIB MARAIKAR v. KADIR SAHIB MARAIKAR.

he may strike from the bill or not as he may think proper" (3 Wheaton, 172 at p. 183, reprinted in Book IV, Lawyers' edition, p. 362—see also *ibid.*, p. 672 for Rose's notes of other cases on the same point).

A further point taken by Mr. Krishnaswami Ayyar was that the payee and first indorser in five of the notes as well as the maker of the sixth was not the firm, and, consequently, that the members of the firm, not parties to the notes, are not liable. As already stated, the plaintiff's case was that it was the firm that was liable on all the notes. Assuming that such an objection was distinctly raised before the lower Courts, the question is, having regard to the fact that the name of the payee or the indorser or the maker is preceded by the letters S.M.P.M., and to the practice of native merchants to indicate firm transactions by such prefixes, one of fact to be decided with reference to the evidence in the case. Of course the reception of parol evidence in regard to such a matter is subject to much the same rules as govern written contracts generally. In *Subba Narayana Vathiar* v. *Ramasami Ayyar*(1), some of the points relating to the admissibility of such extrinsic evidence with reference to a negotiable promissory note were considered; and it may not be superfluous to call attention to what the Judicial Committee said in *Castrique* v. *Buttigieg*(2), in dealing with a case of indorsement which was on its face unqualified. There, a person acted as agent in Malta for another person residing in England for the purpose of buying and remitting to him in England bills on England on account of money received by him in Malta. In the course of the agency he purchased bills in Malta and indorsed them to his principal. It was held with reference to what the Committee referred to as "the law merchant common to all civilized countries" that the agent was not liable on the bills being dishonoured, though the indorsement was without any restriction of his liability and the principle of the decision was explained thus:—"The liability of an indorser to his immediate indorsee arises out of a contract between them, and this contract in no case consists exclusively in the writing popularly called an indorsement and which is indeed necessary to the existence of the contract in question but that contract arises out of the written endorsement itself, the delivery

(1) I.L.R., 28 Mad., 244. (2) 10 M.P.C., 94.

MUTHAR SAHIB MARAIKAR v. KADIR SAHIB MARAIKAR.

of the bill to the indorsee, and the intention with which that delivery was made and accepted, as evinced by the words, spoken or written, of the parties and the circumstances (such as the usage at the place, the course of the dealing between the parties and their relative situations) under which the delivery takes place; thus a bill with an unqualified written indorsement may be delivered and received for the purpose of enabling the indorsee to receive the money for account of the indorser or to enable the indorsee to raise money for his own use or on the credit of the signature of the indorser or with an express stipulation that the indorsee, though for value, is to claim against the drawer and acceptor only and not against the indorser who agrees to sell his claim against the prior parties but stipulates not to warrant their solvency. In all these cases the indorser is not liable to the indorsee and they are all in conformity with the general law of contracts which enables parties to them to limit and modify their liabilities as they think fit provided they do not infringe any prohibitory law" (at pages 108 and 109).

The decree of the District Judge is set aside and the appeal remanded for disposal according to law. The costs will abide and follow the result.

BODDAM, J.—I agree entirely.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Moore.

KURNAM BUTCHAYYA (PLAINTIFF), APPELLANT,

1905. July 20.

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR, KISTNA, AND OTHERS (DEFENDANTS Nos. 1, 4, 6, 7, 8 and 10), RESPONDENTS.*

Madras Salt Act IV of 1889, ss. 16, 25 and 87—Limitation—Suit to recover saltpans when license improperly cancelled.

Under sections 16 and 25 of the Madras Salt Act, the Government is empowered on cancelling a license to take possession of the proprietary rights of others in the salt pans. Where Government have so taken possession of saltpans, a suit to recover the same brought against the Government and its assignees will be a suit in respect of acts done under the Act and will fall within section 87 of the Act, even when the license has been improperly cancelled and will be barred if not brought within the period prescribed by that section.

THIS suit was instituted against the first defendant, the Secretary of State and others, for the recovery of certain saltpans, of which the plaintiff was deprived in 1892 by the first defendant, and for loss of profits. The other defendants were joined as parties as they were in possession under title derived from the first defendant.

The defendants contended *inter alia* that the suit was time-barred.

The District Munsif overruled the contention and passed a decree in favour of the plaintiff.

On appeal the District Judge reversed this decree holding that the suit was barred and dimissed the plaintiff's suit.

The plaintiff preferred this second appeal.

V. Krishnaswami Ayyar for appellant.

The Government Pleader for first respondent.

JUDGMENT.—The plaint in the suit states that the authorities in December 1892 suddenly issued a takeed purporting to cancel the plaintiff's license to certain saltpans and that the first defendant

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* Second Appeal No. 238 of 1904, presented against the decree of V. Vengopaul Chetty, Esq., Acting District Judge of Kistna, in Appeal Suit No. 104 of 1903, presented against the decree of M.R.Ry. A. Venkataramiah, District Munsif of Bapatla, in Original Suit No. 62 of 1901.

KUBNAM BUTCHAYYA v. SECRETARY OF STATE FOR INDIA.

took possession of them and the other defendants are in possession thereof through the first defendant. It states in paragraph 14 that the cause of action for the suit arose in December 1892, the date of the takeed issued on behalf of the defendant purporting to cancel the implied license, and in the month of June in the respective years for the loss of profits.

The reliefs sought thereby were stated to be the immoveable property stated in the schedule, (certain saltpans) and Rs. 200 for loss of profits.

The question before us is whether the suit which was brought in February 1901 is barred or not being a suit to recover land. The defendant's contention is that the acts complained of being acts done under the Madras Salt Act, the suit is barred under section 87 of that Act. The plaintiff contends that that bar only arises when a suit is brought for damages for acts done under the Act and *Annaji* v. *Subramanya*(1), *Syed Ameer Sahib* v. *Venkatarama*(2), *President of the Taluq Board, Shivaganga* v. *Narayanan*(3) and *Srinivasa* v. *Rathnasabhapathi*(4) were cited and relied on. By section 25 of the Madras Salt Act licenses may be cancelled, and by section 16 where a license has been cancelled the proprietary right of any person in the pans may become vested in the Government who may pay compensation for the proprietary rights taken if the existence of such proprietary rights is admitted, and if they are not admitted may refer the late licensee to a Court of competent jurisdiction. By section 87 no suit shall be instituted for any thing done or ordered to be done under this Act after six months from the accrual of the cause of action or from the date of the act or order complained of.

It is found that the proper notice was not given to the plaintiff under section 25 before his license could be properly cancelled under it and that the saltpans belonged to the plaintiff.

Though the cancellation of the plaintiff's license was irregular and improper it was an act done *bonâ fide* under the Madras Salt Act and in the same way the assumption by the Government and the transfer to others of the proprietary rights of the plaintiff were acts done under the same Act and these are the acts complained of in the suit, and in order to make out any case the

(1) I.L.R., 13 Mad., 442 at p. 444. (2) I.L.R., 16 Mad., 296.
(3) I.L.R., 16 Mad., 317. (4) I.L.R., 16 Mad., 474.

KUBNAM BUTCHAYYA v. SECRETARY OF STATE FOR INDIA.

plaintiff has to prove that they were irregular and not strictly in accordance with the Act and that is what the plaintiff complains of in his suit. This suit is therefore exactly within section 87 (of the Madras Salt Act) and is barred by it. The cases referred to do not apply here; for under this Act the Government is empowered to take possession of the proprietary rights of others in the saltpans and that is the act done that the plaintiff complains of and which forms his real cause of action, and as that occurred over nine years ago his suit is barred.

We must therefore dismiss this appeal with costs.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Sankaran Nair.

1905. July 27.

JUMNA BOI RANEE SAHEB BY DULY AUTHORISED AGENT VEERARAGHAVA AYYANGAR (PLAINTIFF), APPELLANT,

v.

SOLAI KAVUNDAN (DEFENDANT), RESPONDENT.*

Landlord and tenant—Right of tenant to hold land for which he refused to accept patta.

A tenant is not entitled to claim lands, for which he had refused to accept pattas tendered by the landlord, as having become part of his holding by such tender.

THE facts necessary for this report are fully set out in the judgment.

T. R. Venkatarama Sastri for the Hon. Mr. *P. S. Sivaswami Ayyar* for appellant.

V. Ramesam for respondent.

JUDGMENT.—The undisputed facts are:—Till the fasli year 1300 the land in dispute was waste, the title thereto being in the plaintiff. In that year the present defendant applied for a grant of the land in question on patta. This was refused, nevertheless, the defendant entered into possession wrongfully. Thereupon the

* Second Appeal No. 643 of 1903, presented against the decree of L. G. Moore, Esq., Acting District Judge of Trichinopoly, in Appeal Suit No. 5 of 1902, presented against the decree of M.R.Ry T. V. Venkateswara Ayyar, District Munsif of Ariyalur, in Original Suit No. 1053 of 1900.

JUMNA BOI v. SOLAI KAVUNDAN.

plaintiff included the land in the patta tendered to the defendant in fasli 1303 for the lands rightly held by him as a tenant, but distinguished the entry in the patta as to this land from the rest of the holding by the words "Sevai jama for land cultivated without permission," the sevai jama or the extra charges made being 10 times the assessment which would have been leviable if the defendant had entered with leave. The patta thus tendered was not accepted by the defendant who refused to take it in consequence of the special terms introduced as stated above, providing for payment of higher rent and characterising the occupation of the land as unpermitted. A similar patta was tendered for fasli 1304 with the similar results. Thereupon the plaintiff distrained for all the arrears due for both the faslis, the amount distrained for including the sevai jama charge. The defendant objected to the distraint and it was declared illegal in the summary suits which followed; and the defendant further obtained a decree for damages for such illegal distraint. The defendant then sued under the Rent Recovery Act to compel the plaintiff to tender a patta including the plaint land as part of his proper holding, but the prayer was refused on the ground that the land not having been granted to him by the plaintiff, the Court had no power to compel the latter to make the grant. The present suit was thereupon instituted for the recovery of the land from the defendant and, in our opinion, the plaintiff is clearly entitled to the decree sought for inasmuch as the plaintiff never once consented to give the land away to the defendant to be held by him with the rest of the holding and as the occupation thereof by the defendant has throughout been wrongful.

The view adopted by the lower Courts involves the conclusion that the pattas tendered, but not accepted, were binding on the Zamindar so as to make the land part of the defendant's proper holding, but not binding upon the defendant as to even the charge which the plaintiff wanted to make for the use and occupation by the defendant for the time such use and occupation lasted. This is, in effect, the Court making a contract between the parties. The decision in *Cheekati Zamindar* v. *Ranasooru Dhora*(1) referred to by the lower Appellate Court has nothing to do with such a case as the present. There, land granted by a landholder to a tenant and

(1) I.L.R., 23 Mad., 318.

JUMNA BOI v. SOLAI KAVUNDAN.

treated as standing on the same footing as those previously held was decided to be of the same tenure as the latter. The decrees of both the Courts are set aside. The appeal is allowed and there will be a decree for the plaintiff with mesne profits from fasli 1309 and subsequent profits for three years or till delivery of possession, whichever is earlier. The plaintiff will get his costs throughout. The amount of mesne profits will be determined in execution.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Sankaran Nair.

VENKATACHELLA CHETTY (PLAINTIFF), APPELLANT,

v.

SRINIVASA VARADA CHARIAR (DEFENDANT), RESPONDENT.*

1905. July 11, 27.

Mortgage—Arrangement between mortgagee and some of several mortgagors, effect of.

The rule that an arrangement between one or more of several mortgagors and the mortgagee whereby the former are released from their liability under the mortgage in consequence of payment of a portion of the debt or otherwise, does not affect mortgagors not parties to the arrangement if their rights against the co-mortgagors are likely to be prejudiced thereby, has no application where the mortgagor who is not a party is sought to be made liable only for his just share of the debt.

Where a division of joint family property is effected by consent or by a decree of Court, an arrangement by some of the members with a mortgagee of the joint family property, by which their shares were to be released on payment of their share of the debt is binding on members who are not parties to the arrangement, so long as they are not called upon to pay more than their share of the debt as settled by the partition.

THE facts necessary for this report are fully set out in the judgment.

K. Ramachandra Ayyar for *P. R. Sundara Ayyar* for appellant.

A. K. Sundram Ayyar for *M. R. Ramakrishna Ayyar* for respondent.

JUDGMENT.—The plaintiff's (appellant's) suit is based upon two mortgages executed to his father by the defendant and his three

* Second Appeals Nos. 515 and 516 of 1903, presented against the decrees of M.R.Ry. T. Varada Rao, Subordinate Judge of North Arcot, in Appeal Suit Nos. 38 and 40 of 1902, presented against the decree of M.R.Ry. D. Venkoba Row, District Munsif of Arni, in Original Suit No. 276 of 1900.

VENKATA-CHELLA CHETTY v. SRINIVASA VARADA CHARIAR.

paternal cousins for a sum of Rs. 475. Subsequent to the date of the said instruments, there was a suit for partition between the defendant and his cousins, whereby it was decreed that the defendant was to take a fourth share of the joint estate and to pay a fourth share of the debt due by the members of the family inclusive of the plaint mentioned mortgage debt. Though the plaintiff was not impleaded in the partition suit, he afterwards agreed with the mortagagors other than the defendant to release them from their liabilities under the mortgages in consideration of their having executed to him mortgages for the amounts payable by them, respectively, upon portions of the property which fell to their share. The defendant not having entered into any such arrangement with the plaintiff, nor discharged his share of the mortgage-debt, the plaintiff sues for the same and for an order for the sale of the portion of the mortgaged lands in the hands of the defendant.

The District Munsif gave a decree for money only but disallowed the prayer for sale. Both parties appealed against the decree, the plaintiff in so far as it refused an order for sale and the defendant in so far as it ordered payment of money. On the appeals coming before the Subordinate Judge, he reversed the decree and dismissed the suit on the ground that it was not maintainable as it was only for a part of the mortgage debt and for sale of a part of the mortgaged property. This view however is clearly wrong.

Now, there can be no doubt that, had the defendant and his cousins made a partition by mutual consent and agreed with one another that each was to be responsible only for his share and that the portion of the mortgaged property allotted to each should bear that much only of the debt, it would be competent to the mortgagee, should he be so minded, to accept this arrangement as between the mortgagors, validly release each mortgagor on payment of his quota of the debt, and proceed against such of them as might make default for what is due by them according to the arrangement. If authority is necessary for so clear a proposition, reference may be made to the case of *Mahadaji Hari Limaye* v. *Ganpatshet Dhondshet*(1), see also *Hari Kissen Bhagat* v. *Veliat Hossein*(2). And it can make no difference that the partition is effected, not by mutual consent, but by decree of Court.

(1) I.L.R., 15 Bom., 257. (2) I.L.R., 30 Calc., 755.

VENKATA-CHELLA CHETTY v. SRINIVASA VARADA CHARIAR.

Now by the partition, the defendant's anterior joint right to the whole of the mortgaged property having as between him and his co-parceners been displaced by an exclusive right to a part thereof, he could have no manner of concern in those portions of the mortgaged property which have been allotted to the other co-parceners so long as he is not called upon to pay more than his proper share of the debt as settled by the partition. The rule that an arrangement between one or more of several mortgagors and the mortgagee whereby the former are released from their liability under the mortgage in consequence of payment of a portion of the debt or otherwise, does not affect mortgagors not parties to the arrangement if their right as against the co-mortgagors is likely in any way to be prejudiced thereby, has no application to the present case, for the obvious reason that the demand here is only for the defendant's just share of the debt and no more. The decree of the Subordinate Judge is therefore set aside and the appeal remanded for disposal according to law; costs will abide and follow the result.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Sankaran Nair.

PACHIAPPA ACHARI (PETITIONER, PLAINTIFF DECREE-HOLDER), APPELLANT,

1905. August 10.

v.

POOJALI SEENAN AND ANOTHER (COUNTER-PETITIONERS), JUDGMENT-DEBTORS (DEFENDANTS), RESPONDENTS.*

Limitation Act XV of 1877, sched. II, art. 179—Application for execution not accompanied by copy of decree sufficient to save bar—Step in aid of execution —Construction of statute.

An application for execution presented on behalf of a party entitled to present it but not accompanied by a copy of the decree as required by the Civil Rules of

* Civil Miscellaneous Second Appeal No. 48 of 1904, presented against the decree of K. C. Manavedan Raja, Esq., District Judge of North Arcot, in Appeal Suit No. 218 of 1903, presented against the order of M.R.Ry. V. K. Desikachariar, District Munsif of Arni, in Execution Petition No. 275 of 1903, in Original Suit No. 331 of 1899.

PACHIAPPA ACHARI v. POOJALI SEENAN.

Practice, is an application 'in accordance with law' within the meaning of article 179, schedule II of the Limitation Act as the defect has reference only to an extraneous circumstance.

Sadashiva Raghunath v. *Ramachandra Chintaman*, (5 Bom. Law Reporter, 394), dissented from.

The provisions of the Limitation Act should receive a fair and not too technical construction.

Observations on the construction of statutes.

Where the decree is more than one year old and the application prays for the issue of notice under section 248 of the Code of Civil Procedure to the judgment-debtor, such application in the absence of any provisions prescribing the form, contents or accompaniments of an application for issuing notice, will be a step in aid of execution within the meaning of article 179, schedule II of the Limitation Act.

THE facts necessary for this report are fully set out in the judgment.

K. S. Ramaswami Sastri for *S. Gopalaswami Ayyangar* for appellant.

K. S. Gopalaratnam Ayyar for respondents.

JUDGMENT.—The decree sought to be executed was passed on the 11th December 1899. The decree-holder applied on the 6th December 1902 for the execution of the decree. The application complied with the terms of section 235, Civil Procedure Code. It was not, however, accompanied (as required by rule 164 of the Civil Rules of Practice which came into force in September 1902) with a copy of the decree. The appellant was required to furnish a copy of the decree within a month and he was not able to do so and applied for further time for the production of the copy on the ground that his application for the same to the Court which had the records had not till then been complied with. No further time was allowed and the application to execute the decree was dismissed. Thereupon on the 4th September 1903, he made the present application for execution. The lower Courts held that this was barred by limitation inasmuch as the application of December 1903 was, in their view, not an application in accordance with law within the meaning of clause 4, article 179, Limitation Act. The case of *Sadashiva Raghunath* v. *Ramachandra Chintaman*(1), no doubt, supports the view, but with all deference to the learned Judges we are unable to agree with that decision. It is scarcely necessary to say that the provision of the

(1) 5 Bom. Law Reporter, 394.

PACHIAPPA ACHARI v. POOJALI SEENAN.

article of the Limitation Act in question should receive a fair and not too technical a construction (*Adhar Chandra Dass* v. *Lal Mohun Dos*(1) and *Kunhi* v. *Seshagiri*(2)). It is in this spirit that the numerous decisions to which our attention has been drawn on behalf of the appellant, of all the High Courts dealing with defects and inaccuracies in applications for execution, have treated such defects and inaccuracies as not rendering the applications otherwise than in accordance with law for the purposes of clause 4, article 179 of the Limitation Act. The present case, in our opinion, is stronger, inasmuch as there was no omission or error in the contents of the application itself which consequently was perfectly in accordance with law having been presented on behalf of a party entitled to present it. The defect relied on has reference to an extraneous circumstance, the failure to produce a copy of the decree sought to be executed. We do not think that this ought to be held to detract from the application being in accordance with law, within the meaning of the provision in question, though it might furnish a ground for the Court not proceeding further with the application until the defect is removed by the production of the copy so as to enable the Court to satisfy itself as to the terms of the decree to be executed. With reference to analogous provisions in section 610 of the Civil Procedure Code of 1877 the Privy Council observed that they were of a directory nature (*Hurrish Chunder Chowdhry* v. *Kali Sundari Debia*(3)), and we do not think that a different or stricter construction ought to be put up upon the rules requiring the production of a copy of the decree to be executed. We think, therefore, that the application of December 1902 was one in accordance with law, viewing it as an application for execution. We ought to add that even if it were otherwise, the present application must be held to be within time, for the reason that the application of December 1902 prayed for notice to the judgment-debtor, and as at the date of that application more than one year had elapsed from the date of the decree, the decree-holder was entitled to apply for the issue of such notice as a step in aid of execution, and in the absence of any provisions prescribing any specific directions as to the form, contents or accompaniments

(1) I.L.R., 24 Calc., 778. (2) I.L.R., 5 Mad., 141.
(3) L.R., 10 I.A., 4 at pp. 15, 16.

PACHIAPPA ACHARI v. POOJALI SEENAN.

of an application for such a purpose, the application of December 1902 was an application to take a step in aid of execution and valid in law. On these grounds we allow the appeal with costs in this and the lower Appellate Courts and reverse the order and direct that the petition be replaced on the file of the Court of First Instance and disposed of in accordance with law.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Sankaran Nair.

1905. July 21, 27.

VIJIASAMY TEVAR (PLAINTIFF), APPELLANT IN ALL THE APPEALS,

v.

SASIVARMA TEVAR AND OTHERS (DEFENDANTS), RESPONDENTS IN ALL.*

*Specific Relief Act I of 1877, s. 42—Discretionary power of Court in granting declaration—Declaration in respect of a void instrument—Courts, inherent powers of, to stay or dismiss vexatious suits—Court Fees Act—*Ad valorem *stamp not necessary in suits for declaration where no consequential relief asked.*

Every Court of competent jurisdiction has inherent power to prevent abuse of its process, by staying or dismissing without proof, actions which it holds to be vexatious.

Haggard v. *Pelicier Freres*, ((L.R.. 1892), A.C., 61 at pp. 67 and 68), referred to.

Where the facts alleged in a plaint are totally inconsistent with decisions pronounced on the amplest materials, in litigation extending over three quarters of a century, such a plaint ought to be dismissed summarily in the exercise of such inherent power.

The discretionary power to grant declaratory decrees under the Specific Relief Act ought not to be exercised when the plaintiff seeks to have declared as invalid and void a transaction which, on his own allegations, would be but a *brutum fulmen* so far as his rights are concerned.

Thakurain Jaipal Kunwar v. *Bhaiya Indar Bahadur Singh* (L.R., 31 I.A., 67 at p. 69).

It will be no ground for the grant of such discretionary relief, that the transaction in question may furnish a piece of evidence against the plaintiff.

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* Civil Miscellaneous Appeal No. 84 of 1903, presented against the order of M.R.Ry. W. Gopala Chariar, Subordinate Judge of Madura (East), passed in Original Suit No. 69 of 1902. (*Vide* Civil Miscellaneous Appeal Nos. 47 and 158 of 1905 and Civil Revision Petition No. 248 of 1903.)

VIJIASAMY TEVAR v. SASIVARMA TEVAR.

Where a plaint merely prays that a will, in regard to a property, may be declared void as against the plaintiff, the stamp duty payable is that for a declaratory suit, and not an *ad valorem* fee on the value of such property.

THE plaintiff, as one of the heirs entitled to succeed to the Sivaganga zamindari, brought this suit to set aside the adoption of the second defendant made by the last Zamindar Muthuvijia *alias* Udayana Tevar; to set aside a will executed by Udayana Tevar bequeathing the whole zamin to the second defendant; and also to have it declared that a decree passed in a suit brought by his father, the first defendant, was not binding on him the plaintiff. The plaint alleged that the adoption and the will were opposed to the immemorial custom of the zamindari. The plaint was stamped with Rs. 30 being the court fee payable for the three declarations.

The Subordinate Judge held that the stamp duty payable for the relief in respect of the will was Rs. 3,000 being the *ad valorem* fee on the value of the zamin, and on the plaintiff failing to furnish the stamp duty, dismissed the suit.

The plaintiff preferred this appeal.

Mr. *M. A. Thirunarayana Chariar* and Sir *V. Bhashyam Ayyangar* for appellant.

S. R. Ramasubba Ayyar for second respondent.

JUDGMENT.—We are unable to agree with the Subordinate Judge that in the present suit any consequential relief is prayed for. Upon the face of the plaint, it is one for mere declaration. The stamp duty due in respect of the declarations sought for, having been paid, the Subordinate Judge was in error in holding that an *ad valorem* duty of Rs. 3,000, with reference to the value of the Zamindari of Sivaganga in regard to which the declarations are sought, was payable upon the plaint.

We think, however, that the order rejecting the plaint must be upheld on the ground that this is not a fit and proper case for the grant of relief by way of declaration, and if it were otherwise, on the ground that the claim is a vexatious one which should not be allowed to be proceeded with.

Now as to the first ground. The declarations prayed for are—

(1) that the proceedings and the decrees and judgments in Original Suit No. 78 of 1896 on the file of the Subordinate Judge of Madura (East), and in Appeal No. 14 of 1898 on the file of the High Court, are not binding on the plaintiff;

VIJIASAMY TEVAR v. SASIVARMA TEVAR.

(2) that the adoption of the second defendant is not valid; and

(3) that the will referred to in paragraph 11 is not binding on the plaintiff.

The case set up in the plaint shortly is that according to family custom the zamindari in question is impartible and inalienable, that the succession thereto is governed by the rule of primogeniture, that the estate of each holder is strictly one for life only, and that though the male issue of the holder for the time being succeeds him in preference to collateral and other heirs, yet that adoption of sons is prohibited.

The common ancestor through whom the parties trace their relationship was Dorasinga Tevar who held the zamindari and died in 1883. He had five sons, of whom one predeceased him leaving male issue, the third and fourth defendants.

The eldest son of Dorasinga Tevar succeeded him and died having adopted his daughter's son, the second defendant, and leaving the will to which the third prayer relates. The first defendant is one of the surviving sons of Dorasinga Tevar and the father of the plaintiff. The plaintiff of course admits that he has no right to possession during the first defendant's lifetime, but asserts that on his death the plaintiff is the person to succeed in preference to even the third and the fourth defendants though their father was the elder brother of the first defendant, the ground for the preference being the plaintiff's seniority in point of age.

Now let us first take the prayer in respect of the will. The observations of the Judicial Committee in *Thakurain Jaipal Kunwar* v. *Bhaiya Indar Bahadur Singh*(1) are strongly against the grant of any such declaration in the matter. Upon his own case the zamindari being inalienable, the will, with reference to the plaintiff and in so far as it concerns the zamindari, would be but a *brutum fulmen* as to which no legal proceedings for the specific relief prayed for should ordinarily lie. At the best the plaintiff can only argue that if the will is not declared invalid as against him it might be used as a piece of evidence against his case that the estate is inalienable. It would be extravagant to hold that the bringing into existence of any and every piece of evidence would give a right to such discretionary relief. Were it

1) L.R., 31 I.A., 67 at p., 69, para. 4.

VIJIASAMY TEVAR v. SASIVARMA TEVAR.

otherwise such relief might be prayed for even in respect of oral declarations of similar evidentiary character.

Next as to the prayer for the setting aside of the decree in Original Suit No. 78 of 1896 and in Appeal No. 14 of 1898 therefrom, that also is untenable for like reasons. It would be different if the plaintiff's case were that though each successive holder of the zamindari was a qualified proprietor, yet that his estate carried with it the power to represent the inheritance so as to bind his successors in respect of matters affecting him and them in common. But as already stated according to him each holder has nothing more than a bare life estate.

Lastly the prayer as to adoption is equally unsustainable. Where the conditions warranting the validity of an adoption were in truth wanting, but the party alleging the adoption pretends that those conditions existed, one can understand that a person, whose rights would in law be affected by the adoption thus set up, should be allowed to impeach it by suit and obtain relief in order that the cloud thus sought to be cast up on his title might be removed. Here there is nothing of the kind. According to the plaint in no circumstances can the adoption be relied on as against the plaintiff, it being also lately prohibited by the alleged custom and incapable of affecting him or the zamindari, however good and valid the adoption may be, under the Hindu Law. In short the transaction of gift and acceptance of the second defendant was so totally nugatory from the point of view of the plaintiff in relation to the zamindari, that it would be futile to make it the subject of judicial investigation for the purposes of the grant of specific relief by way of declaration.

Now as to the second ground:—The zamindari in question has been the subject of litigation so often that matters relating to the devolution of the estate since its creation about the year 1730, as well as the rules governing its ownership and enjoyment are almost matters capable of being judicially noticed, having been repeatedly the subject of consideration and determination in the decision of the Courts inclusive of the Judicial Committee. The litigation which sprang up on the death in 1829 of the grantee of this zamin who took it from the Government at the beginning of the last century was terminated by the judgment of the Judicial Committee in the well-known case of *Katama Nutchiar*

VIJIASAMY TEVAR v. SASIVARMA TEVAR.

v. *The Rajah of Shivaganga*(1) which established that the zamindari, as the self-acquired estate of the said grantee, devolved on his heirs under the ordinary Hindu Law of inheritance. The dispute which arose on the grantee's daughter Katama Natchiar's death in 1877 also found its way to the Privy Council and by the decision of their Lordships, it was laid down that the zamindari was impartible and that the succession thereto passed according to the rule of primogeniture to Dorasinga Tevar, one of the grandsons of the original owner and through whom the parties here have to trace their right (*Mutta Vaduganatha Tevar* v. *Dorasinga Tevar*(2)). The claim which was made on Dorasinga Tevar's death in 1883 by another grandson, viz., the son of Katama Natchiar was also disposed of by the Privy Council, it being held that there was no peculiar rule of survivorship such as was alleged by the plaintiff there and that the estate passed to the eldest son of Dorasinga in accordance with the principle on which the earlier decision in favour of Dorasinga himself rested. The last litigation was that which came before this Court in Appeal No. 14 of 1898 (referred to in the first prayer) in which the plaintiff's father, the present first defendant, disputed the adoption and claimed to be entitled to the estate after the death of the late zamindar. This suit failed. In it the prohibition by custom of alienation and adoption was set up only to be abandoned both at the trial and in the argument before this Court by Counsel who found himself compelled as a last resort to impeach the adoption mainly on the ground of the zamindar's mental incapacity said to have been induced by drink. A suggestion definitely made only after the zamindar who was for many days in the witness box had left it. The history of the zamindari brought out by these decisions pronounced upon the amplest materials and after the most careful consideration and dealing with practically continuous litigation covering three-quarters of a century, is so inconsistent with the allegations of customs against alienation and adoption and involving a perpetual succession of life estates as to make it clear that these allegations are fictions invented to bolster up a totally baseless claim which ought to be stopped in the exercise of the power inherent in this as in every Court of competent jurisdiction "to prevent abuse of its process, by staying or dismissing,

(1) 9 M.I.A., 543. (2) L.R., 8 I.A., 99.

VIJIASAMY TEVAR v. SASIVARMA TEVAR.

without proof, actions which it holds to be vexatious". (*Haggard* v. *Pelicier Freres*(1), see also *Remmington* v. *Scoles*(2) and *Stephenson* v. *Garnett*(3)).

No doubt the power is one which ought to be exercised sparingly and only in very exceptional cases. The present case is in our opinion clearly one of that exceptional character.

We accordingly dismiss the appeals and the revision petition with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Boddam and Mr. Justice Moore.

EMPEROR, APPELLANT,

v.

JONNALAGADDA VENKATRAYUDU, RESPONDENT.*

1905. July 10.

Penal Code Act XLV of 1860, *s.* 182—*Criminal Procedure Code, Act V of* 1889, *ss.* 154, 162—*False information to a Village Magistrate.*

An offence under section 182 of the Penal Code is committed by a person giving false information to a Village Magistrate charging another with having committed an offence. Where such information is given with the view to it being passed on to the Station-house Officer, who, on receiving the information, takes a complaint in writing from such informant, the complaint is one taken under section 154 and not under section 162 of the Criminal Procedure Code.

The Queen v. *Perriannan* and *The Queen* v. *Naraina*, (I.L.R., 4 Mad., 241), distinguished.

IN this case the accused on the 3rd June 1904 charged one Rukminamma before the Village Magistrate, with having set fire to a straw heap. The Village Magistrate at once sent a report to the police station. A constable was sent to the village next day to make an investigation into the case, and he took a statement in writing from the accused. The information given by the accused

(1) L.R., (1892), A.C., 61 at pp. 67, 68 (J.C.).
(2) L.R., (1897), 2 Ch.D, 1. (3) L.R., (1898), 1 Q.B.D., 677.

* Criminal Appeal No. 89 of 1905, presented under section 417 of the Code of Criminal Procedure against the judgment of acquittal passed on the accused in Calendar Case No. 175 of 1905 by M.R.Ry. B. Venkatarama Ayyar, Second-class Magistrate of Mangalagiri Division.

EMPEROR v. JONNALAGADDA VENKATRAYUDU.

was found to be false, and he was prosecuted under section 182 of the Indian Penal Code.

The accused was acquitted by the Sub-Magistrate. The material portion of his judgment was as follows:—"The first information was not, in this case, given to the police, and the statement recorded by the witness was evidently, during the course of his investigation, presumably under section 162, Criminal Procedure Code, and not under section 154, Criminal Procedure Code (*The Queen* v. *Periannan* and *The Queen* v. *Naraina*(1)) is clear on this point. The information contemplated under section 154 (?), Criminal Procedure Code, was the first information given to the police by the informant. No charge would therefore lie under section 182, Indian Penal Code. The accused is therefore acquitted under section 245, Criminal Procedure Code."

This appeal was preferred by the Public Prosecutor against the order of acquittal.

The Public Prosecutor for appellant.

Mr. *M. A. Thirunarayana Chariar* for respondent.

JUDGMENT.—We are clearly of opinion that the acquittal of the accused in this case was wrong and must be set aside.

On the 3rd June 1904, the accused gave to a Village Magistrate (a public servant) oral information of an offence having been committed. The Village Magistrate informed the Police Station-house Officer, and he went on the 4th June and took a complaint from the accused under section 154, Criminal Procedure Code. The information given to the Village Magistrate and the complaint signed by the accused on the 4th were false and the accused was charged under section 182, Indian Penal Code, with having made a false complaint with evil intention, etc. The Second-class Magistrate has acquitted the accused on the ground that giving the information to the Village Magistrate is not an offence within section 182 and the complaint signed by the accused on the 4th was not a complaint within section 182, as the accused had already given information to the Village Magistrate that the complaint to the Station-house Officer was not admissible in evidence having been made under section 162, Criminal Procedure Code, and not under section 154, and further that the case was determined by *The Queen* v. *Periannan* and *The Queen* v. *Naraina*(1).

(1) I.L.R., 4 Mad., 241.

EMPEROR v. JONNALAGADDA VENKATRAYUDU.

We are of opinion that *The Queen* v. *Periannan* and *The Queen* v. *Naraina*(1) does not apply. Section 182, Indian Penal Code, has, since that decision, been altered and the reasoning of the Judges in that case does not apply to the present case under the altered section.

We are further of opinion that the information given to the Village Magistrate was sufficient to justify a charge under section 182, Indian Penal Code, even if it had not been followed up by the Station-house Officer taking a complaint under section 154, Criminal Procedure Code, and also that the evidence given proved that a complaint was in fact and in law made by the accused on the 4th June to the Station-house Officer under section 154. We agree with Mayne (Mayne's 'Criminal Law,' p. 592) that information given to A (the Village Magistrate) for the purpose of being passed on to B (the Station-house Officer) and which it was his bounden duty so to pass on must be considered as having been given to B so as to justify his taking the complaint in writing from the accused under section 154, Criminal Procedure Code.

We therefore set aside the acquittal and direct that the case be restored to the file of the Second-class Magistrate and disposed of according to law.

(1) I.L.R., 4 Mad., 241.